MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JOHN COOMER,	)	
	)	**WD73984 and WD74040**
Appellant,	)	
v.	)	**OPINION FILED:**
	)	
KANSAS CITY ROYALS BASEBALL CORPORATION,	)	**January 15, 2013**
	)	
Respondent.	)	

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Wesley Brent Powell, Judge

Before: Thomas H. Newton, P.J., Joseph M. Ellis, and Gary D. Witt, JJ.

Mr. John C. Coomer appeals from the trial court's judgment finding in favor of the Kansas City Royals Baseball Corporation (the Royals) after a jury trial found him exclusively at fault in his personal injury suit. Mr. Coomer contends that the trial court erred in denying his motion for directed verdict and that it committed instructional error. We reverse and remand.

Factual and Procedural Background

Mr. Coomer filed suit against the Royals, alleging negligence after its mascot "Sluggerrr," played by Mr. John Byron Shores, allegedly threw a hot dog that struck Mr. Coomer in the eye, causing injury.[1] Mr. Coomer contended, *inter alia*, that the Royals failed to exercise

[1] Mr. Coomer also asserted one count of battery against the Royals. The trial court granted summary judgment in favor of the Royals on this count, which Mr. Coomer does not dispute on appeal.

ordinary care through its agents, and failed to adequately train and supervise its agents. In its answer, the Royals asserted defenses of implied primary and secondary assumption of risk.

At trial, Mr. Coomer testified that on September 8, 2009, he went to the Royals game with his father. To be closer to the game, instead of sitting in their ticketed seats, Mr. Coomer and his father sat in open seats six rows behind the third base dugout. Between the third and fourth innings, the Royals had a promotional event, the "Hotdog Launch." Mr. Shores testified that the Royals had been doing the Hotdog Launch at home games since approximately the year 2000. In between innings, the Royals launched 20-30 hotdogs to the fans, either through an air gun or by a hand throw. The hotdogs shot out of the air gun were wrapped in bubble wrap and the ones Mr. Shores threw were typically wrapped in foil. Mr. Shores testified that he used a number of types of throws to entertain the fans: "overhand, over the shoulder, behind the back, . . . sidearm." The jury was shown videos of several games, including the night of September 8, 2009, although the throw at issue had not been videotaped.

Mr. Shores had no recollection of conducting the Hotdog launch any differently on September 8, 2009. He shot hot dogs into the stands with an air gun, and then began tossing hotdogs into the stands by hand. Mr. Shores was in the third base dugout, in front of Mr. Coomer and his father, and people behind them were cheering and yelling for Mr. Shores to throw hot dogs to them. Mr. Coomer testified that he saw Mr. Shores turn his back and make a motion with his arm behind his back; Mr. Coomer looked away to the scoreboard and "a split second later" something hit him in the face. The impact knocked off his hat. Because the throw came so quickly, Mr. Coomer was convinced it was a straight-line throw rather than the soft overhand tosses Mr. Shores had previously been making.

Two mornings later, Mr. Coomer noticed a problem with his vision. A tearing and detachment of his retina was subsequently diagnosed and he underwent surgery. He lost vision in his eye for about three weeks and subsequently developed a cataract. In December 2009, Mr. Coomer had an additional surgery for the cataract and now has an artificial lens in his eye. He testified that his vision in that eye suffers more impairment than prior to the injury.

At the close of Mr. Coomer's evidence, the Royals entered an admission that Mr. Shores was its agent, servant, and/or employee and that he was acting in the scope and course of his employment. Mr. Coomer moved for a directed verdict on the Royals's affirmative defenses, which the trial court denied. In the instructions conference, Mr. Coomer objected to several of the instructions, which are discussed herein, and tendered an alternate verdict director and instructions on his claims for negligent supervision and training, all of which the trial court denied.

The jury returned a verdict finding the Royals's fault to be zero percent and assessing Mr. Coomer one hundred percent at fault. The trial court entered judgment in accord with the verdict and subsequently denied Mr. Coomer's post-trial motion for new trial and judgment notwithstanding the verdict. Mr. Coomer appeals.

Standard of Review

On appeal, Mr. Coomer claims instructional error.[2] Our review of whether the jury was instructed properly is *de novo*. *Hayes v. Price*, 313 S.W.3d 645, 650 (Mo. banc 2010). We view the record in the light most favorable to the instruction's submission. *Id*. Issues submitted in instructions must be supported by substantial evidence "from which the jury could reasonably

[2] Mr. Coomer also claims error in the trial court's denial of his motion for directed verdict on the Royals' affirmative defenses. However, his arguments demonstrate that he claims that the trial court erred in allowing the affirmative defenses to go to the jury because the Royals did not make a submissible case for the defenses. As such, although couched in terms of error as to the denial of his motion for directed verdict, we find these claims to be inseparable from his claims for instructional error.

find such issue." *Id*. (internal quotation marks and citation omitted). If the instruction was not supported by substantial evidence, we reverse only if the error caused prejudice that materially affected the outcome of the case. *Id*.

Legal Analysis

Mr. Coomer raises four points. In his first point, Mr. Coomer argues the trial court erred in instructing on the Royals's defense of primary implied assumption of risk. In his second point, Mr. Coomer contends that even if primary implied assumption of risk was available to the Royals as a defense, the trial court erred because as submitted to the jury, the instruction was an incorrect statement of law. In his third point, Mr. Coomer argues the trial court erred in permitting and instructing on the Royals's defense of comparative fault (secondary implied assumption of risk). Finally, in his fourth point, Mr. Coomer contends the trial court erred in refusing to instruct the jury on his claims for negligent supervision and training.

Primary Implied Assumption of Risk

In his first point, Mr. Coomer contends the trial court erred in permitting the Royals to assert the defense of primary implied assumption of risk. He argues that a "mascot throwing hotdogs directly at business invitees is not an inherent or unavoidable risk of the game of baseball."

To prove a claim for negligence, Mr. Coomer was required to show: (1) the Royals had a duty to conform to a standard of conduct to protect him from unreasonable risks, (2) that duty was breached, (3) proximately causing him injury, (4) and he suffered damages. *See Ivey v. Nicholson-McBride*, 336 S.W.3d 155, 157 (Mo. App. W.D. 2011). There are generally three types of assumption of risk that function as a defense to a claim of negligence: express, implied

primary, and implied secondary. *Lewis v. Snow Creek, Inc*., 6 S.W.3d 388, 393 (Mo. App. W.D. 1999).

Primary implied assumption of risk operates to negate the negligence element of duty. *Ivey*, 336 S.W.3d 155, 157-58. The plaintiff's voluntary participation in the activity serves as consent to the known, inherent, risks of the activity and relieves the defendant of the duty to protect the plaintiff from those harms. *Id*. at 157. Because the defendant has no duty to protect against those inherent risks, he cannot be found negligent for causing the plaintiff injury. *Id*. The risks assumed, however, "are not those created by a defendant's negligence but rather by the nature of the activity itself." *Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. App. E.D. 1993).

The issue is thus whether the risk Mr. Coomer encountered was one which inhered in the game, or one which would be created by the defendant's negligence. *See Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. banc 1982)). Mr. Coomer argues that the trial court erred in submitting the defense to the jury because "the risks created by a mascot throwing promotional items do not arise from the inherent nature of a baseball game."[3] On these facts, we agree.

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[3] The trial court submitted the defense to the jury in instruction numbers 9 and 11. Instruction No. 9 directed the jury:

> In your verdict you must assess a percentage of fault to defendant if you believe:
>
> First, defendant's employee threw a hotdog that hit plaintiff; and
> Second, defendant's employee was thereby negligent, and
> Third, as a direct result of such negligence plaintiff sustained damage,
> unless you believe plaintiff *is not entitled to recover* by reason of Instruction No. 11.

Instruction No. 11 directed the jury:

> In your verdict you must not assess a percentage of fault to defendant if you believe:
>
> First, the risk of suffering an injury by being struck by a hotdog thrown in a manner in which Sluggerrr threw the hotdog that plaintiff alleges struck him was a risk inherent in attending a game at Royals' stadium, and
> Second, plaintiff comprehended the actual risk, and
> Third, plaintiff intelligently accepted the risk.

"[E]veryone who participates in or attends a baseball game assumes the risk of being hit by a ball," because "the risk of being hit by a baseball is a risk inherent to the game." *Sheppard by Wilson v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 262 (Mo. App. W.D. 1995). However, the risk of being hit in the face by a hot dog is not a well-known incidental risk of attending a baseball game. Consequently, a plaintiff may not be said to have consented to, and voluntarily assumed, the risk merely by attending the game. *See Ivey*, 336 S.W.3d at 158.

The Royals, however, argue that the Hotdog Launch was a customary activity at the games, and Mr. Coomer thus acquiesced to the risk by attending the game. It asserts that Mr. Coomer testified that he had probably been to 175 baseball games at Royals Stadium, Mr. Coomer saw promotional items thrown at baseball games, and he knew it was part of the experience. He had also specifically seen the Hotdog Launch. Further, the Royals advance that Mr. Shores testified that the Hotdog Launch had taken place since approximately the year 2000. We agree that these facts point to a conclusion that the Hotdog Launch was a customary activity at Royals games. That the launch was a customary activity, however, does not equate to a patron's consent to the risks of being hit by a promotional item. Inherent risks are those that inure in the nature of the sport itself. *Sheppard*, 904 S.W.2d at 262-63. They represent dangers that are "known and appreciated" to which the plaintiff "intelligently acquiesced." *Martin*, 857 S.W.2d at 368. The risks are "perfectly obvious or fully comprehended." *Id*. at 369.

The primary implied assumption of risk instruction was not supported by substantial evidence. *See Hayes*, 313 S.W.3d at 650. Prejudice is obvious in that the instruction informed the jury that primary implied assumption of risk was a complete and total bar to Mr. Coomer's recovery. Because the trial court erred in instructing the jury on primary implied assumption of risk, Mr. Coomer's first point is granted and the judgment reversed.

Comparative Fault (Secondary Implied Assumption of Risk)

Mr. Coomer's second point is rendered moot.[4] We address Mr. Coomer's third and fourth points because of the likelihood these issues may emerge on retrial. *See, e.g.*, *Jenkins v. Revolution Helicopter Corp., Inc*., 925 S.W.2d 939, 943 (Mo. App. W.D. 1996) (reversing but addressing an issue that could emerge on retrial). In his third point, Mr. Coomer argues that the trial court erred in instructing on the defense of secondary implied assumption of risk (comparative fault) because there was no evidence that Mr. Coomer acted unreasonably.

Under the doctrine of secondary implied assumption of risk, the plaintiff's voluntary and unreasonable encounter of a known risk amounts to the plaintiff's contributing negligence "and is therefore subsumed as an element of fault to be compared by the jury." *Sheppard*, 904 S.W.2d at 262. The question of the plaintiff's voluntary encounter of the risk, and the reasonableness of doing so, may properly be submitted as comparative fault to the jury where the plaintiff alleges the injury was caused not by an inherent risk, but by the defendant's negligence. *Id.* at 263.

Instruction Number 12 presented the Royals's defense of Mr. Coomer's comparative fault, relying on implied secondary assumption of risk. It directed the jury:

> In your verdict, you must assess a percentage of fault to plaintiff if you believe:
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> First, either:
>
> Plaintiff observed the manner in which the "Hotdog Launch" was being conducted on September 8, 2009, and with such knowledge, he stayed in the area where the "hotdog Launch" was being conducted, or
>
> plaintiff unreasonably failed to appreciate the risks associated with the manner in which the "Hotdog Launch" was being conducted on September 8, 2009, and
>
> Second, plaintiff, in any one or more of the respects submitted in paragraph First, was thereby negligent, and

[4] In his second point, Mr. Coomer argues that even if the defense of primary implied assumption of risk was permissible, the defense was improperly submitted to the jury. Because we have determined that permitting the defense was not proper on these facts, Mr. Coomer's second point is rendered moot and therefore denied.

> Third, such negligence of plaintiff directly caused or directly contributed to cause any damage plaintiff may have sustained . . .

Mr. Coomer contends that the Royals presented no evidence that he was aware "that Sluggerrr was conducting the Hotdog Launch in a negligent manner" and that Mr. Coomer was thus comparatively at fault in that he voluntarily chose to encounter the risk.

"The adoption of comparative fault requires the jury be given the responsibility of assessing the relative fault of the parties in tort actions." *Walley v. La Plata Volunteer Fire Dep't.*, 368 S.W.3d 224, 229 (Mo. App. W.D. 2012) (internal quotation marks and citation omitted). The defendant is entitled to a comparative fault instruction "[i]f there is evidence from which a jury could find that plaintiff's conduct contributed to cause some of the damages the plaintiff sustained." *Id*.

Viewed in the light most favorable to the submission, we cannot find that to submit the question of Mr. Coomer's comparative fault was error. "[A] party is entitled to an instruction upon any theory supported by the evidence." *Cluck v. Union Pacific R.R. Co.*, 367 S.W.3d 25, 33 (Mo. banc 2012). Contrary to its submission for primary implied assumption of risk, the Royals presented evidence to support a comparative fault instruction, *i.e.*, that Mr. Coomer voluntarily chose to sit close to "the action," that he observed the hotdogs being thrown, that fans behind him were cheering for a throw, and that he looked away prior to the hotdog allegedly being thrown, despite facts from which it could be reasonably inferred a hotdog was about to be thrown. Because the Royals offered evidence supporting Mr. Coomer's negligence that was sufficient for the issue of comparative fault to reach the jury, Mr. Coomer's third point is denied.

Negligent Supervision and Training

Finally, in his fourth point, Mr. Coomer contends that the trial court erred in refusing to instruct on his claims for negligent supervision and training. Prior to trial, the Royals moved to dismiss Mr. Coomer's claims for negligent supervision and training. The trial court found that the Missouri Supreme Court's decision in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. banc 1995), barred submission to the jury of these claims in addition to submitting a claim of liability for the Royals on a theory of *respondeat superior*. The trial court required Mr. Coomer to opt for one of these theories prior to presenting evidence.

In *McHaffie*, the Missouri Supreme Court held that it was error to allow the jury to assess the defendant employer's fault based on both vicarious liability and theories of "negligent entrustment" or "negligent hiring." 891 S.W.2d at 826-27. In that case, in which the injury was based on an employee's driving, the court determined they were all theories of imputed liability and rejected allowing multiple theories of imputed liability in favor of the majority view, "that once an employer has admitted *respondeat superior* liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability." *Id.* at 826. The *McHaffie* court reasoned that allowing other theories of imputed liability "serves no real purpose," wastes the time and energy of the court and litigants because the employer's liability "is fixed by the amount of liability of the employee," and opens the door to potentially inflammatory and irrelevant evidence. *Id.* The court further found that to do so could result in the "assessment of a greater percentage of fault to the employer than is attributable to the employee," for the accident, which is "plainly illogical." *Id.* at 827.

Mr. Coomer attempts to distinguish *McHaffie* by contending that his claims for negligent supervision and training were not based on theories of imputed liability, but rather, were direct

claims against the Royals for its negligent supervision and training of Mr. Shores. While *McHaffie* left open the possibility, "that an employer or entrustor may be held liable on a theory of negligence that does not derive from and is not dependent on the negligence of an entrustee or employee," such is not the case here, and we find Mr. Coomer's arguments indistinguishable from those rejected in *McHaffie*. There, the supreme court found "nothing in the pleadings or the evidence suggest[ed] that the employer's lack of care . . . might have caused plaintiff's injuries in the absence of negligence by the [employee]." *Id* at 824. Here, the damage alleged by Mr. Coomer was confined to the actions of Mr. Shores and, consequently, the Royals's liability for his training and supervision relied on a theory of imputed liability. While we are cognizant that other jurisdictions have answered these questions differently and reach those answers by employing much of the argument advanced by Mr. Coomer, we are constitutionally bound to follow the decisions of our supreme court.[5] *See Doe v. Roman Catholic Diocese of St. Louis*, 311 S.W.3d 818, 822 (Mo. App. E.D. 2010). Consequently, the trial court did not err in requiring Mr. Coomer to elect one theory of vicarious liability. Mr. Coomer's fourth point is denied.

Conclusion

For the foregoing reasons, the judgment is reversed and remanded for further proceedings consistent with this opinion.

/s/ THOMAS H. NEWTON
Thomas H. Newton, Presiding Judge

Ellis and Witt, JJ. concur.

[5] *See, e.g., Marquis v. State Farm Fire and Cas. Co*., 961 P.2d 1213 (Kan. 1998) (disagreeing with *McHaffie*).