**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 7, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2016AP2357** **Cir. Ct. No. 2014CV126**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**DANE RADEBAUGH, A MINOR, BY HIS GUARDIAN AD LITEM, DANIEL A. ROTTIER, LISA SCOTT AND JAMES RADEBAUGH,**

**PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,**

**DEAN HEALTH PLAN, INC.,**

**INVOLUNTARY-PLAINTIFF,**

**V.**

**WAUSAU UNDERWRITERS INSURANCE COMPANY P/K/A LIBERTY MUTUAL INSURANCE COMPANY, LAKE MILLS SCHOOL DISTRICT, LAKE MILLS RECREATIONAL DEPARTMENT, ABC INSURANCE CORPORATION, TRAVIS MEYERS, DEF INSURANCE CORPORATION, STATE FARM FIRE & CASUALTY COMPANY, TERRY YANDRE AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**DEFENDANTS-RESPONDENTS,**

**ROGER BURROW,**

**DEFENDANT-RESPONDENT-CROSS-APPELLANT,**

**EMPLOYERS INSURANCE COMPANY OF WAUSAU,**

**INTERVENING DEFENDANT-RESPONDENT.**

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APPEAL and CROSS-APPEAL from judgments of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed*.

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.



¶1 PER CURIAM. Dane Radebaugh was injured when he was struck in the head by a line-drive foul ball while participating in a recreational league baseball game at Campus Field in Lake Mills. Radebaugh, by his Guardian ad Litem, and his parents Lisa Scott and James Radebaugh, sued the Lake Mills School District and the Lake Mills Recreational Department and their insurers, along with Radebaugh's coach, Terry Yandre, two umpires refereeing the game, Travis Meyers and Roger Burrow, and their insurers, alleging negligence.[1]

¶2 The School District, Yandre, Meyers, and Burrow moved for summary judgment, asserting in pertinent part that they are entitled to dismissal of

[1] We will refer to Dane Radebaugh individually, and to the plaintiffs collectively, as Radebaugh.

We will refer to the defendants Lake Mills School District and Lake Mills Recreational Department collectively as the School District, and to the individual defendants Yandre, Meyers, and Burrow, either collectively as "the individual defendants" or individually by their last names.

Radebaugh also sued Richard Mason, President of the Lake Mills School Board, but he was dismissed as a defendant by the circuit court and Radebaugh did not oppose his dismissal.

Radebaugh's claims based on governmental immunity under WIS. STAT. § 893.80(4) (2015-16);[2] Yandre, Meyers, and Burrow also asserted that they are entitled to dismissal of Radebaugh's claims based on contact sports immunity under WIS. STAT. § 895.525(4m).

¶3 The circuit court granted the defendants' motions, concluding in pertinent part that: (1) the known and compelling danger exception does not apply to abrogate the School District's and Yandre's immunity under the governmental immunity statute, WIS. STAT. § 893.80(4); and (2) the reckless conduct exception does not apply to abrogate Yandre's, Burrow's, and Meyers' immunity under the contact sports immunity statute, WIS. STAT. § 895.525(4m).[3]

¶4 Radebaugh appeals, arguing that the defendants are not entitled to summary judgment because the known and compelling danger exception abrogates the School District's and Yandre's governmental immunity, and a question of fact exists as to whether the reckless conduct exception abrogates Yandre's, Burrow's, and Meyers' contact sports immunity.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] The circuit court also ruled that Burrow and Meyers were not employees of the School District and, therefore, were not protected by the governmental immunity statute.

Burrow cross-appeals the circuit court's decision concluding that Burrow is not entitled to governmental immunity because he was not a School District agent or employee at the time of the incident. Burrow asserts that we need not address his cross-appeal if we affirm the circuit court's grant of summary judgment to Burrow based on contact sports immunity. Because we affirm the court's decision concluding that Burrow is entitled to contact sports immunity, we do not address Burrow's cross-appeal.

¶5 Viewing the evidence presented on summary judgment in Radebaugh's favor, we conclude that the School District and the individual defendants are immune from liability and, therefore, we affirm.

## BACKGROUND

¶6 The following facts are taken from the summary judgment submissions and are not disputed for purposes of this appeal. We will relate additional undisputed facts as necessary in the discussion that follows.

¶7 On June 14, 2011, when Radebaugh was fourteen years old, he participated in a "Teener" recreational baseball game as part of a program offered by the School District, at Campus Field located at a middle school. At that game, Yandre coached Radebaugh's team and Burrow and Meyers were umpires. Radebaugh, Yandre, Burrow, and Meyers had each observed, played, coached, and/or umpired baseball games at Campus Field for many years.

¶8 Campus Field has two recessed concrete dugouts—one parallel to the first base line and one parallel to the third base line. This case concerns the dugout parallel to the third base line. In June 2011, there was a six-foot high chain link fence three feet from the front of the dugout that extended in a straight line four and one-half feet beyond each end of the dugout running parallel to the third base line. There was no fence on either side of the dugout. The concrete dugout and fence had been in place since at least 1999.

¶9 During the June 14, 2011 game, when the opposing team was at bat, Radebaugh operated the scoreboard at Coach Yandre's request. To operate the scoreboard Radebaugh sat on an overturned bucket in front of and to the home plate side of the dugout. Radebaugh was behind the chain link fence in front of

the dugout, but, when viewed from home plate, there was no fence between Radebaugh and home plate, which was approximately forty-nine feet away. While operating the scoreboard, Radebaugh, who was not wearing a helmet, was struck in the head by a line-drive foul ball.

¶10 Players from the Lake Mills teams had operated the scoreboard in the same location and manner as Radebaugh for many years. Radebaugh, School District personnel, and the individual defendants had seen players operate the scoreboard in the same location and manner as Radebaugh. Radebaugh, School District personnel, and the individual defendants were aware that a line-drive foul ball hit from home plate could enter the area where the scoreboard operator sat without being stopped by the fence in front of the dugout. None of the parties had seen a ball hit the scoreboard operator before Radebaugh was struck.[4]

¶11 Radebaugh sued the School District and the individual defendants alleging negligence. The School District and individual defendants filed motions for summary judgment seeking dismissal of Radebaugh's claims on various grounds, including governmental immunity under WIS. STAT. § 893.80(4) and contact sports immunity under WIS. STAT. § 895.525(4m). After briefing and oral argument, the circuit court issued a well-reasoned decision granting the motions on those two grounds and dismissing Radebaugh's claims. This appeal follows.

[4] Dane Radebaugh testified that there had once been a "close call" but he could not remember any details.

## DISCUSSION

¶12 We review a circuit court's grant of summary judgment de novo. ***Chapman v. B.C. Ziegler and Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶13 "[W]e search the [r]ecord to see if the evidentiary material that the parties set out in support or in opposition to summary judgment supports reasonable inferences that require the grant or denial of summary judgment, giving every reasonable inference to the party opposing summary judgment." ***Chapman***, 351 Wis. 2d 123, ¶2. "Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law." ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (2007).

¶14 Consistent with these well-established principles, we review the summary judgment materials submitted by the parties, drawing all reasonable inferences from the evidence in favor of Radebaugh as the nonmoving party. We focus first on whether the known and compelling danger exception applies to abrogate the School District's governmental immunity and, second, on whether the reckless conduct exception applies to abrogate the individual defendants' contact sports immunity.

### *A. The Known and Compelling Danger Exception to Governmental Immunity Under WIS. STAT. § 893.80(4)*

¶15 The School District's motion for summary judgment is based on its assertion of governmental immunity under WIS. STAT. § 893.80(4).[5] If the School District is entitled to governmental immunity, then there is nothing to try even though factual disputes may exist regarding the issue of negligence. *See* ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶16, 253 Wis. 2d 323, 646 N.W.2d 314. Indeed, for purposes of the immunity analysis, we assume that the School District did act negligently, and we focus on whether the School District is nonetheless entitled to governmental immunity under § 893.80(4) and whether any exception applies to abrogate that immunity. ***Lodl***, 253 Wis. 2d 323, ¶17.

¶16 Relevant here is the exception to governmental immunity in cases involving known and compelling dangers. As ***Lodl*** explains, "[t]here is no immunity against liability associated with ... known and compelling dangers that give rise to ministerial duties on the part of public officers or employees." ***Id.***, ¶24. Radebaugh does not dispute that the School District is entitled to immunity under WIS. STAT. § 893.80(4) if this known and compelling danger exception to immunity does not apply. "The application of the immunity statute and its

[5] WISCONSIN STAT. § 893.80(4) states: "No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof ... or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

The School District's motion included the argument that Coach Yandre is also entitled to governmental immunity because Yandre was a servant and agent of the School District. Radebaugh appeals the circuit court's decision accepting that argument. We do not reach this issue because we conclude that Yandre is entitled to sports contact immunity. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

exceptions involves the application of legal standards to a set of facts, which is a question of law." ***Id.***, ¶17.

¶17 We first review the law relating to the known and compelling danger exception to governmental immunity and then apply that law to the undisputed facts. We conclude that that exception does not apply to abrogate the School District's immunity, and we address and reject Radebaugh's arguments to the contrary.

¶18 The known and compelling danger exception arises when "there exists a known present danger *of such force* that the time, mode and occasion for performance [are] evident *with such certainty* that nothing remains for the exercise of judgment and discretion." ***Lodl***, 253 Wis. 2d 323, ¶38 (emphasis added and quoted source omitted); *see also* ***Noffke v. Bakke***, 2009 WI 10, ¶52, 315 Wis. 2d 350, 760 N.W.2d 156. The known and compelling danger exception is "'reserved for situations that are more than unsafe, where the danger is *so severe and so immediate*' that a response is demanded." ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶14 n.7, 319 Wis. 2d 622, 769 N.W.2d 1 (emphasis added and quoted source omitted). The application of the known and compelling danger exception to governmental immunity is by nature "case-by-case." ***Lodl***, 253 Wis. 2d 323, ¶38.

¶19 The known and compelling danger exception to governmental immunity was first established in ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977). There, the plaintiffs were seriously injured when they fell into a deep gorge while hiking at night on a hazardous portion of a trail at a state-owned nature preserve. ***Id.*** at 531-32, 534-36. The manager of the preserve knew that the drop-off from which the plaintiffs fell was dangerous, particularly at night, but did nothing to advise the public or his supervisors of the hazard. ***Id.*** at 536-37.

The court concluded that "the duty to either place warning signs or advise superiors of the conditions is, *on the facts here*, a duty so clear and so absolute that it falls within the definition of a ministerial duty." ***Id.*** at 542 (emphasis added). The "facts here" in ***Cords***, on which the court relied, were: "[The manager] knew the terrain at the glen was dangerous particularly at night; he was in a position as park manager to do something about it; he failed to do anything about it." ***Id.*** at 541.

¶20 In ***Cords***, the governmental entity was held liable because it was aware of a compelling danger but nonetheless failed to act. ***Id.*** at 541-42. As we explain below, the record here does not establish either the existence of a similarly compelling danger or the School District's awareness of a similarly compelling danger triggering the duty to act.

¶21 The circuit court succinctly described the relevant circumstances at issue here as "[s]corekeeping for a teener baseball game while sitting on an overturned pail within the dugout area but not in the recessed component of the dugout, in an area not protected [from the side facing home plate by a] fence, and without a helmet." A reasonable inference from the evidence favorable to Radebaugh is that in those circumstances the scorekeeper was at risk of being hit by a line-drive foul ball, and incurring a serious injury. However, nothing in the record supports the inference that the risk rose to the level of a compelling danger that "'is so severe and so immediate' that a response is demanded" or, even assuming that the risk was a compelling danger, that the compelling and dangerous nature of that risk was "known" to the School District. *See* ***Umansky***, 319 Wis. 2d 622, ¶14 n.7 (quoted source omitted).

¶22 Unlike in ***Cords***, there is no evidence in this case of anything but some small chance that Radebaugh would be seriously injured. *Compare* ***C.L. v. Olson***, 143 Wis. 2d 701, 723-24, 422 N.W.2d 614 (1988) (danger presented by parolee who had been convicted after using his vehicle to abduct and sexually assault two young victims and was allowed by his parole agent to operate a vehicle, was not of "*such a degree of probability*" that the parole agent was deprived of discretion regarding the parole supervision required (emphasis added)); *and* ***Bauder v. Delavan-Darien School Dist.***, 207 Wis. 2d 310, 315, 558 N.W.2d 881 (Ct. App. 1996) (while having students use a deflated soccer ball to play soccer in an indoors gymnasium on account of inclement weather may be dangerous, the danger "is not *so clear and absolute*" as to require immediate correction (emphasis added)); *and* ***Hoskins v. Dodge Cty.***, 2002 WI App 40, ¶¶3-6, 18, 251 Wis. 2d 276, 642 N.W.2d 213 (the *possibility* that a boat, which had hit a pier, on a lake after midnight in "stormy" weather might be in danger does not constitute a danger that was compelling and known and of such force that there was no discretion not to act); *with* ***Voss v. Elkhorn Area School District***, 2006 WI App 234, ¶¶19, 20, 22, 297 Wis. 2d 389, 724 N.W.2d 420 (class exercise in which some students who wore alcohol impairment simulation goggles designed to distort vision and depth perception amid metal and wood desks and chairs had lost their balance, slipped, and stumbled, and therefore required immediate correction).

¶23 The record here contains no evidence of the requisite high "degree of probability," ***C.L.***, 143 Wis. 2d at 723-24, to invoke the known and compelling danger exception. The parties had observed or participated in games at Campus Field for many years, and none had either seen a ball enter the area where the scoreboard operator sat or seen a ball hit the scoreboard operator before Radebaugh was struck. No party testified that anyone had ever complained about

the circumstances or sought any changes. There is no evidence that any of the players, parents, spectators, coaches, or umpires who were aware of the circumstances before Radebaugh was struck saw the "nearly certain" hazard that Radebaugh argues was present and should have been "clear and absolute" to all. *See* ***Voss***, 297 Wis. 2d 389, ¶19 ("nearly certain"); ***Bauder***, 207 Wis. 2d at 315 ("clear and absolute").

¶24 The record is devoid of any evidence demonstrating that the School District knew or should have known about a high level of risk of injury from scorekeeping behind the chain link fence. As Radebaugh acknowledges, "Wisconsin law … determines knowledge from the general danger of the circumstances." ***Heuser v. Community Ins. Corp.***, 2009 WI App 151, ¶22, 321 Wis. 2d 729, 774 N.W.2d 653. Radebaugh argues that the circumstances here—that the School District knew that there was a risk that the scoreboard operator could be hit by a line-drive foul ball; the risk was heightened by the forty-nine-foot distance to home plate; the dangers of concussions from baseball hits are well known; and the WIAA rules required that certain players in certain areas of the field be protected from being hit by a fence, helmet, or gloved player[6]—did present a known and compelling danger such that the School District was obligated immediately to take protective action. However, the circumstances here also included years of practice that had neither been questioned by anyone (unlike

[6] Radebaugh concedes that the WIAA rules did not require such protective measures in the circumstances here.

Radebaugh also includes in these circumstances that unlike other players the scoreboard operator was preoccupied with duties other than watching the ball. However, this proposition is not supported by the record. Radebaugh testified that he was watching the pitcher pitch just before he was struck.

in ***Cords***, where the preserve manager knew of the serious danger posed by the cliff-side path, especially at night, 80 Wis. 2d at 536-37, 541), nor resulted in any prior injury or incident so as to call someone's attention to any risk (unlike in ***Voss***, where the teacher saw students stumble among the desks before the injury at issue in that case occurred, 297 Wis. 2d 389, ¶¶19, 20, 22). In sum, the record as a whole does not support as reasonable the inference that the School District was aware of a danger that was so highly probable as to be nearly certain and require immediate correction, which is what the cases cited above require.

¶25 Radebaugh argues that it is legal error to consider the probability of danger. However, that argument is contrary to the explicit language in ***C.L.***, 143 Wis. 2d at 723-24, quoted above, which assessed the degree of probability as part of its known and compelling danger analysis. The two cases Radebaugh cites for this proposition, ***Powless v. Milwaukee Cty.***, 6 Wis. 2d 78, 94 N.W.2d 187 (1959) and ***Heuser***, 321 Wis. 2d 729, do not hold otherwise.

¶26 Radebaugh also argues that it is unreasonable to infer a low probability of danger here, solely because no one operating the scoreboard in the same manner and location as Radebaugh had been struck in the many years of the School District's experience. Radebaugh cites ***Voss*** and ***Cords*** in support of this argument, but those cases do not help him.

¶27 In ***Voss***, the court expressly found that "the teacher was well aware of the perils of using the [alcohol impairment simulation] goggles and had seen other students stumbling on the day of Voss' accident, but failed to take any precautions to prevent injury." 297 Wis. 2d 389, ¶22. In contrast, here there is no evidence that any of the parties saw a ball ever strike someone in the area of the scoreboard operator. The teacher's specific knowledge in ***Voss*** of students

stumbling before the accident is not like the parties' generalized knowledge here of the danger of concussions and the need for concussion prevention.

¶28 In ***Cords***, the court found liability where the park ranger took no precautions to protect the public from the "particularly" dangerous risk posed by the path at night. 80 Wis. 2d at 541. In contrast, it cannot be reasonably inferred that the circumstances here, where no one operating the scoreboard behind the chain link fence in the same manner and location as Radebaugh had ever been struck in the many years of the School District's experience, were "particularly" unsafe circumstances such that additional precautions were immediately required.

¶29 The facts relied on by Radebaugh may be relevant to the issue of negligence, but they do not establish a known, nearly certain danger compellingly in need of an immediate fix. "A party cannot work *backwards* from a consequence to create" a known and compelling danger that triggers a ministerial duty to correct. ***Kimps v. Hill***, 200 Wis. 2d 1, 12, 546 N.W.2d 151 (1996) (emphasis added). Whether the circumstances working *forward* from the consequence here create a known and compelling danger during future baseball games is not before us.

¶30 In sum, we conclude that the School District is entitled to summary judgment because the known and compelling danger exception does not apply to abrogate the School District's governmental immunity under WIS. STAT. § 893.80(4).

### *B. The Reckless Conduct Exception to Contact Sports Immunity Under WIS. STAT. § 895.525(4m)*

¶31 The individual defendants' motions for summary judgment are based on their assertion of contact sports immunity under WIS. STAT. § 895.525(4m).[7] Specifically, they argue that they did not engage in reckless conduct and, therefore, they are immune from liability under the statute. Radebaugh does not dispute that the individual defendants are entitled to immunity under WIS. STAT. § 895.525(4m) if their conduct was not reckless. Where as here the material facts are undisputed, "[w]hether any of the defendants' conduct fulfills a recklessness standard is a question of law." ***Kellar v. Lloyd***, 180 Wis. 2d 162, 184, 509 N.W.2d 87 (Ct. App. 1993).

¶32 "'Recklessness' contemplates a conscious disregard of an unreasonable and substantial risk of serious bodily harm to another." ***Noffke***, 315 Wis. 2d 350, ¶36 (quoted sources omitted). The jury instruction on reckless conduct in the contact sport context has been cited with approval in ***Noffke***, ***id.***, ¶36, and provides:

> A participant acts recklessly if [his] conduct is in reckless disregard of the safety of another. It occurs where a participant engages in conduct under circumstances in which [he] knows or a reasonable person under the same circumstances would know that the conduct creates a high risk of physical harm to another and [he] proceeds in conscious disregard of or indifference to that risk. Conduct which creates a high risk of physical harm to another is substantially greater than negligent conduct. Mere inadvertence or lack of skill is not reckless conduct.

[7] WISCONSIN STAT. § 895.525(4m)(a) states: "A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury."

WIS JI—CIVIL 2020 (2007).[8]

¶33 In ***Noffke***, our supreme court concluded that a cheerleader, who was supposed, but failed, to catch a fellow cheerleader, was not reckless as a matter of law. 315 Wis. 2d 350, ¶¶35, 37. When practicing a new stunt, the cheerleader moved to the front of the stunt instead of to the back and, when others yelled for him to move to the back, he froze and was not in proper position to catch the fellow cheerleader when she fell. ***Id.***, ¶37. The court reasoned that, "The record is simply devoid of anything that would indicate that [the cheerleader] consciously disregarded the risk of serious bodily harm to [the fellow cheerleader]." ***Id.***

¶34 As in ***Noffke***, the record in this case does not support a claim that the individual defendants were reckless.[9] Like the circuit court, we conclude that the evidence establishes that none of the individual defendants knew, before Radebaugh was struck, that allowing the scorekeeper to sit on a bucket in front of the dugout unprotected by a helmet or by a fence between the scorekeeper and home plate created a *high* risk of physical harm to the scorekeeper or that the individual defendants consciously disregarded that risk. Scorekeeping in that manner and location was a routine practice for years. While they were aware that there was a possibility that the scorekeeper could be struck by a line-drive foul

[8] Radebaugh appears to urge us to adopt a different definition of recklessness based on the comments to Restatement (Second) of Torts § 500 (1965), but, as he himself notes, the Wisconsin Supreme Court has not adopted the recklessness standard defined in the Restatement. *See* ***Kellar v. Lloyd***, 180 Wis. 2d 162, 184, 509 N.W.2d 87 (Ct. App. 1993).

[9] In ***Elborough v. Evansville Community School Dist.***, the federal district court noted that there is "little difference" between the known and compelling danger exception to governmental immunity and the reckless exception to contact sports immunity. 636 F. Supp. 2d 812, 825 (W.D. Wis. 2009). Consistent with that observation, like the parties' arguments, our analysis of recklessness mirrors to a certain extent our analysis of a known and compelling danger.

ball, there is no evidence that anyone had seen a ball hit in that location or seen a player in that location struck by a ball. And, there is no evidence of any complaints or recommendations for change. Coach Yandre testified that he had never thought about recommending that the fencing continue around that end of the dugout area, and that it was so common for players to operate the scoreboard there that he did not focus on it. Meyers testified that he had never seen a ball hit in the area around the scorekeeper and never anticipated anyone being possibly hit there, and was not concerned because the practice was within the rules and the player was out of play. Burrow testified that he had never seen anyone in that area get hurt and so had never thought about it. We cannot reasonably infer from these facts that the individual defendants consciously disregarded a high risk of harm to Radebaugh.

¶35 Radebaugh argues that the following facts—the rules requiring helmets for certain players in certain areas of the field; the admitted duty of coaches and umpires to recognize dangerous conditions and eliminate or minimize danger; the individual defendants' awareness that the scoreboard operator could be struck by an errant ball and the known risk of errant balls generally, compounded here by inexperienced athletes and the short distance from home plate; and the increased public awareness of the danger of concussions[10]—constitute circumstantial evidence from which the jury could infer doubts about the individual defendants' statements. We are not persuaded.

[10] Radebaugh also includes as a fact the inattention of the scoreboard operator, but, as noted in footnote 6 above, Radebaugh testified that he was watching the pitcher pitch before he was struck.

¶36 In support of his argument, Radebaugh cites ***Anderson v. Hebert***, 2011 WI App 56, ¶22, 332 Wis. 2d 432, 798 N.W.2d 275, in which we stated that a defendant cannot escape liability for defamation simply by claiming that he or she believed a statement was true, and that in certain instances, a jury may infer doubts about a statement from circumstantial evidence specifically "where there are obvious reasons to doubt the veracity of the [declarant] or the accuracy of his reports." (Quoted source omitted.) Here, however, Radebaugh points to no "obvious reasons" to doubt the individual defendants' veracity as to their assessments of the low risk of danger, in light of their many years of experience as observers, players, coaches, and umpires, in which they never saw either a ball hit into the area where the scorekeeper was located or a ball strike the scorekeeper.

¶37 Radebaugh also argues that the circumstances here are like those in ***Werdehoff v. General Star Indemnity Co.***, 229 Wis. 2d 489, 493-94, 600 N.W.2d 214 (Ct. App. 1999), in which a motorcycle racer lost control on part of the track covered by an oil spill and was injured. In that case we concluded that an issue of material fact existed as to whether the defendants' conduct was reckless when they were informed by race track workers of safety concerns from the oil spill and failed to rectify the situation. ***Id.*** at 494, 511. Here, however, there is no evidence of such warning or knowledge of such an immediate high-risk condition.

¶38 Radebaugh cites other cases in support of his argument, but they are inapposite: ***Sharp v. Case Corp.***, 227 Wis. 2d 1, 23, 595 N.W.2d 380 (1999) (concerning whether, in a product liability case, a manufacturer acted in reckless disregard where it failed to take corrective measures after having gained specific knowledge of a product's defect and resulting injuries); ***Martin v. Richards***, 192 Wis. 2d 156, 167-68, 531 N.W.2d 70 (1995) (concerning whether a doctor was negligent in failing to inform the plaintiff of alternate viable medical treatments

even though the possibility of severe consequences from the recommended treatment was small); ***Konitzer v. Hamblin***, No. 11cv426, unpublished slip op. at *1, *11 (W.D. Wis. Sept. 27, 2013) (denying summary judgment in a suit against prison officials for failing to protect an inmate from an assault by a fellow inmate in a state prison, where it was disputed whether certain defendants were aware of threats to the inmate's safety); ***Forsythe v. Indian River Transp. Co.***, No. 2012AP58, unpublished slip op., ¶¶1, 22 (WI App Sept. 27, 2012) (rejecting the proposition that harm is not foreseeable simply because a defendant sued for negligence was not aware of prior accidents involving the valve on defendant's truck).

¶39 Finally, Radebaugh argues that his expert's report creates a dispute of fact by opining that the individual defendants "recklessly failed to provide for the safety of the young players." We, like the circuit court, disagree. The expert's opinion does not create any dispute of fact as to recklessness because the expert did not apply the legal definition of recklessness stated above; rather the expert reviewed the evidence based on the standard of care of a "reasonable and prudent" professional under the circumstances, and what "a reasonable and prudent" professional would have permitted. The expert opined that the defendants "failed to exercise reasonable care for the safety" of the players in "deviation from reasonable and prudent standards of care and practice."

¶40 While the expert's opinions might support a finding of negligence, they do not create a reasonable inference, in light of the evidence, that the individual defendants acted in conscious disregard of a high risk of harm. *See* ***Hoskins***, 251 Wis. 2d 276, ¶28 ("to the extent that the experts rendered opinions that the various municipal actors had performed below requisite standards of care,

those 'facts' are not material to a determination of whether the municipal defendants are nonetheless immune from suit").

## CONCLUSION

¶41 For the reasons stated, we affirm.

*By the Court*.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.