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## *Taylor v. Baseball Club of Seattle*

Court of Appeals of Washington, Division One

February 27, 2006, Filed

No. 55803-0-I

### Reporter

132 Wn. App. 32 \*; 130 P.3d 835 \*\*; 2006 Wash. App. LEXIS 261 \*\*\*

DELINDA MIDDLETON TAYLOR, *Appellant*, v. THE  
BASEBALL CLUB OF SEATTLE, L.P., *Respondent*.

**Subsequent History:** [\*\*\*1] Order Granting Respondent's  
Motion to Publish March 22, 2006.

Reported at *Taylor v. Baseball Club of Seattle, L.P.*, 131 Wn.  
App. 1049, 2006 Wash. App. LEXIS 676 (2006)

### Core Terms

ball, baseball, warm-up, assumption of risk, stands, throw,  
seats, spectators, sport, players, errant, struck, primary  
assumption of risk, games, warm, reasonable person,  
summary judgment, trial court, pitchers, stadium, played

### Case Summary

#### Procedural Posture

Appellant spectator challenged the judgment of the Superior  
Court of King County, Washington, granting summary  
judgment in favor of respondent baseball team, dismissing the  
spectator's negligence claim under the doctrine of implied  
primary assumption of risk.

#### Overview

The spectator went to a baseball game. The spectator arrived  
more than an hour before the game began to see the players  
warm up and to get their autographs. Two players were  
throwing a ball back and forth. As the spectator stood in front  
of her seat, she looked away from the field and a ball got past  
one of the players and struck the spectator in the face, causing  
serious injuries. The spectator claimed she did not know how  
players warmed up and never thought about the possibility of  
a ball entering the stands and hurting someone during a warm-  
up. The appellate court ruled that a reasonable person in the  
spectator's position would realize that, if she was standing  
behind players who were throwing a ball back and forth, there  
was a possibility a ball might not be caught, and that an

uncaught ball might injure her if she did not pay attention.  
The spectator failed to articulate any cognizable reason for the  
appellate court to find that the warm-up portion of the event  
was not encompassed within the spectator's implied primary  
assumption of risk. The risk of injuries such as the spectator's  
were within the normal comprehension of a spectator who  
was familiar with the game.

#### Outcome

The judgment was affirmed.

### LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment  
Review > Standards of Review

#### [HNI](#) [↓] **Summary Judgment Review, Standards of Review**

In reviewing an order granting summary judgment, an  
appellate court engages in the same inquiry as the trial court.

Civil Procedure > ... > Summary Judgment > Entitlement  
as Matter of Law > Appropriateness

#### [HN2](#) [↓] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate if the pleadings,  
depositions, answers to interrogatories, and admissions on  
file, together with any affidavits, show that there is no  
genuine issue as to any material fact and that the moving  
party is entitled to judgment as a matter of law. *Wash. Super.  
Ct. Civ. R. 56(c)*. A court must make all inferences and  
resolve all ambiguities in favor of the nonmoving party. The  
motion should be granted only if, from all the evidence, a

reasonable person could reach but one conclusion.

Torts > ... > Defenses > Assumption of Risk > Athletic & Recreational Activities

### [HN3](#) **Assumption of Risk, Athletic & Recreational Activities**

Throughout the United States, 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. In Washington, the law has long been that baseball stadiums have a duty to screen some seats and, as a corollary, a spectator who takes a seat in the unscreened portion of a stadium assumes the risk of being struck by a baseball.

Torts > ... > Defenses > Assumption of Risk > Athletic & Recreational Activities

### [HN4](#) **Assumption of Risk, Athletic & Recreational Activities**

A sport spectator's assumption of risk and a defendant sports team's duty of care are accordingly discerned under the doctrine of primary assumption of risk. The doctrine serves as a complete bar to recovery when an injury results from a risk inherent in the activity in which the plaintiff is engaged: 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.

Torts > ... > Defenses > Assumption of Risk > Athletic & Recreational Activities

### [HN5](#) **Assumption of Risk, Athletic & Recreational Activities**

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. Therefore, that type of assumption acts as a complete bar to recovery. The doctrine of primary implied assumption of the risk can perhaps more accurately be described as a way to define a defendant's duty.

Torts > ... > Assumption of Risk > Elements & Nature > Primary Assumption of Risk

### [HN6](#) **Elements & Nature, Primary Assumption of Risk**

Under the implied primary assumption of risk, a defendant must show that plaintiff has full subjective understanding of the specific risk, both its nature and presence, and that he or she voluntarily chose to encounter the risk. Unlike contributory negligence, where the standard applied is that of a "reasonable person of ordinary prudence," implied primary assumption of risk applies a subjective standard, one specific to the plaintiff and his or her situation. The question is whether a plaintiff at the time of decision, actually and subjectively knew all facts that a reasonable person in the defendant's shoes would know and disclose.

Torts > ... > Defenses > Assumption of Risk > Athletic & Recreational Activities

### [HN7](#) **Assumption of Risk, Athletic & Recreational Activities**

Warm-ups are integral to the game of baseball and a spectator assumes the risk of being struck by a baseball during warm-ups: Whether the ball is thrown or tossed during an inning of play or between innings lacks legal significance because, this throw occurred during a time which is necessary to the playing of the game, during which time the plaintiff has assumed the risk of injury from bats, balls, and other missiles.

Evidence > Admissibility > Expert Witnesses

### [HN8](#) **Admissibility, Expert Witnesses**

See Wash. R. App. P. 702.

## **Headnotes/Syllabus**

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### **Summary**

**Nature of Action:** A spectator who was injured by an errant throw during warm-up before a professional baseball game sought damages from the baseball team, the players involved in the errant throw, and the baseball stadium public facilities district.

**Superior Court:** After the plaintiff dismissed her claims

against the players and the public facilities district, the Superior Court for King County, No. 03-2-31297-5, Mary Yu, J., on January 28, 2005, entered a summary judgment in favor of the baseball team.

**Court of Appeals:** Holding that the plaintiff's claim is barred by the doctrine of implied primary assumption of the risk, the court *affirms* the judgment.

## Headnotes

### WASHINGTON OFFICIAL REPORTS HEADNOTES

[WA/1/](#) [1]

Judgment > Summary Judgment > Determination > Interpretation of Facts

When ruling on a motion for summary judgment, a court must draw all inferences and resolve all ambiguities in favor of the nonmoving party. The motion should be granted if, from all the factual averments in the record, a reasonable person could reach but one conclusion.

[WA/2/](#) [2]

Sports > Baseball Stadiums > Protection of Spectators > Duty of Care > In General

In general, baseball stadiums have a duty to screen some seats, and a spectator who takes a seat in the unscreened portion of a stadium assumes the risk of being struck by a baseball.

[WA/3/](#) [3]

Negligence > Assumption of Risk > Implied Primary Assumption > What Constitutes > In General

Implied primary assumption of the risk arises where a plaintiff impliedly consents (often in advance of any negligence by a defendant) to relieve the defendant of a duty to the plaintiff regarding specific known and appreciated risks. The doctrine acts as a complete bar to recovery for an injury resulting from a risk inherent in the activity in which the plaintiff was engaged.

[WA/4/](#) [4]

Negligence > Assumption of Risk > Implied Primary

Assumption > What Constitutes > Test

The doctrine of implied primary assumption of the risk bars a plaintiff from recovering for injuries resulting from a risk if the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk and (3) voluntarily chose to encounter the risk. Unlike contributory negligence, where the standard applied is that of a "reasonable person of ordinary prudence," the doctrine of implied primary assumption of the risk applies a subjective standard, one specific to the plaintiff and his or her situation. Under such standard, the question is whether the plaintiff, at the time of decision, actually and subjectively knew all facts that a reasonable person in the defendant's shoes would know and disclose.

[WA/5/](#) [5]

Sports > Baseball Stadiums > Protection of Spectators > Pregame Warm-Up > Errant Throw Into Stands > Assumption of Risk

An errant throw of a baseball into the stands during pregame warm-up is an inherent risk of the game of baseball. A spectator in the stands who is familiar with the game of baseball and with the risks associated therewith who is injured by an errant throw is barred from recovering for the injury, pursuant to a claim for negligence, under the doctrine of implied primary assumption of the risk.

[WA/6/](#) [6]

Evidence > Opinion Evidence > Expert Testimony > Qualifications > Professional Baseball Pitching Coach > Player Preparation for Games

A professional baseball pitching coach may qualify under [ER 702](#) as an expert on why and how baseball players prepare for games.

**Counsel:** *Bradford J. Fulton* (of *Carter & Fulton, P.S.*), for appellant.

*Thomas C. Stratton* (of *Eklund Rockey Stratton, P.S.*), for respondent.

**Judges:** Authored by Stephen J. Dwyer. Concurring: Mary Kay Becker, Susan Agid.

**Opinion by:** Stephen J. DWYER

## Opinion

[\*\*836] [\*34] P1 Dwyer, J. -- During warm-up before a Seattle Mariners game, a pitcher accidentally threw a ball past his teammate into the stands, injuring Delinda Middleton Taylor. The trial court properly dismissed Taylor's negligence claim against the Mariners under the doctrine of implied primary assumption of risk. The court also properly admitted expert testimony from the Mariners' pitching coach. We affirm.

### FACTS

P2 On July 23, 2000, Delinda Middleton (now Delinda Middleton Taylor) went to a Mariners game at Safeco Field with her then-boyfriend, Glen Taylor, and her minor sons, Gavin and Jordan. Their seats were in section 114, along [\*35] the right field [\*\*\*2] foul line and four rows up from the field. They arrived more than an hour before the game began to see the players warm up and to get their autographs. As they walked to their seats, Taylor saw that players were practicing nearby. Mariners pitcher Freddy Garcia was standing in front of section 114 on or about the right field line facing center field. He was throwing a ball back and forth with Jose Mesa, who stood in right center field approximately 120 feet away. As Taylor stood in front of her seat, she looked away from the field and a ball thrown by Mesa got past Garcia and struck Taylor in the face, causing serious injuries.

P3 Taylor sued the Seattle Mariners, Jose Mesa, Mirla Mesa, and Freddy Garcia, asserting that they were liable for the allegedly negligent warm-up throw.<sup>1</sup>

P4 The Mariners moved for summary judgment, claiming that (1) their duty to protect [\*\*\*3] spectators from balls entering the [\*\*837] stands was satisfied by providing a protective screen behind home plate, and (2) Taylor was familiar with baseball and the inherent risk of balls entering the stands and therefore assumed the risk of her injury.

P5 With respect to their assumption of risk defense, the Mariners relied on the following facts. Taylor was a Mariners fan; she had gone to one game at the Kingdome, and she watched their games on television. Taylor knew professional ballplayers do not always catch the ball and that the ball could leave the field during a game. Also, Taylor's son Gavin

played baseball for approximately six years and her son Jordan played for seven years. She went to almost all of their games, during which she saw balls enter the stands.

P6 The Mariners' pitching coach Bryan Price testified that the pitchers warm up by playing "long toss," during which they throw the ball back and forth at increasing distances, with one standing on or near a foul line and the other in center field. Price stated that this method is [\*36] followed to avoid other players who are warming up, including the visiting team, and minimize the possibility that a player could be hit by an errant [\*\*\*4] throw. Price further claimed that this warm-up procedure, though unwritten, is customary to the sport and followed at every baseball level, from Little League to the Major Leagues.

P7 Taylor argued that summary judgment for the Mariners should not be granted because she was not aware that her circumstances posed any risk of injury. She claimed she did not know how players warmed up and never thought about the possibility of a ball entering the stands and hurting someone during a warm-up. Taylor further argued that the Mariners' warm-up method was negligent, contending that they should have a formal policy prohibiting pitchers from practicing near the stands.

P8 The trial court granted the Mariners' motion and dismissed Taylor's claims. Taylor appeals.

### DISCUSSION

P9 Taylor contends that the trial court erred in dismissing her claims against the Mariners on summary judgment. Specifically, she argues that there are issues of material fact regarding whether the Mariners' warm-up method was negligent and whether she assumed the risk of being injured by an errant throw.

#### I. Standard of Review

[WALI](#)[↑] [1] P10 [HNI](#)[↑] In reviewing an order granting summary judgment, an appellate court engages in the same [\*\*\*5] inquiry as the trial court. [Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 \(1996\); Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 \(1994\).](#) [HN2](#)[↑] Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [CR 56\(c\); Nivens v. \[\\*37\] 7-11 Hoagy's Corner, 133 Wn.2d 192, 197-98, 943 P.2d 286 \(1997\).](#) The

<sup>1</sup>Taylor voluntarily dismissed her claims against Jose Mesa, Mirla Mesa, Freddy Garcia, and the Washington Baseball Stadium Public Facilities District.

court must make all inferences and resolve all ambiguities in favor of the nonmoving party. *Degele*, 129 Wn.2d at 48. The motion should be granted only if, from all the evidence, a reasonable person could reach but one conclusion. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 350, 588 P.2d 1346 (1979).

## II. Implied Primary Assumption of Risk

[WA/2](#)[↑] [2] P11 [HN3](#)[↑] Throughout the United States, 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. See, e.g., [\*\*\*6] *Edling v. Kan. City Baseball & Exhibition Co.*, 181 Mo. App. 327, 168 S.W. 908 (1914); see also *Crane v. Kan. City Baseball & Exhibition Co.*, 168 Mo. App. 301, 304, 153 S.W. 1076 (1913). In Washington, the law has long been that baseball stadiums have a duty to screen some seats and, as a corollary, a spectator who takes a seat in the unscreened portion of a stadium assumes the risk of being struck by a baseball. See *Leek v. Tacoma Baseball Club, Inc.*, 38 Wn.2d 362, 229 P.2d 329 (1951).

[\*\*838] [WA/3](#)[↑] [3] P12 [HN4](#)[↑] A sport spectator's assumption of risk and a defendant sports team's duty of care are accordingly discerned under the doctrine of primary assumption of risk. The doctrine serves as a complete bar to recovery when an injury results from a risk inherent in the activity in which the plaintiff was engaged: "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." *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 497, 834 P.2d 6 (1992). The court in *Scott* [\*\*\*7] further explained:

[HN5](#)[↑] 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. Therefore, that type of assumption [\*\*\*8] acts as a complete bar to recovery. The doctrine of primary implied assumption of the risk can perhaps more accurately be described as a way to define a defendant's duty.

*Scott*, 119 Wn.2d at 498 (footnote omitted).

[WA/4](#)[↑] [4] P13 [HN6](#)[↑] Under this implied primary assumption of risk, defendant must show that plaintiff had full subjective understanding of the specific risk, both its nature and presence, and that he or she voluntarily chose to

encounter the risk. *Brown v. Stevens Pass, Inc.*, 97 Wn. App. 519, 523, 984 P.2d 448 (1999) (citing *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987); see also W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 68 at 487 (5th ed. 1984). Unlike contributory negligence, where the standard applied is that of a "reasonable person of ordinary prudence," implied primary assumption of risk [\*\*\*8] applies a subjective standard, one specific to the plaintiff and his or her situation. *Home v. N. Kitsap Sch. Dist.*, 92 Wn. App. 709, 720, 965 P.2d 1112 (1998); KEETON, § 68. The question is "[w]hether a plaintiff . . . , at the time of decision, *actually and subjectively* knew all facts that a reasonable person in the defendant's shoes would know and disclose." *Erie v. White*, 92 Wn. App. 297, 303, 966 P.2d 342 (1998).

## III. Errant Throws Into the Stands are an Inherent Risk of Baseball

[WA/5](#)[↑] [5] P14 The questions presented here are as follows: (1) did the warm-up activities occur outside of the sporting event for which Taylor impliedly assumed the risks inherent in baseball; (2) is it unusual for a ball to enter the stands due to an errant throw; and (3) was the errant throw foreseeable and avoidable by Taylor, given her familiarity with the game?

P15 First, Taylor fails to articulate any cognizable reason for us to find that the warm-up portion of the event is not encompassed within the spectator's implied primary assumption of risk. No Washington case explicitly states that warm-ups are a necessary and inherent part of the [\*\*\*9] sports event. However, it is [\*\*\*9] undisputed that the warm-up is part of the sport, that spectators such as Taylor purposely attend that portion of the event, and that the Mariners permit ticket-holders to view the warm-up.

P16 Therefore, we reject Taylor's attempt to delineate between portions of the event and assign varying standards of care to the defendant. Instead, we adopt the reasoning of *Dalton v. Jones*, 260 Ga. App. 791, 581 S.E.2d 360 (2003), which held that [HN7](#)[↑] warm-ups are integral to the game of baseball and that a spectator assumes the risk of being struck by a baseball during warm-ups:

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."

*Dalton*, 260 Ga. App. 791 at 793. See also *Zeitz v. Cooperstown Baseball Centennial, Inc.*, 31 Misc. 2d 142, 31

*Misc. 142, 29 N.Y.S.2d 56 (1941)*. We find the fact that Taylor was injured during warm-up is not legally significant because that portion of the [\*\*\*10] event is necessarily incident to the game.

[\*\*839] P17 The second element of Taylor's argument is that there are issues of fact regarding whether she suffered an "unusual injury." She relies on *Jones v. Three Rivers Management Corp.*, 483 Pa. 75, 394 A.2d 546 (1978), *Maytnier v. Rush*, 80 Ill. App. 2d 336, 225 N.E.2d 83 (1967), and *Cincinnati Base Ball Club Co. v. Eno*, 112 Ohio St. 175, 147 N.E. 86 (1925), to support the proposition that the Mariners violated the duty of care by leading Taylor into "unusual danger."

P18 However, these cases do not support Taylor's argument. *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, not when it is unusual that a person is injured. See *Eno*, 147 N.E. at 89 (when, between games of a doubleheader, ball batted from [\*\*40] unusual location into unscreened seats struck plaintiff, there was a question of fact whether the plaintiff was aware of the particular danger); *Maytnier*, 80 Ill. App. 2d 336 (where plaintiff was struck and injured by a ball that was not [\*\*\*11] in play in the game, but was thrown from the bullpen to his left while his attentions were focused on the ball actually in play in the game to his right, court could not say defendant did not breach its duty as a matter of law). *Jones* is also inapposite because the plaintiff there was on an internal walkway, not in an unscreened seating section, when she was struck by a ball during batting practice. The court concluded there was an issue of fact regarding her assumption of the risk because the particular stadium design contained a walkway that was not associated with the way baseball is played or viewed. *Jones*, 394 A.2d at 551.

P19 Here, there is no evidence that the circumstances leading to Taylor's injury constituted an unusual danger. It is undisputed that it is the normal, every-day practice at all levels of baseball for pitchers to warm up in the manner that led to this incident. The risk of injuries such as Taylor's are within the normal comprehension of a spectator who is familiar with the game. Indeed, the possibility of an errant ball entering the stands is part of the game's attraction for many spectators.

P20 The third element of Taylor's claim is whether [\*\*\*12] the risk of injury would be foreseeable to a reasonable person with Taylor's familiarity with baseball. The record contains substantial evidence regarding Taylor's familiarity with the game. She attended many of her sons' baseball games, she witnessed balls entering the stands, she had watched Mariners'

games both at the Kingdome and on television, and she knew that there was no screen protecting her seats, which were close to the field. In fact, as she walked to her seat she saw the players warming up and was excited about being in an unscreened area where her party might get autographs from the players and catch balls.

[\*\*41] P21 Taylor nonetheless contends that she could not possibly expect that an overthrow could occur because no one associated with the Mariners had ever seen someone hit by an overthrown ball during long toss. The fact that no one has been injured simply shows that long toss does not pose an unreasonable risk. It does not support Taylor's contention that she did not assume the risk of an overthrow. Accordingly, Taylor assumed the risk of a ball entering the stands.

P22 Taylor also claims she could not be expected to avoid an errant throw because there was more than one ball [\*\*\*13] in play on the field. But this element has no bearing on Taylor's case because she did not allege that she was distracted by any action on the field. In fact, she said that she had turned her attention away from the field and toward the seats when she was struck. A reasonable person in Taylor's position would realize that, if she is standing behind players who are throwing a ball back and forth, there is a possibility a ball might not be caught and that an uncaught ball might injure her if she does not pay attention.

[WA6](#)[↑] [6] P23 Finally, Taylor assigns error to the trial court's admission of Coach Price's testimony as that of an expert under [ER 702](#).<sup>2</sup> Because Price, a professional baseball [\*\*840] pitching coach, is highly qualified to address why and how the athletes prepare for games, his testimony was properly admitted.

[\*\*\*14] P24 Affirmed.

Agid and Becker, JJ., concur.

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<sup>2</sup> [HN8](#)[↑] "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." [ER 702](#).