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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1175**

Brad Ronald Stevens,
Appellant,

vs.

Emily Johnson Piper, et al.,
Respondents.

**Filed April 13, 2020
Affirmed
Connolly, Judge**

Ramsey County District Court
File No. 62-CV-18-7124

Brad R. Stevens, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Michael N. Leonard, Assistant Attorney General, St. Paul,
Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Slieter, Judge; and
Kalitowski, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant, a civilly committed patient of the Minnesota Sex Offender Program (MSOP), brought this action against respondents, members of the MSOP staff and administration, for damages resulting from injuries he received when playing softball. Because the district court correctly granted respondents' motion to dismiss on the ground that appellant had assumed the risk of injury by playing softball, we affirm.

FACTS

Appellant Brad Stevens was civilly committed to MSOP as a sexually dangerous person (SDP) in 2005. In accord with his treatment plan, he participated in several sports as therapeutic recreation.

In 2018, acting pro se, he served and filed a 44-page complaint alleging that: (1) because the MSOP softball field had not been adequately maintained, the pitching plate was not level with the field; (2) while appellant was pitching, another player hit the ball so that it struck the pitching plate and hit appellant in the forehead; and (3) he experienced severe bleeding, headache, vomiting, dizziness, and loss of emotional control as a result. He raised counts of negligent duty to care, failure to maintain therapeutic recreational softball, and failure to warn, and sought judgment not to exceed \$1,500,000, attorney fees, and other costs.

Respondents moved to dismiss the complaint under Minn. R. Civ. P. 12.02(e) (failure to state a claim upon which relief can be granted) on the ground that appellant had

assumed the risk of injury from playing softball. The district court granted their motion and dismissed the complaint.

Appellant challenges the dismissal.

DECISION

“We review de novo whether a complaint sets forth a legally sufficient claim for relief. We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014) (citation omitted). The district court dismissed the complaint based on primary assumption of the risk, which relates to a defendant’s legal duty to protect a plaintiff from harm, and “the existence of a legal duty is an issue for the court to determine as a matter of law.” *Jussila v. U.S. Snowmobile Assoc.*, 556 N.W.2d 234, 236 (Minn. App. 1996) (quoting *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985)), *review denied* (Minn. Jan. 29, 1997).

Primary assumption of the risk completely bars a plaintiff’s claim because it negates the defendant’s duty of care to the plaintiff. . . . [It] arises only where parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks . . . [and] is dependent upon the plaintiff’s manifestation of consent, express or implied, to relieve the defendant of a duty.

Soderberg v. Anderson, 922 N.W.2d 200, 203 (Minn. 2019) (quotations and citations omitted). “Minnesota courts commonly apply primary assumption of the risk in the context of spectators at sporting events.” *Schneider ex rel. Schneider v. Erickson*, 654 N.W.2d

144, 149 (Minn. App. 2002).¹ Primary assumption of the risk requires that: (1) the plaintiff voluntarily enter into a relationship where he assumes a well-known, incidental risk; (2) he appreciates that risk; and (3) he chooses to take the risk even though he has a chance to avoid it. *Id.* “It is the general rule that one who participates in a sport assumes the risks which are inherent in it.” *Moe v. Steenberg*, 147 N.W.2d 587, 589 (Minn. 1966).

Appellant participated in the MSOP softball games. He argues that primary assumption of the risk does not apply here because his “special relationship” with MSOP conferred on MSOP a duty to protect him, since he was unable to protect himself. But appellant provides no connection between his commitment as an SDP and his alleged inability to know the risks of playing softball, and he asserts in his complaint that he played sports, including baseball, all his life and that he had “advanced athletic skills.” Appellant’s stated familiarity with softball and baseball supports the district court’s reasoning that:

Even if there is no evidence that [appellant] had actual knowledge of the risk of being hit by a ground ball, his familiarity with the sport, evidenced by his long standing history of playing a variety of sports, including softball, was such that he must have had knowledge of the danger posed by the pitching plate allegedly being uneven to the ground. Based upon [appellant’s] experience with the sport[s] of softball and baseball, the court finds that [he] had knowledge of any

¹ The doctrine of primary assumption of risk has been held to negate any duty of care to spectators of baseball and softball games beyond providing some protected seating. *See, e.g., Brisson v. Minneapolis Baseball & Athletic Ass’n*, 240 N.W. 903, 904 (Minn. 1932); *Wells v. Minneapolis Baseball & Athletic Ass’n*, 142 N.W. 706, 708 (Minn. 1913). *Alwin v. St. Paul Saints Baseball Club*, 672 N.W.2d 570, 573-74 (Minn. App. 2003); *Swagger v. City of Crystal*, 379 N.W.2d 183, 185-86 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986).

potential inherent risks associated with playing softball that day [i.e., the day he was injured].

Moreover, appellant asserted in his complaint that, prior to a scheduled tournament at the end of May 2018, he informed MSOP staff that the softball field was “in terrible condition” and “need[ed] to be raked and leveled to protect patients participating while in softball.” The district court inferred from appellant’s assertions in his complaint that he “knew that the allegedly uneven condition of the infield posed a hazard to players and that the trajectory of a ground ball could be altered by an elevated pitching plate.”

Appellant also asserts in his complaint that “it was foreseeable that the nature of the game would be altered by a grounded batted softball being uncharacteristically deflect[ed] upward from an elevated pitching plate,” further supporting the district court’s finding that appellant appreciated the risk of playing on that field: “[He] may not have foreseen the exact injury he would later receive, but he clearly appreciated that the risk of an uneven field could pose injury.”

Finally, appellant argues that he had no chance to avoid the risk because he was compelled to play softball. We disagree. His complaint again contradicts this argument: he asserts that there were many other sports and activities he could have joined for therapeutic recreation, and softball was his choice, not a requirement. He chose to take the risk of playing softball on an uneven field.

Because appellant knew the risk of playing softball included being hit with a ball, appreciated the risk of an uneven field, and chose to assume that risk although he could

have avoided it by not playing softball, the district court did not err in concluding that the doctrine of primary assumption of the risk applied and dismissing appellant's complaint.

Affirmed.