IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TIFFANI WILLIAMS, a married woman,	)	**No. 28982-6-III**
Appellant,	)	
v.	)	**Division Three**
RICHLAND SCHOOL DISTRICT #400,	)	
Respondent and Cross-Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Tiffani Williams appeals the dismissal on summary judgment of her negligence claim arguing that she did not assume the risk of injury from a foul ball. The Richland School District (District) cross-appeals the denial of its motion to dismiss.[1] We agree with the trial court and affirm.

FACTS

Ms. Williams attended her daughter's softball game at Enterprise Middle School in

[1] In light of our disposition of the appeal, we do not reach the cross-appeal and forgo discussion of the procedural facts relating to this claim.

West Richland, Washington, on April 12, 2006. Enterprise Middle School is operated by the District. Ms. Williams arrived at the game during the first inning while the teams were playing. When she arrived, the screened seating area behind the backstop was occupied by the softball players. There were no physical seats behind the backstop.

Ms. Williams proceeded to sit between third base and home plate behind the foul line. While assisting her children in setting up lawn chairs, a line drive foul ball struck Ms. Williams in the mouth. The foul ball resulted in injury to her mouth, lips and jaw. She did not see the ball coming.

Ms. Williams had attended numerous other baseball and softball games including professional and minor-league baseball games. This was Ms. Williams' first time attending a softball game at Enterprise Middle School. She stated she knew that foul balls might go into the stands and that a spectator could get hit by a foul ball. While she had seen foul balls go into the stands she had never seen a spectator get hit.

Shortly before the statute of limitations expired, Ms. Williams filed a complaint on April 6, 2009, in Benton County Superior Court alleging that the District negligently failed to provide a safe spectator area. The District filed a motion for summary judgment. The District argued that Ms. Williams had assumed the risk of injury and it was therefore absolved from liability. Ms. Williams responded that her claim was not barred by the

doctrine of implied assumption of risk. She did not allege that the District had failed to affirmatively plead the assumption of risk defense.

The trial court granted the District's summary judgment motion. At the hearing, the trial court relied on a case neither party had discussed. The trial court advised Ms. Williams she could file a motion for reconsideration. Ms. Williams submitted supplemental briefing, which the trial court treated as a motion for reconsideration. Ms. Williams argued for the first time that the District had not timely asserted the defense of assumption of risk. The trial court denied Ms. Williams' motion for reconsideration.

Ms. Williams timely appeals the order granting summary judgment.

ANALYSIS

Ms. Williams first argues that the District waived its ability to assert the defense of assumption of risk because that defense was not timely pleaded in an answer. She also argues that she did not assume the risk of injury.

Waiver of Affirmative Defense. CR 8(c) lists certain defenses which must be pleaded affirmatively, including assumption of risk. "Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties." *Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000), *review denied*, 142 Wn.2d 1019 (2001).

"However, in light of the rule's policy to avoid surprise, affirmative pleading sometimes is not required." *Henderson v. Tyrrell*, 80 Wn. App. 592, 624, 910 P.2d 522 (1996).

"Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless." *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975). Also, when there is written argument to the court without objection on the legal issues raised in connection with the defense, objection to a failure to comply with CR 8(c) is waived. *Id.*

The District did not assert the defense in an answer or in a motion to dismiss. However, Ms. Williams impliedly consented to trying the defense. She addressed the merits of the defense in her summary judgment response and made no objection to the assertion of the defense. It was not until after the summary judgment hearing that she objected to the defense. At that point it was too late to raise the objection.

The noncompliance was also harmless to Ms. Williams. She did not request a continuance to conduct discovery relating to the defense. Nothing in the record indicates Ms. Williams had difficulties preparing a response to the merits of the defense. The District did not waive its affirmative defense.

Summary Judgment. This court reviews summary judgments de novo, performing the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d

1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.*

The moving party bears the initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish there is a genuine issue for the trier of fact. *Id.* at 225-226. "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). A party may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.*

The doctrine of assumption of risk is composed of four categories: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 496, 834 P.2d 6 (1992). Implied primary assumption of risk arises "where a plaintiff has impliedly consented . . . to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks." *Id.* at 497. The focus is on

the scope of the assumption, i.e., what risks were assumed. *Id.* Under implied primary assumption of risk the defendant must show that the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk. *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 454, 746 P.2d 285 (1987).

Generally, implied primary assumption of risk is a complete bar to a plaintiff's recovery. *Lascheid v. City of Kennewick*, 137 Wn. App. 633, 641, 154 P.3d 307 (2007), *review denied*, 164 Wn.2d 1037 (2008). However, to the extent injury results from plaintiff's implied primary assumption of risk and defendant's negligence, implied primary assumption of risk does not serve as a complete bar to recovery. *See Kirk*, 109 Wn.2d at 454-455.

A baseball field proprietor has a duty to screen some seats but does not have a duty to screen all seats. *Leek v. Tacoma Baseball Club*, 38 Wn.2d 362, 364, 229 P.2d 329 (1951); *Taylor v. Baseball Club of Seattle, L.P.*, 132 Wn. App. 32, 37, 130 P.3d 835 (2006), *review denied*, 158 Wn.2d 1026 (2007). Generally, screening the seats behind home plate is sufficient. *See Kavafian v. Seattle Baseball Club Ass'n*, 105 Wash. 215, 220, 181 P. 679 (1919); *Leek*, 38 Wn.2d at 367. If a spectator sits in an unscreened area at a baseball game, the spectator assumes the risk of being struck by a baseball. *Taylor*,

132 Wn. App. at 37 (citing *Leek*, 38 Wn.2d 362).

Kavafian involves the same facts as the present case. In *Kavafian*, a spectator was denied recovery from an injury sustained by a foul ball at a baseball game because the spectator chose to sit in an unscreened area. 105 Wash. at 220. The spectator was conscious of the fact that foul balls were hit often and of the fact that there was no protection between him and the field. *Id.* at 220. Although the spectator could have taken a seat in the screened area, "he chose to sit elsewhere and substitute for that safety the compensating facility of vision." *Id.* Having "full knowledge of the risk of injury" the court denied the spectator recovery for his injury. *Id.*

Taylor is also factually similar to the present case. In *Taylor*, the court upheld a summary judgment dismissal of a negligence claim on assumption of risk. 132 Wn. App. at 34. A spectator was hit by an errant toss into the stands during warm-up before a Seattle Mariners' game at Safeco Field. *Id.* at 34-35. The spectator had watched Mariners' games on TV, knew the ball could leave the field during a game and at her son's baseball games had seen balls enter into the stands. *Id.* at 35. The court held that the spectator assumed the risk of a ball entering the stands because the risk of injury was foreseeable given her knowledge of baseball. *Id.* at 40-41.

Ms. Williams asks us to consider *Barnecut v. Seattle School District No. 1*, 63

Wn.2d 905, 389 P.2d 904 (1964), as dispositive in this matter. However, *Barnecut* is inapplicable because it did not present an assumption of risk issue.

Ms. Williams contends there is a genuine issue as to whether the District fulfilled its duty to provide screened seating. It is undisputed that the backstop area was screened and occupied by the softball players during the game. Although the backstop area did not provide an adequate view, the District only had a duty to provide some screened seating, which it did. The District did not fail to fulfill its duty merely because the screened area seating was taken.

Regarding assumption of risk, Ms. Williams had a full subjective understanding of the presence and nature of the risk of being hit by a foul ball. Ms. Williams stated that she knew foul balls could enter the spectator area and at prior games had seen foul balls go into the spectator area. She also stated she knew that a spectator could get hit by a foul ball.

Ms. Williams contends there is a factual dispute as to her knowledge of the risk. She directs us to a declaration she submitted stating that she was not aware of the risk. This conclusory allegation does not put forth evidence showing the existence of a triable issue. *Seven Gables*, 106 Wn.2d at 13.

Ms. Williams distinguishes *Taylor* on the ground that the spectator in *Taylor* was

familiar with Safeco Field while she was not familiar with the field at Enterprise Middle School. Her familiarity with a specific field does not affect her knowledge about the risk of foul balls at all fields. She had been to other baseball games and seen balls enter into the stands. Ms. Williams had a full subjective understanding of the presence and nature of the risk of being hit by a foul ball.

Ms. Williams also voluntarily chose to encounter the risk because she sat in an unscreened area of the field. She argues that because she arrived at the softball game as it was underway she had little time to consider her safety options and therefore did not voluntarily assume any risk. However, despite her knowledge that foul balls enter the stands during the game, she chose to take her seat while the game was being played. Ms. Williams then chose to gain a better view of the field by sitting in an unscreened area.

Ms. Williams alleges there is a genuine issue as to her exact location at the softball game. For our purposes, the undisputed fact that she sat in an unscreened seating area along the third base line is sufficient. Her exact location is not material to determining whether she voluntarily assumed the risk of injury.

CONCLUSION

The trial court properly granted summary judgment in favor of the District. We need not reach the issues presented in the District's cross-appeal. The judgment is

affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington

Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, A.C.J.

WE CONCUR:

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Brown, J.

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Siddoway, J.