

Summary of SC93214, *John Coomer v. Kansas City Royals Baseball Corporation*

Appeal from the Jackson County circuit court, Judge W. Brent Powell

Argued and submitted September 11, 2013; opinion issued June 24, 2014

Attorneys: Coomer was represented by Robert W. Tormohlen, Jason C. Bache and M. Cory Nelson of Lewis, Rice & Fingersh LC in Kansas City, (816) 421-2500; and the Royals were represented by Scott D. Hofer and Kyle N. Roehler of Foland, Wickens, Eisfelder, Roper & Hofer PC in Kansas City, (816) 472-7474.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A spectator, allegedly injured when a hotdog tossed by a baseball team's mascot hit him in the eye, appeals a jury verdict in favor of the team that assessed 100 percent of the fault for his injury to him. In a unanimous decision written by Judge Paul C. Wilson, the Supreme Court of Missouri vacates the judgment and remands (sends back) the case. Whether a particular risk is inherent in watching a sporting event is a question of law for the court, not a question of fact for the jury. The risk of being injured by the hotdog toss is not one of the inherent risks of watching a baseball game. As a result, the trial court erred in submitting an instruction putting this question to the jury. Because the error affected the outcome of the case, it was prejudicial, requiring the judgment to be vacated and the case remanded.

If on remand the case is retried, two issues may recur. First, the trial court properly ruled the spectator was entitled to submit only one theory on which the jury could find the team liable for the mascot's alleged negligence; no purpose would be served in allowing the spectator to explain alternative ways to reach the same result. Second, the evidence was sufficient to justify submitting the spectator's comparative fault to the jury. It is up to the jury to decide whether the mascot injured the spectator by hitting him with a hotdog and whether the mascot was negligent in doing so. If so, the jury is entitled to hold the team liable for the spectator's damages, and the jury is entitled to reduce those damages by whatever percentage of the fault it determines the evidence shows should be assessed to the spectator.

Facts: John Coomer, a longtime baseball fan and frequent spectator at Kansas City Royals home games at Kauffman Stadium, attended a Royals home game in September 2009. He was sitting six rows behind the visiting team's dugout when Royals mascot Sluggerrr mounted the visitor dugout to begin the "hotdog launch" – a routine feature during breaks in the game in which Sluggerrr either hand-tosses hotdogs to nearby fans or uses an air gun to shoot hotdogs to fans seated farther away. Coomer was struck in the face by a hotdog during the toss and, several days later, after developing vision problems, he was diagnosed with a detached retina.

In February 2010, Coomer sued the Royals for negligence, asserting the team failed to exercise ordinary care in Sluggerrr throwing hotdogs into the stands, failed to train Sluggerrr adequately about how to throw hotdogs into the stands safely and failed to supervise Sluggerrr's hotdog tossing adequately. In response, the team admitted responsibility for Sluggerrr's acts but denied negligence and asserted affirmative defenses of assumption of the risk (arguing that, by attending the game, Coomer had assumed the risk of injury) and comparative fault (arguing that any

liability by the Royals should be reduced because Coomer was at least partially responsible for his own injury). At the close of the evidence, Coomer moved for a directed verdict (in which the court directs the jury to enter a particular verdict rather than allowing it to make its own finding) on the issues of assumption of the risk and comparative fault. The trial court overruled his motion, holding that whether the risk of being injured by Sluggerrr's hotdog toss is a risk inherent in watching a Royals baseball game and the reasonableness of Coomer's actions both were questions for the jury.

The Royals proposed adding a "tail" to the end of its proposed Instruction No. 9, the verdict director for Coomer's negligence claim, directing the jury to Instruction No. 10, which asked the jury to decide whether injury from Sluggerrr's hotdog toss is an inherent risk of watching a Royals game. The Royals also proposed Instruction No. 12 regarding comparative fault. Coomer objected to Instruction No. 11 and the tail on Instruction No. 9 as well as to Instruction No. 12, arguing there was insufficient evidence to submit this issue to the jury. The court overruled Coomer's objections, and the jury returned a verdict in favor of the Royals, assessing zero percent of the fault to the Royals and 100 percent of the fault to Coomer. Coomer appeals.

VACATED AND REMANDED.

Court en banc holds: (1) Whether a particular risk is inherent in watching a sporting event is a question of law for the court, not a question of fact for the jury.

(a) Assumption of the risk is a century-old affirmative defense: A person who voluntarily consents to accept the danger of a known and appreciated risk may not sue another for failing to protect him from it. Under the doctrine's simplest application – express assumption of the risk – when a plaintiff makes an express statement, usually through a written waiver or release, that he voluntarily is accepting a risk, the plaintiff is barred from recovering damages for an injury resulting from that risk. When the risk arises from the circumstances, however, such as the inherent nature of the defendant's activity, another form of the doctrine – implied primary assumption of the risk – completely bars recovery by a plaintiff who knowingly and voluntarily encounters that risk.

(b) In its 1983 decision in *Gustafson v. Benda*, this Court adopted a comparative fault doctrine, based on the uniform comparative fault act, providing that fault chargeable to the plaintiff and to which the plaintiff's injury can be attributed does not bar the plaintiff's recovery but rather diminishes proportionately the amount of compensatory damages awarded to the plaintiff. Under *Gustafson*, when a plaintiff acts unreasonably in deciding to assume a risk created by the defendant's negligence (implied secondary) But *Gustafson* does not reject or abandon implied primary assumption of the risk because the defendant has no duty to protect the plaintiff from injury in such a case and, therefore, has no "fault" to which the jury can compare the plaintiff's fault.

(c) One application of implied primary assumption of the risk involves certain risks assumed by spectators at sporting events such as baseball. Dubbed the "baseball rule" and adopted by nearly every court nationally that has considered it, it provides that the home team has either no duty or only a limited duty to a spectator injured as a result of certain

risks inherent merely in watching a baseball game. Originally articulated with respect to a spectator with personal knowledge of the inherent risk of being injured by a foul ball while watching a baseball game, this Court later expanded its rule to a spectator with no prior knowledge of baseball or the risks inherent in watching it, holding that, when a baseball game is being conducted under the customary and usual conditions prevailing in baseball parks, the baseball club owes no duty to warn spectators against hazards that are necessarily incident to baseball and obvious to an ordinary person. The baseball rule generally does not protect teams from liability, however, if the team alters or increases the inherent risks. For example, one court held the baseball rule did not bar a man struck by a foul ball from claiming his injuries were caused not by inherent risk in the game but rather by the team's mascot – which prevented him from watching for foul balls by repeatedly jostling him and distracting him – noting the game of baseball can be played in the absence of such antics by a mascot.

(d) This and other courts consistently have held that the question of whether a particular risk is an inherent part of watching a sporting event is to be decided by the court as a matter of law. If such a question were left to each separate jury in each separate case, conflicting results would be likely and a team never would know what duty it owes to its spectators. Courts – not juries – must decide, therefore, what duty a defendant owes to ensure that all similarly situated defendants are treated equally and to give fair notice of these duties so potential defendants have the opportunity to adjust their conduct accordingly. By its definition, determining whether a risk is “inherent” is not a fact itself that can be answered in each case by each jury but rather requires a judgment *about* a fact that must be answered by a court as a matter of law.

(2) As a matter of law, the risk of being injured by either Sluggerrr's hotdog toss or hotdog launch is not one of the risks inherent in watching a Royals home game. Hotdog tossing has nothing to do with watching baseball – there is no link between the game and the risk of being hit by a hotdog toss during a break in the game. The risk of being injured by a hotdog toss can be increased, decreased or eliminated altogether without impacting either the game or the spectators' enjoyment of it. Safety always can be ensured simply by handing food to a customer. If Sluggerrr and the Royals decide to engage in the riskier conduct of throwing food, they cannot complain they have to persuade a jury that such conduct was reasonable anytime a fan is injured. As such, Coomer's claim is not foreclosed by the assumption of the risk doctrine.

(3) The trial court erred in submitting to the jury, in Instruction No. 11, the question of whether the risk of injury from Sluggerrr's hotdog toss was an inherent risk of watching a Royals home baseball game – that was decision for the court to make. Instead, it is up to the jury to decide whether Sluggerrr injured Coomer by hitting him with a hotdog and whether Sluggerrr was negligent in doing so. If so, the jury is entitled to hold Royals liable for Coomer's damages, and the jury is entitled to reduce those damages by whatever percentage of the fault it determines the evidence shows should be assessed to Coomer. Because the instructional error affected the outcome of the case, it was prejudicial. The judgment must be vacated and the case remanded.

(4) In the event this case is retried on remand, certain issues are likely to recur:

(a) The trial court properly ruled that Coomer was entitled to submit one, but only one, theory on which the jury could hold the Royals liable for Sluggerrr's alleged negligence. The Royals conceded one way in which it would be responsible for Sluggerrr's actions, Coomer was certain to recover as long as he could prove Sluggerrr was negligent and that this negligence caused Coomer's injury. No purpose would be served in allowing Coomer to explain to the jury alternative ways to reach the same result.

(b) The evidence was sufficient to justify submitting Coomer's comparative fault to the jury. The evidence supports several conclusions, including that Coomer was "just sitting there" and, therefore, was not negligent, as well as that Coomer failed to use reasonable care to protect himself from Sluggerrr's actions negligence and, therefore, should have some percentage of fault assessed to him.