

FILED

JUL 06 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 289826

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

TIFFANI WILLIAMS, Appellant and Cross-Respondent,

v.

RICHLAND SCHOOL DISTRICT, Respondent and Cross-Appellant.

APPELLANT'S OPENING BRIEF

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The appellant and cross-respondent herein, Tiffani Williams (“MS. WILLIAMS”), presents her opening brief of appellant below. Respondent and cross-appellant Richland School District herein is referred to as “the RSD.”

I. ASSIGNMENT OF ERROR

The trial court, by and through the Honorable Bruce A. Spanner, judge of the Benton County Superior Court, erred when it granted the RSD’s motion for summary judgment.

II. ISSUE PRESENTED

Did the superior court commit error by granting the RSD’s motion for summary judgment on grounds of the “implied primary assumption of risk” doctrine?

III. ANSWER SOUGHT FROM THE COURT OF APPEALS

Yes.

IV. STATEMENT OF THE CASE

MS. WILLIAMS was injured by a line-drive foul ball while watching her daughter, Kelsie's, middle school girl's softball game.¹

A true and complete copy of MS. WILLIAMS' deposition transcript, along with its single-page Exhibit 1, is attached hereto as **Exhibit B**. [CP 108-124.] MS. WILLIAMS' deposition was taken by the RSD's attorney, George Fearing. References to the transcript for that deposition will be in the form of "Williams Dep., p. ____, line ____ to p. ____, line ____."

When MS. WILLIAMS arrived on **April 12, 2006** to watch her daughter, Kelsie, it was the first "home" game of Kelsie's 8th grade, fast-pitch softball season with Enterprise

¹ The facts set forth in the following four paragraphs (in the text above) are a cut-and-paste from MS. WILLIAMS' *Plaintiff's Second Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, Declaration of Tiffani Williams in Opposition to Defendant's Motion for Summary Judgment, and Declaration of John C. Bolliger in Opposition to Defendant's Motion for Summary Judgment* ("2nd Suppl. Memo.") [CP 79-81] – now with pertinent dates highlighted in bold and references to the record inserted in brackets.

Middle School. (Williams Dep., p. 9, line 20 to p. 10, line 10 – and p. 12, lines 4-8.) [CP 110.] MS. WILLIAMS had not attended any prior games at those ball fields – and she had not previously seen Kelsie’s team practice at those ball fields. (Williams Dep., p. 12, lines 4-14.) [CP 110.] The year before, Kelsie had been on the Chief Jo softball team. At the Chief Jo fields, there was sufficient safety fencing for the spectators to watch their children play. (Williams Dep., p. 11, lines 4-21.) [CP 110.] This was also the case at the other school fields at which she previously had watched Kelsie play. (Williams Dep., p. 13, line 5 to p. 14, line 25 – and p. 17, line 15 to p. 18, line 7.) [CP 111-112.] MS. WILLIAMS had never been to a softball or baseball game at a field which had the same or less protection for the spectators than did the Enterprise Middle School ball fields on the date of her injury. (Williams Dep., p. 16, lines 1-4.) [CP 111.] If the additional safety fencing which was installed at the other schools’ ball fields had been in place at the Enterprise Middle School ball fields on the day of her injury, MS. WILLIAMS would not have been hit by the line-drive foul ball that caused her

injuries. (Williams Dep., p. 15, lines 1-19.) [CP 111.]

Although MS. WILLIAMS at previous games had seen foul balls go into areas where spectators are seated, she had never seen a spectator being “struck or hit” by a foul ball. (Williams Dep., p. 12, lines 15-22.) [CP 110.] MS. WILLIAMS never brings a glove to softball or baseball games in order to catch foul balls while she is spectating. (Williams Dep., p. 12, lines 24-25.) [CP 110.] When MS. WILLIAMS arrived for the ball game, the game was already underway (it was the first inning). (Williams Dep., p. 21, line 24 to p. 22, line 2.) [CP 113.]

There was nowhere for spectators to safely sit behind the existing backstop to the field – because the players from both teams, and their equipment, had fully occupied that safety area – and because that safety area sloped downward away from the back of the back stop. (Williams Dep., p. 25, lines 15-23 – and p. 34, line 8-12.) [CP 114 and 116.] MS. WILLIAMS arrived at Kelsie’s game with two of her other children; MS.

WILLIAMS’ in-laws were already at the game, seated in their lawn chairs; MS. WILLIAMS and her children were setting up their own lawn chairs – to her in-laws’ left – when MS.

WILLIAMS was struck with the line-drive foul ball. (Williams Dep., p. 21, lines 10-23 – and p. 22, line 3 to p. 23, line 4.) [CP 113.]

Although MS. WILLIAMS doesn't have an independent recollection about this, Kelsie has informed her the batter who was up to bat, when MS. WILLIAMS was struck with the line-drive foul ball, was batting right-handed. Thus, the batter's back was facing MS. WILLIAMS when the batter took her fateful swing at the ball – and the batter therefore extremely (and, therefore, unexpectedly) “pulled” the ball when she line-drove it into MS. WILLIAMS' mouth. MS. WILLIAMS has never seen a line-drive foul ball so extremely and unexpectedly pulled.² [CP 81.]

When MS. WILLIAMS arrived at the ball field for Kelsie's game, there were formal school games underway on three of the ball fields: S-1 (Kelsie's field), S-3, and S-4. As

² It was an opposing batter who extremely pulled the line-drive which injured MS. WILLIAMS. Kelsie's team was in the field at that time. Kelsie was playing left field – and her eyes therefore were on the batter. As such, Kelsie saw the entire incident occur.

for field S-2 (the field directly behind MS. WILLIAMS' back when she was positioned to watch Kelsie's game on field S-1), no formal school game was taking place; however, there were some kids playing a "pickup" game on that field with baseballs (not softballs) and bats. [CP 81.]

In January of 2010, a hearing was held on the RSD's motion for summary judgment. At that hearing, Judge Spanner declined to rule on the motion, instead indicating to the parties he wanted briefing on a subject **neither party theretofore had addressed**: the applicability of the "recreational land use statute," RCW 4.24.200 and .210. As such, on **February 3, 2010**, MS. WILLIAMS filed her *Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and Declaration of Tiffani Williams in Opposition to Defendant's Motion for Summary Judgment* ("1st Suppl. Memo.") [CP 47-67.] – in which, inter alia, she addressed that requested argument [CP 56-63.]

On **February 26, 2010**, another hearing was held on the

RSD's motion for summary judgment. Being persuaded by MS. WILLIAMS' arguments regarding the "recreational land use statute," Judge Spanner declined to grant the RSD's motion for summary judgment on that ground. However, he orally granted the motion on grounds of:

- the decision in Taylor v. Baseball Club of Seattle, L.P., 132 Wn.App. 32, 130 P.3d 835 (2006) – a decision which **neither party theretofore had addressed** and
- the "implied primary assumption of risk" doctrine discussed in the Taylor, supra decision – an issue which **neither party theretofore had addressed.**

Because neither party had addressed that decision and that doctrine – after he orally granted the RSD's motion for summary judgment on those grounds, yet before the **February 26, 2010** hearing concluded – Judge Spanner invited MS. WILLIAMS to submit additional briefing to address that decision and that doctrine if she would like.

On **April 8, 2010**, MS. WILLIAMS therefore filed her 2nd Suppl. Memo. – in which she fully addressed the Taylor, supra decision and the “implied primary assumption of risk” doctrine. [CP 75-124.] Specifically, with this briefing, MS. WILLIAMS put the following additional facts into evidence:³

A drawing of the ball field on which MS. WILLIAMS was injured is attached hereto as **Exhibit A**. [CP 105-106.] The measurements shown on that drawing were taken, and the drawing was prepared, by the undersigned attorney. With respect to that drawing, the following facts apply:

- a. The drawing is not precisely to scale, however, the measurements shown are accurate.
- b. The “star” depicted on the drawing indicates where MS. WILLIAMS was positioned when she was struck by the line-drive foul ball.

³ The facts set forth in the following paragraph (in the text above), with its a-1 subparts, are a cut-and-paste from MS. WILLIAMS’ 2nd Suppl. Memo. [CP 77-79] – now with references to the record inserted in brackets.

- c. MS. WILLIAMS' was located twenty eight feet three inches (28'-3") from the 3rd base line (this measurement is not shown on the drawing, to avoid clutter).

- d. MS. WILLIAMS' was located forty six feet three inches (46'-3") from home plate (this measurement is not shown on the drawing, either, for the same reason).

- e. If an axis line was to be drawn to intersect the center of home plate and the center of the pitcher's mound – and if a person was to stand on home plate, facing the direction of the center of the pitcher's mound precisely along that axis line – the 3rd base line obviously would be forty five degrees (45°) to that person's "left." MS. WILLIAMS' was positioned eighty three degrees (83°) to that person's "left" when she was injured.

- f. The only portion of the spectator-safety fencing which was in existence on the day MS. WILLIAMS was injured was the backstop depicted with bold lines.

- g. The dashed lines depicted on the drawing represent additional spectator-safety fencing which the RSD installed after MS. WILLIAMS was injured. In this regard, only the additional spectator-safety fencing on the 3rd base side is fully depicted. A similar arrangement exists on the 1st base side, however, that is not depicted on the drawing because it is not relevant to this case.
- h. The ball field MS. WILLIAMS was watching is called field “S-1.” The area actually has four ball fields: “S-1” through “S-4.” Looking down on the ball fields from the sky (i.e., a “plan” view as the drawing depicts), the ball fields are sequentially numbered counterclockwise. The four ball fields are equidistantly arranged such that the back sides of their backstops all face each other. The ball fields do not have outfield fences. Thus, at the bottom of the drawing, where the words “ground behind backstop sloped downward in direction of arrows” are located, the four arrows pointing downward from those words are pointing in the direction of the backstop for

field "S-3."

- i. Referring further to the words "ground behind backstop sloped downward in direction of arrows" located at the bottom of the drawing, the past tense of that wording pertains to the date on which MS. WILLIAMS was injured. At that time, there were no bleacher seats located behind the backstops for spectators to sit in. Since the date of MS. WILLIAMS' injury, the RSD has "built up" the lower-elevated ground behind the backstops for the four ball fields – and installed bleacher seats behind each ball field's backstop for spectators to sit in.
- j. The thirty feet six inch (30'-6") measurement shown on the left-most side of the drawing indicates the measurement between the 3rd base dugout for field "S-1" and the 1st base dugout for field "S-2."
- k. The dugouts for the four ball fields are not actually "dug

out” below ground level. Rather, when the players are standing in the dugout areas, they are standing on the same plane elevation as the ball fields.

1. All presently-existing safety fencing at the four ball fields rises substantially higher than MS. WILLIAMS’ full height when she is standing. The backstop fencing which was in place on the date of her injury rises approximately seventeen feet (17'). So, too, does the portion of the new safety fencing which the RSD later installed – and which is identified on the drawing with the twelve feet one inch (12'-1") measurement. The other portions of the new safety fencing which the RSD later installed (i.e., that which is around the 3rd base side dugout and continues outward in the direction of left field) is ten feet (10') in height. In other words, had all the presently-existing safety fencing been in place on the date MS. WILLIAMS was injured, it would have been impossible for MS. WILLIAMS to be struck by a line-drive foul ball emanating from field S-1’s home plate

area.

At the **April 9, 2010** hearing, notwithstanding the fact that Judge Spanner stated from the bench he had reviewed MS. WILLIAMS' 2nd Suppl. Memo. addressing the Taylor, supra decision and the “implied primary assumption of risk” doctrine – and notwithstanding the fact **the RSD had submitted no briefing addressing either the Taylor, supra decision or the “implied primary assumption of risk” doctrine** – Judge Spanner formally granted the RSD's motion for summary judgment by entering the *Order Granting Summary Judgment* from which this appeal has been taken. Curiously, both the RSD and Judge Spanner engaged in additional trial-court-level activities **after** Judge Spanner entered the **April 9, 2010** *Order Granting Summary Judgment*, as follows:

- on **April 22, 2010**, the RSD filed its *Defendants Second Supplemental Memo in Support of Motion for Summary Judgment* – with which, **for the first time**, it addressed the Taylor, supra decision and the “implied primary

assumption of risk” doctrine;

- on **May 12, 2010**, Judge Spanner filed his self-typed *Order Denying Motion for Reconsideration* – even though **MS. WILLIAMS never had filed any “motion for reconsideration”**; and
- on **June 11, 2010**, the RSD caused a *Judgment* to be entered with respect to Judge Spanner’s granting of the RSD’s motion for summary judgment.

V. ARGUMENT

Division III recently again set forth the standard of review relating to an appeal of a trial court’s granting of a motion for summary judgment in Walker v. Wenatchee Valley Truck and Auto Outlet, Inc., 155 Wn.App. 199, 212, 229 P.3d 871 (Div. 3 2010), as follows:

The standard of review for cases resolved on summary

judgment is a matter of well-settled law. A reviewing court also considers those matters de novo, considering the same evidence presented to 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. Because the trial court does not resolve factual disputes, it does not enter findings in relation to a summary judgment. [Fn. omitted.] Duckworth v. City of Bonney Lake, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

As the arguments in the remainder of this Section V clearly demonstrate, (1) a great number of genuine issues of material fact exist for the jury to determine at trial and, (2) in any event, the RSD is not entitled to judgment as a matter of law. As such, it was error for Judge Spanner to grant the RSD's motion for summary judgment.⁴

////

⁴ The arguments contained in the remainder of this Section V are a cut-and-paste from MS. WILLIAMS' 2nd Suppl. Memo. filed April 8, 2010 [CP 84-101] – with the original section-heading numbers from that memorandum retained herein.

3. **The Legal Authorities Addressing The “Assumption Of Risk” Doctrines Still Leave Those Doctrines Somewhat In Ambiguity As To Whether They Operate As A Total Bar, No Bar, Or A Damages-Reducing Factor, To A Plaintiff’s Claim Of Entitlement To Recovery**

Washington State law generally acknowledges four categories of the “assumption of risk” doctrine: (1) express assumption of risk, (2) implied primary assumption of risk (the category presently at issue – because of the Court’s ruling at the February 26, 2010 hearing), (3) implied reasonable assumption of risk, and (4) implied unreasonable assumption of risk. Home v. North Kitsap School District, 92 Wn.App. 709, 965 P.2d 1112 (1998). The Home Court went on the elaborate as follows (with emphases added and original emphasis):

. . . . The third and fourth facets, implied reasonable and implied unreasonable assumption of risk, are nothing but alternative names for contributory negligence, [footnote omitted] The first and second facets, express assumption of risk and implied primary assumption of risk, raise the same question: Did the plaintiff consent, before the accident or injury, to the negation of a duty that the defendant would otherwise have owed to the plaintiff? [Footnote omitted.] If the answer is yes, “the defendant does not have the duty, there can be no breach and hence no negligence.” [Footnote omitted.] Thus, **when either [the first or the**

second] facet applies, it bars any recovery based on the duty that was negated. [Footnote omitted.]

Home, supra, at 718-19. Thus, according to the Home Court, both of the first two categories operate as a complete bar to a plaintiffs' recovery – but both of the second two categories result in the jury's apportionment of fault between the plaintiff and the defendant.

However, in Lascheid v. City of Kennewick, 137 Wn.App. 633, 154 P.3d 307 (Div. 3 2008) – a decision which came after, and cited, Taylor – Division III stated as follows (with emphasis added):

. . . . The City asserts implied primary assumption of risk as a defense. **This is the only one of the four that is a complete bar to a plaintiff's recovery.** [Citations omitted.]

Lascheid, supra, at 641.

In Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 834 P.2d 6 (1992), the Supreme Court of Washington

essentially held that “it depends” with respect to the question of whether the defense of implied primary assumption of risk operates as a complete bar to a plaintiff’s recovery, as follows (with emphases added and original emphases):

Washington case law is somewhat confusing on the issue whether subsequent to the adoption of comparative negligence “primary implied assumption of risk” acts as a complete bar to recovery or only acts as a damage-reducing factor.

....

Although the plaintiff in Kirk[v. WSU, 109 Wn.2d 448, 746 P.2d 285 (1987)] did assume the risks inherent in the sport of cheerleading, **she did not assume the risks caused by the university’s negligent provision of dangerous facilities or improper instruction or supervision. Those were not risks “inherent” in the sport. Hence, in a primary sense, she did not “assume the risk” and relieve defendants of those duties.** However, to the extent she continued to practice (on a dangerous surface, without instruction), she may have “unreasonably assumed the risk,” i.e., have been contributorily negligent. **This unreasonable assumption of the risk is assumption in the secondary sense which does not bar all recovery.**

....

In contrast, implied reasonable and unreasonable assumption of risk arise where the plaintiff is aware of a risk that already has been created by the negligence of the defendant, yet chooses voluntarily to encounter it. In such a case, plaintiff’s conduct is not truly consensual, but is a form of contributory negligence, in which the negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk.

Scott, *supra*, at 497-99. The Supreme Court in Scott went on to hold as follows (with emphasis added):

Under the facts presented, the trial court should not have applied the doctrine of primary implied assumption of risk as a complete bar to plaintiff's recovery against the ski resort operator.

Id. at 499.

In Kirk, *supra*, the Supreme Court of Washington observed as follows with respect to its prior decision in Shorter v. Drury, 103 Wn.2d 645, 695 P.2d 116, cert. denied 474 U.S. 827, 106 S.Ct. 86, 88 L.Ed.2d 70 (1985) (with emphases added):

The use of assumption of risk in this manner can be seen in Shorter v. Drury, *supra*. **The court in Shorter did not allow express or implied primary assumption of risk to act as a complete bar to recovery by the plaintiff where the defendant's negligence was also a cause of the damages to the plaintiff. Shorter, at 657, 695 P.2d 116. The court instead treated the assumption of the risk as a damage-reducing factor, attributing a portion of the causation to the plaintiff's assumption of the risk and a portion to the defendant's negligence.**

....

In the present case, the trial court did not err in rejecting proposed instructions regarding assumption of the risk as a complete bar to recovery. **Although express and implied primary assumption of the risk remain valid defenses, they do not provide the total defense claimed by the defendant.** Implied unreasonable assumption of the risk has never been considered a total bar to recovery in comparative negligence jurisdictions.

Kirk, *supra*, at 455-448.

Finally, the following is stated in 16 Wash. Prac., Tort Law and Practice, § 8.22 (3d ed.) (with emphases added):

A finding of implied primary assumption of risk has been said to operate as a complete bar to recovery. [Footnote omitted.] Such statements, however, are potentially misleading. . . . As with a finding of express assumption of risk, a plaintiff's damages should be reduced, rather than barred, if the damages can be apportioned between the injury attributable to the risks assumed and those not expressly or impliedly assumed. [Footnote omitted.] . . . Since the allocation of fault may be necessary in such cases anyway, trial courts should experience no difficulty asking the jury to identify what percentage of the injury was due to the defendant's breach of a duty other than the duty from which the defendant was relieved by plaintiff's assumption of risk. [Footnote omitted.]

////

The foregoing legal authorities beg the question: which, if any, of the categories of the “assumption of risk” doctrine apply in the instant case? The Washington Practice identification of the elements of each category follows.

Express assumption of risk. The following is stated in 16 Wash. Prac., Tort Law and Practice, § 8.21 (3d ed.) (with emphasis added):

Express assumption of risk is generally bargained for and found in a contractual relationship. [Footnote omitted.] A person expressly assumes the specific risk of harm if that person (1) has a full subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chooses to encounter the risk. [Footnote omitted.] Whether the plaintiff in fact understood the specific risk, and voluntarily agreed to encounter it, is a subjective inquiry, rather than an objective determination of whether a reasonable person would have comprehended the risk. [Footnote omitted.] For example, where a football coach knowingly attended a football practice at a field with a dangerous curb, **it was a question of fact for the jury** whether his belief that he had no reasonable alternative to doing so could be found to have vitiated a finding of voluntariness. [Footnote omitted.]

Implied primary assumption of risk. The following is

stated in 16 Wash. Prac., Tort Law and Practice, § 8.22 (3d ed.):

The second type of assumption of risk, implied primary assumption of the risk, operates in the same way as express assumption of risk, but without the ceremonial and evidentiary weight of an express agreement. [Footnote omitted.] An instruction on implied primary assumption of risk is appropriate where “the plaintiff (1) had a subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.” [Footnote omitted.]

Implied reasonable assumption of risk. The following is stated in 16 Wash. Prac., Tort Law and Practice, § 8.23 (3d ed.) (with emphases added):

The third type of assumption of risk, implied reasonable assumption of risk, has been categorized as simply another form of contributory negligence. [Footnote omitted.] As distinguished from express or implied primary assumption of risk, **implied reasonable assumption of risk involves “voluntary choice to encounter risks created by the negligence of another.”** [Footnote omitted.] In other words, unlike the two forms of primary assumption of risk, which involve a decision by the plaintiff to accept some risk in exchange for a benefit (for example, more enjoyable recreation) to be gained from the activity, **the last two forms of assumption of risk involve decision making after the plaintiff has become aware of some risk negligently created by the defendant and the plaintiff must choose whether to tolerate the risk or take steps to**

avoid it. [Footnote omitted.] Implied reasonable assumption of the risk does not bar recovery. [Footnote omitted.] Instead, to the extent that the plaintiff's decision voluntarily to encounter the risk is reasonable, it is not subject to the allocation of comparative fault.

Similarly, a defendant cannot be heard to say that a plaintiff voluntarily assumed a risk **if the defendant placed the plaintiff in a dilemma that left the plaintiff with no reasonable course of action or conduct.** [Footnote omitted.]⁵

Implied unreasonable assumption of risk. The following is stated in 16 Wash. Prac., Tort Law and Practice, § 8.24 (3d ed.) (with emphases added):

The fourth type of assumption of risk, **implied unreasonable assumption of risk, exists if a person voluntarily and unreasonably encountered a known risk created by another's negligence.** [Footnote omitted.] **The Washington Supreme Court has recognized that this type of assumption of risk is a form of contributory negligence, and has held that unreasonable assumption of risk is subsumed under contributory negligence and should be treated equivalently.** [Footnote omitted.] Thus, as a type of contributory negligence, this form of assumption of risk has no independent significance in Washington. **It merely acts as a damage reducing factor.** [Footnote

⁵ This third category – “implied reasonable assumption of risk” – appears to be the doctrine most applicable to the facts of this case. As already established in prior briefing – see MS. WILLIAMS’ 1st Suppl. Memo., in particular, CP 56-63 – MS. WILLIAMS was a business invitee of the RSD at the Enterprise Middle School ball fields and, as such, the RSD owed MS. WILLIAMS a duty of care with respect to the safety of their ball field facilities and the proper supervision of their patrons at those facilities.

omitted.] **Moreover, it is error to instruct a jury on assumption of risk when the type of assumption of risk that has been alleged by the defendant consists merely of unreasonable behavior in response to negligence by the defendant.** [Footnote omitted.]

As the discussion in the next two sections shows, the Court should rule the “implied primary assumption of risk” doctrine does not apply as an affirmative defense in this case.

4. The Taylor Case Is Inapposite To The Facts Of This Case – And The Court Therefore Should Hold The “Implied Primary Assumption Of Risk” Doctrine Is Inapplicable As An Affirmative Defense In This Case

In Taylor, supra, Ms. Taylor was injured when a player at a Seattle Mariners baseball game errantly threw a ball into the stands where she was located. In particular, Ms. Taylor’s seat was:

. . . in section 114, along the right field foul line and four rows up from the field. [She] arrived more than an hour before the game to see the players warm up and to get their autographs.

Id. at 34-35. As she walked to her seat,

. . . [Ms.] Taylor saw that players were practicing nearby. Mariners pitcher Freddy Garcia was standing in front of section 114 on or about the right field line facing center field. He was throwing a ball back and forth with Jose Mesa, who stood in right center field approximately 120 feet away.

Id. at 35.

The evidence in Taylor established that pitchers often warm up by playing “long toss,” during which they throw the ball back and forth with another player at increasing distances, with one player standing near the foul line and the other moving away from that player in increasing distances toward center field while they are playing catch. The evidence further established this warm-up procedure, though unwritten, is customary to the sport and is followed at every baseball level, from Little League to the Major Leagues. Id. at 35-36.

Moreover, the evidence established that,

. . . as she walked to her seat, she saw the players warming up and was excited about being in an unscreened area where [she] might get autographs from

the players and catch balls.

Id. at 40.

Finally, “[a]s [Ms.] Taylor stood in front of her seat, she looked away from the field and a ball thrown by Mesa [went] past Garcia and struck [Ms.] Taylor in the face, causing serious injuries. Id. at 35.

It is common knowledge (and the Court therefore should take judicial notice of the fact) that Safeco Field, where the Mariners play their home games (and where Ms. Taylor suffered her injuries) is a large, professional, baseball park containing several thousands of seats which – although unscreened – are out of harm’s way with respect to batters and the expected direction of throws made by the players during the game. (Indeed, Ms. Taylor’s seat – located as it was clear out in right field – was one of those seats.) However, as stated, Ms. Taylor made the conscious decision to arrive at the field “more than an hour before the game began” and she “was

excited about being in an unscreened area where [she] might get autographs from the players and catch balls.” In other words, Ms. Taylor need not have arrived at the ball park “more than an hour before the game began” if she didn’t want to; she could have arrived at her seat once the game commenced, thereby vastly reducing any likelihood she could be struck by a baseball at all – however, Ms. Taylor willfully made the choice not to do so. Further, having arrived at the ball park “more than an hour before the game began,” Ms. Taylor need not have gone directly to her seat; rather, prior to actual commencement of the game, she could have situated herself at any of countless locations at the ball park which would have ensured her safety from getting hit by a baseball – however, she purposely chose to position herself at her seat location, where she could have the opportunity to “catch balls” overthrown by the players who were playing “long toss.” In terms of time and place, Ms. Taylor consciously decided to put herself in the **direct line of fire** so that an errant throw could come to where she was then precisely standing (and so she might be able to catch it). Stated another way, Ms. Taylor had a multitude of options at her

disposal – and, yet, she chose the very option which was most likely to put herself in harm’s way. Given those facts, the Taylor Court held Ms. Taylor’s lawsuit against the Seattle Mariners was properly dismissed by the trial court on grounds of the “implied primary assumption of risk” doctrine.

However, in the instant case, MS. WILLIAMS’ facts are vastly different. Ms. Taylor had been to numerous prior games at Safeco Field (and Ms. Taylor therefore had an abundant familiarity with its safe and unsafe areas), whereas MS. WILLIAMS had never been to a game (or practice) at the Enterprise Middle School ball fields before (and MS. WILLIAMS therefore had no such familiarity). Ms. Taylor arrived at Safeco Field more than an hour before the start of the game (and Ms. Taylor therefore had a lot of time to consider her safety options). In contrast, when MS. WILLIAMS arrived at the Enterprise Middle School ball fields, formal school games were already underway on 3 of those fields and some kids were playing a “pickup” game on the 4th field with baseballs and bats (and MS. WILLIAMS therefore had little, if

any, time to consider her safety options). When Ms. Taylor arrived at Safeco Field, she had a multitude of places she could safely stand prior to the start of the game. On the other hand, when MS. WILLIAMS arrived at the Enterprise Middle School ball fields, she had virtually no option other than to position herself where she was located when the line-drive foul ball hit her in the face, because, at the Enterprise Middle School ball fields:

- the RSD had not yet constructed its present-day bleacher seating for spectators to sit in behind safety fencing,
- the RSD had not yet constructed its considerable, present-day safety fencing along the baselines and dugout areas of the ball fields,
- MS. WILLIAMS could not sit behind the narrow backstop which was then installed behind home plate on ball field S-1 because – on account of the facts set forth in the preceding two bullets – that area was taken up by

the players from both teams and all their gear (because it was the only safety-screened area at the field for **them** to be located), and

- MS. WILLIAMS could not sit behind the players (who were taking up the ground immediately behind the backstop of ball field S-1) – because that ground sloped downward (i.e., MS. WILLIAMS would not be able to see the game from behind those players).

Moreover, when Ms. Taylor arrived at Safeco Field, despite having a multitude of options at her disposal to ensure her safety, she chose the **direct line of fire** option – the option which was most likely to result in the injury she ultimately incurred. Ms. Taylor’s choice was **patently unreasonable** because it would require her to pay constant attention to the “long-toss” going on right in front of her – something she did not do. Contrasted with that, despite essentially having no options available to her, MS. WILLIAMS chose to position herself at a location which was least likely to cause her harm (a

choice which was **patently reasonable**, given the circumstances with which she was presented) because:

- since all 4 of the ball fields had ball play going on and each had only the similar, narrow backstop, MS. WILLIAMS had to stay “close in” to the S-1 ball field so as not to get hit by a ball hit or thrown from one of the other 3 fields which she was not even there to watch,
- MS. WILLIAMS safely positioned herself 28'-3" from the third base line of ball field S-1 (i.e., from the actual field of play on that field),
- MS. WILLIAMS safely positioned herself 46'3" from the home plate of ball field S-1 (the point of origin of any potential foul balls),
- MS. WILLIAMS safely positioned herself 83° to the “left” of home plate (90° would have been directly behind the right-handed batters) – an angle at which only

the most extreme and unexpected “pulling” of the ball by a right-handed batter might come in her direction, and

- other spectators already were seated in the area where MS. WILLIAMS located herself when she arrived at ball field S-1.

A final reason justifies the Court ruling the Taylor case is inapposite. In Taylor, Ms. Taylor originally named the owner of Safeco Field – the Washington Baseball Stadium Public Facilities District – as a defendant in her case. However, prior to adjudication of her case, Ms. Taylor “voluntarily dismissed her claims against . . . the Washington Baseball Stadium Public Facilities District.” Taylor, supra, fn. 1, at p. 35. Thus, Ms. Taylor’s suit ultimately was against the Seattle Mariners baseball club, not the owner of the land (i.e., not the owner of Safeco Field). In contrast, MS. WILLIAMS’ lawsuit is against the owner of the ball fields here at issue: the RSD. This is an important distinction because MS. WILLIAMS is a business invitee of the RSD and, as such, the RSD owed MS.

WILLIAMS a duty of care that the Seattle Mariners (who are not the landowner of Safeco Field) did not owe to Ms. Taylor.^[6]

Given the foregoing facts – which were not before the Court for the February 26, 2010 hearing – MS. WILLIAMS respectfully suggests the Court should rule the “implied primary assumption of risk” doctrine is not applicable to her case.

5. Because The RSD Did Not Timely Assert The “Implied Primary Assumption Of Risk” Affirmative Defense, The Court Should Rule That Defense Is Not Available To The RSD In This Case

This lawsuit was filed on April 6, 2009 – more than a year ago. That same month, attorney George Fearing filed his notice of appearance on behalf of the RSD. Mr. Fearing and his partner, Andrea Clare, remain the RSD’S attorneys of record to date. Since filing his notice of appearance, the RSD never has filed an answer to MS. WILLIAMS’ complaint.

⁶ [See, e.g., the discussion of this subject set forth in MS. WILLIAMS’ 1st Suppl. Memo. – in particular, CP 56-63.]

However, the RSD has been busy in this case. On May 7, 2009, the RSD filed a motion to dismiss – and, on May 20, 2009, the RSD filed a supplemental brief in support of its motion to dismiss. The Superior Court denied the RSD’S motion to dismiss. On June 10, 2009, the RSD then filed a notice of discretionary review with the Court of Appeals (addressing the same subject as the RSD’S motion to dismiss). The Court of Appeals denied the RSD’S motion for discretionary review. On December 8, 2009, the RSD filed its motion for summary judgment. In February of 2010, the RSD filed its supplementary memorandum in support of its motion for summary judgment. Under the present *Civil Case Schedule Order*, trial for this case was set to commence on April 5, 2010 (and would have commenced, but for the RSD’S motion for summary judgment which is here at issue). In the more-than-a-year during which this case has been active, the RSD has declined to assert the “implied primary assumption of risk” affirmative defense either in an answer to MS. WILLIAMS’ complaint or in any of its several motions (and their accompanying memoranda and affidavits).

It has long been the law of this state that an affirmative defense which is not timely asserted in pleadings is waived by the party who might derive a benefit from the defense. See, e.g., Teeter v. Superior Court, 110 Wn. 255, 188 P. 391 (1920), in which the Supreme Court of Washington held as follows:

. . . . The statute of limitations is a defense, not a bar, to an action. It is a defense, moreover, that may be waived, and a defendant does waive it when he defaults, or when he appears and fails to interpose it as a defense.

Id. at 257. See, also, Boyle v. Clark, 47 Wn.2d 418, 423-24, 287 P.2d 1006 (1955). More modernly, this rule is indicated in CR 8(c), which states, inter alia, that an alleged defense of “assumption of risk” **shall** be set forth affirmatively in the defendant’s answer to the plaintiff’s complaint. See, e.g., Alexander v. Food Services of America, Inc., 76 Wn.App. 425, 886 P.2d 231 (1994), in which the Court held as follows:

. . . . Under CR 8(c), a defendant must raise the issue of the statute of limitations “and any other matter constituting an avoidance or affirmative defense” in its answer or in another appropriate pleading. The failure to do so in a timely manner results in a waiver of the defense. Davis v. Nielson, 9 Wn.App. 864, 876, 515 P.2d 995 (1973).

Id. at 428-29. See, also, Davidson v. Hensen, 135 Wn.2d 112, 954 P.2d 1327 (1998), in which the Supreme Court of Washington held as follows:

. . . . The Davidsons had an opportunity to timely assert nonregistration before the arbitrator, but failed to do so. . . . By failing to timely assert the affirmative defense of nonregistration, they waived it.

Id. at 123. See, also, Harting v. Barton, 101 Wn.App. 954, 6 P.3d 91 (Div. 3, 2000), in which Judge Sweeney held as follows:

. . . . A party shall affirmatively plead any matter constituting an avoidance or affirmative defense. CR 8(c). Thus, “[a]ny matter that does not tend to controvert the opposing party’s prima facie case as determined by applicable substantive law should be pleaded[.]” Shinn Irrigation Equip., Inc. v. Marchand, 1 Wn.App. 428, 430-31, 462 P.2d 571 (1969).

“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.” Henderson v. Tyrell, 80 Wn.App. 592, 624, 910 P.2d 522 (1996) (quoting Bernsen v. Big Bend Elec. Coop., 68 Wn.App. 427, 433-34, 842 P.2d 1047 (1993)).

Id. at 962. Here, MS. WILLIAMS declines to give her consent to try the “implied primary assumption of risk” issue because –

in the 1+ years since this case has commenced – the RSD has declined to assert the “implied primary assumption of risk” affirmative defense. The undersigned attorney has been unable to locate any decisional law which authorizes to trial court to raise an affirmative defense on behalf of a defendant, sua sponte, even at an early stage of the case – let alone at this late stage.

Based upon the foregoing, MS. WILLIAMS respectfully suggests the Court should decline to allow the RSD to now assert the “implied primary assumption of risk” affirmative defense at this late stage of the case.

VI. CONCLUSION

MS. WILLIAMS respectfully requests that the Honorable Court of Appeals hold the affirmative defense of the “implied primary assumption of risk” doctrine is unavailing to the RSD – because it never pleaded any such affirmative defense in an answer to MS. WILLIAMS’ complaint (and the

RSD never provided any oral argument or submitted any written briefing on the subject prior to Judge Spanner's entry on **April 9, 2010** of the *Order Granting Summary Judgment* from which this appeal has been taken.

Alternatively, MS. WILLIAMS respectfully requests the Honorable Court of Appeals hold it was error for Judge Spanner to grant the RSD's motion for summary judgment – because, **given the abundance of facts in this case which must be construed in the light most favorable to MS. WILLIAMS on summary judgment**, (1) the Taylor, *supra* decision is inapposite (and the RSD therefore is not entitled to judgment as a matter of law on grounds of that decision) and (2) there exist numerous genuine issues of material fact for the jury to resolve at trial. Rather, the Court should hold it is the **“implied reasonable assumption of risk”** doctrine which is the one that is applicable to this case.

Finally, MS. WILLIAMS believes that, with his 24 years of pre-judicial work as an attorney (practicing primarily in the

field of insurance defense), Judge Spanner effectively has shown tendencies to litigate this case on behalf of the RSD – raising issues the RSD itself either declined or refused to raise on its own. It was Judge Spanner, not the RSD, who raised the question of the applicability of the “recreational land use statute,” RCW 4.24.200 and .210, as a possible means for granting the RSD’s motion for summary judgment. When MS. WILLIAMS’ briefing persuaded Judge Spanner to abandon that statutory means for granting the RSD’s motion for summary judgment, he next (and, again, sua sponte) decided to grant the RSD’s motion for summary judgment on other grounds which never had been raised by the RSD: (1) the Taylor, supra decision and (2) the “implied primary assumption of risk” doctrine. Assuming this Court on the merits is going to reverse Judge Spanner’s granting of the RSD’s motion for summary judgment, MS. WILLIAMS respectfully requests that the Court further order remand proceedings in the Superior Court to be conducted by a different judge.

///

DATED this 2 day of July, 2010.

BOLLIGER LAW OFFICES

By: _____

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned over a horizontal line.

John C. Bolliger, WSBA No. 26378
Attorneys for Appellants

DECLARATION OF SERVICE

STATE OF WASHINGTON)
COUNTY OF BENTON) ss.

I, John C. Bolliger, declare as follows:

On the date set forth below, I caused a true and correct copy of this Appellants' Opening Brief to be sent to the following persons and entities in the manner shown:

Andrea J. Clare [] regular mail
Leavy, Schultz, Davis & Fearing, P.S. [] certified mail, RRR no.
2415 W. Falls Avenue [X] facsimile no. 736-1580
Kennewick, WA 99336 [X] Pronto Process & Messenger Service, Inc.
[] hand-delivery by
[] Federal Express

I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

DATED this 2 day of July, 2010.

Kennewick, WA
City, state where signed

John C. Bolliger (with signature)