



Going to Bat for the “Baseball Rule”: *Atlanta National League Baseball Club, Inc. v. F.F. et al.*

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“Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules.”<sup>1</sup>

—Chief Justice John Roberts

I. INTRODUCTION

On a summer day in August of 2010, M.F., a six-year-old girl, was struck by a foul ball while attending an Atlanta Braves game with her fa-

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<sup>1</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (Statement of Judge John G. Roberts, Jr.).

ther.<sup>2</sup> She subsequently suffered a concussion and a skull fracture that resulted in brain injuries.<sup>3</sup> At the time of the injury, she and her parents were sitting several rows behind the visiting team's dugout.<sup>4</sup> M.F.'s parent and guardian sought action against the Atlanta Braves and three other defendants for negligence, asserting that the defendants failed to use ordinary care to keep attendees safe because they failed to install adequate protective netting.<sup>5</sup>

In the United States, baseball is the sport that has compiled the most case law regarding spectator injuries. The cases have established, among other things, the rule that if a spectator in the stands is struck by a foul ball, a home run ball, or even a bat that enters the stands as part of unintentional conduct that is incident to the game, recovery against the stadium is highly unlikely. At the Major-League level, the increasing physical strength of the players and the increasing speed of the game have led some commentators to question the longstanding traditional "Baseball Rule."

Under the Baseball Rule, the legal obligation owed to spectators by landowners is limited to providing protection in the "zone of danger" behind home plate.<sup>6</sup> In order to be considered adequate, there must be protective screening sufficient to accommodate the number of spectators who desire such protected seating during an average game.<sup>7</sup> Once such protection is provided, the landowner has satisfied its legal duty. Accordingly, spectators who choose to watch the game outside the screened area behind home plate, behind the dugouts, or along the baselines, (i.e., the zone of danger) are deemed to have assumed the risk of serious injury from foul balls entering the spectator area.<sup>8</sup> Within this framework, courts and some state legislatures have held it is not proper to impose liability on teams and venues when fans are injured. Even in cases where courts have attempted to impose liability, state legislatures have pushed back to give more deference

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<sup>2</sup> Atlanta Nat. League Baseball Club, Inc. v. F.F., 328 Ga. App. 217, 217 (2014).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 218.

<sup>6</sup> James C. Kozlowski, *Majority Baseball Rule Limits Spectator Liability*, Parks & Recreation, (May 2013), <http://www.parksandrecreation.org/2013/May/Majority-%E2%80%9CBaseball-Rule%E2%80%9D-Limits-Spectator-Liability/>.

<sup>7</sup> *Id.*

<sup>8</sup> See *Wells v. Minneapolis Baseball & Athletic Ass'n*, 122 Min. 327, 332 (1913) ("[I]f it had appeared clearly that plaintiff knew the dangers incurred by taking a seat in the open, it should be held that she assumed all risk of injury from balls thrown or batted in the game.").

to leagues and venue operators.<sup>9</sup> Several states including Colorado, New Jersey, Arizona, and Illinois have enshrined the rule in statute, sometimes in response to lobbying by ballpark owners.<sup>10</sup> Traditionally, assumption of risk is an affirmative defense that precludes liability for ordinary negligence.<sup>11</sup> Assumption of risk is understood to be a voluntary encounter with a known danger, and as such, participants are deemed to have consented and, therefore, to have assumed the open and obvious risk inherent to an activity. With respect to baseball, this would include the possibility of being struck by baseballs while seated in the unprotected areas of baseball stadiums.<sup>12</sup>

As early as the 1930s, the courts have dealt with the topic of a fan's assumption of the risk at a baseball game. For example, in *Brisson v. Minneapolis Baseball & Athletic Ass'n*, the Supreme Court of Minnesota held that a spectator of reasonable intelligence but with limited experience with baseball was said to assume risks of the game.<sup>13</sup> There, an adult bought a grandstand ticket, but the seats were filled when he arrived.<sup>14</sup> He sat in temporary seats located outside the foul line behind third base, where he was injured by a foul ball.<sup>15</sup> He had attended ball games as a small boy, and as an adult he had recently seen at least one league game.<sup>16</sup> The court reasoned that management could not be found negligent when it provided a choice between a screened-in or an open seat when the screen was deemed to be sufficient in extent and substance.<sup>17</sup> The court did not believe that management must, in order to free itself from the charge of negligence, provide screened seats for

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<sup>9</sup> David Glovin, *Baseball Caught Looking as Fouls Injure 1,750 Fans a Year*, BLOOMBERG NEWS, Sep. 9, 2014, <http://www.bloomberg.com/news/articles/2014-09-09/baseball-caught-looking-as-fouls-injure-1-750-fans-a-year>.

<sup>10</sup> *Id.* See Colo. Rev. Stat. Ann. § 13-21-120 ("Limiting the civil liability of those who own professional baseball teams and those who own stadiums where professional baseball games are played will help contain costs, keeping ticket prices more affordable.").

<sup>11</sup> See Kozlowski, *supra* note 6.

<sup>12</sup> *Id.*

<sup>13</sup> 185 Minn. 507, 509 (1932). See also *Brown v. San Francisco Ball Club*, 99 Cal. App. 2d 484, 488 (1950) (rejecting the contention that the spectator was not subject to the rule of assumption of the risk because "[a]lthough she had a limited experience with baseball, she was a mature person in possession of her faculties with nothing about her to set her apart from other spectators and require of her a lower standard of self-protection from obvious, inherent risks than that required of other spectators").

<sup>14</sup> *Brisson*, 185 Minn. at 507.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 508.

<sup>17</sup> *Id.*

all who may possibly apply thereof.<sup>18</sup> Because the spectator was unable to secure a screened seat and consequently occupied one that was not protected, he assumed the risk of being struck by thrown or batted balls and was precluded from recovering damages.<sup>19</sup>

## II. CASE SUMMARY

The relevant facts of M.F.'s case are not in dispute.<sup>20</sup> Prior to the 2010 baseball season, the Braves added netting to portions of both teams' dugouts in order to protect players from errant balls leaving the field of play.<sup>21</sup> During the game in question, safety netting behind home plate protected 2,791 of the stadium's 49,856 seats but did not extend to the seats directly behind the dugouts.<sup>22</sup> Records reveal that during that game, 488 unprotected seats remained unsold.<sup>23</sup> A Braves representative testified that M.F. and her family would have been free to move to unsold protected seats behind home plate as long as they paid a surcharge that would have been applied to the price of their tickets.<sup>24</sup>

In answer to the negligence action, the Braves raised a defense arguing that their netting, which protected only the seats behind home plate, amounted to "ordinary care" for purposes of OCGA § 51-3-1.<sup>25</sup> This statute states that an owner is liable to invitees only if the owner fails to exercise ordinary care in keeping their premises safe.<sup>26</sup> Weeks later, the Braves filed a motion for summary judgment or dismissal based on the fact that they did not have a "duty as a matter of law to protect a spectator at a baseball game from being hit by a foul ball," or in the alternative, that if such a duty did exist, it had to be limited to only those seats behind home plate.<sup>27</sup> They asserted that a sufficient number of those seats did in fact exist in order to accommodate the reasonable anticipation of requests by fans for protected seats.<sup>28</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 510.

<sup>20</sup> *F.F.*, 328 Ga. App. at 218.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Ga. Code Ann. § 51-3-1 (West).

<sup>27</sup> *F.F.*, 328 Ga. App. at 218 (internal quotations omitted).

<sup>28</sup> *Id.*

The trial court denied the Braves' motion to dismiss for failure to state a claim, and the motion for summary judgment.<sup>29</sup> It also denied the Braves' subsequent move for certificate of immediate review.<sup>30</sup> Next, the Braves moved for a declaratory judgment as to the applicable standard of care.<sup>31</sup> The trial court denied this motion as well, but granted a certificate of immediate review.<sup>32</sup>

The Court of Appeals of Georgia granted the Braves' application for interlocutory review of the trial court's denial of their motion for declaratory judgment, affirmed the trial court's denial, and held that such relief was not appropriate at this stage of the proceedings.<sup>33</sup>

### III. HISTORICAL OVERVIEW OF THE BASEBALL RULE

By the late 1800s, the rules of baseball had evolved to the point that pitchers threw overhand, catchers wore masks and chest protectors, and the grandstand behind home plate became known as the "slaughter pen" because of the frequent injuries suffered by spectators watching the game from that area.<sup>34</sup> However, it was not until 1879 that the first professional team, the Providence Grays, installed a screen behind home plate for the express purpose of protecting spectators.<sup>35</sup>

Baseball stadiums are only required under the Baseball Rule to screen the area behind home plate where flying objects are most likely to enter the stands and to ensure that spectator demands for protected seats are met in order to avoid liability. Stadiums must only protect the areas where the obvious yet unavoidable risk of injury is greatest. However, according to the Baseball Rule, ballparks have "no duty to warn spectators at a baseball game of the well-known possibility that a bat or ball might leave the field."<sup>36</sup> Courts that adopt the Baseball Rule seem to accept the idea that spectators at baseball games understand that it is possible that potentially hurtful objects may be propelled into the stands.

For example, the Iowa court in *Arnold v. City of Cedar Rapids* deemed it a well-established principle that the owner or operator of a ballpark fully

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 218–19.

<sup>31</sup> *Id.* at 219.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 217.

<sup>34</sup> J. Gordon Hylton, *A Foul Ball in the Courtroom: The Baseball Spectator Injury as a Case of First Impression*, 38 TULSA L. REV. 485, 488 (2003).

<sup>35</sup> *Id.*

<sup>36</sup> *Benejam v. Detroit Tigers, Inc.*, 246 Mich. App 645, 647 (2001).

discharges any obligation to protect spectators from thrown or hit balls by providing seating in a fully protected area.<sup>37</sup> Thus, the court continued, where, as was the case in *Arnold*, a spectator rejects the protected seating and opts instead for seating that is not, or is less, protected, the owner or operator is not liable.<sup>38</sup> The court added that cases in jurisdictions that have adopted comparative fault have come to the same conclusion.<sup>39</sup>

Michigan's Court of Appeals has adopted a "limited duty" rule, which states that once the stadium owner has provided "adequately screened seats" for all those desiring them, the stadium owner has fulfilled its duty of care as a matter of law.<sup>40</sup> In a 2001 decision, *Benejam v. Detroit Tigers, Inc.*, the court held that a baseball stadium owner is not liable for injuries to spectators that result from projectiles leaving the field during play if safety screening has been provided behind home plate and there are a sufficient number of protected seats to meet ordinary demand.<sup>41</sup> The court further found that the stadium owner had no duty to warn spectators of possible harm.<sup>42</sup> In that case, a girl was seated near the playing field along the third base line.<sup>43</sup> She was behind the edge of the net located behind home plate when a broken bat curved around the edge of the net and struck her.<sup>44</sup> The girl and her parents sued, claiming the net was not sufficiently long and that the warnings were insufficient.<sup>45</sup> The court analyzed similar cases across the nation and reasoned that "a stadium proprietor cannot be liable for spectator injuries if it has satisfied a "limited duty"—to erect a screen that will protect the most dangerous area of the spectator stands, behind home plate, and to provide a number of seats in this area sufficient to meet the ordinary

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<sup>37</sup> 443 N.W.2d 332, 333 (Iowa 1989).

<sup>38</sup> *Id.* See *Neinstein v. Los Angeles Dodgers, Inc.*, 185 Cal. App. 3d 176, 181 (Ct. App. 1986) (holding that the Dodgers were not liable because to "permit plaintiff to recover under the circumstances here would force baseball stadium owners to do one of two things: place all spectator areas behind a protective screen thereby reducing the quality of everyone's view, and since players are often able to reach into the spectator area to catch foul balls, changing the very nature of the game itself; or continue the status quo and increase the price of tickets to cover the cost of compensating injured persons with the attendant result that persons of meager means might be 'priced out' of enjoying the great American pastime").

<sup>39</sup> *Benejam*, 246 Mich. App at 647

<sup>40</sup> *Id.* at 654.

<sup>41</sup> *Id.* at 651–52.

<sup>42</sup> *Id.* at 659.

<sup>43</sup> *Id.* at 647.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 648.

demand for protected seats."<sup>46</sup> The court concluded by stating that there is an inherent risk of objects leaving the playing field that people are aware of when they attend baseball games.<sup>47</sup>

A Washington state case has elaborated on the "limited duty rule" by imposing two requirements on baseball stadium operators.<sup>48</sup> First, baseball stadium operators must provide a sufficient number of protected seats for those spectators that can be reasonably expected to want them.<sup>49</sup> Second, they must "provide protection for all spectators located in the most dangerous parts of the stadium," which include the areas where fans have the highest risk of injury such as those seats directly behind home plate.<sup>50</sup> In this case, a spectator was injured by a foul ball while she was sitting in an un-screened seat during batting practice in which multiple batted balls were simultaneously in play.<sup>51</sup> The court concluded that implied primary assumption of risk barred her negligence action since batting practice was an event necessarily incident to the game.<sup>52</sup> The circumstances did not constitute unusual danger, and, most importantly, the spectator purposely attended the batting practice and was familiar with baseball since she used a social media site several days after her injury to "tweet" that she wanted a foul ball to land near her seat during batting practice.<sup>53</sup>

The New York court in *Akins v. Glens Falls City School Dist.* took the position that in the exercise of reasonable care, the proprietor of a ballpark need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is greatest.<sup>54</sup> Similar to the aforementioned Washington case, the court stated that the screening is sufficient to the extent that it provides adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordi-

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<sup>46</sup> *Id.* at 649. *But see* *S. Shore Baseball, LLC v. DeJesus*, 11 N.E.3d 903, 904 (Ind. 2014) (The Supreme Court of Indiana found "stadiums and franchises by virtue of baseball's status as our national pastime" should not be "entitled to a special limited-duty rule." On the contrary, the court held the liability of an owner/operator of a baseball facility to an injured spectator should be determined by "our standard principles of premises liability.").

<sup>47</sup> *Benejam*, 246 Mich. App at 651.

<sup>48</sup> *Reed-Jennings v. Baseball Club of Seattle, L.P.*, 188 Wash. App. 320, 327 (2015).

<sup>49</sup> *Id.* at 328.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 332.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 335.

<sup>54</sup> 53 N.Y.2d 325, 331 (1981).

nary game.<sup>55</sup> The court said that to rule otherwise “would mean that every spectator injured by a foul ball, no matter where he is seated or standing in the ballpark, would have an absolute right to go to the jury on every claim of negligence, regardless of the owner’s efforts to provide reasonable protection and despite the spectator’s failure to utilize the protection made available.”<sup>56</sup>

A Texas court also weighed in on the matter of assumption of the risk. In *Keys v. Alamo City Baseball Co.*, the court explained that one of the natural risks assumed by spectators attending professional baseball games is that of being struck by batted or thrown balls. The management does not “undertake to insure patrons against injury from such source.”<sup>57</sup> The court ruled that all that is required by a stadium or the team is the exercise of ordinary care to protect patrons against such injuries.<sup>58</sup> As a result, management is not obliged to screen all seats because many patrons prefer to sit in a location in which their view is not obscured by a screen.<sup>59</sup> Moreover, the court reasoned that the management is not required to provide screened seats for all who may apply for them but that the duty imposed by law is performed when screened seats are provided for as many fans as may be reasonably expected to call for them on any ordinary occasion.<sup>60</sup> If spectators choose to occupy an unscreened seat, or are unable to secure a screened seat and consequently occupy one that is not protected, they assume the risk of being struck by thrown or batted balls.<sup>61</sup>

While most jurisdictions apply the Baseball Rule to seated spectators who are struck by a flying object in the course of a game, jurisdictions differ as to whether the rule should apply to spectators who are not seated in the stands when they are injured. For example, Minnesota’s Court of Appeals extended the Baseball Rule to a spectator who was injured by a foul ball as he returned to his seat from the restroom.<sup>62</sup> In *Alwin v. St. Paul Saints Baseball Club, Inc.*, the court held that a spectator at a professional baseball game assumes the inherent risk of being struck by a foul ball.<sup>63</sup> There a spectator was struck in the mouth by a baseball while returning to his seat

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<sup>55</sup> *Id.* See *Hobby v. City of Durham*, 152 N.C. App. 234 (2002) (holding that city and team were not liable since they discharged their duty to spectator by providing protective screen even if that screen did not protect her from injury).

<sup>56</sup> *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 331.

<sup>57</sup> 150 S.W.2d 368, 370 (Tex. Civ. App. 1941).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 371.

<sup>61</sup> *Id.*

<sup>62</sup> 672 N.W.2d 570, 571 (Minn. Ct. App. 2003).

<sup>63</sup> *Id.* at 572.

from the restroom.<sup>64</sup> The spectator was a baseball fan who attended many games in his lifetime and who understood the risk of being hit by a foul ball.<sup>65</sup> The court reasoned that because the spectator "primarily assumed the risk as a spectator of an inherently dangerous sport, he cannot recover damages for his injuries. . ."<sup>66</sup> The court also took careful note of the fact that the spectator received a printed warning on the back of his ticket advising him of the risks he was undertaking by attending the event.<sup>67</sup>

Other courts have pointed out that the limited liability rule is appropriate for injuries occurring in the seating and viewing areas only, but that ordinary negligence principles apply in the situation where injuries occur outside the stands, such as in the passages and entrances and exits, near concessions or in picnic areas. New Jersey's Supreme Court held that the Baseball Rule exempting stadiums from liability to spectators does not extend beyond spectators seated in the stands.<sup>68</sup> **In** *Maisonave v. Newark Bears Prof'l Baseball Club, Inc.*, the court held that "the limited duty rule, which restricts the tort liability of owners, applies in situations where an injury occurs in the stands."<sup>69</sup> In that case, a foul ball struck a spectator in the face while he was purchasing a beverage on the concourse of a minor league stadium.<sup>70</sup> The court analyzed the breadth of the limited duty and found the rule to be applicable only when the spectator was present in the stands.<sup>71</sup> The court reasoned, "public policy and fairness require application of traditional negligence principles in all other areas of the stadium[.]"<sup>72</sup> In reaching this conclusion, the court recognized that the Baseball Rule's authority "diminishes in the context of injuries that occur in stadium areas other than the stands."<sup>73</sup> When fans are in other areas of the stadium, it is both foreseeable and understandable that they would let their guard down.<sup>74</sup> As soon as fans have left the stands, they have "disengaged . . . from the activity on the field," and are no longer concerned with trying

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<sup>64</sup> *Id.* at 571.

<sup>65</sup> *Id.* at 574.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* *But see* *Yates v. Chicago Nat. League Ball Club, Inc.*, 230 Ill.App.3d 472 (1992) (holding that the spectator did not expressly assume the risk because his assent to the disclaimer could not be inferred, since the print on the back of the ticket was so small.).

<sup>68</sup> *Maisonave v. Newark Bears Prof'l Baseball Club, Inc.*, 185 N.J. 70, 74 (2005).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 84.

<sup>74</sup> *Id.*

to catch a foul ball or even watch the game.<sup>75</sup> The court ended by stating that an application of the Baseball Rule to the entirety of the baseball stadium “would convert reasonable protection for owners to immunity by virtually eliminating their liability for foreseeable, preventable injuries to their patrons even when the fans are no longer engaged with the game.”<sup>76</sup> On the other hand, the court said that it did not impose strict liability for owners in areas outside of the stands as such a bright-line rule would impose an onerous burden on owners and operators.<sup>77</sup>

Still, other courts, often expressly rejecting the Baseball Rule, have taken the position that teams or owners will not be liable when injuries to a spectator occur as the result of insufficient screening or other protections unless the teams or owners did not meet their duty to exercise ordinary care to protect spectators in their unscreened area. Noting that its ruling differed somewhat from the Baseball Rule which had been adopted in many jurisdictions, the Arizona court in *Bellezzo v. State*, considered whether a stadium operator owed a duty of care to a spectator, and concluded that the answer to this question depended on whether the defendants exposed the spectator to an unreasonable risk of harm.<sup>78</sup> In determining whether spectators faced an unreasonable risk of injury, the court considered such factors as whether the defendants provided alternative seating in a screened area and whether they reasonably protected spectators by screening the most dangerous areas of the stadium.<sup>79</sup> The court concluded that the stadium offered protected seating that was sufficient to fill requests and that protected seating was available on the day the spectator was injured.<sup>80</sup> The court declined to make stadium operators insurers against the ordinary risk that a spectator seated in an unscreened area of the baseball stadium may be struck by a ball and instead imposed upon the defendants the usual duty to act with reasonable care to protect against foreseeable, unreasonable risks.<sup>81</sup>

In *Coronel v. Chicago White Sox, Ltd.*, the court reversed a summary judgment for the home team, as the spectator, who claimed that the team had provided inadequate protection for her seat location, met the requisite burden for her case to proceed to the jury.<sup>82</sup> The spectator presented evidence of the dangerousness of her seat behind home plate and the fact that

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 85.

<sup>77</sup> *Id.*

<sup>78</sup> 174 Ariz. 548, 551(Ct. App. 1992).

<sup>79</sup> *Id.* at 553.

<sup>80</sup> *Id.* at 554.

<sup>81</sup> *Id.*

<sup>82</sup> 230 Ill. App. 3d 734, 736 (1992).

the protective screen used by the team was one of the smallest in the major leagues.<sup>83</sup> The court explained that the owner of a baseball stadium owes a duty to protect spectators from injury caused by foul balls but that such duty does not require a complete fencing of the spectators present at a baseball game to protect them from stray baseballs.<sup>84</sup> Instead, the duty to protect requires a screen for the most dangerous part of the grandstand.<sup>85</sup> Upon concluding that the most dangerous part of a ballpark is universally recognized as the area behind home plate, the court noted that whether the sports facility adequately screened the most dangerous area is a question of fact for the jury.<sup>86</sup> The court pointed out in discussing the significance of evidence used to compare the screening utilized in one park to that which was commonly employed in others, case law indicated that "while customary methods do not furnish a conclusive or controlling test of negligence or justify a practice obviously laden with danger, they are nevertheless to be considered as factors of measurement of due care."<sup>87</sup> The court added that the defendants had a duty to warn the spectator of the danger created by foul balls, even though it was claimed that the danger was open and obvious, and that a fact question existed as to whether the alleged warnings were adequate.<sup>88</sup>

A number of jurisdictions have adopted comparative negligence statutes following a broader movement within tort law away from complete bars of recovery and towards comparative negligence doctrine.<sup>89</sup> Under comparative negligence, the negligence of the defendant is compared to any negligence on the part of the plaintiff that led to the injury.<sup>90</sup> Accordingly, under some comparative negligence statutes, plaintiff's assumption of risk is no longer an automatic bar to recovery for defendant's negligence.<sup>91</sup> Rather, plaintiff's voluntary encounter with a known danger is simply a factor to be weighed against defendant's negligence when a jury determines the proportion of fault to be assigned to each party under an applicable comparative negligence statute.<sup>92</sup> The importance of comparative fault comes into play

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<sup>83</sup> *Id.* at 738.

<sup>84</sup> *Id.* at 736–37.

<sup>85</sup> *Id.* at 737.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 739.

<sup>88</sup> *Id.* at 742.

<sup>89</sup> 65A C.J.S. Negligence § 316. *See also* Lynne Reaves, *Eye on the Ball: Injured Spectator Wins*, 69 A.B.A.J. 1616 (1983).

<sup>90</sup> 65A C.J.S. Negligence § 316

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* *See* Jones v. Alexandria Baseball Ass'n, 50 So.2d 93 (La. Ct. App. 1951) (holding that the spectator's injury was attributable to his own fault in failing to keep his eye on the ball).

particularly when distinguishing between a spectator who knowingly encounters a danger by trying to catch a foul ball and a spectator who is injured by a projectile that was impossible to avoid. In the former instance, comparative fault would account for the spectator's negligent conduct, while in the latter example comparative fault would properly afford redress for the plaintiff's injury. Despite the comparative fault application, most courts still go on to find the plaintiff-spectator mostly or completely at fault if he or she chose to sit in an unprotected area, leaving very little liability for the facility owner to account for.<sup>93</sup>

Some jurisdictions have not only cast aside contributory negligence but have also disposed of the assumption of risk defense. The Idaho Supreme Court addressed this issue in *Rountree v. Boise Baseball, LLC*, where the plaintiff lost an eye as a result of being struck by a baseball while he was in a club section in the stadium that was located at the very end of the third base line.<sup>94</sup> The club section area was one of the stadium's only sections not covered by vertical netting.<sup>95</sup> The court noted that the precise duty owed by stadium owners and operators to spectators injured by foul balls was a matter of first impression in Idaho.<sup>96</sup> The court recognized that other courts had addressed the issue, stating, "[t]he majority of jurisdictions to consider the issue have limited this duty by adopting some variation of the Baseball Rule."<sup>97</sup> The court then acknowledged that it had the authority to establish or limit existing tort duties.<sup>98</sup> However, it declined to do so in this case, concluding that Idaho's existing premises liability principles provide an adequate framework for analyzing a stadium owner's duty of care.<sup>99</sup> Thus, a baseball fan at a stadium is an invitee, to whom the premises owner owes a duty to keep the premises in a reasonably safe condition or to warn of hidden or concealed dangers.<sup>100</sup> The court concluded that it was not necessary to establish a special rule for baseball stadiums or that if a special rule were necessary, then the legislature would be better equipped to do research and formulate one.<sup>101</sup>

After declining to adopt the Baseball Rule, the court turned to the issue of assumption of risk to decide whether primary implied assumption of

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<sup>93</sup> See *Swagger v. City of Crystal*, 379 N.W.2d 183 (Minn. Ct. App. 1985).

<sup>94</sup> 154 Idaho 167, 169 (2013).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 171.

<sup>97</sup> *Id.* at 172.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 171.

<sup>101</sup> *Id.* at 173.

risk is a viable defense in Idaho.<sup>102</sup> Answering in the negative, the court first distinguished between primary and secondary assumption of risk.<sup>103</sup> The court noted that secondary implies that assumption of risk "is an affirmative defense to an established breach of duty and as such is a phase of contributory negligence." Whereas primary assumption of risk "essentially means that the defendant was not negligent, because there *was* no breach, or no duty."<sup>104</sup> Elaborating on prior Idaho case law, the court ruled that assumption of risk is a defense in Idaho only when a plaintiff expressly assumes the risk, either in writing or orally.<sup>105</sup> The court stated that "whether watching baseball is inherently dangerous, and the degrees of fault to be apportioned" should be questions for the jury.<sup>106</sup> Thus, the *Rountree* decision asserts that assumption of risk is not a defense in Idaho except in cases where a plaintiff expressly assumes risks.

Recently there have been cases that used a limited application of the Baseball Rule. The Missouri Supreme Court, which does recognize the rule, declined to extend it to errant flying hot dogs.<sup>107</sup> In *Coomer v. Kansas City Royals Baseball Corp.*, the court held that the risk of injury from a hotdog tossed by a baseball team's mascot was not one of the risks inherent in watching the team play a game.<sup>108</sup> In this case, a spectator at a Royals game claimed that he suffered a detached retina when he was hit in the eye by a hot dog thrown by Sluggerrr, the team mascot.<sup>109</sup> The Missouri Supreme Court agreed with the lower court ruling, finding that the trial court erred in allowing the jury to determine whether being injured by the hotdog toss was an inherent risk of watching a Royals home game, instead finding that the judge should have decided the issue.<sup>110</sup> Specifically and more importantly, "the risk of being injured by Sluggerrr's hotdog toss . . . is not an unavoidable part of watching the Royals play baseball."<sup>111</sup> The court reiterated that the Royals likely would not have been responsible for the spectator's injury if it had been caused by a foul ball or a bat leaving the

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 174.

<sup>104</sup> *Id.* (emphasis in the original).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 175.

<sup>107</sup> *Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184, 202 (2014).

<sup>108</sup> *Id.* at 203. *See also* *Lowe v. California League of Prof. Baseball*, 56 Cal.App.4th 112 (1997) (holding that the antics of the mascot were not a necessity to the baseball game and whether such a diversion could increase the inherent risks for a spectator was a triable issue of fact).

<sup>109</sup> *Coomer*, 437 S.W.3d at 189.

<sup>110</sup> *Id.* at 191.

<sup>111</sup> *Id.* at 188.

field, citing with approval prior decisions supporting the Baseball Rule as it was applied in Missouri.<sup>112</sup> The court went so far as to declare that being injured by the hotdog toss was not only considered not to be an inherent risk of watching a Royals game, but that it was also not an inherent risk of the hotdog toss.<sup>113</sup>

#### IV. COURT DECISION

In M.F.'s case, the Georgia Court of Appeals focused narrowly on whether the trial judge had properly followed the law regarding declaratory judgment rulings.<sup>114</sup> Judge Branch upheld the trial court's denial, ruling that declaratory judgment in such a case "is not appropriate at this stage of the proceedings."<sup>115</sup> In arriving at its decision, the court reviewed the text of the Georgia Declaratory Judgment Act and emphasized the purpose of the statute.<sup>116</sup> Judge Branch notably cited the decisions of the Georgia Supreme Court that stressed the fact that while the declaratory judgment should be construed liberally, it was never meant to be applicable to every occasion or question arising from a controversy.<sup>117</sup> Citing a Supreme Court of Georgia opinion, the appellate panel reiterated that the goal of a declaratory judgment is to allow for determination of a controversy before obligations are repudiated or rights are violated.<sup>118</sup> If parties to a controversy are seeking a declaratory judgment, then they "must establish that it is necessary to relieve [themselves] of the risk of taking some future action that, without direction, would jeopardize [their] interests."<sup>119</sup>

In an instance where a party seeks declaratory judgment and fails to show that it is in a position of uncertainty with regard to an alleged right, dismissal of the declaratory judgment action is proper.<sup>120</sup> If not, a trial court would be issuing an advisory opinion on the matter, and the Georgia Declaratory Judgment Act makes no provision for this scenario.<sup>121</sup> The Georgia

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<sup>112</sup> *Id.* at 199.

<sup>113</sup> *Id.* at 203.

<sup>114</sup> *F.F.*, 328 Ga. App., at 219–20.

<sup>115</sup> *Id.* at 218.

<sup>116</sup> *Id.* at 219–20.

<sup>117</sup> *Id.* at 220.

<sup>118</sup> *Id.* See *State Highway Dep't v. Georgia S. & F. Ry. Co.*, 216 Ga. 547, 548 (1961).

<sup>119</sup> *F.F.*, 328 Ga. App. at 220.

<sup>120</sup> *Id.* at 221.

<sup>121</sup> *Id.*

Court of Appeals further stated that it is not for them to issue an advisory opinion as to acts or omissions that have not yet occurred.<sup>122</sup>

While applying previous holdings in other Georgia cases to the matter at hand, the Court of Appeals alluded to the fact that the event that gave rise to the Braves' potential liability, the foul ball hitting M.F., had already occurred.<sup>123</sup> As such, it reasoned that "declaratory judgment is not the proper means by which to test their defense that their observation of the [B]aseball [R]ule, or some variant of it, satisfied their duty of care to plaintiffs."<sup>124</sup> The appellate court declined to adopt the Baseball Rule at this juncture and allowed the case to proceed.<sup>125</sup>

## V. CASE ANALYSIS

At first glance the Court of Appeals' affirmation of the trial court's decision denies the Braves' motion for a declaratory judgment.<sup>126</sup> They did not agree with the standard of care issue that was owed to fans at a baseball game. On its face, the decision states nothing noteworthy regarding appellate procedure. However, the Court of Appeals likely could have addressed the standard of care.

If M.F.'s claim is not settled, the case will probably proceed to trial. Liability will likely be considered based upon ordinary principles governing landowner liability for negligence. In the meantime, the applicability of the Baseball Rule in Georgia remains uncertain. Until the State Supreme Court rules on the issue, current Georgia law already makes clear that an adult who sits in an unprotected seat at a baseball game is barred from recovery for potential injury because he or she has assumed the risks inherent in attending a baseball game.<sup>127</sup> However, the status of a minor is less clear.<sup>128</sup> There has only been one such suit in Georgia, and that Court of Appeals decision suggested that while the limited duty rule may be the correct legal rule when a minor is struck by a foul ball, the court found that the record was insufficient to support summary judgment and ultimately neither expressly

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Hunt v. Thomasville Baseball Co.*, 80 Ga. App. 572, 573 (1949).

<sup>128</sup> *City of Atlanta v. Merritt*, 172 Ga. App. 470, 471 (1984) (court chose not to follow *Hunt* because a child spectator, unlike an adult, does not necessarily assume the risk of being struck by baseball equipment).

adopted nor rejected the limited duty rule.<sup>129</sup> The Braves believe that the limited duty rule should supply the relevant standard of care, and it should not vary depending upon whether the spectator is a minor or an adult.

For the Atlanta Braves, it may be difficult from a public relations standpoint to take such a hard stance regarding the inherent risk assumed by minors. Even though the typical injury from a foul ball is a minor one such as a bruised hand or a bloodied lip, a small number of cases are more serious, and those victims tend to be children such as M.F. In other related cases, a seven-year-old in Chicago sustained severe brain swelling as a result of being hit by a foul line ball during the course of a game in 2008.<sup>130</sup> In 2011, a twelve-year-old in New York was admitted to intensive care as the result of an injury, and a foul ball sent an eighteen-month-old toddler to a Seattle hospital last season.<sup>131</sup>

The Baseball Rule relies on the assumption that spectators understand the scope of the game as well as the risk that objects from the game can and often do enter the stands unexpectedly. There is also the expectation that spectators are aware of the option to sit in the protected area behind home plate. One of the biggest thrills for any baseball fan is to catch a foul or home run ball. A major aspect of attending a baseball game is the possibility of coming into contact with, or even possibly catching, a baseball as a souvenir.<sup>132</sup> Baseball spectators often bring baseball gloves to the game with the hope of doing just that. Foul balls have been sought as keepsakes ever since 1921 when a spectator at a New York Giants game refused to surrender a ball that was hit into the stands of the Polo Grounds.<sup>133</sup> The spectator was banished from the ballpark, but he sued for mental anguish and won.<sup>134</sup> This prompted the Giants to change their rules and allow fans to retain balls hit out of the field of play.<sup>135</sup> Since then, baseball has developed into a sport in which spectators not only hope, but also expect to come into contact with the ball. As such, it is understandable why most jurisdictions find that stadiums are not responsible for most spectator injuries.

However, safety is still an important feature of the fan experience. About 1,750 spectators are injured each year at major league games.<sup>136</sup> Most of these injuries are caused by batted foul balls, and they occur at least

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<sup>129</sup> See *id.*

<sup>130</sup> See Glovin, *supra* note 9.

<sup>131</sup> *Id.*

<sup>132</sup> *Benejam*, 246 Mich.App. at 651.

<sup>133</sup> See Glovin, *supra* note 9.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

twice during every three games.<sup>137</sup> According to Elias Sports Bureau Inc., that figure is greater than the likelihood of a batter being hit by a pitch, which happened 1,536 times last season.<sup>138</sup> Unlike the National Hockey League (NHL), which instituted mandatory netting behind the goal and increased Plexiglas above the sideboards after a teenage spectator was hit by a puck and died in 2002, Major League Baseball (MLB) has done little to reduce the risk.<sup>139</sup> MLB's safety policy calls for each team to be responsible for spectator safety.<sup>140</sup> Bud Selig, who retired in January 2015 after two decades as commissioner, said in 2008 that Major League Baseball would discuss whether fans are at risk from batted balls.<sup>141</sup> Since then, the MLB has reviewed the issue at annual meetings, but until very recently, has continued to defer to the teams to decide.<sup>142</sup>

## VI. THE MODERN STADIUM EXPERIENCE

Stadiums and arenas are in a race to keep up with the modern, connected sports fan. The Internet and mobile devices, which are increasing in number, have become substantial instruments for sports fans to engage with their favorite sports teams and to stay updated on the latest news. Teams are targeting younger fans and using mobile apps to improve fans' game-day experience in a variety of ways.<sup>143</sup> In addition, franchises are looking for ways to capitalize on mobile technology to enhance the fans' experiences in their homes and as spectators in stadiums and arenas.<sup>144</sup>

Loyalty programs reward fans for engaging with the team via social media and fans can even order food directly to their seats through stadium mobile apps.<sup>145</sup> All the in-stadium technology is designed to improve fan experience. Many newer arenas also have mobile applications for check-in, ushering fans to their seats, indicating shortest bathroom and concession

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Brian Flood, *Barclays Center Uses Technology to Keep the Modern Fan Experience Current*, ADWEEK, Oct. 22, 2015, <http://www.adweek.com/news/technology/how-barclays-center-uses-technology-constantly-improve-modern-fan-experience-167723>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

lines, seat upgrade options, cashless commerce, and in-seat wireless charging.<sup>146</sup>

Teams have faced the reality that it is less costly, and much easier, for a fan to watch the big game in their family room.<sup>147</sup> So teams have to make it more appealing than ever before to lure fans to the stadium. The connectivity, added services, and apps all aim to provide a vastly improved fan experience at the stadium and keep people coming to games even when they have a 50-inch TV and comfy chair at home.<sup>148</sup> With the added features through Wi-Fi, fans can get an experience at the stadium that they cannot get anywhere else and the added bonus of being able to brag about it to their friends on social media in real time.<sup>149</sup>

However, all of these new technological improvements have led to a more distracting environment at today's ballparks. Ballpark initiatives designed to attract younger fans, including mascots, video boards and the availability of wireless internet, create distractions that put patrons in greater jeopardy of being hit by a foul ball. MLB's encouragement of the use of smartphones during games means patrons may more often avert their eyes from the field of play and become less cognizant of potential dangers headed their way. Encouraging smartphone use is different than simply having T-shirt cannons and dancing mascots at breaks in the play because the mascot stops dancing when the pitch is thrown but Wi-Fi stays on throughout the entirety of the game. A balance should be struck between providing additional sources of entertainment that help draw in a younger fan base and unintentionally subjecting that fan base to a more dangerous environment because of that additional entertainment.

## VII. FURTHER QUESTIONING OF THE BASEBALL RULE

A recent incident at Fenway Park has again brought the Baseball Rule and what duty the league and teams owe fans attending a game to the forefront of MLB safety. During the second inning of the June 5, 2015 game between the Boston Red Sox and the Oakland Athletics, an Oakland player splintered his bat on a pitch, and a piece of the bat struck a fan sitting in the

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<sup>146</sup> Michael Applebaum, *The Connected Fan*, ADWEEK, Jan. 28, 2013, <http://www.adweek.com/sa-article/connected-fan-146692>.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

second row on the third base side.<sup>150</sup> The game was stopped while the bleeding fan was rushed out of the stadium to the hospital.<sup>151</sup> The gruesome injury prompted calls for teams to expand the protective netting used behind home plate in major league stadiums.<sup>152</sup>

Five days after the fan was released from the hospital, MLB commissioner Rob Manfred said the industry is looking at a "variety of remedies" designed to prevent such incidents from recurring. Possible solutions include additional bat regulations, wrapping of bats, and increased netting.<sup>153</sup> Manfred said that MLB is examining all of the available options on the table and expects to make the best decision in order to help keep fans as safe as possible.<sup>154</sup> He indicated that expanding the netting was not an issue that required the approval of the Major League Baseball Players' Association in collective bargaining. However, he stated that the Commissioner's office had held discussions with the players' union on the topic.<sup>155</sup> At the time they did not, however, appear to have a firm timetable in mind for instituting any possible changes.<sup>156</sup>

Only a few weeks after Manfred made that statement, a lawsuit was filed on behalf of an Oakland Athletics season-ticket holder attempting to force Manfred and MLB to extend protective netting along the entire length of the foul pole lines at ballparks.<sup>157</sup> The complaint contends that MLB stadiums only have enough safety netting to protect "VIP" patrons in the most expensive seats immediately near the home plate area and leaves the rest of the lower level seats at risk for injury.<sup>158</sup> The lawsuit filed in the Northern District of California seeks class-action status on behalf of all fans buying season tickets in unprotected areas of major league parks.<sup>159</sup> Rather

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<sup>150</sup> Roger I. Abrams, *Spectators and the Baseball Rule*, THE HUFFINGTON POST, June 8, 2015, [http://www.huffingtonpost.com/roger-i-abrams/spectators-and-the-baseba\\_b\\_7536610.html](http://www.huffingtonpost.com/roger-i-abrams/spectators-and-the-baseba_b_7536610.html).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Gordon Edes, *Rob Manfred: First concern always will be safety of fans*, ESPN.COM, June 16, 2015, [http://espn.go.com/boston/mlb/story/\\_/id/13092988/rob-manfred-eyeing-remedies-ballpark-safety-fenway-park-incident](http://espn.go.com/boston/mlb/story/_/id/13092988/rob-manfred-eyeing-remedies-ballpark-safety-fenway-park-incident).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Jimmy Golen, *Lawsuit seeks safety netting for MLB ballparks*, ASSOCIATED PRESS, July 13, 2015, <http://bigstory.ap.org/article/2d1be345f57e4692977c45ae2dc31957/suit-seeks-safety-netting-mlb-ballparks>.

<sup>158</sup> *Payne v. Office of the Commissioner of Baseball*, 4:15-cv-03229 at 12, U.S. District Court, Northern District of California.

<sup>159</sup> *Id.* at 46.

than looking for a cash payout, the plaintiff is asking for the court to require that all MLB and minor league stadiums be retrofitted to protect the fans in these seats.<sup>160</sup> The attorneys argue that in today's game, the combination of faster and stronger players and more distractions at the park means that the "slaughter pen" now stretches far beyond the area just behind home plate and now encompasses everything between the foul poles.<sup>161</sup> The complaint refers to all season ticket holders in this area as the "Danger Zone" class of plaintiffs.<sup>162</sup>

The primary claim of the lawsuit is that MLB has a duty to protect its fans from errant foul balls and bats.<sup>163</sup> MLB is also accused of distracting their fans with mascots, by encouraging fans to text or Tweet in photos and posts, and even allowing fans to order food from their mobile devices during the game.<sup>164</sup> The lawsuit points out a disparity in treatment between the safety of fans and game participants: MLB added safety measures for players and coaches by adding protective netting in the dugouts and requiring base coaches to wear helmets.<sup>165</sup> MLB failed to keep pace with other sports like professional hockey and NASCAR, which took safety measures to protect fans from pucks and debris going into the stands. Its safety standards are also much less robust than those in other countries like Japan, where protective netting is more common.<sup>166</sup> Japanese baseball leagues use expanded netting extending beyond both dugouts and around the field.<sup>167</sup> But Major League Baseball owners in each of the last two labor negotiations (2007 and 2012) rejected proposals by the players to extend the netting down the foul lines, citing concerns that additional screens would detract from the experience of ticket buyers in certain premium seats.<sup>168</sup> Baseball's current collec-

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<sup>160</sup> *Id.* at 5.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 15.

<sup>164</sup> *Id.* at 43.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 34.

<sup>167</sup> Dave Hueston, *Japanese baseball taking cover after foul-ball decision*, THE JAPAN TIMES, Apr. 5, 2015, <http://www.japantimes.co.jp/sports/2015/04/05/baseball/japanese-baseball/japanese-baseball-taking-cover-foul-ball-decision/#.Vm88LxorJPM>.

(Many stadiums have netting that reach all the way to the foul poles. During the game, attendants blow whistles when foul balls are headed for the seats and the fans sitting in the "Excite Seats" that protrude into foul territory are provided with helmets.).

<sup>168</sup> Ken Rosenthal, *MLB players: Broken-bat injury could have been prevented*, FOX SPORTS, June 7, 2015, <http://www.foxsports.com/mlb/story/boston-red-sox-fenway-park-mlb-broken-bat-injured-fan-safety-netting-060715>.

tive bargaining agreement is set to expire on December 1, 2016, and the netting may be a topic of discussion again<sup>169</sup>

### VIII. A CALL FOR EXPANDED PROTECTED NETTING

After continuing to face increasing calls for improved fan safety and the class-action lawsuit, on December 9, 2015 MLB announced recommendations to extend ballpark stadium netting from dugout to dugout at all ballparks while also improving the education and safety information disseminated to all fans.<sup>170</sup> The guidelines were announced at the winter meetings following a season in which several fans were injured by foul balls.<sup>171</sup> The MLB recommendation is for teams to have protective netting between the dugouts for any field-level seats within 70 feet of home plate.<sup>172</sup>

This decision followed a months' long study of foul ball scatter charts in which the location of each foul ball that entered the stands was plotted and a determination was made of whether any fan was struck or injured by the ball.<sup>173</sup> The study also focused on radar technology that monitored the exit velocity and destination of foul balls.<sup>174</sup> In today's game there are an increasing number of pitchers who throw in the mid- to upper-90s (miles per hour), which can further increase batted-ball speed.<sup>175</sup> With ballpark construction creating a more intimate fan setting, the odds seem to be increasing that fans will be imperiled by foul balls or broken bats.<sup>176</sup>

In a statement regarding the new guidelines, Commissioner Rob Manfred said that MLB takes great pride in making sure that fans have close proximity and access to the players and baseball game taking place on the field.<sup>177</sup> He did add, however, "it is important that fans have the option to sit behind protective netting or in other areas of the ballpark where foul balls and bats are less likely to enter."<sup>178</sup> MLB's guidelines regarding the

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<sup>169</sup> *Id.*

<sup>170</sup> Paul Hagen, *MLB recommends netting between dugouts*, MLB.COM, Dec. 9, 2015, <http://m.mlb.com/news/article/159233076/mlb-issues-recommendations-on-netting>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Joe Lemire, *Lawsuit, calls for safety left MLB no choice but to act on stadium netting*, USA TODAY, Dec. 10, 2015, <http://www.usatoday.com/story/sports/mlb/2015/12/09/mlb-safety-protective-nets-70-feet/77056514/>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See Hagen, *supra* note 170.

<sup>178</sup> *Id.*

expansion of protective netting “attempt[ ] to balance the need for an adequate number of seating options with [its] desire to preserve the interactive pregame and in-game fan experience that often centers around the dugouts, where fans can catch foul balls, see their favorite players up close and, if they are lucky, catch a tossed ball or other souvenir.”<sup>179</sup>

Part of the recommendation by MLB calls for notification at the time of purchase about whether the seats are behind the netting and for a campaign to heighten awareness of the potential dangers if fans choose not to sit behind the protective netting.<sup>180</sup> MLB said it will work with teams and ticket sellers to identify which seats are behind netting.<sup>181</sup> The plan is that by 2017 the actual tickets will, ideally, indicate whether the seat is behind protection.<sup>182</sup>

For many teams, the safety enhancements will be relatively inexpensive—especially when weighed against the moral obligation team ownership might feel—and can be done in a relatively short amount of time without any massive overhaul. The relevant recommendations also apply to spring training ballparks where the plate and field of play is so much closer to the stands.<sup>183</sup>

Some clubs like the Boston Red Sox immediately promised to comply with the voluntary directive.<sup>184</sup> Most, if not all, teams are expected to join in before opening day.<sup>185</sup> The Philadelphia Phillies already announced that they are taking up the recommendation and will extend their nets roughly ten feet each way from where they were last year, while also using newer netting that is more easily seen through in the hopes of combating fan claims that additional netting would obscure their view.<sup>186</sup> Other clubs, like the New York Mets, the Pittsburgh Pirates and the Minnesota Twins, already have netting down the first- and third-base lines.<sup>187</sup> The Cincinnati Reds, Toronto Blue Jays, Washington Nationals and Houston Astros have also said that their stadiums are already in compliance with the new recommendations.<sup>188</sup>

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<sup>179</sup> *Id.*

<sup>180</sup> David Waldstein, *Fan Injuries Spur M.L.B. to Call for Netting at Stadiums*, N.Y. TIMES, Dec. 9, 2015, <http://www.nytimes.com/2015/12/10/sports/baseball/fan-injuries-spur-league-to-call-for-netting-at-stadiums.html>.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See Hagen, *supra* note 170.

<sup>184</sup> Waldstein, *supra* note 180.

<sup>185</sup> *Id.*

<sup>186</sup> Hagen, *supra* note 170.

<sup>187</sup> Waldstein, *supra* note 180.

<sup>188</sup> Lemire, *supra* note 173.

MLB's chief legal officer, Dan Halem, said that regarding the material for the netting, "[t]he goal is to enhance safety while continuing to provide that up-close experience to the game and the players that fans enjoy at baseball games."<sup>189</sup> However, there is still the potential that some seating would remain vulnerable to high-speed projectiles.<sup>190</sup> Halem said teams could combat this issue and elect to extend their netting farther down the lines than MLB's recommendation, which only calls for the protective netting to extend from the existing screen behind home plate to the closest edge of each dugout.<sup>191</sup> MLB officials hired a consulting firm to work with teams and help them install the netting.<sup>192</sup> The architecture of the thirty parks varies enough that individualized plans are necessary.<sup>193</sup> The hope is to keep the netting as unobtrusive as possible while providing maximum protection.

## IX. CONCLUSION

As the great American pastime, baseball is among the last affordable forms of family entertainment, especially as ticket prices in other sports rapidly increase. This is one of the reasons why it is so important to protect the fans: they want to get close to the action, to be able to hear the players and the crack of the bat. However, parents will not take their young children to a game if they feel as though the environment is unsafe. It took the 2002 death of thirteen-year-old girl from an errant hockey puck that flew over safety glass for the NHL to update its netting regulations. Today, this netting has become accepted as just another part of the game. It is unacceptable to wait for a similar incident to happen in a MLB stadium.

MLB's recent guidelines regarding increased protective netting are a step in the right direction for a sport that has focused a great deal on player safety. However, perhaps the league has been too focused on the bottom line from ticket sales instead of the safety of its fans. No matter how MLB decides to improve the situation, it is still unlikely that there will be a day where nets extend all the way around the outfield and block home run balls from reaching the seats. Thus, there is always going to be a certain amount of risk involved in attending a baseball game. The hope is for a reasonable accommodation in which attending fans are protected without having that safety netting become an impenetrable wall that separates fans from the players they have paid to see.

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<sup>189</sup> Waldstein, *supra* note 180.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Lemire, *supra* note 173.

<sup>193</sup> *Id.*

For decades, court opinions reasoned that anyone who attends a baseball game would be held to appreciate the nature of the dangers involved.<sup>194</sup> Employing the defense known as “assumption of risk,” courts stated that patrons subjectively know that balls and bats fly into the stands and can cause grievous injury.<sup>195</sup> As the doctrine of assumption of risk has fallen out of favor, courts refocused their attention on whether a stadium has breached “a duty” to the fallen spectator.<sup>196</sup> We owe to each other a duty of “ordinary care,” and, if we fail to meet that standard (and as a result cause injury to another), our negligence is actionable.<sup>197</sup>

The common theme among contemporary cases modifying the traditional Baseball Rule is that spectators injured by baseballs are generally allowed to advance their claim when the injury is the result of some circumstance, design, or conduct neither necessary nor inherent in the game. As the majority of courts shift the Baseball Rule to this modern standard where courts must measure what is necessary or inherent to a game, it would appear that defendants might conceivably argue that flying hot dogs and t-shirts are inherent parts of the game. Yet an argument can be made that all spectators are made aware of these promotions and that such mascot actions are routine in all sports in all stadiums.

Ideally there would be a solution that balances the interests of fans who want protected seating and those who want to be close enough to the field to be able to lean in and catch foul balls and to watch a game without the obstruction of a protective net. This decision has possible ramifications not only for MLB as a whole, but also more pressingly for the Atlanta Braves. Depending on how the Georgia Supreme Court decides on the applicability of the Baseball Rule in M.F.’s case, the Braves’ new home may be impacted. As it currently stands, the Braves plan to open a new ballpark in Cobb County in 2017.<sup>198</sup> If the court adopts the Baseball Rule, the case may affect whether the team adds new protective netting, as recommended by MLB, as well as whether the Braves give consideration to which areas of the ballpark are most dangerous for spectators. The recent MLB guidelines are a step in the right direction towards standardized rules to regulate the implementa-

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<sup>194</sup> See *Blakeley v. White Star Line*, 154 Mich. 635 (1908) (holding that visitors of a baseball stadium assume the risk of injury because of the nature of the game).

<sup>195</sup> See *Abrams*, *supra* note 150.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Mike Tierney, *Braves Begin Work on Stadium Outside Downtown Atlanta, to Mixed Reaction*, N.Y. TIMES, Sept. 16, 2014, [http://www.nytimes.com/2014/09/17/sports/baseball/braves-begin-work-on-stadium-outside-downtown-atlanta-to-mixed-reaction.html?referrer=&\\_r=0](http://www.nytimes.com/2014/09/17/sports/baseball/braves-begin-work-on-stadium-outside-downtown-atlanta-to-mixed-reaction.html?referrer=&_r=0).

tion of extended safety nets and other safety mechanisms at all MLB ballparks. Atlanta's initial plans for its new ballpark show a 41,500-seat facility that places a higher percentage of seats closer to the field than any other ballpark in MLB.<sup>199</sup> Only time will tell if the Atlanta Braves are forced to "step up to the plate" and reconsider their protective safety measures.

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<sup>199</sup> *Id.*

