

62506-3

62506-3

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2009 JUL 29 AM 10:44

NO. 62506-3-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

TINA ARMSTRONG,
Appellant,

V.

STATE OF WASHINGTON,
Respondent.

APPELLANT'S REPLY BRIEF

Charles S. Hamilton, III, WSBA #5648
Attorney for Appellant
1325 Fourth Ave, Ste. 940
Seattle, WA 98101-2509
206-623-6619

TABLE OF CONTENTS

I. Summary of the Case. 4

II. Restatement of the Case 4

III. Argument 6

 A. The Appellant, an inmate with no option of choice of shoes assigned to her by her jailors, did not consent to assume the risks of injury from oversized shoes which she was unable to replace.6

 B. Ms. Armstrong’s injury was not caused by a risk inherent in the sport of volleyball. 8

 C. Ms. Armstrong, as a prison inmate had no reasonable alternative to wearing the oversized shoes provided her.9

V. Conclusion 10

TABLE OF AUTHORITIES

Table of Cases

Dorr v. Big Creek Wood Products, Inc., 84 Wn. App 420, 927 P.2d 1148 (1996). 6

Erie v. White, 92, Wn. App. 297, 302, 966 P.2d 342 (1998).. 6, 7, 9

Home v. North Kitsap School District, 92 Wn. App. 709, 719, 965 P. 2d 1112 (1998).. 6, 7

Kirk v. Washington State University, 109 Wn. 2d 448, 454, 455, 746 P.2d 285 (1987).. 10

La Marie v. Maass, 12 F. 3d 1444 (9th Cir. 1993)..7

Lascheid v. City of Kennewick, 137 Wn. App. 633, 154 P.3d 307 (2007) 10

Scott v. Harris, 550 US 372 (2007).. 9

Selberg v. United Pac. Ins., 45 Wn. App. 469, 726 P. 2d 468 (1988).. . . .5

Shea v. Spokane, 17 Wn. App. 236, 562 P.2d 264 (1977).. 8

SUMMARY OF THE CASE

This case addresses the question of how much, or how little, the defense of implied primary assumption of risk should apply to injuries suffered by an inmate at a correctional institution because of shoes which were issued by corrections personnel to her, which were three sizes too big for her, and which she was forced to wear because corrections personnel ignored her requests for a pair of shoes that fit her. Because the injury occurred on a prison volleyball court, the State contends that as a matter of law and application of the defense of implied primary assumption of risk, it cannot to any degree be held liable for her injuries. The appeal is of a summary judgment which adopted the State's position.

RESTATEMENT OF THE CASE

The parties agree that the injuries occurred on March 24, 2004 while Tina Armstrong was an inmate at the Women's Correctional Institution at Purdy, Washington. Although the State's brief makes no mention of the fact, at the time of her entry into that institution Ms. Armstrong was issued a pair of size 10 men's shoes. (CP. 88). It should come as no surprise that there is a difference between men's shoe sizes and women's shoe sizes. In this case, Tina Armstrong was issued a pair of shoes, men's size 10 shoes, which were three sizes too big for her. (CP. 88). There is a dispute of fact as to whether Mr. Armstrong, as indicated

by her, made repeated requests for a change of shoes. The State's response indicates that an opportunity was available to Ms. Armstrong for a shoe exchange and that there are no State records indicating that Ms. Armstrong made a written request for a change of shoes. Ms. Armstrong states that she made repeated requests for replacement shoes. (CP. 89).

At issue also is the question of how precisely Ms. Armstrong was injured and whether her past experience of playing volleyball has somehow compromised her claim in the present case. In her deposition, and in her declaration, Ms. Armstrong has sworn that at the moment of injury, she was on a Department of Corrections volleyball court but that she was not playing the sport of volleyball. (CP. 89, 60).

The State has injected several unsworn hearsay statements suggesting that at the time of injury Ms. Armstrong was playing volleyball. (Respondent's Brief, p. 4-6). At best, the State's position, based on hearsay, suggests that she was playing some kind of volleyball near the moment of her injury. Determinations of credibility in factual disputes are the responsibility of the trier of fact. Selberg v. United Pac. Ins., 45 Wn. App. 469, 726 P. 2d 468 (1988).

The State concedes that a written request for what would seem to be a simple change of shoes would take a somewhat surprising two weeks to process. (Respondent's Brief, p.3). Ms. Armstrong filed a grievance

relating to her clothing request on April 3, 2004, in which she stated that her oversized shoes, which were still her only shoes, were a “contributing factor” to her accident. (CP. 31; Respondent’s Brief, p. 5). Despite the fact that she filed a grievance less than two weeks after her injury, the State questions Ms. Armstrong’s ability to recall the mechanics of her injury during the course of her deposition. (Respondent’s Brief, p. 7).

The thrust of the State’s argument in defense against Ms. Armstrong’s claim is that Ms. Armstrong was injured while actively participating in the sport of volleyball and that she assumed all risk of injury inhering in the sport of volleyball while she was the wearing oversized shoes issued to her some three weeks previously. It is submitted that in this case, if the defense is not absorbed into comparative fault analysis, there are material issues of disputed fact, relating to the affirmative defense of implied primary assumption of risk, which must be resolved by the trier of fact.

ARGUMENT

A. The Appellant, an inmate, with no option of choice of shoes assigned to her by her jailors, did not consent to assume the risks of injury from oversized shoes which she was unable to replace.

The defense of implied primary assumption of risk appears to depend in this case upon several factual issues: that at the time of injury

Ms. Armstrong was actually playing the sport of volleyball with its inherent risks of injury; that Ms. Armstrong subjectively knew that the activity in which she was participant at the time of injury was risky; and that her jailors did not decline to provide her with shoes that fit her. Additionally, the evidence must establish that Ms. Armstrong voluntarily consented, in this case not expressly but inferentially, to relieve her jailors of their duty to provide for her health and safety by giving her shoes that fit her.

The requirement of voluntariness inheres in the underlying premise of the affirmative defense of implied primary assumption of risk, that a plaintiff must be deemed to have consented to the negation of a duty of care otherwise owed to her. Home v. North Kitsap School District, 92 Wn. App. 709, 719, 965 P.2d 1112 (1998). The issue of voluntariness is generally a jury question. Erie v. White, 92 Wn. App. 297, 303, 966 P.2d 342 (1998). The issue of consent applicable to the defense is generally a jury issue. Dorr v. Big Creek Products, 84 Wn. App. 420, 431, 927 P.2d 1148 (1996).

As the State acknowledges, key to proof of the affirmative defense of implied primary assumption of the risk is proof that a plaintiff knows of the specific risk of injury inhering in the particular activity which injured her and that she voluntarily chooses to engage that risk. Respondent's

Brief, p. 12, 13 citing Erie v. White, 92 Wn. App. 297, 966 P.2d 342 (1998). The element of knowledge is a subjective one. Home v. North Kitsap School District, 92 Wn. App 709, 718, 965 P.2d 112 (1998).

Therefore, it must be proved that at the time of her injury, however the injury occurred, Ms. Armstrong subjectively knew that what she was doing posed a risk of injury to her because of that activity. Ms. Armstrong has sworn in her declaration that what she was doing at the time of her injury was not risky. (CP. 88-89). This assertion itself should generate a material issue of fact regarding the issue of her subjective knowledge and appreciation of the risks confronting Ms. Armstrong at the time of injury.

The defense of implied primary assumption of the risk is voluntary for purposes of that defense when a plaintiff elects to “encounter it despite knowing of an alternative reasonable course of action.” (Erie, *supra* at 304, Respondent’s Brief p. 9). The State appears to ignore the facts that the determination of what shoes would be provided Ms. Armstrong and what procedures, if any, existed to enable her to replace the erroneously assigned shoes, would be the State’s. Additionally, it was the Defendant who dictated what environmental choices were available to Ms. Armstrong, the inmate, because of that hegemony, the State was required as a matter of constitutional proportions to provide the inmate with recreational or leisure opportunities. La Marie v. Maass, 12 F. 3d 1444

(9th Cir. 1993). Beyond its common law duty, the State as jailor is required constitutionally to provide inmates with recreational or leisure opportunities. *Ibid.* Ms. Armstrong was not required to forfeit her constitutional rights to some degree of exercise while she waited for a response to her request for replacement shoes.

The State's brief makes no mention of the jailor's duty to maintain the prisoner in health and safety. Shea v. Spokane, 17 Wn. App. 236, 562 P.2d 264 (1977). As was noted in Appellant's opening brief, that duty derives from the power, and duty, of the jailor to make health and safety decisions for the inmate, as well the absence of power on the part of the inmate to make alternative choices. Washington courts indicate that the jailor's duty of care owed the inmate is "non-delegable". *Shea, supra* at 242. It is submitted that inherent in that concept of non-delegability is the precept the jailor cannot delegate responsibility for an inmate's health and safety to the inmate herself. If the duty is non-delegable, the inmate should not be deemed to consent to the negation of that duty.

B. Ms. Armstrong's injury was not caused by a risk inherent in the sport of volleyball.

Despite the protests of the Defendant, courts are not at liberty to ignore what Ms. Armstrong has testified under oath to as being the manner of injury at the moment of injury. She was not playing volleyball. She

was in the process of finishing her activity on the volleyball court where she had been hitting a volleyball over a volleyball net with another inmate. (CP. 88-89; 60). Hitting a volleyball over a net with another inmate does not suggest the intensity and rigor of the competitive sport of volleyball. Hitting a ball over a net does not implicate the risk of injury which may inhere in the heat of any actual volleyball game.

The State argues that the trial court or reviewing court may not give credence to Ms. Armstrong's sworn testimony in the face of ambiguous inconsistent hearsay statements, citing as support for this position a decision regarding credibility in a United States Supreme Court case. Scott v. Harris, 550 US 372 (2007). In that case, addressing the issue of qualified immunity of a police officer in a police chase case, deposition testimony was contrasted with an actual video tape of the police chase denied as having existed by the deponent. There was no claim that the video tape was inaccurate or fabricated. The video tape showed a chase and reckless driving behavior which were beyond human contradiction. In the present case it is not clear what the State has produced, if admissible, as the description of the mechanics of Ms. Armstrong's injury; and the evidence offered as contradicting Ms. Armstrong's sworn deposition is at best hearsay, inconsistent and ambiguous. While it may be true that in some circumstances, two

opposing recitations of the same event can be presented such that it can be said as in Scott that one narrative is “blatantly contradicted by the record such that no reasonable jury could believe it”, that dramatic contrast is not presented in this case. Scott, supra at 381.

C. Ms. Armstrong, as a prison inmate, had no reasonable alternative to wearing the oversized shoes provided her.

The State argues that shoe sizes 8.5 and 9.0 were available to Ms. Armstrong when she first entered Purdy. The Court is reminded that the actual shoe given to Ms. Armstrong was a men’s size 10.0 shoe, three sizes bigger than those described by the State. The State also acknowledges that if one were to request a change of improperly fitting shoes it would take two weeks to get those shoes despite the evidence that such shoes were readily available. The State cites the case of Erie v. White, 92 Wn. App. 297, 966 P.2d 342 (1998), for the proposition that one dissatisfied with unsafe equipment provided him or her assumes the risk of injury if an alternative is available but not chosen. However, that scenario is not what exists in this case. Only one pair of shoes was assigned Ms. Armstrong; at best, a proper replacement would have taken two weeks; and Ms. Armstrong states that she made a number of requests for a change of shoes which simply were not honored. It is submitted that the scenario

in this case does not present a situation where alternative equipment was available to, and ignored by, the injured party.

The State suggests that so long as an injured party is aware of negligence which creates a risk to the injured party, the defense of implied primary assumption of risk bars recovery. Respondent's Brief, p. 19 citing Kirk v. Washington State University, 109 Wn. 2d. 448, 746 P.2d 285 (1987). Regardless of disagreement in interpretation of the case, a case sustaining a jury verdict in favor of a cheerleader injured during practice and in a fall on Astroturf, that case discusses the polymorphous shapes of the doctrine of assumption of risk and suggests that the doctrine should be absorbed into comparative fault analysis. Ibid., 452-458.

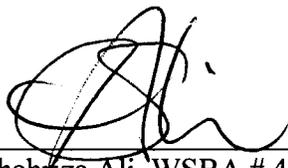
Kirk does not hold that denial of recovery was appropriate in the context of that case or in circumstances where the defendant's negligence preceded the plaintiff's injury and where plaintiff knew of the negligence. That factual scenario, "when a plaintiff knows about an existing risk created by the defendant's existing negligence-and yet voluntarily chooses to encounter that risk," is not a bar to complete recovery, but is analyzed under standards of "unreasonable or reasonable assumption of risk" Lascheid v. City of Kennewick, 137 Wn. App. 631, 54 P. 3d 307, 311 (2007). The application of those standards removes the prohibition of recovery and subjects the claim to comparative fault analysis.

CONCLUSION

The State continues to ignore the duty of a jailor to keep Ms. Armstrong in health and safety. Ms. Armstrong, as an inmate, did not have the power to determine how she could negotiate her daily existence in a correctional institution. Lacking the power to choose, she lacked the power to consent. Ms. Armstrong's material makes clear that her shoe allotment consisted of one pair of oversized shoes. Her evidence establishes that she repeatedly requested a change to her proper shoe size and that her requests were ignored. She was injured during an exercise period in which she was not engaged in a risky sport, and in an exercise period which was adjunct to her constitutional right as an inmate to enjoy to some degree of recreation in her confined environment. While one might find that the risk she assumed was the generalized the risk of walking around in shoes which were too big for her, the creation of that risk was wholly the responsibility of the State of Washington, and the choice of available alternative shoes was not Ms. Armstrong's to make.

For the reasons set forth above it is urged that the order of summary judgment should be reversed and that this matter should set on for trial.

RESPECTFULLY SUBMITTED this 25th day of July, 2009.



Shahriza Ali, WSBA # 40905

For

Charles S. Hamilton III, WSBA # 5648
Attorney for Appellant