NO. A07-1716

State of Minnesota

In Court of Appeals

Mark Prokop and Jacqueline Prokop,

Appellants,

vs.

Independent School District #625,

Respondent.

BRIEF AND APPENDIX OF RESPONDENT INDEPENDENT SCHOOL DISTRICT #625

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STATEMENT OF LEGAL ISSUES

I. WHETHER THE SCHOOL DISTRICT IS ENTITLED TO DISMISSAL OF THE COMPLAINT PURSUANT TO MINN. STAT. § 466.03, SUBD. 6(E)?

The district court held in the affirmative.

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Stiele v. City of Crystal, 646 N.W.2d 251 (Minn. App. 2002)
Merchlewitz v. Midwest 4 Wheel Drive Ass'n, Inc., 587 N.W.2d 652 (Minn. App. 1999)
Lundstrom v. City of Apple Valley, 587 N.W.2d 517, 520 (Minn. App. 1998)
Lloyd v. City of St. Paul, 538 N.W.2d 921, 924 (Minn. App. 1995), *review denied* (Minn. Dec. 20, 1995)

II. WHETHER THE SCHOOL DISTRICT IS ENTITLED TO DISMISSAL OF THE COMPLAINT BECAUSE THEY CANNOT ESTABLISH A DUTY?

The district court held in the affirmative.

Authority
Doe v. Brainerd Int'l Raceway, 533 N.W.2d 617(Minn. 1995)
Martinez v. Minnesota Zoological Gardens, 526 N.W.2d 416 (Minn. App. 1955), *review denied* (Minn. Mar. 29, 1995)
Wagner v. Thomas J. Obert Enterprises, 396 N.W.2d 223 (Minn. 1986)

STATEMENT OF CASE AND UNDISPUTED FACTS

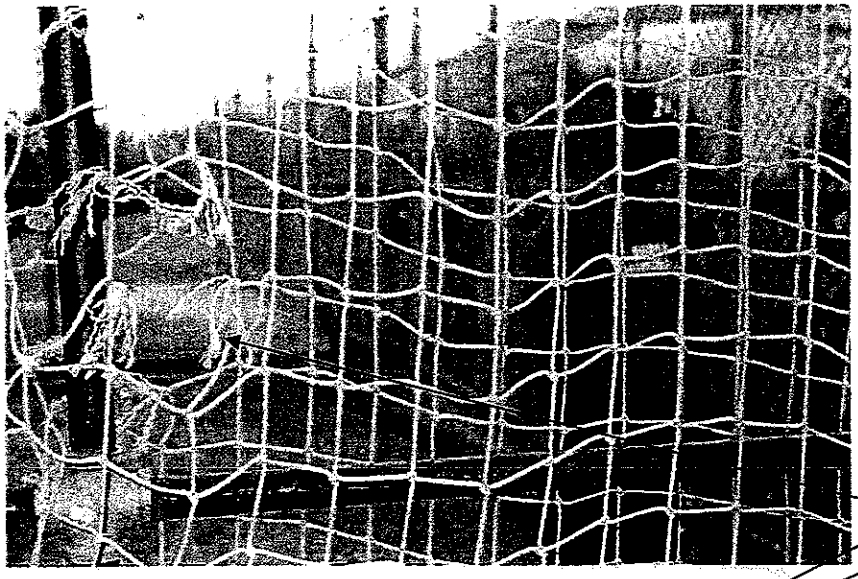
Background

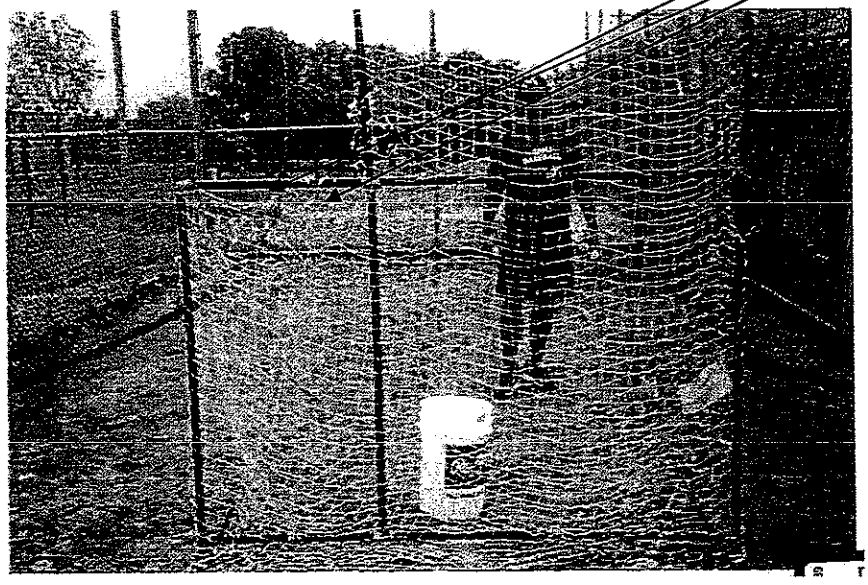
As set forth by Appellants in their brief, Mark Prokop applied for, and obtained, a permit from the School District to use the fields and batting cages at Highland Park High School. *000005-9, 121.* The team practiced two times per week beginning April 11, 2005 through the end of July 2005 at Highland Park High School's ball fields. *000005, 71.*

Batting Practice Equipment

Located at the Highland High School fields are two batting cages for practice. *000005-7, 14, 22, 68-69.* Inside one of the batting cages was a pitching screen. *Id.* The screen is L-shaped, i.e. it is not a full square, rather one corner is cut out so that a person can pitch the ball to a batter. *0000014.* As set forth by Appellants in their brief, Mark Prokop repeatedly used the below depicted L-Screen while conducting batting practice. *000014-21, 71, 73.* The depicted L-Screen is shown in its condition

prior to, and on the day of, the accident:





Visible holes in the netting.

000013, 21, 42, 58, 73-75, 112-116. The netting could be picked up, moved, removed, or draped differently over the frame. *000044.*

Prior to the 2003-2004 school year, the School District had one L-Screen, the one depicted above. *000042.* Leading up to the Spring of 2004, Highland Park High School undertook a major construction project to improve its athletic facilities, including the baseball fields. *000027, 30.* In addition, a new L-Screen was purchased. *000042.* During the 2004-2005 school year, the School District purchased another L-Screen. *000045.* The School District continued to use all three screens. *000042, 45-46, 57-58.* Specifically, the old screen was permanently left in one of the batting cages and was used by various teams. *Id.* In fact, it continues to be used. *000058.*

Prokop's team had used the batting cages and the above depicted L-Screen since the beginning of the season. *000007, 14-15, 49, 44.* Mark Prokop specifically used the L-screen at least three times prior to his injury. *000007, 14-15.* Neither Prokop, nor anyone else, ever complained of the condition of the old L-Screen or requested repair. *000035, 44-45, 59-60, 94-95.*

Accident

On the day of the accident, Mark Prokop and his son entered the batting cage for practice. *000014-15, 70.* Mark Prokop pitched balls to his son who would bat them. *000014, 17, 70.* Mark Prokop did not see how the accident occurred, but his son described it as follows:

> He pitched the ball to me and I hit the ball right back up the middle and I saw it didn't go over the net, but then I saw it was under—it was heading, like, straight for under the bar, and the next thing I noticed, he screamed and he fell to the ground, and I went over there and he was bleeding from the nose and mouth.

000077-78; see also 000016-17. Marcus Prokop did not actually see the ball go through the net, but assumes that it did, and that is what he told his father. *000017, 78.*

Lawsuit

Following his injury, Prokop went to the hospital and his family to photograph the screen. *000012-13, 17, 21, 95.* However, no one reported the injury to the School until nine months later. *Id.* In the meantime, the School continued to use the L-Screen and permitted others to use the screen as well. *000058-59.* In fact, the L-Screen continues to be used today and there has been no further report of injury. *Id.*

Appellants eventually filed suit, discovery was conducted and Defendant St. Paul Public Schools—ISD #625 [hereinafter "School District"] sought summary judgment dismissal of Appellants' negligence and loss of consortium claims because (1) the district is immune from claims arising out of the construction, operation, or maintenance of recreational equipment pursuant to Minn. Stat. § 466.03, subd. 6(e), (2) because it did not owe Prokop a duty of care, and (3) it had in place an enforceable hold harmless agreement with Prokop. The district court granted summary judgment dismissal of the Complaint on the basis of statutory recreational immunity and no duty. The district court did not reach the third issue.

Appellants then appealed. Although the School District filed a Notice of Review of the last issue (hold harmless), the School District is now waiving that hold harmless claim on appeal.

ARGUMENT

Standard of Review

"On an appeal from summary judgment, [this Court asks] two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). When immunity is raised as a defense, any allegation of negligence is a *legal*, not a factual question and de novo review is appropriate. *Rehn v. Fischley*, 557 N.W.2d 328, 332 (Minn. 1997). Immunities provide immunity from suit; therefore, the immunity is effectively lost if the case is erroneously permitted to go to trial. *Gleason v. Metropolitan Council Transit Operations*, 582 N.W.2d 216, 218 (Minn. 1998).

Appellants' Complaint was properly dismissed because (1) their claims are barred by Minn. Stat. § 466.03, subd. 6(e), and (2) the School District did not owe Prokop a duty of care.

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE SCHOOL DISTRICT WAS ENTITLED TO PARKS AND RECREATION IMMUNITY PURSUANT TO MINN. STAT. § 466.03, SUBD. 6E.

Minnesota Statute § 466.03 subd. 6e grants school districts immunity from *any claim* based upon the construction, operation, or maintenance of *any property* used for the provision of recreational services. Minn. Stat. §§ 466.01, 466.03 subd. 6e (2006) (emphasis added). The only exception to recreational immunity provides that school districts are still liable for conduct that would entitle a trespasser to damages against a private person. Minn. Stat. § 466.03, subd. 6e.

A. Minn. Stat. § 466.03, subd. 6(e) applies to claims challenging the condition of recreational equipment.

Appellants' argument that statutory recreational immunity does not apply to their claims is absurd. Minn. Stat. §466.03, subd 6(e) does not specifically state that it applies to claims involving an L-Screen. The statute also does not address rowing machines, drainage grates, signposts, metal anchors on Satellites, paddleboats, boards at a hockey rink, ladders, playground equipment, tape on a tennis court, kitchen mixers, gymnasium walls, or cars flying off of a race track.

Nevertheless, Minnesota Courts have repeatedly applied the recreational immunity statute to bar claims challenging the condition of the foregoing equipment, all of which were being used as part of recreational services. *See e.g. Stiele v. City of Crystal*, 646 N.W.2d 251, 255 (Minn. App. 2002) (barring claim where plaintiff was injured by signpost); *Merchlewitz v. Midwest 4 Wheel Drive Ass'n, Inc.*, 587 N.W.2d 652 (Minn. App. 1999) (barring claims where plaintiff was injured by a race car leaving race track); *Lundstrom v. City of Apple Valley*, 587 N.W.2d 517, 520 (Minn. App. 1998) (barring claim where plaintiff was injured by a piece of tape on tennis court); *Lloyd v. City of St. Paul*, 538 N.W.2d 921, 924 (Minn. App. 1995) (barring claim where plaintiff was injured while using paddleboat), *review denied* (Minn. Dec. 20, 1995); *Krueger v. City of Oakdale*, 2003 WL 21450365 (Minn. App. June 24, 2003) (barring claim where plaintiff was injured by concrete anchor for a fencepost) (unpublished); *Hinnenkamp v. City of Columbia Heights*, 2002 WL 233824 (Minn. App. Feb. 12, 2002) (barring claim where plaintiff was injured by a falling kitchen mixer that splashed scalding grease)

(unpublished); *S.M.R. v. City of Inver Grove Heights*, 2000 WL 385497 (Minn. App. April 18, 2000) (barring claim where plaintiff was injured by drainage grate) (unpublished); *Anderson v. Independent School Dist. No. 891*, 1999 WL 118648 (Minn. App. March 3, 1999) (barring claim where plaintiff was injured by unpadded wall in gym) (unpublished); *Sorgenfrie v. City of Apple Valley,* 1999 WL 243388 (Minn. App. April 27, 1999) (barring claim where plaintiff was injured by ladder) (unpublished); *Zacharias v. City of Bloomington*, 1998 WL 846506 (Minn. App. Dec. 8, 1998) (barring claim where plaintiff was injured by spring on exercise rowing machine) (unpublished); *Peterson v. City of Blooming Prairie*, 1998 WL 217200 (Minn. App. May 05, 1998) (barring claim where plaintiff was injured when she jumped or fell off of piece of playground equipment) (unpublished); *Noble v. City of Eagan*, 1996 WL 162617 (Minn. App. April 9, 1996) (barring claim where plaintiff was injured by metal brackets on hockey rink) (unpublished).

Although Appellants assert that immunity should not apply here where the condition of safety equipment is challenged, courts have repeatedly applied recreational immunity in such cases. *See e.g. Schaffer v. Spirit Mountain Recreation Area Authority,* 541 N.W.2d 357 (Minn. App. 1995) (barring claim where plaintiff was injured by barrel that covered a water hydrant used in a snow-making system); *Mertz v. City of Eden Prairie*, 1997 WL 435881 (Minn. App. Aug. 05, 1997) (barring claim where plaintiff was injured when he collided with safety fence while sledding) (unpublished); *Levine v. City of Maple Grove*, 1994 WL 396354 (Minn. App. Aug. 02, 1994) (barring claim where

plaintiff was injured by post that was erected to limit motor vehicle access to bike trail) (unpublished).

In support of their position that the statute does not apply in this case, Appellants cited *Lloyd* and *Habeck v. Ouverson*, 669 N.W.2d 907 (Minn. App. 2003). Although Appellants cite these cases as support for their position, it is difficult to understand why. As properly noted by Appellants, the court in *Lloyd* barred a claim arising out of the decision of a paddleboat operator to jump on a boat occupied by the claimants, causing the boat to tip. *Id*, 538 N.W.2d at 923. In *Habeck,* the court barred a claim against the driver of a tractor who ran over a child while giving rides at a county fair. *Id.,* 669 N.W.2d at 910. Appellants appear to claim that although recreational immunity *was* granted in those cases, it should not be granted here because no recreational services were being offered to Prokop at the time of his injury. The School District begs to differ. If Highland Park High School decided willy-nilly to shut down its fields and prevent the use of its equipment, it is quite likely that the St. Paul area citizens would have something to say about that.

The record here establishes that the high school team, and other local teams and private clubs, like Prokop's private club, use the fields and equipment in order to carry out the recreational activity of baseball. *000007, 27-28, 31.* Certainly, if Prokop did not like the fields and equipment provided by the school, he could have gone somewhere else, such as his own backyard, purchased other equipment or use the fields and equipment at his son's parochial school. *000064, 69, 76.* The L-Screen, like a backstop, first base, home plate, bench and/or pitcher's mound, is part and parcel of the overall

recreational facility. *000028-29*. It cannot be treated piecemeal; and, therefore, as the district court properly found, Appellants' argument, that the recreational immunity statute does not apply to claims challenging the condition of an L-Screen, must be rejected.

B. The trespasser exception to recreational immunity does not apply.

As set forth above, the only exception to recreational immunity provides that school districts are still liable for conduct that would entitle a trespasser to damages against a private person. Minn. Stat. § 466.03, subd. 6e. Minnesota courts have adopted the adult trespasser standard of care as set forth in the Restatement (Second) of Torts as the standard of care owed to a trespasser. *See, e.g., Sirek v. State, DNR*, 496 N.W.2d 807 (1993); *Green-Glo Turf Farms v. State*, 347 N.W.2d 491, 494 (Minn. 1984). The Restatement (Second) of Torts § 335 provides:

> 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:
>
> 1. The condition:
> a: is one which the possessor has created or maintained,
> b: is, to his knowledge, likely to cause death or serious bodily harm to such trespassers, **and**
> c: is of such a nature that he has reason to believe that such trespassers will not discover it.
>
> **And**,
>
> 2. The possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

Each of the requirements of § 335 must be met before liability will attach. *Cobb v. State*, 441 N.W.2d 839, 841 (Minn. App. 1989) (emphasis added). Therefore, under this

standard, a governmental entity will be liable only where a claimant demonstrates that the governmental entity failed to exercise reasonable care to warn trespassers about hidden, artificial dangers knowingly created or maintained by it that are likely to cause death or serious bodily harm. *Sirek*, 496 N.W.2d at 813.

Whether immunity applies is a legal question. *Stiele v. City of Crystal*, 646 N.W.2d 251 (Minn. App. 2002). Therefore, whether recreational immunity applies (including the trespasser exception) is a question for the judge on summary judgment, not the jury. Restatement (Second) of Torts § 335 (1965) (emphasis added).

As correctly noted by Appellants, for purposes of summary judgment, the School District admitted that the L-Screen is an artificial condition maintained by it. However, Appellants did not, and still cannot establish, any of the remaining elements of § 335 in order to defeat immunity. Specifically, they did not, and still cannot, establish that (1) the condition of the L-Screen was hidden, (2) that the alleged defective condition (holes in the netting of the L-Screen) was likely to cause death or serious bodily harm, nor (3) that the School District knowingly created and maintained a dangerous condition.

1. Condition of the netting was open and obvious.

The standard of whether a condition is concealed is not whether the injured party was aware of it, but whether the condition itself was visible. *Sirek v. State*, 496 N.W. 2d at 812. When a brief inspection would have revealed the condition, it is not concealed. *Johnson v. State of Minnesota*, 478 N.W.2d 769, 773 (Minn. App. 1991). It is the concept of "brief inspection" that Appellants ignore when they argue that the condition of the netting was not open and obvious.

Here, the challenged condition of the recreational equipment (holes in the netting)[1] was clearly open and obvious. The fact that the condition was open and obvious is clear from the above photographic depictions of the L-Screen used by Prokop. Although Prokop denied seeing the holes in the netting prior to his injury, he admits that the photographs depict the condition of the L-Screen as it was prior to, and on, the day of the accident, and that he can see the holes in the netting as depicted in the photographs. *000013, 22.* Further, Prokop's son, at his deposition, also admitted that one can see holes in the net in photographs of the L-Screen. He further admitted that he specifically observed holes in the netting immediately after the accident. *000072-75.*

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[1] In an attempt to defeat summary judgment, Appellants raised for the first time a new theory of liability against Respondent—that the L-Screen netting was in a weakened state because of negligent maintenance; and, thus, the ball hit the net, broke the strings of the netting, flew threw and hit Mark Prokop, causing injury. This new theory of liability is also set forth in their appellate brief. As the School District argued before the district court, if Appellants intend to base their claim for damages based upon allegations not present in the Complaint, then they must seek to amend their Complaint by Motion which is disfavored at the time of summary judgment. Minn. R. Civ. P. 15.01. *See, e.g., Cybyske v. Independent School Dist. No. 196,* 347 N.W.2d 256, 264 (Minn. 1984) (denying motion to amend complaint where plaintiff waited until the eve of defendants' summary judgment motion to make her motion to amend); *Taubman v. Prospect Drilling & Sawing, Inc.*, 469 N.W.2d 335, 338 (Minn. App. 1991) (affirming trial court's denial of plaintiff's motion to amend made after defendant filed summary judgment motion). Appellants never filed a Motion to Amend, in all likelihood because they are not entitled to an amendment or consideration of this new allegation. There is no evidence in the record supporting this allegation. In fact, Appellants' admit that the best evidence as to the accident is in the form of Marcus Prokop's testimony who testified that he did not know whether the ball went through a hole in the net. Mere allegations, without admissible evidentiary support are insufficient to support a Motion to Amend, let alone beat a motion for summary judgment. *Hopkins By LaFontaine v. Empire Fire and Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991). Therefore, this Court should reject this new, manufactured theory outright. *See Stead-Bowens v. Langley*, 636 N.W.2d 334, 341 (Minn. App. 2001).

Appellants, citing *Unzen v. City of Duluth,* assert that even when the condition can be seen, this prong is met if the danger of the condition is hidden. *Id.,* 683 N.W. 2d 875, 880 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). Respondent agrees that *Unzen* stands for that proposition.

Nevertheless, *Unzen* is not dispositive here. In *Unzen,* the record included evidence that:

1. the claimant tripped and fell on metal nosing that was at the edge of a stair step;
2. the metal nosing protruded "slightly" above the step's rubber tread;
3. a dozen (12) people, including the manager, had tripped and fallen on the steps;
4. a city employee inspected the stairs after Unzen's fall, but "did not see anything wrong with the steps"; and
5. the manager who had tripped on the step himself, and who knew that 12 others had tripped on the step, inspected the steps, found the "difficult to observe" condition causing 13 falls; yet, still did not do anything to repair the condition.

Id. at 877-878, 880-881. The egregious facts that existed in *Unzen* do not exist here.

The record here establishes that the L-Screen was functional. *000042.* Multiple baseball coaches, including Prokop, used the L-Screen and no one ever complained about it. *000035.* Furthermore, each of the persons who used the L-Screen admitted that the holes in the screen could be seen. *00013, 22, 34, 72-75.* As for the danger, everyone testifying in this case noted that a pitcher (with or without an L-Screen in use) could be hit by a batted ball. *000007, 14-15, 29.* Being hit by a baseball is simply an inherent danger in the sport of baseball.

Because Prokop admitted that the alleged defective condition (holes in the netting) was visible on the day of the injury, as a matter of law, the alleged defective

condition cannot be considered to be hidden or concealed. *See Collins v. City of Hastings*, 2006 WL 3719545 *3 (Minn. App. Dec. 19, 2006) (dismissing claim by softball player where he admitted that after his injury he could see the alleged defective condition) (unpublished). Accordingly, the district court properly concluded that Appellants did not establish this element of § 335.

2. The condition of the netting was not likely to cause death or serious bodily harm.

Courts have made it clear that not every artificial condition is likely to cause death or serious bodily harm. *See Johnson v. State of Minnesota*, 478 N.W.2d at 773. The Restatement requires the condition to be likely to cause serious bodily harm, not that serious bodily harm "might" actually result. *Id.* The injury suffered does not define the requirement. *Id.* More accurately, courts have stated that hazards filling this prong of the Restatement tend to be those more generally recognized as having inherently dangerous propensities such as razor wire, excavations, open bodies of water and high voltage lines. *Id.*

In the present case, Appellants focus on the injury suffered by Prokop as support for their claim that the condition was one likely to cause serious bodily harm. In doing so, they have ignored the above-cited case law which establishes that it is not the injury in the case that defines whether the condition was likely to cause serious bodily harm.

Appellants, citing *Lishinski v. City of Duluth*, 634 N.W.2d 456 (Minn. App. 2001), also assert that case law does not require "inherently dangerous propensities" and that the subject L-Screen was sufficiently dangerous so as to meet this exception to

recreational immunity. *Lishinski* only addresses whether the alleged dangerous condition was hidden. The case does not address whether the challenged condition was one that was sufficiently dangerous so as to meet the requirements of Restatement (Second) of Torts, § 335.

Here, the record establishes that the condition of the L-Screen, even with holes, generally was not, and is not, hazardous. The condition allegedly causing the injury does not have any inherently dangerous properties, such as razor wires or high voltage. To the contrary, the record establishes that it was a functional piece of equipment regularly used prior to, and after, Prokop's injury.

The fact of the matter is that in a typical game or practice circumstance, a pitcher is not afforded any protection from a batted ball. In this case, the record establishes that the L-Screen offered at least some protection to the pitcher above that which he normally would have. Under these circumstances, as a matter of law, the condition of the L-Screen was not likely to result in death or substantial bodily harm. *See e.g Krueger v. City of Oakdale*, 2003 WL 21450365 (Minn. App. June 24, 2003) (concrete anchor for a fencepost, to which the outfield fence of a city softball field was attached, was not a condition likely to cause death or serious bodily injury) (unpublished), *Zacharias v. City of Bloomington*, 1998 WL 846506 (Minn. App. Dec. 8, 1998) (spring on exercise rowing machine was not a condition likely to cause death or serious bodily injury) (unpublished). Accordingly, the district court properly concluded that Appellants did not establish this element of § 335.

3. No evidence that School District knowingly created and maintained a dangerous condition.

Appellants have not produced, and cannot produce, any evidence that the School District had actual knowledge that the condition of the L-Screen was likely to cause death or serious bodily harm. Appellants assert that since the 1991 decision of *Noland v. Soo Line Railroad Co.*, 474 N.W.2d 4 (Minn. App. 1991), all they need to show is that the School District "should have known" that the condition of the L-Screen was dangerous. This is an inaccurate representation of law.

Prior to 1991 and since 1991, case law has repeatedly held that there must be evidence of "actual knowledge" of a dangerous condition. *See e.g. Cobb*, 441 N.W.2d at 841; *Stiele*, 646 N.W.2d at 255; *Sorgenfrie*, 1999 WL 243388 * 4; *Noble*, 1996 WL 162617 *4. In fact, the courts in these cases hold that, as a matter of law, where there is no evidence that the governmental entity was put on notice of a prior injury, there is no evidence of actual knowledge and this element of the exception to recreational immunity cannot be met. *Stiele*, 646 N.W.2d at 255; *Sorgenfrie*, 1999 WL 243388 *4; Noble, 1996 WL 162617 *4.

In this case, there is no evidence of a prior injury. *000044, 94-95*. In fact, prior to Prokop's injury, no one ever complained about the condition of the L-Screen. *000035, 44, 94-95*. In fact, baseball coaches made the decision to continue using the subject L-Screen even though new screens had been purchase because it was still useful. Case in point, Prokop used the L-Screen on prior occasions without injury and never complained of the condition of the netting. Under these circumstances, the district court correctly

concluded that Appellants cannot establish that the School District had actual knowledge that the condition of the L-Screen was likely to cause death or serious bodily harm. *See e.g. Stiele*, 646 N.W.2d at 255 (city did not have actual knowledge of danger posed by signpost where there had been no prior report of injury); *Sorgenfrie*, 1999 WL 243388 *4 (city and school district did not have actual knowledge of danger posed by ladder where there had been no prior report of injury and several persons had used the ladder just prior to the plaintiff without incident) (unpublished); *Noble*, 1996 WL 162617 *4 (city did not have actual knowledge of danger posed by metal brackets on hockey rink where no prior report of injury) (unpublished). Accordingly, the district court correctly held that Appellants could not establish this element of § 335.

II. WHETHER THE SCHOOL DISTRICT IS ENTITLED TO DISMISSAL OF THE COMPLAINT BECAUSE APPELLANTS CANNOT ESTABLISH A DUTY?

In order to establish a claim of negligence, Appellants must establish that the School District owed Prokop a duty. "A landowner's duty to use reasonable care does not extend to warn or protect against risks which the trespasser knew or from the facts should have known." *Doe v. Brainerd Int'l Raceway*, 533 N.W.2d 617, 621-22 (Minn. 1995); *see also Martinez v. Minnesota Zoological Gardens*, 526 N.W.2d 416, 418 (Minn. App. 1955), *review denied* (Minn. Mar. 29, 1995). Furthermore, a defendant has no duty to protect a participant in sporting events from well-known risks, inherent to the sport and voluntarily assumed by the participant. *Wagner v. Thomas J. Obert Enterprises*, 396 N.W.2d 223, 226 (Minn. 1986) (citing *Olson v. Hanson*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974)).

In considering this defense, it is important for the Court to keep in mind the following: (1) the School District did not require Mark Prokop to coach a baseball team, (2) the School District did not require Mark Prokop to utilize any of its fields or equipment, (3) the School District did not require Mark Prokop to pitch to his son or any other player, and (4) the School District did not require Mark Prokop to use this particular L-Screen much less any L-Screen while conducting batting practice. *00005-7, 14, 22, 68-69.*

Turning to Prokop's knowledge, consistent with common knowledge, the record here establishes that Prokop has played softball and coached baseball for a number of years. *000006.* Prokop, thus, knew that an obvious hazard in baseball is that one might be hit by a ball. *000007.*

The record here also establishes that it is a well-known hazard in baseball that a pitcher may be hit by a batted ball, even if in a batting cage, using a screen. *00007, 14-15, 29, 43, 57, 70, 92.* In fact, Prokop taught his children that they had to exercise caution because of the inherent risk of injury while pitching and had refused to permit other youths to pitch in the batting cage because of "safety reasons". *000070, 77.*

Finally, the record establishes that Prokop could have chosen to pitch without the L-Screen. *000014, 22.* Not only could he have move the L-Screen out of the way, there was an adjacent batting cage without an L-Screen in the cage. In fact, he could have gone out to the fields to conduct batting practice.

Under these circumstances, case law establishes that Prokop assumed the risk of injury; and, thus, the School District did not owe him a duty of care and cannot be held

liable for his injuries. *See e.g. Peterson v. Donahue,* 733 N.W.2d 790, 792-793 (Minn. App. 2007) (discussing history of Minnesota case law accepting primary assumption of the risk as a bar to various sporting injuries); *Vistad v. Board of Regents of University of Minnesota,* 2005 WL 1514633 (Minn. App. June 28, 2005) (holding that no duty of care was owed to injured cheerleader where she knew she could fall and was not required to participate in stunt) (unpublished); *see also Alwin v. St. Paul Saints Baseball Club, Inc.*, 672 N.W.2d 570, 572-74 (Minn. App. 2003) (discussing and citing extensive case law establishing that spectator assumed risk of injury of being struck and injured by errant baseball). Accordingly, the district court properly granted summary judgment dismissal of the Complaint on this basis as well.

CONCLUSION

Statutory recreational immunity bars any claim challenging the condition of recreational equipment where, as here, the claimant testified he could see the condition of the L-Screen, he had used the L-Screen previously without injury, and no one reported any concerns regarding the equipment.

Further, Prokop assumed the risk of being stuck by a baseball, an inherent risk in the sport of baseball. Thus, the district court properly granted summary judgment dismissal of the Complaint. Accordingly, we respectfully request that this Court affirm the decision of the lower court.

Dated: 11/9/07

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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 the Brief is 5,043 words. This Brief was prepared using Microsoft Word 97.

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