

NO. A07-1716

State of Minnesota
In Court of Appeals

Mark Prokop and Jacqueline Prokop,
Appellants,

vs.

Independent School District #625,
Respondent.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. STANDARD OF REVIEW.

Several arguments made in the Respondent School District's brief reflect a departure from the appropriate standard of review. Because this is an appeal from summary judgment, this court must view all reasonable inferences from undisputed facts in favor of the appellants¹. The trial court failed to do so in several critical respects, and the Respondent encourages this court to make the same error.

The first example is found at page 2 of Respondent's brief, where it states "Mark Prokop repeatedly used the below depicted L-Screen while conducting batting practice." Mark Prokop's unequivocal testimony is that he was not the pitching coach, so he had used the L-Screen "maybe three times" before the day of the accident.² The terms "repeatedly" and "maybe three times" are not equivalents.

The second example is of considerable importance. In a long footnote Respondent argues that this court should ignore the factual inference that when the ball breached the netting it tore a new hole rather than traveling through an already existing hole.³ Respondent erroneously refers to this legitimate factual inference as a "new theory of liability."⁴ The School District's argument is unsubstantiated by the record. The Complaint alleges that "a baseball traveled through

¹ *Hedglin v. City of Wilmar*, 582 N.W.2d 897, 901 (Minn. 1998).

² Prokop depo at 41, Respondent's Appendix at 14.

³ Respondent's Brief at 12.

⁴ Respondent's Brief at 12.

the L-screen and struck [Mark Prokop] in the face.”⁵ The Complaint alleges that the ball traveled through the net. It does not state that the ball traveled through an existing hole. The original allegation includes the factual inference that the ball tore a new hole just as readily as it includes the inference that the Respondent prefers – that the ball traveled through an existing gap or hole. The testimony of Marcus Prokop also supports the “weak netting/new hole” inference. Marcus Prokop stated that he hit the ball “straight up the middle,” arriving at the netting “under the bar.”⁶ He did not specifically see how the ball traveled through the netting – whether it went through an existing hole or whether it created a new one.⁷ The trial court specifically made note of evidence of “places where the net was tied together with knots.”⁸ The inference that the netting was in such poor condition that the ball tore through it is a fair one. It is readily drawn from the evidence in the record. This same inference can be drawn from a fair reading of the Complaint. While the Respondent prefers to draw the inference that the ball traveled through an existing gap or whole, this court, utilizing the appropriate standard of review, must accept the reasonable inference that the ball struck the poorly maintained, weakened netting and tore a new hole. The inference is

⁵ Plaintiff’s Complaint at ¶ III, Appellants’ Appendix at A-1.

⁶ Marcus Prokop depo at 60 – 61, 63, Respondent’s Appendix at 77-78.

⁷ Marcus Prokop depo at 63, Respondent’s Appendix at 78.

⁸ Trial Court Memorandum at 4, Appellants’ Appendix at A-16.

fairly made from the evidence, and has been part of this case since the Complaint was served.

Respondent also inaccurately suggests that where the issue before the court is based upon immunity, the matter must be resolved on summary judgment, and there can be no factual questions for jury resolution.⁹ This is a deliberate overstatement of the appropriate standard of review.

As is usual in immunity cases, the immunity issue in this case came before the trial court on a motion for summary judgment. As the moving party on a motion for summary judgment, the Respondent School District must still meet the standard for the imposition of summary judgment. The fact that the issue to be determined is one of immunity does not change the summary judgment standard or burden of proof. That standard requires the School District as the moving party to demonstrate that there are no disputed material facts pertinent to a resolution of the immunity question, with the court drawing all reasonable inferences in favor of the non-moving party. Where a reasonable factual inference can be drawn that defeats either the imposition of the park and recreational immunity statute in the first instance, or defeats the imposition of the trespasser standard as a matter of law, summary judgment on the basis of immunity is improper. This court so held in *Lishinski v. City of Duluth*.¹⁰

⁹ Respondent's Brief at 11.

¹⁰ 634 N.W.2d 456, 460 (Minn. App. 2001).

II. THE PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE EXCEPTION TO MUNICIPAL TORT LIABILITY FOUND AT MINN. STAT. § 466.03, SUBDIVISION 6(e).

A. The Parks and Recreation Limitation to the General Rule of Municipal Tort Liability Found at Minn. Stat. § 466.03, Subdivision 6(e) Does Not Apply to a Claim Based on a Poorly Maintained L-Screen.

As the proponent of the immunity defense, the Respondent has the burden of establishing that this statutory immunity applies.¹¹ The Respondent's primary argument in support of its allegation that statutory park and recreation immunity applies to the Prokops' claims is that the Prokops' argument is "absurd." Glossing over the statutory language itself, the School District argues that this court has repeatedly applied Section 466.03, subdivision 6(e) to "recreational equipment" which was being used "as part of recreational services."¹² The problem with this argument is that the statute itself makes no reference to "recreational equipment" being used "as part of recreational services." The statutory language refers specifically to "property . . . that is intended or permitted to be used **for the provision of** recreational services."¹³

Even if the statutory reference to "property" is interpreted to include personal property, an L-Screen is not property permitted to be used "for the provision of" recreational services. To read the statute that way is to ignore English grammar, something both this court and

¹¹ *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997).

¹² Respondent's Brief at 7.

¹³ Minn. Stat. § 466.03, subd. 6(e) (emphasis added).

the Minnesota Supreme Court have repeatedly acknowledged is improper.¹⁴

Furthermore, an L-Screen is not “recreational equipment” in the same sense that “a backstop, first base, home plate, bench and/or pitcher’s mound” are.¹⁵ An L-Screen is a piece of safety equipment. Throwing batting practice is different than pitching in a game or game practice situation. The distance between the thrower and the batter is shorter. Pitches are thrown in rapid succession, and the thrower’s attention is on putting multiple balls to the batter quickly. The thrower relies on the screen for protection, since his focus is on the batter. When pitching without a screen at normal distances the pitcher relies upon himself for protection from the ball. In short, an L-Screen is a piece of safety equipment. The plethora of cases from this court cited by the Respondent does not and cannot change the statutory language. Safety equipment, which is not used for the provision of recreational services, is not comparable to a signpost, a piece of tape on a tennis court, a paddleboat on a public lake, a concrete anchor for a fencepost, a drainage ditch, the wall of a gym, the roof of a sports center, a rowing machine, or a piece of playground equipment.¹⁶

¹⁴ *Woodhall v. State*, 738 N.W.2d 357, 361 (Minn. 2007); *Independent School District No. 709 v. Bonney*, 705 N.W.2d 209, 214 (Minn. App. 2005); Minn. Stat. § 645.08, subd. 1.

¹⁵ Respondent’s Brief at 9 – 10.

¹⁶ See cases cited at Respondent’s Brief at 7 – 8.

Respondent argues that “courts have repeatedly applied recreational immunity” in cases “where the condition of safety equipment is challenged.”¹⁷ Respondent mischaracterizes both the cases it cites and the thrust of the Appellants’ claims. Mark Prokop alleges that the School District was negligent because it provided him with a piece of safety equipment that was deceptively unfit for the use for which it was made. It failed to perform its intended function. The claim is premised on the fact that the safety equipment itself failed – the netting was in such poor condition that it failed to do what it was intended to do, despite the fact that Prokop did nothing to cause his own injury.

None of the cases cited by the Respondent involve the same type of allegation. *Schaffer v. Spirit Mountain Recreation Area Authority*¹⁸ involved a plaintiff who skied into a bright yellow metal barrel covering a water hydrant. The claim was that the barrel was hidden, not that it failed in some fundamental sense. In *Mertz v. City of Eden Prairie*¹⁹ the plaintiff, electing to inner tube down a sliding hill when it was closed, collided with a temporary fence that had been erected to notify people of the closure. The claim was based on the allegedly poor decision to close the hill by erecting a temporary plastic fence across it. It was not based on an allegation that the fence had been installed

¹⁷ Respondent’s Brief at 8.

¹⁸ 541 N.W.2d 357 (Minn. App. 1995).

¹⁹ 1997 WL 435881 (Minn. App. August 5, 1997) (unpublished), Respondent’s Appendix at 156.

for safety and somehow failed to perform its safety function. In *Levine v. City of Maple Grove*²⁰ the plaintiff bicyclist rode into a post erected across the entrance to a bike trail to limit motor vehicle access. The plaintiff ran into the post because he failed to see it. The post was not a piece of safety equipment, and there was no allegation that the post failed to do what it was intended to do.

It is telling that the Minnesota Supreme Court has never applied Section 466.03, subdivision 6(e) to a claim alleging that safety equipment provided by a municipality failed to perform its intended function. The Minnesota Supreme Court has never applied Section 466.03, subdivision 6(e) to safety equipment, even in the context of a recreational activity. In every case decided by the Minnesota Supreme Court, municipal park and recreation immunity has been applied to property permitted to be used as a park, property permitted to be used as an open area for recreational purposes, or property permitted to be used "for the provision of" recreational services. This court should likewise limit the application of park and recreation statutory immunity to cases falling within the statute's plain language. This case is not one of them.

²⁰ 1994 WL 396354 (Minn. App. August 2, 1994) (unpublished), Respondent's Appendix at 160.

B. Even if Section 466.03, Subdivision 6(e) Applies to Prokop's Claims, the Evidence Meets the Section's Lower Duty Requirements.

1. A Fact Question Exists About Whether The Dangerous Condition of the Netting was Open and Obvious.

Two attributes of the netting are important for a resolution of this appeal. One is that advocated by the Respondent: the existence of pre-existing gaps and holes in the netting, particularly near the edge of the "L" cross bar. The School District goes to great lengths to point out that these gaps and holes are obvious to the naked eye, and if these are the "dangerous defect" that caused Mark Prokop's injuries, then they are "open and obvious." This court is compelled under the evidence, however, to analyze this prong in light of the Appellants' theory of the case: that the netting was in such a weakened condition that the ball hit by Marcus Prokop tore through either a tied area or a new area, creating a new hole. Despite the Respondent's long-winded complaint that this is some kind of "new theory" of liability, it is an inference reasonably supported by the evidence, and was present in the original complaint. Mark Prokop is five foot eight inches tall. The "L" cross beam on this L-Screen is unusually high. In order to throw the ball without hitting the bar on his follow through, Prokop had to stand fairly far back from the netting. He let go of the ball and his arm continued to travel down and to his left. His body twisted and rotated to his left. He turned his entire head and face down and to the left. To hit his face, the jury could reasonably conclude that the ball traveled through the net in a location nearer the center upright bar, rather than the farthest outside corner of the horizontal bar in

which the large gaps and holes are “obvious.” Accepting this reasonable factual scenario, the hazard that caused the injury was not “open and obvious.”

2. There is Substantial Factual Evidence to Support the Finding that The School District Knowingly Maintained a Dangerous Condition.

As discussed in the Appellants’ opening brief, the School District had actual knowledge of the condition of the netting covering the L-Screen. School District employees placed the screen in the batting cage. School District employees placed the netting over the metal frame. The obvious inference to be drawn from the presence of the knotted repairs to pre-existing holes is that School District employees made the repairs. School District employees placed the netting over the metal frame. School District employees made the decision to leave this particular screen outside, exposed to the elements, and School District employees knew that this particular screen was by far the oldest on the premises. The knowledge of these School District employees is the knowledge of the School District. The School District therefore had actual knowledge of the condition of the netting. The poorly maintained condition of the netting was likely to tear. Torn netting on an L-Screen leaves the thrower exposed to a hard-hit ball at close range at a time the thrower is not expecting to have to field the ball. This is dangerous.

The legal requirement here is actual knowledge of a dangerous condition, not the existence of prior accidents. While knowledge of prior accidents does in fact provide a municipality with knowledge of a

dangerous condition, it is not the exclusive means by which actual knowledge of a dangerous condition can occur.

The Respondent would have this court ignore the teachings of *Unzen v. City of Duluth*.²¹ Certainly there were egregious facts in *Unzen*. Numerous people had fallen on the stairs in question, and apparently no one had bothered to investigate the reason. It was not the number of prior falls, however, that created the test articulated by the *Unzen* court. *Unzen* teaches that it is not sufficient that the condition at issue be merely capable of objective observation. Rather, this prong is met only if the danger of an objectively observable condition is hidden. The resolution of this prong is entirely dependent on the identity of the condition at issue. It is for this reason that the Respondent works so diligently to frame the condition at issue in terms of the pre-existing gaps or holes. The issue is not for the Respondent to frame, however. It is just as likely, or even more likely, that the ball traveled through the netting by tearing a new hole, either in an area of a prior repair or in an area where no hole previously existed, as it is that the ball miraculously found an existing hole to travel through. The danger posed by netting that was so poorly maintained that it was weak enough to tear when struck by a well-hit baseball is not obvious to the naked eye. Even the coach at Highland Park High School for the 2005 season did not appreciate that danger.

CONCLUSION

When the claims pled in this case are examined in light of the plain language of parks and recreation immunity found at Section

²¹683 N.W.2d 875 (Minn. App. 2004).

466.03, subdivision 6(e), it is clear that this statutory exception to the general tort liability of municipalities has no application to these claims. Even if this statutory immunity provision is applicable, when the appropriate standard of review is utilized, and with all inferences that may fairly be drawn from the evidence drawn in favor of Mark and Jacqueline Prokop, the trial court plainly erred in granting summary judgment on the basis of the trespasser standard of care as a matter of law. Since Mark Prokop did not assume the hidden risk that the netting in the L-Screen would fail, in the absence of the imposition of immunity as a matter of law this court should reverse the trial court and remand the case for trial on the merits.

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,076 words. This brief was prepared using Microsoft Word 2007.

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