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LITIGATION SERVICES – SPORTS LAW
ALERT

AUGUST
2013

Texas Plaintiff Takes Another Swing at the "Baseball Rule"

By Matthew J. Kelly Jr. and Samuel W. Silver

For many, excitement at the ballpark includes the possibility, however remote, of a batted ball heading into the awaiting throngs in the stands. Because this is considered an ordinary part of the game that fans expect, if not embrace, the "baseball rule" of limited liability has protected stadium owners and operators for decades, making it all but impossible for a fan to recover when struck by a batted ball. Plaintiff Shirley Martinez is down to her last strike in her effort to change the rules of the game, having recently filed a petition for rehearing before the Texas Supreme Court.

According to papers filed in *Martinez v. Houston McLane Co., LLC*, on September 7, 2009, Ms. Martinez attended a Houston Astros baseball game with a large group of Texas National Guard members and families. Upon request, the Astros had donated a large block of tickets to the group. The seats were in the right field bleachers in fair territory. Ms. Martinez arrived during batting practice. She escorted four children as well as a baby in a stroller. When they arrived at their section, an Astros usher informed Ms. Martinez that she would have to store her stroller in another section of the ballpark. Ms. Martinez left the stroller at the top of the stairs while she took the children down to their seats. She then left all but the baby with other adults in the group, and started up the stairs, holding the baby, to move the stroller.

While walking up the stairs, Ms. Martinez heard someone yell a warning that a fly ball was headed her way. She shielded the baby, but the ball struck Martinez in the face. The injuries proved so severe that she lost her eye. Ms. Martinez and her husband filed suit in Texas State Court, asserting claims of negligence and premises liability against the Houston McLane Company, LLC, d/b/a Houston Astros Baseball Club.

The Baseball Rule

Standing in Ms. Martinez's way is the limited duty rule protecting defendants like the Astros: the "Baseball Rule." In Texas and most other jurisdictions, a stadium owner or operator — including towns, schools, or any entity that operates a ballpark — owes only a limited duty to spectators to protect them from baseballs hit into the stands. If the stadium owner provides "adequately screened seats for all those who wish to sit behind a screen," then it is immune from most claims from fans hit by balls. A form of this rule is in place in the vast majority of jurisdictions, with courts looking to the adequacy of the screening or other protection in the most dangerous areas of the stadium, but holding in essence no duty to spectators elsewhere. For example, New York and New Jersey have broad no-duty applications to fans: So long as there is a sufficient screen behind home plate, the stadium has no duty to fans elsewhere in the stadium, including areas outside the stands.

The Martinez Appeal

For Ms. Martinez, Texas's application of the baseball rule resulted in summary judgment against her in the lower court, which was affirmed at the first level of appeal. Ms. Martinez petitioned the Supreme Court of Texas to review the case. It declined, and she has now asked for a rehearing by that Court. She argues three grounds why her case should be reheard.[1]

First, Ms. Martinez argues that the Astros distracted her, via the usher calling upon her to walk back up the stairs. She cites a case from California where a mascot distracted a fan who was then struck by a batted ball. The Astros opposed this point below by stating that a dancing mascot presents a whole different level of distraction (a point embraced by the Appellate Court). Moving about the park, even as directed by ushers, is such a normal part of the game, the Astros argued, that it does not amount to this sort of distraction.

Next, Ms. Martinez argues that the "adequacy of the screened seats" was not properly addressed by the Astros or the Court. The Astros, however, pointed out in their opposition to Ms. Martinez's initial petition that the Appellate Court recognized that screening was not an issue in

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the case because: (1) Ms. Martinez was in the right field bleachers when she was struck; (2) the Astros submitted evidence that there were still seats available behind the home plate screen; and (3) the park offered a sizeable number of screened seats: 5,063 seats with screening out of nearly 41,000 total seats.

Finally, Ms. Martinez argues for an end to the baseball rule. Calling it "a relic," she argues that a general duty of care would be more in line with current jurisprudence. The fact-finder under a general negligence and premises liability standard would consider all the circumstances surrounding an injury at a baseball stadium, including the stadium owner's efforts to provide a reasonably safe stadium, any actions of stadium employees that contributed to the incident, warnings, and plaintiff's own comparative fault.

In opposition, the Astros have argued for history. The baseball rule arose, they contend, out of a history of courts balancing the desire to have games be public affairs, against the risks involved in witnessing a game involving projectiles. Important in this balance is the fan's willingness to be *involved* with the game — the fan's desire for the chance to physically be in contact with a foul ball or home run.

Rehearings are very rarely granted by the Texas Supreme Court. Thus, it likely will decline again to review Ms. Martinez's claims. But if it does take the case, the resulting decision could dramatically alter the landscape of liability for stadium owners and operators, and the experience of fans, at ballparks in Texas and beyond. ◆

1. Plaintiff's petition (submitted April 24, 2013), the Astros' opposition (submitted May 23, 2013), and Plaintiff's motion for rehearing (submitted August 14, 2013) are available at http://www.search.txcourts.gov/Case.aspx?cn=13-0297.

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