No. 71545-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

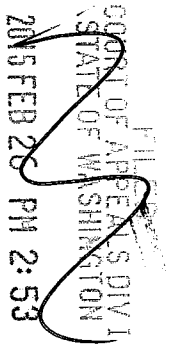
TERESA REED-JENNINGS and **CLIFF JENNINGS,** Wife and Husband and their marital community,

Appellants,

v.

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

Respondent.



BRIEF OF APPELLANTS

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On behalf of Appellants
Teresa Reed-Jennings and
Cliff Jennings

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A. INTRODUCTION

Appellants, Teresa Reed-Jennings and Cliff Jennings (hereinafter "the Jennings"), appeal a grant of summary judgment in favor of Respondent, the Baseball Club of Seattle, L.P. (hereinafter "the Mariners"), in King County Superior Court. The Superior Court's grant of summary judgment was based on a finding that the Jennings' claim was barred by the doctrine of primary implied assumption of risk. Here, the Jennings, by and through counsel, argue that summary judgment should have been denied and request this Court reverse the trial court's ruling.

The trial court's ruling should be reversed because the record presents genuine issues of material fact regarding the Mariners breach of its duty to exercise reasonable care commensurate with the circumstances of batting practice pursuant to Restatement (Second) of Torts § 343 and § 343A (1965). In light of sufficient evidence to reach a jury on the issue of the Mariners' negligence, and its contribution to the Jennings' injury, primary implied assumption of risk cannot support a grant of summary judgment as a matter of law. Furthermore, there are genuine issues of material fact regarding the elements necessary to establish that the Jennings impliedly relieved the Mariners of its duty of care.

In support of their claim of negligence, the Jennings cite the opinions of Gil Fried, an expert in sport facility management and baseball.

His testimony and declaration, coupled with the rest of discovery, when viewed in the light most favorable to the Jennings, present a triable issue of fact regarding the negligence of the Mariners' provision of warnings, adequate safeguards, and management of batting practice.

Primary implied assumption of risk, for its part, should be considered a damage mitigating factor. *Scott v. Pacific West Mountain* (1992), decided by the Washington Supreme Court and explained later in this brief, explains the interplay between sufficiency of the evidence and a plaintiff's implied assumption of risk at summary judgment for a sport's related injury.

The following Argument section attempts, firstly, to explain the Mariners' duty of care under a system of comparative fault. Second, the inapplicability of the "limited duty rule," as championed by the Mariners, is explained. Finally, primary implied assumption of risk, and its failure to bar recovery at summary judgment, is addressed.

B. ASSIGNMENTS OF ERROR

1. The King County Superior Court ("trial court") erred in granting the Mariners' Motion for Summary Judgment and dismissing the Jennings' complaint as barred by the doctrine of primary implied assumption of risk.

1. Issues Pertaining to Assignment of Errors

A. Did the Trial Court Error in Granting Respondent's Motion for Summary Judgment Pursuant to the Doctrine of Primary Implied Assumption of the Risk Where there was Sufficient Evidence for a Reasonable Person to Conclude the Negligence of the Baseball Club of Seattle Caused or Contributed to the Injury Suffered by the Jennings?

B. Did the Trial Court Error in Granting Respondent's Motion for Summary Judgment Pursuant to the Doctrine of Primary Implied Assumption of the Risk Where there was Sufficient Evidence for a Reasonable Person to Conclude Mrs. Reed-Jennings Did Not Subjectively Understand the Nature and Extent of the Risks of Pre-Game Batting Practice?

C. Did the Trial Court Error in Granting Respondent's Motion for Summary Judgment Pursuant to the Doctrine of Primary Implied Assumption of the Risk Where there was Sufficient Evidence for a Reasonable Person to Conclude that the Mariners Enhanced the Risks that are Necessary and Inherent to Pre-Game Batting Practice?

C. STATEMENT OF THE CASE

1. Overview

This case involves an injury suffered by the Jennings during pre-game batting practice at Safeco Field on May 4, 2009. CP 2-3. A batted baseball struck Teresa Reed-Jennings in her face while she was tracking the flight of the previously batted ball from her seat along the right field foul line. CP 199, 279-80.

Discovery included: interrogatories; requests for production; the depositions of three members of the Mariners' organization (batting coach; third base coach; and VP of Ballpark Operations); the depositions of Teresa Reed-Jennings and Cliff Jennings; and the deposition of Gil Fried, the Jennings' expert in sport facility management and baseball.

The Mariners filed for summary judgment on December 20, 2013. The motion was opposed and oral argument was heard on January 24, 2014, before Judge Kenneth Schubert.

In its Motion, the Mariners argued that it did not owe a duty of care to the Jennings as a matter of law. The Mariners reached this conclusion by way of two different claims: (1) that it, as a baseball stadium operator, satisfied its limited duty to the Jennings by screening the seats behind home plate; and (2) that the Jennings impliedly assumed the risk that caused their injury. CP 10-11.

The Jennings argued that the Mariners owed them a duty of reasonable care and not a "limited" duty. CP 157-58. Further, the Jennings argued that implied assumption of risk did not support summary judgment because the record contained sufficient evidence to create a genuine issue of fact regarding the Mariners' negligence. Id. The issues of fact concerning implied assumption of risk were also addressed. CP 169-172.

The trial court granted the Mariners' motion from the bench without a written decision. This appeal was timely taken following the entry of an order granting summary judgment on January 24, 2014. CP 401 (Order); CP 398 (Notice of Appeal).

2. The Parties

Respondent is the Baseball Club of Seattle, leasee of Safeco Field and owner of the Mariners baseball team. CP 5. Appellants are Teresa Reed-Jennings (hereinafter "Teresa") and Cliff Jennings (hereinafter "Cliff"), wife and husband. CP 179, 218. Cliff is a police officer for the City of Bellingham, CP 219, and Teresa is a civil engineer. CP 180.

3. The Jennings' injury during pre-game batting practice

Cliff purchased tickets to Mariners home games through the police association, seeing one game a year for the six or seven years preceding 2009. CP 220-22. In this fashion, Cliff obtained four tickets to attend the Mariners game against the Texas Rangers at Safeco Field on the evening

of May 4, 2009. CP 181. With the extra tickets the Jennings invited Teresa's sister, Sharon, and her husband, Ray. CP 182.

The four planned to arrive early to Safeco Field because of Sharon's interest in seeing batting practice. CP 183, 223. The group drove first to Ivar's restaurant where Teresa consumed one alcoholic beverage with her meal. CP 183-84. After Ivar's, they drove to a parking facility near Safeco Field and entered the stadium, arriving shortly before 6pm. CP 185, 187.

Upon entering, they found their seats in section 116 along the right field foul line. CP 186, 224-225. Cliff took the seat to the left of Teresa, while immediately to her right were Sharon and, next to Sharon, Ray. CP 188, 226. Teresa noticed after taking her seat that players were warming up with running, throwing, and stretching on the field. CP 189-90.

Immediately after sitting Teresa took photographs using her phone. CP 191, 225, 228. The photographs were introduced as exhibits during Teresa's deposition. CP 281-90. Rangers batting practice commenced while photos were being taken, with the group shifting their attention to actively watching "balls get hit." CP 195, 230-231.

After practice commenced, Teresa recalled that a batted ball was hit into the stands that she thought landed to the left of the group, bouncing into their section. CP 196. Cliff did not remember the same

during his deposition. CP 232. Teresa recalled what happened next:

> **A.** We were watching the balls get hit and – and the guy hit the ball and we – because we were watching and following and watching them get caught and the batter hit the ball – and this guy out here was running back up like that to catch the ball because it was a longer ball and then I heard a ball – another ball get hit and I turned my face and it was right there. CP 197-98.

Teresa further explained that, just before the incident, she was watching a player back-pedaling to field a ball. CP 198. The back-pedaling player was located more towards center field but still right in front of section 116. Id. Teresa never saw the player catch the ball; before the ball fell to the ground, she heard the next batted ball. CP 198-99. The crack of the next batted ball caused her to turn her head toward the noise, at which point she was struck in the left eye. CP 199, 280.

Cliff recalled the incident in his deposition:

> **Q.** *But after a certain amount of time, you recall seeing – following a ball and then hearing a crack and turning to see again?*
>
> A. Right. Because that is what we had been doing, yeah.
>
> **Q.** *And when you turned to watch, that is when you saw a flash and then you heard –*
>
> **A.** No, when I turned to watch, I heard another crack while that ball was still in the air. That is what caused me to turn back to look and that is when I saw the flash. So ball is in the air, I'm watching, I hear the crack, so I stopped tracking that one, turned to look to pick up the next one and as I am turning, it was just a flash and then another crack.
>
> **Q.** *And the other crack is the ball hitting your wife?*
>
> **A.** That's correct. CP 233.

Teresa estimated that it took the group maybe five minutes to find their seats and that it was less than ten minutes between when the group arrived and the incident. CP 194-95.

She remained conscious after being hit. CP 199. Cliff called to a deputy on the field and requested medical assistance. CP 234. Medical assistance came to her aid and carried her out of the section. CP 199. EMTs then received Teresa and she was transported to Harborview Medical Center. CP 200-01, 280. She has undergone eight surgeries as a result of the injury and a ninth surgery is planned. CP 202. She suffers from permanent vision loss in her left eye and daily pain. CP 204-06.

Teresa started a Twitter account during her recovery to keep in touch with her son Noah in California. CP 207. A portion of the Twitter feed was introduced during Teresa's deposition. CP 208. Teresa's account of the accident on Twitter mirrors her deposition testimony. See generally CP 292-96.

4. The Jennings' knowledge of baseball

Teresa estimated having attended six to ten Mariners' games. CP 212. Of those, she estimated viewing four to six games at Safeco Field. Id. Teresa recalled having seen foul balls go into the stands and was aware that foul balls could reach the stands. CP 213-14. Cliff recalled being at Mariners games where foul balls landed in the stands. CP 235.

Prior to the incident on May 4, 2009, Teresa had never attended a pre-game warm-up or batting practice. CP 279. Cliff testified that, apart from the game on May 4, 2009, he could not recall ever seeing batting practice, but remembered arriving before the start of a game where the players were wrapping up. CP 237.

Teresa did not know that multiple baseballs could be batted into the air simultaneously during batting practice. CP 280. She did not know that batting multiple balls into the air simultaneously was a byproduct of the rhythm of practice. Id. She did not know that a person could be seriously injured or killed by a batted baseball. Id. The screen along the right field foul line, to her left hand side, gave her a sense of protection. Id. She believed she was protecting herself by paying attention to the ball that was batted just prior to the incident. Id.

5. Pre-game batting practice at Safeco Field

For an evening game at Safeco Field that starts at 7:10pm, the Mariners practice batting from approximately 4:30pm to 5:30pm. CP 242, 257, 333-334. The visiting team will then typically practice batting from 5:30pm to 6:15pm. CP 267, 335.

Safeco Field opens to patrons at 4:40pm, where at first attendees

are only allowed in the outfield from Edgar's Cantina to the batter's eye[1]. CP 268. At 5:10pm the whole ballpark opens to patrons. Id. Therefore, patrons are not allowed to sit along the right field foul line, including section 116, during the first 40 minutes of the Mariners' batting practice. See Id.

6. Batting Practice Safety at Safeco Field

Dave Hansen is the Mariners' hitting coach. CP 258. During his deposition he testified that, for away games, the team loses 10 to 15 minutes of practice time, so batting practice has to be faster to get in the number of swings. CP 259. Each team's coaches pitch for practice. CP 260. When throwing, the coach picks up four baseballs at a time to keep pace and limit the time between pitches. CP 261, 333-34. Mr. Hansen confirmed that another ball could be thrown to the batter before the previous ball is caught. CP 262. From his experience, the same procedure is followed by other teams in the league. CP 262.

According to the Mariners' third base coach, Jeff Datz, it is unimportant where the baseballs land during batting practice. CP 333-34. Once the player and coach determine how the ball came off the bat, the player resumes his stance and the next pitch is thrown. Id. Mr. Datz described how the rhythm allows players and coaches to anticipate when

[1] The batter's eye is a solid-colored, usually dark area beyond the center field wall.

to move from behind protective screens placed on the field during batting practice. Id. "If the rhythm of the practice becomes disjointed, players and coaches would be exposed to undue risk of injury." Id. No other team conducts batting practice in a materially different way. CP 335.

The Mariners' head groundskeeper is Robert Christofferson. CP 242. For batting practice, Mr. Christofferson's crew sets up the batting cage at home plate and screens at the pitcher's mound, first base, second base, center field, and down each of the left and right field foul lines. CP 243. The screens down the foul lines are meant to stop line drives from entering the adjacent seating. CP 244.

Mr. Christofferson received no formal training for the groundskeeper position. CP 247. He, and the players to some degree, decide on the placement of the screens. CP 248.

When asked about the origin of the base line screens, Mr. Christofferson responded: "Well, it's a combination of, you know, I was asked, and, you know, they just wanted to add a little protection for – a lot of kids down those lines trying to get baseballs." CP 249. In about 2002 the former VP of Ballpark Operations asked Mr. Christofferson to find a removable screen to use along the first and third base lines; no study was conducted into the appropriate size of the screens. CP 249-51. He confirmed that he has seen multiple balls batted into the air simultaneously

during batting practice. CP 250.

Mr. Christofferson's supervisor is Scott Jenkins, the VP of Ballpark Operations. CP 269. Mr. Jenkins verified that Major League Baseball issued a memo to the Mariners in 2012 directing the Mariners to setup screens along the foul ball lines during batting practice. CP 270, 298. Mr. Jenkins confirmed with Mr. Christofferson that the Mariners were in compliance with the Memo's direction at that time. CP 271. Although the Memo encouraged the Mariners to analyze Safeco Field and add more screening where necessary, Mr. Jenkins testified that he "felt when that memo came out that we were adequately protected." CP 272. He could not recall any independent study of patron accidents occurring at Safeco Field. CP 273-74.

Mr. Jenkins testified that the Mariners' discussed, and now employ, nets to catch people who fall when reaching over balconies to catch baseballs. CP 274. Mr. Jenkins also testified that the organization installed a temporary net at Edgar's Cantina just beyond the left field wall to protect bar patrons "knowing that people would have their backs turned being served at the bar and that during batting practice that would be helpful." CP 275. The Cantina net is removed before the game starts. (Id.)

D. ARGUMENT AND BASIS FOR RELIEF

1. Standard of Review – *De Novo*

Appellate courts review summary judgment orders de novo and perform the same inquiry as the trial court. *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). A trial court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

A defendant can meet its burden by establishing that the plaintiff lacks sufficient evidence to support an essential element of its claim. *See Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n. 1, 770 P.2d 182 (1989). If successful, the burden shifts to the plaintiff to respond with documents allowed by Civil Rule 56(e) setting forth specific facts to show that there is a genuine issue for trial. CR 56(e); *Young*, 112 Wn.2d at 225-26, 770 P.2d 182. The court must consider all facts and reasonable inferences in the light most favorable to the nonmoving party. *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 530, 503 P.2d 108 (1972).

2. The duty owed the Jennings by the Mariners must first be settled before addressing primary implied assumption of risk

The Mariners argued two distinct positions in support of its motion for summary judgment. The first position was that it owed only a limited duty to the Jennings to screen behind home plate. The second was that the Jennings impliedly assumed the specific risk that caused their injury, thereby relieving the Mariners of a duty it owed. CP 10-11.

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.

The implied assumption of risk doctrine acts to shift a defendant's duty to the plaintiff. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 495, 834 P.2d 6 (1992). If the Mariners only owed a duty to screen behind home plate, then it would not have owed any duty with regards to the risk that caused the Jennings injury. If there is no duty to shift from defendant to plaintiff, there is no need to discuss the doctrine's application. It would simply be a factual question of screening, and here there is no factual dispute that the Mariners provide it behind home plate.

Thus it is necessary to resolve what duty the Mariners owed the Jennings in order to proceed to the assumption of risk doctrine.

3. The Mariners owed the Jennings a duty of care pursuant to Restatement (Second) of Torts § 343 (1965)

The Mariners owed the Jennings an affirmative duty, pursuant to Restatement (Second) of Torts § 343 (1965), to repair, safeguard, or warn as reasonably necessary for the Jennings' safety under the circumstances of pre-game batting practice.

a. Restatement (Second) of Torts § 343 (1965)

Washington looks to the Restatement of Torts for guidance with issues of landowner liability. *Egede-Nissen v. Crystal Mt., Inc.*, 93 Wn.2d 127, 131-32, 606 P.2d 1214 (1980). Restatement (Second) of Torts § 343 (1965) describes when a possessor of land is liable to a business invitee for injuries caused by a condition on the land. *Tincani v. Inland Empire Zoological Soc'y,* 124 Wn.2d 121, 138-39, 875 P.2d 621 (1994); *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 881-82, 866 P.2d 1272 (1994).

Restatement § 343 states:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, [the possessor]

> **(a)** knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> **(b)** should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> **(c)** fails to exercise reasonable care to protect them against the danger.

The possessor's duty is based on the expectation of the invitee that

the premises have been made safe for his or her use for the purposes of the invitation. *Jarr v. Seeco Constr. Co.*, 35 Wash.App. 324, 326-27, 666 P.2d 392 (1983) (citing Restatement (Second) of Torts § 343 cmt. b).

b. The Washington Supreme Court adopted § 343 as the duty of care owed by a baseball stadium operator to its patrons

The Washington Supreme Court, in *Leek v. Tacoma Baseball Club*, applied § 343 as the applicable duty of care owed by a stadium operator to a patron. 38 Wn.2d 362, 365-66, 229 P.2d 329 (1951).

In *Leek*, a patron sitting behind the vertical home plate screen was struck by a high foul ball that flew over the top of the screen. *Id* at 363. There was no horizontal overhead screen. *Id.* The issue of a baseball stadium operator's liability was appealed after dismissal by the trial court. *Id.* at 363-64.

The *Leek* Court first announced a ballpark owner's general duty to exercise care commensurate with the circumstances, which includes the provision of some screened seats. *Id.* at 364. Next, the Court cited the limited duty rule for baseball stadium operators: "There is no obligation to screen all such seats, however, and the proprietor's duty is fulfilled when screened seats are provided for as many as may reasonably be expected to call for them on any ordinary occasion." Id. at 364-65. (Section 5 below argues that the limited duty rule announced in *Leek* was impliedly

overruled by the adoption of comparative fault statutes.)

Yet, "lacking a precedent on the factual situation," where a patron seated behind the screen is injured, the Court turned to Restatement of Torts § 343. *Id* at 365-66. The Court framed the issue as a jury question regarding whether the ballpark owner had reason to believe that the lack of an overhead screen involved an unreasonable risk of injury to patrons (the first element of § 343). *Id.* at 366. The Court resolved the issue in favor of the stadium operator, finding nothing in the record to support a finding that the operator should have known of an unreasonable risk of harm from baseballs coming over the vertical screen. *Id.*

Here, like the stadium operator in *Leek*, the Mariners, as the possessor of Safeco Field, owed the Jennings the duty of care outlined in § 343.[2] It is undisputed that the Jennings were invitees of the Mariners. Subsequently, the Mariners would be subject to liability for the physical harm caused to the Jennings during batting practice if the three elements of § 343 are met.

4. There is sufficient evidence for a reasonable person to conclude the Mariners' are liable for the Jennings' injury

There is sufficient evidence, when viewed in the light most favorable to the Jennings, for a reasonable person to conclude the

[2] The *Leek* Court cited to the previous version of § 343 but the elements are the same in substance as Restatement (Second) of Torts § 343 (1965).

Mariners are liable for the Jennings' injury pursuant to § 343.

a. The Mariners knew, or should have discovered, that batting practice posed an unreasonable risk of harm to patrons sitting along the right field foul line.

Here, there is sufficient evidence for a reasonable person to conclude that the Mariners knew, or should have discovered, that batting practice posed an unreasonable risk of harm to patrons sitting along the right field foul line.

Gil Fried is an expert in ballpark safety and management. His knowledge, skill, experience, training, and education are summarized in his declaration and CV. CP 302-06 (Fried Decl.); CP 307-25 (Fried CV). Mr. Fried described in detail the risk of injury to a patron from a batted baseball during batting practice. CP 304. The risk of harm is greater than during a baseball game when only one baseball is in play at a given time. Id. Given the possibility of simultaneously batted baseballs, coupled with the dangers of sitting along the foul lines, it is Mr. Fried's opinion that batting practice presents an unreasonable risk of harm to patrons. Id.

The evidence further indicates that the Mariners should anticipate that patrons will be dangerously distracted during batting practice. Jeff Datz, Mariners' third base coach, described how baseball warm up is an "orchestrated ballet," with many warm-up activities occurring at the same time as batting practice. CP 135-36. Both the Mariners batting coach and

grounds keeper testified that multiple baseballs can be batted into the air simultaneously during batting practice. CP 262, 250. A reasonable juror could conclude that such activity, with fans sitting along the foul lines, presents an unreasonable risk of harm.

The baseball related injuries at Safeco Field indicate an unreasonable risk of harm. Mariners located records of 300 patrons being hit by baseballs at Safeco Field during the 2005, 2006, 2007, 2008, and 2009 baseball seasons up to May 4, 2009. Def.'s First Interrog. Resp. #12, CP 329. In Section 116, the Mariners reported the following batted ball injuries: In 2008, a person was hit in the head; in 2006, a person was hit above the knee; in 2006, a person was hit below the hip; in 2005 a person was hit in the mouth. Id.

The Mariners' own actions are perhaps the strongest evidence indicating that it knows batting practice poses an unreasonable risk of harm to patrons. The Mariners' groundskeeper, Robert Christofferson, testified that the Mariners' ground crew sets up screens down each of the left and right field foul lines. CP 243. When asked about the origin of the screens, Mr. Christofferson responded: "Well, it's a combination of, you know, I was asked, and, you know, they just wanted to add a little protection for – a lot of kids down those lines trying to get baseballs." CP 249. The Mariners also place a temporary net at Edgar's Cantina just

beyond the left field wall to protect bar patrons "knowing that people would have their backs turned being served at the bar and that during batting practice that would be helpful." CP 275.

In both these examples the Mariners are anticipating an unreasonably enhanced risk of harm during batting practice. The question for a jury is if the safeguards employed were reasonable in response to the enhanced risk of harm.

b. The Mariners should have expected that the Jennings would not discover or realize the danger posed by batting practice, or would fail to protect themselves from it.

A reasonable person could conclude that the Mariners should expect that patrons, including the Jennings, would not discover the danger posed by batting practice.

As stated by Mr. Fried:

> It cannot be reasonably expected that the general public should know the serious danger of sitting/standing down the first or third base line in unprotected seats, much less of batting practice procedure and its corresponding dangers to those often engaged in finding their seats, eating food, and other activities that will draw their attention away from the field. CP 305.

It is for the fact finder to determine whether the Mariners should anticipate that patrons will sit along the first and third base foul lines without realizing the risk of being hit by a foul ball during batting practice. The element is also satisfied by the conclusion that patrons will realize the

danger but still fail to adequately protect themselves from foul balls during batting practice.

c. The Mariners failed to exercise reasonable care to protect the Jennings against the danger posed by batting practice.

There is sufficient evidence for a reasonable person to conclude that the Mariners failed to exercise reasonable care to protect the Jennings against the risk of simultaneously batted baseballs during batting practice.

First, the Mariners failed to supervise and regulate the activity of batting practice at Safeco Field to prevent multiple balls from being struck into the air simultaneously. Teresa, tracking the previously batted baseball in an attempt to protect herself, was unable to escape from the next batted baseball's path.

According to the Mariners, there needs to be a rhythm to practice to protect players and coaches on the field. CP 333-34. It stands to reason that the rhythm can be slowed by a small margin to allow for the previously batted baseball to land before the next pitch is thrown. This would accommodate for the reasonable safety of patrons in the stands who are exposed to the flight paths of baseballs as are players. Given the life-threatening damage a baseball strike may cause, it seems a reasonable measure to take to prevent injury.

Second, the Mariners failed to provide the Jennings reasonable

warning of the dangers unique to batting practice. Specifically, the warnings used by the Mariners did not provide reasonable notice of the risk posed by multiple baseballs batted into the air simultaneously during batting practice. Fried Decl., CP 305. Reasonable measures would have included: public address announcements before batting practice; scoreboard announcements during batting practice; notification by ushers; and more specific signage for lower stadium seating areas during batting practice. Id.

Lastly, the Mariners failed to conduct any inquiry into the appropriate size or placement of protective screens along the foul lines or research patron injuries. Mr. Christofferson confirmed that he picked out the screens to use for patron protection without any study made as to the appropriate height or width of the screening. CP 251. The Mariners' VP of Operations could not recall any independent study of patron accidents at Safeco Field. CP 273-74. A fact finder could reasonably conclude that the Mariners' lack of research into the appropriate size of screening or patron injuries was a failure to exercise reasonable care.

5. Restatement (Second) of Torts § 343A (1965) governs the treatment of open and obvious risks

An invitee's knowledge of a particular dangerous condition does not preclude landowner liability. *Iwai v. State*, 129 Wn.2d 84, 94, 915

P.2d 1089 (1996). "When a possessor 'should anticipate the harm despite such knowledge or obviousness,' Restatement (Second) of Torts § 343A creates a duty to protect invitees even from known or obvious dangers." *Tincani*, 124 Wn.2d at 139, 875 P.2d 621 (quoting § 343A).

Examples where the possessor's duty is triggered include "'where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.'" *Tincani*, 124 Wn.2d at 139, 875 P.2d 621 (quoting § 343A cmt. *f*) (emphasis added). The allegation that a danger is known or obvious is "important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances." *Maynard*, 72 Wash.App. at 882, 866 P.2d 1272 (quoting § 343A cmt. *f*) (emphasis added).

Here, pursuant to § 343A, the Jennings' knowledge that baseballs could enter the stands where they were seated did not relieve the Mariners of its duty of care. Rather than preclude recovery, § 343A would require a factual inquiry into whether the risk that injured the Jennings was open and obvious and, if so, whether the Mariners' duty to protect the Jennings was triggered.

There is sufficient evidence for a reasonable person to conclude the Mariners' duty to safeguard the Jennings from batted balls was triggered during batting practice. The same factual support for breach of § 343 supports the reasonable conclusion that the Mariners should anticipated the harm stemming from batting practice despite its allegedly obvious nature. See above, section 4a-4c.

6. There is no "Limited Duty rule" applicable to ballpark operators in Washington.

Standing in contrast to the landowner liability described in § 343 is the limited duty rule for baseball stadium operators.

The Mariners argued in its motion for summary judgment that it only owed the Jennings a limited duty to screen behind home plate. CP 20. The Mariners claimed that this result is the flip side of, and corollary to, the assumption of risk doctrine: that a patron who takes an unscreened seat necessarily assumes the risk of being hit by a baseball, such that the two are conversely related. RP 8-9. This is commonly referred to as the "limited duty rule." (For a history and overview of the rule, see Gil Fried; Ammon, Robin Jr., *Baseball Spectators' Assumption of Risk: Is It Fair or Foul*, 13 Marq. Sports L. Rev. 39 (2002-2003)).

The limited duty rule is an anachronistic construction of the law. It stems from a time when, if a spectator chose an unscreened seat, such a

choice implied his or her objectively unreasonable assumption of risk. (It also stems from a time where a grand stand ticket provided the baseball spectator such a choice of seating.) Whether labeled assumption of risk or contributory negligence, the result was the same: both completely barred a plaintiff's recovery.

The limited duty rule was impliedly overruled by the adoption of comparative fault statutes in Washington. The type of assumption of risk that supports the limited duty rule (unreasonable assumption of risk) no longer acts as a complete bar to recovery. Rather, unreasonable assumption of risk is a damage mitigating factor to be considered by the fact finder.

a. *Kavafian* was impliedly overruled

The Washington case that announced the limited duty rule as advocated by the Mariners, and that was decided using that rule, is *Kavafian v. Seattle Baseball Club Ass'n*, 105 Wash. 215, 181 P. 679 (1919) (*en banc*). Its precursor, with more detailed facts, is *Kavafian v. Seattle Baseball Club Ass'n*, 105 Wash. 215, 177 P. 776 (1919) (Department 1).

In *Kavafian*, a patron purchased a grand stand ticket to attend a baseball game conducted by the stadium operator. 105 Wash. at 216, 177 P. 776. The patron arrived during the second inning and took the first

convenient seat he could reach, which was in an unscreened area. *Id.* at 217. During the game a foul ball struck the patron, causing injury. *Id.* He sued, claiming it was negligent for the operator to have not screened his seat. *Id.* at 216. The operator argued for the same limited duty rule as advocated by the Mariners here: that it had provided ample seating for all patrons who cared to sit behind a screen and that the plaintiff was guilty of contributory negligence and assumption of the risk by taking an unscreened seat. *Id.* A jury found for the plaintiff. *Id.*

On appeal, Department One of the Supreme Court found that issues of contributory negligence and assumption of risk were properly submitted to the jury and upheld the verdict. Id. at 218. *En banc*, the decision was reversed. 105 Wash. 215, 181 P. 679 (Mitchell, J., dissenting.)

After noting the patron's familiarity with baseball and the obviousness of the lack of screening, the majority stated: "It matters not whether one designates his act in this regard contributory negligence or views it as in the nature of assumption of risk, the result is the same." *Id.* at 220. Because the patron had chosen an unscreened seat when a screened seat was available, he was barred from recovering for his injury. *Id.*

Kavafian was decided in 1919 when the common law rule was that contributory negligence and assumption of risk served as complete bars to

recovery. Comparative fault statutes replaced that system in 1981. *Kirk v. WSU*, 109 Wash.2d 448, 452, 746 P.2d 285 (1987). By adopting comparative fault, the harsh result of denying recovery for contributory negligence was eliminated. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 830, 959 P.2d 651 (1998).

Today, the comparative fault of the patron in choosing an unscreened seat would diminish, not preclude, recovery. Applied to the present matter, the Jennings' choice of seating, to the extent they even had a choice to sit behind the screened portion of Safeco Field, does not indicate an assumption of risk that might bar their recovery.

b. The limited duty rule continues to be cited, but not applied, in cases involving baseball injuries

The limited duty rule has never been explicitly overruled by a Washington court. Rather, it continues to be cited in some form, but not used, in cases involving spectator injury at baseball stadiums.

Leek stands as an example. The *Leek* Court stated:

> 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. It is only on this latter point that the one Washington case involving injuries in a baseball park (*Kavafian v. Seattle Baseball Club Ass'n*, 105 Wash. 215, 177 Pac. 776, 181 Pac. 679) is pertinent.

Leek, 38 Wn.2d at 369, 229 P.2d 329.

More recently, the court in *Taylor v. Baseball Club of Seattle, L.P.*

stated the limited duty rule as well, but cited generally to *Leek* for its support. 132 Wn.App. 32, 37, 130 P.3d 835 (2006). And, like *Leek*, *Taylor* was not decided on an application of the limited duty rule. Rather, the affirmation of summary judgment in that case was based on primary implied assumption of risk. *See Id.* at 34.

c. The limited duty rule should not be adopted

The limited duty rule should not be adopted as a way to define a stadium operator's duty of care to patrons in Washington. Current principals of comparative fault allow the fact finder to assess a patron's assumption of risk and the ability of stadium owners to guard against risk. By contrast, the limited duty rule shields stadium owners from liability and, by extension, acts as a disincentive for operators to adopt reasonable safety measures for the protection of patrons. (For a complete treatment of the arguments against the limited duty rule, and for the adoption of a duty of reasonable care, see David Horton, *Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. Rev. 339 (2003-2004)).

Favoring principles of comparative fault instead of the limited duty rule would also be in conformity to the Restatement (Third) of Torts: Apportionment of Liability § 3 (2000). The Restatement (Third) of Torts provides the following relevant example:

A attends a baseball game at B's ballpark. A sits in a portion of the

> stands beyond the point where the screen prevents balls from entering the seats. A is aware that balls occasionally are hit into the stands. The fact that A knew balls are occasionally hit into the stands does not constitute assumption of risk. The fact that A knew balls occasionally are hit into the stands is relevant in evaluating whether A acted reasonably by engaging in particular types of conduct while sitting in the stands (sitting in the stands would not itself constitute unreasonable conduct). If the [fact finder] concludes that A did not act reasonably under the circumstances, A's knowledge of the risk is relevant to the percentage of responsibility the [fact finder] assigns to A.... If B could reasonably assume that A and other fans are aware that balls are occasionally hit into the stands, this fact is also relevant to whether B acted reasonably in relying on A to watch out for balls instead of constructing a screen or providing warnings.

As an example, the Idaho Supreme Court recently declined to adopt the limited duty rule, despite the stance of the majority of jurisdictions considering the subject. *Rountree v. Boise Baseball, LLC*, 154 Idaho 167, 296 P.3d 373 (2013). In *Rountree*, a season-ticket holder lost his eye after being struck by a foul ball in 2008. 296 P.3d at 375. Citing the lack of statistical evidence regarding foul ball injuries, the *Rountree* Court found that questions of a stadium owner's liability are appropriately addressed by the legislature because it "has the resources for the research, study and proper formulation of broad public policy." 296 P.3d at 379 (citation omitted.)

7. The doctrine of primary implied assumption of risk does not bar the Jennings' recovery

Assuming the limited duty rule does not apply, the critical issue then becomes whether the Jennings impliedly assumed the specific risk

that caused their injury during pre-game batting practice at Safeco Field.

The duty-negating doctrine of primary implied assumption of risk was cited by the trial court as sufficient grounds to grant the Mariners' motion for summary judgment. RP 37-38. [3] Therefore, it is essential here to explain the doctrine and its inability to support the trial court's ruling.

a. Assumption of Risk in General

Assumption of risk is composed of four categories: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable. *Shorter v. Drury*, 103 Wn.2d 645, 695 P.2d 116, *cert. denied*, 474 U.S. 827 (1985) (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts*, 496 (5th ed. 1984)).

Implied reasonable and implied unreasonable assumption of risk retain no independent significance from contributory negligence after the adoption of comparative negligence. *Scott*, 119 Wn.2d at 497, 834 P.2d 6; *Shorter*, 103 Wn.2d at 654-55, 695 P.2d 116; *Lyons v. Redding Const. Co.*, 83 Wash. 2d 86, 96, 515 P.2d 821 (1973).

In contrast, primary implied assumption of risk can act as a complete bar to recovery at summary judgment, even after the adoption of comparative negligence laws. *Kirk*, 109 Wash.2d at 457, 746 P.2d 285.

Here, the Jennings' unreasonable and reasonable assumption of

[3] The trial court's alternative grounds was that no duty was breached. RP 37-38.

risk are irrelevant at summary judgment. In other words, what a reasonable person would know or do in their position at batting practice is irrelevant. Our focus is on primary implied assumption of risk, which can shift the duty element completely.

b. Primary Implied Assumption of Risk in Particular

"Express and implied primary assumption of risk arise where a plaintiff has consented to relieve the defendant of a duty to the plaintiff regarding specific known risks." *Id.* at 453.

There are two different formulations of the primary implied assumption of risk doctrine employed by Washington courts. The first formulation looks to the plaintiff's subjective understanding of the nature and extent of the specific risk that caused their injury. Restatement (Second) of Torts § 496C(1) (1965). The second formulation, described as a "classic example" of the first, involves a sport or activity where the participant assumes the risks that are necessary and inherent to the sport or activity. *E.g.*, *Tincani,* 124 Wn.2d 121, 144, 875 P.2d 621 (1994); *Scott,* 119 Wn.2d at 498, 834 P.2d 6.

i. Material issues of fact regarding the subjective knowledge of the Jennings

Under the first formulation, primary implied assumption of risk is established if the plaintiff has (1) full subjective understanding (2) of the

presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk. *Kirk*, 109 Wash.2d at 453, 746 P.2d 285. These are the same elements as express assumption of risk, only that there is no reference to a written contract. *Id.*

Implied primary assumption of risk applies only to specific known risks. *Scott*, 119 Wn.2d 484, 497, 834 P.2d 6 ("It is important to carefully define the scope of the assumption, i.e., what risks were impliedly assumed and which remain as a potential basis for liability.")

The implied assumption is subjective: whether the plaintiff in fact understood the risk encountered, not whether the reasonable person of ordinary prudence would comprehend the risk. *Martin v. Kidwiler*, 71 Wn.2d 47, 49, 426 P.2d 489 (1967). The defendant carries the burden of demonstrating that a plaintiff impliedly assumed a risk of harm. *Home v. North Kitsap School Dist.*, 92 Wn. App. 709, 717, 965 P.2d 1112 (1998). Except when reasonable minds could not differ, knowledge and voluntariness are questions of fact for the jury. *Id.*

Here, the trial court's grant of summary judgment should be reversed because the record reveals factual disputes regarding whether the Jennings had (1) full subjective understanding (2) of the presence and nature of the specific risk of batting practice, and (3) voluntarily chose to encounter the risk.

The record before the trial court presented evidence that demonstrated the Jennings did not understand the nature and extent of the risk they encountered during batting practice at Safeco Field:

- Prior to the incident on May 4, 2009, Teresa had never attended a pre-game warm-up or batting practice. CP 279.
- Prior to the incident on May 4, 2009, Cliff could not recall ever seeing batting practice. CP 237.
- Teresa stated that she did not know that multiple baseballs could be batted into the air simultaneously during batting practice. CP 280.
- Teresa did not know that a person could be seriously injured or killed by a batted baseball. Id.
- The Jennings must have observed batting practice for only a few minutes in total. See CP 194-195.
- Nothing in the record indicates that a player had batted baseballs simultaneously in the few minutes before the accident.
- Teresa believed she was protecting herself by paying attention to the baseball that was batted just prior to the one that injured her. CP 280.
- The screening along the right field foul line gave Teresa some sense of protection. Id.

From these admissible facts, a reasonable person could conclude the Jennings did not understand the nature and extent of the specific risk

they were encountering at Safeco Field during batting practice. The Jennings' subjective knowledge is an issue of fact for resolution by a jury. Therefore, summary judgment should have been denied by the trial court.

ii. The record only establishes that the Jennings knew a baseball could reach section 116

During the summary judgment hearing, the Mariners framed the central issue as whether Mrs. Reed-Jennings subjectively knew a foul ball could reach her seat. RP 6. And indeed the record reflects that Teresa subjectively knew a baseball could reach her seat because a baseball had bounced into section 116 moments before the incident. RP 6-7. The trial court was impressed with this fact, noting it as a factor in granting the Mariners' summary judgment. RP 34-35.

Yet, in reality, the Jennings' knowledge that a baseball could reach section 116 does not establish that the Jennings had the requisite subjective knowledge needed to dismiss their claim on summary judgment. It is one fact that a reasonable person would consider in determining the degree to which the Jennings subjectively understood the risks involved in batting practice.

The Mariners only established that the Jennings knew batted balls could enter the area where they were sitting. There is a chasm between what the Mariners established factually (knowledge that balls could enter

the stands) and the Mariners burden of proof (full subjective understanding of the nature and presence of the specific risk posed by batting practice – specifically, the risk posed by simultaneously batted baseballs.)

iii. Material issues of fact regarding the necessary and inherent formulation of the doctrine

The second formulation of the primary implied assumption of risk doctrine involves a question of what is necessary and inherent to the sport or activity. From the Court in *Scott v. Pacific West Mountain*, "[a] classic example of primary assumption of risk occurs in sports cases. One who participates in sports 'assumes the risks' which are inherent in the sport. To the extent a plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is no negligence." 119 Wn.2d at 500-01, 834 P.2d 6 (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen § 68, at 496-97.)

The *Scott* decision illustrates the application of primary implied assumption of risk in a sports setting at summary judgment. In *Scott*, the minor plaintiff sustained severe head injuries while skiing at a commercial ski resort owned by defendant. 119 Wn.2d at 488, 834 P.2d 6. At the time of his injury the minor was skiing a slalom course, allegedly laid out at the instruction of the resort's agent. *Id.* Witnesses described how the skier

missed a ski gate, left the course, and fell into a depression under a shack. *Id.* The skier and his parents sued both the resort and the ski school alleging the race course had been negligently placed too close to an unfenced shack. *Id.* The trial court granted the ski resort's motion for summary judgment based on the theory that the skier had assumed the risk that caused his injury. *Id.* at 489. The *Scott* Court framed the issue as "whether all the risks which caused [the skier's] injuries were inherent in the sport." *Id.* at 501.

The *Scott* Court reversed the trial court's dismissal of the ski resort, holding that there was some evidence that could support a reasonable person's finding that the racecourse was placed unnecessarily close to the shack, rendering summary judgment inapplicable. "In sum, [the skier] did assume the risks inherent in the sport (primary assumption of risk) but he did not assume the alleged negligence of the operator." *Id.* at 503.

Here, similar to the skier in *Scott*, the Jennings are said to have impliedly assumed the risks inherent and necessary for the activity of pre-game batting practice when they took their seats at Safeco Field. Yet the Jennings did not assume the negligence of the Mariners in the provision of facilities, warnings, or in the regulation of batting practice.

The argument against the application of primary implied

assumption of risk thus points back at the sufficiency of the evidence for breach of duty. Because there is sufficient evidence for a reasonable person to conclude that the Jennings' injuries were caused, in whole or in part, by the negligence of the Mariners, summary judgment cannot rest on primary implied assumption of risk.

iv. Primary implied assumption of risk cannot bar recovery in the presence of sufficient evidence supporting the Mariners' negligence.

Primary implied assumption of risk is a damage mitigating factor when plaintiff's injuries resulted from risks not impliedly assumed by the plaintiff. *Kirk*, 109 Wn.2d at 455, 746 P.2d 285.

Kirk v. WSU provides an example much like *Scott*. In *Kirk*, the plaintiff was a WSU student and cheerleader. *Id.* at 449. The cheerleader team usually practiced in a matted room but, on the occasion of the plaintiff's injury, were required to conduct their practice on a comparatively harder astroturf surface. *Id.* While practicing a cheerleading maneuver, the plaintiff fell and was injured. *Id.* at 450. A jury verdict found for the plaintiff, concluding that the defendant-university was negligent for the failure to provide adequate facilities, failure to warn regarding the hardness of the Astroturf, and failure to adequately train and supervise practice. *Id.* at 451. The university appealed, arguing that the

trial court erred in refusing to instruct the jury that implied assumption of risk would completely bar the plaintiff's recovery. *Id.*

The *Kirk* Court held that the trial court properly rejected the proposed instruction. *Id.* at 458. The Court found that primary implied assumption of risk may be used to limit recovery, but only to the extent a plaintiff's damages resulted from the specific risks known to the plaintiff and voluntarily encountered. "To the extent a plaintiff's injuries resulted from other risks, created by the defendant, the defendant remains liable for that portion." *Id.* at 455.

Here, Teresa had never before witnessed batting practice, did not know that baseballs could be batted simultaneously, and did not know the risk of harm posed by a batted baseball. CP 280. The screen between her and the batter gave her a sense of protection. Id. To the extent a reasonable person could conclude that the Jennings' injury was caused in part by a risk not subjectively known by them, or unnecessarily created or enhanced by the Mariners, summary judgment is inapplicable.

8. *Taylor v. Baseball Club of Seattle, L.P.*

The court in *Taylor v. Baseball Club of Seattle, L.P.* affirmed summary judgment dismissal of a case involving an overthrown baseball at Safeco Field based on the primary implied assumption of risk doctrine.

132 Wn.App. at 41, 130 P.3d 835. Therefore, its applicability to the present matter requires addressing.

The plaintiff in *Taylor* attended a pre-game practice at Safeco Field with her family in July 2000, sitting in section 114. *Id.* at 34-35. Two players were tossing a baseball in front of, and perpendicular to, section 114. *Id.* at 35. The plaintiff, as she was looking away from the field, was struck in the face by a thrown baseball. *Id.* The plaintiff claimed the Mariners were negligent in the conduct of pre-game warm-up. *Id.* The Mariners claimed that: (1) only a limited duty to screen behind home plate was owed the plaintiff; and (2) the plaintiff impliedly assumed the risk of being struck by a baseball. *Id.* The plaintiff argued that she could not be expected to avoid an overthrown baseball when more than one ball is in play at a given time. Id. at *41*. The *Taylor* court found this line of argument to be irrelevant: the plaintiff had testified that she was looking away from the field at the time of her injury. *Id.*

The type and manner of injury suffered by the plaintiff in *Taylor* is significantly different than the injury suffered by Teresa Reed-Jennings. The plaintiff in *Taylor* was injured by an overthrown ball when she was looking away from the field. The type of incident (overthrown ball) was found to be rare, and the plaintiff was not protecting herself.

In contrast, batting practice involves a not-so-rare risk of injury by a batted ball. Further, it involves a risk of simultaneously batted baseballs. One can reasonably anticipate that a patron, distracted by tracking the flight of one baseball, will be struck by another. The undisputed facts of the present matter confirm that this is what happened to the Jennings. A patron, like Teresa, could not be reasonably expected to avoid such an injury, but the plaintiff in *Taylor* could.

Mr. Fried described in his declaration the unique danger posed by batting practice:

> During batting practice, because of the aforementioned likelihood that multiple baseballs will be hit into the air simultaneously, a patron cannot protect themselves from the danger pose by errant batted baseballs like they could during the game. This is because the patron cannot focus his or her view on two batted balls at the same time. Subsequently, at times during batting practice, the patron must choose which ball to track. The choice necessarily exposes him or her to the danger of being struck by the other batted ball. CP 304.

Given the inability of patrons to protect themselves in a situation where multiple balls are batted simultaneously, it cannot be considered an assumed risk in the same way as the overthrown baseball in *Taylor*.

9. The Jennings are not asking for a fundamental change to how professional baseball is conducted in Seattle

The trial court felt that the Jennings were asking for a fundamental change in how professional baseball is conducted in Seattle. RP 27. The

Jennings do not advocate for a fundamental change in how professional baseball is conducted. Rather, the Jennings request this Court reverse the trial court's grant of the Mariners' motion for summary judgment. Reversal would give the Jennings an opportunity to have the issues of fact resolved by a fact finder. Such issues involve: the sufficiency of the warnings regarding the dangers specific to batting practice; the necessity, and inherency, of conducting batting practice in such a rapid manner as to have multiple balls in the air at a given time; the sufficiency of the ad hoc screening measures along the first base line; and the degree to which the Jennings might have impliedly assumed the specific risk that cause their injury.

E. CONCLUSION

For the forgoing reasons, the Jennings request this Court reverse the trial court's grant of summary judgment to the Mariners.

DATED this 1st day of August, 2014.

Respectfully submitted,

By: _____

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DECLARATION OF SERVICE

I certify that on the 1st day of August, 2014, I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the Brief of Appellants in Court of Appeals Cause No. 71545-3-I to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 1st day of August, 2014.

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