

NO. A07-1716

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State of Minnesota  
**In Court of Appeals**

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Mark Prokop and Jacqueline Prokop,

*Appellants,*

vs.

Independent School District #625,

*Respondent.*

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**APPELLANTS' BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF LEGAL ISSUES .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF FACTS .....	3
ARGUMENT.....	10
I. <u>STANDARD OF REVIEW</u> .....	10
II. <u>THE PLAINTIFFS’ CLAIMS ARE NOT BARRED BY THE EXCEPTION TO MUNICIPAL TORT LIABILITY FOUND AT MINN. STAT. § 466.03, SUBDIVISION 6(e).</u> .....	11
A. <u>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</u> .....	12
B. <u>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</u> .....	17
1. <u>Fact Question Exists About Whether The School District Should Have Known About The Dangerous Condition.</u> .....	20
2. <u>A Fact Question Exists About Whether The L-Screen Was Likely To Cause Serious Bodily Harm</u> .....	23
3. <u>A Fact Question Exists About Whether Mark Prokop Would Discover The Hazardous Condition of the L-Screen While Using it for Batting Practice.</u> .....	25

<u>III. MARK PROKOP, WHO CHOSE TO CONDUCT BATTING PRACTICE IN A BATTING CAGE ONLY WHEN USING AN L-SCREEN FOR SAFETY, DID NOT PRIMARILY ASSUME THE RISK THAT THE SCREEN PROVIDED WOULD BE SO POORLY MAINTAINED THAT A BALL WOULD PASS THROUGH THE NETTING.</u> .....	28
CONCLUSION .....	31
CERTIFICATION OF BRIEF LENGTH .....	33

## TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>Minnesota Cases:</u></b>	
<i>Andren v. White-Rodgers Co.</i> , 465 N.W.2d 102 (Minn. App. 1991).....	30
<i>Armstrong v. Mailand</i> , 284 N.W.2d 343 (Minn. 1979) .....	30
<i>Cobb v. State</i> , 347 N.W. 491 (Minn. 1984).....	20
<i>Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990) .....	10
<i>Fabio v. Bellomo</i> , 504 N.W.2d 758 (Minn. 1993) .....	10
<i>Green-Glo Turf Farms, Inc. v. State</i> , 347 N.W. 491 (Minn. 1984) .....	17, 21
<i>Grisim v. Tapemark Charity Pro-Am Golf Tournament</i> , 415 N.W.2d 874 (Minn. 1987) .....	29
<i>Habeck v. Ouverson</i> , 669 N.W.2d 907 (Minn. App. 2003) .....	1, 16, 17
<i>Hahn v. City of Ortonville</i> , 238 Minn. 428, 57 N.W.2d 254 (1953) .....	17
<i>Hanson v. Bailey</i> , 249 Minn. 495, 83 N.W.2d 252 (1957) .....	17
<i>Henry v. State</i> , 406 N.W. 2d 608 (Minn. App. 1987) .....	21
<i>Kari v. City of Maplewood</i> , 582 N.W.2d 921(Minn. 1998) .....	10
<i>Kopveiler v. Northern Pacific Ry. Co.</i> , 280 Minn. 489, 160 N.W.2d 142 (1968) .....	22
<i>Krueger v. City of Oakdale</i> , 2003 WL 21450365 (Minn. App. 2003) .....	15

<i>Lishinski v. City of Duluth</i> , 634 N.W.2d 456 (Minn. App, 2001) .....	1, 22, 23, 24, 26
<i>Lloyd v. City of St. Paul</i> , 538 N.W.2d 921 (Minn. App. 1995) .....	16
<i>Noland v. Soo Line Ry</i> , 474 N.W.2d 4 (Minn. App. 1991) .....	1, 21, 22
<i>Olson v Hansen</i> , 299 Minn. 39, 216 N.W.2d 124 (1974) .....	28, 30
<i>Rusciano v. State Farm Auto. Ins. Co.</i> , 445 N.W.2d 271 (Minn. App. 1989).....	2, 30
<i>Sorgenfrie v. City of Apple Valley</i> , 1999 WL 243388 (Minn. App. 1999) .....	15
<i>Springrose v. Willmore</i> , 292 Minn. 23, 192 N.W.2d 826 (1971) .....	28
<i>Swagger v. City of Crystal</i> , 379 N.W.2d 183 (Minn. App. 1985).....	29
<i>Steile v. City of Crystal</i> , 646 N.W.2d 251 (Minn. App. 2001) .....	15, 19
<i>Unzen v. City of Duluth</i> , 683 N.W.2d 875 (Minn. App. 2004) .....	1, 14, 15, 25
<i>Wagner v. Thomas J. Obert Enterprises</i> , 396 N.W.2d 223 (Minn. 1986). .....	2, 29, 30
<i>Wartnick v. Moss &amp; Barnett</i> , 490 N.W.2d 108, 112 (Minn. 1992) .....	10

**Statutes:**

Minn. Stat. § 3.736 ..... 17

Minn. Stat. § 466.01, subd. 1..... 11

Minn. Stat. § 466.02 ..... 11

Minn. Stat. § 466.03, subd. 6(e) ..... 11, 12, 13, 14, 17

**Other Authority:**

Restatement (Second) of Torts Section 335,  
comment d (1965) ..... 18, 19

## **STATEMENT OF LEGAL ISSUES**

1. Are Mark Prokop's claims barred by the exception to municipal tort liability found at Minn. Stat. § 466.03, Subdivision 6(e)?

The trial court held that Section 466.03, subdivision 6(e) applies to the plaintiff's claims, and that when applied his claims against the School District are barred as a matter of law.

The most apposite authorities are:

*Unzen v. City of Duluth*, 683 N.W.2d 875 (Minn. App. 2004).

*Habeck v. Ouverson*, 669 N.W.2d 907 (Minn. App. 2003)

*Noland v. Soo Line Ry*, 474 N.W.2d 4 (Minn. App. 1991).

*Lishinski v. City of Duluth*, 634 N.W.2d 456 (Minn. App, 2001).

2. Did Mark Prokop assume the risk in a primary sense that the School District would provide him with safety equipment that was in such a state of disrepair that it would not serve the purpose for provided an L-Screen to protect a pitcher in a batting cage that the L-Screen was in a reasonable state of repair so that it served the purpose for which it was designed and intended?

The trial court held that Prokop assumed the risk of injury in the primary sense and that the School District owed him no duty.

The most apposite authorities are:

*Wagner v. Thomas J. Obert Enterprises*, 396 N.W.2d 223 (Minn. 1986).

*Rusciano v. State Farm Auto. Ins. Co.*, 445 N.W.2d 271 (Minn. App. 1989).

### **STATEMENT OF THE CASE**

Mark Prokop was seriously injured on June 2, 2005 when a baseball passed through the netting of a protective L-Screen and smashed the bones on the right side of his face. He commenced suit in May 2006 against Independent School District #625 (School District) alleging that it was negligent in its failure to inspect, maintain and repair the L-Screen.<sup>1</sup> The School District answered, pleading 23 affirmative defenses.<sup>2</sup> It also brought a counterclaim against Prokop for indemnity and/or contribution.<sup>3</sup> Following discovery the School District brought a motion for summary judgment, seeking dismissal on the basis of (1) Park and Recreational Area Immunity as set forth in Minnesota Statutes Section 466.03, subdivision 6(e), (2) primary assumption of the risk, and (3) an indemnification/hold harmless clause located on the back of the application Prokop filled out to obtain permission to use the Highland Park High School baseball field.<sup>4</sup> The motion was heard on April 23,

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<sup>1</sup> Complaint, A-1. "A-#" refers to pages in the Appendix.

<sup>2</sup> Answer, A-5 – A-7.

<sup>3</sup> Counterclaim, A-9.

<sup>4</sup> Notice of Motion and Motion, A-11.

2007 by the Honorable Teresa R. Warner of the Ramsey County District Court. By order of June 22, 2007 the trial court granted the School District's motion.<sup>5</sup> The denial was based upon the trial court's conclusions that Section 466.03, subdivision 6(e) Park and Recreational Area Immunity applies to the plaintiffs' claims, that the plaintiffs could not meet the lower trespasser standard of care required by that immunity as a matter of law, and that the doctrine of primary assumption of the risk applies, relieving the School District of any duty owed to Mark Prokop as a permissive user of the Highland Park baseball fields. The trial court expressly declined to rule on the enforceability of the indemnity/hold harmless clause on the back of the application.<sup>6</sup> Judgment of dismissal was entered on July 9, 2007.<sup>7</sup> The plaintiffs appealed.<sup>8</sup>

### **STATEMENT OF THE FACTS**

In the Spring of 2005 Mark Prokop, a St. Paul resident living in the Highland Park neighborhood, was looking for a baseball field at which to conduct baseball practice with a team of 14 year-old boys.<sup>9</sup> This was the second year of the team's existence.<sup>10</sup> Prokop was one of

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<sup>5</sup> Order, A-13.

<sup>6</sup> Court Memorandum, A-24.

<sup>7</sup> A-14, A-25.

<sup>8</sup> Notice of Appeal, A-26.

<sup>9</sup> Prokop depo at 16; Marcus Prokop depo at 18. The depositions cited here are part of the trial court record.

<sup>10</sup> Marcus Prokop depo at 18.

three father-coaches, and it was his assigned task to locate a practice field.<sup>11</sup> Knowing that the Highland Park High School ball fields had recently undergone a major upgrade, Prokop sought permission for his team to use the fields.<sup>12</sup>

Prokop called John Heller, Highland Park High School Athletic Director, and discussed the team's use of the fields.<sup>13</sup> After questioning Prokop about the nature of the team, on March 18, 2005 Heller faxed Prokop an application for a permit to use school facilities.<sup>14</sup> The fax consisted of a cover sheet and two additional pages.<sup>15</sup> The first was entitled Application for Use of Public School Facilities. The second page was entitled Rules and Regulations for Use of School Facilities.<sup>16</sup> Prokop filled out the application, glanced over the rules, and faxed it back to Heller at the high school.<sup>17</sup> In response to the question "List any equipment and/or additional furniture you desire to use" Prokop requested the use of a batting

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<sup>11</sup> Prokop depo at 16.

<sup>12</sup> Prokop depo at 16.

<sup>13</sup> Prokop depo at 17 – 18.

<sup>14</sup> Deposition Exhibit 8; Prokop depo at 18.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Prokop depo at 20 – 21.

cage.<sup>18</sup> He assumed that a batting cage would come equipped with an L-Screen.<sup>19</sup>

Per the School District's normal procedures for issuing a permit, Heller checked the application to make sure it was fully filled out and sent it to the Principal's office for approval.<sup>20</sup> After the principal signed off, the application was sent to the School District Office.<sup>21</sup> The application was sent to Jackie Kearns, the School District's grounds and maintenance supervisor, to make sure that the requested fields would be available and in a proper condition for use.<sup>22</sup> Kearns signed off on April 5, 2005 and the application went back to the School District office.<sup>23</sup> Using the School District's fee schedule, the clerk determined that no fee was to be charged, and the permit was issued on April 8, 2005.<sup>24</sup> At one point during this process Prokop called the School District office to check on the status of his application.<sup>25</sup> In neither his discussion with Heller nor his discussion with the person at the School District office did the subject of an indemnity or hold

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<sup>18</sup> Deposition Exhibit 9.

<sup>19</sup> Prokop depo at 26.

<sup>20</sup> Heller depo at 26; 31 – 32.

<sup>21</sup> Deposition Exhibit 9.

<sup>22</sup> Wittgenstein depo at 33.

<sup>23</sup> Deposition Exhibit 9.

<sup>24</sup> Deposition Exhibit 11; Wittgenstein depo at 25; 27; 34.

<sup>25</sup> Prokop depo at 19 – 20.

harmless clause come up.<sup>26</sup> The School District office will only issue a permit if the applicant agrees to follow School District policy and rules.<sup>27</sup>

The team began practice on the school's junior varsity field sometime in mid-April.<sup>28</sup> Near the field were two batting cages.<sup>29</sup> Inside one of the batting cages was an L-Screen.<sup>30</sup> The screen was old and worn, but from a distance appeared functional.<sup>31</sup> At that time Highland Park High School had three L-Screens.<sup>32</sup> The old one was intentionally left in the batting cages at all times.<sup>33</sup> The two new ones were put away after each use, locked up in a nearby storage building.<sup>34</sup> Prokop and his team, not having access to the storage building, used the old screen that was left in the batting cage.<sup>35</sup>

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<sup>26</sup> Prokop depo at 17, 19 – 20; See Heller depo at 26 – 27; 31.

<sup>27</sup> See Wittgenstein depo at 27 – 28.

<sup>28</sup> Prokop depo at 24.

<sup>29</sup> Marcus Prokop depo at 36.

<sup>30</sup> Marcus Prokop depo at 36.

<sup>31</sup> Danneker depo at 15; See Deposition exhibit 3, bottom photograph.

<sup>32</sup> Danneker depo at 25 – 27.

<sup>33</sup> Danneker depo at 28.

<sup>34</sup> Danneker depo at 27.

<sup>35</sup> Marcus Prokop depo at 36; Prokop depo at 27.

Practice was held twice a week.<sup>36</sup> Prokop generally coached out in the field, although on occasion he threw batting practice in the cage.<sup>37</sup> When he did he used the L-Screen.<sup>38</sup>

On June 2, 2005 Prokop and his son Marcus were late for practice, having attended a wake that afternoon.<sup>39</sup> When they arrived Prokop noted that two players were doing batting practice in the cage; the other coaches were in the field with the other players conducting ground practice.<sup>40</sup> Prokop went to the cage and took over batting practice.<sup>41</sup> The L-screen was about halfway down the cage, nearer the batter than in regular play.<sup>42</sup> He began throwing to his son Marcus.<sup>43</sup> The old L-Screen kept in the batting cage had an unusually high cross bar.<sup>44</sup> Because Prokop is relatively short at five foot eight inches tall, he had to stand further back from this screen than he would from a screen with a lower bar to avoid striking the bar with his hand in his

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<sup>36</sup> Marcus Prokop depo at 33.

<sup>37</sup> Prokop depo at 41.

<sup>38</sup> Prokop depo at 41.

<sup>39</sup> Prokop depo at 41, 47 – 48; Marcus Prokop depo at 32.

<sup>40</sup> Prokop depo at 41.

<sup>41</sup> Prokop depo at 48.

<sup>42</sup> See Deposition Exhibit 3, bottom photograph.

<sup>43</sup> Prokop depo at 48.

<sup>44</sup> Marcus Prokop depo at 37 – 38.

follow through.<sup>45</sup> As is customary when throwing batting practice when using an L-Screen, upon release of the ball he stepped forward while turning his body down and to his left, making sure to retreat behind the screen.<sup>46</sup> The right side of his face was nearest the net. Marcus hit a ball hard, straight up the middle.<sup>47</sup> The ball struck Prokop on the right side of his face, causing him serious injury.

At the time the ball struck him, Prokop was finishing his follow through and did not see it coming. The only person who saw the accident was his son Marcus.<sup>48</sup> Marcus saw the ball go straight at the net, under the cross bar.<sup>49</sup> His father was behind the net.<sup>50</sup> Marcus deduced that the ball went through the net, but does not know whether it went through an existing gap/hole or made a new one.<sup>51</sup> Marcus is sure that the ball went through the net and did not just strike his father when the net “gave” because 1) his father was too far from the net, and the net did not give that much,<sup>52</sup> and 2) the stitches

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<sup>45</sup> Marcus Prokop depo at 62; Prokop depo at 44.

<sup>46</sup> Prokop depo at 49 – 50.

<sup>47</sup> Marcus Prokop depo at 60.

<sup>48</sup> Marcus Prokop depo at 66.

<sup>49</sup> Marcus Prokop depo at 60 – 61.

<sup>50</sup> Marcus Prokop depo at 63.

<sup>51</sup> Marcus Prokop depo at 63.

<sup>52</sup> Marcus Prokop depo at 67 – 68; 70 - 71.

from the baseball were cut into his father's face.<sup>53</sup> There were no marks that would reflect netting.<sup>54</sup>

L-screens are frequently used when throwing batting practice. Throwing batting practice usually involves throwing many balls from a shorter distance than in regular play.<sup>55</sup> The focus is on teaching batting skills, not on pitching.<sup>56</sup> The shortened distance between the batter and the thrower, and the rapidity of the multiple throws are the primary reasons an L-Screen is used to throw batting practice.<sup>57</sup> The thrower, not being prepared to field the ball as he would in regular game play, relies on the screen.<sup>58</sup> When throwing batting practice with the use of an L-screen the thrower changes the manner in which he throws.<sup>59</sup> His follow through is different, and he deliberately throws so that he turns forward and down behind the screen.<sup>60</sup> He is not prepared to field the ball.<sup>61</sup> Chuck Simmons, a baseball coach

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<sup>53</sup> Marcus Prokop depo at 74 – 75.

<sup>54</sup> Marcus Prokop depo at 75.

<sup>55</sup> Danneker depo at 18 – 19; 24 - 25; Morris depo at 12 – 13.

<sup>56</sup> Danneker depo at 18 – 19.

<sup>57</sup> Morris depo at 14.

<sup>58</sup> Morris depo at 12 – 13, 14; Simmons depo at 18.

<sup>59</sup> Simmons depo at 16 – 17; Danneker depo at 18 – 19.

<sup>60</sup> Morris depo at 13 – 14.

<sup>61</sup> Morris depo at 13, 14.

with 30 years' experience, was the Highland Park High School varsity coach the 2003 and 2004 seasons.<sup>62</sup> Mr. Simmons testified that he would never throw batting practice in a batting cage without using an L-Screen to protect the thrower because it is not safe.<sup>63</sup> The purpose of the L-Screen is to protect the thrower from the hit ball.<sup>64</sup>

## **ARGUMENT**

### **I. STANDARD OF REVIEW.**

On appeal from summary judgment this court's task is to determine whether there are any genuine issues of material fact and whether the district court erred in applying the law.<sup>65</sup> All evidence must be viewed in the light most favorable to the nonmoving party.<sup>66</sup> The application of immunity is a question of law subject to *de novo* review.<sup>67</sup>

The facts pertinent to the trial court's resolution of the immunity and assumption of the risk issues are not in dispute, although the inferences the parties have drawn from those facts are significantly different. This court is bound to draw all reasonable inferences from

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<sup>62</sup> Simmons depo at 8, 9.

<sup>63</sup> Simmons depo at 15 – 16.

<sup>64</sup> Danneker depo at 19 – 10; Heller depo at 17 – 18; Morris depo at 14; Simmons depo at 18.

<sup>65</sup> *Wartrick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992); *Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

<sup>66</sup> *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

<sup>67</sup> *Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998).

the undisputed facts in favor of the appellants. With those facts and inferences in mind, *de novo* is the appropriate standard of review.

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

The School District is a municipality for the purposes of determining its tort liability.<sup>68</sup> As a general rule municipalities are liable for their torts.<sup>69</sup> This general rule of liability is subject to express limitations identified in the remainder of the Municipal Tort Claims Act.<sup>70</sup> The School District seeks the protection of the lowered duty provided for in Section 466.03, subdivision 6(e), a limitation that applies to parks and recreation areas. It is not entitled to this limitation, however. The plain language of Section 466.03, subdivision 6(e) refers to claims connected to the land itself, or the provision of recreational services associated with that land. It does not apply to claims arising out of poorly maintained safety equipment. In holding that the School District is entitled to the protection of Section 466.03 subdivision 6(e) Parks and Recreation Area immunity the trial court erred.

Even if Section 466.03 subdivision 6(e) were to apply, there is credible, relevant evidence to support a finding that the School District failed to meet the lowered duty owed to a trespasser. In holding that the trespasser standard has not been met as a matter of

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<sup>68</sup> Minn. Stat. § 466.01, subd. 1.

<sup>69</sup> Minn. Stat. § 466.02.

<sup>70</sup> Minn. Stat. § 466.02.

law, the trial court erred. Each of these errors is prejudicial, and each standing alone requires reversal.

**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.**

The Parks and Recreation Area exception to general tort liability is found in Section 466.03, subdivision 6(e):

**Park and recreation areas.** Any *claim based upon the construction, operation, or maintenance of any property owned* or leased *by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services*, or from any claim based on the clearing of land, removal of refuse and creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user of park or recreation property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.<sup>71</sup>

This section, which limits the duty the School District owes a person who whom it applies, does not apply to a claim arising out of the poor maintenance of an L-Screen.

An L-Screen is a piece of protective equipment. It is not fixed to the ground. It is designed and intended to be moved. In fact Highland Park High School employees move their newer L-Screens in and out of a storage facility every time they play. The old L-Screen involved in this accident was left in the batting cage because it was old and less likely to be stolen or damaged by weather. All L-Screens,

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<sup>71</sup> Minn. Stat. § 466.03, subd. 6(e) (emphasis added).

including the old one, are moved by the Highland Park coaches into the storage building outside the batting cages at Highland Park High School for the winter and taken out of the storage building for use in the batting cages or on the field in the spring at the beginning of baseball season. L-Screens are moved in and out of batting cages and to different locations either within a cage or on the field depending on the type of batting practice the coach wishes to conduct. All of the School District witnesses referred readily to L-Screens as equipment.

Section 466.03, subdivision 6(e) applies only to claims based on the operation or maintenance of "property" intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services. Breaking the statute into its component parts, yet reading it in accordance with its plain meaning, the statutory language does not support the trial court's conclusion that the statute applies.

Looking to the first provision, "claims based on the operation or maintenance of property intended or permitted to be used as a park," it is clear that Prokop's claims do not fall within the meaning of this phrase. The reference to property in the context of this phrase is necessarily a reference to real property, since only real property can be used as a park. Similarly, the phrase "claims based on the operation or maintenance of property intended or permitted to be used as an open area for recreational purposes" necessarily refers to real property. Only real property can be described as an "open area," whether that open area be on land or inside a building. Prokop's claims are based solely on the condition of the L-Screen. An L-Screen is a piece of safety equipment that is readily moved. In fact, an L-

Screen is intended to be moved in order to serve its proper function. The second phrase in the statute does not apply any more than the first.

This leaves the third and final phrase in the statute. It is this third phrase that the trial court used to conclude that Parks and Recreation Area Immunity applies to Prokop's claims. Taken in its totality, that phrase reads:

Any claim based upon the . . . operation or maintenance of any property owned . . . by the municipality that is intended or permitted to be used . . . for the provision of recreational services if the claim arises from a loss incurred by a user of . . . recreation services.<sup>72</sup>

The trial court, relying on this court's decision in *Unzen v. City of Duluth*,<sup>73</sup> reasoned that subdivision 6(e) immunity applies because "the baseball field, batting cage and L-Screen are property that District 625 permits to be used for the provision of recreational services." The problem with this reasoning is that Prokop's claims are not based on allegations arising from his use of the baseball field or the batting cage. The three – baseball field, batting cage and L-Screen – are not equivalent. A claim based on an allegation that the baseball field had been poorly maintained is subject to subdivision 6(e) not because use of the field by a community team for practice is a recreational service provided by the school district, but because it falls within the second provision of the statute. A baseball field is "property intended or permitted to be used as an open area for

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<sup>72</sup> Minn. Stat. § 466.03, subd. 6(e).

<sup>73</sup> 683 N.W.2d 875 (Minn. App. 2004).

recreational purposes.” The batting cages, which are affixed to the baseball field, are part of the “open area” permitted to be used for recreational purposes. This court’s cases have consistently held that the entire physical premises are entitled to immunity where those premises as a whole constitute property intended to be used for recreational purposes.<sup>74</sup> The “entire premises” include fixtures.<sup>75</sup> Nothing in the statutory language makes it appropriate to extend the protections of the first two phrases to safety equipment that is not affixed to the real property that constitutes a park or open area.

Whether Prokop’s claim - that the L-Screen was poorly maintained, in poor condition, and unfit to be used as a safety device - is entitled to the protection of Parks and Recreation Area immunity, then, depends upon whether the L-Screen is part and parcel of the School District’s provision of recreational services. It is not.

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<sup>74</sup> *See Sorgenfrie v. City of Apple Valley*, 1999 WL 243388 (Minn. App. 1999) (injury occurred when plaintiff slipped on a ladder climbing to roof of sports facility; court held the roof was part of the sports facility, and entitled to the same immunity as the rest of the building) (A copy is contained in the Appendix at A-27 in accordance with the requirements of Minn. Stat. § 480A.08(3)); *Unzen v. City of Duluth*, 683 N.W.2d 875 (Minn. App. 2004) (metal nosing on the steps in a clubhouse of a municipal golf course).

<sup>75</sup> *See, e.g., Steile v. City of Crystal*, 646 N.W.2d 251 (Minn. App. 2001) (a signpost implanted in the ground at a city park); *Krueger v. City of Oakdale*, 2003 WL 21450365 (Minn. App. 2003) (a concrete anchor for a fencepost in the outfield of a softball field) (A copy is contained in the Appendix at A-30 in accordance with the requirements of Minn. Stat. § 480A.08(3)).

This court's opinion in *Habeck v. Ouverson*<sup>76</sup> is instructive in the proper application of this portion of the statutory clause. In *Habeck* a six year old child was killed when he was run over by the wheels of a tractor-trailer used by members of the County Fair Board to transport county fair visitors around the fairgrounds. The child somehow fell off the back of the trailer and under the wheels while the vehicle was transporting a group of fair attendees around the fairgrounds. The child's family brought suit in negligence against the County Fair Board and the individual members of that board who were responsible for the modification of the trailer and driving the tractor at the time of the incident. Clearly the tractor-trailer was not real property and did not fit under the first two clauses. In holding that Parks and Recreation Area immunity applied to the plaintiff's claims, this court noted that "[r]ecreational-use immunity under subdivision 6e covers claims arising from alleged negligence based on the provision of recreational services and unrelated to the condition of the recreational property."<sup>77</sup> Providing a ride to fair-goers to help them get around the fairgrounds was the provision of a recreational service that had nothing to do with the condition of the real property. The *Habeck* court cited to *Lloyd v. City of St. Paul*,<sup>78</sup> another decision in which recreational immunity was appropriately applied because the alleged negligence was based on the provision of recreational services. In

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<sup>76</sup> 669 N.W.2d 907 (Minn. App. 2003).

<sup>77</sup> *Habeck*, 669 N.W.2d at 910 (emphasis in original).

<sup>78</sup> 538 N.W.2d 921, 923 (Minn. App. 1995)

*Lloyd* the plaintiff was injured when a paddleboat on a municipal lake was negligently operated, causing it to tip. The *Lloyd* court appropriately found that the City's provision of paddleboats operated by City employees for the pleasure of the public was the provision of a recreational service. In *Habeck* the recreational service was a ride around the fairgrounds. In *Lloyd* the recreational service was the operation of paddleboats to give park visitors a ride.

The School District provided no comparable recreational service in this case. Mark Prokop had permission to use the baseball field, and the batting cages. He was provided with access to recreational land and a fixture on that land. His claims are not based on the operation or maintenance of either the ball field or the batting cages, however. Prokop was also given permission to use an L-Screen, a piece of safety equipment. There was no guarantee an L-Screen would be available, and his use of a screen was conditional on whether the old screen had been left in one of the batting cages. The School District gave him permission to use recreational land and a piece of recreational safety equipment. It did not provide him or his team with any recreational "services" as was the case in *Habeck* and *Lloyd*.

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

Even if the trial court was correct, and Section 466.03, subdivision 6(e) does apply to this case, the evidence in the record is sufficient to create disputed, credible facts and reasonable inferences drawn from those facts that entitle the plaintiffs to go the jury for a determination of whether the lower trespasser standard has been met.

The limitation on liability expressed by Section 466.03, subdivision 6(e) is not immunity in the usual sense. It does not wholly absolve a municipality of liability, but instead allows it to treat visitors, in the tort context, as trespassers rather than entrants.<sup>79</sup> Under this lowered duty, the School District is liable for bodily injuries to persons whose presence is foreseeable which arise out of the maintenance of dangerous artificial conditions in a recreational area.<sup>80</sup> A municipality may be held liable for bodily injury sustained in a recreation area for conduct which would entitle a trespasser to damages against a private person.<sup>81</sup>

To determine whether a landowner owes a duty of care to a known trespasser injured by an artificial condition, Minnesota has adopted Restatement (Second) of Torts § 335 (1965).<sup>82</sup> Section 335 states:

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<sup>79</sup> *Habeck*, 669 N.W.2d at 909.

<sup>80</sup> See, *Green-Glo Turf Farms, Inc. v. State*, 347 N.W. 491, 494 (Minn. 1984); Minn. Stat. § 466.03, subd. 6(e). *Green-Glo* addresses the liability of the state for damages sustained by a farm arising out of the state's operation of a recreational facility under Minn. Stat. § 3.736, et seq. Although the statute at issue in the instant action applies to municipalities (Minn. Stat. § 466.03, et seq.) the wording of both statutes is nearly identical in that both statutes subject the governmental entity to liability for conduct that would entitle a trespasser to damages against a private person. Therefore, the analysis of the statutes and case law are, for the most part, interchangeable. See, *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N.W.2d 254, 261 (1953).

<sup>81</sup> Minn. Stat. § 466.03, subd. 6(e).

<sup>82</sup> *Hanson v. Bailey*, 249 Minn. 495, 499-500, 83 N.W.2d 252, 257 (1957).

A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if (a) the condition (i) is one which the possessor has created or maintains and (ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and (iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.<sup>83</sup>

Under this standard the claimant must show the following in order to proceed with his claim: (1) the defendant created or maintained the artificial condition; (2) the defendant knew or should have known that the artificial condition was likely to cause death or serious bodily harm; (3) the nature of the dangerous condition is such that the defendant has reason to believe that plaintiff will not discover it; and (4) the defendant has negligently failed to warn claimant of the condition and associated risks.<sup>84</sup> A claimant must satisfy all prongs under section 335.<sup>85</sup>

The School District concedes that the L-Screen is an artificial condition that it owned and maintained. It is undisputed that the School District gave no warnings about the poor condition of the L-Screen and the risks associated with using it. The issue before the

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<sup>83</sup> *Id.*

<sup>84</sup> *See, Id.*

<sup>85</sup> *Stiele v. City of Crystal*, 545 N.W.2d 251, 255 (Minn. App. 2002).

trial court, therefore, was whether evidence would allow a reasonable jury to conclude that the condition of the L-Screen was such that that Prokop was unlikely to discover the danger it posed, and whether the School District should have known that the condition of the L- Screen was likely to cause serious bodily harm. The trial court concluded that neither conclusion was supported by the evidence as a matter of law. In arriving at this conclusion, however, the trial court drew inferences from undisputed facts that favor the School District. Had the trial court drawn the equally reasonable inferences from those undisputed facts that favor Mark and Jacqueline Prokop, it would have denied the School District's motion, directing the parties to proceed to trial utilizing the trespasser jury instruction.

1. **A Fact Question Exists About Whether The School District Should Have Known About The Dangerous Condition.**

The School District owns the L-Screen, and was responsible for maintaining it. School District employees placed the screen in the batting cage for use by those persons with permission to use the batting cages. School District employees made the decision to leave this particular L-Screen outside in the elements rather than store it inside the storage building like it did the newer screens. Contrary to the trial court's conclusion, therefore, the School District had actual knowledge of the placement of the screen and of its condition. The School District argued below that there is no evidence that it had knowledge that the L-Screen was such poor condition that it was dangerous to users. This argument belies the evidence. The School District, through its employees, placed the screen in the batting cage,

put the netting over the frame, and moved it into position. Areas of the netting had been repaired by tying strands of the netting together. These repairs could only have been made by School District, who had actual knowledge that the netting they were repairing was weak. The knowledge of these School District employees is the knowledge of the School District. The School District had actual knowledge of the condition of the screen, particularly of the condition of the netting. Whether that condition was likely to cause death or bodily harm is a separate question.

Although this court originally interpreted language from the Minnesota Supreme Court's decision in *Green-Glo Turf Farms, Inc. v. State*<sup>86</sup> to require actual knowledge as opposed to constructive knowledge of the fact that a given condition was likely to cause death or bodily harm, more recent cases have applied a constructive knowledge standard to Section 335.<sup>87</sup> The School District, citing to *Cobb v. State*,<sup>88</sup> asked the trial court to apply the actual knowledge standard. *Cobb* pre-dates the change. The Minnesota Supreme Court has not addressed the issue since the change was made in 1991 in *Noland v. Soo Line Ry.*<sup>89</sup> *Noland* supersedes *Cobb* and the earlier opinions of this court. Thus under Section 335 an injured plaintiff

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<sup>86</sup> 347 N.W. 491, 494-95 (Minn. 1984).

<sup>87</sup> Compare *Henry v. State*, 406 N.W. 2d 608, 611 (Minn. App. 1987) and *Noland v. Soo Line R. Co.* 474, N.W.2d 4, 6 (Minn. App. 1991).

<sup>88</sup> 441 N.W.2d 839, 841 (Minn. App. 1989).

<sup>89</sup> 474, N.W.2d 4 (Minn. App. 1991).

need only show that the municipality had constructive knowledge that an artificial condition was dangerous to satisfy the requirement.<sup>90</sup>

Likewise, it is not necessary that the municipality anticipate the exact nature of the particular accident that occurred.<sup>91</sup> Whether a possessor of land has constructive knowledge of a dangerous condition is a fact question.<sup>92</sup>

It is not disputed that the School District owned and maintained the L-Screen, that its employees placed the L-Screen in the batting cage, or that its employees used the L-Screen. The screen was moved into and out of the storage building with the change of seasons, again by School District employees. This particular L-Screen was comprised of a "sleeve" of netting that was placed over the metal frame. Portions of the netting had come apart and had been repaired by tying knots. That too was done by School District employees. In moving the L-Screen in and out of the batting cage, repairing the prior damage to that netting and then putting the netting over the frame, those employees were in a position to view the condition of the netting at close range. Under these circumstances a jury could reasonably conclude that the School District, through its employees, possessed actual knowledge of the danger posed by the poor condition of the

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<sup>90</sup> *Noland v. Soo Line R. Co.*, 474 N.W.2d 4, 6 (Minn. App. 1991) review denied, September 13, 1991; cited with approval in, *Lishinski v. City of Duluth*, 634 N.W.2d 456, 458 (Minn. App. 2001); Restatement (Second) of Torts section 335, comment d (1965).

<sup>91</sup> *Noland*, 474 N.W.2d at 6.

<sup>92</sup> See, *Kopveiler v. Northern Pacific Ry. Co.*, 280 Minn. 489, 160 N.W.2d 142, 145-6 (1968).

netting. Constructive notice is a lower standard. Under these circumstances a jury must decide whether the School District knew or should have known of the hazardous condition.

**2. A Fact Question Exists About Whether The L-Screen Was Likely To Cause Serious Bodily Harm.**

The trial court summarily concluded that Prokop presented no evidence that the School District had knowledge that the poor condition of the L-Screen was likely to cause death or serious bodily harm. It based its conclusion solely on the fact that there is no evidence that the School District ever received any complaints about the poor condition of the netting. The trial court misperceived the standard to be applied to this element.

The School District argued below that this element could not be met because an L-Screen has no “inherently dangerous propensities.” Neither Restatement section 335 nor Minnesota case law, however, require that an artificial condition have “inherently dangerous propensities” before a municipality will be held to have constructive knowledge of the condition’s likelihood to cause serious injury. An excellent illustration of this legal reality is found in this court’s decision in *Lishinski v. City of Duluth*.<sup>93</sup> *Lishinski* dealt with injuries to an inline skater who fell on a skating path due to changes in the trail’s curve and skating surface. Although the *Lishinski* court did not directly address the dangerous propensity of an inline skate path, it tacitly agreed with the trial court that the inline skate path was likely to cause serious injury or death because skaters were not likely to

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<sup>93</sup> 634 N.W. 2d 456 (Minn. App. 2001).

discover a curve in the path or a change in the path's surface until they were already in danger.<sup>94</sup> *Lishinski* teaches that the "dangerousness" prong cannot be decided in a vacuum. An artificial condition need not rise to the level of "inherently dangerous" before the second requirement of section 335 is met.

The evidence of the hazard posed by the condition of the L-Screen in this case is substantially like the evidence of the hazard posed by the change in path surface in *Lishinski*. An L-Screen is a safety device. Its sole purpose is to protect a person throwing batting practice – usually at distance closer to the batter than during real play – from the danger of being hit by a baseball. The user of an L-Screen relies upon the screen to prevent the ball from striking him at close range. Being hit in the face or head by a baseball at close range is a highly likely to cause serious bodily injury. The prevention of such a likely outcome is the sole reason for the existence and use of the device in the first place. The obvious danger posed by an L-Screen with a netting that has weak strands likely to break and form holes of such size that a baseball can travel through it is obvious. A jury is entitled to determine whether the condition of the L-Screen was likely to cause serious bodily harm.

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<sup>94</sup> *Id.* at 460.

**3. A Fact Question Exists About Whether Mark Prokop Would Discover The Hazardous Condition of the L-Screen While Using it for Batting Practice.**

The trial court concluded that the condition of the L-Screen was open and obvious, and in no way hidden.<sup>95</sup> It based its conclusion on the fact that close-up photographs of the screen “reveal several holes and numerous places where the net had been repaired by tying it in knots.”<sup>96</sup> Mark Prokop and his son Marcus, when shown the close-up photographs in their depositions agreed that the holes and knots were present. In using this evidence to conclude that the dangerous condition of the L-Screen was “open and obvious and in no way hidden,” the trial court misapplied the appropriate standard to be used on this part of the test.

This court addressed the proper standard in *Unzen v. City of Duluth*.<sup>97</sup> In *Unzen*, as in this case, the plaintiff acknowledged in his deposition that he could see the metal edging on the stairs as he fell. The metal edging, which was the defect, was clearly visible. Yet this court noted that “[t]he focus should not be on whether the metal nosing itself was visible, but rather whether the *dangerous condition* was visible.”<sup>98</sup> Although the plaintiff could see the defect on close inspection, which occurred as he fell, the danger posed by the

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<sup>95</sup> A-22.

<sup>96</sup> A-22.

<sup>97</sup> 683 N.W.2d 875 (Minn. App. 2004).

<sup>98</sup> *Unzen*, 683 N.W.2d. at 880 (emphasis in original).

condition was arguably not obvious. The *Unzen* court upheld the trial court's conclusion that despite the plaintiff's testimony that the metal edging on the stairs was objectively visible to the naked eye, the question of whether the danger posed by the condition was hidden was a question for jury resolution.<sup>99</sup>

In *Lishinski v. City of Duluth*<sup>100</sup> this court affirmed a trial court's conclusion that a jury should decide whether the curvature and surface change of an inline skate path was a hidden dangerous condition. Had the skater inspected the path before taking the curve a fairly high speed she would have seen the surface change, since it was in fact visible upon close inspection. Because she was skating, however, the danger posed by this objectively visible surface was not apparent to a user until she was already imperiled by the hazard it posed. Under these circumstances this court held that the trial court had correctly left the question of whether the danger posed to the skater by the trail's surface change was hidden to the jury.

Mark Prokop was injured when a baseball traveled through the netting of an L-Screen and struck him in the face. The question to be answered here is whether the L-Screen was so poorly maintained that the risk of a ball going through the net and striking Prokop in the face was objectively obvious. It was not. Certainly an up-close inspection of the netting on the L-Screen would have revealed gaps in the netting near where it was hung over the cross bar, an occasional hole ,and

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<sup>99</sup> *Id.*

<sup>100</sup> 634 N.W.2d 456 (Minn. App. 2001).

places where threads had been tied back together. From a distance, however, the netting just looked old. Furthermore, the evidence of how the accident occurred is such that the jury could conclude either that the ball passed through an existing gap in the netting, or made a new hole of its own. While the presence of the gap is something that is objectively visible to the naked eye, the likelihood that the netting was in such bad shape that a ball would tear a hole in it is not.

Photographs of the L-Screen taken shortly after the accident show a net thrown over a metal frame. The net has several gaps in it. Review of photographs taken at close range reveal that some of the strings have been tied together in an effort to repair what had been a hole in the netting. The ties are not visible at any appreciable distance. The only person who saw the ball travel from the bat to the netting was the batter, 14 year-old Marcus Prokop. He saw the ball fly straight at the net, "under the bar," from which he deduced that it traveled through the net. It is just as likely that the ball created a hole by striking the poorly maintained netting as it is that the ball was lined up so precisely that it traveled through an existing hole or gap. A jury could readily conclude that even if Mark Prokop had looked closely at the netting before he used the L-Screen he would not discover its weakened condition, and would not anticipate that the netting would break when hit with a baseball.

The appropriate inference drawn from these facts is that the School District should have anticipated that a person like Mark Prokop throwing batting practice in the batting cage would use the aged and poorly maintained L-Screen despite its run-down appearance. While it looked old and run down, the Highland Park

varsity coach, Robert Danneker, described it as still "functional." Although Danneker's credibility with respect to this assessment is questionable, Danneker himself used the L-Screen. Under the law set forth above, the School District had a duty to use reasonable care to protect Mark Prokop from the hazardous L-Screen because it should have anticipated that he would not discover the hazard posed by the weakened netting and would use it to his detriment. Although the gaps in the netting and the tied strands were objectively visible at close inspection, whether the danger they posed was likely to be appreciated by a casual user is an issue of fact for jury resolution.

**III. MARK PROKOP, WHO CHOSE TO CONDUCT BATTING PRACTICE IN A BATTING CAGE ONLY WHEN USING AN L-SCREEN FOR SAFETY, DID NOT PRIMARILY ASSUME THE RISK THAT THE SCREEN PROVIDED WOULD BE SO POORLY MAINTAINED THAT A BALL WOULD PASS THROUGH THE NETTING.**

The common law doctrine of primary assumption of the risk is concerned with the threshold issue of whether the defendant owes a duty to the plaintiff.<sup>101</sup> The doctrine applies only "where the parties have voluntarily entered into a relationship in which the plaintiff assumes well known incidental risks. As to those risks, the defendant has no duty to protect the plaintiff, and thus if the plaintiff's injury arises from an incidental risk the defendant is not negligent."<sup>102</sup>

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<sup>101</sup> *Springrose v. Willmore*, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971).

<sup>102</sup> *Olson v Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974).

Application of the doctrine of primary assumption of the risk is uncommon.<sup>103</sup> It is most commonly applied in cases where patrons of inherently dangerous sporting events are injured due to a risk inherent in the sport itself.<sup>104</sup> Even in cases involving sporting events, however, the doctrine of primary assumption of the risk is applied only to the “ordinary, necessary, obvious risks” that are incidental to the sport or activity itself.<sup>105</sup> *Wagner v. Thomas J. Obert Enterprises*<sup>106</sup> is instructive in this respect. In *Wagner* the plaintiff was injured when she fell while roller skating at the defendant’s rink.<sup>107</sup> The *Wagner* court carefully noted the difference between primary and secondary assumption of the risk with respect to this fall.

Here there are two versions of how plaintiff’s accident happened. If the accident happened simply because plaintiff, concerned about other skaters, lost her balance

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<sup>103</sup> *Swagger v. City of Crystal*, 379 N.W.2d 183, 185 (Minn. App. 1985).

<sup>104</sup> *See Grisim v. Tapemark Charity Pro-Am Golf Tournament*, 415 N.W.2d 874 (Minn. 1987) (spectator at golf tournament assumes the risks inherent in being on a golf course, including being struck by a golf ball while seated outside of the designated, protected area); *Wagner c. Thomas J. Obert Enter.*, 396 N.W.2d 223 (Minn. 1986) (patron of roller skating rink assumes risk inherent in roller skating, including the risk of falling or colliding with other skaters due to lack of skill or clumsiness); *Swagger v. City of Crystal*, 379 N.W.2d 183 (Minn. App. 1985) (observer of softball game assumes risks inherent to the sport, including being struck by a wildly thrown ball).

<sup>105</sup> *Wagner*, 396 N.W.2d at 226.

<sup>106</sup> 396 N.W.2d 223 (Minn. 1986).

<sup>107</sup> *Id.* At 225.

and fell while exiting, the defendant owed no duty to prevent her fall, or, to put it another way, plaintiff had assumed a primary risk of roller skating. On the other hand, if the fall occurred as plaintiff testified at trial [fall due to poor lighting and poorly maintained flooring at exit point], defendant owed her a duty of care which was breached and this negligence would be compared with plaintiff's contributory negligence, if any.<sup>108</sup>

The elements of both primary and secondary assumption of the risk are identical: the plaintiff (1) had knowledge of the risk, (2) appreciated the risk, and (3) had a choice to avoid the risk but voluntarily chose to accept the risk.<sup>109</sup> "The manifestations of acceptance and consent dictate whether primary or secondary assumption of the risk is applicable in a given case."<sup>110</sup> The wisdom and reasonableness of the plaintiff's actions are not factors in the determination.<sup>111</sup> The doctrine of primary assumption of the risk is not appropriate where there is evidence that the tortfeasor's conduct enlarged the inherent risk assumed by the claimant.<sup>112</sup>

Mark Prokop acknowledges that there is always a risk of getting hit with a baseball when pitching to a batter. That, however, is not the risk that caused his injury. When Mark Prokop assumed the risks

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<sup>108</sup> *Id.* At 226.

<sup>109</sup> *Andren v. White-Rodgers Co.*, 465 N.W.2d 102, 104-05 (Minn. App. 1991); *Olson*, 299 Minn. at 44, 45, 216 N.W.2d at 127.

<sup>110</sup> *Armstrong v. Mailand*, 284 N.W.2d 343, 351 (Minn. 1979).

<sup>111</sup> *Id.*; *Andren*, 465 N.W.2d at 105.

<sup>112</sup> *Rusciano v. State Farm Auto. Ins. Co.*, 445 N.W.2d 271, 273 (Minn. App. 1989).

inherent to entering a batting cage and commencing batting practice while utilizing the protection of an L-Screen, those risks included the risk of getting hit because he failed to duck behind the screen, or of getting hit by a wildly hit ball that bounced off the side or back of the cage. They did not include the risk that the L-screen, a piece of safety equipment designed and intended to protect a thrower from a high speed ball would fail, allowing the ball to travel through the netting. Users of L-Screens in a batting cage affirmatively rely on the L-Screen to protect them from balls hit into the net so long as they duck behind that net. Mark Prokop would not have thrown batting practice in a batting cage if no L-Screen had been provided. By providing this poorly maintained L-Screen, the School District enhanced the risks ordinarily associated with throwing batting practice. The trial court failed to make the necessary distinction between the ordinary risks of baseball and batting practice, which Mark Prokop assumed in the primary sense, and the risk to which he was ultimately exposed. He did not primarily assume the risk that cause his injury.

### **CONCLUSION**

Parks and Recreation Area immunity set forth in Minnesota Statutes Section 466.03, subdivision 6(e) does not apply to a claim based upon negligently maintained safety equipment that is not part of a service provided by the municipality. The trial court erred in concluding that the immunity applies, and should be reversed on that basis alone.

Even if the trial court's conclusion that immunity applies is correct, it committed prejudicial error when it concluded that there is insufficient evidence for the question of whether the School District

breached the lowered duty it owes to trespassers to go to the jury. There is sufficient evidence in the record, when construed in favor of the Prokofs, for a reasonable jury to conclude that the School District had both actual and constructive knowledge of the dangers posed to any person who used the L-Screen, and that serious bodily injury or death was likely. There is also sufficient evidence in the record, when construed in favor of the Prokofs, for a reasonable jury to conclude that Mark Prokop was not likely to discover the danger the netting on the L-Screen posed to him. In deciding these two factual questions in favor of the School District as a matter of law, the trial court committed reversible error and should be reversed.

Finally, the doctrine of primary assumption of the risk does not eliminate the School District's duty, since the risk that caused Mark Prokop's injuries was not inherent in throwing batting practice in a batting cage while using an L-Screen. The trial court should be reversed, and the case remanded for trial by jury.

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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 6,115 words. This brief was prepared using Microsoft Word 2000.

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