FILED
AUG 24 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 289826

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OF THE STATE OF WASHINGTON

TIFFANI WILLIAMS,

Appellant and Cross-Appellant

vs.

RICHLAND SCHOOL DISTRICT,

Respondent and Cross-Appellant

RESPONDENT AND CROSS-APPELLANT'S BRIEF

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I. CROSS ASSIGNMENTS OF ERROR

The Superior Court erred when it failed to grant Richland School District's motion to dismiss. SCP 171, 2. The school district sought dismissal on the ground that Tiffani Williams failed to file a municipal tort claim pursuant to RCW 4.96. SCP 145.

II. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

Whether a school district has a duty to protect spectators, attending a softball game, from foul balls?

III. ISSUE PERTAINING TO CROSS-APPELLANTS' ASSIGNMENT OF ERROR

Whether completing an accident form, which (a) does not contain any statement of damages, (b) lacks addresses for the complainant, and (c) omits a verified signature is a substitute for the tort claim notice required by RCW 4.96?

IV. STATEMENT OF CASE

Tiffani Williams sues the Richland School District alleging that negligence of the school district led to injuries from a foul ball. CP 43. The school district sought dismissal of the suit, because of Williams' failure to file a pre-suit notice required under RCW 4.96. SCP 145. The

Superior Court denied the motion. SCP 171, 2. Later, however, the court granted the school district's summary judgment motion, because Richland violated no duty to Williams, as a matter of law. CP 125-7.

On April 12, 2006, Tiffani Williams, with two of her children, attended, at Enterprise Middle School, an eighth-grade women's softball game, in which a third child played. CP 4. Enterprise Middle School is operated by the Richland School District.

Before April 12, 2006, Tiffani Williams had been a spectator at a baseball or softball game. CP 5. She had attended too many games to count. CP 5. Williams had attended a Seattle Mariners game and a number of minor league baseball games in Pasco. CP 5. Williams previously attended at least twenty games in which her daughter Kelsie played. CP 6.

By April 12, 2006, Tiffani Williams understood that foul balls might carry to where spectators sit. CP 8. She had seen foul balls go into areas where spectators sit. CP 8. As of April 12, 2006, Williams understood that a spectator in the stands or in the viewing area could get hit by a foul ball. CP 9. She had watched baseball games on television and noticed foul balls reaching the stands. CP 10.

On April 12, 2006, Tiffani Williams arrived at the softball game around 4 p.m. CP 11. She sat between home plate and third base, back from the foul line probably about five to six feet. CP 12. Her ex-husband's parents sat to her right and closer to home plate. CP 13. Williams' children were to her left. CP 13.

Tiffani Williams and her children had just arrived at the game and were setting up lawn chairs. CP 13. The game had earlier began. CP 13. Williams had sat down, gotten up, sat down, and gotten up as her children were getting settled. CP 14. Williams got up again to assist her children. CP 14, 5. As she stood, a foul ball struck her in the mouth. CP 14, 15, 21. She did not see the ball coming, but she insists that she was struck by a line drive because she was struck instantaneously after she heard the crack of the bat. CP 15, 113.

In her brief, on page 5, Tiffani Williams relates what her daughter purportedly told her about the foul ball. Nevertheless, the daughter has never testified and Williams' repeating of her daughter's statement is inadmissible hearsay. Actually, the story from the daughter is not even in Tiffani Williams' testimony, but rather comes from a brief. The next paragraph on page 5 and continuing to page 6, about other games, is also

based upon a brief, rather than testimony.

At a later date, Tiffani Williams was struck by another foul ball. CP 121. She sat in the spectator bleachers at a softball game and a ball from the field behind her hit her on the back. CP 121.

Within weeks of the accident, Williams completed a Richland School District "General Liability Loss Notice." CP 55. The loss notice completed fails to state an amount of damages claimed. CP 55. The loss notice also omits any address for Williams, let alone the current address and addresses for other residences within the last six months. CP 55. Finally, the signature of Tiffani Williams is not verified and there is no proof of service upon the school district. CP 55. Before filing suit, Tiffani Williams did not serve upon the Richland School District a municipal tort claim. SCP 145.

The Superior Court conducted a summary judgment hearing, on February 26, 2010. CP 125. The court then tentatively granted the summary judgment motion, but, because Williams filed late pleadings, CP 46, the court stated it would consider the late pleadings to be a motion for reconsideration.

Beginning on page 8 and through page 13 of Tiffani Williams'

brief, she asserts more purported facts that are inadmissible. Her attorney, after the court granted Richland School District summary judgment on February 26, asserted himself as a witness in the case and, based upon Tiffani Williams' hearsay statements, took measurements of the baseball field on February 26, 2010, nearly four years from the date of injury. CP 103 - 6. The attorney does not aver that the field was in the same condition as it was on April 12, 2006, nor why such evidence, if admissible, was not available before the summary judgment hearing. CP 103-6.

V. ARGUMENT OF LAW

A. TIFFANI WILLIAMS' SUIT MUST BE DISMISSED BECAUSE OF A COMPLETE FAILURE TO FILE A TORT CLAIM.

The law demands that a claimant, before filing suit against a school district, file a claim. RCW 4.96.010 prescribes:

> Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages.

A second statute, RCW 4.96.020, describes the content needed in the pre-suit claim:

> (3) All claims for damages arising out of tortious conduct must locate and describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and *shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose. If the claimant is incapacitated from verifying*, presenting, *and filing the claim* in the time prescribed or if the claimant is a minor, or is a nonresident of the state absent therefrom during the time within which the claim is required to be filed, the claim may be verified, presented, and filed on behalf of the claimant by any relative, attorney, or agent representing the claimant.

Italics added.

Tiffani Williams argues she complied with the demands of the statute by mailing to the Richland School District a "loss notice" that the school district uses to document accidents. Nevertheless, Williams' notice lacks much of the information demanded by RCW 4.96.020. The notice fails to state an amount of damages claimed. The loss notice also omits any address, let alone the current address and addresses for other residences within the last six months. Finally, the signature of Tiffani Williams is not verified and there is no proof of service upon the school

district. Therefore, the notice and service of notice is defective.

Required information that is totally absent from the claim cannot be supplied by any method of construction, however liberal, such that such a failure leads to dismissal. **Renner v. City of Marysville**, 145 Wn.App. 443, 452, 187 P.3d 283 (2008); **Brigham v. City of Seattle**, 34 Wn.2d 786, 789, 210 P.2d 144 (1949). Tiffani Williams omitted two, if not three, pieces of necessary information from her notice. Going further, strict compliance is necessary for filing requirements such as verification of notices. **King ex rel. King v. Snohomish County,** 105 Wn.App. 857, 868, 21 P.3d 1151 (2001).

Tiffani Williams protests that she completed the "notice of claim form" sent her by Richland School District employee Gayla Davis. Nevertheless, the form sent to Williams was not a "notice of claim" form. The form was a "general liability loss notice," and Davis wrote that "the form ... needs to be filled out so that we can have our insurance company investigate this incident." CP 57. Gayla Davis did not represent the form as the form needed to be filed with the school district before filing suit. CP 57.

As shown by a letter from her counsel, Tiffani Williams hired an attorney by October 23, 2006, six months after her injuries and two and one-half years before the running of the statute of limitations. CP 61, 2. Any attorney, who files a tort suit against a municipal corporation, should know the requirements of RCW 4.96.020. This attorney could have and should have ensured that Williams complied with the demands of RCW 4.96.020. Williams has only herself and her lawyer to blame for dismissal of the suit.

Richland School District is entitled to dismissal of the complaint. A court must dismiss any action commenced in violation of a statutorily mandated claim filing condition precedent. **Westway Const., Inc. v. Benton County**, 136 Wash.App. 859, 867, 151 P.3d 1005 (2006).

B. THIS COURT SHOULD NOT ENTERTAIN INADMISSIBLE EVIDENCE AND LATE EVIDENCE.

CR 56(e) requires that, upon a summary judgment motion, the parties follow evidentiary rules and that affidavit testimony be based upon personal knowledge. On page 5 of Tiffani Williams' appeal brief, she forwards the purported observations of her daughter in the form of unsworn hearsay testimony.

CR 56(c) requires affidavits to be submitted timely. On pages 8 through page 13 of Tiffani Williams' brief, she asserts more purported facts that not only inadmissible, but late. Her attorney, after the court orally granted Richland School District summary judgment on February 26, asserted himself as a witness in the case and, based upon Tiffani Williams' hearsay statements, took measurements of the baseball field on February 26, 2010, nearly four years from the date of injury. The court should also ignore this faux evidence. The school district objected to late evidence. CP 46.

C. THE OWNER OF A BASEBALL DIAMOND IS NOT LIABLE FOR INJURIES TO SPECTATORS SUFFERED FROM FOUL BALLS.

Ball game spectators, particularly those sitting near the third base line without the protection of any intervening barrier, know the hazards of foul balls. Few, if any, American adults are unaware that balls are likely, if not certain, to fly out of control and out of bounds. Tiffani Williams' testimony confirms she knew of the dangers and possibilities of being struck by a ball. Williams attended numerous earlier games and saw foul balls leave the diamond area and enter spectator stands. Williams

understood the nature of a line drive. With this knowledge, Williams carelessly stood without paying attention to the game.

Washington courts have absolved the owners of ball diamonds from claims for injuries resulting from foul balls. **Kavafian v. Seattle Baseball Club**, 105 Wn. 215, 177 P. 776, rehearing en banc, 105 Wn. 219 181 P. 679 (1919); **Leek v. Tacoma Baseball Club, Inc.**, 38 Wn.2d 362, 229 P.2d 329 (1951). In **Kavafian v. Seattle Baseball Club**, the Washington Supreme Court held that a paying patron, who attended a baseball game and elected to sit in an unscreened portion of the grandstand, could not recover damages from the baseball club for injuries sustained when struck by a foul ball. The patron frequented baseball games and was familiar with the manner in which they were conducted. The court wrote:

> Conscious of the fact that balls are very often hit "foul" and that wild throws sometimes result in the ball falling among the spectators, and conscious of the fact that there was no protection between the balls and himself, he continued to occupy a seat in that unscreened portion until he received his injury.

105 Wn. 220. If there was a chance of danger the patron voluntarily took it.

In **Leek v. Tacoma Baseball Club, Inc.**, involved an action for damages for personal injuries by a spectator at a baseball game. 38 Wn.2d 362 (1951). The patron had never been in the ball park before. He played baseball as a boy and viewed games infrequently since that time. When he entered the park, an usher directed him to a seat in the grandstand behind home plate and behind a vertical screen 26 feet high. The grandstand was not roofed, and there was no screen overhead. He did not look to see if there was any overhead protection, but assumed that there was such protection. A short time after he had been seated, a batter hit a high foul, which traveled up over the screen and down into the grandstand. It struck the spectator on the head. The court held that the spectator could not recover, reasoning that spectator's failure to observe what was plainly there to be observed, cannot operate to enlarge the proprietor's duty of care beyond that which it would otherwise be.

Kavafian v. Seattle Baseball Club was cited by the Washington Court of Appeals in **Simpson v. May**, 5 Wn.App. 214, 486 P.2d 336 (1971), in which the court denied recovery to a teenager engaged in the popular Yakima sport of throwing cattail heads. Like the baseball game patron, the boy assumed the risks of attended to the game.

In **Perry v. Seattle School District**, 66 Wn.2d 800, 405 P.2d 589 (1965), the court followed the teachings in **Kavafian v. Seattle Baseball Club**. The Washington Supreme Court denied recovery to a visitor who attended a school football game. The visitor, who stood near the field's boundary, was struck by a player knocked out of bounds. The visitor assumed the risk of injuries resulting from the obvious consequences of the game.

In **Taylor v. Baseball Club of Seattle**, L. P., 132 Wn.App. 32, 130 P.3d 835 (2006), the court summarily dismissed a claim of a lady injured by a wild throw during pre-game warmups.

In **Brown v. San Francisco Ball Club**, 99 Cal.App.2d 484, 222 P.2d 19 (1950), the California court held that a patron was not entitled to damages for injuries sustained while she was watching a game, although she held little knowledge of the game of baseball. In a well reasoned opinion, the court noted that, in baseball, the patron participates in the sport as a spectator and subjects himself to risks inherent in the game. The court wrote:

> "[w]ith respect to the law governing cases of this kind, it has been generally held that one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown

> balls; that the management is not required, nor does it undertake to insure patrons against injury from such source."

222 P.2d 20, 1.

In line with **Kavafian v. Seattle Baseball Club, Leek v. Tacoma Baseball Club, Inc.**., and **Brown v. San Francisco Ball Club**, most American jurisdictions embrace the rule that a stadium owner's duty to spectators is limited to screening the dangerous area behind home plate. **Sciarrotta v. Global Spectrum**, 194 N.J. 345, 944 A.2d 630 (2008); **Turner v. Mandalay Sports Entertainment, LLC**, 180 P.3d 1172 (Nev.2008); **Lawson By and Through Lawson v. Salt Lake Trappers, Inc.**, 901 P.2d 1013 (Utah.1995).

Tiffani Williams expends effort arguing whether the Richland School District may raise a defense of assumption of risk and the nature of the defense. Williams faults the school district for not raising the defense in its answer. Nevertheless, the school district has not answered the complaint yet and thus has reserved all defenses. Going further, whether or not the suit is decided upon a defense of assumption of risk or the conclusion that the school district held no duty to Williams is unimportant. The Richland School District still wins.

VI. CONCLUSIONS

The Richland School District respectfully requests that the court affirm dismissal of plaintiff's complaint with prejudice. The Court of Appeals may affirm the dismissal either on the ground that Tiffani Williams failed to file a notice of claim or the basis that the school district is entitled to summary judgment on the merits.

DATED this 23rd day of August, 2010.

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.

By: _____
GEORGE FEARING, WSBA #12970

CERTIFICATE OF SERVICE

I, Kristi Flyg, hereby certify that on the 23rd of August, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☐	Hand-delivered	JOHN C. BOLLIGER
☐	First-Class Mail	Attorney at Law
☐	Overnight Mail	5205 W. Clearwater Avenue
☐	Facsimile	Kennewick, WA 99336
☑	Pronto Process	

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