--- A.2d ----, 2005 WL 3118015 (Pa.Super.), 2005 PA Super 396
Superior Court of Pennsylvania.
Jeremy LOUGHRAN, Appellant
v.
THE PHILLIES AND MARLON BYRD, Appellees
No. 652 EDA 2005.
Nov. 23, 2005.
Before: MUSMANNO, BENDER, and OLSZEWSKI, JJ.
OLSZEWSKI, J.
¶ 1 This is an appeal from an order granting summary judgment in favor of appellees. [FN1] Appellant claims the trial court misapplied the "no duty" rule in finding that a spectator at a major league baseball game is not owed a duty by either the team or individual player to protect against a ball thrown into the stands; and that the trial court incorrectly found that his injury was an inherent risk of attending the game. We disagree with appellant, and affirm the order of the trial court.
¶ 2 On July 5, 2003, Jeremy Loughran (appellant) attended a baseball game between the Philadelphia Phillies (Phillies) and the Florida Marlins. Appellant's Brief, at 5. At the end of the top half of the seventh inning, appellant was injured when Philadelphia centerfielder, Marlon Byrd, after catching a ball for the last out, threw the ball into the stands. *Id.* Appellant was treated twice at the Veterans Stadium Infirmary and later at St. Mary's Medical Center. *Id.* at 6. Appellant's immediate injuries included bleeding around his left eye, a concussion, facial contusions, and abrasions. [FN2] *Id.* Appellant has since been treated for severe headaches, vomiting, confusion, incoherence, hallucinations, loss of balance, head and neck pain, photophobia, eye spasms, sleep disruption, and depression. *Id.*
¶ 3 Appellant filed the current negligence action against Byrd and the Phillies on March 8, 2004 and on March 8, 2005, the trial court granted summary judgment in favor of appellees, holding that "the applicable law clearly states that recovery is not granted to those who voluntarily expose themselves to risks by participating in or viewing an activity." Trial Court Opinion, 5/3/2005, at 1. This timely appeal follows.
¶ 4 Our standard of review of an order granting or denying a motion for summary judgment is well established:

> We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered. Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion.

Sackett v. Nationwide Mut. Ins. Co., 880 A.2d 1243 (Pa.Super.2005).
¶ 5 On appeal, appellant lists five separate "questions involved." *See* Appellant's Brief, at 4. For purposes of our review, however, they can be combined into one issue: whether the trial court's application of the "no duty" rule to this case was proper. [FN3]
¶ 6 We must first note that appellant's claim was brought under a negligence theory. It is axiomatic to say that in order to succeed on a negligence claim, the four basic elements of duty, breach, causation, and damages must be established. Appellees moved for summary judgment on the grounds that "as a matter of law, [appellees] did not owe a duty to [appellant] to protect him from the risk of being struck by a thrown baseball while sitting in the stands, [and that] [appellant] assumed the risk of being struck by a thrown ball by sitting in an area where he knew balls could be thrown." Defendant's Motion for Summary Judgment, 1/4/2005, at ¶ ¶ 22, 23 (Docket Entry 24).
¶ 7 In explaining its application of the "no duty" rule, the trial court noted that appellant failed to show that appellees "deviated from an established custom in the game of baseball" in tossing a ball to the fans, and therefore appellant could not escape its application. Trial Court Opinion, 5/3/2005, at 5. The trial court further explained that regardless of appellant's claimed ignorance as to the possibility of a ball reaching the seats via a player's throw, he still could be said to have assumed that risk because it was an inherent risk in attending a baseball game. *Id.* at 4 (citing *Schentzel v. Philadelphia National League Club*, 173 Pa.Super. 179, 96 A.2d 181 (Pa.Super.1953).
[1][2] ¶ 8 We think it necessary to first examine the nature of the "no duty" rule and specifically, its application on the baseball diamond. We have previously stated that "[t]he operator of a place of

amusement is 'not an insurer of his patrons,' and therefore, patrons will only be able to recover for injuries caused by the operator's failure to exercise 'reasonable care in the construction, maintenance, and management of the facility." ' *Romeo v. The Pittsburgh Associates*, 787 A.2d 1027 (Pa.Super.2001) (quoting *Jones v. Three Rivers Management Corp.*, 483 Pa. 75, 394 A.2d 546 (Pa.1978)). The "no duty" rule applies to bar a plaintiff's claims for injuries suffered as a result of common, frequent and expected risks inherent during the activity in question. *Jones v. Three Rivers Management Corp.*, 483 Pa. 75, 394 A.2d 546 (Pa.1978). "Only when the plaintiff introduces adequate evidence that the amusement facility in which he was injured *deviated in some relevant respect from established custom* will it be proper for an 'inherent-risk' case to go to the jury." *Id.* at 550. It can be said that the "no duty" rule has evolved into a modified version of the assumption of the risk doctrine, which has been largely abolished in Pennsylvania. *Romeo v. The Pittsburgh Associates*, 787 A.2d 1027 (Pa.Super.2001).

[3] ¶ 9 Appellant first challenges the trial court's finding that his being hit by a ball thrown by the centerfielder is an inherent risk. Appellant argues that his injuries were not the result of "a throw that could in any way be construed as a common, frequent or expected part of the game." Appellant's Brief, at 13. In support of this argument, appellant offers that "he had never seen an outfielder throw a ball into the seats; that he had never seen a player throw a ball overhand into the seats from any location on the field; and that he was completely surprised by Byrd's throw into the stands, and was not expecting an outfielder to throw a ball into the crowded outfield seats after play had ended." *Id.* at 13.

[4] ¶ 10 Appellant correctly surmises that the application of the "no duty" rule hinges on whether the activity in question is a "common, frequent, or expected part of the game." He argues that because the third out had been made, the inning was over, and therefore Byrd's throw can neither be expected, nor even part of the game. When determining what is "customary" part of the game, it is our opinion that we cannot be limited to the rigid standards of the Major League Baseball rule book; we must instead consider the actual everyday goings on that occur both on and off the baseball diamond; we must consider as "customary" those activities that although not specifically sanctioned by baseball authorities, have become as integral a part of attending a game as hot dogs, cracker jack, and seventh inning stretches. Fans routinely arrive early for batting practice in hopes of retrieving an errant baseball as a souvenir, and fans routinely clamor to retrieve balls landing in the stands via home runs or foul balls. Although not technically part of the game of baseball, those activities have become inextricably intertwined with a fan's baseball experience, and must be considered a customary part of the game. Similarly, both outfielders and infielders routinely toss caught balls to fans at the end of an inning.

¶ 11 We note that during the particular game in question, there were at least twenty (20) occasions of a ball entering the stands. Defendant's Motion for Summary Judgment, 1/4/2005, at ¶ 13 (Docket Entry 24). At least two of those balls were thrown to fans near appellant by players. *Id.* at ¶ ¶ 13(f), 13(i). Appellant admits to having attended numerous baseball games in the past, and to having witnessed balls tossed into the stands on previous occasions. N.T., 10/29/2004, Oral Deposition of Jeremy Loughran, at 57-60. Regardless of appellant's current contention that he did not directly see the balls thrown into the stands by the players, our courts have held that even a first-time spectator at a baseball game is imputed with the common or "neighborhood knowledge" of the risks of the game. *Schentzel v. Philadelphia National League Club*, 96 A.2d at 186.

¶ 12 Appellant also argues that if the trial court's decision stands, baseball fans could be said to have assumed the risk of injuries from "a resin bag, baseball glove, baseball bat, spiked shoe, catcher's mask, or some other object that may be intentionally thrown into the stands by a player." Appellant's Brief, at 14. We cannot agree with appellant's contention that the analysis of a spiked shoe or catcher's mask thrown into the stands would be the same as the current situation, as players are not regularly booed for failing to throw their shoes or equipment into the stands, nor are fans routinely seen clamoring or jockeying for position to retrieve a thrown shoe or mask. Likewise, as previously stated, the "no duty" rule applies only to "common, expected, and frequent" risks of the game; players do not commonly throw their spiked shoes into the stands following an out.

¶ 13 We agree with the trial court that the injuries received by appellant from actions taken by Phillies centerfielder Byrd constituted an inherent risk of the game. Countless Pennsylvania court cases have held that a spectator at a baseball game assumes the risk of being hit by batted balls, wildly thrown balls, foul balls, and in some cases bats. *See Schentzel v. Philadelphia National League Club*, 173 Pa.Super. 179, 96 A.2d 181 (Pa.Super.1953); *Ierovlino v. Pittsburgh Athletic Co.*, 212 Pa.Super. 330, 243 A.2d 490 (Pa.Super.1968). *See also, Dalton v. Jones, et al.*, 260 Ga.App. 791, 581 S.E.2d 360 (Ga.Ct.App.2003) *(holding that the doctrine of assumption of risk precluded recovery from the Atlanta Braves and their centerfielder when the centerfielder tossed a ball to fans in between innings, resulting in a permanent eye injury to a spectator). Even a casual baseball spectator would concede it was not*

uncommon for a player to toss a memento from the game to nearby fans. While appellant makes much of the manner in which the ball was thrown, [FN4] and warns of the slippery slope the trial court's decision could result in, he fails to establish that Byrd or the Phillies deviated from the common and expected practices of the game of baseball or acted in a manner which would take them out of the purview of the "no duty" rule.

¶ 14 Because we find that the trial court did not err in applying the "no duty" rule to the case at bar, we must affirm its grant of summary judgment.

¶ 15 Order AFFIRMED