

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

JOHN COOMER

Appellant

v.

KANSAS CITY ROYALS BASEBALL CORPORATION

Respondent

DOCKET NUMBER WD73984 and WD74040

DATE: January 15, 2013

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Wesley Brent Powell, Judge

Appellate Judges:

Division One
Thomas H. Newton, P.J., Joseph M. Ellis, and Gary D. Witt, JJ.

Attorneys:

Robert Tormohlen, Kansas City, MO
M. Cory Nelson, Kansas City, MO

Counsel for Appellant
Co-Counsel for Appellant

Attorneys:

Scott Hofer, Kansas City, MO
Kyle Roehler, Kansas City, MO

Counsel for Respondent
Co-Counsel for Respondent

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

JOHN COOMER, Appellant, v. KANSAS CITY ROYALS BASEBALL CORPORATION, Respondent

WD73984 and WD74040

Jackson County

Before Division One Judges: Newton, P.J., Ellis, and Witt, JJ.

Coomer attended a Royals baseball game. During a promotional event, the “Hotdog Launch,” he was allegedly struck in the eye with a hotdog thrown by the Royals’s mascot, played by Shores. Coomer sued the Royals for negligence, alleging that Shores threw a hotdog straight at him, striking him and causing injury. The jury was instructed on the Royals’s affirmative defenses of primary and secondary implied assumption of risk. The jury found the Royals’ fault to be zero percent and assessed Coomer one hundred percent at fault. Coomer appeals, raising four points.

REVERSED AND REMANDED.

Division One Holds:

In his first point, Coomer argues the trial court erred in instructing the jury on the Royals’s defense of primary implied assumption of risk. Under primary implied assumption of risk, the plaintiff’s voluntary participation in the activity serves as consent to the known risks of the activity and relieves the defendant of the duty to protect the plaintiff from those harms. Because the defendant has no duty to protect against those risks, he cannot be found negligent for the plaintiff’s injury. Coomer argues that the risks created by a mascot throwing promotional items do not arise from the inherent nature of a baseball game. On these facts, we agree. Coomer’s first point is granted and we reverse the trial court’s judgment. By the disposition of the first point, Coomer’s second point is rendered moot.

In his third point, Coomer argues that the trial court erred in instructing on the defense of secondary implied assumption of risk (comparative fault). Under secondary implied assumption of risk, the defendant is entitled to a comparative fault instruction if there is evidence from which a jury could find that plaintiff’s conduct contributed to cause some of the plaintiff’s damages. Coomer argues that there was no evidence that he acted unreasonably. Viewed in the light most favorable to the submission, the Royals presented evidence supporting a comparative fault instruction. Coomer’s third point is denied.

In his fourth point, Coomer contends that the trial court erred in refusing to instruct on his claims for negligent supervision and training. The trial court found that the Missouri Supreme Court’s decision in *McHaffie v. Bunch* barred submission of these claims in addition to his claim based on a theory of *respondeat superior* and required Coomer to opt for one of these theories. *McHaffie* held that once an employer has admitted *respondeat superior* liability, it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability. 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. While *McHaffie* left open the possibility that an employer may be held liable on a theory of negligence that does not derive from and the negligence of an employee, such is not the case here, and we find Mr. Coomer's arguments indistinguishable from those rejected in *McHaffie*. Coomer's fourth point is denied.

Opinion by Thomas H. Newton, Presiding Judge

January 15, 2013

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.