71545-3

71545-3

ORIGINAL

NO. 71545-3-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TERESA REED-JENNINGS and **CLIFF JENNINGS**, Wife and Husband and their marital community,

Appellants/Plaintiffs below,

v.

THE BASEBALL CLUB OF SEATTLE, L.P., a Washington Corporation, d/b/a **THE SEATTLE MARINERS,**

Respondent/Defendant below.

BRIEF OF RESPONDENTS

ROCKEY STRATTON, P.S.
Thomas C. Stratton, WSBA 14545
Attorneys for Respondent

200 West Mercer Street, Suite 208
Seattle, WA 98119-3994
(206)223-1688

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

A. Issues in Response

Did the trial court correctly dismiss plaintiffs Theresa Reed-Jennings' ("Reed–Jennings") and Cliff Jennings' claims against defendant The Baseball Club of Seattle L.P. and Baseball of Seattle, Inc. (collectively the "Mariners") on summary judgment when it is undisputed (1) that the batting practice, which resulted in Reed–Jennings' injury, is standard and common in baseball; (2) the Mariners satisfied their duty when, during batting practice, they provided a protective screen behind home plate, a batting cage at home plate, a screen at the pitching mound, screens at first and second bases, screens along the right field and left field foul lines, and a screen in center field; and (3) Reed–Jennings assumed the risk of a ball entering her seating area because she knew batting practice was ongoing and that a foul ball had landed in her seating area earlier.

B. Statement of the Case

I. Procedural Background

Reed–Jennings sued defendant Mariners asserting they were liable for an allegedly negligent batting practice conducted by the Texas Rangers that resulted in a foul ball injuring Reed–Jennings. CP 1–4.

The Mariners sought summary judgment by motion filed December 20, 2013 asserting (1) that the Texas Rangers batting practice

was standard and common in baseball; (2) that the Mariners fulfilled their duty when, during batting practice, they provided a protective screen behind home plate, a batting cage at home plate, a screen at the pitching mound, screens at first and second bases, screens along the right field and left field foul lines, and a screen in center field; and (3) that Reed–Jennings assumed the risk of a ball entering her area because she knew batting practice was ongoing and that a foul ball had landed in her seating area earlier. CP 10–32.

On January 24, 2014, Judge Kenneth Schubert granted the Mariners' motion and dismissed Reed- Jennings' claims against them. CP 372–73. Reed- Jennings then appealed.

II. Factual Background

Players Must Prepare To Play

The Mariners are a Major League Baseball team located in Seattle, Washington. In 1999, the Mariners made Safeco Field their home field. The Texas Rangers are a Major League Baseball team located in Arlington, Texas.

Jeff Datz is a long-time professional baseball coach. He was first drafted by the Houston Astros in 1982. CP 133 at ¶ 1. In 1989, he played for the Detroit Tigers as a catcher and first baseman. *Id.* He began coaching in 1993 for Cleveland's single A team in Watertown,

New York. CP 133-34 at ¶ 2. Between 2002 and 2009, he was a coach for the Cleveland Indians. *Id.* In 2010, he was a bench coach for the Baltimore Orioles. CP 134 at ¶ 3. He was hired by the Seattle Mariners in 2011 to be the third base coach. He continued in that position through the 2013 season. *Id.* at ¶ 4. He has thrown batting practice to professional ballplayers since 1993 and has knowledge regarding the practices followed by major league teams during batting practice. *Id.*

Datz has explained it is typical that the home team's pitchers will take the field for practice at 4:00 p.m. prior to a game scheduled to start at or about 7:00 p.m. CP 134 at ¶ 5. The pitchers will stretch and play catch with one of the pitchers standing on the right field line and throwing to another pitcher toward center field. *Id.* The pitchers take the field before the position players because they need more time to warm up their arms. *Id.* The position players take the field at about 4:10 p.m. to stretch and play catch. *Id.* They will also play catch standing on the right field line and throwing toward another player in center field. *Id.* This activity is essential for the players to be properly warmed up so that they reduce the risk of injury during the game. *Id.*

The home team's batting practice is scheduled to take place between 4:30 and 5:30 p.m. prior to a game scheduled to start at or about 7:00 p.m. CP 134-35 at ¶ 6. All position players take batting practice.

Id. The position players will be divided into four groups with three or four players in each group. *Id.* Each group will take 15 minutes of batting practice. *Id.* Typically, a different coach will pitch to each group. *Id.* The coach will throw so that each player gets 25 to 30 swings. *Id.* The coach pitching will typically hold three balls in his non-pitching hand and one ball in his pitching hand. *Id.* This is so there is a limited delay between pitches. *Id.*

The goal of batting practice is for the player to master his swing. CP 135 at ¶ 7. The coach and player are looking to see how the ball comes off the bat. *Id.* It is not important where the ball lands. *Id.* Once the coach and player are able to determine how the ball came off the bat and the player resumes his batting stance, the next pitch is thrown. *Id.*

Datz has explained that it is important to understand that the pitcher must throw in a rhythm during batting practice so that players and coaches can get the maximum work done and are not unduly exposed to danger. CP 135 at ¶ 8. Players taking batting practice are not the only players on the field. *Id.* During batting practice, there are other coaches hitting fungo (balls tossed in the air and batted toward position players for fielding practice). *Id.* There may be other players running bases. *Id.* Coaches can also be hitting fly balls to outfielders. *Id.* The opposing team's players may be playing catch down the left field line. *Id.* Some of

the pitchers may be in the bullpen. *Id.* All of these players and coaches rely on the rhythm of the pitching coach as they go about their business practicing. *Id.* They expect the pitching coaches' rhythm to be a constant pace. *Id.* The constant pace allows the other coaches to hit balls to infielders or outfielders for fielding practice during the expected time between pitches. *Id.* If the rhythm was not maintained, players and coaches would be exposed to possible injury because they would not be able to anticipate when a ball would be hit during the batting practice. *Id.* Consequently, they may move from behind protective screens placed on the field while focused on their own practice activity at the moment a ball would be hit during batting practice. *Id.*

Datz notes that practice for a professional baseball team is an orchestrated ballet with many activities occurring at the same time. CP 136 at ¶ 9. All of these activities are important for the players to be properly prepared for a ball game so they can both perform well and not be injured. *Id.* If the rhythm of the practice becomes disjointed, players and coaches would be exposed to undue risk of injury. *Id.* This means that the pitcher cannot wait for a batted ball to be caught because it would break the rhythm and expose players and coaches to undue risk of injury. *Id.* It would also reduce the work that could take place during batting practice to properly prepare the players for the ball game. *Id.*

The visiting team typically takes batting practice at 5:30 p.m. prior to a game scheduled to start at or about 7:00 p.m. CP 136 at ¶ 11. At that time, the home team and its coaches leave the field. *Id.* The home team coaches cannot tell the visiting team how to conduct practice. *Id.* Likewise, the visiting team coaches cannot tell the home team how to conduct practice. *Id.* The visiting team will typically conduct batting practice as described above. CP 136 at ¶ 10.

Multiple Screens Are on the Field During Batting Practice

Bob Christofferson is the Mariners' head groundskeeper. CP 42 (lines 23-25). He has been employed in that position with the Mariners for the last 14 years. CP 42 (line 23) to CP 43 (line 3). Safeco Field has a permanent screen behind home plate. CP 60 (lines 7-9). It is Christofferson's responsibility to place temporary screens on the field prior to batting practice. CP 47 (lines 9-23). The temporary screens include a batting cage at home plate, a screen placed in front of the pitcher's mound, screens at first and second bases, and a screen in center field. CP 44 (lines 17-24), CP 64 (lines 2-7) & CP 65 (photo of field with screens). Beginning in 2002, the Mariners added screens along the left and right field foul lines. CP 48 (lines 1-3). Two screens are placed along each foul line, which are each eight feet tall by ten feet wide. CP 45 (line 24) to CP 46 (line 14) & CP 49 (photo showing right field foul

line screens). The temporary screens along the foul lines were placed based on Christofferson's experience in witnessing the flight of baseballs during batting practice in order to reduce the number of line drive foul balls reaching the spectator seats. CP 366 at ¶ 8. The screens along the foul lines were not required by Major League Baseball until April 2012. CP 70 (line 10) to CP 72 (line 2) & CP 77-78. The temporary screens have stopped many foul balls from reaching the spectator seats. CP 366 at ¶ 8. In fact, spectators complain that the screens prevent foul balls from reaching the seats. CP 366 at ¶ 8.

The screens have served their purpose. In the last five years, over 10 million patrons have attended Mariners games at Safeco Field. CP 73 (line 6) to CP 74 (line 20). Throughout the entire ballpark for that five year period, during both practices and games, there have been about 300 documented occurrences where a fair or foul ball has hit a person.[1] *Id.* There have been only five documented incidents (including Reed-Jennings' injury) involving foul balls in the section where Reed-Jennings was injured (section 116). CP 75 (line 7) to CP 76 (line 9).

---

[1] Although not in the record, more than 54% of the incidents only required palliative treatment at the seat, such as ice or Advil; about 25% did not require any treatment, and about 21% had additional medical attention, with only about 5% requiring medical treatment beyond in-park First Aid responders.

Plaintiff Reed-Jennings Knew that Balls Could Enter the Stands

Plaintiff Teresa Reed-Jennings lives in Richland, Washington and is 55 years old. CP 82 (lines 14-20) & CP 83 (lines 18-19). Although she does not recall playing much softball when she was young, Reed-Jennings participated in soccer, took fencing classes and rode horses for at least ten years. CP 84 (lines 3-21).

Reed-Jennings has two sons, Ethan (now 27 years old) and Noah (now 23 years old). Both boys played T-ball and Ethan played one year of baseball with Reed-Jennings' husband, Cliff Jennings, serving as the coach. CP 85 (lines 4-13).

Reed-Jennings has watched the Mariners play in both the Kingdome and at Safeco Field. CP 86 (lines 10-17). She saw four to six games in the Kingdome. CP 87 (lines 1-8). She is confident that she saw foul balls go into the stands at the Kingdome. CP 89 (lines 20-23).

Reed-Jennings' husband, Cliff Jennings, is an officer with the Bellingham police. CP 54 (lines 19-20). His police association purchases four season tickets every year to attend Mariners games at Safeco Field. CP 56 (lines 1-17). He began using the police association tickets in 2002 or 2003. CP 56 (lines 18-25). The seats always were located in section 116 along the right field foul line halfway between first base and where the right fielder would stand. CP 57 (line 20) to CP 58

(line 13); CP 88 (line 23) to CP 89 (line 6). Cliff Jennings and Reed-Jennings typically would attend one game per year. CP 55 (lines 18-25). Cliff Jennings can only recall his wife not accompanying him on one occasion. CP 57 (lines 7-15). Reed-Jennings acknowledges attending between two and four games at Safeco Field prior to the game at issue. CP 86 (lines 24-25). Cliff Jennings recalls a foul ball landing in the stands every time they attended a game. CP 89 (lines 14-23). Patrons in the area where they sat often carried gloves to catch foul balls. CP 89 (line 24) to CP 90 (line 12). As Reed-Jennings testified:

> Q. It would be fair to say that you were aware that foul balls could reach the stands where people are sitting?
>
> A. Yes. That is why people bring their mitts.

CP 89 (line 24) to CP 90 (line 1).

Cliff Jennings believes that there were occasions when they arrived before a game and saw the end of batting practice. CP 58 (lines 14-23).

The Incident

Reed-Jennings and her husband decided to take Reed-Jennings' sister and her sister's husband to the Mariners game on May 4, 2009. CP 92 (lines 7-12). The Mariners were playing the Texas Rangers that evening. CP 92 (line 19) to CP 93 (line 6). Reed-Jennings' party was

using the tickets for the police association seats in section 116. CP 93 (lines 12-15). The plan was to arrive early to see batting practice. CP 94 (lines 5-7).

Reed-Jennings' party went to Ivar's Restaurant in Seattle prior to going to the game. CP 94 (lines 17-23). Reed-Jennings ordered two strawberry margaritas while at Ivar's. CP 95 (line 14) to CP 96 (line 8). (Although she ordered two drinks, she maintains that she only drank one.) *Id.*

Reed-Jennings and her party then went to the ballpark. CP 96 (lines 12-14). The back of each of the tickets contains a warning about the dangers of balls entering the stands. The warning stated:

> WARNING: The Holder voluntarily assumes all risk incident to attending a game of Baseball, whether occurring before, during or after the game, including specifically (but not exclusively) the danger of being injured by bats, balls or other objects leaving the field, or by others in attendance. The Holder agrees that Major League Baseball, the Club and its opponent, and the Public Facilities District that owns Safeco Field, and all individuals affiliated with such organizations, are not liable for injuries, expenses, claims or liabilities resulting from such causes. . . .

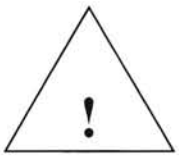
CP 139 at ¶ 6 & CP 148. However, Reed-Jennings maintains that she has never read the back of the ticket. CP 107 (lines 16-21). Her husband has read the back of the ticket. CP 64 (lines 11-13). On the concourse above

section 116, there are posts that contained warnings about balls leaving the field. CP 139 at ¶ 5 & CP 146. At that time, the warning stated:

CAUTION
BEWARE of BATS
AND BALLS LEAVING
PLAYING FIELD.

Reed-Jennings maintains that she did not read the warning on the posts. CP 108 (lines 6-15) & CP 123.

Reed-Jennings acknowledges that she saw players warming up as she went down towards her seat. CP 108 (line 24) to CP 109 (line 8) & CP 124. At the end of the aisle, there is another warning stating:



CAUTION

YOU ARE CLOSE TO THE ACTION

WATCH FOR BATS OR BALLS LEAVING THE FIELD

CP 139 at ¶ 4 & CP 144. Reed-Jennings says that she did not see this warning. CP 109 (line 12) to CP 110 (line 8) & CP 125.

Reed-Jennings took her seat in section 116, Row 2, Seat 7. CP 62 (lines 10-12); CP 107 (line 22) to CP 108 (line 2). There is a warning on the backs of the seats in section 116 stating:

PLEASE STAY ALERT
TO BATS AND BALLS LEAVING THE FIELD

CP 138 at ¶ 3 & CP 142. This warning was on the back of each and every seat directly in front of Reed-Jennings. Even so, Reed-Jennings states that she does not recall seeing this warning. CP 111 (lines 8-16) & CP 126.

Even though Reed-Jennings maintains that she did not see any of the above warnings, she admits that she knew balls could land in the stands. CP 110 (lines 9-14) & CP 91 (lines 1-4). She was also aware that there was no screen placed immediately in front of her seat. CP 117 (lines 12-17).

Reed-Jennings took photos of herself and members of her party when they arrived at the seats. CP 101 (lines 12-17) & CP 118; CP 102 (lines 12-21) & CP 119; CP 103 (lines 14-18) & CP 120; CP 104 (lines 9-12) & CP 121; CP 105 (line 23) to CP 106 (line 8) & CP 122. The photos show Reed-Jennings and members of her party turning their faces away from the field as players practiced. *Id.* Reed-Jennings concedes that she saw players warming up with running, throwing and stretching on the field. Brief of Appellants at page 11; CP 151 (lines 8-10).

Reed-Jennings recalls that the Texas Rangers started conducting batting practice. CP 97 (lines 6-11). The temporary batting practice

screens had been placed on the field. CP 105 (line 23) to CP 106 (line 8) & CP 122 (photo showing Cliff Jennings and right foul line screens). As occurs during professional batting practice, the Texas pitcher would throw the next pitch before the last hit ball would be caught. CP 63 (lines 8-17). Reed-Jennings watched the batting practice for between five and ten minutes. CP 194 (line 23) to CP 195 (line 5). In Reed-Jennings' words, the Texas Rangers bats were "huge." CP 112 (lines 1-8) & CP 127-131; CP 114 (line 25) to CP 115 (line 7).

A foul ball landed near to Reed-Jennings prior to the incident at issue. Reed-Jennings described the foul ball on her Twitter account:

> **A foul ball landed in the seats in front of us and the young man next to Cliff scampered over the seats and grabbed it.**
>
> **I said, well, that really should have been my ball. I just wasn't fast enough. I said I wanted another one to land right there. It's be mine.**

CP 112 (lines 1-8) & CP 127-131; CP 113 (line 17) to CP 114 (line 12) (emphasis added).

Soon thereafter, Reed-Jennings saw another ball get hit toward centerfield. CP 98 (line 18) to CP 99 (line 20). She was watching the player in centerfield back pedal when she heard the crack of the bat. CP 99 (line 2) to CP 100 (line 3). She turned her head toward the sound and was hit. CP 100 (lines 1-7). She suffered a serious left eye injury.

C. Argument

I. Washington Courts Do Not Require that Seats in Right Field Be Protected by Screens

Washington courts have long held that screening solely behind home plate is sufficient for a baseball field. *See Leek v. Tacoma Baseball Club*, 38 Wn.2d 362, 229 P.2d 329 (1951). In *Leek*, a spectator suffered serious personal injuries when he was struck by a foul ball while watching a baseball game. *Id.* at 363. Leek had entered the baseball park after 8:00 p.m. when the game was already in progress. *Id.* He was directed to sit behind home plate in the fourth row. *Id.* The area behind home plate was protected by a screen. *Id.* The screen did not provide any overhead protection. *Id.* Leek assumed that there was overhead protection since he had never before been in this baseball park. *Id.*

A short time after Leek had taken his seat, a batter hit a high foul ball into his section of the grandstand. *Id.* Leek watched the ball start up but the night was hazy and he lost sight of it. *Id.* Suddenly, Leek was struck in the head, rendering him unconscious. *Id.* Leek brought a claim against the baseball club for his injuries. *Id.* The case was tried to the court without a jury. *Id.* At the conclusion of Leek's case, the court granted defendant's motion for dismissal. *Id.*

On appeal, Leek argued that the stadium failed to provide any seats that were effectively screened because there was no overhead protection. *Id.* at 365. The Washington Supreme Court rejected Leek's contention and reaffirmed the general principle that a stadium only has a duty to screen some grandstand seats and no obligation to screen all seats, holding: "[a]pplying this rule to factual situations of the kind here presented, it is now settled that the proprietor has the duty of screening **some** grandstand seats." *Id.* at 364 (emphasis added).[2] The Court held that failure to provide overhead protection for patrons directly behind home plate did not pose an "unreasonable risk" of injury to the patrons, stating:

> [T]here is nothing in the record, aside from this one incident, or in common experience, to indicate that foul balls of this kind cause serious injuries with sufficient frequency to be considered an unreasonable risk.

Id. at 366. The Court explained:

> The fact that in this case a serious injury did result is not controlling. The question is whether the proprietor had reason to

---

[2] The *Leek* Court cited with approval several cases where courts held that a baseball club had satisfied its duty by providing a screen behind home plate. *Crane v. Kansas City Baseball & Exhibition Co.*, 168 Mo.App. 301, 153 S.W. 1076, 1077 (1913) ("Defendants fully performed that duty when they provided screened seats in the grand stand..."); *Quinn v. Recreation Park Ass'n*, 3 Cal.2d 725, 729, 46 P.2d 144 (1935) ("... the management is not obligated to screen all seats, because, as pointed out by the decisions, many patrons prefer to sit where their view is not obscured by a screen."); *Brisson v. Minneapolis Baseball & Athletic Ass'n*, 185 Minn. 507, 508-09, 240 N.W. 903 (1932) ("We do not think that the management must, in order to free itself from the charge of negligence, provide screened seats for all who may possibly apply therefor.").

> believe, *before the accident happened,* that lack of overhead protection would unreasonably endanger appellant.

Id. at 367 (emphasis in original). The Court concluded that the stadium owner was not under a duty to provide overhead protection behind home plate. *Id.* The Court also confirmed that the fact that Leek did not realize there was no overhead protection did not change the result:

> Appellant's failure to observe what was plainly there to be observed cannot, however, operate to enlarge respondent's duty of care beyond that which it would otherwise be. The proprietor was entitled to assume that patrons walking into the grandstand would note that there was no roof, and hence nothing to which overhead screening could attach.

Id. at 368-69.

There is no support for Reed-Jennings' suggestion that the *Leek* decision would have been different if it was decided after Washington adopted the Comparative Fault Statute RCW 4.22.015-RCW 4.22.070. The *Leek* Court concluded that the ball club had not violated any duty. *Leek*, 38 Wn.2d at 367. It did not decide the case on the basis of assumption of risk. As the *Leek* Court noted: "Our disposition of the case makes it unnecessary to consider whether, in any event, appellant was contributorily negligent or assumed the risk with regard to the injuries suffered." 38 Wn.2d at 369. *See also Taylor v. Baseball Club of Seattle L.P.*, 132 Wn. App. 32, 37, 130 P.3d 835 (2006), *review denied,* 158 Wn.2d 1026, 152 P.3d 347 (2007) ("... for many decades, courts have

required baseball stadiums to screen some seats – generally those behind home plate – to provide protection to spectators who choose it."). Reed-Jennings conceded at summary judgment that this duty is not enlarged during batting practice. CP 160 (lines 1-4).

The Washington Supreme Court's reasoning has been followed by courts in other jurisdictions. *See Wade-Keszey v. Town of Niskayuna*, 4 A.D.3d 732, 733-34, 772 N.Y.S.2d 401 (2004) (ballpark owners are not insurers of the safety of spectators; the owners' duty is only to provide screening for the area of the field behind home plate, where the danger of being struck by the ball is the greatest); *Sparks v. Sterling Doubleday Enters.*, 300 A.D.2d 467, 752 N.Y.S.2d 79, 80 (2002) (court held stadium owner is not required to be insurer of the safety of spectators who choose to occupy unprotected areas and stadium owner fulfilled its limited duty by providing protective screening behind home plate, where the danger of being struck by a baseball is the greatest); *Benejam v. Detroit Tigers, Inc.*, 246 Mich. App. 645, 635 N.W.2d 219, 225 (2001) (baseball stadium owner that provides screen behind home plate has fulfilled its duty); *Iervolino v. Pittsburgh Athletic Co.*, 212 Pa. Super. 330, 243 A.2d 490, 491-92 (1968) (plaintiff must prove that the stadium owner deviated from

ordinary standards and plaintiff could not do so when the evidence established that a screen was erected directly behind home plate).[3]

Plaintiffs' citation to *Rountree v. Boise Baseball LLC*, 154 Idaho 167, 296 P.3d 373 (2013), disregards the fact that Washington courts have long been with the majority and apply the limited duty rule. *See Leek*, 38 Wn.2d at 367; *Taylor*, 132 Wn. App. at 37. *Rountree* is not applicable here because the Idaho Supreme Court refused to follow the majority and also refused to apply the limited duty rule. *Rountree*, 296 P.3d at 379. Notably, the Idaho court also concluded that primary implied assumption of risk is not a viable defense in Idaho. *Id.* at 379-381. In contrast, the Washington Supreme Court in *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 495, 834 P.2d 6 (1992), held that the defense of "[p]rimary implied assumption of risk continues as a complete bar to recovery after the adoption of comparative negligence laws."[4]

---

[3] *See also Loughran v. The Phillies*, 888 A.2d 872, 875-76 (2005) (no duty rule applied when player threw ball into stands); *Roberts v. Boys & Girls Republic, Inc.*, 51 A.D.3d 246, 252, 850 N.Y.S.2d 38 (2008) (plaintiff assumed risk of being hit by bat); *Streichler v. Plainview/Old Bethpage Cent. School Dist.*, 82 A.D.3d 1082, 1083, 918 N.Y.S.2d 883 (2011) (ball park owner only needs to provide screen behind home plate); *Pakett v. The Phillies, L.P.*, 871 A.2d 304, 308-09 (2005) ("no-duty" rule applied to spectator hit in eye even though screen allegedly inadequate).

[4] Plaintiffs' other cases do not even involve baseball. *See Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 129, 606 P.2d 1214 (1980) (issue was duty owed to patron who fell from ski lift); *Iwai v. State of Washington*, 129 Wn.2d 84, 87, 915 P.2d 1089 (1996) (issue was duty owed to person who slipped in parking lot); *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 126, 875 P.2d 621 (1994) (issue was duty owed to child who fell from rock); *Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 330, 666 P.2d 392 (1983) (issue was duty owed to prospective buyer injured during condo

In the instant case, Reed-Jennings had watched Mariners games both at the Kingdome and at Safeco Field. She had witnessed balls enter the stands. She had witnessed a ball enter the stands in her very seating area. She knew that there was not a screen protecting her seats, which were close to the field. In fact, she was excited about getting the next foul ball hit into her area.

As the court in *Benejam* explained:

> [T]here is inherent value in having most seats unprotected by a screen because baseball patrons generally want to be involved with the game in an intimate way and are even hoping that they will come in contact with some projectile from the field (in the form of a souvenir baseball). ("[T]he chance to apprehend a misdirected baseball is as much a part of the game as the seventh inning stretch or peanuts and Cracker Jack.") In other words, spectators know about the risk of being in the stands and, in fact, welcome that risk to a certain extent.

Benejam, 635 N.W.2d at 651 (citations omitted). Here, the Mariners satisfied their limited duty by providing multiple screens on the field.

---

inspection); *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 823, 959 P.2d 651 (1998) (involved accounting firm liability for audit); *Home v. North Kitsap School Dist.*, 92 Wn. App 709, 712–13, 965 P.2d 1112 (1998) (assistant football coach struck by opposing player while guarding curb to protect players); *Kirk v. WSU*, 109 Wn.2d 448, 450, 746 P.2d 285 (1987) (cheerleader injured while practicing on AstroTurf); *Martin v. Kidwiler*, 71 Wn.2d 47, 48, 426 P.2d 489 (1967) (plaintiff burned when flaming pot thrown onto patio); *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 880, 866 P.2d 1272 (1994) (issue was hospital's negligence in allowing accumulation of ice and snow in parking lot); *Owen v. Burlington N. & Santa Fe R. R. Co.*, 153 Wn.2d 780, 783, 108 P.3d 1220 (2005) (people killed in a car/train collision).

Batting Practice is Not an Unreasonable Risk

Reed-Jennings failed to produce any evidence that the Texas Rangers batting practice created an "unreasonable risk." It is undisputed that the Texas Rangers were conducting practice as it is commonly done in baseball. Moreover, during a five-year period over 10 million patrons attended Mariners games at Safeco field. Throughout the entire ballpark for that five year period, during both practices and games, there have been about 300 documented occurrences where a fair or foul ball has hit a person. There have been only five documented incidents (including Reed-Jennings' injury) involving foul balls in the section where Reed-Jennings was injured. That is only 1.6% of the occurrences. As the Washington Supreme Court noted in *Leek*, 38 Wn.2d at 366, the fact that there has been a serious injury does not demonstrate "sufficient frequency" to be considered an "unreasonable risk."

In addition, at the time of this incident in 2009, the Mariners provided screens on the right field foul line. It was not until 2012 that Major League Baseball required all teams to use the foul line screens. This more than satisfied the Mariners' duty to provide screening for some seats. *See Leek*, 38 Wn.2d at 364–65.

Unable to address the relevant case law, Reed-Jennings submitted expert Gil Fried's declaration. Fried's assertion that batting practice is an

"unreasonable risk" is inadmissible and should not be considered.[5] Reed-Jennings then goes on to argue that there was an unreasonable risk because the Texas Rangers had multiple balls in play at the same time, there were inadequate warnings regarding balls leaving the field, and the Mariners had not conducted any inquiry into the placement of the field screens. Yet, Reed-Jennings fails to identify any ballpark that conducts practice differently or provides more protection for its spectators.

All Practices Use Multiple Balls

The contention regarding multiple balls ignores the fact that there are multiple balls in play during all major league practices. Division I upheld the summary judgment dismissal of a similar case that involved

---

[5] In the Reply Brief at summary judgment, the Mariners moved to exclude Fried's testimony asserting legal conclusions, including any testimony asserting that batting practice poses an unreasonable risk and that the Mariners had a duty to restrict seating or provide even more warnings. CP 340 (lines 14-16) and footnote 13. Such testimony is inadmissible under Washington law. It would invade the province of the jury, or of the court in giving instructions on or otherwise determining applicable law. A witness "may not give legal conclusions. Improper legal conclusions include testimony that a particular law applies to the case, or testimony that the defendant's conduct violated a particular law." *State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) citing *Hyatt v. Sellen Const. Co., Inc.*, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985); *see also King County Fire Protection Districts No. 16, No. 36 and No. 40 v. Housing Authority of King County*, 123 Wn.2d 819, 825-26, 872 P.2d 516 (1994); *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993); *Hiskey v. City of Seattle*, 44 Wn. App. 110, 113, 720 P.2d 867, *review denied*, 107 Wn.2d 1001 (1986). An expert witness may not opine, for example, on whether a person was negligent or on whether that person's conduct was the proximate cause of some event or state of affairs. *Hiskey*, 44 Wn. App. at 113. Furthermore, "[e]xperts may not offer opinions of law in the guise of expert testimony." *Olmedo*, 122 Wn. App. at 532, citing *Stenger v. State*, 104 Wn. App. 393, 407, 16 P.3d 655, *review denied*, 144 Wn.2d 1006, 29 P.3d 719 (2001); *see also Eriks v. Denver*, 118 Wn.2d 451, 458, 824 P.2d 1207 (1992) (expert testimony by attorney on whether a lawyer satisfied rules of professional conduct held inadmissible).

multiple balls in play. *See Taylor*, 132 Wn. App at 41. Other courts have repeatedly dismissed cases where multiple balls are in use during warm up. *See, e.g., Zeitz v. Cooperstown Baseball Centennial*, 31 Misc.2d 142, 29 N.Y.S.2d 56, 59 (1941); *Koenig v. Town of Huntington*, 10 A.D.3d 632, 782 N.Y.S.2d 92, 93 (2004).

The Mariners Provided Multiple Warnings

Reed-Jennings also had no evidence that the warnings provided by the Mariners were inadequate. The Mariners provided warnings regarding balls leaving the field on the ticket, on the post-leading to section 116, on the section's wall, and on the seats directly in front of Reed-Jennings' seat in row 2. Although these warnings were not necessary because the danger of a ball leaving the field is inherent to the sport of baseball, they serve to emphasize the steps taken by the Mariners to notify Reed-Jennings of the danger. In *Costa v. Boston Red Sox Baseball Club*, 61 Mass. App. Ct. 299, 809 N.E.2d 1090 (2004), the court reaffirmed that there is no duty to warn spectators regarding inherent dangers at a baseball park.

The evidence in *Costa* documented that, in the 1990s, there were 36 to 53 injuries per year by foul balls at Fenway Park. *Id.* at 1091. *Costa*, an adult, had only attended one prior baseball game when she was eight years old. *Id.* She had not watched baseball on TV. *Id.* She

maintained that she thought a foul ball was simply one that rolled off to the side after being hit and that she had no understanding of the risks posed by an errant foul ball. *Id.*

Fenway Park only had netting behind home plate. *Id.* Costa took a seat in an unscreened area on the first base line. *Id* at 1090-91. A player hit a foul ball into the stands along the first base line and struck Costa in the face, causing severe permanent injuries. *Id.* at 1091. Costa maintained that she was entitled to a warning about the dangers of sitting in an unprotected location so that she could make an informed choice whether to remain in her seat. *Id.* at 1092.

The court rejected Costa's contention, stating that the duty to warn does not extend to dangers that would be obvious to persons of average intelligence. *Id.* at 1092-93. The court explained that it was clear "that a person of ordinary intelligence would perceive the risk and need no additional warning." *Id.* at 1093. *See also Benejam*, 246 Mich. App. at 652, 661 (court held that stadium owner that provides screen behind home plate has fulfilled its duty and does not have a duty to warn regarding objects leaving the field. The court also concluded that if a warning had been required, the warnings, including the warnings on the back of the ticket, were adequate.).

The *Costa* decision applies to the instant case. The Mariners had no duty to provide a warning regarding the danger of balls leaving the field. Even so, plaintiff's expert Fried acknowledged that the multiple written warnings provided by the Mariners were "an important and key component of a warning system." CP 391 (lines 6–9). Fried could not identify any team that provides additional warnings by the use of ushers, the loud speaker system, the JumboTron or more specific written warnings. CP 379 (lines 1–5); CP 379 (lines 14–19); CP 380 (lines 13–17); CP 392 (lines 11–16).

Here, Reed-Jennings was aware that batting practice was in session and foul balls could be hit to her area. Even though the Mariners had no duty to provide a warning, they did provide warnings on the ticket, on the post leading up to Reed-Jennings' seat, on the section wall, and on the seats directly in front of Reed-Jennings' seat. These warnings said that Reed-Jennings should be alert for "balls" and clearly notified Reed-Jennings that multiple "balls" were in use on the field. Notably, Reed-Jennings claims she never saw any of these warnings, including the warning that was on the back of each and every seat directly in front of her. She offers no explanation for why she would have paid attention to additional warnings.

The Mariners Placed Additional Screens

Reed-Jennings' expert Fried could not identify any other team that used the temporary left and right field screens in 2009. CP 387 (line 19) – CP 388 (line 6). Fried conceded that he did not have any knowledge regarding the number of foul balls that get to the stands after the batting cage, the first base screen, and the right field screens have been installed. CP 385 (lines 1-6). More importantly, Fried acknowledged that he cannot say that the Mariners placement of the right field screens was not the optimum location. As he testified:

> Q: All right. Now, do you have any information to show that that's not the optimum location for these screens?
>
> A: No.

CP 393 (lines 17–19). Indeed, the screens have prevented many line drive foul falls from reaching the stands. CP 366 at ¶ 8.

In this case, as in *Leek*, the Mariners only had a duty to provide a screen behind home plate. That screen was provided. The Mariners also provided a batting cage at home plate. It is clear that the Mariners exceeded their duty when they provided screens on the left and right field foul lines in 2009, especially when Major League Baseball did not require such screens until 2012. Reed-Jennings concedes that her claims must be dismissed and that there is no need to even consider the issue of

assumption of the risk if the limited duty rule is applicable because the Mariners clearly satisfied that duty. Brief of Appellants at page 19.[6]

II. Reed-Jennings Assumed the Risk of Being Hit by a Ball in an Unscreened Section of the Stadium

Washington courts have long accepted the proposition that a spectator who takes a seat in the unscreened portion of a stadium assumes the risk of being struck by a baseball. *See Kavafian v. Seattle Baseball Club Ass'n*, 105 Wash. 215, 220, 181 P. 679 (1919). The *Kavafian* court explained:

> . . . that balls are very often hit 'foul' and that wild throws sometimes result in the ball falling among the spectators . . .

Id. at 220. Consequently, the court held that a patron who sat in an unscreened portion of the stadium and was struck by a ball had assumed the risk. *Id.*

In *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992), the court held that the defense of "[p]rimary implied assumption of risk continues as a complete bar to recovery after the adoption of comparative negligence laws." *Id.* at 495. The *Scott* court observed:

---

[6] Reed-Jennings states in her brief, "If it is decided that the Mariners only owed the Jennings a limited duty to screen behind home plate, there is no need to consider the arguments for or against the application of primary implied assumption of risk." Brief of Appellants at page 19.

> Implied *primary* assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific *known* and appreciated risks.

Id. at 497 (italics by court). The court reasoned as follows:

> [T]he basis of both express and implied primary assumption of risk was the plaintiff's *consent* to the *negation of defendant's duty with regard to those risks assumed.* Since implied primary assumption of the risk *negates duty*, it acts as a bar to recovery when the injury results from one of the risks assumed. As Dean Prosser explains, *primary* implied assumption of risk should continue to be an absolute bar after the adoption of comparative fault because in this form it is a principle of "no duty" and hence no negligence, thus negating the existence of any underlying cause of action.

Id. at 498 (italics by court).

The *Scott* court synthesized all of the confusing and competing threads of prior assumption of risk law into a coherent whole. Repeatedly, *Scott* states that assumption of risk is a complete defense: It is a "**complete bar to recovery**," *id.* at 495, 497 & 498; it is an "**absolute bar**," *id.* at 498, "negating the existence of **any** underlying cause of action," *id.*; and, simply put, "the claim **will be barred**," *id.* at 496 (emphasis added in each quotation). Nowhere does the *Scott* court say that assumption of risk is only a partial defense that must be heard by a jury.

In *Neinstein v. Los Angeles Dodgers Inc.*, 185 Cal.App.3d 176, 229 Cal.Rptr. 612 (1986), the California court explained the policy

reasons for finding that spectators assume the risk of being struck by balls landing in the stands:

> The quality of a spectator's experience in witnessing a baseball game depends on his or her proximity to the field of play and the clarity of the view, not to mention the price of the ticket.
>
> As we see it, to permit plaintiff to recover under the circumstances here would force baseball stadium owners to do one of two things: place all spectator areas behind a protective screen thereby reducing the quality of everyone's view, and since players are often able to reach into the spectator area to catch foul balls, changing the very nature of the game itself; or continue the status quo and increase the price of tickets to cover the cost of compensating injured persons with the attendant result that persons of meager means might be "priced out" of enjoying the great American pastime.
>
> To us, neither alternative is acceptable. In our opinion it is not the role of the courts to effect a wholesale remodeling of a revered American institution through application of the tort law.

Id. at 181.

Reed-Jennings argues that she did not have a full subjective understanding of the risk that she might be injured by a foul ball during batting practice. She makes this argument even though she acknowledges that she saw a foul ball land in the row of seats directly in front of her immediately prior to this incident.[7] She also admits that she saw players

---

[7] The fact that a prior ball had landed in Reed-Jennings' section and her admission in her deposition that no screen was placed immediately in front of her prevents Reed-Jennings from contending she thought the right field screens prevented all balls from reaching her. Reed-Jennings Dep. at CP 117 (lines 12-17). *See Marshall v. AC&S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

running and throwing balls. CP 151 (lines 8-10). Brief of Appellants at page 11. The record documents that the Texas pitcher would throw the next pitch before the last hit ball would be caught. CP 63 (lines 8-17). Clearly, Reed-Jennings was aware that multiple balls were in use. In any event, with respect to her subjective understanding, the court in *Ridge v. Kladnick*, 42 Wn. App. 785, 713 P.2d 1131 (1986), held that a person is "deemed to have known and understood the risk of such injury where such risk would have been quite clear and obvious to a reasonably careful person under the same or similar circumstances." *Id.* at 787. As the Washington supreme court explained: "Appellant's failure to observe what was plainly there to be observed cannot, however, operate to enlarge respondent's duty of care beyond that which it would otherwise be." *Leek*, 38 Wn.2d at 368-69.

The same arguments now made by Reed-Jennings were rejected by the court in *Taylor v. Baseball Club of Seattle, L.P.*, 132 Wn. App. 32, 130 P.3d 835 (2006). Taylor was injured during pre-game warm-ups at Safeco Field when a Mariners player failed to catch a ball thrown towards her seat along the foul line in right field. *Id.* at 34. Taylor argued that she was not aware that her circumstances posed any risk of injury, that she did not know how players warmed up, and that she never thought about the possibility of being hurt. *Id.* at 36. There were multiple balls in

play at the time of Taylor's injury. *Id.* at 41. Taylor also maintained that the Mariners should have had a policy prohibiting pitchers from practicing near the stands. *Id.* at 36.

The Court of Appeals held that pregame warm-up is integral to the game of baseball and that a spectator assumes the risk of being struck by a baseball during warm-ups. *Id.* at 37, 39. The court noted that there was no evidence that the circumstances leading to Taylor's injury were unusual. *Id.* at 40. It was undisputed that the practice being conducted by the pitchers was normal baseball practice. *Id.* The *Taylor* court rejected Taylor's argument and found Taylor assumed the risk of being hit by a ball during practice because Taylor had witnessed balls entering stands and was excited to be in an area where she could catch balls. *Id.* at 40-41.

Likewise, in the present case, the Texas Rangers' batting practice was being conducted in normal fashion and Reed-Jennings assumed the risk of a ball entering the stands.[8] Practice always has more than one ball in play. As explained by Coach Datz, there are coaches hitting to infielders and outfielders as well as players throwing to each other. CP 135 at ¶ 8. To accept the argument that the risk cannot be assumed when

[8] Reed-Jennings can also offer no basis for holding the Mariners responsible for the actions of the Texas pitcher and Texas batter. It is undisputed that the Mariners did not have control over how Texas conducted batting practice. CP 136 at ¶ 11.

more than one ball is in use would eliminate assumption of risk as a defense during practice and during the warmups between innings.

Other jurisdictions have repeatedly held that warm-ups are integral to the game of baseball and the spectator assumes the risk of being struck by the baseball. In *Dalton v. Jones, et al.*, 260 Ga.App. 791, 581 S.E.2d 360 (2003), the court held that a spectator assumes the risk of a ball being thrown into the stands during warm-up between innings. On June 6, 2000, Dalton attended an Atlanta Braves baseball game held at Turner Field. *Id.* at 361. Dalton had a seat in an unprotected area of the stadium. *Id.* at 362. Between innings, two Braves players were pitching the ball back and forth to each other after coming back onto the field. *Id.* When it was time for a player on the other team to hit, professional baseball player Andruw Jones threw a ball into the stands at about the time Dalton was just standing up to go and get a soda. *Id.* Dalton did not see the ball coming toward her and sustained a permanent eye injury. *Id.* at 361-62.

Dalton filed a negligence action against Jones and the Atlanta Braves. *Id.* at 361. She alleged that Jones was negligent in throwing a baseball in the stands between innings of the game. *Id.* She also asserted that the Atlanta Braves were negligent by failing to properly educate and train their players as to the potential danger of such acts and for failing to

provide equipment in the stands to protect the spectators. *Id.* The trial court granted summary judgment to defendants. *Id.* The appellate court upheld the summary judgment dismissal, stating:

> One who buys a ticket for the purpose of witnessing a baseball game and who chooses or accepts a seat in a portion of the grandstand which his own observation will readily inform him is unprotected, voluntarily assumes the risk inherent in such a position, since he must be presumed to know that there is a likelihood of wild balls being thrown and landing in the grandstand or other unprotected areas.

Id. at 362 (citations omitted). The court went on to note:

> Whether the ball was thrown or tossed during an inning of play or between innings lacks legal significance because, as the trial court noted, "this throw occurred during a time which was necessary to the playing of the game, during which time the Plaintiff has assumed the risk of injury from bats, balls, and other missiles."

Id.

The same conclusion was reached by the court in *Hunt v. Thomasville Baseball Co.*, 80 Ga.App. 572, 56 S.E.2d 828 (1949). Hunt purchased a ticket and occupied a seat in the grandstand, which was not protected by a screen. *Id.* at 829. During the warm-up period preceding the game, one of the players threw a baseball that was too high to be caught and the ball entered the stands, striking Hunt. *Id.* Hunt brought suit against the Thomasville Baseball Company, alleging that it knew that a wildly thrown ball could injure a spectator. *Id.* The trial court dismissed the complaint. *Id.*

The appellate court upheld the dismissal, stating that the spectator "subjects himself to the dangers necessarily and usually incident to and inherent in the game." *Id.* The appellate court rejected Hunt's contention that preliminary practice is not part of the game, concluding that warm-up is necessary to the playing of the game itself. *Id.* at 830.

Other courts have all concluded that warm-up is part of the inherent risk of baseball. In *Zeitz v. Cooperstown Baseball Centennial*, 31 Misc.2d 142, 29 N.Y.S.2d 56 (1941), the court considered facts similar to the instant case. In *Zeitz*, the stadium owner had provided a screen behind home plate. *Id.* at 56-57. Beyond the screened area toward first base, there were a series of open grandstands which were not screened. *Id.* at 57. Zeitz purchased tickets for the open grandstand. *Id.* At the time Zeitz entered the grandstand, the teams were engaged in preliminary practice with five or six different balls in play. *Id.* One team was warming up within 14 feet of where Zeitz was sitting. *Id.* Zeitz noticed the players throwing and decided to change seats. *Id.* While in the act of changing her seat, Zeitz was struck by a thrown baseball. *Id.*

Zeitz filed an action against the baseball club, alleging that it had not properly supervised the players. *Id.* The baseball club argued that Zeitz had assumed all risks incidental to the game. *Id.*

Zeitz conceded that she had assumed all risks necessarily incident to the game of baseball but argued that preliminary practice is not part of the game and was not an incidental risk associated with the game. *Id.* at 57-58. The court rejected Zeitz's contention, holding that, by sitting in the unprotected bleachers, she had assumed all risks, including the risks associated with players during preliminary practice:

> The plaintiff concedes that she assumed all the risks necessarily incident to the game of baseball, but her position is that preliminary practice is not a part of the game and hence, not an incidental risk of it. In other words, the injuries were not received in the course of the game while being played and the ball was not batted or thrown by players in their usual position in the game. I do not see much logic in that. Preliminary practice or 'warming up' is a necessary part of every ball game. It is indulged in by the players generally, preliminary to every game when many balls are in use at the same time.

Id. at 57-58. *See also Koenig v. Town of Huntington*, 10 A.D.3d 632, 782 N.Y.S.2d 92, 93 (2004) (spectator assumed risk of being injured by ball coming from adjacent field); *Alwin v. St. Paul Saints Baseball Club, Inc.*, 672 N.W.2d 570, 574 (2003) (spectator assumed risk of being hit by baseball even when he could not see the baseball because he was walking near a concession stand).

Although not raised in the brief of appellants, Reed-Jennings attempted to argue at summary judgment that a 1925 Ohio case, *Cincinnati Baseball Club Co. v. Eno*, 112 Ohio St. 175, 147 N.E. 86

(1925), required the trial court to conclude that there is an issue of fact regarding whether Reed-Jennings assumed the risk of being struck by a baseball during warm-up. However, *Eno* is easily distinguished from the instant case because *Eno* involved a situation where the players were batting at an **unusual** outfield location as opposed to batting at home plate, where the area is screened. *Id.* at 88. As the *Taylor* court explained: "*Eno* and *Maytnier* simply stand for the proposition that there may be liability when the baseball activity or the location of the baseball activity is unusual…" *Taylor*, 132 Wn. App. at 39.

In 1921, Eno attended a doubleheader game between New York and Cincinnati. *Eno*, 147 N.E. at 86 at 86. She took a seat in the non-screened portion of the grandstand. *Id.* at 86, 88. During the intermission between games, the Cincinnati players began conducting batting practice at a point near the grandstand where Eno was seated and away from the normal infield area where batting is usually conducted. *Id.* at 86. The only screen for the field was behind home plate, and there was no screen near Eno. *Id.* Eno was struck in the face by a batted ball. *Id.* Eno alleged that the baseball club was negligent in permitting the players to bat balls at a location away from home plate. *Id.* at 88.

The court concurred with the general case law which holds that a stadium need only screen home plate and that a spectator assumes the

risks inherent in baseball. *Id.* at 87. However, the court explained that the baseball club had a duty to "not lead its invited guests into unusual dangers." *Id.* at 88. The court noted that, during the game, the batter always intends to bat away from home plate. *Id.* The court concluded that "[u]nder the facts set out in this case, which differ so essentially from those in the cases cited, we are of the opinion that the contributory negligence of the plaintiff should have been submitted to the jury." *Id.* at 89.

Eno apparently was also not aware that balls could reach the area where Eno was sitting. *See Whiting v. Aerni*, 1998 WL 741937 (Ohio App. 8 Dist.), *reconsideration denied*, 85 Ohio St. 3d 1448, 708 N.E.2d 213 (1999), where, in the concurring opinion, the court stated that "in *Eno* there is no evidence that Eno was knowledgeable about the custom of players warming up before games or that it was foreseeable that balls sometimes reach the areas where spectators sit." *Id.* at *5.

Similarly, Reed-Jennings cannot rely on *Maytnier v. Rush*, 80 Ill.App.2d 336, 225 N.E.2d 83 (1967), because it also involved an unusual location for the activity. In *Maytnier*, a bullpen was in an unusual location on the field without any protective screening, even though other stadiums had placed their bullpens off the field behind protective screening. *Maytnier*, 225 N.E.2d at 88. *Maytnier* would not

be followed in Illinois at the present time. Illinois has now passed the Baseball Act. *See Jasper v. Chicago Nat'l League Ball Club, Inc.*, 309 Ill.App.3d 124, 772 N.E.2d 731, 734 (1999).

A careful analysis of baseball cases demonstrates that each court looks at three factors in determining whether a case should be dismissed on the basis of "no duty" or "assumption of risk." The courts dismiss the action if (1) the activity is a normal part of baseball; (2) the baseball activity was occurring at a normal location on the baseball field; and (3) the injured person was in the unscreened seating area.

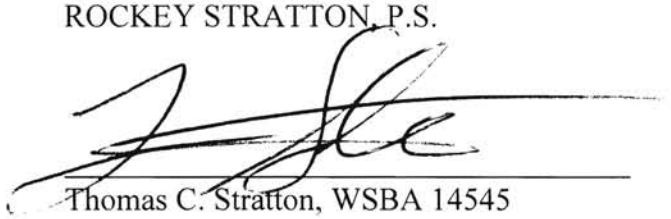
The instant case satisfies all of these factors. First, it is undisputed that this type of batting practice is universal in baseball. Second, the batting practice was taking place at home plate, the normal location. Third, Reed-Jennings was in unscreened seats and was aware that batting practice was in session and foul balls could get to her seat. As a result, plaintiff Reed-Jennings assumed the risk of being injured by a baseball.

CONCLUSION

The trial court was correct to dismiss all claims against the Mariners because the Mariners did not violate any duty and Reed-Jennings assumed the risk of being injured.

RESPECTFULLY SUBMITTED this 29 day of August, 2014.

ROCKEY STRATTON, P.S.



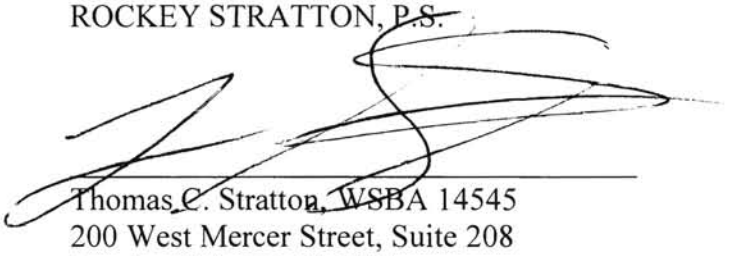
Thomas C. Stratton, WSBA 14545
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that service of a copy of Brief of Respondents to which this certificate of service is attached, is being made on the 29th day of August, 2014, by mailing same via the United States Postal Service to the attorneys of record for respondent in this case, first class postage prepaid.

DATED this 29 day of August, 2014.

ROCKEY STRATTON, P.S.



Thomas C. Stratton, WSBA 14545
200 West Mercer Street, Suite 208
Seattle, WA 98119-3994
(206)223-1688
Attorneys for Respondent