



BASEBALL FAN HELD NOT TO HAVE ASSUMED THE RISK OF GETTING HIT WITH A HOT DOG

JOHN COOMER V. KANSAS CITY ROYALS BASEBALL CORPORATION, --- S.W.3D ---, 2013 WL 150838 (Mo.App. W.D., JANUARY 15, 2013)

While enjoying a hot dog at a baseball game may be as all-American as the game itself, getting hit by one is not typically part of the plan, at least not according to the Missouri Court of Appeals for the Western District. In a recent opinion, that Court held the risk of getting hit by a hot dog thrown by a mascot is not inherent in the game of baseball.

In September 2008, Plaintiff John Coomer went to a Kansas City Royals baseball game with his father. They sat in some open seats six rows behind the third base dugout. Between innings, the Royals conducted a promotional event called the “Hotdog Launch,” where the Royals mascot, “Sluggerrr,” launched 20 to 30 hotdogs to the fans, either by hand or with the use of an air gun. Hand launched hot dogs were typically wrapped in foil and gun-launched hot dogs were wrapped in bubble wrap. Plaintiff testified he had been to probably 175 baseball games at Royals stadium and had seen hot dogs and other promotional items thrown at baseball games many times before and knew it was part of the experience.

Just before he was hit, Plaintiff noted that fans in the rows behind him were cheering and yelling for the mascot to throw hot dogs to them. He testified that he looked away to the scoreboard and “a split second later” something hit him in the face, knocking off his hat. A couple days later, Plaintiff noticed a problem with his vision and was subsequently diagnosed with a tearing and detachment of his retina. He underwent surgery, temporarily lost vision in the eye, and later developed a cataract. He underwent additional surgery for the cataract and ultimately had an artificial lens implanted.

At trial, the jury, which had been instructed that primary implied assumption of the risk was a complete bar to Plaintiff’s recovery, returned a verdict finding the Royals zero percent at fault and Plaintiff one hundred percent at fault. On appeal, Plaintiff argued, among other things, that the trial court had erred in instructing the jury on the Royal’s defense of primary implied assumption of the risk. The court of appeals agreed, reversed the judgment, and remanded for a new trial.

The Court noted there are generally three types of assumption of the risk which may be raised as a defense to a claim of negligence: express, implied primary, and implied secondary. Primary implied assumption of the risk negates the element of duty in a negligence case because the plaintiff’s voluntary participation in the activity serves as consent to the known, inherent, risks of the activity, thereby relieving the defendant of the duty to protect the plaintiff from that harm. Thus, the issue in this case was whether the risk Plaintiff encountered at the Royals game, i.e., being hit by a hot dog thrown as part of a promotional activity, was a risk inherent in the game itself or whether it was one created by the defendant’s negligence. According to the Court, everyone who attends a baseball game assumes the risk of being hit by a ball, making that a risk inherent in the game. Being hit by a hot dog, however, is not a well-known incidental risk of attending a baseball game, even though the “Hotdog Launch” promotion had been a long-running event. Consequently, it could not be said that the Plaintiff had consent to, and voluntarily assumed, the risk merely by attending the game. That tossing out promotional items is a customary activity does not equate to a fan’s consent to the risk of being hit by a promotional item. According to the Court, inherent risks are those that inure in the nature of the sport itself, not the general experience of enjoying the game.

SUBMITTED BY

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