

NO. 62506-3-1

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 17 PM 4:11

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

TINA ARMSTRONG,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

Catherine Hendricks
Senior Counsel
WSBA No. 16311
800 5th Avenue, Suite 2100
Seattle, WA 98164-3188
206-464-7352

ORIGINAL

TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUE1

II. COUNTERSTATEMENT OF THE CASE1

 A. Counterstatement Of Facts.....1

 B. Procedural Posture7

III. ARGUMENT7

 A. Standard Of Review7

 B. Implied Primary Assumption Of The Risk8

 C. Ms. Armstrong Assumed The Risks Inherent In Playing
 Volleyball.....10

 1. The Relevant Risk In This Case Is The Risk Of
 Tripping And Falling While Playing Volleyball.10

 2. Ms. Armstrong Impliedly Assumed The Risk Of
 Tripping And Falling While Playing Volleyball12

 D. Ms. Armstrong Knowingly And Voluntarily Encountered
 The Risk Of Falling On The Volleyball Court When She
 Played With Improperly Fitted Shoes.....14

 E. In The Alternative, Ms. Armstrong Assumed The General
 Risk Of Tripping From Wearing Over-Sized Shoes.....16

 F. Washington Law Allows Complete Denial Of Recovery
 When There Has Been An Implied Primary Assumption
 Of A Risk Even When The Defendant Was Negligent In
 Creating That Risk19

IV. CONCLUSION20

TABLE OF AUTHORITIES

Cases

Erie v. White,
92 Wn. App. 297, 966 P.2d 342 (1998)..... 9, 13, 14, 15

Fawn Lake Maintenance Commission v. Abers,
149 Wn. App. 318, 202 P.3d 1019 (2009)..... 8

Kirk v. Washington State Univ.,
109 Wn.2d 448, 746 P.2d 285 (1987)..... 19, 20

Mudarri v. State,
147 Wn. App. 590, 196 P.3d 153, 160 (2008)..... 8

Ridge v. Kladnick,
42 Wn. App. 785, 713 P.2d 1131 (1986)..... 10, 12

Scott v. Harris,
550 US 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)..... 11, 12

Scott v. Pac. W. Mountain Resort,
119 Wn.2d 484, 834 P.2d 6 (1992)..... 10, 12, 20

Rules

CR 56(c)..... 8, 17

WPI 13.03 9

Treatises

Restatement (Second) of Torts §496 C (1965)..... 20

Restatement (Second) of Torts §496 C cmt. f (1965)..... 20

I. COUNTERSTATEMENT OF THE ISSUE

Did the appellant Tina Armstrong, an experienced volleyball player, impliedly assume the risk of injury when she voluntarily played volleyball while wearing shoes that she knew did not properly fit and could cause her to trip?

II. COUNTERSTATEMENT OF THE CASE

A. Counterstatement Of Facts

On November 5, 2003, Tina Armstrong was arrested for buying crack cocaine from an undercover officer. CP at 57. On February 26, 2004, the court committed Armstrong to the Washington Corrections Center for Women (“WCCW”). CP at 25. During her time in the county jail and before her commission to WCCW, she gained 20 pounds. CP at 13. Ms. Armstrong was 5’ 9” tall, weighed 187 pounds, and was 33 years old at the time of her commitment. CP at 14.

On her commission to the WCCW, Ms. Armstrong arrived at the WCCW “Intake” where offenders are initially issued state clothing. CP at 35. During her trip from the county jail to Intake, Department of Corrections (“DOC”) personnel would have asked her clothing and shoe sizes and called that information ahead to Intake where they meet requests from the stock on hand. CP at 34-35. On the day Armstrong was

processed at Intake, she was issued a size 10 shoe; the facility had both size 8 ½ and size 9 shoes available had she requested either of those sizes. CP at 31, 35. When offenders arrive at Intake, they are searched by DOC personnel after which offenders take a shower and then try on their issued clothing. CP at 35. DOC personnel would have asked Ms. Armstrong if any of the clothing did not fit properly and would have issued her different-sized shoes or clothing had she so requested. CP at 35. At Intake, Ms. Armstrong did not request new shoes nor did she make any complaint, although she subsequently testified that she knew her shoes were too large and that they caused her feet to slide forward at the time she received them. CP at 63.

Ms. Armstrong was then transferred to “Reception” where she stayed for a few weeks before she was transferred to the main prison facility. CP at 60. During her time in Reception, Armstrong states that she continued to be bothered by her feet sliding forward in her shoes. CP at 63. Had Ms. Armstrong completed a clothing replacement request for a different size shoe while in Reception, the warehouse would have issued her the size she requested on the same day. CP at 35. Throughout her entire time in Reception, both size 8 ½ and size 9 shoes were available. *Id.*

Ms. Armstrong was transferred from Reception into the main WCCW facility and then into the closed custody unit (“CCU”) within a day of arriving at the main facility. CP at 60. She received her intake physical exam on March 2, 2004. CP at 14.

Ms. Armstrong had played on volleyball teams throughout high school, college, and after college on a community team, and she began playing volleyball during her first week at the WCCW facility. CP at 60. A medical examination from March 10, 2004 confirms that Armstrong had played volleyball at least one time between March 2 and March 10, 2004. CP at 21. From her long experience playing volleyball, Ms. Armstrong knew the risks of playing the sport. CP at 52. She also knew that it was important to have correctly fitted shoes while playing volleyball. CP at 64. She states that she knew, while she was playing volleyball, that her shoes did not fit, that they would cause her feet to slide forward and that “my shoes would slosh.” CP at 64. Armstrong’s volleyball playing at WCCW was completely voluntary. In her own words, “Nobody tells me to play volleyball.” CP at 62.

Once out of Reception, Ms. Armstrong was still able to obtain different-sized shoes, but she had to make a written request to the warehouse requesting the change. CP at 43-44. After a written request, DOC needed two weeks to process and deliver new shoes. CP at 43-44.

Ms. Armstrong testified that she asked for shoes in a letter to her mother after she had left Reception, but that the shoes had not arrived by the time of her accident.¹ CP at 60, 61, 65.

Ms. Armstrong claims to have “put in for a state issue clothing request on March 15, 2004 while being housed at CCU East POD,” but this request appears to have been made orally. CP at 31. Ms. Armstrong states that, on the day she made the request, officers responded by telling her “to do a clothing request” and that it would take “2-3 weeks” to get different-sized shoes. CP at 31. Armstrong testified that multiple DOC officers explained to her on different occasions that she must fill out a clothing request form in order to receive different-sized shoes. CP at 62. The warehouse had no record of Armstrong filing a clothing-exchange form at any time in February or March of 2004. CP at 44.

The accident at issue in this case occurred on March 21, 2004, in the WCCW gym. CP17. The contemporaneous reports describing how the accident occurred are consistent:

A medical note dated March 21, 2004 entitled “Med response to the gym,” quotes Ms. Armstrong stating how the accident happened: “It hurts – I jump up + twisted my knee + came [down] on my hand.” CP at 17.

¹ Ms. Armstrong received a pair of size 9 shoes in the mail from her mother on April 4, 2004. CP 25, 33.

An incident report also dated March 21, 2004 states that Armstrong “was playing volleyball in the gym at 1820” and that another inmate reported that Armstrong had “fallen on her right arm while trying to back up and hit the volleyball.” CP at 29.

A physical examination medical history dated March 22, 2004, states “Pt. was playing volleyball on 3-21-04 took a few steps backwards, twisted her L knee + fell down breaking her R arm.” CP at 23.

An April 14, 2004 diagnostic imaging report describes the likely etiology of Ms. Armstrong’s knee injury, a torn anterior cruciate ligament, as “a pivot-shift injury.” CP at 19.

Two weeks after the accident, on April 3, 2004, Ms. Armstrong sent an Offender Complaint to the Grievance Coordinator that contains the first written statement attributing the accident to oversized shoes. CP at 65. Her Offender Complaint states:

I want to grieve: WCCW Clothing Request.

. . . On Sunday the 21st of March, I had an accident in the gym while playing volleyball. I believe the shoes I wore were a contributing factor to my accident. Since then I am still wearing the same shoes (not walking mind you) but I have asked again for a smaller pair of shoes. I was brought a size 7 but those were too small. As of today, April 3, 2004 I am still wearing the same size 10 shoes.

Please allow me to have my shoes from my quarterly package and or give me a pair 8 ½ to 9 shoes please. Thank you.

CP at 31.

When the grievance coordinator received Armstrong's complaint on April 5, 2004, DOC issued her a pair of size 8 ½ shoes that same day.

CP at 31.

In her January 31, 2008 deposition, Ms. Armstrong described the March 21, 2004, accident much differently:

A: The bell had rang. I had bent down to pick the ball up and carry it to put it away because it was time to go. And when I did that, I picked up the ball and I commenced to walking. And I fell, and I tried to catch my fall, and that's when I fell on the other – on my right arm.

Q: Now how did you come to fall?

A: To the best of my recollection, you don't think about it when you walk, you just walk, okay, but I could feel my foot kind of skip towards – like it was coming out of that shoe, out of the left shoe, and the right foot kind of stepped on that shoe, the foot's going, the shoe was staying. And I must have just like stepped on that left shoe and it – as I felt myself going down, I tried to catch my fall and I fell on my hand.

CP at 60.²

² In *Scott v. Harris*, 550 US 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), the United States Supreme Court wrote, "when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." All favorable inferences are to be made in ruling on a motion for summary judgment only "*to the extent supportable by the record.*"

Ms. Armstrong's opening brief relies upon her 2008 deposition testimony in describing the accident as having occurred as she was leaving the volleyball court; her brief is otherwise unsupported by the factual record. Br. of App., p. 4.

B. Procedural Posture

Tina Armstrong filed a complaint with the King County Superior Court on March 8, 2007, requesting damages from her accident on March 21, 2004. CP at 73. Ms. Armstrong's complaint alleged that WCCW employees were negligent in failing to replace Armstrong's shoes and that the oversized shoes issued by WCCW were a proximate cause of her injuries. CP at 74.

DOC filed for summary judgment and argued that Ms. Armstrong assumed the risk of falling while playing volleyball and of tripping and falling while playing volleyball before her shoes were replaced. CP at 83-86. On September 17, 2008, the trial court granted DOC's motion for summary judgment and dismissed all claims against DOC. Ms. Armstrong appeals the trial court's summary dismissal of her claims.

III. ARGUMENT

A. Standard Of Review

Summary judgment is appropriate if the moving party can show that "there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law.” CR 56(c). On appeal, this court should “engage in the same inquiry as the trial court” and review the motion for summary judgment de novo. *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153, 160 (2008). All reasonable inferences and facts should be considered in the light most favorable to the non-moving party. *Fawn Lake Maintenance Commission v. Abers*, 149 Wn. App. 318, 323, 202 P.3d 1019 (2009).

In Ms. Armstrong’s case, no facts or reasonable inferences support her negligence claim. The trial court’s award of summary judgment should be affirmed by this court.

B. Implied Primary Assumption Of The Risk

Tina Armstrong knew that tripping and falling are inherent risks of playing volleyball and that improper footwear would increase the inherent risks of the sport. She voluntarily played volleyball on the day of her accident and despite repeated instruction from WCCW personnel, Armstrong did not comply with the WCCW procedures for receiving replacement shoes. Under these circumstances, implied primary assumption of the risk is a defense for the State:

It is a defense to an action for [*personal injury*] that the [*person injured*] impliedly assumed a specific risk of harm.

A Person impliedly assumes a risk of harm if that person knows of the specific risks associated with [*an activity*],

understands its nature, voluntarily chooses to accept the risk by engaging in that *[activity]*, and impliedly consents to relieve the defendant of the duty of care owed to the person in relation to the specific risk.

[a person's acceptance of a risk is not voluntary if that person is left with no reasonable alternative course of conduct *[to avoid the harm]* because of the defendant's negligence]

WPI 13.03

This Court has distilled the two requirements for implied primary assumption of a risk: a plaintiff must *knowingly* and *voluntarily* choose to encounter the risk. *Erie v. White*, 92 Wn. App. 297, 303, 966 P.2d 342 (1998). “Knowingly” is not an objective reasonable-person standard, as with comparative negligence, but is a subjective standard that considers whether the plaintiff “at the time of the decision *actually* and *subjectively* knew . . . all facts that a reasonable person in the plaintiff's situation would want to consider.” *Id.* at 304. Voluntarily encountering a risk “depends on whether [the plaintiff] elects to encounter it despite knowing of a reasonable alternative course of action.” *Id.*

Ms. Armstrong both knowingly and voluntarily encountered the risk that resulted in her injury and this court should affirm the trial court's summary judgment for DOC because Armstrong impliedly assumed the risk of injury. She assumed the risks of playing volleyball generally. She also assumed the risks of playing volleyball with defective equipment (her

ill-fitting shoes). Finally, Armstrong assumed the risk of tripping and falling generally while wearing shoes that were too large.

C. Ms. Armstrong Assumed The Risks Inherent In Playing Volleyball

Participants in sports or other activities assume the risks inherent in those activities. Implied primary assumption of the risk applies specifically to sports injuries:

One who participates in a sport “assumes the risks” *inherent in the sport*. To the extent that a plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is no negligence.

Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 498, 834 P.2d 6 (1992).

Implied primary assumption of the risk extends beyond strenuous or competitive sports exclusively to any sport or amusement where there is a known risk of being injured. *Ridge v. Kladnick*, 42 Wn. App. 785, 788, 713 P.2d 1131 (1986).

1. The Relevant Risk In This Case Is The Risk Of Tripping And Falling While Playing Volleyball.

The relevant risk in this case is the risk of tripping and falling inherent in playing volleyball. This accident occurred while Armstrong was on the volleyball court during her gym time. Further, the “med response to gym” from the day of the accident (CP at 17), the incident report from the day of the accident (CP at 29), the physical examination

from the day after the accident (CP at 23), and the hospital's imaging report from three weeks after the accident (CP at 19) all indicate that the injury was sustained while Ms. Armstrong was actively playing volleyball. The grievance written by Ms. Armstrong less than two weeks after her accident states that her injury occurred "while playing volleyball." CP at 31. It is only Armstrong's deposition, taken nearly four years after the accident, that suggests the accident may have occurred while Armstrong was walking off the volleyball court and not while playing with the other inmate. CP at 64.

In *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), the United States Supreme Court evaluated a plaintiff's testimony that, as in this case, differed significantly from the contemporaneous evidence in the record. In *Scott v. Harris*, the plaintiff testified that while he was being pursued by the police he had driven carefully, slowed for turns and intersections, and had even used his signals before turning. *Id.* at 379. Videotape evidence in the record, however, "tells quite a different story," and depicted the plaintiff speeding, running red lights, and driving in a way that was dangerous to others on and near the road. *Id.* at 379-80. The Court held that, under these circumstances, there were limits to the inferences that should be made in favor of the non-moving party when considering a motion for summary judgment:

When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Id. at 380. The Court also held that inferences should be made for the non-moving party only “to the extent supportable by the record.” *Id.* at 381.

In the present case, this court should apply the reasoning articulated in *Scott v. Harris*. No reasonable jury could believe the deposition testimony of a plaintiff given four years after her accident when four contemporaneous written reports—including a report of the plaintiff’s comments about the accident and another written by the plaintiff herself—directly contradict that testimony. Reasonable minds could not differ. Ms. Armstrong’s accident occurred while she was *playing* volleyball.

2. Ms. Armstrong Impliedly Assumed The Risk Of Tripping And Falling While Playing Volleyball

Here, as with skiing in *Scott v. Pac. W. Mountain Resort* and the roller-skating game in *Ridge*, there is an inherent risk of falling and injuring oneself while playing volleyball. This accident happened while Ms. Armstrong was on the volleyball court and, according to multiple written reports, while she was playing volleyball. Ms. Armstrong testified

in her deposition that she knew the risks of playing volleyball because “I’ve been playing all my life.” CP at 62.

A plaintiff’s belief that the risk of an activity will not cause injury on a particular day does not negate the subjective knowledge required for implied primary assumption of risk. In *Erie*, the plaintiff testified that he thought the equipment provided by the defendant “would be safe enough for me to just get in there and get the job done.” *Erie*, 92 Wn. App. at 301. Despite the plaintiff’s belief that the risk would not result in injury, this Court held that “reasonable minds could not differ on whether Erie knew all the facts a reasonable person would have known” and thus had the required knowledge. *Id.* at 306. Similarly, Ms. Armstrong’s statement that the particular game of volleyball that she played on the day of her accident was “not a risky kind of volleyball,” (CP at 89) does not negate the knowledge requirement of implied primary assumption of risk. She knew the risks inherent in volleyball, and her belief that she would not be injured on that particular day does not change her actual knowledge of the risk.

Ms. Armstrong also voluntarily encountered the risks of volleyball because she chose to play. In her words, “nobody tells me to play volleyball.” CP at 62. By knowingly and voluntarily encountering the

risk of falling inherent in volleyball, Ms. Armstrong assumed the risk that she might trip and injure herself.

D. Ms. Armstrong Knowingly And Voluntarily Encountered The Risk Of Falling On The Volleyball Court When She Played With Improperly Fitted Shoes

A person knowingly encounters a risk from faulty equipment if he or she recognizes the equipment as faulty and thereby knows of the risk of the equipment's potential failure. *See Erie*, 92 Wn. App. at 306. In *Erie*, White hired Erie to remove a tree from White's property, and Erie asked White to supply the tree-climbing equipment needed to finish the job. *Id.* at 300. When Erie arrived to remove the tree, he recognized that the equipment White had supplied was not proper tree-climbing equipment but instead was pole-climbing equipment that could be easily cut by an errant chainsaw because it lacked a steel-reinforced strap. *Id.* The court found that Erie knowingly encountered the risk of falling because he knew "actually and subjectively knew all of the facts . . . that the plaintiff should have known and considered in the exercise of ordinary care." *Id.* at 304.

Ms. Armstrong similarly believed that her shoes were unsafe for playing volleyball because they increased the risk of her falling while playing. Prior to her accident, Ms. Armstrong had played volleyball and was well aware that her shoes were too large, that her feet would slide in the shoe, and that "my feet should slosh." CP at 64. She also knew that it

was important to have properly fitting shoes to minimize risks while playing volleyball. *Id.* She was also specifically aware of the risk of tripping because she had actually tripped prior to her accident on the volleyball court. *Id.* She knew all of the facts that a person exercising ordinary care would need to consider. Ms. Armstrong clearly knew the risk of wearing oversized shoes when she decided to step onto the court on the day of her injury.

As explained above, primary assumption of risk also requires that the person assuming the risk of using improper equipment do so voluntarily. This Court held in *Erie* that the plaintiff had voluntarily encountered the risk of falling because he had a reasonable alternative to climbing the tree with unsafe equipment. Wn. App. at 306. It was not enough to render the plaintiff's consent involuntary that he felt pressure to complete the job with the improper equipment or that he thought he would be safe for a few hours. *Id.* This Court held that the plaintiff had reasonable alternative courses of action because he "could have gone to the rental store for the right kind of equipment . . . or simply declined to proceed." *Id.*

Ms. Armstrong had comparable options. She could have chosen to not play volleyball until she received a new pair of shoes in the mail from her mother. She could have participated in some other activity during her

gym time. She could have complied with her guards' repeated instructions to fill out a written clothing request form or she could have filed a grievance and complained that she needed new shoes. CP at 62. By not refusing to play volleyball with the oversized shoes nor exercising any of the other reasonable options available to her for obtaining a new pair of shoes, Ms. Armstrong failed to exhaust her reasonable alternatives to playing volleyball with improper equipment and therefore voluntarily encountered the risk of tripping and falling.

E. In The Alternative, Ms. Armstrong Assumed The General Risk Of Tripping From Wearing Over-Sized Shoes

Even if the risk that resulted in Ms. Armstrong's injury was the general risk of tripping while walking with over-sized shoes, as the appellant argues, and not the risk of playing volleyball with improper equipment as DOC argues, this Court should still affirm the trial court's award of judgment as a matter of law on grounds that Ms. Armstrong assumed the relevant risks.

Ms. Armstrong knew that her shoes were too large and could cause her to trip. She testified that when she received the shoes at Intake she immediately knew they were too large and that her feet would slip in the shoes. CP at 63. Before her accident, she had actually tripped while walking with the shoes although she did not fall and injure herself. *Id.*

Ms. Armstrong offers no evidence or argument that she was unaware of the risk of falling. In fact, she makes it clear that she *was* aware of the risk. Determination of whether Ms. Armstrong assumed the risk of tripping and falling generally, then, turns on whether she *voluntarily* assumed the risk of tripping on oversized shoes and falling.

As in *Erie*, Ms. Armstrong had a number of reasonable alternative courses of action that indicate she voluntarily encountered the risk of tripping and falling. The WCCW procedure for issuing shoes at Intake is to ask the offender her shoe size and to call that shoe size ahead to Intake. CP at 34-35. At Intake, DOC issues the offender the size requested so long as it is in the warehouse. CP at 35. On the day of Ms. Armstrong's arrival at Intake, there were both size 8 ½ and size 9 shoes that would have been issued to her had she requested either size. *Id.* While still at Intake, WCCW personnel ask each offender if her issued clothing fits properly and they exchange any item that the offender indicates does not properly fit. *Id.* Ms. Armstrong testified that she immediately recognized that her shoes did not fit but that she chose not to inform Intake personnel. CP at 63.

After leaving Intake, the WCCW still has procedures in place to exchange improperly fitting shoes. The offender need only submit a written request to the warehouse. CP at 35, 43-44. The warehouse

generally responds within one day if the offender is still at Reception or within two weeks if the offender has been transferred from Reception to the main WCCW facility. CP at 35, 43-44. Ms. Armstrong testified that she repeatedly asked for new shoes and that the guards repeatedly informed her that she would need to fill out a clothing request form. CP at 62. The warehouse records did not contain a clothing exchange request from Ms. Armstrong. CP at 44. Ms. Armstrong could have also filed a grievance requesting shoes, but she did not do so until after her accident. CP at 91. When she did file a DOC grievance form after her accident, the coordinator responded by issuing her new shoes the following day. *Id.*

All of the opportunities Ms. Armstrong had to replace her shoes through the WCCW procedures were reasonable alternatives to continuing to wear oversized shoes. There is no evidence or testimony that WCCW personnel ever refused to supply Ms. Armstrong with the size of shoes that she requested. The evidence only shows that WCCW personnel informed her of the procedures for obtaining the shoes she requested several times. Ms. Armstrong knowingly and voluntarily encountered the risk of tripping while wearing oversized shoes.

F. Washington Law Allows Complete Denial Of Recovery When There Has Been An Implied Primary Assumption Of A Risk Even When The Defendant Was Negligent In Creating That Risk

Ms. Armstrong argues that *Kirk v. Washington State Univ.*, 109 Wn.2d 448, 746 P.2d 285 (1987), holds that a plaintiff could not, as a matter of law, be denied all recovery when the risk resulted from negligently maintained facilities or inadequate supervision. That is not, however, an accurate conclusion to draw from the holding in *Kirk*.

The implied primary assumption of the risk defense in *Kirk* did not fail because the defendant's negligence barred that defense, but, rather, because the plaintiff *did not know* that the defendant's negligence created a risk of injury to her. *Id.* at 449-450. The relevant risks in *Kirk* were the dangers of performing a particular cheerleading lift and the dangers of practicing on Astroturf. The court explained that "the pamphlets [instructing cheerleaders on safer lifts] had not been made available to the 1978 team," and that "the cheerleaders were given no warning of the dangers of practicing on the Astroturf." *Id.* If the plaintiff does not have knowledge of the relevant specific risk then the plaintiff cannot voluntarily encounter the risk and defendants do not have a viable assumption of the risk defense.

In *Scott v. Pac. W. Mountain Resort*, the Washington Supreme Court similarly held that although the plaintiff assumed the risks inherent in skiing, he did not assume the risks of the negligently constructed racecourse on the defendant's ski slope. 119 Wn.2d at 501. Again, the plaintiff did not assume the risks resulting from the defendant's negligence because he *did not know* the risks that the negligently constructed racecourse posed to his safety.

Kirk and Scott v. Pac. W. Mountain Resort bear little resemblance to the present case on this point. In this case, even if DOC were negligent in issuing Ms. Armstrong shoes that were too large, she knowingly and voluntarily assumed the risk of wearing those shoes. There was no hidden or unknown risk. See *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d at 498. In this case, any negligence attributable to DOC is not a bar to the defense of implied primary assumption of the risk.³

IV. CONCLUSION

Ms. Armstrong was aware of the risk of falling while playing volleyball and also the risk of tripping and falling while wearing her oversized shoes. She also voluntarily encountered this risk when she did

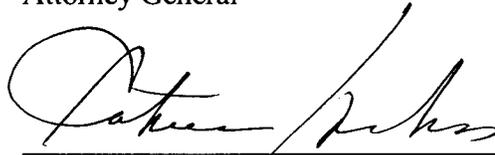
³ The comments to *Restatement (Second) of Torts* §496 C (1965) specifically discuss situations in which the defendant has been negligent in creating the risk to the plaintiff. In those cases, the plaintiff may still impliedly assume the risk (and thereby relieve the defendant of his duty of care) if “[the plaintiff] discovers the danger and voluntarily proceeds in the face of it.” *Id.* at cmt. f.

not pursue the reasonable alternative courses of action available to her: requesting new shoes at Intake, filling out a written request while at Reception or at WCCW, filing a grievance with DOC, or waiting for her mother to send new shoes. Knowing the risk of injury, she did not take the reasonable alternative course of action of refraining from playing volleyball until new shoes arrived.

Because Ms. Armstrong both knowingly and voluntarily encountered the risks of injury while playing volleyball with defective equipment, DOC requests that this Court affirm the trial court's dismissal of her case as a matter of law.

RESPECTFULLY SUBMITTED this 17th day of June, 2009.

ROBERT M. MCKENNA
Attorney General



CATHERINE HENDRICKS, WSBA #16311
Senior Counsel
Attorneys for the State of Washington

CERTIFICATE OF SERVICE

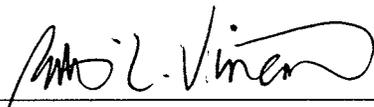
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Brief of Respondent was filed by messenger at the following address:

Court of Appeals of Washington, Division I
One Union Square
600 University Street
Seattle, WA 98101

And, that a copy of the Brief of Respondent was served on counsel for appellant, by messenger, at the following address:

Charles S. Hamilton III
1325 Fourth Avenue, Suite 940
Seattle, WA 98101-2509

DATED this 17th day of June, 2009 at Seattle, Washington.



PATTI L. VINCENT

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 17 PM 4:11