

2. Defendant's motion in limine is hereby GRANTED IN PART.

Plaintiff may not seek recovery of special damages

beyond those identified in the January 22, 2015, letter

wherein Plaintiff listed past medical Expenses.

3. Defendant's motion in limine is hereby GRANTED IN PART.

Plaintiff may not seek recovery of wage loss.

4. Defendant's motion in limine is hereby GRANTED IN PART.

Plaintiff's medical expenses are capped at \$50,000.00.

IT IS SO ORDERED this 7th day of April, 2015.

By:

Hon. Richard F. Scotti *RAS*
District Court Judge
Eighth Judicial District Court
Department 2
Clark County, Nevada

Submitted by:

Daniel L. O'Brien

Daniel L. O'Brien
Nevada Bar No. 983
Counsel for District


CLERK OF THE COURT

1 **NEOJ**
2 Office of the General Counsel
3 Clark County School District
4 DANIEL L. O'BRIEN, ESQ.
5 Nevada Bar No. 983
6 CARLOS L. McDADE, ESQ.
7 Nevada Bar No. 11205
8 5100 W. Sahara Avenue
9 Las Vegas, NV 89146
10 (702) 799-5373
11 Attorneys for Defendant

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 MAKANI KAI PAO,

10 Plaintiff,

11 v.

12 CLARK COUNTY SCHOOL DISTRICT; DOE
13 CLARK COUNTY SCHOOL DISTRICT
14 EMPLOYEES I-V; DOES I-V AND ROE
15 COMPANIES I-V, inclusive,

16 Defendants.

Case No. A-12-668833-C
Dept. No. II

NOTICE OF ENTRY OF ORDER

17
18 NOTICE is hereby give that an Order Granting In Part and
19 Denying In Part Defendant's Motion to Strike Plaintiff's Damages
20 Calculation or, in the Alternative, Motion in Limine was entered
21 on the 10th day of April, 2015, regarding the above-entitled
22 matter, a copy of which is attached hereto as Exhibit "A".

23 Respectfully submitted this 14th day of April, 2015.

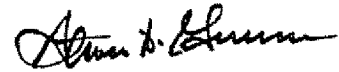
24 /s/ Daniel L. O'Brien
25 DANIEL L. O'BRIEN, ESQ.
26 Nevada Bar No. 983
27 Clark County School District
28 5100 W. Sahara Avenue
Las Vegas, NV 89146
Attorneys for District

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Robert O. Kurth, Jr.
Kurth Law Office
3420 North Buffalo Drive
Las Vegas, NV 89129
Kurthlawoffice@gmail.com
Attorney for Plaintiffs

/s/ Joan Mortimer

EXHIBIT A



CLERK OF THE COURT

OGM
Office of the General Counsel
Clark County School District
DANIEL L. O'BRIEN, ESQ.
Nevada Bar No. 0983
CARLOS L. McDADE, ESQ.
Nevada Bar No. 11205
5100 W. Sahara Avenue
Las Vegas, NV 89146
(702) 799-5373
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

MAKANI KAI PAYO,

Plaintiff,

v.

CLARK COUNTY SCHOOL DISTRICT; DOE
CLARK COUNTY SCHOOL DISTRICT
EMPLOYEES I-V; DOES I-V and ROE
COMPANIES I-V, inclusive,

Defendants.

Case No. A-12-668833-C
Dept. No. II

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO STRIKE
PLAINTIFF'S DAMAGES
CALCULATION OR, IN THE
ALTERNATIVE, MOTION IN
LIMINE

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S
MOTION TO STRIKE PLAINTIFF'S DAMAGES CALCULATION OR, IN THE
ALTERNATIVE, MOTION IN LIMINE

This matter came on regularly before the Court, in Chambers,
on the third day of March, 2015, for consideration of Defendant's
January 28, 2015, Motion to Strike Plaintiff's Damages
Calculation or, in the Alternative, Motion in Limine. The Court,
having considered the Defendant's Motion, Plaintiff's Opposition
and Defendant's Reply, hereby GRANTS IN PART and DENIES IN PART
Defendant's Motion, as follows:

1. Defendant's motion to strike Plaintiff's untimely
damages calculation is hereby DENIED.


1 2. Defendant's motion in limine is hereby GRANTED IN PART.
2 Plaintiff may not seek recovery of special damages
3 beyond those identified in the January 22, 2015, letter
4 wherein Plaintiff listed past medical Expenses.

5 3. Defendant's motion in limine is hereby GRANTED IN PART.
6 Plaintiff may not seek recovery of wage loss.

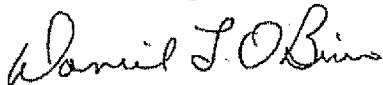
7 4. Defendant's motion in limine is hereby GRANTED IN PART.
8 Plaintiff's medical expenses are capped at \$50,000.00.

9 IT IS SO ORDERED this 7th day of April, 2015.

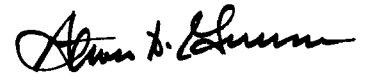
10
11 By: 

Hon. Richard F. Scotti 
District Court Judge
Eighth Judicial District Court
Department 2
Clark County, Nevada

12
13
14
15 Submitted by:

16 

17 Daniel L. O'Brien
18 Nevada Bar No. 983
19 Counsel for District



CLERK OF THE COURT

1 ORDR
Office of the General Counsel
2 Clark County School District
DANIEL L. O'BRIEN, ESQ.
3 Nevada Bar No. 983
CARLOS L. McDADE, ESQ.
4 Nevada Bar No. 11205
5100 W. Sahara Avenue
5 Las Vegas, NV 89146
(702) 799-5373
6 Attorneys for Defendant

7 DISTRICT COURT

8 CLARK COUNTY, NEVADA

9 MAKANI KAI PAYO,
10 Plaintiff,

11 v.

12 CLARK COUNTY SCHOOL DISTRICT; DOE
13 CLARK COUNTY SCHOOL DISTRICT
14 EMPLOYEES I-V; DOES I-V and ROE
COMPANIES I-V, inclusive,
15 Defendants.

Case No. A-12-668833-C
Dept. No. II

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS

17 ORDER GRANTING IN PART AND DENYING IN PART
18 DEFENDANT'S MOTION TO DISMISS


19 This matter came on regularly before this Court on July 15,
20 2013 by way of Defendant's June 10, 2013, Notice of Motion and
21 Motion to Dismiss Plaintiff's complaint for the failure to state
22 a claim upon which relief can be granted. Appearing on behalf of
23 the School District was Daniel L. O'Brien. Representing
24 Plaintiff was Robert O. Kurth, Jr., Esq. After considering the
25 motion, the Opposition and the Reply briefs, together with
26 argument of counsel, and Good Cause appearing, it is hereby
27 ORDERED that Defendant's Motion is hereby Granted in Part and
28 Denied in Part, as follows:

1. Defendant's Motion to Dismiss is Granted in part:
Plaintiff's Second Cause of Action, Negligent
Infliction of Emotional Distress, is hereby Dismissed,
without prejudice;
2. Defendant's Motion to Dismiss is Granted in part:
Plaintiff's Third Cause of Action, Negligence Per Se,
is hereby Dismissed, without prejudice;
3. Defendant's Motion to Dismiss is Granted in part:
Plaintiff's claims for punitive or exemplary damages
are hereby Dismissed pursuant to NRS 41.035;
4. Defendant's Motion to Dismiss is Denied in part:
Defendant has not demonstrated sufficient prejudice,
thus the case will not be dismissed on the grounds of
laches;
5. Defendant's Motion to Dismiss is Denied in part: The
Coverdell Act does not apply to the allegations set
forth in Plaintiff's Complaint, thus Plaintiff's case
will not be dismissed upon the grounds that the
Coverdell Act provides immunity in this case.
6. Defendant's Motion to Dismiss is Denied in part: The
Court finds that the student who injured Plaintiff and
his parents are not indispensable parties to this
action, thus Plaintiff's case will not be dismissed for
failure to join an indispensable party.
7. Defendant's Motion to Dismiss on the grounds of
assumption of the risk, for the failure of Plaintiff to
identify any recoverable special damages, and the
Defendant's request for declaratory relief as to the

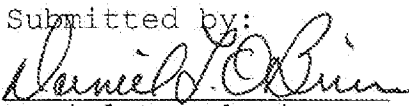
1 number of statutory caps on damages, and the maximum
2 amount thereof which is applicable in this case are
3 hereby denied. *

4 Plaintiff shall have twenty (20) days from notice of entry
5 of this Order in which to file an amended complaint incorporating
6 the foregoing rulings. Defendant shall have ten (10) days from
7 receipt of the proposed amended complaint to answer or otherwise
8 plead in this case.

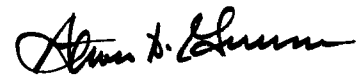
9 IT IS SO ORDERED this 14th day of August, 2013.

10
11 
12 Hon. Valerie J. Vega
District Court Judge
Department II
DAS

13 Submitted by:

14 
15 Daniel L. O'Brien
16 Nevada Bar No. 983
Counsel for District

17 * The rulings are pursuant to NRC 12(6)(5),
18 Simpson v. Mars, 113 Nev. 188 (1997),
19 Vacation Village v. Hitachi America, 110 Nev. 481 (1994),
20 The Coverdell Act, NRS § 41.0305, and
21 NRS 386.010 (2)
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CLERK OF THE COURT

NOE
Office of the General Counsel
Clark County School District
DANIEL L. O'BRIEN, ESQ.
Nevada Bar No. 983
CARLOS L. McDADE, ESQ.
Nevada Bar No. 11205
5100 W. Sahara Avenue
Las Vegas, NV 89146
(702) 799-5373
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

MAKANI KAI PAYO,

Plaintiff,

v.

CLARK COUNTY SCHOOL DISTRICT; DOE
CLARK COUNTY SCHOOL DISTRICT
EMPLOYEES I-V; DOES I-V and ROE
COMPANIES I-V, inclusive,

Defendants.

Case No. A-12-668833-C
Dept. No. II

**NOTICE OF ENTRY OF ORDER
GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS**

NOTICE OF ENTRY OF ORDER

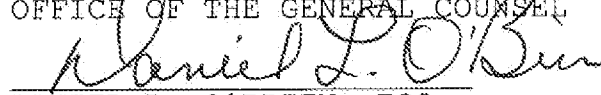
TO: ALL PARTIES AND THEIR ATTORNEYS:

NOTICE is hereby given that an Order was entered on the 21ST
day of August, 2013, a copy of which is attached hereto as Exhibit
"A" regarding the above-entitled matter.

DATED this 21ST day of August, 2013.

CLARK COUNTY SCHOOL DISTRICT
OFFICE OF THE GENERAL COUNSEL

By:



DANIEL L. O'BRIEN, ESQ.

Nevada Bar No. 983

5100 West Sahara Avenue

Las Vegas, NV 89146

Attorney for Defendant, CLARK COUNTY
SCHOOL DISTRICT

1
2 CERTIFICATE OF MAILING

3 I HEREBY CERTIFY that on the 22nd day of August, 2013, I
4 served the parties hereto with the foregoing NOTICE OF ENTRY OF
5 ORDER by depositing a true and correct copy hereof in the United
6 States mail at Las Vegas, Nevada, postage fully prepaid, addressed
7 as follows:

8 Robert O. Kurth, jr.
9 Kurth Law Office
10 3420 North Buffalo Drive
11 Las Vegas, NV 89129
12 Attorney for Plaintiff

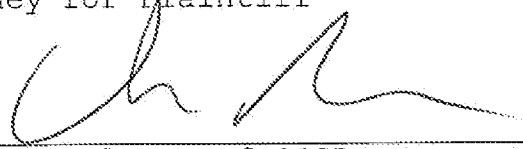
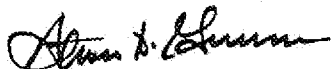
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An Employee of CCSD

EXHIBIT A


CLERK OF THE COURT

1 ORDR
2 Office of the General Counsel
3 Clark County School District
4 DANIEL L. O'BRIEN, ESQ.
5 Nevada Bar No. 983
6 CARLOS L. McDADE, ESQ.
7 Nevada Bar No. 11205
8 5100 W. Sahara Avenue
9 Las Vegas, NV 89146
10 (702) 799-5373
11 Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

9 MAKANI KAI PAYO,

10 Plaintiff,

11 v.

12 CLARK COUNTY SCHOOL DISTRICT; DOE
13 CLARK COUNTY SCHOOL DISTRICT
14 EMPLOYEES I-V; DOES I-V and ROE
15 COMPANIES I-V, inclusive,

16 Defendants.

Case No. A-12-668833-C
Dept. No. II

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION TO DISMISS


19 This matter came on regularly before this Court on July 15,
20 2013 by way of Defendant's June 10, 2013, Notice of Motion and
21 Motion to Dismiss Plaintiff's complaint for the failure to state
22 a claim upon which relief can be granted. Appearing on behalf of
23 the School District was Daniel L. O'Brien. Representing
24 Plaintiff was Robert O. Kurth, Jr., Esq. After considering the
25 motion, the Opposition and the Reply briefs, together with
26 argument of counsel, and Good Cause appearing, it is hereby
27 ORDERED that Defendant's Motion is hereby Granted in Part and
28 Denied in Part, as follows:

1. Defendant's Motion to Dismiss is Granted in part:
Plaintiff's Second Cause of Action, Negligent
Infliction of Emotional Distress, is hereby Dismissed,
without prejudice;
2. Defendant's Motion to Dismiss is Granted in part:
Plaintiff's Third Cause of Action, Negligence Per Se,
is hereby Dismissed, without prejudice;
3. Defendant's Motion to Dismiss is Granted in part:
Plaintiff's claims for punitive or exemplary damages
are hereby Dismissed pursuant to NRS 41.035;
4. Defendant's Motion to Dismiss is Denied in part:
Defendant has not demonstrated sufficient prejudice,
thus the case will not be dismissed on the grounds of
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5. Defendant's Motion to Dismiss is Denied in part: The
Coverdell Act does not apply to the allegations set
forth in Plaintiff's Complaint, thus Plaintiff's case
will not be dismissed upon the grounds that the
Coverdell Act provides immunity in this case.
6. Defendant's Motion to Dismiss is Denied in part: The
Court finds that the student who injured Plaintiff and
his parents are not indispensable parties to this
action, thus Plaintiff's case will not be dismissed for
failure to join an indispensable party.
7. Defendant's Motion to Dismiss on the grounds of
assumption of the risk, for the failure of Plaintiff to
identify any recoverable special damages, and the
Defendant's request for declaratory relief as to the

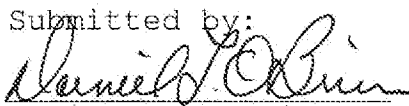
1 number of statutory caps on damages, and the maximum
2 amount thereof which is applicable in this case are
3 hereby denied. *

4 Plaintiff shall have twenty (20) days from notice of entry
5 of this Order in which to file an amended complaint incorporating
6 the foregoing rulings. Defendant shall have ten (10) days from
7 receipt of the proposed amended complaint to answer or otherwise
8 plead in this case.

9 IT IS SO ORDERED this ^{14th} day of ^{August} ~~April~~, 2013.

10
11 
12 Hon. Valerie J. Vega
District Court Judge
Department II
DAS

13 Submitted by:

14 
15 Daniel L. O'Brien
16 Nevada Bar No. 983
Counsel for District

17 * The rulings are pursuant to NRC 12(6)(5),
18 Simpson v. Mars, 113 Nev. 188 (1997),
19 Vacation Village v. Hitachi America, 110 Nev. 481 (1994),
20 The Coverdell Act, NRS § 41.0305, and
21 NRS 386.010 (2)
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

May 01, 2013

A-12-668833-C Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

May 01, 2013 3:00 AM Motion to Dismiss

HEARD BY: Vega, Valorie J. **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Nora Pena

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- COURT ORDERED, matter CONTINUED as should be on the oral calendar.

5/08/13 9:00 AM CCSD'S MOTION TO DISMISS

CLERK'S NOTE: Copy of minutes placed in counsels attorney folder, Robert Kurth (Kurth Law) and Daniel Louis O'Brien (Counsel for CCSD)./np

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

May 08, 2013

A-12-668833-C Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

May 08, 2013 9:00 AM Motion to Dismiss

HEARD BY: Vega, Valorie J. **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Nora Pena

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT: Kurth, Robert O. Attorney
O'Brien, Daniel Louis Attorney

JOURNAL ENTRIES

- Via telephonic call to Mr. Kurth's Law Office, Judge left a message concerning the motion set for today at 9:00 a.m. and noted counsel has not arrived but Mr. O'Brien is present.
COURT ORDERED, matter set for 5/13th at 9:30 a.m. for Mr. Kurth to be present and clerk to place a copy of the minute order in his folder.

Mr. Kurth present. FURTHER ORDERED, 5/13th date VACATED. Argument by Mr. O'Brien to strike Plaintiff's response to reply to opposition as it's a fugitive document. Court advised leave was not authorized. COURT ORDERED, Oral motion to Strike Response to Reply to Opposition GRANTED. Argument by Mr. O'Brien for failure to post a bond untimely for security of costs. Mr. Kurth advised he posted it in time for the opposition which was filed and asked to be allowed to proceed with discovery. Response by Mr. O'Brien that he could have pursued it eight years ago and Plaintiff has not shown to follow the rules. Court stated her findings, and ORDERED, CCSD's motion to Dismiss DENIED pursuant to NRCp 12(b)(5), NRS 18.130 and Borders Elec. Co. v. Quirk, 97 Nev. 205 (1981). Mr. Kurth to prepare the order and pass it to Mr. O'Brien prior to submission to the Court.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

July 15, 2013

A-12-668833-C Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

July 15, 2013 9:00 AM Motion to Dismiss

HEARD BY: Vega, Valorie J. **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Dania Batiste

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT: Kurth, Robert O. Attorney
O'Brien, Daniel Louis Attorney

JOURNAL ENTRIES

- Argument by Mr. O'Brien, stating the Coverdale Act provides that a teacher can not be held in negligence while trying to maintain order; and under Rule 19, Defendant moves to dismiss because Plaintiff failed to join an indispensable party. Opposition by Mr. Kurth, stating the Coverdale Act was never intended to give the school district immunity; further, the district should have investigated, had more supervisors, and provided more protection. Further arguments by counsel. Noting Plaintiff met the statute of limitations, COURT ORDERED, Motion GRANTED IN PART and DENIED IN PART as follows: GRANTED IN PART as to punitive damages, pursuant to NRS 41.0305 and NRS 386.010(2); GRANTED WITHOUT PREJUDICE as to the causes of action where negligence inflicted emotional distress; DENIED, as Defendant did not meet its burden on the causes of action, pursuant to NRCP 12(b)(5).

Court directed Mr. O'Brien to prepare the Order.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

April 07, 2014

A-12-668833-C Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

April 07, 2014 9:00 AM Motion to Dismiss

HEARD BY: Vega, Valorie J. **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Nora Pena

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT: Kurth, Robert O. Attorney
O'Brien, Daniel Louis Attorney

JOURNAL ENTRIES

- Following arguments by counsel, COURT ORDERED, motion to Dismiss DENIED pursuant to NRCp 12(b)(5), *Simpson v. Mars, Inc.*, 113 Nev. 188 (1997), *Vacation Village v. Hitachi America*, 110 Nev. 481 (1994) and ORDERED, Mr. Kurth to reschedule the early case conference within 30 days of today's date and as to sanctions, Mr. Kurth to prepare the order.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

September 03, 2014

A-12-668833-C	Makani Payo, Plaintiff(s)
	vs.
	Clark County School District, Defendant(s)

September 03, 2014 3:00 AM

At Request of Court

HEARD BY: Vega, Valorie J.

COURTROOM: RJC Courtroom 16B

COURT CLERK: Nora Pena

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- This Court does hereby sua sponte ORDERED, VACATE its Order to Statistically Close Case filed 3/08/13 due to non-compliance with NRCP 4 and NRS 18.130. On 4/3/13 the Security Cost Bond was paid and entered into Odyssey in compliance with NRS 18.130 curing that deficiency. On 3/11/13 Plaintiff's Counsel filed the Summons and Affidavit of Service showing service was actually earlier effected on Deft. CCSD on 1/14/13 which was in compliance with NRCP 4. Therefore, the case is hereby, ORDERED, Returned to Open status. Clerk to copy counsels' attorney folders.

CLERK'S NOTE: Copy of minutes placed the attorney folders of Robert Kurth (Kurth Law) and Daniel Louis O'Brien (CCSD - Sr. Asst Gen Cnsl).

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

March 03, 2015

A-12-668833-C Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

March 03, 2015 3:00 AM Motion to Strike

HEARD BY: Scotti, Richard F **COURTROOM:** Phoenix Building Courtroom -
11th Floor

COURT CLERK: Phyllis Irby

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- COURT ORDERED, Defendant's motion to strike plaintiff's January 22, 2015 damage calculator is DENIED. Defendant's motion in limine is granted in part and denied in part, as follows: Plaintiff may not seek special damages beyond those identified in the January 22, 2015 letter. As such: Plaintiff may not present a claim for wage loss; the claim for medical expenses is capped at wage loss; the claim for medical expenses is capped at \$50,000.00. Defendant may renew its motion in limine as to the claim for future medical expenses if documentary support has not been timely disclosed and resulting prejudice is shown. Defendant's counsel to prepare the order.

CLERK'S NOTE: A copy of this minute order shall be place in the Attorneys bin for: Robert O. Kurth, Daniel Louis O'Brien (CCSD-Sr Asst Gen Cnsl)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence**COURT MINUTES****March 18, 2015**

A-12-668833-C Makani Payo, Plaintiff(s)
 vs.
 Clark County School District, Defendant(s)

March 18, 2015	9:00 AM	Motion to Extend Discovery	Pltf's Motion to Extend Discovery
-----------------------	----------------	---------------------------------------	--

HEARD BY: Bulla, Bonnie**COURTROOM:** RJC Level 5 Hearing Room**COURT CLERK:** Jennifer Lott**RECORDER:** Sandra Pruchnic**REPORTER:****PARTIES**

PRESENT:	Kurth, Robert O.	Attorney
	Murch, Patrick J.	Attorney

JOURNAL ENTRIES

- 2.34 insufficient. The District Court Judge Denied Deft's Motion to Strike but limited Pltf's damages to medical expenses of \$50,000, and no wage loss. Colloquy re: deposing a Teacher in Minnesota and taking Deft's 30(b)(6) deposition. Commissioner suggested a telephonic deposition. Argument by Mr. Kurth; Pltf needs additional treatment, Pltf works on a cruise line out of Hawaii, but lived in California for many years.

COMMISSIONER RECOMMENDED a telephonic or video deposition for the Teacher in Minnesota, or go to Minnesota, but Commissioner will not require parties go to Minnesota. Mr. Kurth explained he is a sole practitioner, and his employee's medical emergency affected Trial preparation.

COMMISSIONER RECOMMENDED, Motion to Extend Discovery is GRANTED IN PART; discovery extended to 4/17/15 to complete Teacher and 30(b)(6) depositions; FILE dispositive motions by 4/8/15; Motion to Continue Trial is DENIED WITHOUT PREJUDICE. If counsel want a Mandatory Settlement Conference, contact Commissioner by conference call, but the Trial date will be moved. COMMISSIONER RECOMMENDED, Status Check SET.

Mr. Kurth to prepare the Report and Recommendations, and Mr. Murch to approve as to form and content. A proper report must be timely submitted within 10 days of the hearing. Otherwise, counsel will pay a contribution. Mr. Kurth to appear at status check hearing to report on the Report and Recommendations.

4/17/15 9:30 a.m. Status Check: Status of Case / Trial date . SC: Compliance

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

April 17, 2015

A-12-668833-C	Makani Payo, Plaintiff(s)
	vs.
	Clark County School District, Defendant(s)

April 17, 2015 9:30 AM All Pending Motions

HEARD BY: Bulla, Bonnie **COURTROOM:** RJC Level 5 Hearing Room

COURT CLERK: Jennifer Lott

RECORDER: Francesca Haak

REPORTER:

PARTIES

PRESENT:	Kurth, Robert O.	Attorney
	O'Brien, Daniel Louis	Attorney

JOURNAL ENTRIES

- Status Check: Status of Case / Trial Date Status Check: Compliance

Colloquy re: the First Aid Safety Assistant will be deposed this afternoon, and Mr. Kurth's attempts to schedule the Teacher's deposition (Nebraska). Arguments by counsel. COMMISSIONER RECOMMENDED, discovery cutoff EXTENDED to 4/30/15 to depose the Teacher in Nebraska; noticed REDUCED to five business days, but everyone must be available; take a telephonic deposition if necessary; 5/18/15 Trial date STANDS.

Mr. Kurth to prepare the Report and Recommendations, and Mr. O'Brien to approve as to form and content. A proper report must be timely submitted within 10 days of the hearing. Otherwise, counsel will pay a contribution. Mr. Kurth to appear at status check hearing to report on the Report and Recommendations.

5/8/15 11:00 a.m. Status Check: Compliance

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

May 08, 2015

A-12-668833-C Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

May 08, 2015 11:00 AM Status Check: Compliance

HEARD BY: Bulla, Bonnie **COURTROOM:** RJC Level 5 Hearing Room

COURT CLERK: Jennifer Lott

RECORDER: Francesca Haak

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- COMMISSIONER RECOMMENDED, matter continued 30 days due to Mr. Kurth's medical emergency.

6/5/15 11:00 a.m. Status Check: Compliance

CLERK'S NOTE: On 5-12-15, a copy of this minute order was placed in the attorney folder(s) of:

Robert Kurth

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence**COURT MINUTES****May 11, 2015**

A-12-668833-C Makani Payo, Plaintiff(s)
 vs.
 Clark County School District, Defendant(s)

May 11, 2015**9:00 AM****All Pending Motions****HEARD BY:** Hardy, Joe**COURTROOM:** Phoenix Building Courtroom -
11th Floor**COURT CLERK:** Jennifer Kimmel**RECORDER:** Matt Yarbrough**REPORTER:****PARTIES**

PRESENT: Kurth, Robert O. Attorney
 O'Brien, Daniel Louis Attorney

JOURNAL ENTRIES

- DEFENDANT'S MOTION AND NOTICE OF MOTION FOR SUMMARY JUDGMENT...
 PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, AND COUNTER-
 MOTION FOR SUMMARY JUDGMENT

Argument by counsel regarding Deft's Motion for Summary Judgment. COURT FINDS, it to be undisputed that Clark County School District (CCSD) has a general duty to exercise due care. Additionally CCSD knew risks of injury were inherent in the sport of field hockey. COURT further FINDS, the question of duty is not reliant on the Pltf's testimony, whether or not duty exists is a question of law. Therefore genuine questions of material fact exist as to; 1- duty; 2- whether CCSD exercised reasonable care in allowing an eleven year old student to play field hockey in Physical Education (P.E.) without providing him with any safety equipment; 3- whether CCSD's treatment of the eleven year old student and advice given to Pltf. were reasonable and ; 4- whether additional training, supervision or equipment could have prevented the injury. Accordingly, COURT ORDERED, Deft's Motion for Summary Judgment as to the first cause of action - Negligence and as to the second cause of action - Negligent Supervision is DENIED WITHOUT PREJUDICE.

COURT FURTHER ORDERED, Pltf's Opposition and Counter-Motion for Summary Judgment is also DENIED WITHOUT PREJUDICE as the COURT FINDS, no concise statement setting forth each fact material to the disposition of the motion that Pltf's claims is or is not genuinely in issue as required by NRCP 56 (c).

Court directed Mr. Kurth, Esq. to prepare the Order and submit to Mr. O'Brien, Esq. for his review and signature prior to submitting to the Court for signature.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

May 13, 2015

A-12-668833-C Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

May 13, 2015 **8:30 AM** **Calendar Call**

HEARD BY: Hardy, Joe **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Jennifer Kimmel

RECORDER: Matt Yarbrough

REPORTER:

PARTIES

PRESENT: Kurth, Robert O. Attorney
O'Brien, Daniel Louis Attorney

JOURNAL ENTRIES

- Both sides announced ready however no EDCR 2.67 Conference has been held. Additionally counsel believe matter will take about 3 days to complete. Mr. O'Brien, Esq. advised the Court of an Out of State witness and indicated he requests scheduling the witness be accommodated. Mr. Kurth, Esq. advised he will cooperate with scheduling of this witness. Following discussion regarding scheduling COURT ORDERED, Trial dates set FIRM.

COURT FURTHER ORDERED, Counsel to complete the EDCR 2.67 meeting on or before 5/20/15 and then submit a Joint Pre Trial Memorandum on or before 5/21/15.

5/27/15 10:30 A.M. JURY TRIAL//5/28/15 10:30 A.M. JURY TRIAL//5/29/15 9:00 A.M. JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

May 27, 2015

A-12-668833-C Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

May 27, 2015 10:30 AM Jury Trial - FIRM

HEARD BY: Hardy, Joe

COURTROOM: Phoenix Building Courtroom - 11th Floor

COURT CLERK: Jennifer Kimmel

RECORDER: Matt Yarbrough

REPORTER:

PARTIES

PRESENT: Kurth, Robert O. Attorney
O'Brien, Daniel Louis Attorney
Payo, Makani Kai Plaintiff

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY PANEL: Court and counsel discussed voir dire questions and general trial guidelines.

Argument regarding the Pltf's notes made on a menu, which was also referred to as a journal. Court stated its inclinations to not allow this document to be used in any manner, by the Pltf., given it was not produced in discovery. COURT stated, if this journal was a work product, as indicated by Mr. Kurth, it would have been put into a privilege log. Court stated additional inclination to allow Clark County School District (CCSD) to use this journal in any way they choose. COURT stated its inclination to allow Mr. Kurth to conduct re-direct if this issue comes up during cross examination. COURT FURTHER ORDERED, counsel to file brief addressing this issue, as soon as possible.

Discussion regarding the CAP amount for damages. COURT FURTHER ORDERED, the Court will reserve its ruling on this issue pending receipt of briefs from both sides.

Argument regarding the Inherent Risk Doctrine. Court stated its inclinations to DENY this

PRINT DATE: 07/17/2015

Page 14 of 22

Minutes Date: May 01, 2013

WITHOUT PREJUDICE based on the reasons set forth in the prior Order that denied summary judgment. Court stated it is the jury who will determine if CCSD provided reasonable care by either providing or not providing safety equipment.

Argument regarding Mr. Kurth's request to limit testimony of CCDC concerning going to the State and testifying about curriculum document, given this document was not disclosed in discovery.

Overtime costs for Staff, was explained to counsel, who subsequently agreed to share the cost of same.

Exhibits were offered and admitted into evidence, (see worksheets).

PROSPECTIVE JURY PANEL PRESENT: Voir dire oath administered. Introductions by Mr. Kurth and Mr. O'Brien, who each named their witnesses. Voir dire commenced. Eight jurors and two alternates selected and sworn. Both sides INVOKED the EXCLUSIONARY RULE which shall be lifted as to the Plaintiff's mother and Ms. Eileen Wheelan, as a Representative for Clark County School District (CCSD).

COURT admonished and excused Jury for evening recess and ORDERED, matter CONTINUED.

CONTINUED TO: 5/28/15 10:30 A.M.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

May 28, 2015

A-12-668833-C Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

May 28, 2015 10:30 AM Jury Trial - FIRM

HEARD BY: Hardy, Joe **COURTROOM:** Phoenix Building Courtroom -
11th Floor

COURT CLERK: Jennifer Kimmel

RECORDER: Matt Yarbrough

REPORTER:

PARTIES

PRESENT: Kurth, Robert O. Attorney
O'Brien, Daniel Louis Attorney
Payo, Makani Kai Plaintiff

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF THE JURY: Deft s brief on The Issue of the Number of Statutory Caps on Damages Available Under NRS 41.035 was FILED IN OPEN COURT.

Mr. O'Brien advised the top line of exhibit 15 is objectionable. Argument ensued. COURT ORDERED, exhibit 15 stands as admitted with no objection, however the School District shall retain the right to argue that the all or some of the summary of bills were not incurred and they have not conceded liability. Court stated it appreciates the summary because it makes everyone's job easier.

Mr. Kurth disclosed his daughter works at Woodbury Middle School, however it was not during the time of this incident.

Court clarified as follow up regarding Plt f s notes on the menu (journal) that Mr. Kurth may conduct re-direct examination if the issue is brought up on cross by Deft s counsel. Therefore COURT ORDERED, prior ruling stands and if Deft s counsel opens the door it could/would make re-direct appropriate, subject to scope and objections.

PRINT DATE: 07/17/2015

Page 16 of 22

Minutes Date: May 01, 2013

JURY PRESENT: Counsel STIPULATED to the presence of the jury. Exclusionary rule in place. Testimony and exhibits presented, (see worksheets). Court admonished and excused Jury for afternoon recess.

OUTSIDE THE PRESENCE OF THE JURY: Discussion regarding exhibit 17, to which the Defense had an objection and withdrew same.

JURY PRESENT: Counsel STIPULATED to the presence of the jury. Testimony and exhibits resumed, (see worksheets). Deposition of Makani Payo was FILED and PUBLISHED in OPEN COURT. Court admonished and excused the jury for evening recess and ORDERED, matter CONTINUED.

OUTSIDE THE PRESENCE OF THE JURY: Court and counsel discussed Jury Instructions. Counsel are directed to provide their agreed upon and not agreed upon instructions to the Court tomorrow.

CONTINUED TO: 5/29/15 9:00 A.M.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

May 29, 2015

A-12-668833-C Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

May 29, 2015 9:00 AM Jury Trial - FIRM

HEARD BY: Hardy, Joe

COURTROOM: Phoenix Building Courtroom - 11th Floor

COURT CLERK: Jennifer Kimmel

RECORDER: Matt Yarbrough

REPORTER:

PARTIES

PRESENT: Kurth, Robert O. Attorney
O'Brien, Daniel Louis Attorney
Payo, Makani Kai Plaintiff

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF THE JURY: Court and counsel discussed Jury Instructions. Court queried Mr. O'Brien regarding his preference for sanction for Mr. Kurth's late arrival. Mr. O'Brien requested apology. Mr. Kurth apologized to the Court, Mr. O'Brien, Ms. Wheelan and his clients, who arrived on time.

JURY PRESENT: Counsel STIPULATED to the presence of the jury. Exclusionary rule in place. Testimony and exhibits presented, (see worksheets). Court admonished and excused Jury for lunch recess.

OUTSIDE THE PRESENCE OF THE JURY: Court and counsel discussed scheduling of witnesses. Both sides were expecting Dr. Carr however he has not responded to the subpoena, therefore Pltf. will reserve the right to call him should he come in for the Defense and the Court will consider an Order to Show Cause should counsel pursue same. PLTF. RESTED. Mr. Kurth moved for a directed verdict. COURT ORDERED, request is DENIED.

JURY PRESENT: Testimony and exhibits resumed, (see worksheets). Court admonished and excused Jury for evening recess and FURTHER ORDERED, matter CONTINUED.

OUTSIDE THE PRESENCE OF THE JURY: Court and counsel discussed Jury Instructions.

CONTINUED TO: 6/1/15 10:30 A.M.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

June 02, 2015

A-12-668833-C Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

June 02, 2015 10:30 AM Jury Trial - FIRM

HEARD BY: Hardy, Joe

COURTROOM: Phoenix Building Courtroom -
11th Floor

COURT CLERK: Jennifer Kimmel

RECORDER: Matt Yarbrough

REPORTER:

PARTIES

PRESENT: Kurth, Robert O. Attorney
O'Brien, Daniel Louis Attorney
Payo, Makani Kai Plaintiff

JOURNAL ENTRIES

- JURY DELIBERATING.

OUTSIDE THE PRESENCE OF THE JURY: Upon receiving a question from the deliberating Jury, Court Staff contacted counsel to have them return and discuss the answer to that question. Prior to returning the question, with its answer, to the Jury, the Jury had reached a verdict.

JURY PRESENT, without alternates. At the hour of 2:56 p.m., the Jury returned with a verdict for the Plaintiff as follows. Past medical and related expenses: \$48,288.06, Future medical and related expenses: \$10,000.00, Past pain, suffering, disability, and Loss of enjoyment of life: \$2,000.00, Future pain, suffering, disability, and Loss of enjoyment of life: 0, for a total judgment \$60,288.06.

Court thanked and excused the jury.

OUTSIDE THE PRESENCE OF THE JURY: Court and counsel discussed filing of post trial motions and Pltf. will file a Motion for Attorney s fees and costs.

PRINT DATE: 07/17/2015

Page 21 of 22

Minutes Date: May 01, 2013

		OFFERED		ADMITTED		DATE
		DATE	OBJ	DATE	OBJ	DATE
1	Woodbury Middle School Health Office log 4/6/2005 - Bates # 000021-000022	5/27	x	No	x	5/27
2	Student Injury Accident Report - Bates # CCSD 000039	"	"	"	"	"
3	FASA's written statement of Waleska Morton 2/16/05 - Bates # CCSD000024	"	"	"	"	"
4	Medical records from Nevada Institute of Ophthalmology - Bates # 000018-000092	"	"	"	"	"
5	Medical records from Retina Consultants of Nevada - Bates # 000093-000114	"	"	"	"	"
6	Medical records from University Medical Center (UMC) - Bates # 000115-000264	"	"	"	"	"
7	Medical records from Dr. Tyree Carr, Date of Service 1/21/15- Bates # 000291-000293	"	"	"	"	"
8	Woodbury's Hockey Unit introduction and floor hockey rules - Bates # CCSD 000030-000037	5/29	X	obj/or	X	5/29
9	Deft. CCSD's Responses to Pltf's First Set of Interrogatories	5/27	x	No	x	5/27
10	Deft. CCSD's Responses to Pltf's First Set of Requests for Admissions	"	"	"	"	"
11	Pltf's Answers to Deft. CCSD's Interrogatories	"	"	"	"	"
12	Pltf's Answers to Deft. CCSD's Requests for Production of Documents	"	"	"	"	"
13	DEPOSITION (NOT AN EXHIBIT)					
14	DEPOSITION (NOT AN EXHIBIT)					
15	Medical Billing summary of Damages (Version 2)	5/27	X	No	X	5/27
15 a	Medical Billing summary of Damages (Version 1) - WITHDRAWN					
16	Claim Form against Clark County School District form - Bates # 000295-000297					
17	Letter dated 12/29/05 to CCSD with claim form - Bates # 000295-000297	5/28	X	No	X	5/28
18	Floor Hockey rules produced by Deft. - CCSD 000025-000029	5/29	X	obj/or	X	5/29
19	Vitreous Hemorrhage Conditions information produced by Deft. - CCSD 000012-000013	"	X	obj/or	X	"
20	Billing record from Southwest Ambulance - Bates # 000267					
21	Billing record from UMC - Bates # 000009-000016					
22	Billing record from Summit Anesthesia Consultants - Bates # 000017					
23	Billing record from Medschool Associates South - Bates # 000267					
24	Billing record from EPMG - Bates # 000268					
25	Billing record from Nevada Institute of Ophthalmology - Bates # 000269-000280					
26	Billing records from Retina consultants of Nevada - Bates # 000281-000289					
27	Billing record from Tenaya Surgical Center - Bates # 000290					
28	Updated billing record from Tenaya Surgical Center - Bates # 000294					
29	Letter dated 12/15/04 to CCSD from Mr. Kurth - Bates # CCSD 000040	5/29	X	No	X	5/29
30						
31						
32						

Court's Exhibit List

CASE # A668833

[illegible]

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; JUDGMENT ON JURY VERDICT; NOTICE OF ENTRY OF JUDGMENT; ORDER REGARDING DAMAGES POST-JURY VERDICT; NOTICE OF ENTRY OF ORDER; ORDER; NOTICE OF ENTRY OF ORDER; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S DAMAGES CALCULATION OR, IN THE ALTERNATIVE, MOTION IN LIMINE; NOTICE OF ENTRY OF ORDER; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS; NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS; DISTRICT COURT MINUTES; EXHIBITS LIST

MAKANI KAI PAYO,

Plaintiff(s),

vs.

CLARK COUNTY SCHOOL DISTRICT; DOE
CLARK COUNTY SCHOOL DISTRICT
EMPLOYEES,

Defendant(s),

Case No: A668833

Dept No: XV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 17 day of July 2015.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT,
Appellant,
vs.
MAKANI KAI PAYO,
Respondent.

No. 68443

FILED

AUG 31 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

SETTLEMENT PROGRAM STATUS REPORT

A mediation session was held in this matter on 8/26, 2015.

I make the following report to the court:

(check one box)

- ☐ The parties have agreed to a settlement of this matter.
- ☒ The parties were unable to agree to a settlement of this matter.
- ☐ The settlement process is continued as follows:

Date: _____ Time: _____

Location: _____

☐ Other: _____

Additional Comments:

There will be another appeal filed in this case on the attorney fees after the order is signed. Please assign the case to me.

[Signature]
Settlement Judge

RECEIVED

AUG 31 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

1727

15-21388

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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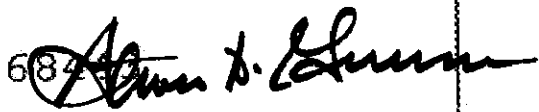
3 CLARK COUNTY SCHOOL
4 DISTRICT,

5 Appellant

6 v.

7 MAKANI KAI PAYO,

8 Respondent.

Supreme Court Case No: 684 

District Court Case No: A CLERK OF THE COURT

REQUEST FOR TRANSCRIPTS
OF PROCEEDINGS

9
10 TO: MATTHEW YARBOUGH, COURT REPORTER FOR DEPARTMENT XV

11 Appellant, Clark County School District, in accordance with
12 NRAP 9, respectfully requests preparation of transcripts of the
13 proceedings before the district court in case No. A-12-668833-C,
14 as follows:

- 15 1. - Presiding Judge: Hon. Joseph Hardy;
16 - May 27, 2015, through June 2, 2015, trial;
17 - Complete transcript of trial and all pre-trial, trial
18 and post-trial hearings and conferences, including
19 matters heard outside of the presence of the jury,
20 settling of jury instructions, motions, and any other
21 matter recorded in connection with the trial of this
22 matter, together with any and all exhibits submitted or
23 considered in connection therewith.
24 - Two (2) copies required.
- 25 2. - Presiding Judge: Hon. Joseph Hardy;
26 - May 11, 2015, hearing on Defendant's motion for summary
27 judgment, counter-motion for summary judgment;
28 - Complete transcript of hearing;
- Two (2) copies required.

- 1 3. - Presiding Judge: Hon. Valerie J. Vega;
2 - March 3, 2015, hearing on Defendant's motion to strike
3 Plaintiff's damages calculation;
4 - Complete transcript of hearing;
5 - Two (2) copies required.
6 4. - Presiding Judge: Hon. Valerie J. Vegas;
7 - July 15, 2013, hearing on Defendant's motion to dismiss;
8 - Complete transcript of hearing;
9 - Two (2) copies required.

10 I hereby certify that on the 17th day of September, 2015, I
11 ordered the transcripts, printed court minutes, a complete copy
12 of the Register of Actions, exhibits and jury instructions listed
13 above from the court reporter named above, but paid no deposit as
14 the court reporter advised that a deposit is not required and
15 that payment could be made upon completion of the transcript.

16 Dated this 16th day of September, 2015.

17 By: /s/ Daniel L. O'Brien
18 DANIEL L. O'BRIEN, ESQ.
19 Nevada Bar No. 0983
20 Office of the General Counsel
21 Clark County School District
22 5100 West Sahara Avenue
23 Las Vegas, Nevada 89146
24 Telephone (702) 799-5373
25 Facsimile: (702) 799-5505
26 Attorneys for Appellant
27
28

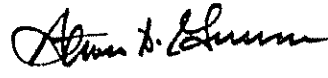
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Clark County School District, and that on the 16th day of September, 2015, I served a copy of the **REQUEST FOR TRANSCRIPTS OF PROCEEDINGS** via electronic filing and electronic service through the EFP Vendor System to all registered parties pursuant to the order for electronic filing and service and by depositing a copy in the United States mail at Las Vegas, Nevada, postage prepaid, addressed as follows:

Robert O. Kurth, Jr.
Kurth Law Office
3420 North Buffalo Drive
Las Vegas, NV 89129
Kurthlawoffice@gmail.com
Attorney for Plaintiff

_____/s/ Joan Mortimer_____
An Employee of CCSD



CLERK OF THE COURT

1 **ORDR**
2 ROBERT O. KURTH, JR.
3 Nevada Bar No. 4659
4 **KURTH LAW OFFICE**
5 3420 North Buffalo Drive
6 Las Vegas, NV 89129
7 Tel: (702) 438-5810
8 Fax: (702) 459-1585
9 E-mail: kurthlawoffice@gmail.com
10 Attorney for Plaintiff

11
12
13 **DISTRICT COURT**
14
15 **CLARK COUNTY, NEVADA**

16 MAKANI KAI PAYO,

17 Plaintiff,

18 vs.

19 CLARK COUNTY SCHOOL DISTRICT;
20 DOE CLARK COUNTY SCHOOL DISTRICT
21 EMPLOYEES I-V; DOES I-V and ROE
22 COMPANIES I-V, inclusive,

23 Defendants.

Case No. A-12-668833-C
Dept. 2

Date of Hearing: April 7, 2014
Time of Hearing: 9:00 a.m.

24
25 **ORDER**

26 **THIS MATTER** having come before this Court on April 7, 2014, for the hearing of
27 the Defendant's CLARK COUNTY SCHOOL DISTRICT's ("CCSD"), Motion to Dismiss and the
28 Plaintiff's, MAKANI KAI PAYO's ("PAYO") Opposition thereto. The Plaintiff PAYO appeared
29 through his counsel, Robert O. Kurth, Jr., of the KURTH LAW OFFICE, and the Defendant CCSD
30 appeared through their attorney, Daniel Louis O'Brien, Esq. The Court having reviewed the
31 pleadings and papers on file herein, together with argument, and it appearing to the satisfaction of
32 the Court, and good cause appearing therefor:

33 **NOW THEREFORE, IT IS HEREBY ORDERED** that the Motion to Dismiss is
34 DENIED pursuant to NRCP 12(b)(5), Simpson v. Mars, Inc., 113 Nev. 188 (1997), Vacation
35 Village v. Hitachi America, 110 Nev. 481 (1994).

KURTH LAW OFFICE
3420 North Buffalo Drive
Las Vegas, NV 89129
(702) 438-5810

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APR 28 2014

CLERK OF THE COURT

1 **IT IS FURTHER ORDERED** that Mr. Kurth is to reschedule the early case
2 conference within thirty (30) days of today's date.

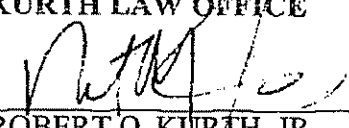
3 **IT IS FURTHER ORDERED** that Mr. Kurth shall prepare the Order.

4 DATED and DONE this 30th day of April, 2014.

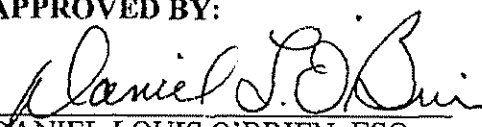
5 **IT IS SO ORDERED.**

6 
7 **DISTRICT COURT JUDGE** *RAS*

8 Respectfully Submitted By:
9 **KURTH LAW OFFICE**

10 
11 **ROBERT O. KURTH, JR.**
12 Nevada Bar No. 4659
13 Attorney for Plaintiff PAYO

14 **APPROVED BY:**

15 
16 **DANIEL LOUIS O'BRIEN, ESQ.**
17 Nevada Bar No. 983
18 Attorney for Defendant CCSD
19
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27
28

KURTH LAW OFFICE
3420 North Buffalo Drive
Las Vegas, NV 89129
(702) 438-5810

RSPN
Office of the General Counsel
Clark County School District
DANIEL L. O'BRIEN, ESQ.
Nevada Bar No. 983
CARLOS L. McDADE, ESQ.
Nevada Bar No. 11205
5100 W. Sahara Avenue
Las Vegas, NV 89146
(702) 799-5373
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

MAKANI KAI PAYO,

Plaintiff,

v.

CLARK COUNTY SCHOOL DISTRICT; DOE
CLARK COUNTY SCHOOL DISTRICT
EMPLOYEES I-V; DOES I-V and ROE
COMPANIES I-V, inclusive,

Defendants.

Case No. A-12-668833-C
Dept. No. II

CLARK COUNTY SCHOOL
DISTRICT'S RESPONSES TO
PLAINTIFF'S FIRST SET OF
INTERROGATORIES

TO: Plaintiff and Robert O. Kurth, Jr., Esq., his attorney.

Defendant, CLARK COUNTY SCHOOL DISTRICT ("District"), by and
through counsel undersigned, hereby responds to Plaintiff's First
Set of Requests Interrogatories as follows:

Individuals providing information in response to the
Plaintiff's interrogatories:

1. Eileen Wheelan, Coordinator IV, Property, Crime and Liability Claims, Risk and Environmental Services Department, Clark County School District (responses to interrogatories Number 1, 2, 7 & 8).
2. Todd Peterson, former CCSD teacher (responses to interrogatories Number 1, 2, 3, 5, 13, 14 and 15).
3. Waleska Ruiz a/k/a Wally Morton, CCSD First Aid Safety Assistant ("FASA"), (responses to interrogatories Number 1, 4, 11, 12, 13, 14 and 16).

/ / / /

1 INTERROGATORY NO. 1:

2 Describe in detail your account of the incident on May 12,
3 2004, wherein PAYO was injured while playing the game of field
4 hockey at C.W. Woodbury Middle School.

5 RESPONSE NO. 1:

6 E.W.: I was not present and did not witness the incident.
7 However, I was the Claims Examiner conducting the investigation
8 of this incident after notice of a potential claim against the
9 District was provided to the Risk Management Department, on or
10 about December 20, 2004.

11 The only information I had as to how the accident occurred
12 is set forth on the "Student Injury Accident Report," CCF620,
13 which was completed by the First Aid Safety Assistant ("FASA"),
14 Waleska R. Morton ("Wally") and submitted to the school's
15 Principal, Joseph Murphy, for signature. Mr. Todd Peterson, P.E.
16 Teacher, completed the "Description of Accident" portion of the
17 CCF620.

18 T.P.: As it has been more than ten years, I do not recall
19 much about the accident itself. I am not sure if I actually saw
20 the hit or noticed that Mr. Payo was injured only after it
21 occurred. I was present and was supervising the field hockey
22 game at the time of Mr. Payo's injury. We had teams of ten to
23 twelve players on each side, with substitutions.

24 Prior to teaching individual units (field hockey is one
25 unit), at each grade level (5th, 6th, 7th and 8th grades) we went
26 over the rules. We heavily stressed the fact that the stick had
27 to be held with both hands as they cannot swing the hockey stick
28 as hard or as wildly if both hands remain gripping the stick. We

1 also emphasized that the blade was never to go above knee level.
2 As might be expected, bruised knees and sore knuckles were the
3 most common forms of injuries. If we observed someone swinging
4 their stick with one hand or raising their hockey stick above the
5 knees, we would talk to them and show them how to control the
6 stick properly. If they continued to fail to control their
7 hockey stick, we would take them out of the game.

8 Our practice was that, when a student would get injured
9 (regardless of the unit being taught), I would send them to the
10 nurse's office. If the injury was bad enough, I would call for
11 paramedics and/or an ambulance. After Mr. Payo was hit, play
12 stopped and I assessed the wound, which looked like he might have
13 been slapped on the side of his face with a hockey stick. I sent
14 him to the Nurse's Office with another student, since he did not
15 seem to be seriously injured at that time.

16 W.M.: A young man, Mr. Payo, came into the health office
17 with an injury on the left side of his face around the left eye.
18 There was bruising, swelling, a cut and bleeding. I took care of
19 him immediately. I applied a cold compress for 15 to 20 minutes
20 after which I cleaned the area with soap and water while
21 assessing the injury and reassuring the child. Then I applied
22 the compress again. I called the parent/guardian as soon as
23 possible, around 9:40 a.m., and spoke with a Ms. Lori Payo. I
24 advised her to pick up the student and to take him to get checked
25 out to make sure he is OK. The student waited with me until Ms.
26 Payo finally came to pick him up at 11:00 a.m. I completed the
27 paperwork that was required back then, which included making an
28 / / / /

1 entry on the Health Office Log and completing the student
2 accident injury report, CCF-620.

3 INTERROGATORY NO. 2:

4 Identify any and all persons who were involved or observed
5 the May 12, 2004 incident; wherein PAYO was injured while playing
6 field hockey at C.W. Woodbury Middle School; including but not
7 limited to the identity of the persons, their address and
8 telephone number, and a description of their involvement or their
9 observation of said incident.

10 RESPONSE NO. 2:

11 TP: I was there but honestly do not recall if I actually saw
12 Mr. Payo get hit or only saw that he was hurt after the fact.

13 EW: The CCF620 lists a student named Brandon Higgins as a
14 possible witness, although it is unclear whether he witnessed the
15 incident or whether he was the student who escorted Mr. Payo to
16 the Nurse's Office (or both).

17 INTERROGATORY NO. 3:

18 Describe and identify all persons supervising the game of
19 field hockey on May 12, 2004 at C.W. Woodbury Middle School;
20 including but not limited to the name of the person, their
21 address and telephone number, a description of the instructions
22 given for the game of field hockey, the rules of the game, and
23 roll-taking.

24 RESPONSE NO. 3:

25 Todd Peterson, 17534 J Street, Omaha, Nebraska 68135, Tel
26 No.: (402) 884-9625.

27 INTERROGATORY NO. 4:

28 Identify all persons (students, employees, or others) who

1 you think may have caused or failed to mitigate the May 12, 2004
2 incident, including a description of the basis of your opinion or
3 conclusion.

4 RESPONSE NO. 4:

5 Plaintiff and Plaintiff's mother both knew the full nature
6 and extent of Plaintiff's injury yet Ms. Payo delayed coming to
7 pick him up for more than an hour and then elected, after being
8 advised to go to the hospital, to go without medical treatment
9 for several days.

10 INTERROGATORY NO. 5:

11 Did C.W. Woodbury Middle School require students to wear any
12 sort of protective gear or safety equipment while playing the
13 game of field hockey on or about May 12, 2004? If so, list the
14 gear or equipment and describe its use in the game of field
15 hockey.

16 RESPONSE NO. 5:

17 The curriculum developers did not mandate the use of safety
18 equipment and there was no money in the budget for such. Field
19 hockey was considered a relatively safe sport.

20 INTERROGATORY NO. 6:

21 Identify by name, firm name, affiliation name, business
22 address, business telephone number and home address, each person
23 you expect to call as an expert at the time of the trial of this
24 action.

25 RESPONSE NO. 6:

26 No decision has yet been made regarding whether an expert
27 witness will be called to testify at the time of trial.

28 / / / /

1 INTERROGATORY NO. 7:

2 Identify each and every individual who has investigated or
3 prepared any oral or written reports concerning any aspect of the
4 May 12, 2004 incident in which PAYO was injured while playing
5 field hockey.

6 RESPONSE NO. 7:

7 EW: Eileen Wheelan was the claims examiner conducting the
8 investigation of this incident, commencing on December 20, 2004.
9 Mr. Todd Petersen, the P.E. Teacher, completed the "Description
10 of Accident" portion of the CCF620. The FASA, Wally Morton,
11 completed the remainder of the CCF620 and submitted it to the
12 Principal, Joseph Murphy for his review and signature. Upon
13 request, Wally Morton also provided a typed statement regarding
14 her account of the incident. Mary Whited, the person replacing
15 Ms. Morton as the FASA at Woodbury M.S., provided a copy of the
16 Health Office log for May 12, 2004. Greg Snelling, the Principal
17 at Woodbury on 02/11/2005 provided a copy of the objectives for
18 Field Hockey as a P.E. activity. File notes indicate an unnamed
19 male P.E. teacher provided this information to Mr. Snelling to be
20 furnished to Risk Management.

21 INTERROGATORY NO. 8:

22 Identify all individuals (including witnesses, parties, or
23 your employees) with whom you have spoken to about the May 12,
24 2004 injury; including but not limited to their name, address,
25 telephone number, and a description of what was discussed.

26 RESPONSE NO. 8:

27 Please see response to Interrogatory number 7, above.

28 / / / /

1 INTERROGATORY NO. 9:

2 Describe in detail any and all conversation which you or
3 your representatives have had with any expert witness or any
4 other persons relating to C.W. Woodbury Middle School's failure
5 to properly supervise the game of field hockey on May 12, 2004;
6 including but not limited to the identity of the person making
7 the statements, a description of the conversation, when and where
8 the conversations took place, and the purpose of the
9 conversation.

10 RESPONSE NO. 9:

11 The District has not talked to anyone, other than
12 Plaintiff's counsel, who has suggested that the school may have
13 failed to properly supervise the game of field hockey on May 12,
14 2004.

15 INTERROGATORY NO. 10:

16 Identify any and all witnesses, lay or expert, who has
17 advised you or otherwise given an opinion that C.W. Woodbury
18 Middle School acted negligently or failed to act reasonably in
19 any manner related to PAYO's May 12, 2004 injury.

20 RESPONSE NO. 10:

21 The District has not talked to anyone, other than
22 Plaintiff's counsel, who has suggested that the school may have
23 acted negligently or failed to act reasonably in any manner
24 related to Payo's May 12, 2004, injury.

25 INTERROGATORY NO. 11:

26 Describe in detail any statements or conversations which you
27 or your representatives have had with any persons concerning
28 PAYO's mother's alleged failure to seek immediate medical

1 treatment for PAYO on or about the May 12, 2004 injury; including
2 but not limited to the identity of the persons, their address and
3 telephone number, and a synopsis of the conversation or statement
4 made.

5 RESPONSE NO. 11:

6 OBJECTION, this interrogatory seeks to discover matter
7 protected from disclosure by the attorney work product doctrine
8 and the attorney client privilege. Without waiving these
9 objections, Wally Morton, the First Aid Safety Assistant, is
10 expected to testify that she specifically informed Plaintiff's
11 mother that Plaintiff should be taken to the hospital
12 immediately.

13 INTERROGATORY NO. 12:

14 Describe or identify any and all fact (sic) which CCSD
15 believes demonstrates that PAYO's mother's conduct did anything
16 to increase the severity of the injury after the May 12, 2004
17 incident.

18 RESPONSE NO. 12:

19 Upon information and belief, Mrs. Payo delayed coming to the
20 school until more than an hour after being notified that Makani
21 had been injured and, contrary to the recommendation made by the
22 FASA, she did not take Makani to the doctor until several days
23 after the incident. Plaintiff now complains that the District
24 did not tell him or his mother of the seriousness of the injury
25 and seeks recovery for such, implying that Plaintiff will testify
26 that any delay in seeking treatment exacerbated his condition.

27 INTERROGATORY NO. 13:

28 Describe or identify your normal course and ordinary

1 procedure and practices in handling and dealing with student
2 injuries resulting from the game of field hockey or any other
3 sports conducted by C.W. Woodbury Middle School on or around the
4 time of the May 12, 2004 incident.

5 RESPONSE NO. 13:

6 TP: Play would stop, I would assess the injury and if
7 serious enough I would use my walkie talkie to call the School
8 Nurse, the FASA or the Administration to come and take the
9 student to the Nurse's Office. If the injury did not appear too
10 serious, I would send the student to the Nurse's Office with
11 another, responsible student. If the injury was severe enough, I
12 could call the paramedics or an ambulance, as appropriate.

13 WM: Our protocols are spelled out in various documents
14 addressing treatment for various types of injuries, including the
15 protocol on First Aid Emergency Care Guidelines for Handling
16 Accidents and Illnesses Occurring at School, CCF-648. If the
17 School Nurse was present, she would be in charge and would follow
18 her training and guidelines. If the School Nurse was not
19 present, I would assess the injury and provide first aid. If the
20 injury appeared to be serious, I would call the School Nurse (the
21 School Nurse serves more than one school so she might not be on
22 campus) for further instructions. I would also call the parent
23 or guardian to keep them informed of the student's status and, if
24 appropriate, to ask them to come and pick up the child. Even if
25 we could not get in touch with the parent or guardian, or any of
26 their emergency contacts, if the injury appeared serious enough
27 we would call the paramedics or an ambulance and someone would
28 accompany the child to the emergency room. With respect to

1 treatment provided to Mr. Payo at that time, please see the
2 response to Interrogatory No. 1, above.

3 INTERROGATORY NO. 14:

4 Did C.W. Woodbury Middle School follow its normal course of
5 ordinary procedure in Interrogatory No. 9? If so, identify the
6 names of all employees assisting in the accident or injury, a
7 description of their duties, and any other recorded conversations
8 and/or correspondence exchanged in relation to the incident.

9 RESPONSE No. 14:

10 OBJECTION: Unintelligible as written. Without waiving this
11 objection, the normal procedure for dealing with a student
12 injury, whether sports related or not, was followed by the
13 teacher and by the FASA with respect to Plaintiff's injury.

14 INTERROGATORY NO. 15:

15 Please state each and every fact which CCSD believes the
16 risk of PAYO's injuries from the May 12, 2004 incident are
17 inherent in the sport of field hockey.

18 RESPONSE NO. 15:

19 OBJECTION: unintelligible. Without waiving this objection,
20 and to the extent Defendant thinks it understands this
21 interrogatory: the game is played with hockey sticks. The risk
22 of coming into contact with a hockey stick cannot be eliminated
23 without altering the fundamental nature of the sport, to wit:
24 eliminating the sticks and, therefore, the entire object of the
25 game, which is to use the sticks to control the movement of the
26 tennis ball and to hit the tennis ball (puck) into the goal. The
27 term "high sticking" has been coined to reflect the known

28 / / / /

1 possibility of getting hit by a hockey stick and is a term with
2 which Plaintiff was fully aware of before he started to play.

3 INTERROGATORY NO. 16:

4 Did Wally Morton obtain any certification for her to be
5 qualified to provide medical treatment, opinion, or advice on May
6 12, 2004 while working at C.W. Woodbury Middle School? If so,
7 provide the name of the certification, the job descriptions
8 permitted by such certification, and/or any other identifying
9 information related to the certification.

10 RESPONSE NO. 16:

11 OBJECTION: Vague as to what Plaintiff means by the term
12 "Certifications." Without waiving this objection, in 2004, First
13 Aid Safety Assistants were required to have First Aid and CPR
14 certification, which must be renewed every two years. The FASAs
15 must undergo an extensive training program with the District
16 prior to being assigned to work as a FASA at a school. The job
17 required providing first aid and emergency care for ill or
18 injured students according to the First Aid/Emergency Guidelines
19 for School Personnel, PUB-648, and maintaining health related
20 records. FASAs are also required to contact the parent or
21 guardian of the student and to summon medical personnel,
22 including paramedics, an ambulance and/or a hospital in
23 emergencies.

24 INTERROGATORY NO. 17:

25 Identify any and all documents you plan on using at the time
26 of trial of this action.

27 / / / /

28 / / / /

1 RESPONSE NO. 17:

2 No decision has yet been made as to what documents will be
3 used at the time of trial of this action.

4 DATED this 13th day of February, 2015.

5 CLARK COUNTY SCHOOL DISTRICT
6 OFFICE OF THE GENERAL COUNSEL

7 

8 DANIEL L. O'BRIEN, ESQ.
9 Nevada Bar No. 983
10 Attorneys for Defendant
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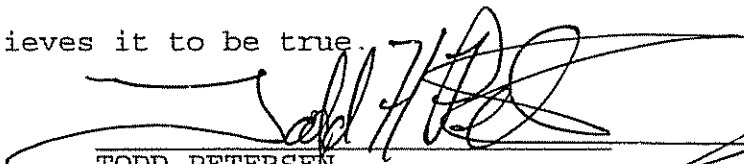
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VERIFICATION


STATE OF NEBRASKA)
) ss:
COUNTY OF DOUGLAS)

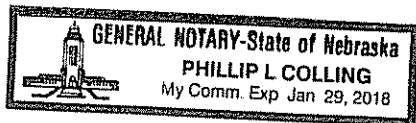
Todd Petersen, being first duly sworn, deposes and says under penalty of perjury as follows:

That he is an adult, over the age of 21 years, that at the time of the incident addressed by the foregoing interrogatories, he was an employee of Defendant Clark County School District and is knowledgeable and competent to testify regarding the matters set forth in the foregoing CLARK COUNTY SCHOOL DISTRICT'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES, specifically the answers to interrogatories numbered 1, 2, 3, 5, 13, 14 and 15, knows the contents thereof and the same is true of his own knowledge, except for those matters therein stated upon information and belief, and as to those matters after due inquiry into the premises, he believes it to be true.


TODD PETERSEN

SUBSCRIBED and SWORN to
before me this 19th day
of February, 2015.


NOTARY PUBLIC



1 VERIFICATION

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3 STATE OF NEVADA)
4 COUNTY OF CLARK) ss:

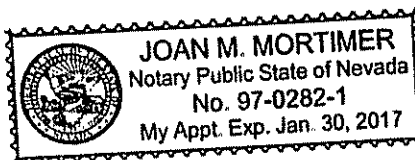
5 Waleska Ruiz, p/k/a Wally Morton, being first duly sworn,
6 deposes and says under penalty of perjury as follows:

7 That she is an adult, over the age of 21 years, and an
8 employee of Defendant Clark County School District and is
9 knowledgeable and competent to testify regarding the matters set
10 forth in the foregoing CLARK COUNTY SCHOOL DISTRICT'S RESPONSES TO
11 PLAINTIFF'S FIRST SET OF INTERROGATORIES, specifically the answers
12 to interrogatories numbered 1, 4, 11, 12, 13, 14 and 16, knows the
13 contents thereof and the same is true of her own knowledge, except
14 for those matters therein stated upon information and belief, and
15 as to those matters after due inquiry into the premises, she
16 believes it to be true.

17 Waleska Ruiz
18 WALESKA RUIZ

19 SUBSCRIBED and SWORN to
20 before me this 13th day
21 of February, 2015.

22 Joan M. Mortimer
NOTARY PUBLIC



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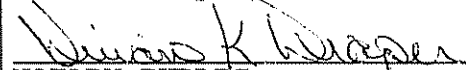
STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

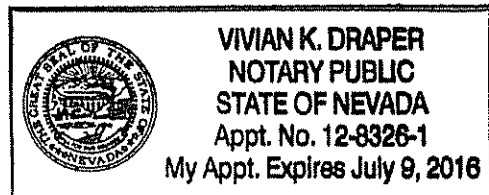
Eileen Wheelan, being first duly sworn, deposes and says
under penalty of perjury as follows:

That she is an adult, over the age of 21 years, employed by
the Clark County School District as a Coordinator IV, Property,
Crime and Liability Claims, Risk and Environmental Services
Department and is knowledgeable and competent to testify regarding
the matters set forth in the foregoing CLARK COUNTY SCHOOL
DISTRICT'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES,
specifically the answers to interrogatories numbered 1, 2, 7 & 8,
knows the contents thereof and the same is true of her own
knowledge, except for those matters therein stated upon
information and belief, and as to those matters after due inquiry
into the premises, she believes it to be true.


EILEEN WHEELAN

SUBSCRIBED and SWORN to
before me this 13 day
of February, 2015.


NOTARY PUBLIC



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Robert O. Kurth, jr.
Kurth Law Office
3420 North Buffalo Drive
Las Vegas, NV 89129
Kurthlawoffice@gmail.com
Attorney for Plaintiff

Joan Montaner
An Employee of CCSD

1
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3
4 CLARK COUNTY SCHOOL DISTRICT,

No.: 68443

5 Appellant,

6 v.

District Court
Case No.: A-12-668833-C

7 MAKANI KAI PAYO,

District Court Dept. No.: XV
(Hon. Joe Hardy)

8 Respondent.
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13 **APPELLANT'S APPENDIX**

14 **VOLUME IX**
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24 Daniel L. O'Brien
25 Nevada Bar No. 983
26 Sr. Asst. General Counsel
27 Office of the General Counsel
28 Clark County School District
5100 West Sahara Avenue
Las Vegas, NV 89146
Attorney for District

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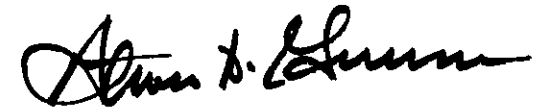
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the **APPELLANT'S APPENDIX** was filed electronically with the Nevada Supreme Court on the 31 day of December, 2015. I further certify that I served a copy of this document by depositing a true and correct copy hereof in the United States mail at Las Vegas, Nevada, postage fully prepaid, addressed as follows:

Robert O. Kurth, Jr.
Kurth Law Office
3420 North Buffalo Drive
Las Vegas, NV 89129
Kurthlawoffice@gmail.com
Attorney for Plaintiff


AN EMPLOYEE OF THE OFFICE OF THE
GENERAL COUNSEL-CCSD



CLERK OF THE COURT

1 **NJUD**
2 ROBERT O. KURTH, JR.
3 Nevada Bar No. 4659
4 **KURTH LAW OFFICE**
5 3420 North Buffalo Drive
6 Las Vegas, NV 89129
7 Tel: (702) 438-5810
8 Fax: (702) 459-1585
9 E-mail: kurthlawoffice@gmail.com
10 Attorney for Plaintiff

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

10 MAKANI PAYO,

11 Plaintiff,

12 vs.

13 CLARK COUNTY SCHOOL DISTRICT,

14 Defendant.

Case No. A-12-668833-C
Dept. XV

16 **NOTICE OF ENTRY OF JUDGEMENT**

18 PLEASE TAKE NOTICE that a JUDGEMENT UPON JURY VERDICT was entered in the
19 above-referenced matter on or about the 16th day of June, 2015, and was filed on the 16th day of June,
20 2015; a copy of which is attached hereto.

21 DATED this 17th day of June, 2015.

22 Respectfully submitted by:
23 **KURTH LAW OFFICE**

24 /s/Robert O. Kurth, Jr.
25 ROBERT O. KURTH, JR.
26 Nevada Bar No. 4659
27 Attorney for the Plaintiff

28 ///

///

///

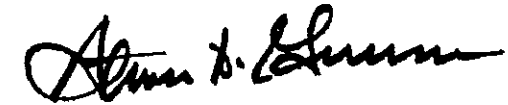
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CERTIFICATE OF SERVICE/MAILING

I HEREBY CERTIFY that on the 17th day of June, 2015, I electronically served a true and correct copy of the foregoing **NOTICE OF ENTRY OF JUDGEMENT** via Electronic Service in accordance with EDCR 8.05, and I deposited a true and correct copy of the foregoing in a sealed envelope in the U.S. Mail, first class, postage prepaid, and addressed as follows:

DANIEL O'BRIEN, ESQ.
Office of General Counsel
Clark County School District
5100 W. Sahara Avenue
Las Vegas, NV 89146
E-serve: obriedl@interact.ccsd.net
Attorneys for Defendant

/s/Maritsa Lopez
An employee of **KURTH LAW OFFICE.**



CLERK OF THE COURT

JUV

**DISTRICT COURT
CLARK COUNTY, NEVADA**

MAKANI PAYO,

Plaintiff,

vs.

CLARK COUNTY SCHOOL DISTRICT,

Defendant.

Case No.: A-12-668833-C
Dept No.: XV

JUDGMENT UPON JURY VERDICT

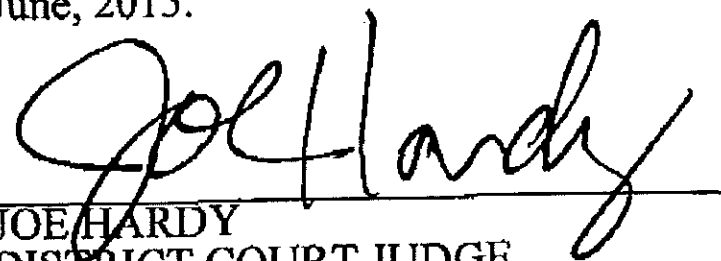
This action came on for trial before the Court, Honorable Joe Hardy, District Judge, presiding and a jury on May 27, 2015 through June 2, 2015. The issues having been duly tried; the jury having duly rendered its verdict on June 2, 2015; and the Court having filed its Order Regarding Damages Post-Jury Verdict; the Court enters this judgment pursuant to NRCp 54.

IT IS ORDERED AND ADJUDGED that Judgment on the jury verdict is entered in favor of Plaintiff Makani Kai Payo ("Payo") against Defendant Clark County School District in the total amount of FIFTY THOUSAND DOLLARS (\$50,000.00).

Within ten (10) days after entry of this Judgment, Payo shall serve written notice of entry of this Judgment together with a copy of this Judgment upon CCSD and shall file the notice of entry with the clerk of the court.

IT IS SO ORDERED

DATED this 16th day of June, 2015.


JOE HARDY
DISTRICT COURT JUDGE
DEPARTMENT XV

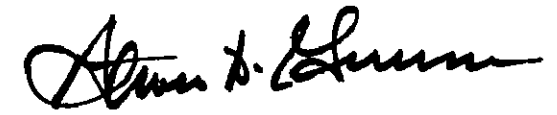
CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this document was electronically served, mailed or placed in the attorney's folder on the first floor of the Regional Justice Center as follows:

Robert Kurth, Esq.
Daniel O'Brien, Esq.

robertk@robertkurth.com
obriedl@interact.ecsd.net


Amanda Rivera
Judicial Executive Assistant



CLERK OF THE COURT

1 ASTA
2 Office of the General Counsel
3 Clark County School District
4 DANIEL L. O'BRIEN, ESQ.
5 Nevada Bar No. 0983
6 CARLOS L. McDADE, ESQ.
7 Nevada Bar No. 11205
8 5100 W. Sahara Avenue
9 Las Vegas, NV 89146
10 (702) 799-5373
11 Attorneys for Defendant

7 DISTRICT COURT

8 CLARK COUNTY, NEVADA

9 MAKANI KAI PAYO,
10 Plaintiff,
11 v.
12 CLARK COUNTY SCHOOL DISTRICT,
13 Defendant.

Case No. A-12-668833-C
Dept. No. XV

CASE APPEAL STATEMENT

15 TO: Plaintiff Makani Kai Payo and Robert O. Kurth, Esq., his
16 attorney.

17 CASE APPEAL STATEMENT

18 Pursuant to NRAP 3(f)(3), Defendant Clark County School
19 District respectfully submits for consideration its Case Appeal
20 Statement in the above-referenced matter:

21 (A) District Court Case Number and Caption:

22 Case No. A-12-668833-C; Makani Kai Payo v. Clark County
23 School District.

24 (B) Name of Judge who entered the orders or judgment being
25 appealed:

26 (1) *Honorable Judge Joseph Hardy, Jr.*

27 - 06/16/15 Judgment Upon Jury Verdict;

28 - 06/16/15 Order Regarding Damages Post-Jury
Verdict;

- 1 - 05/19/15 Order denying District's motion for
2 summary judgment and permitting the issue of duty
to be submitted to the jury;
- 3 - Jury Instructions given, and not given, as identified
4 in the Notice of Appeal.
- 5 (2) **Honorable Richard F. Scotti.**
- 6 - 04/10/15 Order refusing to strike Plaintiff's damages
calculation;
- 7 (3) **Honorable Valorie J. Vega.**
- 8 - 08/21/13 Order Granting in Part and Denying in Part
9 Defendant's Motion to Dismiss.
- 10 (C) **Name of each appellant and name and address of counsel for**
11 **each appellant:**
- 12 (1) The Clark County School District, a political subdivision
of the State of Nevada, is the Appellant.
- 13 (2) Daniel L. O'Brien and the Office of General Counsel for
14 the Clark County School District, located at 5100 West
Sahara Avenue, Las Vegas, Nevada, 89146, are the
15 attorneys representing the Appellant.
- 16 (D) **Name of each respondent and the name and address of appellate**
17 **counsel, in known, or if not, name and address of trial**
counsel:
- 18 (1) Makani Kai Payo is the Respondent.
- 19 (2) Robert O. Kurth, Jr., whose office is located at 3420
20 North Buffalo Drive, Las Vegas, NV 89129, was trial
counsel for Respondent.
- 21 (E) **All attorneys identified herein are licensed to practice law**
22 **in Nevada.**
- 23 (1) Appellant's counsel's Nevada Bar number is 983.
- 24 (2) Respondent's counsel's Nevada Bar number is 4659.
- 25 (F) **Whether Appellant was represented by appointed counsel in the**
26 **district court; whether Appellant is represented by appointed**
counsel on appeal:
- 27 (1) No.
- 28 (2) No.

1 (G) Whether the district court granted Appellant leave to proceed
2 in forma pauperis:

3 No.

4 (H) Date the proceedings commenced in the district court:

5 Plaintiff's Complaint was filed on September 21, 2012.

6 (I) Brief description of the nature of the action and result in
7 district court, including the type of judgment or order being
8 appealed and the relief granted by the district court:

9 (1) The matter before the District Court was a negligence
10 action brought against the Clark County School District
11 by Plaintiff Makani Payo who, on May 12, 2004, was an
12 eleven year old student who was injured while
13 participating in a Floor Hockey unit in his Physical
14 Education class at Woodbury Middle School. Makani
15 alleged that another student accidentally struck him in
16 the face near his eye with a hockey stick while they were
17 both trying to hit the puck with their hockey sticks.
18 Plaintiff alleged that the District breached a duty to
19 provide unspecified "safety equipment" for the protection
20 of players.

21 (2) The case was tried before a jury which, on June 2, 2015,
22 entered an award in favor of Plaintiff and against the
23 District as follows:

24 (A) Past Medical and related expenses:	\$48,288.06
25 (B) Future medical and related expenses:	10,000.00
26 (C) Past pain, suffering, disability, and loss of enjoyment of life:	2,000.00
27 (D) Future pain, suffering, disability, and loss of enjoyment of life:	- 0 -

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The Court also specifically ruled that Plaintiff, who was
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recover past medical expenses incurred by his parents
while he was a minor.

(4) Also on June 16, 2015, the Court entered a separate
judgment on the jury verdict in the amount of \$50,000.

1 (J) This case has NOT been the subject of a previous appeal or
2 writ proceeding before any Nevada appellate Court.

3 (K) This case does NOT involve child custody or visitation.

4 (L) Whether this case involves the possibility of settlement:

5 Although settlement is not inconceivable, in Appellant's view
6 the probability that this case can be settled appears unlikely.

7 Respectfully submitted this 15th day of July, 2015.

8 By:




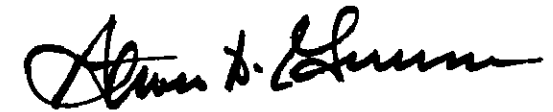
9 Daniel L. O'Brien
10 Nevada Bar No. 983
11 Office of General Counsel
12 Clark County School District
13 5100 West Sahara Avenue
14 Las Vegas, NV 89146
15 Counsel for District

14 CERTIFICATE OF SERVICE

15 I HEREBY CERTIFY that on the 15th day of July, 2015, I served
16 a true and correct copy of the foregoing CASE APPEAL STATEMENT
17 via electronic filing and electronic service through the EFP
18 Vendor System to all registered parties pursuant to the order for
19 electronic filing and service.

20 Robert O. Kurth, Jr.
21 Kurth Law Office
22 3420 North Buffalo Drive
23 Las Vegas, NV 89129
24 Kurthlawoffice@gmail.com
25 Attorney for Plaintiff

24 
25 An Employee of CCSD



CLERK OF THE COURT

1 NOAS
2 Office of the General Counsel
3 Clark County School District
4 DANIEL L. O'BRIEN, ESQ.
5 Nevada Bar No. 0983
6 CARLOS L. McDADE, ESQ.
7 Nevada Bar No. 11205
8 5100 W. Sahara Avenue
9 Las Vegas, NV 89146
10 (702) 799-5373
11 Attorneys for Defendant

7 DISTRICT COURT

8 CLARK COUNTY, NEVADA

9 MAKANI KAI PAYO,
10 Plaintiff,
11 v.
12 CLARK COUNTY SCHOOL DISTRICT,
13 Defendant.

Case No. A-12-668833-C
Dept. No. XV

NOTICE OF APPEAL

15 TO: Plaintiff Makani Kai Payo and Robert O. Kurth, Esq., his
16 attorney.

17 NOTICE OF APPEAL

18 Pursuant to NRAP 3(c):

19 (A) Party taking this appeal:

20 Defendant, Clark County School District.

21 (B) Judgment, order or part thereof being appealed:

22 (1) the Judgment Upon Jury Verdict entered in the
23 above-captioned case on June 16, 2015;

24 (2) the portion of the Order Regarding Damages Post-
25 Jury Verdict entered on June 16, 2015, which holds
26 that a minor, after reaching the age of majority,
27 may recover medical expenses incurred by his
28 parents during the minor's infancy;

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- (3) the May 19, 2015, Order denying the District's motion for summary judgment and permitting the issue of duty to be submitted to the jury;
- (4) the April 10, 2015, Order refusing to strike Plaintiff's untimely damages calculation;
- (5) the August 21, 2013, Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, to the extent the Court denied the motion to strike the claim for past special damages which were incurred by Plaintiff's parents while he was a minor;
- (6) the refusal of the Court to give a jury instruction offered by the District on the issue of whether Plaintiff was entitled to recover past medical expenses incurred by his parents while he was a minor;
- (7) the refusal of the court to give a jury instruction offered by Defendant on the inherent risk doctrine; and
- (8) the giving by the Court of Jury Instruction No. 34, to the extent permitting the jury to award past medical expenses incurred by Plaintiff's parents while Plaintiff was a minor.

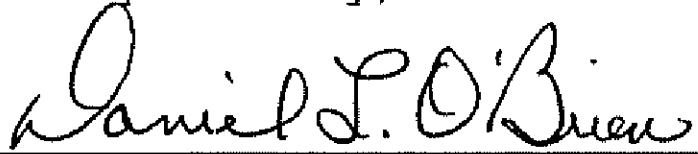
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1 C. Name of Court to which appeal is taken:

2 Supreme Court of the State of Nevada, pursuant to NRAP
3 17(a)(13) [matter raising as a principal issue a question of
4 first impression involving common law] and NRAP 17(a)(14) [matter
5 raising as a principal issue an issue upon which there is an
6 inconsistency in interpretation of the published decisions of the
7 Supreme Court]. Cf: NRAP 17(2) [appeals from a judgment,
8 exclusive of interest, attorneys fees and costs, of \$250,000 or
9 less in a tort case].

10 Respectfully submitted this 15th day of July, 2015.

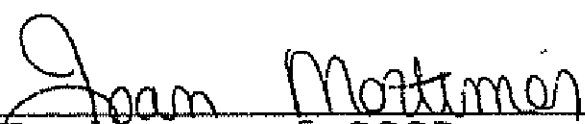
11 By:

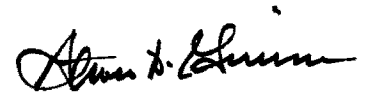

Daniel L. O'Brien
Nevada Bar No. 983
Office of General Counsel
Clark County School District
5100 West Sahara Avenue
Las Vegas, NV 89146
Counsel for District

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23 Robert O. Kurth, Jr.
24 Kurth Law Office
3420 North Buffalo Drive
Las Vegas, NV 89129
25 Kurthlawoffice@gmail.com
Attorney for Plaintiff

26
27 
28 An Employee of CCSD



CLERK OF THE COURT

Electronically Filed
Jul 20 2015 02:06 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

1 NOAS
2 Office of the General Counsel
3 Clark County School District
4 DANIEL L. O'BRIEN, ESQ.
5 Nevada Bar No. 0983
6 CARLOS L. McDADE, ESQ.
7 Nevada Bar No. 11205
8 5100 W. Sahara Avenue
9 Las Vegas, NV 89146
10 (702) 799-5373
11 Attorneys for Defendant

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 MAKANI KAI PAYO,

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16 v.

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Case No. A-12-668833-C
Dept. No. XV

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- 6 (5) the August 21, 2013, Order Granting in Part and
- 7 Denying in Part Defendant's Motion to Dismiss, to
- 8 the extent the Court denied the motion to strike
- 9 the claim for past special damages which were
- 10 incurred by Plaintiff's parents while he was a
- 11 minor;
- 12 (6) the refusal of the Court to give a jury
- 13 instruction offered by the District on the issue
- 14 of whether Plaintiff was entitled to recover past
- 15 medical expenses incurred by his parents while he
- 16 was a minor;
- 17 (7) the refusal of the court to give a jury
- 18 instruction offered by Defendant on the inherent
- 19 risk doctrine; and
- 20 (8) the giving by the Court of Jury Instruction No.
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- 22 past medical expenses incurred by Plaintiff's
- 23 parents while Plaintiff was a minor.

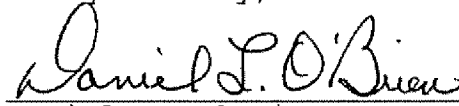
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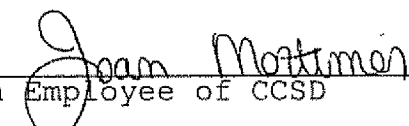
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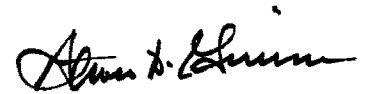

Daniel L. O'Brien
Nevada Bar No. 983
Office of General Counsel
Clark County School District
5100 West Sahara Avenue
Las Vegas, NV 89146
Counsel for District

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CLERK OF THE COURT

1 ASTA
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4 DANIEL L. O'BRIEN, ESQ.
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11 Attorneys for Defendant

12 DISTRICT COURT

13 CLARK COUNTY, NEVADA

14 MAKANI KAI PAYO,

15 Plaintiff,

16 v.

17 CLARK COUNTY SCHOOL DISTRICT,

18 Defendant.

Case No. A-12-668833-C
Dept. No. XV

CASE APPEAL STATEMENT

19 TO: Plaintiff Makani Kai Payo and Robert O. Kurth, Esq., his
20 attorney.

CASE APPEAL STATEMENT

21 Pursuant to NRAP 3(f)(3), Defendant Clark County School
22 District respectfully submits for consideration its Case Appeal
23 Statement in the above-referenced matter:

24 (A) District Court Case Number and Caption:

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28 appealed:

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10 - 08/21/13 Order Granting in Part and Denying in Part
11 Defendant's Motion to Dismiss.
12 (C) **Name of each appellant and name and address of counsel for**
13 **each appellant:**
14 (1) The Clark County School District, a political subdivision
15 of the State of Nevada, is the Appellant.
16 (2) Daniel L. O'Brien and the Office of General Counsel for
17 the Clark County School District, located at 5100 West
18 Sahara Avenue, Las Vegas, Nevada, 89146, are the
19 attorneys representing the Appellant.
20 (D) **Name of each respondent and the name and address of appellate**
21 **counsel, in known, or if not, name and address of trial**
22 **counsel:**
23 (1) Makani Kai Payo is the Respondent.
24 (2) Robert O. Kurth, Jr., whose office is located at 3420
25 North Buffalo Drive, Las Vegas, NV 89129, was trial
26 counsel for Respondent.
27 (E) **All attorneys identified herein are licensed to practice law**
28 **in Nevada.**
29 (1) Appellant's counsel's Nevada Bar number is 983.
30 (2) Respondent's counsel's Nevada Bar number is 4659.
31 (F) **Whether Appellant was represented by appointed counsel in the**
32 **district court; whether Appellant is represented by appointed**
33 **counsel on appeal:**
34 (1) No.
35 (2) No.

1 (G) Whether the district court granted Appellant leave to proceed
2 in forma pauperis:

3 No.

4 (H) Date the proceedings commenced in the district court:

5 Plaintiff's Complaint was filed on September 21, 2012.

6 (I) Brief description of the nature of the action and result in
7 district court, including the type of judgment or order being
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10 action brought against the Clark County School District
11 by Plaintiff Makani Payo who, on May 12, 2004, was an
12 eleven year old student who was injured while
13 participating in a Floor Hockey unit in his Physical
14 Education class at Woodbury Middle School. Makani
15 alleged that another student accidentally struck him in
16 the face near his eye with a hockey stick while they were
17 both trying to hit the puck with their hockey sticks.
18 Plaintiff alleged that the District breached a duty to
19 provide unspecified "safety equipment" for the protection
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21 (2) The case was tried before a jury which, on June 2, 2015,
22 entered an award in favor of Plaintiff and against the
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27 and loss of enjoyment of life: 2,000.00

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and loss of enjoyment of life: - 0 -

(3) In an Order, dated June 16, 2015, the Court subsequently
reduced the total judgment to \$50,000 pursuant to the
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accident.

The Court also specifically ruled that Plaintiff, who was
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(4) Also on June 16, 2015, the Court entered a separate
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1 (J) This case has NOT been the subject of a previous appeal or
2 writ proceeding before any Nevada appellate Court.


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5 Although settlement is not inconceivable, in Appellant's view
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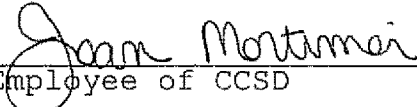
8 By:


Daniel L. O'Brien
Nevada Bar No. 983
Office of General Counsel
Clark County School District
5100 West Sahara Avenue
Las Vegas, NV 89146
Counsel for District

13
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21 Kurth Law Office
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23 Las Vegas, NV 89129
24 Kurthlawoffice@gmail.com
25 Attorney for Plaintiff

26
27 
28 An Employee of CCSD

DEPARTMENT 15
CASE SUMMARY
CASE NO. A-12-668833-C

Makani Payo, Plaintiff(s)
vs.
Clark County School District, Defendant(s)

§
§
§
§
§

Location: **Department 15**
Judicial Officer: **Hardy, Joe**
Filed on: **09/21/2012**
Case Number History:
Cross-Reference Case Number: **A668833**

CASE INFORMATION

Statistical Closures
03/08/2013 Involuntary (Statutory) Dismissal

Case Type: **Negligence - Other Negligence**
Case Flags: **Appealed to Supreme Court**
Jury Demand Filed
Arbitration Exemption Granted

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	A-12-668833-C
Court	Department 15
Date Assigned	05/04/2015
Judicial Officer	Hardy, Joe

PARTY INFORMATION

Plaintiff **Payo, Makani Kai**

Lead Attorneys
Kurth, Robert O.
Retained
702-438-5810(W)

Defendant **Clark County School District**

O'Brien, Daniel Louis
Retained
7027995373(W)

Doe Clark County School District Employees I-V


Murch, Patrick J.
Retained
7028734100(W)

DATE

EVENTS & ORDERS OF THE COURT

INDEX


09/21/2012

 **Complaint**
Filed By: Plaintiff Payo, Makani Kai
Complaint


09/21/2012

Case Opened


02/13/2013

 **Demand for Security of Costs**
Filed By: Defendant Clark County School District
Demand for Security of Costs and Charges


03/08/2013

 **Order to Statistically Close Case**
Civil Order to Statistically Close Case

03/11/2013

 **Summons**
Filed by: Plaintiff Payo, Makani Kai
Summons - Clark County School District

03/18/2013

 **Motion to Dismiss**

DEPARTMENT 15
CASE SUMMARY
CASE NO. A-12-668833-C

	Filed By: Defendant Clark County School District <i>CCSD's Motion to Dismiss</i>
04/10/2013	 Notice of Filing Cost Bond Filed By: Plaintiff Payo, Makani Kai <i>Notice if Filing Non-Resident Cost Bond</i>
04/12/2013	 Opposition to Motion Filed By: Plaintiff Payo, Makani Kai <i>Opposition to Motion to Dismiss</i>
04/19/2013	 Reply to Opposition Filed by: Defendant Clark County School District <i>Defendant's Reply to Opposition to Motion to Dismiss</i>
04/30/2013	Response Filed by: Plaintiff Payo, Makani Kai <i>Response to Reply to Opposition to Motion to Dismiss</i>
05/01/2013	 Motion to Dismiss (3:00 AM) (Judicial Officer: Vega, Valorie J.) 05/01/2013, 05/08/2013 Events: 03/18/2013 Motion to Dismiss <i>CCSD's Motion to Dismiss</i>
05/31/2013	 Order Granting Motion Filed By: Plaintiff Payo, Makani Kai <i>Order Granting Plaintiff's Motion to Strike Response to Reply to Opposition and Denying Defendant's Motion to Dismiss</i>
06/03/2013	 Notice of Entry of Order Filed By: Defendant Clark County School District <i>Notice of Entry of Order</i>
06/10/2013	 Motion to Dismiss Filed By: Defendant Clark County School District <i>Notice of Motion and Motion to Dismiss</i>
07/01/2013	 Opposition to Motion to Dismiss Filed By: Plaintiff Payo, Makani Kai <i>Opposition to Motion to Dismiss</i>
07/10/2013	 Reply to Opposition Filed by: Defendant Clark County School District <i>Reply to Opposition to Motion to Dismiss</i>
07/15/2013	 Motion to Dismiss (9:00 AM) (Judicial Officer: Vega, Valorie J.) <i>Notice of Motion and Motion to Dismiss</i>
08/21/2013	 Order Granting Filed By: Defendant Clark County School District <i>Order Granting in Part and Denying in Part Defendant's Motion to Dismiss</i>
08/21/2013	Order of Dismissal Without Prejudice (Judicial Officer: Vega, Valorie J.) Debtors: Makani Kai Payo (Plaintiff) Creditors: Clark County School District (Defendant)

DEPARTMENT 15
CASE SUMMARY
CASE NO. A-12-668833-C














	Judgment: 08/21/2013, Docketed: 08/28/2013 Comment: Certain Causes
08/21/2013	Order of Dismissal (Judicial Officer: Vega, Valorie J.) Debtors: Makani Kai Payo (Plaintiff) Creditors: Clark County School District (Defendant) Judgment: 08/21/2013, Docketed: 08/28/2013 Comment: Certain Claims
08/22/2013	 Notice of Entry of Order Filed By: Defendant Clark County School District <i>Notice of Entry of Order Granting in Part and Denying in Part Defendant's Motion to Dismiss</i>
10/14/2013	 Amended Complaint Filed By: Plaintiff Payo, Makani Kai <i>First Amended Complaint</i>
12/10/2013	 Answer to Amended Complaint Filed By: Defendant Clark County School District <i>Clark County School District's Answer to Plaintiff's First Amended Complaint</i>
02/07/2014	 Commissioners Decision on Request for Exemption - Granted <i>Commissioner's Decision on Request for Exemption</i>
03/05/2014	 Certificate of Mailing Filed By: Defendant Clark County School District <i>Certificate Of Mailing</i>
03/05/2014	 Motion to Dismiss Filed By: Defendant Clark County School District <i>Notice of Motion and Motion To Dismiss</i>
03/07/2014	 Notice of Early Case Conference Filed By: Plaintiff Payo, Makani Kai <i>Notice of 16.1 Case Conference</i>
03/24/2014	 Opposition to Motion to Dismiss Filed By: Plaintiff Payo, Makani Kai <i>Opposition to Motion to Dismiss</i>
03/28/2014	 Reply to Opposition Filed by: Defendant Clark County School District <i>Reply to Opposition to Motion to Dismiss</i>
04/07/2014	 Motion to Dismiss (9:00 AM) (Judicial Officer: Vega, Valorie J.) <i>Notice of Motion and Motion To Dismiss</i>
04/17/2014	 Amended Notice of Early Case Conference <i>First Amended Notice of 16.1 Case Conference</i>
05/13/2014	 Order Denying Motion Filed By: Plaintiff Payo, Makani Kai <i>Order</i>

DEPARTMENT 15
CASE SUMMARY
CASE NO. A-12-668833-C

05/19/2014	 Notice of Entry of Order Filed By: Plaintiff Payo, Makani Kai <i>Notice of Entry of Order</i>
07/21/2014	 Joint Case Conference Report Filed By: Plaintiff Payo, Makani Kai <i>Joint Case Conference Report</i>
07/23/2014	 Certificate of Service Filed by: Plaintiff Payo, Makani Kai <i>Certificate of Service</i>
08/06/2014	 Scheduling Order <i>Scheduling Order</i>
08/25/2014	 Demand for Jury Trial Filed By: Plaintiff Payo, Makani Kai <i>Demand for Jury Trial</i>
09/03/2014	 At Request of Court (3:00 AM) (Judicial Officer: Vega, Valorie J.) <i>Status Check Re:Reopening the Case</i>
09/18/2014	 Order Setting Civil Jury Trial, Pre-Trial, and Calendar Call <i>Order Setting Civil Jury Trial, Pre-Trial Conference and Calendar Call</i>
01/05/2015	Judicial Elections 2014 - Case Reassignment <i>District Court Judicial Officer Reassignment 2014</i>
01/28/2015	 Motion to Strike Filed By: Defendant Clark County School District <i>Notice of Motion and Motion to Strike Plaintiff's Damages Calculation or, in the Alternative, Motion in Limine</i>
02/13/2015	 Motion to Continue Trial Filed By: Plaintiff Payo, Makani Kai <i>Plaintiff's Motion to Continue/Extend Discovery and Trial</i>
02/13/2015	 Opposition to Motion Filed By: Plaintiff Payo, Makani Kai <i>Plaintiff's Opposition to Defendant's Motion to Strike Plaintiff's Damages Calculation and Motion in Limine</i>
02/23/2015	 Reply to Opposition Filed by: Defendant Clark County School District <i>Clark County School District's Reply to Plaintiff's Opposition to Motion to Strike Plaintiff's Damages Calculations or, in the alternative, Motion in Limine</i>
02/24/2015	 Opposition to Motion Filed By: Defendant Clark County School District <i>Clark County School District's Opposition to Plaintiff's Motion to Continue/Extend Discovery and Trial</i>
03/02/2015	 Stipulation and Order Filed by: Plaintiff Payo, Makani Kai

DEPARTMENT 15
CASE SUMMARY
CASE NO. A-12-668833-C














Stipulation and Order to Amend Plaintiff's First Amended Complaint

03/03/2015	 Motion to Strike (3:00 AM) (Judicial Officer: Scotti, Richard F) <i>Notice of Motion and Motion to Strike Plaintiff's Damages Calculation or, in the Alternative, Motion in Limine</i>
03/05/2015	 Amended Complaint Filed By: Plaintiff Payo, Makani Kai <i>Second Amended Complaint</i>
03/06/2015	 Reply to Opposition Filed by: Plaintiff Payo, Makani Kai <i>Reply to Opposition to Motion to Continue/Extend Discovery and Trial</i>
03/10/2015	 Answer to Amended Complaint Filed By: Defendant Clark County School District <i>Clark County School District's Answer to Plaintiff's Second Amended Complaint</i>
03/18/2015	 Motion to Extend Discovery (9:00 AM) (Judicial Officer: Bulla, Bonnie) <i>Plt's Motion to Extend Discovery</i>
04/08/2015	 Response Filed by: Defendant Clark County School District <i>Clark County School District's Responses to Plaintiff's Subpoena Duces Tecum</i>
04/08/2015	 Motion for Summary Judgment Filed By: Defendant Clark County School District <i>Notice of Motion and Motion for Summary Judgment</i>
04/09/2015	 Notice of Hearing <i>Notice of Hearing</i>
04/10/2015	 Order Filed By: Defendant Clark County School District <i>Order Granting In Part and Denying in Part Defendant's Motion to Strike Plaintiff's Damages Calculation or, in the Alternative, Motion in Limine</i>
04/14/2015	 Notice of Entry of Order Filed By: Defendant Clark County School District <i>Notice of Entry of Order</i>
04/17/2015	Status Check: Status of Case (9:30 AM) (Judicial Officer: Bulla, Bonnie) <i>Status Check: Status of Case / Trial Date</i>
04/17/2015	Status Check: Compliance (9:30 AM) (Judicial Officer: Bulla, Bonnie)
04/17/2015	 All Pending Motions (9:30 AM) (Judicial Officer: Bulla, Bonnie) <i>Status Check: Status of Case / Trial Date Status Check: Compliance</i>
04/27/2015	 Opposition and Countermotion Filed By: Plaintiff Payo, Makani Kai <i>Opposition to Motion for Summary Judgment, and Counter-Motion for Summary Judgment</i>
04/28/2015	 Initial Appearance Fee Disclosure

DEPARTMENT 15
CASE SUMMARY
CASE NO. A-12-668833-C

	Filed By: Plaintiff Payo, Makani Kai <i>Initial Appearance Fee Disclosures</i>
05/04/2015	Case Reassigned to Department 15 <i>Case reassigned from Judge Richard F Scotti Dept 2</i>
05/05/2015	 Reply to Opposition Filed by: Defendant Clark County School District <i>Reply to Opposition to Motion for Summary Judgment and Opposition to Countermotion for Summary Judgment</i>
05/08/2015	 Pre-trial Memorandum Filed by: Plaintiff Payo, Makani Kai <i>Plaintiff's Pre- Trial Memorandum</i>
05/08/2015	 Status Check: Compliance (11:00 AM) (Judicial Officer: Bulla, Bonnie)
05/11/2015	Motion for Summary Judgment (9:00 AM) (Judicial Officer: Hardy, Joe) <i>Deft's Motion and Motion for Summary Judgment</i>
05/11/2015	Opposition and Countermotion (9:00 AM) (Judicial Officer: Hardy, Joe) <i>Plaintiff's Opposition to Motion for Summary Judgment, and Counter-Motion for Summary Judgment</i>
05/11/2015	 All Pending Motions (9:00 AM) (Judicial Officer: Hardy, Joe) <i>Defendant's Motion and Notice of Motion for Summary Judgment and Plaintiff's Opposition to Motion for Summary Judgment, and Counter-Motion for Summary Judgment</i>
05/13/2015	 Calendar Call (8:30 AM) (Judicial Officer: Hardy, Joe) <i>Calendar Call</i>
05/13/2015	 Errata Filed By: Defendant Clark County School District <i>Errata to Clark County School District's Pre-Trial Memorandum</i>
05/18/2015	CANCELED Jury Trial (10:30 AM) (Judicial Officer: Hardy, Joe) <i>Vacated - per Judge</i>
05/19/2015	 Order Filed By: Plaintiff Payo, Makani Kai <i>Order</i>
05/19/2015	 Discovery Commissioners Report and Recommendations Filed By: Plaintiff Payo, Makani Kai <i>Discovery Commissioner's Report and Recommendations</i>
05/20/2015	 Notice of Entry of Order Filed By: Plaintiff Payo, Makani Kai <i>Notice of Entry of Order</i>
05/22/2015	 Joint Pre-Trial Memorandum Filed By: Plaintiff Payo, Makani Kai <i>Joint Pre-Trial Memorandum</i>
05/22/2015	 Subpoena

DEPARTMENT 15
CASE SUMMARY
CASE NO. A-12-668833-C

	Filed by: Plaintiff Payo, Makani Kai <i>Subpoena</i>
05/26/2015	 Trial Memorandum Filed by: Defendant Clark County School District <i>Clark County School District's Trial Brief</i>
05/26/2015	 Trial Memorandum Filed by: Plaintiff Payo, Makani Kai <i>Plaintiff's Trial Brief</i>
05/27/2015	 Subpoena Filed by: Plaintiff Payo, Makani Kai <i>Subpoena</i>
05/27/2015	 Jury Trial - FIRM (10:30 AM) (Judicial Officer: Hardy, Joe) 05/27/2015-05/29/2015, 06/01/2015-06/02/2015 <i>Jury Trial - Firm</i>
05/27/2015	 Jury List
05/28/2015	 Trial Brief Filed By: Defendant Clark County School District <i>Clark County School District's Trial Brief on the Issue of the Amount of the Statutory Cap on Damages Applicable to Plaintiff;s Case under NRS 41.035</i>
05/28/2015	 Points and Authorities Filed by: Defendant Clark County School District
05/29/2015	 Notice of Service Party: Plaintiff Payo, Makani Kai <i>Notice of Service</i>
05/29/2015	 Brief Filed By: Plaintiff Payo, Makani Kai <i>Plaintiff's Trial Brief Re:The Statutory Cap On Damages Per NRS 41.035</i>
06/01/2015	 Trial Brief Filed By: Defendant Clark County School District <i>Clark County School District's Trial Brief on the Issue of Whether an Adverse Inference Jury Instruction is Appropriate in this Case Under NRS 47.250 (3)</i>
06/02/2015	 Proposed Verdict Forms Not Used at Trial <i>Proposed Verdict Form Returned Unsigned</i>
06/02/2015	 Verdict
06/02/2015	 Jury Instructions
06/02/2015	Verdict (Judicial Officer: Hardy, Joe) Debtors: Clark County School District (Defendant), Doe Clark County School District Employees I-V (Defendant) Creditors: Makani Kai Payo (Plaintiff) Judgment: 06/02/2015, Docketed: 06/09/2015

DEPARTMENT 15
CASE SUMMARY
CASE NO. A-12-668833-C

Total Judgment: 60,288.06

06/16/2015	 Order <i>Order Regarding Damages Post-Jury Verdict</i>
06/16/2015	 Judgment Upon Jury Verdict <i>Judgment Upon Jury Verdict</i>
06/16/2015	Judgment Upon the Verdict (Judicial Officer: Hardy, Joe) Debtors: Clark County School District (Defendant) Creditors: Makani Kai Payo (Plaintiff) Judgment: 06/16/2015, Docketed: 06/24/2015 Total Judgment: 50,000.00
06/17/2015	 Notice of Entry of Judgment Filed By: Plaintiff Payo, Makani Kai <i>Notice of Entry of Judgement</i>
06/17/2015	 Notice of Entry of Order Filed By: Plaintiff Payo, Makani Kai <i>Notice of Entry of Order</i>
07/01/2015	 Memorandum of Costs and Disbursements Filed By: Plaintiff Payo, Makani Kai <i>Memorandum of Costs</i>
07/01/2015	 Motion for Attorney Fees and Costs Filed By: Plaintiff Payo, Makani Kai <i>Plaintiff's Motion for Attorney's Fees and Costs</i>
07/08/2015	 Motion to Retax Filed By: Defendant Clark County School District <i>Notice of Motion and Clark County School District's Motion to Retax and Settle Costs</i>
07/10/2015	 Errata Filed By: Defendant Clark County School District <i>Errata to Clark County School District's Motion to Retax and Settle Costs</i>
07/10/2015	 Opposition to Motion Filed By: Defendant Clark County School District <i>Clark County School District's Opposition to Plaintiff's Motion for Attorney's Fees and Costs</i>
07/15/2015	 Notice of Appeal Filed By: Defendant Clark County School District <i>Notice of Appeal</i>
07/15/2015	 Case Appeal Statement Filed By: Defendant Clark County School District <i>Case Appeal Statement</i>
08/03/2015	Motion for Attorney Fees and Costs (9:00 AM) (Judicial Officer: Hardy, Joe) <i>Plaintiff's Motion for Attorney's Fees and Costs</i>
08/10/2015	Motion to Retax (9:00 AM) (Judicial Officer: Hardy, Joe) <i>Notice of Motion and Clark County School District's Motion to Retax and Settle Costs</i>

DEPARTMENT 15
CASE SUMMARY
CASE NO. A-12-668833-C

DATE	FINANCIAL INFORMATION
	Plaintiff Payo, Makani Kai
	Total Charges 470.00
	Total Payments and Credits 470.00
	Balance Due as of 7/17/2015 0.00
	Plaintiff Payo, Makani Kai
	Security Cost Bond Balance as of 7/17/2015 500.00

I. Party Information

Plaintiff(s) (name/address/phone): MAKANI KAI PAYO

Attorney (name/address/phone):

ROBERT O. KURTH, JR.

3420 North Buffalo Drive

Las Vegas, NV 89129 / (702) 438-5810

Defendant(s) (name/address/phone):

CLARK COUNTY SCHOOL DISTRICT

Attorney (name/address/phone):

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)☐ **Arbitration Requested****Civil Cases**

Real Property	Torts	
<input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	Negligence <input type="checkbox"/> Negligence – Auto <input type="checkbox"/> Negligence – Medical/Dental <input type="checkbox"/> Negligence – Premises Liability (Slip/Fall) <input checked="" type="checkbox"/> Negligence – Other	<input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate Estimated Estate Value: _____ <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	Other Civil Filing Types <input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Civil Petition for Judicial Review <input type="checkbox"/> Foreclosure Mediation <input type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	
	<input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment – Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters	

III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

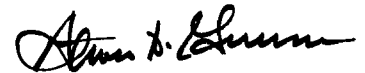
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|---|--|---|
| <input type="checkbox"/> NRS Chapters 78-88 | <input type="checkbox"/> Investments (NRS 104 Art. 8) | <input type="checkbox"/> Enhanced Case Mgmt/Business |
| <input type="checkbox"/> Commodities (NRS 90) | <input type="checkbox"/> Deceptive Trade Practices (NRS 598) | <input type="checkbox"/> Other Business Court Matters |
| <input type="checkbox"/> Securities (NRS 90) | <input type="checkbox"/> Trademarks (NRS 600A) | |

September 21, 2012

Date

/s/Robert O. Kurth, Jr.

Signature of initiating party or representative



CLERK OF THE COURT

1 JUJV

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 MAKANI PAYO,

6 Plaintiff,

7 vs.

8 CLARK COUNTY SCHOOL DISTRICT,

9 Defendant.

Case No.: A-12-668833-C
Dept No.: XV

10 JUDGMENT UPON JURY VERDICT

11 This action came on for trial before the Court, Honorable Joe Hardy, District Judge,
12 presiding and a jury on May 27, 2015 through June 2, 2015. The issues having been duly
13 tried; the jury having duly rendered its verdict on June 2, 2015; and the Court having filed its
14 Order Regarding Damages Post-Jury Verdict; the Court enters this judgment pursuant to
15 NRCP 54.

16 IT IS ORDERED AND ADJUDGED that Judgment on the jury verdict is entered in
17 favor of Plaintiff Makani Kai Payo ("Payo") against Defendant Clark County School District
18 in the total amount of FIFTY THOUSAND DOLLARS (\$50,000.00).

19 Within ten (10) days after entry of this Judgment, Payo shall serve written notice of entry
20 of this Judgment together with a copy of this Judgment upon CCSD and shall file the notice of
21 entry with the clerk of the court.

22 IT IS SO ORDERED

23 DATED this 16th day of June, 2015.

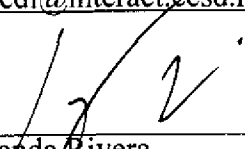
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27 JOE HARDY
DISTRICT COURT JUDGE
DEPARTMENT XV

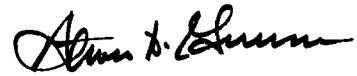
CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this document was electronically served, mailed or placed in the attorney's folder on the first floor of the Regional Justice Center as follows:

Robert Kurth, Esq.
Daniel O'Brien, Esq.

robertk@robertkurth.com
obriedl@interact.ecsd.net


Amanda Rivera
Judicial Executive Assistant



CLERK OF THE COURT

1 **NJUD**
2 ROBERT O. KURTH, JR.
3 Nevada Bar No. 4659
4 **KURTH LAW OFFICE**
5 3420 North Buffalo Drive
6 Las Vegas, NV 89129
7 Tel: (702) 438-5810
8 Fax: (702) 459-1585
9 E-mail: kurthlawoffice@gmail.com
10 Attorney for Plaintiff

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

10 MAKANI PAYO,

11 Plaintiff,

12 vs.

13 CLARK COUNTY SCHOOL DISTRICT,

14 Defendant.

Case No. A-12-668833-C
Dept. XV

16 **NOTICE OF ENTRY OF JUDGEMENT**

18 PLEASE TAKE NOTICE that a JUDGEMENT UPON JURY VERDICT was entered in the
19 above-referenced matter on or about the 16th day of June, 2015, and was filed on the 16th day of June,
20 2015; a copy of which is attached hereto.

21 DATED this 17th day of June, 2015.

22 Respectfully submitted by:
23 **KURTH LAW OFFICE**

24 /s/Robert O. Kurth, Jr.
25 ROBERT O. KURTH, JR.
26 Nevada Bar No. 4659
27 Attorney for the Plaintiff

28 ///

///

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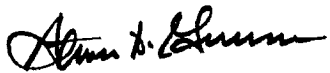
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CERTIFICATE OF SERVICE/MAILING

I HEREBY CERTIFY that on the 17th day of June, 2015, I electronically served a true and correct copy of the foregoing **NOTICE OF ENTRY OF JUDGEMENT** via Electronic Service in accordance with EDCR 8.05, and I deposited a true and correct copy of the foregoing in a sealed envelope in the U.S. Mail, first class, postage prepaid, and addressed as follows:

DANIEL O'BRIEN, ESQ.
Office of General Counsel
Clark County School District
5100 W. Sahara Avenue
Las Vegas, NV 89146
E-serve: obriedl@interact.ccsd.net
Attorneys for Defendant

/s/Maritsa Lopez
An employee of **KURTH LAW OFFICE.**


CLERK OF THE COURT

JUV

DISTRICT COURT
CLARK COUNTY, NEVADA

MAKANI PAYO,

Plaintiff,

vs.

CLARK COUNTY SCHOOL DISTRICT,

Defendant.

Case No.: A-12-668833-C
Dept No.: XV

JUDGMENT UPON JURY VERDICT

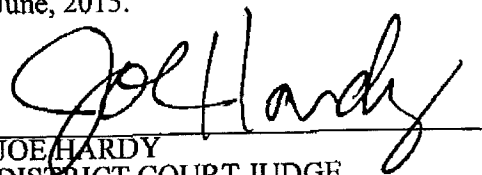
This action came on for trial before the Court, Honorable Joe Hardy, District Judge, presiding and a jury on May 27, 2015 through June 2, 2015. The issues having been duly tried; the jury having duly rendered its verdict on June 2, 2015; and the Court having filed its Order Regarding Damages Post-Jury Verdict; the Court enters this judgment pursuant to NRCp 54.

IT IS ORDERED AND ADJUDGED that Judgment on the jury verdict is entered in favor of Plaintiff Makani Kai Payo ("Payo") against Defendant Clark County School District in the total amount of FIFTY THOUSAND DOLLARS (\$50,000.00).

Within ten (10) days after entry of this Judgment, Payo shall serve written notice of entry of this Judgment together with a copy of this Judgment upon CCSD and shall file the notice of entry with the clerk of the court.

IT IS SO ORDERED

DATED this 16th day of June, 2015.

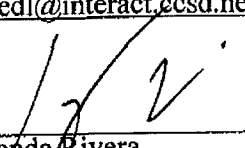

JOE HARDY
DISTRICT COURT JUDGE
DEPARTMENT XV

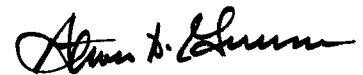
CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this document was electronically served, mailed or placed in the attorney's folder on the first floor of the Regional Justice Center as follows:

Robert Kurth, Esq.
Daniel O'Brien, Esq.

robertk@robertkurth.com
obriedl@interact.ecsd.net


Amanda Rivera
Judicial Executive Assistant



CLERK OF THE COURT

1 **ORDR**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 MAKANI PAYO,

6 Plaintiff,

7 vs.

8 CLARK COUNTY SCHOOL DISTRICT,

9 Defendant.

Case No.: A-12-668833-C
Dept No.: XV

**ORDER REGARDING DAMAGES
POST-JURY VERDICT**

10
11 This case was tried before a jury which resulted in a verdict being awarded in favor of
12 Plaintiff Makani Payo ("Payo") and against Defendant Clark County School District
13 ("CCSD") in a total amount of \$60,288.06 on June 2, 2015. Prior to and during trial, the
14 parties filed and served briefs relating to issues with damages and have submitted those briefs
15 to the Court for consideration and ruling. This Order constitutes the Court's ruling and
16 decision on those issues.

17 **I. Plaintiff May Recover Medical Expenses Incurred By His Parents While**
18 **Plaintiff Was a Minor**

19 The Court hereby rules that Payo may recover medical expenses incurred by his parents
20 while Payo was a minor.

21 As the parties are aware, the undersigned was assigned this case on the eve of trial.
22 Prior to that assignment, various issues had been briefed and orders entered by the Court.
23 Notably, such briefs included CCSD's Motion to Strike Plaintiff's Damages Calculation or, in
24 the Alternative, Motion in Limine filed herein on January 28, 2015. In that motion, CCSD
25 argued, among other things, that Payo "lists medical expenses which were incurred while he
26 was a minor and which he is not entitled to as a matter of law." Motion to Strike at 6:14-16.
27 CCSD requested that Payo be precluded "from presenting as damages medical expenses
28 incurred by his parents while he was a minor." Motion to Strike at 1:27-28. CCSD further

1 requested “[a]n order precluding Plaintiff from putting on any evidence or making any
2 argument at trial regarding alleged past or future special damages.” Motion to Strike at 9:1-3.

3 In opposition, Payo argued, among other things, that he “is entitled to medical expenses
4 he incurred as a minor child and which were paid by his parents when he incurred such as a
5 minor child.” Opposition, filed on February 13, 2015, at 6:12-13. Payo went on to request
6 that the Court “allow this case to proceed on the merits . . . rather than on the technicalities of
7 not having the parents named as parties to the suit. In the alternative, the Plaintiff PAYO is
8 requesting that this Court allow PAYO to amend his Complaint to include his parents as
9 parties if necessary.” Opposition at 8:8-13.

10 In reply, CCSD devoted three pages to the argument that “Plaintiff is not entitled to
11 recover medical expenses incurred while he was a minor.” Reply, filed on February 23, 2015.

12 In ruling on the issues raised, rather than strike or disallow the medical expenses
13 incurred by Payo’s parents while he was a minor, this Court ruled Payo “may not seek
14 recovery of special damages beyond those identified in the January 22, 2015, letter wherein
15 Plaintiff listed past medical expenses” and “Plaintiff’s medical expenses are capped at
16 \$50,000.00.” Order, filed on April 10, 2015. As demonstrated at trial, the January 22, 2015
17 letter included various medical expenses incurred by Payo’s parents while he was a minor. In
18 other words, prior to the commencement of trial this Court ruled then that Payo could seek
19 recovery of special damages, including the medical expenses incurred by his parents while he
20 was a minor. Notably, neither party sought reconsideration of the April 10, 2015 Order and
21 the Court sees no reason to reconsider its prior order at this time.

22 Further, the Nevada case law relied upon by CCSD in an attempt to exclude Payo’s
23 medical damages clearly uses the discretionary “may” rather than the mandatory “shall”
24 regarding potential limiting of damages. *Walker v. Burkham*, 63 Nev. 75, 83, 165 P.2d 161,
25 164 (1946); *Hogle v. Hall*, 112 Nev. 599, 916 P.2d 814 (1996). The use of “may” indicates a
26 grant of discretion to the district court in determining whether to limit the incurred damages.
27 In this case, the Court determines to exercise its discretion to permit Payo to seek and obtain
28 an award of damages for the medical expenses incurred by his parents while he was a minor.

1 Finally, the ultimate policy behind any division of medical expenses between the minor
2 child and the parents is simply to prevent a double recovery. *See Estate of DeSela v. Prescott*
3 *Unified School Distr. No. 1*, 249 P.3d 767 (Ariz. 2011); *Garay v. Overholtzer*, 631 A.2d 429
4 (Md. Ct. App. 1993). The clear trend is “hold that the right to recover pre-majority medical
5 expenses belongs to both the injured minor and the parents, but double recovery is not
6 permitted.” *Estate of DeSela*, 249 P.3d at 770 (various citations omitted). Payo’s parents
7 have not asserted any claims to the medical expenses, nor could they at this juncture due to
8 statute of limitation issues. Additionally, Payo’s mother attended the trial and testified as a
9 witness on her son’s behalf, thereby impliedly waiving any right to claim the damages for
10 herself.

11 Thus, this Court determines that Payo was permitted to recover medical expenses
12 incurred by his parents while Payo was a minor and the Court will not disturb the jury’s
13 verdict awarding the past medical and related expenses to him in the amount of \$48,288.06.

14 **II. Plaintiff’s Damages Are Limited to \$50,000 Under the Applicable Version of**
15 **NRS 41.035**

16 The Court hereby rules that Payo’s damages are limited to \$50,000.00 under the
17 applicable version of NRS 41.035.¹

18 At least by 1965, if not sooner, the State of Nevada waived its sovereign immunity. *See*
19 *NRS 41.031*. That waiver likewise applies to political subdivisions of the state such as
20 Defendant Clark County School District. *Id.* The waiver, however, is not absolute. For
21 decades, NRS 41.035 has provided a cap on “damages in an action sounding in tort brought
22 under NRS 41.031.” Throughout that time, the amount of the cap has increased with various
23 amounts being in effect at various times. For example, on May 12, 2004, the date of this
24 case’s accident, the statute provided for a \$50,000.00 cap. On September 21, 2012, the date

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26 ¹ The \$50,000.00 cap applies to prejudgment interest, but does not apply to post-judgment
27 interest, nor does it limit CCSD’s potential liability for attorney fees and costs. *Arnesano v.*
28 *State ex rel. Dept. of Transp.*, 113 Nev. 815, 821-822, 942 P.2d 139, 143-144 (1997). Thus,
should Payo believe he has a basis for attorney fees and costs, he may file the appropriate
motion and/or memorandum for the Court’s consideration.

1 the complaint was filed, the cap was \$100,000.00. CCSD argues the \$50,000 cap applies to
2 reduce the jury verdict and Payo argues the \$100,000 cap applies.

3 The statute and its various iterations are ambiguous as to when the various caps take
4 effect. However, the Nevada Supreme Court discussed the applicable determination date in
5 *Las Vegas Metropolitan Police Dep't v. Yeghiazarian*, 129 Nev. Adv. Op. 81, 312 P.3d 503
6 (2013). There, the Court stated, "The version of NRS 41.035(1) that was in effect at the time
7 of the accident provided that awards for damages in tort actions filed against state entities
8 'may not exceed the sum of \$50,000.00.'" *Id.*, 312 P.3d at 509 (emphasis added). Although
9 that statement is *dicta*, it indicates the applicable cap for any claim filed under NRS 41.031 is
10 the version "in effect at the time of the accident," rather than at the time the complaint is filed.

11 For additional confirmation, the factual and procedural background of *Yeghiazarian* is
12 helpful. *Yeghiazarian* involved an accident that occurred on July 4, 2007, when the cap was
13 \$50,000. See Complaint, filed in Case No. A-09-594543-C. The complaint, however, was
14 filed on July 2, 2009, when the cap was \$75,000. *Id.* Under those circumstances it is
15 reasonable to believe that the Nevada Supreme Court intended to guide the trial courts that the
16 applicable date is when the accident occurred, not when the complaint was filed. The
17 legislative history goes so far as to explicitly state that the increase from \$50,000 to \$75,000
18 applies "to a cause of action that accrues on or after October 1, 2007," and the increase from
19 \$75,000 to \$100,000 applies "to a cause of action that accrues on or after October 1, 2011."
20 Laws 2007, c. 512, § 5.5 eff. July 1, 2007. A cause of action for negligence accrues when the
21 accident occurs and injury is sustained. *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18
22 (1990). Here, Payo's causes of action accrued on May 12, 2004, the date of the accident, and
23 thus the applicable cap is \$50,000.00.

24 Finding that the \$50,000 cap applies does not, however, end the inquiry. In his Second
25 Amended Complaint, Payo asserted two causes of action—one for negligence, the other for
26 negligent supervision. Payo argues that because he pleaded and proved two causes of action
27 at trial, he is entitled to \$50,000 for each cause of action and the jury's verdict of \$60,288.06
28 falls below the total \$100,000 cap. The Court disagrees.

1 The language of NRS 41.035 on this issue appears unambiguous to the Court in that it
2 refers to a single cap on “[a]n award for damages in an action sounding in tort.” To this
3 Court, the reference to “an action” would appear to encompass all tort claims asserted in an
4 action. *See* NRCP 2 (“There shall be one form of action to be known as ‘civil action.’”). In
5 the seminal case of *State v. Webster*, 88 Nev. 690, 504 P.2d 1316 (1972), however, the
6 Nevada Supreme Court clarified, “Although joined in one complaint, an action for wrongful
7 death and an action for personal injuries suffered by the plaintiff in the same accident are
8 separate, distinct and independent. They rest on different facts, and may be separately
9 maintained.” *Id.*, 88 Nev. at 695. Consequently, one cap applied to the plaintiff’s personal
10 injury claim and a separate cap applied to the plaintiff’s wrongful death claim. *Id.*

11 Post-*Webster*, the Nevada Supreme Court has interpreted “an action” to mean “a claim.”
12 *See, e.g., State ex rel. Dep’t of Transp. v. Hill*, 114 Nev. 810, 818, 963 P.2d 480 (1998) (in a
13 case with a claim for personal injuries and a claim for negligent infliction of emotional
14 distress, holding, “each claim could be separately maintained, and each claim was subject to
15 its own \$50,000.00 statutory cap”), abrogated on other grounds by *Grotts v. Zahner*, 115 Nev.
16 339, 989 P.2d 415 (1999); *County of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749,
17 759, 961 P.2d 754 (1998) (stating NRS 41.035 allows “plaintiffs to recover damages on a per
18 person per claim basis”). In the *Upchurch* case, the Nevada Supreme Court limited recovery
19 as follows: “NRS 41.035 allows one statutory limitation for each cause of action, regardless of
20 the number of actors.”

21 Although it was subsequently withdrawn based on a stipulation of the parties, the case of
22 *State, Dept. of Human Resources v. Jimenez*, 113 Nev. 356, 935 P.2d 274 (1997), op.
23 withdrawn in 113 Nev. 735, 941 P.2d 969 (1997), is instructive. There, the Nevada Supreme
24 Court upheld awards of \$50,000 each for nine instances of sexual assault, but reversed the
25 award of \$50,000 for negligent supervision because that award “to permit further recovery on
26 the basis of negligent supervision is tantamount to awarding the victim an improper double
27 recovery.” *Id.*, 113 Nev. at 373, 935 P.2d at 284. The withdrawal of the opinion, however,

28

1 leaves this Court without a binding decision directly on point. Nevertheless, the Court must
2 rule on the issue.

3 Here, Payo's damages as a result of negligence or negligent supervision by CCSD are
4 the same damages regardless of the claim asserted. Both claims are essentially for negligence.
5 Thus, the claims asserted in this case differ substantially from the distinct claims of personal
6 injury and wrongful death or personal injury and negligent infliction of emotional distress set
7 forth in the *Webster* and *Hill* cases. Additionally, the jury verdict simply awards amounts of
8 damages and makes no distinction between the two causes of action. Alternatively, to the
9 extent needed to support the Court's ruling that a single \$50,000.00 cap applies, and based on
10 the evidence presented at trial, the Court would find that Payo failed to prove a sufficient issue
11 for the jury regarding his claim for negligent supervision and that CCSD is entitled to
12 judgment as a matter of law on that claim. In Nevada, negligent supervision is a claim against
13 an employer for failing to properly supervise its own employee and is not based on an
14 employee's alleged failure to properly supervise a plaintiff. *See Rockwell v. Sun Harbor*
15 *Budget Suites*, 112 Nev. 1217, 1226, 925 P.2d 1175, 1181 (1996). Payo's claim is based on
16 alleged failure by CCSD to properly "supervise, warn or safely protect PAYO from injury"
17 (First Amended Comp. at ¶¶ 27-35), and thus CCSD would be entitled to judgment as a matter
18 of law on the claim.

19 Consequently, the Court finds and rules that one cap applies to limit the jury verdict to
20 \$50,000.00.

21 **III. Conclusion and Order**

22 IT IS HEREBY ORDERED that Payo is entitled to recover medical and related
23 expenses incurred by his parents while he was a minor.

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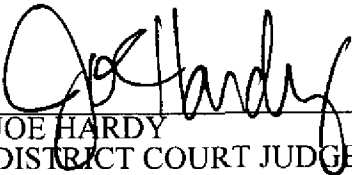
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IT IS FURTHER ORDERED that Payo's damages are reduced from the \$60,288.06 in the Verdict to \$50,000.00. The Court will issue a separate judgment.

DATED this 16th day of June, 2015.



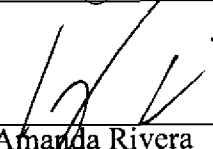
JOE HARDY
DISTRICT COURT JUDGE
DEPARTMENT XV

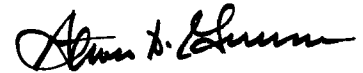
CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was electronically served, mailed or placed in the attorney's folder on the first floor of the Regional Justice Center as follows:

Robert Kurth, Esq.
Daniel O'Brien, Esq.

robertk@robertkurth.com
obriedl@interact.ccsd.net


Amanda Rivera
Judicial Executive Assistant



CLERK OF THE COURT

1 **NEO**
2 **ROBERT O. KURTH, JR.**
3 **Nevada Bar No. 4659**
4 **KURTH LAW OFFICE**
5 **3420 North Buffalo Drive**
6 **Las Vegas, NV 89129**
7 **Tel: (702) 438-5810**
8 **Fax: (702) 459-1585**
9 **E-mail: kurthlawoffice@gmail.com**
10 **Attorney for Plaintiff**

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

10 **MAKANI PAYO,**

11 **Plaintiff,**

12 **vs.**

13 **CLARK COUNTY SCHOOL DISTRICT,**

14 **Defendant.**

Case No. A-12-668833-C
Dept. XV

16 **NOTICE OF ENTRY OF ORDER**

17
18 PLEASE TAKE NOTICE that an ORDER REGARDING DAMAGES POST-JURY
19 VERDICT was entered in the above-referenced matter on or about the 16th day of June, 2015, and was
20 filed on the 16th day of June, 2015; a copy of which is attached hereto.

21 DATED this 17th day of June, 2015.

22 Respectfully submitted by:
23 **KURTH LAW OFFICE**

24 /s/Robert O. Kurth, Jr.
25 **ROBERT O. KURTH, JR.**
26 **Nevada Bar No. 4659**
27 **Attorney for the Plaintiff**

28 ///

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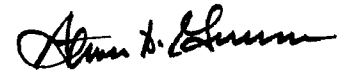
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CERTIFICATE OF SERVICE/MAILING

I HEREBY CERTIFY that on the 17th day of June, 2015, I electronically served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** via Electronic Service in accordance with EDCR 8.05, and I deposited a true and correct copy of the foregoing in a sealed envelope in the U.S. Mail, first class, postage prepaid, and addressed as follows:

DANIEL O'BRIEN, ESQ.
Office of General Counsel
Clark County School District
5100 W. Sahara Avenue
Las Vegas, NV 89146
E-serve: obriedl@interact.ccsd.net
Attorneys for Defendant

/s/Maritsa Lopez
An employee of **KURTH LAW OFFICE.**



CLERK OF THE COURT

1 **ORDR**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 **MAKANI PAYO,**

6 **Plaintiff,**

7 **vs.**

8 **CLARK COUNTY SCHOOL DISTRICT,**

9 **Defendant.**

Case No.: A-12-668833-C
Dept No.: XV

**ORDER REGARDING DAMAGES
POST-JURY VERDICT**

10
11 This case was tried before a jury which resulted in a verdict being awarded in favor of
12 Plaintiff Makani Payo ("Payo") and against Defendant Clark County School District
13 ("CCSD") in a total amount of \$60,288.06 on June 2, 2015. Prior to and during trial, the
14 parties filed and served briefs relating to issues with damages and have submitted those briefs
15 to the Court for consideration and ruling. This Order constitutes the Court's ruling and
16 decision on those issues.

17 **I. Plaintiff May Recover Medical Expenses Incurred By His Parents While**
18 **Plaintiff Was a Minor**

19 The Court hereby rules that Payo may recover medical expenses incurred by his parents
20 while Payo was a minor.

21 As the parties are aware, the undersigned was assigned this case on the eve of trial.
22 Prior to that assignment, various issues had been briefed and orders entered by the Court.
23 Notably, such briefs included CCSD's Motion to Strike Plaintiff's Damages Calculation or, in
24 the Alternative, Motion in Limine filed herein on January 28, 2015. In that motion, CCSD
25 argued, among other things, that Payo "lists medical expenses which were incurred while he
26 was a minor and which he is not entitled to as a matter of law." Motion to Strike at 6:14-16.
27 CCSD requested that Payo be precluded "from presenting as damages medical expenses
28 incurred by his parents while he was a minor." Motion to Strike at 1:27-28. CCSD further

1 requested “[a]n order precluding Plaintiff from putting on any evidence or making any
2 argument at trial regarding alleged past or future special damages.” Motion to Strike at 9:1-3.

3 In opposition, Payo argued, among other things, that he “is entitled to medical expenses
4 he incurred as a minor child and which were paid by his parents when he incurred such as a
5 minor child.” Opposition, filed on February 13, 2015, at 6:12-13. Payo went on to request
6 that the Court “allow this case to proceed on the merits . . . rather than on the technicalities of
7 not having the parents named as parties to the suit. In the alternative, the Plaintiff PAYO is
8 requesting that this Court allow PAYO to amend his Complaint to include his parents as
9 parties if necessary.” Opposition at 8:8-13.

10 In reply, CCSD devoted three pages to the argument that “Plaintiff is not entitled to
11 recover medical expenses incurred while he was a minor.” Reply, filed on February 23, 2015.

12 In ruling on the issues raised, rather than strike or disallow the medical expenses
13 incurred by Payo’s parents while he was a minor, this Court ruled Payo “may not seek
14 recovery of special damages beyond those identified in the January 22, 2015, letter wherein
15 Plaintiff listed past medical expenses” and “Plaintiff’s medical expenses are capped at
16 \$50,000.00.” Order, filed on April 10, 2015. As demonstrated at trial, the January 22, 2015
17 letter included various medical expenses incurred by Payo’s parents while he was a minor. In
18 other words, prior to the commencement of trial this Court ruled then that Payo could seek
19 recovery of special damages, including the medical expenses incurred by his parents while he
20 was a minor. Notably, neither party sought reconsideration of the April 10, 2015 Order and
21 the Court sees no reason to reconsider its prior order at this time.

22 Further, the Nevada case law relied upon by CCSD in an attempt to exclude Payo’s
23 medical damages clearly uses the discretionary “may” rather than the mandatory “shall”
24 regarding potential limiting of damages. *Walker v. Burkham*, 63 Nev. 75, 83, 165 P.2d 161,
25 164 (1946); *Hogle v. Hall*, 112 Nev. 599, 916 P.2d 814 (1996). The use of “may” indicates a
26 grant of discretion to the district court in determining whether to limit the incurred damages.
27 In this case, the Court determines to exercise its discretion to permit Payo to seek and obtain
28 an award of damages for the medical expenses incurred by his parents while he was a minor.

1 Finally, the ultimate policy behind any division of medical expenses between the minor
2 child and the parents is simply to prevent a double recovery. See *Estate of DeSela v. Prescott*
3 *Unified School Distr. No. 1*, 249 P.3d 767 (Ariz. 2011); *Garay v. Overholtzer*, 631 A.2d 429
4 (Md. Ct. App. 1993). The clear trend is “hold that the right to recover pre-majority medical
5 expenses belongs to both the injured minor and the parents, but double recovery is not
6 permitted.” *Estate of DeSela*, 249 P.3d at 770 (various citations omitted). Payo’s parents
7 have not asserted any claims to the medical expenses, nor could they at this juncture due to
8 statute of limitation issues. Additionally, Payo’s mother attended the trial and testified as a
9 witness on her son’s behalf, thereby impliedly waiving any right to claim the damages for
10 herself.

11 Thus, this Court determines that Payo was permitted to recover medical expenses
12 incurred by his parents while Payo was a minor and the Court will not disturb the jury’s
13 verdict awarding the past medical and related expenses to him in the amount of \$48,288.06.

14 **II. Plaintiff’s Damages Are Limited to \$50,000 Under the Applicable Version of**
15 **NRS 41.035**

16 The Court hereby rules that Payo’s damages are limited to \$50,000.00 under the
17 applicable version of NRS 41.035.¹

18 At least by 1965, if not sooner, the State of Nevada waived its sovereign immunity. See
19 NRS 41.031. That waiver likewise applies to political subdivisions of the state such as
20 Defendant Clark County School District. *Id.* The waiver, however, is not absolute. For
21 decades, NRS 41.035 has provided a cap on “damages in an action sounding in tort brought
22 under NRS 41.031.” Throughout that time, the amount of the cap has increased with various
23 amounts being in effect at various times. For example, on May 12, 2004, the date of this
24 case’s accident, the statute provided for a \$50,000.00 cap. On September 21, 2012, the date
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27 interest, nor does it limit CCSD’s potential liability for attorney fees and costs. *Arnesano v.*
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should Payo believe he has a basis for attorney fees and costs, he may file the appropriate
motion and/or memorandum for the Court’s consideration.

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5 *Las Vegas Metropolitan Police Dep't v. Yeghiazarian*, 129 Nev. Adv. Op. 81, 312 P.3d 503
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9 that statement is *dicta*, it indicates the applicable cap for any claim filed under NRS 41.031 is
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11 For additional confirmation, the factual and procedural background of *Yeghiazarian* is
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22 (1990). Here, Payo's causes of action accrued on May 12, 2004, the date of the accident, and
23 thus the applicable cap is \$50,000.00.

24 Finding that the \$50,000 cap applies does not, however, end the inquiry. In his Second
25 Amended Complaint, Payo asserted two causes of action—one for negligence, the other for
26 negligent supervision. Payo argues that because he pleaded and proved two causes of action
27 at trial, he is entitled to \$50,000 for each cause of action and the jury's verdict of \$60,288.06
28 falls below the total \$100,000 cap. The Court disagrees.

1 The language of NRS 41.035 on this issue appears unambiguous to the Court in that it
2 refers to a single cap on "[a]n award for damages in an action sounding in tort." To this
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12 See, e.g., *State ex rel. Dep't of Transp. v. Hill*, 114 Nev. 810, 818, 963 P.2d 480 (1998) (in a
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16 339, 989 P.2d 415 (1999); *County of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749,
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20 the number of actors."

21 Although it was subsequently withdrawn based on a stipulation of the parties, the case of
22 *State, Dept. of Human Resources v. Jimenez*, 113 Nev. 356, 935 P.2d 274 (1997), op.
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26 the basis of negligent supervision is tantamount to awarding the victim an improper double
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1 leaves this Court without a binding decision directly on point. Nevertheless, the Court must
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3 Here, Payo's damages as a result of negligence or negligent supervision by CCSD are
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5 Thus, the claims asserted in this case differ substantially from the distinct claims of personal
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7 forth in the *Webster* and *Hill* cases. Additionally, the jury verdict simply awards amounts of
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12 judgment as a matter of law on that claim. In Nevada, negligent supervision is a claim against
13 an employer for failing to properly supervise its own employee and is not based on an
14 employee's alleged failure to properly supervise a plaintiff. See *Rockwell v. Sun Harbor*
15 *Budget Suites*, 112 Nev. 1217, 1226, 925 P.2d 1175, 1181 (1996). Payo's claim is based on
16 alleged failure by CCSD to properly "supervise, warn or safely protect PAYO from injury"
17 (First Amended Comp. at ¶¶ 27-35), and thus CCSD would be entitled to judgment as a matter
18 of law on the claim.

19 Consequently, the Court finds and rules that one cap applies to limit the jury verdict to
20 \$50,000.00.

21 **III. Conclusion and Order**

22 IT IS HEREBY ORDERED that Payo is entitled to recover medical and related
23 expenses incurred by his parents while he was a minor.

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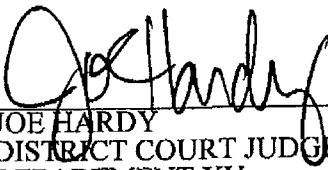
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1 IT IS FURTHER ORDERED that Payo's damages are reduced from the \$60,288.06 in
2 the Verdict to \$50,000.00. The Court will issue a separate judgment.

3 DATED this 16th day of June, 2015.

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6 JOE HARDY
7 DISTRICT COURT JUDGE
8 DEPARTMENT XV
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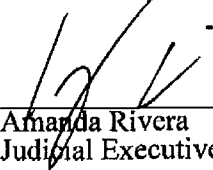
Joe Hardy
District Judge
Department XV

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was electronically served, mailed or placed in the attorney's folder on the first floor of the Regional Justice Center as follows:

Robert Kurth, Esq.
Daniel O'Brien, Esq.

robertk@robertkurth.com
obriedl@interact.ccsd.net


Amanda Rivera
Judicial Executive Assistant


CLERK OF THE COURT

ORDR
ROBERT O. KURTH, JR.
Nevada Bar No. 4659
KURTH LAW OFFICE
3420 North Buffalo Drive
Las Vegas, NV 89129
Tel: (702) 438-5810
Fax: (702) 459-1585
E-mail: kurthlawoffice@gmail.com
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

MAKANI KAI PAYO,

Plaintiff,

Case No. A-12-668833-C
Dept. XV

vs.

CLARK COUNTY SCHOOL DISTRICT;
DOE CLARK COUNTY SCHOOL DISTRICT
EMPLOYEES I-V; DOES I-V and ROE
COMPANIES I-V, inclusive,

Defendants.

KURTH LAW OFFICE
3420 North Buffalo Drive
Las Vegas, NV 89129
(702) 438-5810

ORDER

THIS MATTER having come before this Court on May 11, 2015, for the hearing of the Defendant's CLARK COUNTY SCHOOL DISTRICT's ("CCSD"), Motion and Notice of Motion for Summary Judgment and the Plaintiff's, MAKANI KAI PAYO's ("MAKANI") Opposition to Motion for Summary Judgment and Counter-Motion for Summary Judgment. The Plaintiff MAKANI appeared through his counsel, Robert O. Kurth, Jr., of the KURTH LAW OFFICE, and the Defendant CCSD appeared through their attorney, Daniel Louis O'Brien, Esq. The Court having reviewed the pleadings and papers on file herein, together with argument, and it appearing to the satisfaction of the Court, and good cause appearing therefor:

The **COURT FINDS** it to be undisputed that the Defendant, Clark County School District ("CCSD"), has a general duty to exercise due care. Additionally, the Defendant CCSD knew risks of injury were inherent in the sport of field hockey.

The **COURT FURTHER FINDS** that the question of duty is not reliant on the Plaintiff's testimony; whether or not duty exists is a question of law. Therefore genuine questions of material fact exist as to: 1. - duty; 2. - whether CCSD exercised reasonable care in allowing an eleven year old student to play field hockey in Physical Education (P.E.) without providing him with any safety equipment; 3. - whether CCSD's treatment of the eleven year old student and advice given to the Plaintiff MAKANI were reasonable; and 4. - whether additional training, supervision or equipment could have prevented the injury to the Plaintiff MAKANI.

NOW THEREFORE, IT IS HEREBY ORDERED that the Defendant's CCSD's Motion for Summary Judgment as to the first cause of action – Negligence, and as to the second cause of action - Negligent Supervision, is DENIED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the Plaintiff's Opposition and Counter-Motion for Summary Judgment is also DENIED WITHOUT PREJUDICE as the COURT FINDS that no concise statement setting forth each fact material to the disposition of the motion that Plaintiff's claims is or is not genuinely in issue as required by NRCP 56 (c).

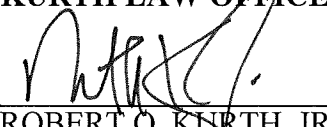
IT IS FURTHER ORDERED that the Court directed Mr. Kurth, Esq. to prepare the Order and submit to Mr. O'Brien, Esq. for his review and signature prior to submitting to the Court for signature.

DATED and DONE this 15th day of May, 2015.


IT IS SO ORDERED.

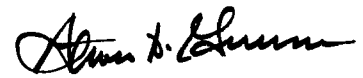

DISTRICT COURT JUDGE

Respectfully Submitted By:
KURTH LAW OFFICE


ROBERT O. KURTH, JR.
Nevada Bar No. 4659
Attorney for Plaintiff MAKANI

APPROVED BY:

As to Form only

DANIEL LOUIS O'BRIEN, ESQ.
Nevada Bar No. 983
Attorney for Defendant CCSD



CLERK OF THE COURT

1 **NEOJ**
2 ROBERT O. KURTH, JR.
3 Nevada Bar No. 4659
4 **KURTH LAW OFFICE**
5 3420 North Buffalo Drive
6 Las Vegas, NV 89129
7 Tel: (702) 438-5810
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9 E-mail: kurthlawoffice@gmail.com
10 Attorney for Plaintiffs

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

10 MAKANI KAI PAYO,

11 Plaintiff,

12 vs.

Case No. A-12-668833-C
Dept. XV

13 CLARK COUNTY SCHOOL DISTRICT;
14 DOE CLARK COUNTY SCHOOL
DISTRICT EMPLOYEES I-V; DOES I-V
and ROE COMPANIES I-V, inclusive,
Defendants.

16 **NOTICE OF ENTRY OF ORDER**

18 PLEASE TAKE NOTICE that an ORDER was entered in the above-referenced matter
19 on or about the 15th day of May, 2015, and was filed on the 20th day of May, 2015; a copy of which
20 is attached hereto.

21 DATED this 20th day of May, 2015.

22 Respectfully submitted by:
23 **KURTH LAW OFFICE**

24 /s/Robert O. Kurth, Jr.
25 ROBERT O. KURTH, JR.
26 Nevada Bar No. 4659
27 Attorney for the Plaintiffs

28 ///

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CERTIFICATE OF SERVICE/MAILING

I HEREBY CERTIFY that on the 20th day of May, 2015, I electronically served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** via Electronic Service in accordance with EDCR 8.05, and I deposited a true and correct copy of the foregoing in a sealed envelope in the U.S. Mail, first class, postage prepaid, and addressed as follows:

Daniel L. O'Brien, Esq.
Clark County School District
Office of the General Counsel
5100 W. Sahara Ave.
Las Vegas, NV 89146
Attorney for Defendants

/s/Maritsa Lopez
An employee of **KURTH LAW OFFICE.**


CLERK OF THE COURT

1 **ORDR**
2 ROBERT O. KURTH, JR.
3 Nevada Bar No. 4659
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10 Attorney for Plaintiff

11
12 **DISTRICT COURT**
13
14 **CLARK COUNTY, NEVADA**

15 MAKANI KAI PAYO,

16 Plaintiff,

17 vs.

18 CLARK COUNTY SCHOOL DISTRICT;
19 DOE CLARK COUNTY SCHOOL DISTRICT
20 EMPLOYEES I-V; DOES I-V and ROE
21 COMPANIES I-V, inclusive,

22 Defendants.

Case No. A-12-668833-C
Dept. XV

23 **ORDER**

24 **THIS MATTER** having come before this Court on May 11, 2015, for the hearing of
25 the Defendant's CLARK COUNTY SCHOOL DISTRICT's ("CCSD"), Motion and Notice of
26 Motion for Summary Judgment and the Plaintiff's, MAKANI KAI PAYO's ("MAKANI")
27 Opposition to Motion for Summary Judgment and Counter-Motion for Summary Judgment. The
28 Plaintiff MAKANI appeared through his counsel, Robert O. Kurth, Jr., of the KURTH LAW
OFFICE, and the Defendant CCSD appeared through their attorney, Daniel Louis O'Brien, Esq.
The Court having reviewed the pleadings and papers on file herein, together with argument, and it
appearing to the satisfaction of the Court, and good cause appearing therefor:

The **COURT FINDS** it to be undisputed that the Defendant, Clark County School
District ("CCSD"), has a general duty to exercise due care. Additionally, the Defendant CCSD
knew risks of injury were inherent in the sport of field hockey.

KURTH LAW OFFICE
3420 North Buffalo Drive
Las Vegas, NV 89129
(702) 438-5810

1 The COURT FURTHER FINDS that the question of duty is not reliant on the
2 Plaintiff's testimony; whether or not duty exists is a question of law. Therefore genuine questions
3 of material fact exist as to: 1. - duty; 2. - whether CCSD exercised reasonable care in allowing an
4 eleven year old student to play field hockey in Physical Education (P.E.) without providing him
5 with any safety equipment; 3. - whether CCSD's treatment of the eleven year old student and advice
6 given to the Plaintiff MAKANI were reasonable; and 4. - whether additional training, supervision or
equipment could have prevented the injury to the Plaintiff MAKANI.

7 NOW THEREFORE, IT IS HEREBY ORDERED that the Defendant's CCSD's
8 Motion for Summary Judgment as to the first cause of action - Negligence, and as to the second
9 cause of action - Negligent Supervision, is DENIED WITHOUT PREJUDICE.

10 IT IS FURTHER ORDERED that the Plaintiff's Opposition and Counter-Motion
11 for Summary Judgment is also DENIED WITHOUT PREJUDICE as the COURT FINDS that no
12 concise statement setting forth each fact material to the disposition of the motion that Plaintiff's
claims is or is not genuinely in issue as required by NRCP 56 (c).

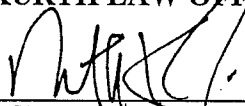
13 IT IS FURTHER ORDERED that the Court directed Mr. Kurth, Esq. to prepare the
14 Order and submit to Mr. O'Brien, Esq. for his review and signature prior to submitting to the Court
15 for signature.

16 DATED and DONE this 15th day of May, 2015.

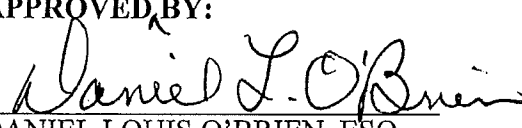
17 IT IS SO ORDERED.

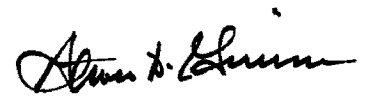
18 
19 DISTRICT COURT JUDGE

20 Respectfully Submitted By:
21 KURTH LAW OFFICE

22 
23 ROBERT O. KURTH, JR.
Nevada Bar No. 4659
Attorney for Plaintiff MAKANI

24 APPROVED BY:

25 
26 DANIEL LOUIS O'BRIEN, ESQ.
27 Nevada Bar No. 983
Attorney for Defendant CCSD
28


CLERK OF THE COURT

OGM
Office of the General Counsel
Clark County School District
DANIEL L. O'BRIEN, ESQ.
Nevada Bar No. 0983
CARLOS L. McDADE, ESQ.
Nevada Bar No. 11205
5100 W. Sahara Avenue
Las Vegas, NV 89146
(702) 799-5373
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

MAKANI KAI PAYO,

Plaintiff,

v.

CLARK COUNTY SCHOOL DISTRICT; DOE
CLARK COUNTY SCHOOL DISTRICT
EMPLOYEES I-V; DOES I-V and ROE
COMPANIES I-V, inclusive,

Defendants.

Case No. A-12-668833-C
Dept. No. II

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO STRIKE
PLAINTIFF'S DAMAGES
CALCULATION OR, IN THE
ALTERNATIVE, MOTION IN
LIMINE

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S
MOTION TO STRIKE PLAINTIFF'S DAMAGES CALCULATION OR, IN THE
ALTERNATIVE, MOTION IN LIMINE

This matter came on regularly before the Court, in Chambers,
on the third day of March, 2015, for consideration of Defendant's
January 28, 2015, Motion to Strike Plaintiff's Damages
Calculation or, in the Alternative, Motion in Limine. The Court,
having considered the Defendant's Motion, Plaintiff's Opposition
and Defendant's Reply, hereby GRANTS IN PART and DENIES IN PART
Defendant's Motion, as follows:

1. Defendant's motion to strike Plaintiff's untimely
damages calculation is hereby DENIED.

1 was going to happen to him? I suggest, no. We know that Mr.
2 Petersen said that he heard -- that sometimes he would say, no
3 high sticking during the games. Makani said he heard someone
4 say no high sticking and then he got hit. Mr. Peterson's
5 walking around the perimeter, he's not in the game, he's not
6 in the middle, he's not actively involved because he probably
7 would have noticed Makani was down for 10 seconds.

8 I thank you for your time and for your attention and
9 I'll summarize when I return. Thank you.

10 MR. O'BRIEN: May it please the Court?

11 THE COURT: Yes.

12 DEFENDANT'S CLOSING ARGUMENT

13 MR. O'BRIEN: Can everybody hear me? You remember
14 when we started this journey, if you will, first thing I said
15 was this is not all that complicated. It's still not
16 complicated. Makani Payo was injured while playing a game of
17 floor hockey at school. He was hit by another player during
18 the game. This can happen. Counsel was stipulated that the
19 risk of getting hit by it -- suffering an injury like Mr. Payo
20 did under these circumstances is a risk that's inherent in the
21 game, everybody knows that. Everybody knows you can get hit
22 by -- if you've got a bunch of kids with sticks, somebody can
23 get hit.

24 But the issue in this case isn't whether something
25 could happen. And it's not even whether we could have done

1 something differently because there's no limit to what could
2 happen, that's limited only by your imagination. The question
3 in this case, as the Judge has instructed you, is whether or
4 not we exercised reasonable care in light of the risk. What
5 was the risk in this case? The risk that somebody might be
6 hit by a hockey stick. It had never happened before, nobody
7 ever received this kind of injury before anywhere in the Clark
8 County School District.

9 We know that because Eileen Wheelan, who is in the
10 risk management department, searched the records and informed
11 you that this had never happened before, no serious injury.
12 Todd Petersen said it didn't ever happen in his entire time he
13 was teaching this unit. And it's not like this was the first
14 time this was taught, it had been taught for years and it's
15 still being taught.

16 What was the level of risk that this was going to
17 happen? History shows that Mr. Payo was the first, the first
18 one since -- in the seven or eight years that this class had
19 been taught to ever be injured. It was considered a low risk
20 sport. Why? You have a three-foot hockey puck that you have
21 to bend over and hold on the ground to hit the hockey puck.
22 If you don't bend over you can't hit it. So 99.99 percent of
23 the time the hockey pucks are down on the ground trying to hit
24 a hockey puck or the ball. So it's not a high risk, it's a
25 noncontact sport. You don't get to run into other players,

1 you don't get to hit them with your stick or hook them or
2 slash them or any of those terms that have been coined to
3 reflect what you can't do in a game. So it's a low risk sport
4 and with a long history of not having any serious injuries.
5 And the district is still teaching the same way.

6 So the question is on May 12th, 2004, was the
7 district negligent by allowing this sport to be taught?
8 Plaintiff has produced no evidence whatsoever that this is
9 considered an extremely risky sport. There's no evidence
10 whatsoever that safety equipment was even available in 2004
11 that would have prevented this specific injury. Counsel
12 speculates a lot about what type of safety equipment should
13 have been provided. I mean we can imagine anything. We can
14 imagine that if they wear a full helmet like the motorcycle
15 guys do with the full face shield that might have protected
16 him. We can imagine that some sort of goggles might have
17 protected the eye. It wouldn't have stopped him getting hit,
18 neither one of them would stop him getting hit but it might
19 lessen the injury.

20 But counsel has produced no evidence that there was
21 any specific safety device that we could have used that was
22 available that was being used by any school anywhere -- any
23 middle school anywhere to protect students. There -- and he
24 hasn't produced any evidence of what it would cost. He hasn't
25 produced any evidence that it was readily available. There

1 was discussion about the school district didn't have it in
2 their budget. But counsel hasn't provided any numbers. You
3 know, what does one of these specialized goggles cost? The
4 Clark County School District doesn't just have one middle
5 school in 2004, it had over 100 middle schools. And if
6 they're all teaching the -- the floor hockey game, that means
7 they're not buying just a few helmets, just a few goggles,
8 they're buying thousands of them. That's a big issue. That's
9 a big issue.

10 Now you can say well, what's the -- you know, you
11 weigh that against the cost of one injury. You weigh that
12 against the cost of -- the likelihood that there's going to be
13 an injury. If the district spends that much money on -- on
14 helmets and goggles and safety equipment, that's that much
15 money -- less money it has to spend on educating students. If
16 one student in charge of -- one teacher, excuse me, in charge
17 of the class why was that? Money. If we had 50 extra PE
18 teachers we could have two teachers there or three or four.
19 If we had more hockey sticks we could have divided them up
20 into different -- more games. And if we had more facilities
21 we could spread them out so that they wouldn't have to all
22 play at the same time.

23 You know, the alternative is we -- we got 24 kids I
24 think it was in a class -- on a side 12 -- 10 or 12 on each
25 side, there were only eight or 10 hockey sticks. That's what

1 the testimony was, there's eight or 10 hockey sticks. The
2 rest of the students rotate in. So there's this many on a
3 side but there was no testimony that that's how many are
4 constantly playing, that's how many have hockey sticks in
5 their hands. And even if -- even if it was true, 12 on each
6 side, 24 hockey sticks, there's been no testimony whatsoever
7 that this accident happened because there were too many kids
8 on the field. The ball's getting hit around whether there's
9 five kids on a side, 10 kids on a side, they're all doing the
10 same thing, they're going after the ball.

11 Plaintiff never produced any evidence that said that
12 because there's 10 on each side people were flinging their
13 hockey sticks wildly or not paying attention to what they were
14 doing, nothing. Not -- that's a red herring. You know what a
15 red herring -- the story behind the red herring is, right?
16 Back in middle ages, you know, there was -- back in the jolly
17 old England they had a real problem with foxes. They'd get
18 into hen houses, they'd eat the -- they'd attack and kill the
19 small crop -- the small -- smaller animals. So the farmers
20 started organizing these annual hunts. They'd go out and
21 they'd try to eliminate as many foxes as they could. And
22 around the 1600s or so they started training dogs to ferret
23 them out so that they could get them.

24 Now what happened is over time and with selective
25 breeding and all this kind of stuff, the dogs got really good.

1 So they'd go out on a hunt and it wasn't even sport, they'd
2 track a bunch of them down and kill them. So they decided
3 they had to make it a more sporting event. So what they did
4 was they'd go down to the river and get the local fish. The
5 local fish happened to be a red herring, it was the most
6 abundant fish they had. And they would tie it to a string and
7 they'd drag it across the path before the hunt, before the
8 dogs were released to give the fox a fair chance. In other
9 words, the fox -- the dogs would take off and some of them
10 would catch the scent of this herring and they'd follow it.
11 And -- and they could -- they could do that at any of the
12 different places where this happened.

13 And it -- nowadays the term means, you know, raising
14 an issue that really is -- has nothing to do with the point.
15 The point in this case is did the district do something wrong.
16 Don't be misled by the red herring. Did the district do
17 something wrong? What did the district do?

18 Well, let's start with Mr. Petersen. Counsel's
19 correct, Todd Petersen was our teacher, he was our employee.
20 If he did something negligent we're responsible for his
21 conduct. But what did he do? He taught the kids the rules,
22 he taught -- went over the safety rules, he went out there
23 with them. And contrary to what counsel was saying, he not
24 only walked around he -- he specifically stated, and you heard
25 him, that he'd go right in the middle of the game because it

1 was a teaching -- it wasn't just he was watching them play,
2 it's a teaching experience. He goes in there so he can show
3 them. If somebody's doing something wrong, he provides
4 instruction. If somebody's doing something that's a little
5 risky, high sticking or something, he'd call out, no high
6 sticking. And then if he does it again he goes over there and
7 he either takes him out or at least provides one-on-one
8 instruction.

9 So what did Mr. Petersen do? He supervised,
10 instructed and trained the class, he went over the rules. He
11 kept control of the situation. There's no evidence that he
12 didn't keep control over the situation. What happened in this
13 case was nothing but an accident.

14 Now, when plaintiff talks about Mr. Higgins, the
15 individual that accidentally struck him, it's all a big
16 accident. He didn't do it deliberately. Oh, no, I don't want
17 you to think he did it deliberately, it was just an accident.
18 And how did he describe the accident? It happened in the
19 blink of an eye, it came out of the blue, he didn't anticipate
20 it. He didn't even have time to move out of the way. Well,
21 if he didn't have time to react, didn't have time to move or
22 get out of the way, how is Mr. Petersen supposed to observe
23 this happening and jump in and prevent it?

24 Again, you know, this was an accident. This was
25 something that happened. This is a regular PE class teaching

1 a course that's been approved at every level. It wasn't
2 something invented at Woodbury, it wasn't something that was
3 only done at Woodbury, it's done district wide. And Mr.
4 Murphy told you and Mr. Petersen told you, there's no middle
5 school that anybody knows of that provides safety equipment
6 for this type of activity. There's no evidence that the
7 number of students on the course increased the risk of
8 anything. He wasn't run over by a bunch of -- a stampede of
9 kids. There weren't 10 hockey sticks -- nine hockey sticks
10 coming at him at once. This was one instance that happened in
11 a blink of an eye where he and another student went for the
12 ball and the other student accidentally raised his stick and
13 hit him.

14 Now did we know that this could happen? Of course.
15 Everybody -- that's what -- what an inherent risk is.
16 Everybody knows it can happen. But was it unreasonable -- did
17 we act unreasonably in light of that knowledge? I mean we
18 could buy very large rolls of bubble wrap and wrap all the
19 students in them and make sure that they could never come in
20 contact with another student. They couldn't play any sports.
21 I mean there's no sport they could play unless there's some
22 sort of bubble wrap bounce competition or something. But
23 that's not our duty, that's not our obligation.

24 Our duty is to try to provide an education to the
25 students. Give them the opportunity to develop their skills.

1 Get them -- give them the opportunity to learn rules and learn
2 that rules have consequences and that's what we tried to do.
3 Plaintiff comes in after the fact, Monday morning
4 quarterbacking, perfect day for that, today's Monday although
5 it's not football season, and says after the fact we think
6 something else could have -- could have been done differently.
7 That is not -- that is not the issue.

8 There's no instruction that says if you find out
9 afterwards that something bad happens, it might happen, that
10 you go back to the beginning and apply that standard. I mean
11 Seattle lost the game last -- the Super Bowl because at the
12 very last second instead of doing what everybody thinks they
13 should have done, they give it to their runner to run it in,
14 they decided an over the middle pass, which not only didn't
15 work -- well, for Seattle fans it wasn't even calculated --
16 reasonably calculated to work but that's where we are now.

17 Plaintiff wants you to Monday morning quarterback.
18 Well, you could have done it differently. You could have
19 maybe rented additional facilities so you could have more kids
20 -- fewer kids per game and you could have hired more people
21 and that way you could have had better -- and you could have
22 done all this and you could have done all that. The burden
23 isn't on us to show that we acted that we -- that we are not
24 negligent. The burden is upon plaintiff to show we were
25 negligent. Plaintiff has done absolutely nothing to show that

1 we did anything but -- but try to teach these kids how to play
2 this -- this sport, this activity.

3 And Mr. Petersen told you this wasn't even the first
4 time through. Now, counsel said -- or excuse me, plaintiff
5 said this was the first time he had -- he had ever played
6 field hockey. But Mr. Petersen said this -- they rotate.
7 That they -- in one semester they'll go through the same thing
8 three times. Now, this is March 12th, it's the end of the
9 school year. This is at least the second time the students
10 are going through this. So they've been through it before,
11 they know what it's about.

12 Counsel brought up some other points that I -- that
13 I consider red herrings. If you believe that they're
14 important issues then you're -- you know, you make your
15 decision based on that. But he raised the issue that we
16 didn't have parents and students sign some sort of waivers
17 before they played. I'm not sure where that's coming from.
18 That's not required, it's never been required, it's not done
19 unless you have an extraordinarily like intramural sports or
20 -- or rock climbing and we do have rock climbing clubs. We
21 have flying club, we have different things like that. We do
22 have them sign those sorts of things but those aren't classes,
23 they're extracurricular activities.

24 Attendance in class is mandatory. I mean attendance
25 at school is mandatory. I mean everybody -- I don't think I

1 need to cite a statute to tell you that, you have to go to
2 school or they come after you or your parent. But attendance
3 in this class is not. Plaintiff himself said that when he was
4 -- he wanted to play, first of, all so he wasn't coerced into
5 playing. But he also said there were a couple of students --
6 he seems to recall a couple of students sitting out and he
7 didn't know why. So plaintiff didn't ask if he could sit out,
8 he didn't ask to sit out, and he didn't express any concern
9 that he might be injured. He wouldn't -- didn't -- he wasn't
10 reluctant at all about playing this game. The notion that we
11 forced him somehow and he had -- you know, he was our prisoner
12 is, you know, it's just not supported by the evidence.

13 The issue in this case is -- as I said, is simply
14 did we do something wrong? Did we do something to increase
15 the risk? What did we do? What did we do to increase the
16 risk? Counsel suggested that we had too many people on the
17 floor but he hasn't even established that the rules that he's
18 going from were the rules that were being followed at the time
19 of the injury. The rules that he got from the Woodbury
20 teacher after the accident, several months after the accident
21 that the risk management department got, they're not the same
22 ones Mr. Petersen had. He said they were similar but they
23 didn't take him through line by line and say, did you do this,
24 did you do that.

25 The only significant difference from those written

1 rules is that the game ordinarily is played with five or six
2 on each side and Mr. Petersen told you that's not the way they
3 played it when he was there. That's not the way they played
4 it at any time when he was teaching. So for his six or seven
5 years or whatever it was before this incident that they'd been
6 teaching this class, they hadn't been teaching it five or six
7 at a time. And counsel hasn't suggested that there was any
8 requirement. That -- that's a rule, when you generally have a
9 game that's played but there's nothing in there that says this
10 is a legal requirement and if you break this you're
11 endangering the children. That -- yeah, that's -- that's
12 plaintiff's argument, that's not fact.

13 Every time counsel would say, oh, well so-and-so
14 doesn't remember something and/or plaintiff would answer a
15 question and say I don't remember or anyone would say I don't
16 remember, it's another issue. It's an issue aside from the --
17 from the -- the only real issue in this case and that's the
18 timing issue.

19 Okay. What happened? May 12th, 2004, plaintiff was
20 injured. Seven months later plaintiff contacts, through his
21 attorney, contacts the district and says I think you're at
22 fault. Up until that time there's no reason to do anything
23 because all that happened was somebody got hurt in PE class.
24 There's no suggestion anywhere in those documents that we did
25 anything wrong. There's nothing in there that indicates that

1 the teacher wasn't present, that he wasn't paying attention or
2 that he could have done anything to stop him. There's not
3 much information at all on those two forms; the student
4 accident injury form or the student health log, but -- that
5 deal with that, but that's the point. There was no red flag.

6 Ms. Wheelan said that the risk management department
7 would have seen the student accident injury report but there
8 was nothing there that would indicate, wow, we've got to jump
9 on this and investigate this. We've got to do a CSI type
10 investigation right now. So seven months later plaintiff puts
11 us on notice that there's a potential claim.

12 Now, why does that matter? Well, Todd Peterson's
13 gone, we can't ask him. He's the one witness that had we had
14 access to him could have made a difference in this case early
15 on. Either way, if he had come in and said, yeah, we were
16 supposed to have five or six on a team and we didn't, that
17 would have changed our thinking. I mean it would have changed
18 anybody's thinking. If he said that, yeah, we were supposed
19 to provide safety equipment, would that have changed our --
20 our thinking earlier on? Yeah. There's several things he
21 could have said that would have changed the district's view on
22 it. He was gone already.

23 Now, he's not gone because of plaintiff's fault. I
24 mean the plaintiff didn't cause him to leave but plaintiff
25 tried -- comes in and notifies us at a time when it's very

1 difficult for us to complete an investigation. Mr. Murphy had
2 moved to another school. Mr. Murphy at that time didn't
3 remember anything other than he had signed something. So he
4 wouldn't -- he wasn't much help. Wally Morton was here and
5 she gave a statement. She first of all filled out the -- the
6 health -- health log and she filled out a big portion of the
7 student accident injury report, but she also prepared another
8 statement, you know, sometime in early 2005 at the request of
9 risk management. And her statement it's pretty consistent.
10 He came in, he had an injury to the side of his face, she
11 examined him, she cleaned the wound, she put a compress on it
12 and she called mom.

13 Now, she explained why -- what's the protocol?
14 Well, an awful lot of kids come into the office and all they
15 need is a Band-Aid or -- or something simple and they can go
16 back to class and that's on that form. It says disposition,
17 it's got BTC for back to class, it's got home and it's got
18 other, which would be used if -- if an ambulance or something
19 came. And in this case he was sent home.

20 Waleska called Mrs. Ruiz shortly after the -- after
21 -- after the student arrived at the office and she told him
22 he's been hit, you need to come and get him and check -- get
23 checked out. Now there was a lot of testimony about oh, no,
24 she never said that, she never said that. There's no reason
25 for her to call her. There's no reason in the world for her

1 to call the mom if it isn't to come and deal with this
2 situation. She testified that if -- they don't call mom every
3 time somebody gets a scrape or -- or runs into a locker or
4 something like that, they call when it's important and they
5 need treatment. And why did they do that? Wally is a first
6 aid safety assistant, she's got first aid training in CPR,
7 that's it. She's not a doctor, she can't give medical advice.
8 She -- her job is to treat the wounds she can and call for
9 help when she can't. She calls mom or she calls the
10 administration in and somebody will call an ambulance.

11 Now, counsel has suggested that well, you know, all
12 she knows is first aid. That's all she's required to know
13 because she doesn't have to make a lot of decisions. She's
14 not a diagnostician, she's not a doctor, she's not a
15 registered nurse, she's a first aid safety assistant. Her job
16 is to decide who can best handle this. And in this case she
17 knew that she couldn't handle this so she called mom. And mom
18 -- she thinks mom came and they claim that grandma came but
19 she doesn't even recognize mom so she doesn't -- honestly
20 don't know if she -- who's who at that time. She knows she
21 called and talked to mom and that somebody came and got him.
22 And that wasn't long after. The injury happened, according to
23 the records at 9:40, Makani was in the nurse's office at 9:45
24 and by what was it, 11:40, he's out the door.

25 Counsel has suggested that we have somehow increased

1 Makani's damages because we didn't call an ambulance
2 immediately. Where is that evidence? We had her -- we had
3 Makani from the time of his injury until the time that he left
4 for slightly less -- let's see, less than two hours. Called
5 mom, said come and get him, Makani said that. Makani said --
6 initially said no, I overheard her say there was nothing and
7 don't come and get him. But then we showed you based upon his
8 other -- his other discovery responses that he said the nurse
9 didn't treat me at all, which we know isn't true because he
10 changed the story. And he also said all she did was call mom
11 and tell her to come get me. Now that -- that -- it's hard to
12 reconcile his two versions of that -- that -- that event. Mom
13 claims that she never said -- she said she'd call back if it
14 was serious enough but either way, Makani was picked up at 11
15 -- 11 something and they took him home.

16 Now let's take a look at what the significance of
17 that is. So Makani's on the field and gets injured, he's
18 holding his hand over his eye. Mr. Petersen says, what
19 happened, you got hit with a hockey stick, go to the nurse.
20 He's not having -- he's not staggering or -- or dizzy or not
21 -- he's not experiencing -- showing any symptoms at all that
22 he's unsteady on his feet or that he can't walk to the -- to
23 the nurse's office. So all he knows he got hit in the face,
24 that's enough for me, go to the nurse's office. Now he goes
25 to the nurse's office.

1 Wally talks to him and -- and takes a look at him.
2 He's not unsteady on his feet, he doesn't -- he isn't
3 vomiting, he isn't having difficulty standing, he isn't
4 carried into the room, which is basically what plaintiff has
5 tried to suggest that this other student had to put his arm
6 around him and help him walk into the office. That -- you
7 know, if that happened it stopped long before they got to the
8 office. And Wally examined him. She got -- she got
9 nose-to-nose to him, she looked at his face, looked at his
10 eye, cleaned -- cleansed the wound. You can't do that without
11 being face-to-face. So she saw what she saw.

12 And based upon -- and she said there was no apparent
13 injury to the eyeball itself but there was cuts on I think his
14 eyelids and a mark on the side of his face and swelling,
15 discoloration. She called mom to come get him, he needs to be
16 evaluated. So based upon what Mr. Petersen saw at the time,
17 he did the right thing. Based upon what she saw at the time,
18 she did the right thing. If mom had said I'm not coming, she
19 then would have had to make a decision as to what to do about
20 it. Do we now call paramedics? Do we now -- never got to
21 that point. She can't be faulted for not doing that because
22 they came right -- within reasonable dispatch and picked him
23 up.

24 It turns out after the fact, the injury is very
25 serious. We don't contest that. We have not contested that

1 from the beginning. And that he's had I think at least three
2 surgeries and that the medical expenses and the costs are --
3 are phenomenal. And had -- and it's had a permanent effect on
4 him. We don't contest any of that. The issue is what --
5 based upon the information we had at the time, did we act
6 appropriately. So based upon the information that Todd
7 Petersen had at the time, he acted appropriately. He talked
8 about his criteria, you know, if they were able to walk, you
9 know, didn't see anything wrong with that to send them to the
10 office if they were hurt or in particular if they had been
11 knocked unconscious would have immediately called for help.

12 But nobody said he had been knocked unconscious.
13 His -- his statement by the way wasn't that he didn't see it
14 happen, his statement was he couldn't recall after all this
15 time whether or not he saw it happen or if he only saw it
16 after the fact. But he didn't see him lying on the ground, he
17 didn't see him knocked unconscious for 10 minutes. You know,
18 counsel kind of glossed over that a little bit. Mr. Payo said
19 -- stood on that -- sat on that stand and told you in
20 considerable detail that he was knocked unconscious for 10 --
21 10 minutes or so and he wakes up and sees these feet around
22 him and I mean he went into considerable detail. And you will
23 recall that when he said that, you know, you may have seen --
24 if you were watching us at all you would have seen the shocked
25 expression on my face, Mr. Kurth's face, everybody's face. I

1 tried to convince him that maybe he was wrong, that maybe it
2 was only a few seconds. No, he stood by his story until we
3 came back.

4 Next day we went and visited that issue again and
5 now suddenly he remembers it's 10 or 15 seconds. The only
6 problem is in his deposition he said it was one second. In
7 his deposition he didn't say anything about falling to the
8 ground. In the nurse's office he didn't say anything about
9 falling to the ground. In the -- to the teacher he never said
10 anything about falling to the ground. That -- the first time
11 we heard that was in trial in front of you; he was knocked
12 unconscious for a significant period of time. Whether it's 10
13 seconds or 10 minutes, that's a significant period of time and
14 that's the first time we've heard that story.

15 So the issue of credibility comes up. Credibility
16 goes back to what I was saying about time. He's injured, he
17 waits seven minutes -- months to make a claim. Then he waits
18 over a year to actually file a formal claim. And maybe he was
19 waiting to see how his injuries turn out, you know. Maybe he
20 had a reason for waiting that long. But shortly after that he
21 stops -- his attorney, who he had shortly after the accident,
22 stops communicating with the district. The district keeps
23 sending letters, what's going on? Tell us -- tell us, you
24 know, about your injuries. Tell us, you know -- we have to
25 have some idea -- some basis not only for liability but for

1 damages because that's what an adjuster does, they gather that
2 information, they make a decision. Absolute silence from 2007
3 I think it was until they filed a complaint in 2013 I think it
4 was.

5 What do you expect is going to happen after that
6 length of time? [indiscernible] remember anything. Records
7 -- I'm amazed that we still had this -- these records after
8 all that time. I mean risk management didn't even get enough
9 information to make a determination of whether we owed money
10 or not. They conducted the investigation they needed to do to
11 get started and then tell us more, tell us more, tell us why
12 we owe you money and how much. Nothing. Two days before
13 Makani turns age 20, which would be the statute of
14 limitations, the two-year statute limitation runs from when
15 you turn an adult, for a minor when you turn 18 you've got two
16 years from that day. So two years before he turns 20 the
17 lawsuit is filed.

18 And now we've got to start from scratch except for
19 the two documents that we had and the great fortune that we
20 had that Wally still works for us. That Eileen Wheelan who
21 could at least tell us how the claim was handled was still
22 with us and that we eventually tracked down Todd Petersen. We
23 would all be standing -- standing here guessing who did what
24 and what happened. This is an issue because it affects
25 plaintiff's credibility. When plaintiff says I don't remember

1 something he had a duty to remember it. He knew he was going
2 to make a claim, he knew he had made a claim, he knew he was
3 going to come back. We didn't know. Our risk management
4 department, I believe she said closed the file after a couple
5 years because we had nothing -- no new news.

6 So when we -- we're starting from scratch when we
7 start this lawsuit and we conduct discovery. We ask them to
8 produce documents, they ask us to produce documents and take
9 depositions, they take depositions. We asked them to produce
10 everything they've got that in any way references or describes
11 the accident. We get to trial almost before we find out, oh,
12 yeah, plaintiff has one more record. We took his deposition
13 on January 22nd of this year and for the first time we find
14 out that shortly after the accident, while he's still in the
15 hospital, while everything's fresh in his mind, Makani wrote
16 down a record on the back of an old menu of what happened so
17 that he'd have a record of what happened at the time. But he
18 never gives that to us until the second day at trial we never
19 saw that document. Well after we saw it the first day at
20 trial because plaintiff's counsel was waiving it around but he
21 didn't have copies. But we didn't get a chance to even look
22 at that document.

23 Now the Court has instructed you that if somebody's
24 got a record that should have been produced and it wasn't and
25 plaintiff had that record and it contains information that

1 could have changed the outcome of the case or at least the
2 outcome of how we handled it, who knows which way it would
3 have gone, and don't produce it, you're entitled to infer that
4 if the information on that document would be adverse to
5 plaintiff's position if it had been produced. We're talking
6 about credibility again. We're talking about someone who
7 confuses 10 minutes with 10 seconds with one second. We're
8 talking about somebody who has a document and never gives it
9 to us, presumably because it has something on there that they
10 don't want us to see. We're talking about someone who
11 conveniently doesn't remember details when it suits him but
12 then remembers exacting detail about things when it does suit
13 him.

14 I'm not -- it's difficult to talk about credibility
15 because you think we're calling someone a liar and that's not
16 really what we're doing. What we're saying is his testimony
17 on many of the key points in this case are unreliable. And
18 they're unreliable because of this many year delay that it
19 took to get this case to trial. Plaintiff had it in his
20 control the entire time as to when this case was brought to
21 trial.

22 Plaintiff elected to wait -- any evidence has
23 disappeared or that's equivocal or -- or -- Mr. Petersen
24 saying that probably I would have noticed if he was down 10,
25 15 seconds. If we had talked to him -- been able to talk to

1 him at the time and if a lawsuit was filed we would have
2 tracked him down, we wouldn't be saying probably. We'd be
3 saying I saw it or I didn't see it because he doesn't even
4 remember if he saw it. He said he might have seen it but he
5 just didn't remember. So if he had seen it he could give us a
6 lot more detail. We can't -- don't have that detail because
7 of the delay.

8 So whatever you may think about the merits of the
9 case itself, if you look at the evidence that's been produced,
10 when you see that there's places where there should be
11 evidence and there aren't, you've got to look plaintiff and
12 say, why? Why are we in this position and not have any
13 evidence we need to decide this case.

14 The -- one of the key things that you may have
15 picked up on in this case, is that Makani himself testified in
16 his deposition under oath that he didn't think Mr. Petersen
17 did anything wrong. He didn't think he did anything to cause
18 the accident or his injuries. He testified to that under
19 oath. And that they're basing their claim on what Mr.
20 Petersen did or didn't do. He didn't testify as to -- that he
21 didn't think Mr. Petersen didn't do anything wrong when he
22 was 11 years old, he testified that -- to that in January this
23 year when he's 21 or 22 years old. So what is the evidence
24 that shows that Mr. Petersen did anything wrong?

25 I think that speculation is offered by the plaintiff

1 speculating that he could have done something different. That
2 he -- he could have -- I don't even know what it is that he's
3 supposed to have done that he didn't already do. He's
4 supposed to have supervised better somehow. And yet,
5 plaintiff himself doesn't think he did anything wrong.

6 One of the other things that the Judge instructed
7 you is that you're not to be -- be influenced by sympathy.
8 The first day or two of trial we must have heard single mother
9 10 or 15 times. Why is that important in this case? To try
10 to get sympathy. The mother is not a party in this case. The
11 mother is not entitled to recover any damages in this case.
12 Makani is not entitled to recover additional damages because
13 his mom may or may not have been -- may not have suffered
14 financial hardship or may -- may or may not have had to go out
15 of her way to take care of Makani. She was required to do
16 that as her mother -- as his mother anyway.

17 I mean all parents have a duty to take care of their
18 kids. It doesn't matter how or why they arrive at a certain
19 situation. If they're born with a debilitating condition or
20 if they suffer an accident, mom has the same duty. And
21 there's no testimony that she did anything that any other mom
22 wouldn't have done under the circumstances. So we -- mom is
23 not a party and you can't award plaintiff any damages for
24 anything that was allegedly caused to Makani's mother.

25 I -- I think if I keep talking I'm just going to be

1 beating a dead horse. This is a simple case. And you'll
2 either agree with me or you won't. You'll either decide that
3 the district's bad act or we should have done more, we had a
4 duty and we breached it and you're going to award plaintiff
5 money. Or you're going to use the common sense that the Judge
6 said you should bring to this case. This was a low-risk
7 activity. There was no reason to anticipate that this -- this
8 would happen. We knew it could happen but there -- reasonable
9 conduct under the circumstances wasn't to deprive the students
10 of this learning opportunity, this opportunity to -- to
11 develop their skills and -- and knowledge and experience the
12 -- the thrill of competition and -- and the comradery and all
13 of that stuff.

14 A reasonable person under the same or similar
15 circumstances would have said, hey, this is a great
16 opportunity for these kids, let's let them do it. And that's
17 what our duty is, to -- to exercise reasonable care under the
18 circumstances. Not extraordinary care, not go out and spend a
19 million dollars to make sure that the -- that we're using --
20 you know, floor hockey ball instead of a tennis ball. I mean
21 Mr. Petersen -- I think that's kind of a fun distinction
22 because he wasn't hurt by a ball. Mr. Petersen said they used
23 a floor hockey ball, he was there. Mr. Murphy said he thought
24 it was a tennis ball but he never said he went up and examined
25 it. And it just doesn't matter, he wasn't hit by a ball.

1 There's just an awful lot of clutter around this
2 case. And the simple fact is the district did not do anything
3 to increase the risk of harm to Makani or to cause any harm to
4 Makani. This is something that could happen. It's a risk
5 inherent in the -- in the activity. And if you find that we
6 acted reasonably under the circumstances, then the only thing
7 that you have to do is take -- there's a one-page simple form
8 and it says verdict for the defendant, it says we find in
9 favor of the defendant against the plaintiff, you sign that
10 and you're done. And that's what I would respectfully request
11 that you do in this case under these circumstances.

12 Thank you very much. Your Honor.

13 THE COURT: Mr. Kurth, we need to break at five to
14 five.

15 MR. KURTH: Okay, Judge. I'll be done.

16 PLAINTIFF'S REBUTTAL CLOSING ARGUMENT

17 MR. KURTH: You know, we hear -- we hear a lot of --
18 can you hear me okay? We hear a lot of speculation and
19 conjecture really. You know, we're talking about these red --
20 red herrings and things like that and, you know, we're talking
21 about credibility. Well, let me tell you about -- about this
22 case, which is what I asked you in the beginning about the
23 length of the time on this case.

24 Now this case, as Mr. O'Brien said, was filed within
25 the statute of limitations, otherwise we wouldn't be here,

1 would have been filed too late. When a minor, until they
2 reach the age of majority, then the statute of limitations
3 runs. You know, is that good or bad? Well, in this case it
4 has its -- it has its difficulties. But in most cases if
5 somebody's filing within two years or three years or four
6 years, whatever, usually get it filed within two years of your
7 accident, the incident.

8 Well, and you know some things but in this case we
9 know a lot more. We know a lot more about the damages that he
10 suffered and will continue to suffer because we know even now
11 what he has 11 years after the incident occurred, that he has
12 this membrane that's formed on his eye and he's going to have
13 to have this other surgery to fix it and install a new crystal
14 lens. Where you might not know that for sure if we were
15 arguing that back then.

16 We also know that -- you heard Ms. Wheelan testify,
17 a very nice lady, you know, I mean a nice person. And she
18 said they get these student injury accident reports but, you
19 know, we don't really do anything with them, there's so many.
20 Is that okay with the school district because they get so many
21 they're just going to worry about who's pressing the hardest,
22 you know? The squeaky wheel gets the grease? And they're
23 saying well, Mr. Kurth and his client, Makani, weren't squeaky
24 enough so we didn't look for any grease. But when we get to
25 December 15th, 2004 -- oh, seven months later, that's so long.

1 Well, we had no notice that Makani was ever knocked out.
2 Really? Even in the letter that says, Exhibit 29, Makani
3 passed out for approximately 10 seconds and was taken to the
4 nurse's office at approximately -- and it's talking about 9:45
5 a.m. Really, they didn't know this? They didn't know
6 anything about what he was suffering? They didn't have the
7 doctor's name that he had already treated with?

8 Then Ms. Wheelan goes on to do her investigation.
9 Now, I don't know why this case -- you know, if you -- if you
10 found something -- I don't think there's necessarily -- I
11 don't think there's a conspiracy but it's just kind of
12 strange, it just happened. It's just the unfortunate
13 circumstances. Mr. Petersen decides well, I've been done
14 teaching seven classes a day PE for so many years dealing with
15 this 40 to 50 students, I'm done. So he's done in October.
16 Who would have known? The principal leaves, what I think in
17 January of 2005 is what I think he said and then these rules
18 come over in February 2005. When Ms. Wheelan does her
19 investigation he leaves. The FASA ends up going to Chaparral
20 High School, I think it was Chaparral High School.

21 All this happens? They were advised of the accident
22 and the incident when it occurred. The student injury report
23 was done. Makani's treating, his mother's taking him back and
24 forth by now. What's going on? How bad is this? Back and
25 forth and back and forth and back and forth, finally gather

1 some information and send it to the school district and what
2 do they say? We're not going to really take any action on
3 this until you fill out our form number whatever it is. But
4 they did take action, which was good because I think the
5 testimony normally was well we don't do anything until we get
6 that student injury accident report form.

7 So that one was requested and then the testimony was
8 that Ms. Wheelan received that or was told that Ms. Payo was
9 going to come into my office and sign the form and then we'd
10 get it to her. So then they got the form in like December of
11 '05. But she started her investigation when she got the
12 letter in December of '04. She looked up rules. She
13 requested from Woodbury, give me your rules, what do you have?
14 What's going on here? Is it Makani's fault that the principal
15 changed, the PE teacher left and the FASA went to another
16 school? At this time, even in December of 2004, could the
17 school district have looked up a list of the kids that were in
18 the class at that time on that day? I would suggest they
19 could look that up.

20 Could they have investigated and tried to find this
21 Brandon Higgins and anyone else about it and who saw what,
22 when, where, why and how and when? Sure. Did they? No. Did
23 she even call Mr. Petersen and try to find him? No. Found
24 him later. She was satisfied with those rules that they got.
25 Oh, well, if we knew all this we wouldn't even be here today,

1 we wouldn't be wasting everybody's time. Well, if this would
2 have been handled earlier on and we would have had all this
3 medical substantiation.

4 We're here because they dispute that they did
5 anything wrong and we say they did do something wrong. They
6 created this activity. Do they have to play floor hockey?
7 Could they have played basketball? Basketball says what, five
8 on a side? Is it okay if we're playing 10 on a side and
9 somebody gets hurt because it's basketball? But we -- we need
10 to get everybody to participate. Are we going to change the
11 meanings of the game? I mean, what are we doing here? What
12 do we have, we have the rules. What do the rules say? One
13 says, the Woodbury rules say six on a side.

14 What is the testimony? The littlest would be eight
15 on a side but it's like 10 to 12 in interrogatories and he
16 divides the class up by four. That's how he did it. That's
17 what he said. Didn't waiver from that. And what do they say?
18 Well, somebody's going to get hurt because of hockey sticks.
19 Well, it's not our fault. Well, don't play the game. Why
20 make these kids -- why make these kids play this activity?
21 Because somebody really liked it? Because somebody enjoyed
22 it? Because somebody was a hockey enthusiast? And, you know,
23 nothing against hockey, I don't have anything against it but
24 so we're going to play this game. Well, then follow the
25 rules. Aren't you a PE teacher?

1 Does Makani's parent have the -- the right as a
2 parent to think her child's going to be safe when they go to
3 school? And that question was asked in the beginning on voir
4 dire. Do you have a reason to feel that your child should be
5 safe at school? Yes. Did she have any reason to think her
6 kid's going to be playing some activity that's supposed to be
7 five or six on a side with 10 or 12? Would that cause a
8 parent more concern if they knew that?

9 Well, they're saying, well, it's okay because it
10 doesn't usually happen. And let's talk about red herrings and
11 the Seattle Seahawks, you know. And if you're a football fan,
12 did Seattle lose because of one decision? No, there's a lot
13 of decisions made during that entire game, you know? And then
14 somebody blames it on one decision in the end. Does -- is the
15 NFL are there -- you know, people saying well, we all had
16 helmets but now we think the concussion rules are wrong so --
17 so we think -- you know, we want recovery because, man, we
18 were subjected to this activity even though we were wearing
19 safety equipment but they knew that we shouldn't have been
20 playing again so fast if we had a concussion.

21 The school district has a general duty to exercise
22 reasonable care. They increase the risk of harm by putting
23 them into this activity, by agreeing to have the activity,
24 using a tennis ball that bounces that another kid's going to
25 reach up to try to hit. That's what they're trying to do, hit

1 the ball with the stick. Are they going to wait until it hits
2 the ground or are they all going to be rushing toward that
3 ball to get it? Or if it's flying up in the air -- I mean a
4 tennis ball, it bounces.

5 The -- and the investigation, we went through that
6 investigation. That -- what investigation? Oh, well, it's
7 your burden, plaintiff. Yes, it is our burden. What
8 investigation? Here school district, give us all this
9 information about everything while this is what we did on our
10 investigation. What investigation? Not much. Could the 11
11 year old, you know, appreciate that risk? Can't they rely on
12 the PE teacher to properly teach a game? I mean if I was --
13 you know, we're all taking everybody on a horseback riding
14 trip and I said well, everybody rode horseback for years, you
15 don't need a saddle, you don't have to have stirrups. I know
16 this trail's usually good but now there's some overgrowth on
17 the trail or maybe there's something that -- that jumps out or
18 another horse reacts and you don't have as much to hold onto
19 because you're not on the saddle, but everybody's rode
20 bareback for years and nobody's fallen off. Nobody's gotten
21 hurt, but it's okay.

22 You know, Abraham Lincoln said something and he said
23 give me six hours to chop down a tree and I'll spend the first
24 four sharpening the axe. Some people might just go to chop
25 down the tree. Give me that axe or give me some other

1 implement and I'm going to try and chop down this tree where
2 other people could say, you know, maybe I should have a sharp
3 instrument. Maybe I should have the right instrument.

4 In this, Makani wasn't given the chance, the
5 opportunity to be successful and to fully have the opportunity
6 to not have the risk of injury put upon him. Who placed him
7 in this harm, himself? His mother? The school district
8 placed him in that harm and I just -- the damages, they're in
9 your -- your exhibit books --

10 THE COURT: Is the last --

11 MR. KURTH: Yes, it is, Judge. I just want to show
12 -- I won't even go over the damage instruction. These are the
13 damages, they're in the exhibit book. The damages
14 instructions -- you know, first we think -- we think there's
15 enough here, we think we met the more probable than not.
16 Preponderance of the evidence standard, that's for you to
17 decide. If you decide that way, and I think you -- you should
18 decide that way, that we're asking for damages. We're asking
19 for damages to Makani for what he has to undergo. He's going
20 to have increased medical expenses.

21 He's got to deal with this the rest of his life. Is
22 that worth what, \$10 -- is it worth \$10 a day to know that you
23 have this eye injury and you're going to have to live with it?
24 What's -- what's \$10 a day? You know, even if that's \$300 a
25 month, is that \$3,600 a year. I mean three -- what is it,

1 \$36,000 every 10 years? If he was around until he was 61,
2 another 50 years or 71 another 60 years. I mean \$10 a day, is
3 it worth more than that? Is it worth \$100 a day? What would
4 it be worth to somebody to know they're going to lose that
5 vision in their eye and have to undergo everything he already
6 went through. And they knew they were going to go through it.
7 What price would compensate somebody for that? Okay.

8 And I ask you to think about that and I thank you
9 very much for your time and your patience in this matter and I
10 appreciate your service.

11 MR. O'BRIEN: Your Honor, may we have a sidebar
12 outside the presence of the jury?

13 THE COURT: Quickly?

14 MR. O'BRIEN: Yes, Your Honor.

15 (Off-record bench conference.)

16 THE COURT: Let's submit to the jury.

17 Madam clerk, if you can swear the jurors.

18 (Jury panel sworn.)

19 THE COURT: Okay. Ladies and gentlemen of the jury,
20 the alternate jurors are jurors number nine and 10. If the
21 two of you will go with Amanda back there, she's our judicial
22 executive assistant, she'll take care of you. The remainder
23 of you normally right now would go back to the jury room,
24 however, we do need to break for the day. But tomorrow you
25 can go straight to the jury room and wait for instructions

1 from the Marshal. He will bring into the jury room the
2 exhibits that were admitted with the -- with the jury
3 instructions and the jury verdict form. We will meet back
4 tomorrow at 10:30 because I have -- I have hearings in the
5 morning. So be back here at 10:30.

6 THE MARSHAL: Actually, they'll be back at nine a.m.

7 THE COURT: Oh, yeah.

8 THE MARSHAL: I can put them in the deliberation
9 room while we're doing morning calendar and they can get to
10 work on what they need to do.

11 THE COURT: Thank you. If at all possible, I would
12 say nine a.m. but if it does -- if -- if nine does not work
13 for any of you -- okay. It doesn't -- it looks like you're
14 not the only one. So does 10:30 work for everyone? Okay. So
15 be back here at 10:30 then. You're welcome to come earlier
16 and hang out I guess but.

17 During this recess you're admonished not to talk or
18 converse amongst yourselves or with anyone else on any subject
19 connected with this trial or read, watch or listen to any
20 report of or commentary on the trial or any person connected
21 with this trial by any medium of information including,
22 without limitation, newspapers, television, radio or Internet
23 or form or express any opinion on any subject connected with
24 the trial until the case is finally submitted to you, which it
25 has been.

1 Remember the instructions already given about your
2 deliberations. And again, you will have -- you will have a
3 written copy of those instructions for you tomorrow in the
4 jury room. So thank you.

5 (Jury recessed at 5:04 p.m.)

6 THE COURT: Tomorrow we can go over on the record if
7 you would like the discussion we had at sidebar. Thank you.

8 MR. KURTH: Thank you, Judge.

9 (Court recessed for the evening at 5:05 p.m.)
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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**KARR REPORTING, INC.
Aurora, Colorado**


KIMBERLY LAWSON

② The Hon. of 2:50 PM
FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUN - 2 2015

BY Jennifer Kimmel
JENNIFER KIMMEL DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

MAKANI KAIPAYO,

Plaintiff,

vs.

CLARK COUNTY SCHOOL DISTRICT,

Defendant.

Case No. A-12-668833-C
Dept. XV

**JURY INSTRUCTIONS
(APPROVED & CITED)**

INSTRUCTION NO. 1

LADIES AND GENTLEMEN OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the court.

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

The purpose of the trial is to ascertain the truth.

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INSTRUCTION NO. 4

You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works for additional information.

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3 Although you are to consider only the evidence in the case in reaching a
4 verdict, you must bring to the consideration of the evidence your everyday common
5 sense and judgment as reasonable men and women. Thus, you are not limited solely
6 to what you see and hear as the witnesses testify. You may draw reasonable
7 inferences from the evidence which you feel are justified in the light of common
8 experience, keeping in mind that such inferences should not be based on speculation
9 or guess.
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12 A verdict may never be influenced by sympathy, prejudice or public opinion.
13 Your decision should be the product of sincere judgment and sound discretion in
14 accordance with these rules of law.
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2 The evidence which you are to consider in this case consists of the testimony of the
3 witnesses, the exhibits, and any facts admitted or agreed to by counsel.

4 There are two kinds of evidence; direct and circumstantial. Direct evidence is direct
5 proof of a fact, such as testimony of an eyewitness about what the witness personally saw
6 or heard or did. Circumstantial evidence is the proof of one or more facts from which you
7 could find another fact. The law makes no distinction between the weight to be given
8 either direct or circumstantial evidence. Therefore, all of the evidence in the case,
9 including circumstantial evidence, should be considered by you in arriving at your verdict.
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12 Statements, arguments and opinions of counsel are not evidence in the case.
13 However, if the attorneys stipulate as to the existence of a fact, you must accept the
14 stipulation as evidence and regard that fact as proved.
15

16 You must not speculate to be true any insinuations suggested by a question asked a
17 witness. A question is not evidence and may be considered only as it supplies meaning to
18 the answer.

19 You must disregard any evidence to which an objection was sustained by the court
20 and any evidence ordered stricken by the court.
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22 Anything you may have seen or heard outside the courtroom is not evidence and
23 must also be disregarded.
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5 One of the parties in this case is a governmental entity.
6 Do not discriminate between a governmental entity and a natural
7 individual. A governmental entity is entitled to the same fair
8 and unprejudiced treatment as an individual would be under like
9 circumstances, and you should decide the case with the same
10 impartiality you would use in deciding a case between
11 individuals.
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INSTRUCTION NO. 8

You are not to discuss or even consider whether or not the plaintiff was carrying insurance to cover medical bills, loss of earning or any other damages he claims to have sustained.

You are not to discuss or even consider whether or not the defendant was carrying insurance that would reimburse them for whatever sum of money they may be called upon to pay to the plaintiff.

Whether or not a party was insured is immaterial, and should make no difference in any verdict you may render in this case.

INSTRUCTION NO. 9

If, during this trial, I have said or done anything which has suggested to you that I am inclined to favor the claims or position of any party, you will not be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inference should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

INSTRUCTION NO. 10

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Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in court.

INSTRUCTION NO. 11

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3 During the course of the trial you have heard reference made to the word
4 "interrogatory." An interrogatory is a written question asked by one party to
5 another, who must answer it under oath in writing. You are to consider
6 interrogatories and the answers thereto the same as if the questions had been asked
7 and answered here in court.
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5 In this case, as permitted by law, both parties served ^{on}~~per~~
6 each other written requests for the admission of the truth of
7 certain matters of fact. You will regard as being conclusively
8 proved all such matters of fact which were expressly admitted by
9 the parties or which the parties failed to deny.
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In this case, Plaintiff has testified in a deposition taken before trial that he created a contemporaneous record of events, including what happened and that he provided the same to his attorney.

Although obligated to produce such, Plaintiff has not done so. Accordingly, you may infer from the fact that such evidence is in the possession or under the control of the plaintiff that the record is adverse to plaintiff. You are not bound by this inference, however, if you find that Plaintiff's claims are supported by other competent evidence in the record.

INSTRUCTION NO. 14

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If counsel for the parties have stipulated to any fact, you will regard that fact as being conclusively proved as to the party or parties making the stipulation.

INSTRUCTION NO. 15

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3 The credibility or believability of a witness should be determined by his or
4 her manner upon the stand, his or her relationship to the parties, his or her fears,
5 motives, interests or feelings, his or her opportunity to have observed the matter to
6 which he or she testified, the reasonableness of his or her statements and the
7 strength or weakness of his or her recollections.
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9 If you believe that a witness has lied about any material fact in the case, you
10 may disregard the entire testimony of that witness or any portion of this testimony
11 which is not proved by other evidence.
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INSTRUCTION NO. 16

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3 Discrepancies in a witness's testimony or between his or her testimony and that
4 of others, if there were any discrepancies, do not necessarily mean that the witness
5 should be discredited. Failure of recollection is a common experience, and innocent
6 misrecollection is not uncommon. It is a fact, also, that two persons witnessing an
7 incident or transaction often will see or hear it differently. Whether a discrepancy
8 pertains to a fact of importance or only to a trivial detail should be considered in
9 weighing its significance.
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INSTRUCTION NO. 17

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3 An attorney has a right to interview a witness for the purpose of learning what
4 testimony the witness will give. The fact that the witness has talked to an attorney
5 and told him what he or she would testify to does not, by itself, reflect adversely
6 on the truth of the testimony of the witness.
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INSTRUCTION NO. 18

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: that unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same to be not true.

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A "preponderance of the evidence" means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your mind a belief that what is sought to be proved is more probably true than not true. In determining whether a party has met this burden, you will consider all the evidence, whether produced by the plaintiff or the defendant.

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3 The preponderance, or weight of evidence, is not necessarily with the greater
4 number of witnesses. The testimony of one witness worthy of belief is sufficient for
5 the proof of any fact and would justify a verdict in accordance with such testimony,
6 even if a number of witnesses have testified to the contrary. If, from the whole case,
7 considering the credibility of witnesses, and after weighing the various factors of
8 evidence, you believe that there is a balance of probability pointing to the accuracy
9 and honesty of the one witness, you should accept his or her testimony.
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INSTRUCTION NO. 21

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In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.

INSTRUCTION NO. 22

The plaintiff seeks to establish a claim of negligence. I will now instruct you
on the law relating to this claim

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INSTRUCTION NO. 23

Defendant, Clark County School District, owed Plaintiff a duty to use reasonable care.

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5 Evidence as to whether or not a person conformed to a custom
6 that has grown up in a given locality or business is relevant and
7 ought to be considered, but is not necessarily controlling on the
8 question of whether or not he exercised ordinary care; for that
9 question must be determined by the standard of care that has been
10 stated to you.
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3 In order to establish a claim of negligence, the Plaintiff must prove the
4 following elements by a preponderance of the evidence:
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- 6 1. That the Defendant was negligent;
- 7 2. That the Plaintiff sustained damages; and
- 8 3. That the Defendant's negligence was a proximate cause of damages
9 sustained by the Plaintiff.

10 The Defendant has the burden of proving, as an affirmative defense:
11

- 12 1. That the Plaintiff was negligent; and
- 13 2. That Plaintiff's negligence was a proximate cause of any damage
14 Plaintiff may have sustained.
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3 When I use the word "negligence" in these instructions, I mean the failure to
4 do something which a reasonably careful person would do, or the doing of
5 something which a reasonably careful person would not do, to avoid injury to
6 themselves or others, under circumstances similar to those shown by the evidence.
7

8 It is the failure to use ordinary or reasonable care.

9 Ordinary or reasonable care is that care which persons of ordinary prudence
10 would use in order to avoid injury to themselves or others under
11 circumstances similar to those shown by the evidence.

12 The law does not say how a reasonably careful person would act under those
13 circumstances. That is for you to decide. You will note that the person whose
14 conduct we set up as a standard is not the extraordinarily cautious individual, nor
15 the exceptionally skillful one, but a person of reasonable and ordinary prudence.
16 While exceptional skill is to be administered and encouraged, the law does not
17 demand it as a general standard of conduct.
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INSTRUCTION NO. 27

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Todd Peterson was an employee of Defendant, Clark County School District and was acting within the course and scope of his employment at the time of the May 12, 2004 incident. If you find that Todd Peterson was negligent, then Defendant, Clark County School District is liable for his conduct.

An employer has a general duty to exercise reasonable care to ensure that an employee is properly trained and supervised in the performance of his position.

INSTRUCTION NO. 29

When I use the expression "proximate cause," I mean that a cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the injury.

A proximate cause of injury, damage, loss or harm is a cause which, in natural and continuous sequence, produces the injury, damage, loss or harm, and without which the injury, damage, loss or harm, would not have occurred.

INSTRUCTION NO. 31

Plaintiff has the right to rely on the recommendations of his healthcare providers when ordinary care has been exercised in selecting a healthcare provider.

The mere fact that there was an accident or other event and someone was injured is not of itself sufficient to predicate liability. Negligence is never presumed but must be established by a preponderance of the evidence.

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5 An injured person cannot recover for damages which could
6 have been avoided by the exercise of reasonable care. The burden
7 is upon the defendant to prove that the plaintiff failed to use
8 reasonable diligence in mitigating his damages.
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3 In determining the amount of losses, if any, suffered by the plaintiff as a
4 proximate result of the incident in question, you will take into consideration the
5 nature, extent and duration of the injuries or damage you believe from the evidence
6 plaintiff has sustained, and you will decide upon a sum of money sufficient to
7 reasonably and fairly compensate plaintiff for the following items:
8

9 The reasonable medical expenses plaintiff has necessarily incurred as a result
10 of the incident and the medical expenses which you believe the plaintiff is
11 reasonably certain to incur in the future as a result of the incident.
12

13 The physical and mental pain, suffering, anguish and disability endured by the
14 plaintiff from the date of the incident to the present; and the physical and mental
15 pain, suffering, anguish, and disability which you believe plaintiff is reasonably
16 certain to experience in the future as a result of the incident.
17

18 The loss of enjoyment of life and compensation for loss of ability to
19 participate and derive pleasure from the normal activities of daily life, or for the
20 Plaintiff's inability to pursue his talents, recreational interests, hobbies, or avocations
21 endured by the plaintiff from the date of the incident to the present and the loss of
22 enjoyment of life and compensation for loss of ability to participate and derive
23 pleasure from the normal activities of daily life, or for the plaintiff's inability to
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1 pursue his talents, recreational interests, hobbies, or avocations which you believe
2 plaintiff is reasonably certain to experience in the future as a result of the incident.
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3 Damages for "pain and suffering" compensate Plaintiff for the physical
4 discomfort and the emotional response to the sensation of pain caused by the injury
5 itself.

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7 On the other hand, damages for "loss of enjoyment of life" compensate for
8 the limitations, resulting from Defendant's negligence, on Plaintiff's ability to
9 participate in and derive pleasure from the normal activities of daily life, or for
10 Plaintiff's inability to pursue his talents, recreational interests, hobbies, or
11 avocations.
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INSTRUCTION NO. 36

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

INSTRUCTION NO. 37

Whether any of these elements of damage have been proven by the evidence is for you to determine. Neither sympathy nor speculation is a proper basis for determining damages. However, absolute certainty as to the damages is not required. It is only required that plaintiff prove each item of damage by a preponderance of the evidence.

INSTRUCTION NO. 38

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3 The court has given you instructions embodying various rules of law to help
4 guide you to a just and lawful verdict. Whether some of these instructions will apply
5 will depend upon what you find to be the facts. The fact that I have instructed you
6 on various subjects in this case must not be taken as indicating an opinion of the
7 court as to what you should find to be the facts or as to which party is entitled to
8 your verdict
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3 It is your duty as jurors to consult with one another and to deliberate with
4 a view toward reaching an agreement, if you can do so without violence to your
5 individual judgment. Each of you must decide the case for yourself, but should do
6 so only after a consideration of the case with your fellow jurors, and you should not
7 hesitate to change an opinion when convinced that it is erroneous. However, you
8 should not be influenced to vote in any way on any question submitted to you by
9 the single fact that a majority of the jurors, or any of them, favor such a decision. In
10 other words, you should not surrender your honest convictions concerning the
11 effect or weight of evidence for the mere purpose of returning a verdict or solely
12 because of the opinion of the other jurors. Whatever your verdict is, it must be the
13 product of a careful and impartial consideration of all the evidence in the case under
14 the rules of law as given you by the court.
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When you retire to consider your verdict, you must select one of your number to act as foreperson, who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

In civil actions, three-fourths of the total number of jurors may find and return a verdict. This is a civil action. As soon as six or more of you have agreed upon the verdict, you must have the verdict signed and dated by your foreperson, and then return with them to this room.

INSTRUCTION NO. 41

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence, as you understand it and remember it to be, and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

GIVEN: 1st day of June, 2015


DISTRICT COURT JUDGE

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5 In a sports setting, Nevada courts provide limitations upon
6 the duty of care owed to a participant. The District cannot be
7 held liable for injuries that are the results of conduct that is
8 inherent in the sports activity being played. In this case,
9 Defendant must prove that the District acted in such a manner as
10 to unreasonably increase the inherent risks associated with the
11 game of field hockey, as played at Woodbury Middle School on May
12 12, 2004. A failure to provide safety equipment does not
13 increase the risks associated with the game of field hockey.

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25 Authority:

26 FCH1, LLC v. Rodriguez, 130 NAO 46 (Oct. 02, 2014); Turner v.
27 Mandalay Sports Entm't, LLC, 124 Nev. 213, 220-221, 180 P.3d 1172
28 (2008); American Golf Corporation v. Becker, 79 Cal.App.4th 30,
38, 93 Cal.Rptr.2d (2000); Knight v. Jewett, 834 P.2d 696, 3
Cal.4th 296 (Cal. 1992).

The defendant seeks to establish that the plaintiff assumed the risk of injury from the danger the plaintiff contends caused his injury.

In order to establish that the plaintiff assumed the risk, the defendant must prove, by a preponderance of the evidence, the following elements:

1. That the plaintiff had actual knowledge of the risk;
2. That he fully appreciated the danger resulting from the risk; and
3. That he voluntarily exposed himself to the danger.

If you find that each of these elements has been proved, then the plaintiff may not recover for his injuries and your verdict should be for the defendant. If, on the other hand, you decide that any of these elements has not been proved, then the defendant has not proved the plaintiff assumed the risk.

Authority:

N.P.J.I. 4.16 (1986); Turner v. Mandalay Sports Entm't., 124 Nev. 213, 221, 180 P.3d 1172 (2008); American Golf Corporation v. Becker, 79 Cal.App.4th 30, 38, 93 Cal.Rptr.2d (2000).

Makani Payo was a minor at the time of the incident in which he was injured. Nevada law provides that the right to recover medical expenses arising out of injuries to a minor belongs exclusively to the parents of the minor. Accordingly, you may not award Plaintiff any sum for past medical expenses incurred before he turned 18 years of age. Makani Payo is, however, entitled to recover medical expenses, if any, incurred for treatment of injuries sustained in the May 12, 2004, accident to the extent such were incurred after he turned 18 years of age, and the medical expenses which you believe he is reasonably certain to incur in the future as a result of the accident.

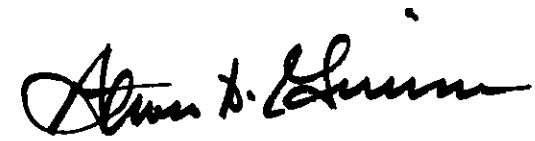
Authority:

McGarvey v. Smith's Food & Drug Centers, Inc., 2011 U.S. Dist. LEXIS 52184 (D.Nev. 2001); Walker v. Burkham, 63 Nev. 75, 83, 165 P.2d 161 (1946); Armstrong v. Onufrock, 75 Nev. 342, 347, 341 P.2d 105 (1959); Walker v. Burkham, 63 Nev. 75, 83, 165 P.2d 161 (1946); Matlock v. Greyhound Lines, 2009 U.S. Dist. LEXIS 19962 (D.Nev. 2009); Hogle v. Hall, 112 Nev. 599, 606, 916 P.2d 814 (1996); N.P.J.I. 10.02 (mod.), (1986).

With respect to a governmental entity such as the Clark County School District, there is a presumption of regularity in the performance of its duty. This presumption is rebuttable. The meaning of this presumption is this: the burden is upon Plaintiff to come forward with substantial evidence which proves that the Clark County violated the law or breached its duty of care towards Plaintiff and that such breach was a proximate cause of Plaintiff's injuries. In the absence of substantial evidence, you must presume that the Clark County School District did not violate the law or breach its duty of care towards Plaintiff.

Authority:

NRS 47.250(9), (16); In re Moore, 65 Nev. 393, 400-401, 197 P.2d 858 (1948); City of Asbury Park v. Asbury Park Towers, 905 A.2d 880, 886 (NJ Sup.Ct. 2006) ["[T]he 'good faith' of public officials is to be presumed; their determinations are not to be approached with a general feeling of suspicion.").



CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

MAKANI PAYO,)	
)	CASE NO. A-12-668833
Plaintiff,)	DEPT NO. XV
vs.)	
)	
CLARK COUNTY SCHOOL DISTRICT,)	
)	
Defendant.)	TRANSCRIPT OF
)	PROCEEDINGS

BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 5

TUESDAY, JUNE 2, 2015

APPEARANCES:

For the Plaintiff:	ROBERT O. KURTH, ESQ.
For the Defendant:	DANIEL LOUIS O'BRIEN, ESQ.

RECORDED BY MATTHEW YARBROUGH, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

KARR REPORTING, INC.

1 **LAS VEGAS, NEVADA, TUESDAY, JUNE 2, 2015, 2:28 P.M.**

2 * * * * *

3 (Outside the presence of the jury)

4 THE COURT: Please be seated. Okay. We received a
5 question from the jurors and I'll read it to you and we'll
6 discuss what to do in response. So the question is, "What do
7 we do if we do not agree on the dollar amounts?" Signed
8 6/2/15 by Jason Terry.

9 MR. O'BRIEN: Sign the defense verdict, right?

10 THE COURT: So we will need to provide either a
11 response that says we're not at liberty to answer the question
12 or if we can all agree on some type of response to the
13 question we can provide that to them as well. In either case,
14 it will be in writing basically attaching the note to a blank
15 sheet of paper and the answer under the -- under the note. My
16 guess, I haven't looked at them but this question may very
17 well be covered in the instructions to an extent. But welcome
18 any input either counsel has.

19 MR. O'BRIEN: Your Honor, there is an instruction
20 that says that you have to deliberate towards a solution --

21 THE COURT: Can you speak up? I'm sorry, the air
22 just kicked on in the back.

23 MR. O'BRIEN: There is an instruction that states
24 that they're required to deliberate towards a decision without
25 violating their own rights. I would recommend that -- that

1 they be directed to that jury instruction.

2 MR. KURTH: I don't know what to do on that.

3 THE COURT: In the meantime, if -- I guess do you
4 have the instructions in front of you, Mr. O'Brien?

5 MR. O'BRIEN: No, Your Honor, I do not.

6 THE COURT: Okay.

7 MR. KURTH: I think I have them. I'm looking for
8 them right now.

9 THE COURT: Okay. No -- no -- no hurry, I'll look
10 through them as well. My thinking, and again, this is me
11 thinking out loud, would be to refer them to the instruction
12 mentioned by -- by Mr. O'Brien. But also to maybe one or two
13 other instructions, including the -- the instruction that
14 refers to three-quarters of the total number of jurors may
15 find and return a verdict as well as the instruction on
16 elements of damages for them to determine either sympathy nor
17 speculation as a proper basis, however, absolute certainty is
18 not required, only preponderance of the evidence.

19 MR. KURTH: We don't have an instruction that says
20 go with the highest amount or anything in there? We didn't
21 have that --

22 MR. O'BRIEN: Your Honor, if I may comment on
23 your --

24 THE COURT: Certainly.

25 MR. O'BRIEN: -- suggestion? The last part, the

1 element -- reciting the elements of damages and stating that
2 the absolute certainty is not required, I think that's going
3 to invite people to change their -- their decision and their
4 previous convictions. They've already considered the elements
5 of damages, they're trying to put a value on it. And so I
6 think that any instruction should be limited to returning your
7 verdict and agreeing and not suggesting that they go back and
8 recalculate their -- what they've already done.

9 THE COURT: Okay. I may not have been clear. What
10 I was thinking is a simple response that would say something
11 to the effect of, please refer to instruction numbers -- you
12 know, whatever the numbers are of those three. But if your
13 concern still applies in that case then let me know.

14 MR. O'BRIEN: I still think it draws their attention
15 to one aspect. We know they're arguing now about the amounts
16 and this is going to perhaps invite them to multiply the
17 amounts by finding something on each issue as opposed to
18 wherever they're at now. We don't know where they're at now.
19 I don't want them to change their process to come to an
20 agreement. I just want them to remember they're supposed to
21 deliberate and come to a conclusion that the majority agrees
22 on. That's -- that's really what I believe is appropriate for
23 them to be instructed.

24 MR. KURTH: I don't know what else we could --
25 Judge, I don't know what else we could instruct them on. I

1 guess when you're talking about referring to them you're
2 referring -- would refer them back to instruction number 40, I
3 guess?

4 THE COURT: Correct.

5 MR. KURTH: Okay. And I guess 34 and 35 describe
6 damages but that's -- I don't know that that would be helpful.
7 But I -- I think I tend to agree that I don't think -- I think
8 should have the -- this -- like 36 or 37.

9 THE COURT: If you two are in agreement that works
10 for me.

11 MR. O'BRIEN: Are we talking about just number 40?

12 MR. KURTH: Number 40 is just the -- that you have
13 to have --

14 THE COURT: Correct. And 40 actually starts out
15 with the language, Mr. O'Brien, that -- that you were -- well
16 it starts out you need to select a foreperson and you'll have
17 all the exhibits and as soon as six or more of you agree -- I
18 guess maybe we're referring to another instruction however
19 because that one doesn't really talk about their duty to -- to
20 come to an agreement.

21 MR. O'BRIEN: That's true. There is -- I believe
22 there is one that -- I apologize, I didn't bring them. I
23 didn't anticipate this.

24 THE COURT: That's not a problem at all. Let me --
25 let me go through them and --

1 MR. KURTH: [indiscernible] 39 but this is still
2 talking about weight of evidence and things. I don't know.

3 MR. O'BRIEN: Yeah, 39 is the one I was thinking
4 because it goes on and on about don't surrender your honest
5 convictions but it is your duty to consult to try to come to
6 an agreement.

7 THE COURT: Yeah, yeah. So are we okay then
8 referring them to both 39 and 40?

9 MR. O'BRIEN: That's fine with the defense, Your
10 Honor.

11 MR. KURTH: Yes.

12 THE COURT: Okay. What we'll do now, we'll -- we'll
13 type it up on a sheet and then before we submit it to them let
14 -- let you two review and make sure we're all on the same
15 page. And you'll see the original note on there as well.
16 Does that work?

17 MR. O'BRIEN: Yes, Your Honor.

18 THE COURT: Thanks.

19 (Court recessed at 2:40 p.m. until 2:44 p.m.)

20 THE COURT: You may be seated. While we were
21 literally in the process of typing up the answer, apparently
22 we weren't fast enough. We do have a verdict. Before we go
23 to that, however, I think just so we have a clear record, what
24 I'd like to do is -- is put the question and answer with a
25 sign -- instead of me signing it, writing not given due to

1 verdict. If either of you want to see this before we put it
2 in you're welcome to approach.

3 MR. O'BRIEN: I have no reason to see it since it's
4 not being given, Your Honor. I have no objection to it not
5 being given.

6 MR. KURTH: We have no objection either, Judge.

7 THE COURT: Okay. Thanks. So what I've written
8 instead of me signing I've just written not given because
9 verdict came back while typing this answer. So the question
10 and the answer will be entered as a Court's Exhibit 14.

11 (Jury reconvened at 2:48 p.m.)

12 MR. O'BRIEN: Your Honor, the defense stipulates to
13 the presence of the jury less the alternates.

14 MR. KURTH: So stipulated, Judge.

15 THE COURT: Thank you both. Ladies and gentlemen of
16 the jury, have you chosen a foreperson? And if so, who is
17 that foreperson?

18 JUROR NO. 2: Jason Terry.

19 THE COURT: Thank you, Mr. Terry. Mr. Terry, have
20 at least six of the jurors come to a decision of the issues
21 presented to the jury?

22 JUROR NO. 2: Yes.

23 THE COURT: Please give the verdict form to the
24 Marshal.

25 Madam Clerk.

1 THE CLERK: In the District Court, Clark County,
2 Nevada in the case of A668833, Department 15, verdict.

3 Makani Payo versus Clark County School District.

4 We, the jury in the above-entitled action, find for the
5 plaintiff, Makani Payo, and against the defendant Clark County
6 School District and assess the total amount of the plaintiff's
7 damages as follows: Past medical and related expenses,
8 \$48,288.06.

9 Future medical and related medical expenses,
10 \$10,000.

11 Past pain, suffering, disability and loss of
12 enjoyment of life, \$2,000.

13 Future pain, suffering, disability and loss of
14 enjoyment of life, zero.

15 For a total judgment of \$60,288.06.

16 Done and dated the second day of June, 2015 and
17 signed by jury foreperson, Jason Terry.

18 Ladies and gentlemen of the jury, are these your
19 verdicts as read?

20 JURY PANEL: Yes.

21 THE COURT: Does either party wish to have the jury
22 individually polled?

23 MR. O'BRIEN: Yes, Your Honor.

24 THE CLERK: Jerelyn Malan, are these your verdicts
25 as read?

1 JUROR NO. 1: Yes.

2 THE CLERK: Jason Terry, are these your verdicts as
3 read?

4 JUROR NO. 2: Yes.

5 THE CLERK: Somanathan Pillai?

6 JUROR NO. 3: Yes.

7 THE CLERK: Are these your verdicts as read?

8 JUROR NO. 3: Yes, ma'am.

9 THE CLERK: Karen Ericsson, are these your verdicts
10 as read?

11 JUROR NO. 4: Yes.

12 THE CLERK: Sherice Green, are these your verdicts
13 as read?

14 JUROR NO. 5: No.

15 THE CLERK: Jasmine Miranda, are these your verdicts
16 as read?

17 JUROR NO. 6: Yes.

18 THE CLERK: Mark Russie, are these your verdicts as
19 read?

20 JUROR NO. 7: Yes.

21 THE CLERK: Yvonne Anderson, are these your verdicts
22 as read?

23 JUROR NO. 8: Yes.

24 THE CLERK: We have seven affirmative answers, Your
25 Honor.

1 THE COURT: Thank you. Ladies and gentlemen of the
2 jury, on behalf of the Court and the parties and your fellow
3 citizens of Clark County, I'd like to thank you very, very
4 much for your service this past week as jurors. If this was
5 your first time as a juror I hope that you will look forward
6 to serving as a juror again. I think unless you've actually
7 served as a juror you can't really appreciate what it means to
8 be a juror. It's one of the most important functions in our
9 government. And so we -- we the Court and the parties and the
10 citizens of Clark County certainly thank you very much for
11 your service.

12 We may all elect a president and a governor and
13 state representatives in county or city council people,
14 however, in less you're one of those officials, elected
15 officials making decisions, service as a juror is really the
16 only opportunity we have as citizens to directly affect a
17 decision and for that we thank you.

18 Ladies and gentlemen, you are now excused. The
19 Marshal, if he has given you vouchers, you're good. If not,
20 he will need to give you the vouchers. Those aren't checks so
21 you can't take them to the bank but the Marshal will direct
22 you to go the third floor in the other building. You're now
23 free to speak to anyone and say anything at all that you would
24 like about the case.

25 Attorneys, as you probably have already figured out,

1 frequently do like to talk to jurors because that's how they
2 get input. You know, learn what was important to you, what
3 you thought they did well or could have done differently and
4 that's how they improve their skills at trial. So if -- if
5 the attorneys wish to speak with you, you're welcome to do
6 that, you do not have to do that. What we'll -- what we'll do
7 is we'll let you all remain here if you want or as you leave
8 you're welcome to again see the Marshal.

9 Again, I know the attorneys would greatly appreciate
10 being able to ask you questions, you know, about your decision
11 in the trial making process. Having been in their shoes
12 myself, it -- it's very helpful and greatly appreciated.
13 However, again, you don't have to. You don't have to talk to
14 them at all if you don't want to. And so we'll go -- again,
15 before we go off the record thank you, again, very much for
16 your patience with the process and for your service. So we'll
17 go off of the record and --

18 (Court adjourned at 2:55 p.m.)
19
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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**KARR REPORTING, INC.
Aurora, Colorado**


KIMBERLY LAWSON

JUN - 2 2015

DISTRICT COURT
CLARK COUNTY, NEVADA

BY, Jennifer Kimmel
JENNIFER KIMMEL, DEPUTY

Makani Payo

Plaintiff(s),

-vs-

Clark County School District

Defendant

CASE NO. A-12-668833

DEPT. NO. 15

PROPOSED VERDICT FORM RETURNED UNSIGNED

Attached hereto is the proposed verdict form which was returned by the Jury unsigned.

Dated this 2nd day of June, 2015.

STEVEN D. GRIERSON, Clerk of the Court

Jennifer Kimmel

Jennifer Kimmel, Deputy Clerk of the Court

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DISTRICT COURT

CLARK COUNTY, NEVADA

MAKANI KAI PAYO,
Plaintiff,
v.
CLARK COUNTY SCHOOL DISTRICT,
Defendant.

Case No. A-12-668833-C
Dept. No. XV

**GENERAL VERDICT FORM;
VERDICT FOR DEFENDANT**

GENERAL VERDICT FORM; VERDICT FOR DEFENDANT

We, the jury in the above-entitled action, find for the
Defendant, Clark County School District and against the Plaintiff.

DATED this ____ day of June, 2015.

FOREPERSON

JUN - 2 2015

DISTRICT COURT
CLARK COUNTY, NEVADA

BY *[Signature]*
J. GRIERSON, DEPUTY

MAKANI KAI PAYO,

Plaintiff,

vs.

CLARK COUNTY SCHOOL DISTRICT,

Defendant.

Case No. A-12-668833-C
Dept. XV

VERDICT

We, the jury in the above-entitled action, find for the Plaintiff, MAKANI KAI PAYO, and against the Defendant, CLARK COUNTY SCHOOL DISTRICT, and assess the total amount of the Plaintiff's damages as follows:

Past medical and related expenses: \$ 48,288.06

Future medical and related expenses: \$ 10,000.00

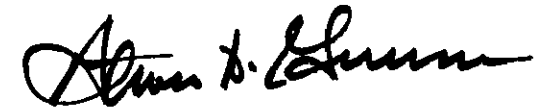
Past pain, suffering, disability, and
Loss of enjoyment of life: \$ 2,000.00

Future pain, suffering, disability and
Loss of enjoyment of life: \$ -0-

TOTAL: \$ 60,288.06

DATED and DONE this 2 day of June, 2015.

[Signature]
FOREPERSON



CLERK OF THE COURT

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

MAKANI PAYO,

Plaintiff,

vs.

CLARK COUNTY SCHOOL DISTRICT,

Defendant.

Case No.: A-12-668833-C
Dept No.: XV

JUDGMENT UPON JURY VERDICT


This action came on for trial before the Court, Honorable Joe Hardy, District Judge, presiding and a jury on May 27, 2015 through June 2, 2015. The issues having been duly tried; the jury having duly rendered its verdict on June 2, 2015; and the Court having filed its Order Regarding Damages Post-Jury Verdict; the Court enters this judgment pursuant to NRCP 54.

IT IS ORDERED AND ADJUDGED that Judgment on the jury verdict is entered in favor of Plaintiff Makani Kai Payo ("Payo") against Defendant Clark County School District in the total amount of FIFTY THOUSAND DOLLARS (\$50,000.00).

Within ten (10) days after entry of this Judgment, Payo shall serve written notice of entry of this Judgment together with a copy of this Judgment upon CCSD and shall file the notice of entry with the clerk of the court.

IT IS SO ORDERED

DATED this 16th day of June, 2015.



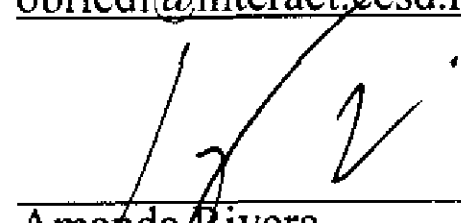
JOE HARDY
DISTRICT COURT JUDGE
DEPARTMENT XV

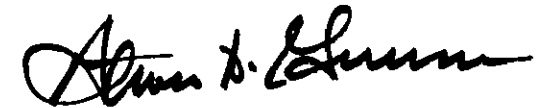
CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this document was electronically served, mailed or placed in the attorney's folder on the first floor of the Regional Justice Center as follows:

Robert Kurth, Esq.
Daniel O'Brien, Esq.

robertk@robertkurth.com
obriedl@interact.ccsd.net


Amanda Rivera
Judicial Executive Assistant



CLERK OF THE COURT

1 **ORDR**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 MAKANI PAYO,

6 Plaintiff,

7 vs.

8 CLARK COUNTY SCHOOL DISTRICT,

9 Defendant.

Case No.: A-12-668833-C
Dept No.: XV

**ORDER REGARDING DAMAGES
POST-JURY VERDICT**

10
11 This case was tried before a jury which resulted in a verdict being awarded in favor of
12 Plaintiff Makani Payo ("Payo") and against Defendant Clark County School District
13 ("CCSD") in a total amount of \$60,288.06 on June 2, 2015. Prior to and during trial, the
14 parties filed and served briefs relating to issues with damages and have submitted those briefs
15 to the Court for consideration and ruling. This Order constitutes the Court's ruling and
16 decision on those issues.

17 **I. Plaintiff May Recover Medical Expenses Incurred By His Parents While**
18 **Plaintiff Was a Minor**

19 The Court hereby rules that Payo may recover medical expenses incurred by his parents
20 while Payo was a minor.

21 As the parties are aware, the undersigned was assigned this case on the eve of trial.
22 Prior to that assignment, various issues had been briefed and orders entered by the Court.
23 Notably, such briefs included CCSD's Motion to Strike Plaintiff's Damages Calculation or, in
24 the Alternative, Motion in Limine filed herein on January 28, 2015. In that motion, CCSD
25 argued, among other things, that Payo "lists medical expenses which were incurred while he
26 was a minor and which he is not entitled to as a matter of law." Motion to Strike at 6:14-16.
27 CCSD requested that Payo be precluded "from presenting as damages medical expenses
28 incurred by his parents while he was a minor." Motion to Strike at 1:27-28. CCSD further

1 requested “[a]n order precluding Plaintiff from putting on any evidence or making any
2 argument at trial regarding alleged past or future special damages.” Motion to Strike at 9:1-3.

3 In opposition, Payo argued, among other things, that he “is entitled to medical expenses
4 he incurred as a minor child and which were paid by his parents when he incurred such as a
5 minor child.” Opposition, filed on February 13, 2015, at 6:12-13. Payo went on to request
6 that the Court “allow this case to proceed on the merits . . . rather than on the technicalities of
7 not having the parents named as parties to the suit. In the alternative, the Plaintiff PAYO is
8 requesting that this Court allow PAYO to amend his Complaint to include his parents as
9 parties if necessary.” Opposition at 8:8-13.

10 In reply, CCSD devoted three pages to the argument that “Plaintiff is not entitled to
11 recover medical expenses incurred while he was a minor.” Reply, filed on February 23, 2015.

12 In ruling on the issues raised, rather than strike or disallow the medical expenses
13 incurred by Payo’s parents while he was a minor, this Court ruled Payo “may not seek
14 recovery of special damages beyond those identified in the January 22, 2015, letter wherein
15 Plaintiff listed past medical expenses” and “Plaintiff’s medical expenses are capped at
16 \$50,000.00.” Order, filed on April 10, 2015. As demonstrated at trial, the January 22, 2015
17 letter included various medical expenses incurred by Payo’s parents while he was a minor. In
18 other words, prior to the commencement of trial this Court ruled then that Payo could seek
19 recovery of special damages, including the medical expenses incurred by his parents while he
20 was a minor. Notably, neither party sought reconsideration of the April 10, 2015 Order and
21 the Court sees no reason to reconsider its prior order at this time.

22 Further, the Nevada case law relied upon by CCSD in an attempt to exclude Payo’s
23 medical damages clearly uses the discretionary “may” rather than the mandatory “shall”
24 regarding potential limiting of damages. *Walker v. Burkham*, 63 Nev. 75, 83, 165 P.2d 161,
25 164 (1946); *Hogle v. Hall*, 112 Nev. 599, 916 P.2d 814 (1996). The use of “may” indicates a
26 grant of discretion to the district court in determining whether to limit the incurred damages.
27 In this case, the Court determines to exercise its discretion to permit Payo to seek and obtain
28 an award of damages for the medical expenses incurred by his parents while he was a minor.

1 Finally, the ultimate policy behind any division of medical expenses between the minor
2 child and the parents is simply to prevent a double recovery. *See Estate of DeSela v. Prescott*
3 *Unified School Distr. No. 1*, 249 P.3d 767 (Ariz. 2011); *Garay v. Overholtzer*, 631 A.2d 429
4 (Md. Ct. App. 1993). The clear trend is “hold that the right to recover pre-majority medical
5 expenses belongs to both the injured minor and the parents, but double recovery is not
6 permitted.” *Estate of DeSela*, 249 P.3d at 770 (various citations omitted). Payo’s parents
7 have not asserted any claims to the medical expenses, nor could they at this juncture due to
8 statute of limitation issues. Additionally, Payo’s mother attended the trial and testified as a
9 witness on her son’s behalf, thereby impliedly waiving any right to claim the damages for
10 herself.

11 Thus, this Court determines that Payo was permitted to recover medical expenses
12 incurred by his parents while Payo was a minor and the Court will not disturb the jury’s
13 verdict awarding the past medical and related expenses to him in the amount of \$48,288.06.

14 **II. Plaintiff’s Damages Are Limited to \$50,000 Under the Applicable Version of**
15 **NRS 41.035**

16 The Court hereby rules that Payo’s damages are limited to \$50,000.00 under the
17 applicable version of NRS 41.035.¹

18 At least by 1965, if not sooner, the State of Nevada waived its sovereign immunity. *See*
19 *NRS 41.031*. That waiver likewise applies to political subdivisions of the state such as
20 Defendant Clark County School District. *Id.* The waiver, however, is not absolute. For
21 decades, NRS 41.035 has provided a cap on “damages in an action sounding in tort brought
22 under NRS 41.031.” Throughout that time, the amount of the cap has increased with various
23 amounts being in effect at various times. For example, on May 12, 2004, the date of this
24 case’s accident, the statute provided for a \$50,000.00 cap. On September 21, 2012, the date

25
26 ¹ The \$50,000.00 cap applies to prejudgment interest, but does not apply to post-judgment
27 interest, nor does it limit CCSD’s potential liability for attorney fees and costs. *Arnesano v.*
28 *State ex rel. Dept. of Transp.*, 113 Nev. 815, 821-822, 942 P.2d 139, 143-144 (1997). Thus,
should Payo believe he has a basis for attorney fees and costs, he may file the appropriate
motion and/or memorandum for the Court’s consideration.

1 the complaint was filed, the cap was \$100,000.00. CCSD argues the \$50,000 cap applies to
2 reduce the jury verdict and Payo argues the \$100,000 cap applies.

3 The statute and its various iterations are ambiguous as to when the various caps take
4 effect. However, the Nevada Supreme Court discussed the applicable determination date in
5 *Las Vegas Metropolitan Police Dep't v. Yeghiazarian*, 129 Nev. Adv. Op. 81, 312 P.3d 503
6 (2013). There, the Court stated, "The version of NRS 41.035(1) that was in effect at the time
7 of the accident provided that awards for damages in tort actions filed against state entities
8 'may not exceed the sum of \$50,000.00.'" *Id.*, 312 P.3d at 509 (emphasis added). Although
9 that statement is *dicta*, it indicates the applicable cap for any claim filed under NRS 41.031 is
10 the version "in effect at the time of the accident," rather than at the time the complaint is filed.

11 For additional confirmation, the factual and procedural background of *Yeghiazarian* is
12 helpful. *Yeghiazarian* involved an accident that occurred on July 4, 2007, when the cap was
13 \$50,000. *See* Complaint, filed in Case No. A-09-594543-C. The complaint, however, was
14 filed on July 2, 2009, when the cap was \$75,000. *Id.* Under those circumstances it is
15 reasonable to believe that the Nevada Supreme Court intended to guide the trial courts that the
16 applicable date is when the accident occurred, not when the complaint was filed. The
17 legislative history goes so far as to explicitly state that the increase from \$50,000 to \$75,000
18 applies "to a cause of action that accrues on or after October 1, 2007," and the increase from
19 \$75,000 to \$100,000 applies "to a cause of action that accrues on or after October 1, 2011."
20 Laws 2007, c. 512, § 5.5 eff. July 1, 2007. A cause of action for negligence accrues when the
21 accident occurs and injury is sustained. *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18
22 (1990). Here, Payo's causes of action accrued on May 12, 2004, the date of the accident, and
23 thus the applicable cap is \$50,000.00.

24 Finding that the \$50,000 cap applies does not, however, end the inquiry. In his Second
25 Amended Complaint, Payo asserted two causes of action—one for negligence, the other for
26 negligent supervision. Payo argues that because he pleaded and proved two causes of action
27 at trial, he is entitled to \$50,000 for each cause of action and the jury's verdict of \$60,288.06
28 falls below the total \$100,000 cap. The Court disagrees.

1 The language of NRS 41.035 on this issue appears unambiguous to the Court in that it
2 refers to a single cap on “[a]n award for damages in an action sounding in tort.” To this
3 Court, the reference to “an action” would appear to encompass all tort claims asserted in an
4 action. See NRCp 2 (“There shall be one form of action to be known as ‘civil action.’”). In
5 the seminal case of *State v. Webster*, 88 Nev. 690, 504 P.2d 1316 (1972), however, the
6 Nevada Supreme Court clarified, “Although joined in one complaint, an action for wrongful
7 death and an action for personal injuries suffered by the plaintiff in the same accident are
8 separate, distinct and independent. They rest on different facts, and may be separately
9 maintained.” *Id.*, 88 Nev. at 695. Consequently, one cap applied to the plaintiff’s personal
10 injury claim and a separate cap applied to the plaintiff’s wrongful death claim. *Id.*

11 Post-*Webster*, the Nevada Supreme Court has interpreted “an action” to mean “a claim.”
12 See, e.g., *State ex rel. Dep’t of Transp. v. Hill*, 114 Nev. 810, 818, 963 P.2d 480 (1998) (in a
13 case with a claim for personal injuries and a claim for negligent infliction of emotional
14 distress, holding, “each claim could be separately maintained, and each claim was subject to
15 its own \$50,000.00 statutory cap”), abrogated on other grounds by *Grotts v. Zahner*, 115 Nev.
16 339, 989 P.2d 415 (1999); *County of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749,
17 759, 961 P.2d 754 (1998) (stating NRS 41.035 allows “plaintiffs to recover damages on a per
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19 as follows: “NRS 41.035 allows one statutory limitation for each cause of action, regardless of
20 the number of actors.”

21 Although it was subsequently withdrawn based on a stipulation of the parties, the case of
22 *State, Dept. of Human Resources v. Jimenez*, 113 Nev. 356, 935 P.2d 274 (1997), op.
23 withdrawn in 113 Nev. 735, 941 P.2d 969 (1997), is instructive. There, the Nevada Supreme
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26 the basis of negligent supervision is tantamount to awarding the victim an improper double
27 recovery.” *Id.*, 113 Nev. at 373, 935 P.2d at 284. The withdrawal of the opinion, however,
28

1 leaves this Court without a binding decision directly on point. Nevertheless, the Court must
2 rule on the issue.

3 Here, Payo's damages as a result of negligence or negligent supervision by CCSD are
4 the same damages regardless of the claim asserted. Both claims are essentially for negligence.
5 Thus, the claims asserted in this case differ substantially from the distinct claims of personal
6 injury and wrongful death or personal injury and negligent infliction of emotional distress set
7 forth in the *Webster* and *Hill* cases. Additionally, the jury verdict simply awards amounts of
8 damages and makes no distinction between the two causes of action. Alternatively, to the
9 extent needed to support the Court's ruling that a single \$50,000.00 cap applies, and based on
10 the evidence presented at trial, the Court would find that Payo failed to prove a sufficient issue
11 for the jury regarding his claim for negligent supervision and that CCSD is entitled to
12 judgment as a matter of law on that claim. In Nevada, negligent supervision is a claim against
13 an employer for failing to properly supervise its own employee and is not based on an
14 employee's alleged failure to properly supervise a plaintiff. See *Rockwell v. Sun Harbor*
15 *Budget Suites*, 112 Nev. 1217, 1226, 925 P.2d 1175, 1181 (1996). Payo's claim is based on
16 alleged failure by CCSD to properly "supervise, warn or safely protect PAYO from injury"
17 (First Amended Comp. at ¶¶ 27-35), and thus CCSD would be entitled to judgment as a matter
18 of law on the claim.

19 Consequently, the Court finds and rules that one cap applies to limit the jury verdict to
20 \$50,000.00.

21 **III. Conclusion and Order**

22 IT IS HEREBY ORDERED that Payo is entitled to recover medical and related
23 expenses incurred by his parents while he was a minor.

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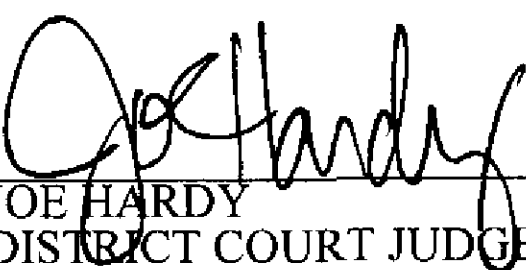
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IT IS FURTHER ORDERED that Payo's damages are reduced from the \$60,288.06 in the Verdict to \$50,000.00. The Court will issue a separate judgment.

DATED this 16th day of June, 2015.



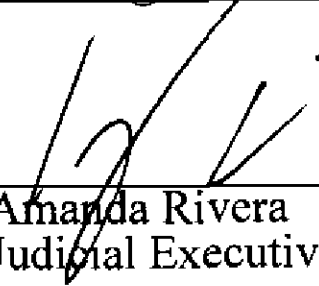
JOE HARDY
DISTRICT COURT JUDGE
DEPARTMENT XV

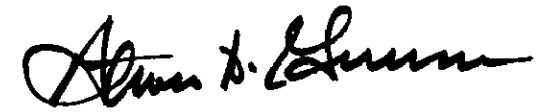
CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was electronically served, mailed or placed in the attorney's folder on the first floor of the Regional Justice Center as follows:

Robert Kurth, Esq.
Daniel O'Brien, Esq.

robertk@robertkurth.com
obriedl@interact.ccsd.net


Amanda Rivera
Judicial Executive Assistant



CLERK OF THE COURT

1 **NEO**
2 ROBERT O. KURTH, JR.
3 Nevada Bar No. 4659
4 **KURTH LAW OFFICE**
5 3420 North Buffalo Drive
6 Las Vegas, NV 89129
7 Tel: (702) 438-5810
8 Fax: (702) 459-1585
9 E-mail: kurthlawoffice@gmail.com
10 Attorney for Plaintiff

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

10 MAKANI PAYO,

11 Plaintiff,

11 vs.

12 CLARK COUNTY SCHOOL DISTRICT,

13 Defendant.

Case No. A-12-668833-C
Dept. XV

16 **NOTICE OF ENTRY OF ORDER**

18 PLEASE TAKE NOTICE that an ORDER REGARDING DAMAGES POST-JURY
19 VERDICT was entered in the above-referenced matter on or about the 16th day of June, 2015, and was
20 filed on the 16th day of June, 2015; a copy of which is attached hereto.

21 DATED this 17th day of June, 2015.

22 Respectfully submitted by:
23 **KURTH LAW OFFICE**

24 /s/Robert O. Kurth, Jr.
25 ROBERT O. KURTH, JR.
26 Nevada Bar No. 4659
27 Attorney for the Plaintiff

26 ///

27 ///

28 ///

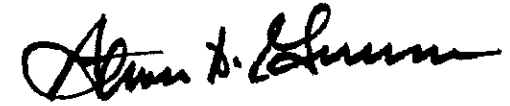
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CERTIFICATE OF SERVICE/MAILING

I HEREBY CERTIFY that on the 17th day of June, 2015, I electronically served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** via Electronic Service in accordance with EDCR 8.05, and I deposited a true and correct copy of the foregoing in a sealed envelope in the U.S. Mail, first class, postage prepaid, and addressed as follows:

DANIEL O'BRIEN, ESQ.
Office of General Counsel
Clark County School District
5100 W. Sahara Avenue
Las Vegas, NV 89146
E-serve: obriedl@interact.ccsd.net
Attorneys for Defendant

/s/Maritsa Lopez
An employee of **KURTH LAW OFFICE.**



CLERK OF THE COURT

1 **ORDR**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 MAKANI PAYO,

6 Plaintiff,

7 vs.

8 CLARK COUNTY SCHOOL DISTRICT,

9 Defendant.

Case No.: A-12-668833-C
Dept No.: XV

**ORDER REGARDING DAMAGES
POST-JURY VERDICT**

10
11 This case was tried before a jury which resulted in a verdict being awarded in favor of
12 Plaintiff Makani Payo ("Payo") and against Defendant Clark County School District
13 ("CCSD") in a total amount of \$60,288.06 on June 2, 2015. Prior to and during trial, the
14 parties filed and served briefs relating to issues with damages and have submitted those briefs
15 to the Court for consideration and ruling. This Order constitutes the Court's ruling and
16 decision on those issues.

17 **I. Plaintiff May Recover Medical Expenses Incurred By His Parents While**
18 **Plaintiff Was a Minor**

19 The Court hereby rules that Payo may recover medical expenses incurred by his parents
20 while Payo was a minor.

21 As the parties are aware, the undersigned was assigned this case on the eve of trial.
22 Prior to that assignment, various issues had been briefed and orders entered by the Court.
23 Notably, such briefs included CCSD's Motion to Strike Plaintiff's Damages Calculation or, in
24 the Alternative, Motion in Limine filed herein on January 28, 2015. In that motion, CCSD
25 argued, among other things, that Payo "lists medical expenses which were incurred while he
26 was a minor and which he is not entitled to as a matter of law." Motion to Strike at 6:14-16.
27 CCSD requested that Payo be precluded "from presenting as damages medical expenses
28 incurred by his parents while he was a minor." Motion to Strike at 1:27-28. CCSD further

1 requested "[a]n order precluding Plaintiff from putting on any evidence or making any
2 argument at trial regarding alleged past or future special damages." Motion to Strike at 9:1-3.

3 In opposition, Payo argued, among other things, that he "is entitled to medical expenses
4 he incurred as a minor child and which were paid by his parents when he incurred such as a
5 minor child." Opposition, filed on February 13, 2015, at 6:12-13. Payo went on to request
6 that the Court "allow this case to proceed on the merits . . . rather than on the technicalities of
7 not having the parents named as parties to the suit. In the alternative, the Plaintiff PAYO is
8 requesting that this Court allow PAYO to amend his Complaint to include his parents as
9 parties if necessary." Opposition at 8:8-13.

10 In reply, CCSD devoted three pages to the argument that "Plaintiff is not entitled to
11 recover medical expenses incurred while he was a minor." Reply, filed on February 23, 2015.

12 In ruling on the issues raised, rather than strike or disallow the medical expenses
13 incurred by Payo's parents while he was a minor, this Court ruled Payo "may not seek
14 recovery of special damages beyond those identified in the January 22, 2015, letter wherein
15 Plaintiff listed past medical expenses" and "Plaintiff's medical expenses are capped at
16 \$50,000.00." Order, filed on April 10, 2015. As demonstrated at trial, the January 22, 2015
17 letter included various medical expenses incurred by Payo's parents while he was a minor. In
18 other words, prior to the commencement of trial this Court ruled then that Payo could seek
19 recovery of special damages, including the medical expenses incurred by his parents while he
20 was a minor. Notably, neither party sought reconsideration of the April 10, 2015 Order and
21 the Court sees no reason to reconsider its prior order at this time.

22 Further, the Nevada case law relied upon by CCSD in an attempt to exclude Payo's
23 medical damages clearly uses the discretionary "may" rather than the mandatory "shall"
24 regarding potential limiting of damages. *Walker v. Burkham*, 63 Nev. 75, 83, 165 P.2d 161,
25 164 (1946); *Hogle v. Hall*, 112 Nev. 599, 916 P.2d 814 (1996). The use of "may" indicates a
26 grant of discretion to the district court in determining whether to limit the incurred damages.
27 In this case, the Court determines to exercise its discretion to permit Payo to seek and obtain
28 an award of damages for the medical expenses incurred by his parents while he was a minor.

1 Finally, the ultimate policy behind any division of medical expenses between the minor
2 child and the parents is simply to prevent a double recovery. *See Estate of DeSela v. Prescott*
3 *Unified School Distr. No. 1*, 249 P.3d 767 (Ariz. 2011); *Garay v. Overholtzer*, 631 A.2d 429
4 (Md. Ct. App. 1993). The clear trend is “hold that the right to recover pre-majority medical
5 expenses belongs to both the injured minor and the parents, but double recovery is not
6 permitted.” *Estate of DeSela*, 249 P.3d at 770 (various citations omitted). Payo’s parents
7 have not asserted any claims to the medical expenses, nor could they at this juncture due to
8 statute of limitation issues. Additionally, Payo’s mother attended the trial and testified as a
9 witness on her son’s behalf, thereby impliedly waiving any right to claim the damages for
10 herself.

11 Thus, this Court determines that Payo was permitted to recover medical expenses
12 incurred by his parents while Payo was a minor and the Court will not disturb the jury’s
13 verdict awarding the past medical and related expenses to him in the amount of \$48,288.06.

14 **II. Plaintiff’s Damages Are Limited to \$50,000 Under the Applicable Version of**
15 **NRS 41.035**

16 The Court hereby rules that Payo’s damages are limited to \$50,000.00 under the
17 applicable version of NRS 41.035.¹

18 At least by 1965, if not sooner, the State of Nevada waived its sovereign immunity. *See*
19 *NRS 41.031*. That waiver likewise applies to political subdivisions of the state such as
20 Defendant Clark County School District. *Id.* The waiver, however, is not absolute. For
21 decades, NRS 41.035 has provided a cap on “damages in an action sounding in tort brought
22 under NRS 41.031.” Throughout that time, the amount of the cap has increased with various
23 amounts being in effect at various times. For example, on May 12, 2004, the date of this
24 case’s accident, the statute provided for a \$50,000.00 cap. On September 21, 2012, the date
25

26 ¹ The \$50,000.00 cap applies to prejudgment interest, but does not apply to post-judgment
27 interest, nor does it limit CCSD’s potential liability for attorney fees and costs. *Arnesano v.*
28 *State ex rel. Dept. of Transp.*, 113 Nev. 815, 821-822, 942 P.2d 139, 143-144 (1997). Thus,
should Payo believe he has a basis for attorney fees and costs, he may file the appropriate
motion and/or memorandum for the Court’s consideration.

1 the complaint was filed, the cap was \$100,000.00. CCSD argues the \$50,000 cap applies to
2 reduce the jury verdict and Payo argues the \$100,000 cap applies.

3 The statute and its various iterations are ambiguous as to when the various caps take
4 effect. However, the Nevada Supreme Court discussed the applicable determination date in
5 *Las Vegas Metropolitan Police Dep't v. Yeghiazarian*, 129 Nev. Adv. Op. 81, 312 P.3d 503
6 (2013). There, the Court stated, "The version of NRS 41.035(1) that was in effect at the time
7 of the accident provided that awards for damages in tort actions filed against state entities
8 'may not exceed the sum of \$50,000.00.'" *Id.*, 312 P.3d at 509 (emphasis added). Although
9 that statement is *dicta*, it indicates the applicable cap for any claim filed under NRS 41.031 is
10 the version "in effect at the time of the accident," rather than at the time the complaint is filed.

11 For additional confirmation, the factual and procedural background of *Yeghiazarian* is
12 helpful. *Yeghiazarian* involved an accident that occurred on July 4, 2007, when the cap was
13 \$50,000. *See* Complaint, filed in Case No. A-09-594543-C. The complaint, however, was
14 filed on July 2, 2009, when the cap was \$75,000. *Id.* Under those circumstances it is
15 reasonable to believe that the Nevada Supreme Court intended to guide the trial courts that the
16 applicable date is when the accident occurred, not when the complaint was filed. The
17 legislative history goes so far as to explicitly state that the increase from \$50,000 to \$75,000
18 applies "to a cause of action that accrues on or after October 1, 2007," and the increase from
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24 Finding that the \$50,000 cap applies does not, however, end the inquiry. In his Second
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27 at trial, he is entitled to \$50,000 for each cause of action and the jury's verdict of \$60,288.06
28 falls below the total \$100,000 cap. The Court disagrees.

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12 See, e.g., *State ex rel. Dep’t of Transp. v. Hill*, 114 Nev. 810, 818, 963 P.2d 480 (1998) (in a
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1 leaves this Court without a binding decision directly on point. Nevertheless, the Court must
2 rule on the issue.

3 Here, Payo's damages as a result of negligence or negligent supervision by CCSD are
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17 (First Amended Comp. at ¶¶ 27-35), and thus CCSD would be entitled to judgment as a matter
18 of law on the claim.

19 Consequently, the Court finds and rules that one cap applies to limit the jury verdict to
20 \$50,000.00.

21 **III. Conclusion and Order**

22 IT IS HEREBY ORDERED that Payo is entitled to recover medical and related
23 expenses incurred by his parents while he was a minor.

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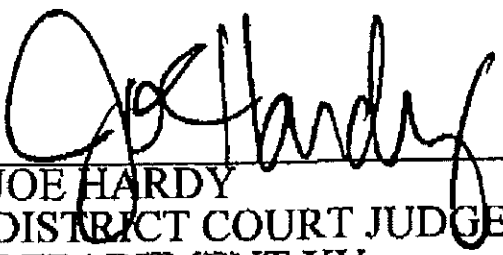
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1 IT IS FURTHER ORDERED that Payo's damages are reduced from the \$60,288.06 in
2 the Verdict to \$50,000.00. The Court will issue a separate judgment.

3 DATED this 16th day of June, 2015.

4 
5 _____
6 JOE HARDY
7 DISTRICT COURT JUDGE
8 DEPARTMENT XV
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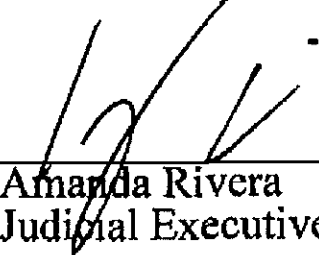
Joe Hardy
District Judge
Department XV

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was electronically served, mailed or placed in the attorney's folder on the first floor of the Regional Justice Center as follows:

Robert Kurth, Esq.
Daniel O'Brien, Esq.

robertk@robertkurth.com
obriedl@interact.ccsd.net


Amanda Rivera
Judicial Executive Assistant

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT,

Appellant,

v.

MAKANI KAI PAYO,

Respondent.

No.: 68443

District Court
Case No.: A-12-00893

District Court Dept. No.: XV
(Hon. Joe Hardy)

Electronically Filed
Dec 31 2015 11:52 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S APPENDIX

VOLUME VIII

Daniel L. O'Brien
Nevada Bar No. 983
Sr. Asst. General Counsel
Office of the General Counsel
Clark County School District
5100 West Sahara Avenue
Las Vegas, NV 89146
Attorney for District

ALPHABETICAL INDEX

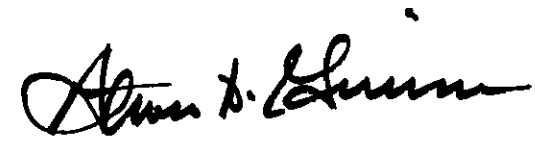
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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

MAKANI PAYO,)	
)	CASE NO. A-12-668833
Plaintiff,)	DEPT NO. XV
vs.)	
)	
CLARK COUNTY SCHOOL DISTRICT,)	
)	
Defendant.)	TRANSCRIPT OF
)	PROCEEDINGS

BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 4

MONDAY, JUNE 1, 2015

APPEARANCES:

For the Plaintiff:	ROBERT O. KURTH, ESQ.
For the Defendant:	DANIEL LOUIS O'BRIEN, ESQ.

RECORDED BY MATTHEW YARBROUGH, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

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1 **LAS VEGAS, NEVADA, MONDAY, JUNE 1, 2015, 10:31 A.M.**

2 * * * * *

3 (Outside the presence of the jury.)

4 THE COURT: Please be seated. Before we bring the
5 jurors in, a couple things. Was any progress made on jury
6 instructions?

7 MR. KURTH: No progress from where we were at at the
8 time we left, Judge.

9 MR. O'BRIEN: That's correct. I produced a brief
10 that I'd like to follow up with Court, though, on the issue of
11 the adverse inference [inaudible]

12 THE COURT: Certainly. I assume have given or will
13 give Mr. Kurth a copy and you may approach.

14 MR. O'BRIEN: Thank you.

15 THE COURT: Thank you, counsel.

16 THE MARSHAL: We're missing one juror.

17 THE COURT: Okay. Thank you. I guess along with
18 the jury instructions, does anyone have a proposed jury
19 verdict form?

20 MR. KURTH: I do have that, Judge. And I know
21 myself and Mr. O'Brien had looked at this form prior. Can we
22 approach?

23 THE COURT: Certainly.

24 MR. O'BRIEN: It's actually two -- two forms, Your
25 Honor. [indiscernible] general verdict form for the defendant

1 and a special verdict form with interrogatories.

2 THE MARSHAL: We have all the jurors now.

3 THE COURT: Okay. Thank you. In terms of
4 scheduling, we have Ms. Wally as a witness. I forget her last
5 name.

6 MR. O'BRIEN: Actually Ruiz.

7 THE COURT: Okay. And Mr. Kurth, were you able to
8 obtain Doctor -- Doctor, was it Carr's presence?

9 MR. KURTH: We were not, Judge.

10 THE COURT: Okay. With Ms. Wally, do we expect long
11 enough to take us up through lunch?

12 MR. O'BRIEN: I wouldn't expect so, Your Honor.

13 THE COURT: Okay. And I guess you had reserved the
14 right to I think maybe recall -- and I apologize --

15 MR. O'BRIEN: Yes, I don't anticipate doing that.

16 THE COURT: Okay. I kind of -- yeah. So I welcome
17 counsel's thoughts on scheduling with finalizing still the
18 instructions and the verdict form and getting the testimony of
19 the last witness.

20 MR. O'BRIEN: My recommendation would be we get the
21 last witness done, give the jury a long lunch break and then
22 we try to settle jury instructions during that time.

23 MR. KURTH: That makes sense to me, Judge. I -- I
24 do have -- I would ask the Court, I have a quick little
25 appearance to get a continuance on a matter, it's at 1:30 next

1 door. It's in a municipal court case. I've just got to run
2 over and continue it for another week or two or something, if
3 that works out in that time period.

4 THE COURT: Okay.

5 MR. KURTH: If not, I'll try to get somebody else to
6 do that for me.

7 THE COURT: I guess let's get the last witness and
8 then probably take the extended lunch break. Depending on how
9 long the witness goes, we may need a -- a two-hour break I
10 guess with Mr. Kurth's appearance at 1:30 next door. I guess
11 we'll kind of play that by ear.

12 MR. O'BRIEN: Sounds good to me, Your Honor.

13 THE COURT: Does that work okay?

14 MR. KURTH: Yes. Thank you, Judge.

15 THE COURT: Yeah. Okay. Are we ready for the jury?

16 MR. O'BRIEN: Yes, Your Honor.

17 MR. KURTH: Yes.

18 THE COURT: Okay. Thank you.

19 (Jury reconvened at 10:41 a.m.)

20 MR. O'BRIEN: The defense stipulates to the presence
21 of the jury.

22 MR. KURTH: So stipulated, Judge.

23 THE COURT: Thank you both. Welcome back, ladies
24 and gentlemen. I -- you may notice I now have a higher chair
25 so I can see over my monitor. But thank you and welcome back.

1 Mr. O'Brien, I believe you're calling your next witness?

2 MR. O'BRIEN: Yes. I call Waleska Ruiz.

3 WALESKA RUIZ, DEFENDANT'S WITNESS, SWORN

4 THE CLERK: Please be seated. I need you to speak
5 up a bit and say your full name for the record, please.

6 THE WITNESS: My name is Waleska Ruiz
7 [indiscernible].

8 THE CLERK: Spell your first name, please.

9 THE WITNESS: W-a-l-e-s-k-a.

10 DIRECT EXAMINATION

11 BY MR. O'BRIEN:

12 Q Good morning, Ms. Ruiz. Is it Ms. Ruiz or how do
13 you -- how should I address you?

14 A Ruiz, Ruiz, however you want to sound it.

15 Q Okay. Ms. Ruiz, are you currently employed by the
16 Clark County School District?

17 A I am.

18 Q Do you formally go by Waleska Morton or Wally
19 Morton?

20 A Yes.

21 Q At some point in time have you signed records with
22 Wally or Wally Morton?

23 A Correct.

24 Q How long have you worked for the Clark County School
25 District?

1 A This -- I'm finishing 18 years now.

2 Q When did you start?

3 A August 1997.

4 Q And what position did you hold when you worked --
5 started working for the Clark County School District?

6 A I did two weeks in a different area in the office
7 and then after that I was -- I became a FASA, a First Aid
8 Safety Assistant.

9 Q What qualifications do you have to have to be a
10 First Aid Safety Assistant?

11 A In those days the requirements were that we will
12 have office experience or medical experience. I had the
13 office experience.

14 Q Did Clark County School District provide you with
15 any training to become a First Aid Safety Assistant?

16 A Yes.

17 Q What -- would you please describe for the jury -- to
18 the jury what sort of training you underwent?

19 A Yes. We -- I had to attend an orientation as the
20 first training. After that I had several sections to do with
21 the head nurse, the nurse of health services. I believe back
22 then, if I don't recall wrong, it was eight sections of that,
23 so I had several weeks attending that, in returning to the job
24 to put in practice what I learned.

25 Q What sort of things were you taught?

1 A Of course, the basics of first aid. The basics in
2 an emergency case. And back then we didn't have the AD
3 machine.

4 Q And what is that, the AD machine?

5 A Well, it's a machine for when we have to handle the
6 cardiac arrest.

7 Q Is that a defibrillator?

8 A Yes.

9 Q You were -- you started in I think you said 1996?

10 A Ninety-seven.

11 Q Ninety-seven, excuse me. And have you had any
12 additional training since being hired?

13 A We always do. We have two big trainings to attend a
14 year. And, of course, we have our own nurse that she's
15 responsible of training us and being there for us for anything
16 that we might need.

17 Q Have you done any sort of self-training? Have you
18 done any -- read any manuals or books or online articles,
19 anything to -- to add to your education?

20 A Yes. As soon as I got this position I took the
21 manuals, it's a publication on first aid and emergency
22 guidelines from the school district, it's publication 648. I
23 took it home; I read it cover to cover. I also have a big
24 FASA, First Aid Assistant Manual and for policies and things
25 like that. I took that home also and I read it. So whatever

1 was available, those two publications, I took them home and I
2 read them over the weekend.

3 Q Generally speaking, what is it -- and I'm going to
4 focus back on about 2004. Generally speaking, what was it you
5 did as a First Aid Safety Assistant?

6 A Of course, handle the first aid emergencies -- or
7 emergencies. Anything having to do with the children, having
8 to deal with the parents, call them, administering the
9 medications and, of course, always being the right hand to my
10 nurse.

11 Q Was there a school nurse assigned to Woodbury Middle
12 School in May of 2004 full time?

13 A Yes.

14 Q By full time, I mean she's there five days a week?

15 A No, she's not with us five days a week. The nurses
16 have two days in one school and three days in another. Or she
17 could have two days in one school, two days in another school
18 and on Friday they might be doing screening. So -- but my
19 nurse was always a phone call away if she was not scheduled to
20 be with me that day.

21 Q Do you know how many schools your school nurse was
22 assigned to cover in May of 2004?

23 A Two.

24 Q Okay. What was the other school?

25 A If I don't recall wrong, Beckley -- Berkley. It was

1 not too far from mine.

2 Q What would you do if your -- if the school nurse is
3 not there and someone came in and they had say a cut?

4 A Immediately, I will take care of that child. Give
5 the first aid assistance and document because if you don't
6 document you haven't done anything. So I had to take care of
7 the student -- or I have to take care of the student and
8 document everything.

9 Q Okay. After you've taken care of the students --
10 student, what would you do next?

11 A In an emergency or something that it's -- that even
12 if it's not serious now but it can bring consequence down the
13 road, I have to take care of the child, document and make sure
14 the mom and dad know what happened, so I will contact parent.

15 Q Do you ever get life-threatening injuries where a
16 student needs immediate medical attention?

17 A I've a -- I have had, not so many, but I have had,
18 yes.

19 Q And what is the protocol for handling that type of
20 -- of injury?

21 A One in specific I had to stop the bleeding
22 immediately and I had to get a hold of mom and dad immediately
23 without wasting time. And if I could not reach the parent I
24 have to continually keep until I find the parent. If it's
25 lots of bleeding involved and something really drastic and we

1 cannot get a hold of the parents, we definitely have to call
2 the paramedics and the administration then will get involved
3 because somebody has to go with that student to the hospital.

4 Q And is that the way you were trained to handle those
5 types of injuries?

6 A Yes.

7 Q When the school nurse was present, I mean you're
8 there and the school nurse is present, did you do anything any
9 differently?

10 A No. But, of course, if my nurse is there and she
11 steps in, then I let her do her thing. I don't get in her
12 way, but I will assist with whatever she might need from me.

13 Q You described a First Aid Safety Assistant handbook
14 or you mentioned it --

15 A Yes.

16 Q -- would you describe what sorts of things are in
17 that handbook?

18 A In that publication, the 648, it has different
19 scenarios, possible scenarios and it shows the symptoms and
20 then it shows the action, what I need to be doing in that
21 case, in that particular case.

22 Q And that's the one that you said you went through
23 cover to cover?

24 A Yes.

25 Q Do you remember a Makani Payo coming in to your --

1 the nurse's office on May 12th, 2004?

2 A Some I do, yes.

3 Q And do you recall what happened when he came in?

4 A Yes. He walked in the office and he had an injury
5 on his left -- left side. So it -- it was not in the eyeball
6 but it was near the eyeball on the skin over the bone. So but
7 it was left eye area.

8 Q So what did you do?

9 A I immediately put cold compress because there were
10 -- the color of the skin was different, which means it's
11 bruising. Bruised, swelling, some bleeding, cut, I
12 immediately applied the cold compress to stop it from swelling
13 and bruising more. And after 15, 20 minutes of that, then I
14 took care to make sure that the cut is clean. Of course,
15 dealing with a cut I'm careful because I don't want to tear it
16 even more or make it worse. After I clean it gently, then I
17 apply the cold compress, the ice pack, whatever, on again.

18 Q When Mr. -- well, when Makani came into your office,
19 was he alone?

20 A Another child walked him, accompany him to the
21 office.

22 Q Okay. Do you know who that was?

23 A The documentation that refresh my mind it's by the
24 last name student Higgins.

25 Q Did -- what did you observe when he first walked in

1 in terms of what -- what his demeanor was?

2 A Well, I mean --

3 Q And by his -- I mean Makani's demeanor, not Mr.
4 Higgins.

5 A Oh. His -- he was able to walk, to stand. He was
6 able to tell me what had happened. He was conscious, he was
7 alert.

8 Q Did he appear to have any difficulty standing?

9 A No, I don't recall that.

10 Q When Mr. Higgins came into the office with him, did
11 Mr. Higgins have his arm around Makani supporting him?

12 A I don't recall that, no.

13 Q If -- if that had been the case, would you have
14 recorded that information?

15 A Yes.

16 Q And did Makani appear to be dizzy or disoriented in
17 any way?

18 A I don't recall that.

19 Q Did Makani ever tell you while he was in your office
20 that he had been knocked out?

21 A No, I don't recall.

22 Q Did Mr. Higgins ever tell you that he had been
23 knocked out?

24 A I don't recall that.

25 Q Okay. That's kind of important for a -- a FASA or a

1 school nurse, isn't it?

2 A Yes.

3 Q If you had been told that Makani had been knocked
4 out, would you have recorded that in your records?

5 A Yes.

6 Q If you had been told that Makani had been knocked
7 out in this incident, would you have handled his case
8 differently?

9 A Probably. Was then -- it could have been very
10 serious if he's out.

11 Q Would you -- I mean, for instance, would you have
12 done more than just call the mom?

13 A If it was needed, yes, definitely.

14 Q I mean, if he had just -- if you took him in and he
15 said I -- I was knocked out, would you have called -- would
16 you have done anything other than call the mom and -- and
17 dress the wound, clean the wound?

18 MR. KURTH: Objection, asked and answered, leading.

19 THE COURT: Calls for speculation.

20 MR. KURTH: That one too.

21 THE COURT: So sustained.

22 BY MR. O'BRIEN:

23 Q What is the protocol that a FASA uses when someone
24 comes into the nurse's office claiming that they've been
25 knocked unconscious?

1 A We will still do the same thing, call the parent and
2 definitely we will look for symptoms. We will observe the
3 symptoms and see what I need to do according to those
4 symptoms.

5 Q Did Makani -- when Makani came in, did he say
6 anything about being nauseous?

7 A I don't recall that.

8 Q Do you remember him vomiting when he was in the
9 nurse's office?

10 A No.

11 Q Was he having any apparent difficulty standing?

12 A Not that I recall, no.

13 Q Did he tell you that he could -- he was having
14 difficulty seeing out of his left eye?

15 A I don't recall him saying that.

16 Q Did he tell you he was having severe headaches?

17 A I don't recall him saying that either.

18 Q When you examined Makani, what kind of examination
19 did you perform?

20 A I look at the area and because I had to fill out a
21 diagram indicating to the risk management where the injury
22 was, then I had to look closely. And I also wanted to be able
23 to see how serious that injury was.

24 Q And what did you observe when you examined the area
25 of Makani's injury?

1 A Well, as I already said, it was swollen, it was
2 bruised, it had some bleeding to it.

3 Q And did you examine the eyeball itself?

4 A Yes, because I need to make sure if the eyeball has
5 -- is affected as well.

6 Q Okay. And how did you go about examining the
7 eyeball? Did you just get closer or what did you do?

8 A Well, to start with I had my gloves so I will just
9 gently, probably look, check the eyeball. And in some cases I
10 might have to use a flashlight.

11 Q Did you use a flashlight in this case?

12 A I don't recall that.

13 Q Did you see anything at all about the eyeball that
14 caused you any concern?

15 A No.

16 Q Did you discuss the incident with the young man, Mr.
17 Higgins, that brought Makani into the nurse's office?

18 A No, that child in particular left. When he left the
19 student with me in my care he went back to class.

20 Q Okay. And did Makani go into any detail about how
21 he had been hurt?

22 A I cannot clearly recall that, but I'm sure that I
23 took his statement and -- because we -- we have to document
24 students stated such thing and so I will take it from there
25 plus what I see.

1 Q And you stated that after you put the cold compress
2 -- the compress on the eye at some point you called Makani's
3 mother?

4 A Yes. I tried contacting parent -- either parent
5 immediately after I had him comfortable with a cold compress.
6 So we're talking about a couple of minutes later.

7 Q Okay. And did you speak with Ms. -- with Ms. --
8 Mrs. Payo?

9 A I talked to the person by Lori Payo, Payo and I
10 believe that was the mother that I spoke to. And I informed
11 her of what was going on, his visit, the urgency that I needed
12 her to come. And I also suggested that -- to have the student
13 evaluated to be -- to make sure that the child is safe.

14 Q Is that a standard protocol for the health office at
15 that time?

16 A Until this day it is.

17 Q And you followed that protocol on this occasion?

18 A Yes.

19 Q In May of 2004, was it the health office's protocol
20 that you call every parent whenever any child comes in for any
21 -- into the health office for any reason?

22 A No. No, because I'm not going to call a parent just
23 to tell them that their child got a little scratch, no.

24 Q What's the purpose of calling the parent?

25 A To make them aware of what happened at school and to

1 please observe the child. If they see anything wrong I want
2 the parent also to know that it came from what happened here
3 as consequence. You know, so I -- and me being a mother
4 myself, I always keep in mind that I will like to -- I like to
5 treat the parent the way I will like to be treated, so inform
6 me, please.

7 Q Do you recall when Makani arrived at your office on
8 May 12th, 2004?

9 A I recall the student coming in, yes.

10 Q Do you recall what time it was?

11 A Oh, the time. It was sometime between 9:40, 9:45.

12 Q And do you recall what time Makani left your office?

13 A At 11, refreshing my mind at 11.

14 Q So when you talked -- and who picked him up as far
15 as you know?

16 A As far as I know back then, mother.

17 Q Did you speak with mother -- with the individual
18 that picked him up at all?

19 A Yes. We have few words, yeah. I have to give her
20 her child.

21 Q Okay. Did you tell her anything about Makani's
22 injury?

23 A Well, I had already informed her over the telephone.

24 Q I understand that but when she came into the office,
25 did you tell her anything else?

1 A Besides that, I don't recall. I did emphasize to
2 her, you know, for him to be evaluated.

3 Q Do you know, what is a student health log at
4 Woodbury as of May 12th of 2004, what was that document?

5 A Well, back then we will have to keep track there the
6 time the student came in, teacher/student number, the
7 description of -- the purpose of the visit and of course we
8 had to also inform the result of -- the care and the result of
9 the visit.

10 Q Okay. And would you look at Exhibit Number 1 in the
11 exhibit book that's in front of you? It should be numbered.
12 There should be numbers on the side that say one, two, three.

13 A At the bottom of the page it says that?

14 MR. O'BRIEN: May I approach, Your Honor?

15 THE COURT: Yes.

16 MR. O'BRIEN: Mine's tabbed, so I don't know if
17 yours is.

18 THE COURT: Hers has tabs as well.

19 BY MR. O'BRIEN:

20 Q See the tab.

21 A Oh.

22 Q Okay. Look for Exhibit --

23 A In one?

24 Q Look for Exhibit Number 1.

25 A This is the log.

1 Q Okay. That's what I was just going to ask you Is
2 this the -- the health log for -- the health office log for
3 Woodbury Middle School on May 12th, 2004?

4 A It is.

5 Q You recognize that document?

6 A Yes.

7 Q A lot of that information is blacked out. Do you
8 know what information would be contained in the blacked out
9 areas?

10 A Other -- the visit of other students.

11 Q Okay. But the part in the middle about a third of
12 the way down that isn't blacked out, item number six it looks
13 like, can you read what that information is?

14 A Yeah, in that line number six it says Payo, Makani
15 and his student number and the teacher, the time he came in,
16 the reason for the visit, the observation, action, the result
17 and the time, the time that the student left the office.

18 Q And what is the outcome -- what is -- what
19 information is recorded in the outcome column?

20 A In the result it's the teacher went back -- sorry,
21 the student went back to class, the student went home or
22 other.

23 Q In this case what outcome did you record?

24 A The child went home.

25 Q And that's the little word that's hard to read but

1 it's got a circle around it?

2 A Correct.

3 Q And you signed this -- this log page too -- as well,
4 didn't you, down on the lower right?

5 A Right.

6 Q Is there anything about that meeting or that record
7 that you believe is incorrect today?

8 A No.

9 Q Now you had to fill out some other paperwork with
10 respect to this incident; is that correct?

11 A I -- that's correct. I had to do the incident
12 report -- the accident -- sorry, accident report.

13 Q All right. Did you do one in this case?

14 A I did.

15 Q When did you do it?

16 A I did it immediately after I took care of him and he
17 left after I assisted him.

18 Q Have you had a chance to review that document?

19 A I did.

20 Q Have you seen anything in that document that you
21 believe is inaccurate?

22 A No.

23 Q And did you record -- you -- not all of that writing
24 is yours in that document, is it?

25 A Correct.

1 Q Who else would have written something in that
2 document?

3 A The teacher had to report too.

4 Q Okay. What happens after you're done with the
5 report?

6 A After I'm done with that report I need to give that
7 to the administrator, the principal.

8 Q And that's Mr. Murphy?

9 A Back then, yeah, Mr. Joe Murphy, yes.

10 Q All right. And does this Student Accident Injury
11 Report accurately show -- excuse me, let me start over. Does
12 the Student Accident Injury Report that you filled out --

13 A Uh-huh.

14 Q -- accurately record your observations on May 12th,
15 2014?

16 A That's correct.

17 Q I mean, for instance, if he had told you he had
18 blacked out, that information would be on here, wouldn't it?

19 A Yes.

20 Q If he told you he couldn't see out of one eye, that
21 information would be on here?

22 A Yes.

23 Q And if he claimed that he was nauseous, that would
24 be on here?

25 A Yes.

1 Q And dizzy? Okay. Were you subsequently asked to
2 complete another report of this incident?

3 A I -- I did later on.

4 Q Do you remember who asked you to make another
5 statement?

6 A Risk management.

7 Q And what did risk management tell you? Why did they
8 tell you they needed a statement?

9 A At the time they didn't say. They just request that
10 I do that and I did it.

11 Q Okay. Have you seen the statement that you prepared
12 in response to risk management's request?

13 A I have review it.

14 Q Okay. If you would look at Exhibit Number 3. Is
15 that the statement you prepared?

16 A Yes.

17 Q Did you type that out?

18 A Yes.

19 Q I mean no one else typed it out for you, right?

20 A No.

21 Q Did anybody tell you what to say in that report?

22 A No.

23 Q Did anyone give you any information about the
24 incident or about Makani that you incorporated into this
25 report?

1 A No.

2 Q In your -- in this document, which has been admitted
3 into evidence you state that when you called Lori Payo you
4 requested that she come and pick him up and have him checked
5 out to see if he is okay. Do you recall that?

6 A Yes.

7 Q Is that what you did?

8 A Yes.

9 Q If Makani or his mother were to testify that you
10 instead said that he was fine and didn't -- didn't need to see
11 a doctor, would that be incorrect?

12 A That's correct. I could not say he's fine if I see
13 that he's not.

14 Q Would you have called her if he was fine?

15 A If he was fine? But with the injury I still would
16 have call.

17 Q The reason you called was what?

18 A The reason I call and I requested for her to come
19 urgently is because it was an injury that later on could have
20 results, bad results.

21 Q And in this statement you also state that after he
22 was picked up by mom, a few days later you saw Makani at
23 school again?

24 A Yes, a few days later I saw him.

25 Q And you're -- you're pretty sure about that?

1 A Yes. And I was very interested in what was the
2 result after he left my office.

3 Q Did you speak with Makani about that?

4 A I ask him what happened when you went home, what did
5 the doctor say.

6 Q Okay. And what did he tell you?

7 A He said he did not go to the doctor.

8 Q Didn't go at all?

9 A No, he said not immediately. Later on he did.

10 Q Did he go -- tell you what the doctors found out
11 after he went to go see them?

12 A No. I never got a report back on that.

13 Q In here it says that you got -- that Makani told you
14 that his mom had asked her friend who's a paramedic if she
15 should take him to the hospital. Do you remember those
16 details?

17 A Yes. I remember him telling me that, which I was
18 amazed that he was not taken when I gave him to her and that
19 she waited I don't know how many days later to. And then,
20 like I documented by his own statement, that she asked a
21 friend of her, a paramedic, if she should take him or not and
22 that the friend said yes, take him. But I had already told
23 her that he needs to be evaluated immediately.

24 Q Okay. Have you had any subsequent conversations
25 with Makani or his mother?

1 A No, because after that I didn't see him again.

2 Q Thank you.

3 MR. O'BRIEN: That's all I have, Your Honor.

4 THE COURT: Thank you.

5 CROSS-EXAMINATION

6 BY MR. KURTH:

7 Q Ms. Ruiz. Is it Ruiz or Ruiz?

8 A That's correct. However you want to say it.

9 Q All right. My name's Robert Kurth, I'm a -- the
10 attorney for Makani who's here today. I imagine he looks a
11 little bit different than he did back --

12 A He was a kid back then.

13 Q Correct. Back then in 2004 he was in sixth grade.
14 Do you recall that, that he was in sixth grade?

15 A I'm not sure what grade he was but it's a long time
16 ago.

17 Q Right. Of course, right. I mean, your testimony
18 just now was pretty much based on your review of some of the
19 records and documents to refresh your recollection so you
20 could be prepared for today, wasn't it?

21 A Yes.

22 Q Okay. And you don't really have an independent
23 recollection of what Makani looked like on that day in
24 question, do you?

25 A No.

1 Q Okay. So, a FASA, you're telling me that you get
2 this treatment in first aid. Was is that? You know, to stop
3 bleeding, to put pressure on or, I mean, what kind of -- do
4 you have CPR treatment? What did your treatment consist of?

5 A We are --

6 Q Excuse me, not your treatment but your --

7 A Okay.

8 Q -- your education, right?

9 A Yeah, yeah. Well, specifically, the training with
10 the school district, they discuss after they show us the first
11 aid, CPR, instructional videos. And what we see we have to
12 put it in practice, of course, mainly the CPR part. But when
13 it's regarding cuts and things like that, yeah, we're
14 explained what to do.

15 Q Do you know what rice is, r-i-c-e?

16 A Rice?

17 Q Uh-huh. I think that's what it's called. No?

18 A I cannot recall that at this moment.

19 Q Okay. Do you know if somebody's -- do you know when
20 you elevate -- you've got a student come to you and they were,
21 you know, their face was -- was really red, they were on the
22 ground, do you know which part that you would elevate on the
23 body?

24 A But it depends why the student is red and is like
25 that.

1 Q Sure, sure. And you said you document -- your
2 practice back then and still today is that you're very
3 particular on your documentation, correct?

4 A I try to be really hard because I have to have that
5 ready legally for risk management at any time. And if I don't
6 document it, I haven't done it even if I have.

7 Q Sure, sure. Just like this -- you still have that
8 binder in front of you, don't you --

9 A I do.

10 Q -- like that large binder?

11 A Yes.

12 Q Okay. If you'd turn to Exhibit 1 on that.

13 A Sure.

14 Q And has -- having difficulty talking today for some
15 reason. So what has already been represented to you is that
16 this is the health office log from -- from this date, May
17 12th, 2004. Is that your handwriting on there where it says
18 5/12/04 and then the 21 with the lines under it?

19 A Where? Pardon me.

20 Q On page two --

21 A Which one?

22 Q -- are you on page two of that document?

23 A Yes. I'm looking at it, yes.

24 Q Okay. And it's the one that shows the line where
25 Makani came in and the rest is blacked out?

1 A Right.

2 Q Okay. Above -- you see the phone number on there
3 that's handwritten, 799-2994 and then Makani Payo, that part
4 there?

5 A I -- I don't see that. I see the line where I
6 documented Makani's information.

7 MR. KURTH: Can I approach the witness, Judge?

8 THE COURT: Yes.

9 MR. KURTH: So I can explain this correctly.

10 A Which one?

11 BY MR. KURTH:

12 Q I'm just talking about like the hand -- like the
13 different handwriting on the document. Like the handwriting
14 on top.

15 A Oh, no, that's not my handwriting.

16 Q Okay.

17 A No.

18 Q What about where it says Clark County School
19 District Health Office Log and there's a date on the left and
20 then it says 21 and then it looks like it says page, is that
21 your handwriting?

22 A Yes. That was the total of students I believe for
23 that page, uh-huh.

24 Q Is that how many students that you had saw on -- in
25 that particular day?

1 A Yeah. Sometimes I will have three of those pages.

2 Q Wow. In one day?

3 A Yes.

4 Q Do you know how many pages you had on this
5 particular day?

6 A No, I don't recall that.

7 Q Okay. Do you know if the school nurse ever came to
8 Woodbury on May 12th, 2004?

9 A That particular day, no, my nurse was in her other
10 school.

11 Q And you never called the school nurse and discussed
12 Makani's treatment with her, did you?

13 A No, I didn't.

14 Q And you never discussed with her any findings that
15 you had when you made your observations of Makani, correct?

16 A Correct.

17 Q Okay. And when a student brings another student in
18 that was injured or sick, is it correct that the other student
19 usually leaves as soon as he -- he or she drops the injured or
20 ill student off with your office?

21 A Back to class, uh-huh.

22 Q Okay. When you -- well, let's see. On this date
23 then, could you tell me what it -- it says 9:45. Do you know
24 if that was like around the first class of the day that day?

25 A It could be but I don't recall it completely.

1 Q Time -- times have kind of changed --

2 A It's long ago.

3 Q -- right? Right. Okay. Does it -- did you write
4 that in there where it says, "Hit with hockey stick near left
5 eye area", I think it says.

6 A That's correct.

7 Q And you wrote this part, right?

8 A Yeah, that's my handwriting, uh-huh.

9 Q And would you write this right when he came in or
10 after he left or later on in the day or when would you write
11 that?

12 A As soon as possible after I take care of the child,
13 yes.

14 Q After you're finished taking care of them or while
15 you're still taking care of them?

16 A I left him comfortable with a cold compress and then
17 I can move to do other stuff that I need to do regarding the
18 matter.

19 Q Sure, sure. Okay. And then it says here, can you
20 read what the rest of that says? It's says Lori Payo --

21 A I read here, "Hit with hockey stick near eye area."
22 And it says Lori Payo and it says bruise and cut, swollen eyes
23 and cleaned. Home 11:00.

24 Q Okay. Do you see anything in there about checking
25 Makani's eye with a flashlight?

1 A No.

2 Q Do you see anything in there about actually checking
3 his eye?

4 A No.

5 Q And that's not part of your normal job as a FASA, is
6 it, to like actually touch his eye and check his eye would it
7 have been at that time?

8 A It depends if it's an eye injury or near the -- near
9 the eye, that could be damaging to the eye.

10 Q Correct. So -- so in this case when Makani came in
11 -- well, if you recall, do you recall if he had his hand over
12 his eye?

13 A I don't recall that.

14 Q If a student came in and had his hand over his eye
15 because he was -- because he was hurt or was hurting, what
16 would you do?

17 A I will remove the hand and look at the injury.

18 Q Right. You'd have to remove the hand to look and
19 assess the situation --

20 A Of course --

21 Q -- right?

22 A -- yes.

23 Q I mean, otherwise would you know how serious it is?

24 A Not if I don't remove, uncover the area.

25 Q Sure, sure. Okay. So -- so you'd have to remove

1 that to assess whether or not you needed to call 9-1-1 or take
2 some other action, right?

3 A That's correct but I don't recall him coming to my
4 office like this.

5 Q Okay. I would -- but you don't really even have an
6 independent recollection of seeing him come into the office.

7 A I have a slight picture in my brain still --

8 Q Okay.

9 A -- of when he walked in and the conversation that we
10 have at the end. I never forgot that part, that ending part
11 --

12 Q Okay.

13 A -- never.

14 Q Now you called the parent while Makani was sitting
15 there, didn't you?

16 A Yes. As soon as I left him comfortable with the
17 cold temperature on I called.

18 Q And he could hear that -- he could hear at least
19 what you were saying in that conversation, couldn't he?

20 A Definitely. He was there with me, yes.

21 Q Sure. Okay. So let's look at Exhibit 2, please.
22 So this is the Student Injury Accident Report you talked
23 about.

24 A Yes.

25 Q Where it says -- you see that -- which part of this

1 did you not fill out?

2 A The area that says, "Employee in charge when
3 accident occurred." And the witness information and also the
4 area that says, "Description of accident. Include any
5 equipment or structure that may have been involved." That's
6 not my area, I didn't do that.

7 Q Okay. Did you fill out the very top area with the
8 school name and the location of the accident?

9 A The student information, yes, that is my
10 handwriting.

11 Q Would Todd Petersen have filled out his information
12 before you filled out your information or did you fill out
13 yours first?

14 A No. The -- the paper comes from me so after I do my
15 document -- my documentation, what I'm responsible for, I make
16 sure the teacher gets it and he reports to me what happened.

17 Q Does the teacher fill out his part in your presence?

18 A I don't recall that.

19 Q Is that normally how it works or no?

20 A Yes. There's no -- I mean they -- they will do it
21 as soon as possible also.

22 Q Okay. And then could -- could you read what it says
23 in that area that -- where you wrote about --

24 A Sure.

25 Q -- I think it says hit with hockey stick --

1 A Yes.

2 Q -- starting there.

3 A Where it says, "Please indicate areas of injury on
4 the figures to the right." I did so. "Describe nature of
5 injury and treatment below." I wrote, "Hit with hockey stick
6 while participating in PE class. Hit on left eye side of
7 face. Swelling, bruise, cut, bleeding. Ice pack applied for
8 15 to 20 minutes, then cleaned with soap and water, more ice
9 apply."

10 Q And the marking on the figures that are to the
11 right, did you make the arrow marking on the right figure?

12 A I did. I did those marks.

13 Q And is that other mark on the -- the left figure's
14 head, is that a mark that somebody made on there or is that
15 how it looks normally?

16 A I made that mark because I'm indicating risk
17 management where the injury is.

18 Q Okay. So you basically drew like an eye?

19 A I -- no, I didn't try. I don't -- I don't draw, I
20 don't have that talent.

21 Q Okay.

22 A I make a mark.

23 Q Well, you see the -- there's two figures there,
24 correct?

25 A The back and the front.

1 Q Okay. So you drew the arrow?

2 A To indicate the back, which side.

3 Q And then what did you draw on the front one?

4 A In the front the area where the injury is.

5 Q Okay. Thank you. There's nothing in that
6 description about checking Makani's eye with a flashlight, is
7 there?

8 A No.

9 Q And do you recall how much bleeding there was going
10 on at the time?

11 A For sure not gushing, it was not. He had some
12 bleeding but it was not gushing.

13 Q If it was gushing you would have called 9-1-1 or
14 something --

15 A It would be a more alarming concern, yes.

16 Q Okay. Sure, sure. Weren't you alarmed and
17 concerned when you knew that he actually got hit in the eye
18 with a hockey stick?

19 A Oh, I tried to -- when my students come to me I
20 don't want them to get scared so it's a habit for me to keep
21 my coolness, my calmness and be assertive. And definitely, I
22 was concerned about him. I am always concerned with injuries
23 of any of my children.

24 Q And on this more detailed report here, the Student
25 Injury Accident Report, you didn't write anything specifically

1 about what you told Makani's mother, did you?

2 A No, but, you know, pretty much what I said back then
3 is what I say now. You know? The visit, what it's about, the
4 concern and if they need to come and get the child, whether
5 it's urgent or to check them when they get home at the end of
6 the day. So I try to be very specific with the parents.

7 Q So basically, your -- your testimony on what you
8 believe you told Lori Payo was based on what your regular
9 course of conduct is when discussing injuries with parents
10 over the years as you've been a FASA?

11 A No.

12 Q Okay.

13 A My conversation with parent that day was your child
14 is injured, he just arrived, you need to come and see him. I
15 need you to come in, however I put it, but I let her know the
16 urgency that I needed her to come and see. Because I could
17 not return Makani back to class like that and that he needed
18 to be evaluated by a physician.

19 Q But you didn't -- you didn't give any -- you didn't
20 give Makani's mother something that said he needs to go get
21 evaluated by a physician that day, did you?

22 A I did tell mother, I need you to take him and have
23 him evaluated.

24 Q Do you remember that it was Makani's grandmother
25 that actually picked him up that day?

1 A All these years to my knowledge I gave him to
2 mother.

3 Q Okay. And this -- let's look at Exhibit 3, the
4 statement that you -- you wrote here -- or typed. Do you have
5 that in front of you?

6 A I'm there.

7 Q Okay. It's easy, it's just a -- one more down. The
8 -- did you make this statement after reviewing the Student
9 Accident Injury Report and the health log?

10 A You're correct because this is a while later and I
11 have to refer to the documentation to be able to go back there
12 mentally and -- yes.

13 Q Because even on that day you might have had 21
14 students that came in that you treated just that day, correct?

15 A Yes, but I don't remember any other injury besides
16 his that day.

17 Q Okay. This -- now would it surprise you that
18 there's -- there's no record that shows that Makani ever went
19 back to school after he left the health office that day?

20 A Not necessarily, because in injuries if the doctor
21 has limitation for this student in school or if there's any
22 medicine, anything, per the doctor that has to be done in
23 school, then the parent will bring that documentation, the
24 doctor's order, the limitations. All that has to be
25 documented by the doctor and it has to be brought to the

1 health office for us. But I didn't see Makani after this few
2 days later and we had that conversation and then after that I
3 didn't see him again.

4 Q When you wrote this statement were -- did you know
5 that May 12th, 2004 was a Wednesday?

6 A I don't remember. I don't remember what day that
7 was.

8 Q And did you know that Makani went to Quick Care and
9 then the emergency room on the Friday, May 14th?

10 A No.

11 Q And that he actually went and saw his other eye
12 doctor on the Monday?

13 A No.

14 Q Okay. And on this statement you wrote that you
15 informed Lori Payo of the accident and to have him checked
16 out.

17 A Yes.

18 Q Okay. Do you remember a time when you were -- well,
19 asked to help respond to some interrogatories? Do you know
20 what interrogatories are?

21 A They ask you a bunch of questions, yeah. What was
22 exactly your question? I'm sorry.

23 Q Do you remember a time when you were asked to help
24 provide some answers to some interrogatories, some questions
25 that we sent the school district some questions and they

1 needed to contact you to help --

2 A Oh, yes, yes.

3 Q -- provide answers to those questions?

4 A Yes. Uh-huh, yes.

5 Q Okay. Okay. I'm going to have you turn to Exhibit
6 9.

7 A Okay.

8 Q Okay. Let's turn to the -- near the last page of
9 that document. Let's see, three pages from the -- the end,
10 page 14 it says on it.

11 A Page 14? Okay. Okay, I'm there.

12 Q Okay. So it -- this looks like it's a verification
13 with your signature on it.

14 A Yes.

15 Q Okay. And this document says that you specifically,
16 you know, assisted with the answers to interrogatories
17 numbered one, four, 11, 12, 13, 14 and 16.

18 A Correct.

19 Q Okay.

20 A Yes.

21 Q Okay. So go ahead and flip back to the front of
22 that. We're just going to look at a couple of those
23 responses. So on interrogatory number one there's a response
24 number one if you look at page three --

25 A Yes.

1 Q -- if you go down about a little past half the page,
2 line 16, it says, "WM."

3 A Yes.

4 Q So this is your -- your response to the question.

5 A Uh-huh. Yes.

6 Q The question was, "Describe in detail your account
7 of the incident." Okay, basically. So your response is what
8 happened at the -- at the FASA office, correct?

9 A Yes.

10 Q And here you said, "Advised the mom to pick up the
11 student and take him to get checked out to make sure he's
12 okay."

13 A That's what it says there, yes.

14 Q Doesn't say anything about checking his eye with a
15 flashlight or anything like that, does it?

16 A No.

17 Q It looks like it pretty much says what you've --
18 you've already said.

19 A Yes.

20 Q Did you even have a flashlight in the office there
21 at that time?

22 A We always do, uh-huh.

23 Q Is that part of your training to take a flashlight
24 and look in a child's eyes?

25 A You would think that it is.

1 Q It's not?

2 A I have -- I don't recall having a flashlight in the
3 training per se, to do it.

4 Q Okay. I'm just trying to clarify a few things --

5 A That's okay.

6 Q -- that's all. Okay. Do you recall how swollen his
7 eye was?

8 A I don't recall now. No, I don't really recall.

9 Q Let's see. And then it looked like you helped to
10 answer number -- let's see, four.

11 A Page four? I'm sorry.

12 Q It's on page five.

13 A On page five. Okay.

14 Q So this just says -- it doesn't have your initials
15 by it but it says, you know, some of the information that you
16 provided helped to formulate the response --

17 A Uh-huh.

18 Q -- the answer to this question.

19 A Okay.

20 Q And it says that -- let's see here. "Ms. Payo
21 delayed coming to pick him up for more than hour then he
22 elected after being advised to go to the hospital." You
23 didn't advise anybody to take him to the hospital, did you?

24 A I did not say take him to the hospital, I said being
25 evaluated by a physician.

1 Q Okay.

2 A Until this day that's what I say because I cannot
3 tell the parents or commend the parents on what to do.

4 Q It's just pretty much a standard thing that you --
5 you tell them, hey, you should always have your child
6 evaluated by a physician.

7 A Exactly.

8 Q Okay. And then it says, "To go without medical
9 treatment for several days." You didn't -- you didn't have
10 that information to provide, did you?

11 A No.

12 Q Okay. That wouldn't -- well, we know now that
13 that's not even correct. Okay. Let's look at number 11.
14 Let's see -- well, that's on page eight, the response. But --
15 but it does say expected to testify here that you had said
16 that he should be taken to the hospital immediately but we
17 know that was a -- that he wasn't advised -- she wasn't
18 advised to take him to the hospital immediately.

19 A She was advised to have him evaluated.

20 Q Okay. Sure.

21 A Whether it's a private clinic, her own doctor,
22 emergency, I don't know.

23 Q So on number 13, which is on page nine, it says --

24 A Uh-huh.

25 Q -- you helped with the answer to this -- this

1 question.

2 A Okay. Page nine. Okay.

3 Q Okay. And this is, let's see -- this is talking
4 about "Describing or identifying your normal course and
5 ordinary procedure and practices in handling and dealing with
6 student injuries." And it looks like your response starting
7 at line 13 on page nine is consistent with what you've been
8 saying about you look at your protocols and this CCF 648,
9 whatever that is. Is that pretty thick, that thing, that
10 manual, CCF 648?

11 A It's not -- it's not a big book. So it would be
12 about that much, about that thick.

13 Q Did it come with a video too then or?

14 A No.

15 Q No? Okay. Now, it says down here on lines 18, 19
16 that the school nurse was not present that would assess the
17 injury and provide first aid.

18 A That's correct, she was not there. She was at her
19 other school then.

20 Q Okay. So and that's what you did. If the injury
21 appeared to be serious I would call the school nurse for
22 further instructions. Did you not think that this injury was
23 serious enough to call the school nurse?

24 A No, I think I could handle it. I could assess the
25 injury and see what I needed to do. And if it was really

1 necessary for me to make her come to school to my office I
2 would have, but I took care of him and I kept my eye on the
3 student during that time that he was with me. I believe it
4 was an hour and 15 minutes, so just a little bit over an hour.
5 And if he had other symptoms or had gotten worse or something,
6 but what -- well, you know, it happened how it happened and
7 thank goodness he didn't pass out on me.

8 Q Okay. So as a FASA, your training is basically some
9 just like basic first aid and some CPR pretty much?

10 A And some common sense.

11 Q You have to have common sense, sure.

12 A Yes, common sense is necessary.

13 Q Yeah. It's always good to have common sense. So
14 when -- when a student like Makani would come in with this
15 injury and he was -- and you find out that he was hit in the
16 face with a hockey stick, then is there a litany of questions
17 that you would ask him? And I know you were getting sixth
18 grade, seventh graders and eight graders then.

19 A Yes. Well we need to see if the child is alert. We
20 could ask questions, yes, to see if he's -- if he's okay. I
21 don't recall having to do that with Makani.

22 Q You didn't ask Makani if he had been knocked
23 unconscious at all on that date, did you?

24 A I don't recall that.

25 Q Well, don't you think that would be an important

1 question to ask if he got hit in the face, in his head area
2 with a hockey stick?

3 A You could be very correct but I have no
4 recollection.

5 Q Okay. And -- and didn't you already -- did you
6 already testify that if you would have known that he had been
7 unconscious for any period of time at all you probably would
8 have done something differently?

9 A I think we stated that and then -- but then it's
10 hard for me to tell how to act with something that it really
11 didn't happen. Because -- I mean I have to have the fact --

12 Q You didn't know.

13 A -- the symptoms and work with that.

14 Q Sure. And you didn't know it had happened. You
15 didn't know that he was unconscious, did you?

16 A No. I don't have recollection of him being
17 unconscious.

18 Q Because nobody told you.

19 A For whatever reason I don't have recollections. I
20 saw him walking in my office.

21 Q With the help of another student who brought him
22 there.

23 A The student accompanied him, yes.

24 Q And you never asked Makani if he had been
25 unconscious at all.

1 A I don't recall that. It's too long.

2 Q Okay. So there's not some kind of litany like, you
3 know, like three four, five, two, whatever questions that you
4 ask the student when they've been injured at school, there's
5 not a certain amount of questions that you ask them?

6 A No, sir. No.

7 Q Okay. I just want to make sure because --

8 A No, that's fine.

9 Q -- I want to know. Okay. And then you had said
10 something about, well, I mean if the student was fine, so I'm
11 kind of looking at what is your definition of fine?

12 A A child that is fine, a child is conscious, he's
13 alert, he has good movement in the body. My observations of
14 the symptoms are not telling me that later on this child can
15 have bad consequences as a result of the injury. So I feel
16 pretty comfortable that during the day and tomorrow he's going
17 to be fine, there is --

18 Q Have you since learned what Makani's injury resulted
19 in, what treatment he ended up having?

20 A I don't know anything about -- I don't know what
21 happened after the last time I saw him. When this all came to
22 me I'm like, wow, now I have to recall things. Good thing
23 that my documentations refresh my mind and I have a couple of
24 pictures of back then.

25 Q You do have pictures of Makani back then?

1 A In my mind.

2 Q Okay, okay.

3 A When he came in, when I took care of him and our
4 last conversation that I was very amazed. That's all. That's
5 all I recall.

6 Q So would it surprise you to know that his -- his eye
7 filled up with blood and he went to the emergency room?

8 MR. O'BRIEN: Your Honor, she's already expressed
9 lack of knowledge.

10 THE COURT: Overruled.

11 MR. KURTH: Thank you.

12 BY MR. KURTH:

13 Q Would it -- from this injury that Makani had that
14 you initially treated him for where you didn't call the school
15 nurse, would it surprise you that he ended up having to have a
16 crystal lens implanted in his eye?

17 A No, because like I said, common sense told me it
18 could have consequences. And I'm not allowed -- I mean we
19 cannot assume or diagnose or nothing in my job, we're not
20 supposed to do that. We just common sense tell me, you know,
21 it could be bad later on. Have him checked, make sure.

22 Q Did you contact the school nurse and -- and ask that
23 person to follow up with Makani or his parents on this injury?

24 A No. But the fact that I asked what did the doctor
25 say, I just didn't ask that question just to ask. I want to

1 know what the doctor say. Is there things that we need,
2 information that we need to receive back because when -- when
3 a child is injured then, depending of the result, we could
4 have -- at school the child could have certain limitations.
5 But I didn't receive anything back.

6 Q All right. Thank you.

7 REDIRECT EXAMINATION

8 BY MR. O'BRIEN:

9 Q Ms. Ruiz, I just want to clarify something that
10 arose from one of counsel's questions. He asked you -- he was
11 asking you a series of questions about whether you saw Makani
12 come into the office.

13 A Yes.

14 Q And at one point he said that -- he stated that
15 Makani -- that another student was helping Makani come into
16 the office and your response was I think you said he escorted
17 him to the office.

18 A That's correct.

19 Q Okay. By escorting, I mean, was he -- and again, I
20 asked you this earlier but I want to make sure it's crystal
21 clear --

22 MR. KURTH: Objection, asked and answered.

23 MR. O'BRIEN: You opened it up, counsel.

24 THE COURT: Overruled.

25 MR. KURTH: Thank you, Judge.

1 BY MR. O'BRIEN:

2 Q Did Makani come -- require any assistance that you
3 saw to enter your office?

4 A No.

5 Q Was Mr. Higgins supporting him in any way as he came
6 into the office?

7 A I don't recall, no.

8 Q If Makani said in one of his statements that you
9 told Mrs. Payo -- Payo, excuse me, to come and get him, would
10 you agree with that statement?

11 A I told for him to be picked up --

12 Q Yes.

13 A -- to come and get him.

14 Q Yes.

15 A Yes.

16 Q So you'd agree with that statement?

17 A Yes.

18 Q Do you recognize Lori Payo?

19 A He's a good looking man now, he's thin and tall.

20 Q Lori -- Lori Payo, Mrs. Payo, the lady sitting
21 behind Makani. Do you recall her?

22 A I don't know if she -- I don't remember if she was
23 the one picking him up or not.

24 Q Okay. Thank you.

25 A To me it was Lori, it was mom.

1 Q It was your understanding it was mom?

2 A All this time, yeah. I was -- I gave him to mom.

3 Q Okay. But you don't recognize this lady?

4 A I don't remember.

5 MR. O'BRIEN: That's all I have, Your Honor. Thank
6 you.

7 THE COURT: Thank you. Does plaintiff rest?
8 Apparently, we may have a question so let's -- Counsel, please
9 approach. Thank you.

10 (Off-record bench conference.)

11 THE COURT: Thank you for your patience, ladies and
12 gentlemen. Mr. O'Brien, you may ask the question based on the
13 written questions from the jurors.

14 BY MR. O'BRIEN:

15 Q Ms. Ruiz, when Mr. -- Mr. Payo came into your
16 office, do you remember if he was wearing eyeglasses?

17 A [inaudible]

18 Q Can you speak up, please?

19 A I don't remember.

20 Q You don't remember either way?

21 A No.

22 MR. O'BRIEN: That's all I have, Your Honor.

23 THE COURT: Thank you. Mr. Kurth, do you have any
24 follow up?

25 RECROSS-EXAMINATION

1 BY MR. KURTH:

2 Q So let me just try to clarify that a little bit
3 more. Ms. Ruiz, do you remember seeing if Makani was holding
4 broken glasses in his hand?

5 A No.

6 Q Okay.

7 MR. KURTH: Nothing further, Judge.

8 THE COURT: Thank you. Mr. O'Brien, any -- anything
9 further?

10 MR. O'BRIEN: No, Your Honor.

11 THE COURT: Okay. Does plaintiff rest at this time?

12 MR. KURTH: Yes, Judge, we rest.

13 THE COURT: And does defense rest?

14 MR. O'BRIEN: Yes, Your Honor.

15 THE COURT: Thank you both. Ladies and gentlemen,
16 as you've now heard, both parties have now rested their cases
17 so no further evidence will be submitted to you. It's about
18 that time again, however, and we do have a few items to -- to
19 clarify with the Court and the attorneys as well, so we'll go
20 ahead and take an extended lunch break. We will break until
21 about 1:45, it's almost noon right now. And when you return
22 we will have -- I will give you the instructions on the law
23 and then the attorneys will make their -- their closing
24 arguments and you will then have the case.

25 So the admonishment that you all have come to know

1 and love, ladies and gentlemen, we are going to take a recess
2 until 1:45. During this recess you're admonished to talk or
3 converse amongst yourselves or with anyone else on any subject
4 connected with this trial, or read, watch or listen to any
5 report of or commentary on the trial or any person connected
6 with this trial by any medium of information including,
7 without limitation, newspapers, television, radio or Internet,
8 or form or express any opinion on any subject connected with
9 the trial until the case is finally submitted to you. We will
10 see you back at about 1:45. Thank you.

11 (Jury recessed at 11:55 a.m.)

12 THE COURT: Let's go ahead and go over the -- the
13 jury instructions before we break. And on the verdict form I
14 did have a chance kind of to glance at those. On the verdict
15 form probably inclined to give more of a -- a general verdict
16 form rather than the -- the complex, complicated one submitted
17 by Clark County School District. But let's go ahead and --
18 and go over the instructions.

19 As I said previously, we will use the agreed upon
20 jury instructions. I don't know -- the copy I have at least
21 does have citations on the bottom. So we'll need a copy that
22 -- that doesn't have the citations. Don't need that right
23 this minute but it would probably be something we'll -- well,
24 I know we'll need to -- to give it to the jurors when they go
25 back to deliberate.

1 Let's go then to instructions proposed by plaintiff,
2 objected by defendant. And let me -- let me know when you
3 both have a -- a copy of those in front of you.

4 MR. O'BRIEN: I have a copy in front of me, Your
5 Honor.

6 MR. KURTH: Let's see, I have that. Proposed by
7 plaintiff, objected by defendant?

8 THE COURT: Yes.

9 MR. KURTH: Is that the one?

10 THE COURT: Yeah.

11 MR. KURTH: Okay.

12 THE COURT: The shorter of the two.

13 MR. KURTH: All right.

14 THE COURT: Okay. The first one I have in there is
15 the P8, which is the insurance instruction. As we kind of
16 stated previously, I think we do need this instruction, given
17 especially the written questions submitted multiple times on
18 that issue. Mr. O'Brien, you're welcome to -- you're welcome
19 to make your record or present any questions.

20 MR. O'BRIEN: All right. Your Honor, thank you. My
21 concern was that giving that instruction ordinarily plants the
22 idea of insurance in the jury's mind. And I believe that the
23 insurance questions that came of -- that have been presented
24 have come from the juror number 10, who is an alternate who
25 likely won't be participating in the discussion of the case.

1 So I -- I still believe that it shouldn't be given in this
2 case because it -- if they weren't thinking about it before
3 they will be now.

4 On the other hand, we discussed this and there is an
5 issue in the jury. So if Your Honor is inclined to believe
6 that other jurors share the same opinion, then I have no
7 objection giving that instruction.

8 THE COURT: Okay. We'll go ahead and give it.

9 MR. KURTH: Okay. And I do think, Judge, that there
10 was a question from I think it was from juror number four too
11 about it.

12 THE COURT: Yeah. I think there was perhaps more
13 than one juror that asked about that but I think we're all on
14 the same page now there.

15 Next, I have P16, which was the expert testimony,
16 along with P17 and P18, all concern expert witness testimony.
17 Not inclined to -- to give those because we haven't had any
18 expert witness testimony. But Mr. Kurth, you're welcome to --
19 to make your record and give any comments.

20 MR. KURTH: I think that there's been certain
21 testimony that has, you know, brushed on the edge of it but we
22 haven't had anybody that was called as a specific expert on
23 either side. So it would probably be more confusing to the
24 jury to give them, so I would agree that they probably should
25 not be given those three.

1 THE COURT: Okay. Thank you. So P16, P17, P18, we
2 will not give.

3 Next I have P25, which is they knew that risk of
4 injury was inherent or was aware that a student could be
5 injured. As I think I mentioned, that instruction to me
6 seems, you know, overly prejudicial and really not necessary.
7 You're certainly welcome to make statements like that in
8 closing argument, but Mr. Kurth, I welcome your thoughts and
9 -- and --

10 MR. KURTH: Your Honor, as -- since jury
11 instructions are basically instructing the jury on the law, I
12 would say that the law of this case, most recently the
13 decision that was done by the Court's order that was filed on
14 May 19th, 2015, in that order, which was filed with the Court,
15 it makes a specific finding where it says, "The Court finds it
16 to be undisputed that the defendant, Clark County School
17 District, has a general duty to exercise due care.
18 Additionally, the defendant, CCSD, knew risks of injury were
19 inherent in the sport of field hockey."

20 THE COURT: And I think candidly that's a -- should
21 have been qualified by the Court, that last sentence.
22 Assuming on the motion for summary judgment standard facts in
23 dispute in favor of the plaintiff, so that may be candidly
24 somewhat of a -- an error on the Court's part.

25 MR. KURTH: I understand that it's in the testimony

1 and that the testimony has been consistent that they knew
2 there was risk of injury, aware, you know, aware of that. But
3 if not this, I have to double check if we have that general
4 duty, you know, instruction, if that's already been admitted.

5 MR. O'BRIEN: I believe there is one, yeah.

6 MR. KURTH: Okay.

7 MR. O'BRIEN: [indiscernible] exercise reasonable
8 [indiscernible]

9 MR. KURTH: Okay. There is an instruction in there,
10 P24, that says, "Defendant, Clark County School District, owed
11 plaintiff a duty to use reasonable care."

12 THE COURT: That's the one I'd be -- and that's one
13 you both agreed upon, right?

14 MR. KURTH: We --

15 MR. O'BRIEN: Yes, Your Honor.

16 THE COURT: Yeah, yeah. So we will -- over Mr.
17 Kurth's objection, we will not use P25.

18 Next one is P26, which is the standard negligence
19 instruction. As I indicated Friday, I'd be inclined to use
20 that and still so inclined. But Mr. O'Brien, you're welcome
21 to -- to respond and make your record.

22 MR. O'BRIEN: Yes, Your Honor. I believe that the
23 comparative negligence in this case is really a breach of the
24 duty to mitigate damages. So I -- I have a concern that this
25 conflicts with the duty to mitigate damages because it says

1 that we have a duty to show they were negligent but they have
2 the duty to show that they mitigated damages. And actually,
3 now that I said that I think that's incorrect.

4 THE COURT: Yeah. I was going to say I think -- I'm
5 pretty sure you have the duty to --

6 MR. O'BRIEN: I think I just flip-flopped that, Your
7 Honor.

8 THE COURT: Okay. So repeat it the way it should
9 have been.

10 MR. O'BRIEN: Okay. The way it should have been I
11 have no objection.

12 THE COURT: Okay. So we'll use P26. Next I had
13 P28. The caveat we discussed on Friday was changing liable
14 for plaintiff's injuries to liable for his conduct. Subject
15 to that change I'd be inclined to use the instruction. But
16 Mr. O'Brien, I welcome your -- your thoughts.

17 MR. O'BRIEN: It was my recommendation that the
18 language be changed that way so I have no -- no objection.

19 THE COURT: Okay. So we'll use P28 as changed.
20 P29. Court has no issues and would be inclined to use it but
21 Mr. O'Brien, your input, please?

22 MR. O'BRIEN: Your Honor, I think this is a
23 restatement of the duty that we have a -- the previous
24 instruction, we have a duty to exercise reasonable care,
25 number one. But number two, there has been no evidence

1 whatsoever regarding the training that the employees went
2 through other than for Ms. Morton. There's been no evidence
3 presented that how he -- how Mr. Petersen was trained or any
4 suggestion that any training is even an issue in this case.
5 Same with supervision, there's been no evidence that he was
6 not properly supervised. The only evidence is that he was
7 regularly supervised. So I believe that this -- it is
8 inappropriate to raise this issue even in closing.

9 THE COURT: Mr. Kurth?

10 MR. KURTH: Thank you, Judge. Judge, I -- I
11 disagree obviously. I think there's been sufficient evidence
12 to prove by the quadrants that he was -- that the negligent
13 supervision claim should be found by the jury. We had
14 testimony from this former principal that's a higher up now,
15 that testified about what he did or that he saw Mr. Petersen,
16 he'd observed him three different occasions. But we also had
17 testimony by Mr. Petersen about his credentials and about
18 working in the PE department, about the development of the
19 curriculum, about the curriculum for this particular activity,
20 floor hockey, being just posted in the gym, not given back.

21 Question asked about the person that was the
22 principal at the time whether that was, you know, a proper
23 procedure and the school district is just arguing that well,
24 how they do things is of course okay. But we think that
25 there's -- this should be brought forward to the jury to

1 determine if there was negligent supervision involved because
2 that is a separate claim that we have.

3 THE COURT: I'm still inclined to -- to use it so
4 Mr. O'Brien, however, since it is your objection, your -- you
5 have the last word.

6 MR. O'BRIEN: Yes, Your Honor. I believe that the
7 evidence will not support a claim that he was not properly
8 trained. Plaintiff has emphasized the fact that his client
9 got injured on our property. And he's trying to raise an
10 inference that ergo, it must have been the fault of the
11 district. But there's no evidence that he wasn't properly
12 supervised. There is an evidence that a bad result happened,
13 but there's no evidence whatsoever to rebut Mr. Murphy's
14 testimony about the supervision that was provided.

15 And it wasn't just three times, it was three formal
16 -- three formal reviews every year. And plus, he would go by
17 on occasion and drop by and make observations. And, you know,
18 the evaluations of the -- the teachers are, you know, it's
19 critical to keeping them in their -- in their place as
20 teachers are kicking out bad teachers. Now, contrary to that,
21 there's nothing. There's nothing that says that Mr. Petersen
22 wasn't properly supervised. Nothing.

23 THE COURT: So but -- but aren't, here aren't we --
24 this is a -- a -- I don't want to use the word generic but
25 we're not -- we're not pointing out in the instruction whether

1 we're discussing Mr. Petersen or Ms. Ruiz who we certainly
2 just now had quite a bit of testimony I think on -- on her
3 training and supervision. And I think we also did have
4 specific evidence on the PE teacher's supervision. So I
5 appreciate both counsel's comments and over the school
6 district's objection we'll use P29.

7 MR. KURTH: Thank you, Judge.

8 THE COURT: Last on plaintiff's proposed I have P32.
9 I don't see an issue with using this so Mr. O'Brien, I think
10 you had some concerns still.

11 MR. O'BRIEN: There's no argument that he didn't do
12 what the doctor suggested. I think this is sort of
13 reinforcing -- in the jury instruction reinforcing plaintiff's
14 argument that he has a right to rely on doctors. But that's
15 not -- hasn't been an issue in this case. We stipulated to
16 the medical treatments reasonable and necessary. I think this
17 creates undo emphasis on a nonissue.

18 THE COURT: Mr. Kurth?

19 MR. KURTH: Thank you, Judge. The plaintiff's
20 position on this, as we discussed prior, is that I believe
21 there was even -- even a question about it but part of this --
22 this lawsuit, since there's been such a long length of time
23 that was brought up in voir dire and in everything that's gone
24 on plus the evidence that's been produced, to show that the
25 plaintiff was going to get checked out again by his doctor

1 after 18. And his testimony was that he wanted to come back
2 and see Dr. Carr but I think that this instruction is very
3 important to be given.

4 THE COURT: Thank you. Mr. O'Brien.

5 MR. O'BRIEN: Your Honor, he came back because he
6 had a deposition. He took the opportunity to see the doctor
7 to prepare for trial. He hadn't treated since he was 18.

8 THE COURT: You're certainly welcome to argue.

9 MR. O'BRIEN: Thank you, Your Honor.

10 THE COURT: I don't mean to cut you off, I
11 apologize.

12 MR. O'BRIEN: I understand, Your Honor.

13 THE COURT: Okay. So we'll go ahead over the school
14 district's objection and use P32.

15 Okay. Now, the fun stuff. Instructions proposed by
16 defendant objects -- objected to by plaintiff. First one I
17 have is the -- or do you both have those in front of you?

18 MR. O'BRIEN: Yes, Your Honor.

19 THE COURT: Okay. First one's the governmental
20 entity instruction. As I mentioned on Friday, I would be
21 inclined to use this so Mr. Kurth, any objections at this
22 time?

23 MR. KURTH: My objection is only to the use of the
24 words governmental entity. You know, I mean it's -- it's the
25 school district who operates independently but I don't know

1 how else we'd -- we'd have to name them in here unless we -- I
2 mean usually this is like a corporation instruction. So do
3 not discriminate between a government entity and a natural
4 individual. Let's see. Judge, I suppose it's okay.

5 THE COURT: Okay. Thank you, Mr. Kurth. We'll use
6 the governmental entity instruction and I'm thinking probably
7 before, right before the insurance instruction.

8 Next we have the two alternative willful suppression
9 instructions. Mr. Kurth, since this would be your objection,
10 welcome your -- your input.

11 MR. KURTH: Thank you. You know, as the Court's
12 already stated and we touched on prior a little bit, this is
13 an instruction about willful suppression. Now, there was this
14 document that's written on the back of the Wolfgang Puck menu,
15 which just has some handwriting that the plaintiff testified
16 to that it was done sometime close to the time of the -- the
17 incident. With a little bit of information about the incident
18 there's -- I think giving this -- there was no willful
19 suppression. He said that he gave it to his attorney's
20 office. It wasn't disclosed in the -- in the discovery time
21 period. It has been disclosed, it's been offered. It's --
22 the defense has had the opportunity to review it.

23 And I think that giving this would be unfairly
24 prejudicial to the plaintiff's case because it's talking about
25 a -- a willful suppression. It's inferring that this is some

1 kind of document that could change the course of the trial,
2 that could change the case here and it's not and we know it's
3 not, Judge. And we've had all this other testimony given by
4 Ms. Wheelan, the PMK from the school district, about her
5 process and procedure and even investigating the claim, you
6 know, what she did and what she didn't do.

7 We've also heard other -- other things that haven't
8 been provided but we can't give a willful -- you know,
9 willfully suppressed instruction on that. It just wasn't
10 willful, it's not -- it wasn't willfully suppressed, Judge.

11 THE COURT: Thank you. Mr. O'Brien.

12 MR. O'BRIEN: Your Honor, I -- I don't know how
13 counsel can come to that conclusion that it wasn't willfully
14 suppressed. Even on the first day of trial when he showed it
15 to us for the first time, he didn't give it to us then, he
16 gave it to us the next day. I mean he was required to produce
17 it automatically under 16.1. He was then required to produce
18 it at -- at -- at -- in response to our interrogatories and
19 our request for production of documents, which I have briefed
20 this issue for you, Your Honor. So it points out where we
21 requested this.

22 And none of this information was provided. I mean
23 it was kept a secret until January 22nd when plaintiff said,
24 oh, yeah, I have this record. And even after January 22nd,
25 it's now five months later and it was just given to us last

1 week. I mean you can't -- there's no spin you can put on this
2 that it was accidentally not produced, Your Honor. And even
3 if it was, if it's -- if it's willfully suppressed
4 intentionally with the intent to harm, we get a presumption
5 instruction. But if it's willfully suppressed, negligently if
6 you will, without an attempt to only give an inference
7 instruction, but either way we get an instruction. An
8 instruction is appropriate under the circumstances of this
9 case.

10 In looking at the document itself, now that it's
11 been produced, it is prejudicial to us. He identifies two
12 additional witnesses that have never been disclosed. Had we
13 had that information in response to risk management's many
14 inquiries, we might have conducted more investigation, we
15 might have resolved this case. Even potentially in
16 plaintiff's favor. But we were deprived that. We're sitting
17 here in trial, in the middle of trial wondering who these
18 people are and what they know and then with no real effective
19 way to go back 11 years and find out.

20 So it is prejudicial. And if there's any prejudice
21 to plaintiff for having the instruction given, it's prejudice
22 brought on by their own conduct.

23 THE COURT: Thank you.

24 MR. KURTH: Judge, the document -- besides anything
25 else that was provided, the document shows two names, first

1 names, apparently of other students that might have been in
2 the class. Or that at that time when Makani was injured that
3 he remembered because when he was asked to write something
4 down by his attorney and the only thing he had was a menu
5 where his mother worked and he wrote these things on the back
6 of it, there was nothing on there that looked that it was
7 substantial.

8 This case -- this investigation was done by the
9 testimony by Ms. Wheelan for the school district who was the
10 risk claim specialist at the time and still in this
11 department. She never even looked at who was in -- she never
12 even interviewed Brandon Higgins who brought him there. She
13 never talked to Todd Petersen who was the PE teacher at the
14 time. She never -- I mean her investigation was completely
15 lacking. She didn't even look at the list of the students
16 that were in the school, which she had and known in 2004, in
17 2005. This document if anything would have been produced in
18 2015. And there's nothing that they would have gained from
19 it.

20 It wasn't willfully suppressed, it was a mistake.
21 It was something that was overlooked and it was found. And
22 when it was found we offered to allow the school district to
23 look at it, to present it to the Court. Didn't have copies
24 that day, I made copies and filed it and gave it to him. But
25 he had the opportunity to look at it. But either way, the

1 most important thing is it's -- it wasn't willfully.

2 And when you read this in these cases or what Mr.
3 O'Brien's citing, I mean the presumption is that because it
4 was willfully suppressed is because it had some higher
5 evidentiary value that could be prejudicial to the party that
6 did -- that suppressed it. And for the jury to get that
7 instruction or that inference would be highly prejudicial to
8 our case --

9 THE COURT: Thank you.

10 MR. KURTH: -- because it's not true. Thank you.

11 THE COURT: I think it's pretty much been conceded
12 now that production was -- or lack of production maybe was
13 negligent and that it was not produced. Court does not find
14 that it was willfully suppressed. However, we're -- according
15 to the school district's brief where evidence has negligently
16 but not willfully lost or destroyed in adverse inferences is
17 appropriate. So here's -- and the Court believes that is
18 Nevada law on point.

19 Here's what the Court is going to do and we'll need
20 to discuss generally how to come up with a copy of all this to
21 give this to the jury. But the Court is going to take the
22 second instruction and modify it to read, "There's a
23 presumption of the law that evidence willfully suppressed
24 would be adverse of produced and that higher evidence would be
25 adverse from inferred -- inferior being produced in this case.

1 Plaintiff has testified in a deposition taken before trial
2 that he created a contemporaneous record of events, including
3 what happened, and that he provided the same to his attorney."
4 So we're going to strike in how he felt following his injury.

5 "Although obligated to produce such, plaintiff has
6 not done so accordingly. You may infer from the fact that
7 such evidence is in the possession or under the control of the
8 plaintiff and that the record is adverse to plaintiff." In
9 other words, we're going to strike, "Has been willfully
10 suppressed that plaintiff's record." "You are not bound by
11 this inference, however, if you find the plaintiff's claims
12 are supported by other competent evidence in the record."

13 MR. KURTH: Did you leave the word willfully in the
14 first line?

15 THE COURT: I did but that -- thank you for pointing
16 that out. Bear with me here.

17 MR. O'BRIEN: You can probably delete that whole
18 first sentence.

19 THE COURT: Yeah, I -- I agree. So we'll take that
20 first sentence out and it will just start, "In this case
21 plaintiff has testified."

22 MR. KURTH: So after that the only -- the parts that
23 are stricken out are on line 10 and how he felt following his
24 injury?

25 THE COURT: Correct.

1 MR. KURTH: And then line 14 and 15 has been
2 willfully suppressed, that plaintiff's record?

3 THE COURT: Correct.

4 MR. KURTH: Okay.

5 MR. O'BRIEN: Your Honor, will the Court be revising
6 these or will we be --

7 THE COURT: What's -- say that question when we're
8 -- when we've gone through all of them.

9 MR. O'BRIEN: Thank you, Your Honor.

10 THE COURT: Thank you. It appears to the Court that
11 that instruction should be perhaps made before P12 in the
12 agreed upon.

13 Next is the instruction on request for admission.
14 It may be me, but I don't recall any of those coming up at --
15 during trial but if they're -- if they were admitted into
16 evidence -- there is a set that you all stipulate I believe to
17 admit into evidence is Exhibit 10 it looks like.

18 MR. KURTH: And I do think we asked a couple
19 questions about it.

20 THE COURT: Okay. So we do need that instruction
21 but Mr. Kurth it is your objection.

22 MR. KURTH: I'm okay with that instruction, Judge.
23 We just had to change --

24 THE COURT: Okay.

25 MR. KURTH: -- the word to on I think in the first

1 line. In this case that's permitted by law both parties
2 served on each other written request for the admission of the
3 truth.

4 THE COURT: Good point. I mean it looks like
5 there's an -- actually in your agreed upons there is an
6 alternative instruction in there. But that one -- that one
7 has the -- the brackets, defendant, plaintiff. I prefer this
8 one.

9 MR. KURTH: Okay.

10 THE COURT: We'll -- we'll take out -- it doesn't
11 have a number on it in my copy but it starts, "In this case as
12 permitted by law, the plaintiff -- defendant served on the
13 defendant/plaintiff a written request for the admission." So
14 we'll just switch those. Okay.

15 Next is the instruction the plaintiff -- MPJI3.06,
16 the plaintiff has the burden to prove that he's sustained
17 damage, that the school district was negligent. Negligent --
18 such negligence was approximate causes I stated on Friday. I
19 believe this is covered by the P26 instruction. So I would
20 not be inclined to grant it. But Mr. O'Brien, you're welcome
21 to make your record.

22 MR. O'BRIEN: Judge, I don't have a real preference
23 at this point. You've already allowed plaintiff's in. My
24 concern was the second part that said that the defendant has a
25 burden in a comparative negligence whereas it should be the

1 defendant has a burden to show [inaudible]. I have no
2 objection to using plaintiff's instead of this one.

3 THE COURT: Okay. Thank you. The next is the
4 negligence is never presumed instruction. As I indicated, I
5 had a real concern about the substantial negligence phrasing
6 in there but Mr. Kurth, this is your objection.

7 MR. KURTH: I mean, that is -- that is definitely my
8 objection too, Judge. I mean it's an instruction proposed to
9 be given to the jury says, "Negligence is never presumed but
10 must be established by substantial negligence." I don't -- I
11 think that will confuse and mislead the jury and the
12 negligence instructions with approximate cause that they
13 already have and are being provided to them.

14 THE COURT: So if we change --

15 MR. KURTH: It looks like it's a different burden of
16 proof too [indiscernible] preponderance.

17 THE COURT: Yeah. If we change negligence is never
18 presumed but must be established by a preponderance of the
19 evidence or would that address your concern?

20 MR. KURTH: If they just kept the first line, the --
21 the mere fact that there was an accident or other event and
22 someone was injured is not of itself sufficient to predicate
23 liability. So just keeping that in?

24 THE COURT: Keeping that and then continuing
25 negligence is never presumed but must be established by a

1 preponderance of the evidence.

2 MR. KURTH: I would -- I would say nothing after the
3 word liability. I mean negligence is never presumed but must
4 be established.

5 MR. O'BRIEN: It should have been evidence, Your
6 Honor, not negligence. That's my error.

7 THE COURT: Okay.

8 MR. O'BRIEN: [inaudible] substantial evidence
9 standard is actually lower than preponderance of the evidence.
10 I think that would [inaudible] but --

11 MR. KURTH: I think it's too confusing. I mean if
12 they see substantial I don't think they're going to think
13 substantial is less than preponderance.

14 THE COURT: Yeah, I -- I wouldn't either but you --
15 Mr. O'Brien may be right but I -- I tend to agree that when I
16 see substantial I think it's a higher burden than a
17 preponderance but --

18 MR. O'BRIEN: Should we can change that to a
19 preponderance of the evidence instead of substantial evidence?

20 MR. KURTH: I think just leave the first line in if
21 he wants it, which I don't know if it's covered by another
22 instruction already or not. Which is what he's arguing. Just
23 because the plaintiff got hurt doesn't mean that there's
24 liability. That's what their argument is, that's what that
25 instruction says.

1 MR. O'BRIEN: This is what's referred to as a mere
2 happening instruction, Your Honor. And it has been given many
3 times in this type of case where basically plaintiff is
4 arguing I was injured, it must be their fault. And this just
5 reminds him that they have to -- that negligence is never
6 presumed, they have to prove it.

7 THE COURT: Here's what I'm inclined to do. Revise
8 the instruction, the mere fact that there was an accident or
9 other event and someone was injured is not of itself
10 sufficient to predicate liability. Negligence is never --
11 well, liability is never presumed but must be established by a
12 preponderance of the evidence.

13 MR. O'BRIEN: It certainly differs from the language
14 in the case law, Your Honor.

15 MR. KURTH: And I think we already have our
16 preponderance of evidence instruction and we already have a
17 negligence instruction that's pretty detailed. I don't -- I
18 just think that it would be confusing to add that in there
19 when reading with the other ones -- when read with the other
20 instructions. However, I mean I understand their position on
21 the first sentence but that's argument too so. They're just
22 saying because -- just because this happened doesn't mean
23 there's negligence. But they're already being instructed on
24 what negligence is and reasonable care and ordinary care
25 and --

1 THE COURT: I guess the question that Mr. Kurth is
2 saying is that the second sentence is repetitive of my
3 instruction regarding, you know, the -- the elements of
4 negligence itself.

5 MR. O'BRIEN: The second sentence clarifies
6 essentially that you're not to speculate about it, you have to
7 -- it has to be supported by -- I mean even if you left out
8 preponderance, it's just that by evidence [inaudible]
9 demonstrate, you know, the mere fact that this accident
10 happened, it has to be something else. There has to be
11 something else to demonstrate that if the --

12 THE COURT: But doesn't -- your first sentence says
13 that, though.

14 MR. O'BRIEN: I'm not sure that it does. It's half
15 of a statement there. It tells you what isn't sufficient and
16 then the second one says, negligence is never presumed and
17 then it basically says what is sufficient, must be established
18 by evidence.

19 THE COURT: Okay. I'll take a look at the cases
20 after we break. My inclination will be to give the
21 instruction just limited to the first sentence. But I will
22 look at the cases and before we bring the jury back I'll let
23 you know my ruling.

24 Next is the -- the presumption of regularity and the
25 performance of duty instruction.

1 MR. KURTH: Sorry, Judge.

2 THE COURT: That's okay. Mr. Kurth, next one up is
3 the respect to governmental entity and presumption of
4 regularity in the performance of duty instruction.

5 MR. KURTH: Yeah. I don't -- I don't think this one
6 -- this one applies at all. I mean, we're looking at it and
7 it's -- I guess it's calling the school district a
8 governmental entity and it's saying there's a presumption of
9 regularity in the performance of its duty. So what,
10 everything they do, just because they do it every day, it's --
11 they want to instruct the jury that that's okay, that's
12 normal? And we have to show that their normal regularity is
13 rebuttable? And then it's talking about substantial evidence
14 again to show that they violated the law or breached their
15 duty of care. And then they want a presumption that the
16 school district didn't violate the law or breach its duty of
17 care in the absence of substantial evidence.

18 I think we're back on the whole substantial evidence
19 standard again, Judge. I mean, I'd love to instruct the jury
20 -- I guess we could say, hey, there's -- substantial evidence
21 is actually less than preponderance of evidence but I don't
22 know that that would be a correct statement of the law for
23 them to make a decision without a preponderance basis so.

24 THE COURT: Mr. O'Brien?

25 MR. O'BRIEN: Your Honor, as the case law clearly

1 states, the good faith of public officials is to be presumed.
2 Their determinations are not to be approached with the general
3 feeling of suspicion. That's --

4 THE COURT: Can you speak up a little? I'm -- the
5 air is blowing really loud back here.

6 MR. O'BRIEN: Okay. The footnotes -- the case we
7 cited states that, "The good faith of public officials is to
8 be presumed. Their determinations are not to be approached
9 with the general feeling of suspicion." And that's what this
10 says. In other words, if plaintiff doesn't show that we
11 violated a specific duty that the presumption is we didn't
12 violate the duty. They don't to get to -- okay, they didn't
13 produce any evidence but we're going to say they did anyway.
14 They don't get to create a duty that doesn't exist that isn't
15 true. And that's what this -- this says. And it's -- counsel
16 seems to think that the Clark County School District may not
17 be a governmental entity and I'm not sure what the issue is
18 we're --

19 THE COURT: We're past that one so.

20 MR. O'BRIEN: Okay.

21 MR. KURTH: Right.

22 MR. O'BRIEN: I just -- you know, it's -- this is
23 basically to let them know that if plaintiff doesn't prove its
24 case they are to presume that we did what we were supposed to
25 do the way we were supposed to do it. If they don't establish

1 that we had a standard, for instance, that you had to have
2 three teachers for every two students, I'm being facetious,
3 but they're to presume that if we didn't have three teachers
4 for every two students we were nevertheless acting in good
5 faith and that we have not violated a breach or duty. And
6 that's a lot of what this case is about is the lack of
7 evidence by plaintiff.

8 They're trying to shift the burden to us to show we
9 did everything right when the burden's on them to show we did
10 something wrong. And that's what this -- that's what this
11 instruction is directed to inform the jury that they don't get
12 to guess just because they don't like a big bad school
13 district, that we must be doing things terribly and
14 incompetently. And, you know, even without proof they get to
15 presume that and that's -- that's what this jury instruction's
16 intended to prevent.

17 THE COURT: Thank you. Mr. Kurth?

18 MR. KURTH: Judge, I mean this jury instruction is
19 going to presume that the PE teacher is a public official I
20 guess? And is -- their determination should not to be
21 approached with the general feeling of suspicion. And the
22 FASA is a public official? I don't -- I don't know that we
23 have any -- any evidence of that. Plus it's -- throughout the
24 substantial -- the same objection I've already stated on the
25 record, Judge. I mean, the substantial negligence standard is

1 -- is way too confusing.

2 I don't even understand looking at this instruction
3 what needs to be proven. It looks like our -- it's giving the
4 plaintiff an increased burden of proof through this
5 instruction other than the burden of proof that he really has
6 to meet, which is negligence.

7 THE COURT: Thank you. I'm going to have to take a
8 look at this one as well.

9 MR. O'BRIEN: May I respond to just one thing he --
10 he stated?

11 THE COURT: Sure. One point.

12 MR. O'BRIEN: One point. There's nothing in here
13 that says anything about being a public official. Clark
14 County School District is a defendant, not the FASA, not the
15 teacher, there's no mention of public officials. It's suing
16 the district and this is -- goes to the defense of the
17 district.

18 THE COURT: Okay. A fair point. Thank you. I'll
19 look at it.

20 Next is the custom instruction. Generally speaking,
21 I don't have an issue with the instruction itself but question
22 why, you know -- not sure this is really applicable to
23 evidence we receive but Mr. Kurth it's your -- your objection.

24 MR. KURTH: Judge, I don't know why it's -- I don't
25 know why it's being proposed. Evidence of a custom -- or

1 whether somebody conformed to a custom? I don't -- I don't
2 know what custom they're -- they're talking about. You know,
3 I don't see any relevance in this matter at all.

4 THE COURT: Okay. Mr. O'Brien?

5 MR. O'BRIEN: Yes, Your Honor. There's been
6 substantial evidence that's been produced by Todd Petersen and
7 by Mr. Murphy regarding whether or not safety equipment is
8 provided to middle school students playing field hockey. That
9 is relevant to the issue in this case. Plaintiff wants to
10 suggest that we do have a duty and clearly, this is evidence
11 that we don't have a duty. And they can -- this just tells
12 them they can consider that.

13 MR. KURTH: I think the -- well, I think the
14 testimony is that they didn't have any but nobody ever really
15 went into the whole -- into any questioning on could they have
16 purchased some. Or why didn't they have it or -- I mean that
17 really didn't -- that really didn't come out. It was just
18 that they didn't have any. I don't even know that the
19 principal was even asked the question except for when counsel
20 asked him when he's walking around if he's seen other games
21 being played or something when he said that he saw tennis
22 balls being used.

23 THE COURT: No, he did -- he did testify as to use
24 in other schools throughout Clark County that he's familiar
25 with. We will -- given the clarification that -- and Court

1 does believe that evidence relating to the -- the custom was
2 introduced at trial, so we'll go ahead and use this
3 instruction.

4 MR. KURTH: Just have Court's indulgence for a
5 minute on these next instructions?

6 THE COURT: Sure. Mr. Kurth, you have 30 more
7 seconds.

8 MR. KURTH: Okay.

9 THE COURT: So the next one up is the -- in a sports
10 setting, Nevada courts provide limitations upon the duty of
11 care to a participant, et cetera, et cetera.

12 MR. KURTH: Judge, I think this whole line of
13 instructions here are talking about -- you know, really
14 talking about -- well, we'd have to look at each one
15 separately I suppose. But they're, you know, they're really
16 all talking about assumption of risk and this inherent risk
17 and then we have comparative negligence, which I could go
18 through a large litany -- or let's see if I need to. But
19 there's -- I don't believe that -- I mean the next ones are
20 talking about assumption of risk. I think assumption of risk
21 is for the Court to find that there was a duty. Some implied
22 assumption of risk that the Court has to find, not -- not that
23 the jury has to find.

24 I mean the counsel cited this Turner case on this
25 first instruction, Turner versus Mandalay Sports Entertainment

1 which -- which I believe handled that and analyzed that and
2 said that the court has to determine whether, you know, is
3 there some kind of duty there or not. The -- this inherent
4 risk, you know, we're talking about this -- this baseball case
5 about somebody that is attending a game and knows that they
6 could get hit by a baseball attending a game. That's not --
7 that's not our case here.

8 I mean the testimony is that Makani was required to
9 participate in this class, it was in his physical education
10 class, it was an activity that he was involved in and that the
11 school district knew that somebody could get hurt by the use
12 of -- of hockey sticks in this game and that Makani was hurt.
13 And we're talking about him when he was also 11 years old at
14 the time, you know. Did he appreciate? Did he -- I don't
15 even know how we could even have comparative negligence
16 instruction even in this type of case because did he even
17 appreciate that risk at the time? I mean I think the jury --
18 well --

19 THE COURT: You're going to my thoughts on that. I
20 don't know that he could either but I think that's a question
21 for the jury.

22 MR. KURTH: But this assumption of risk and this
23 express assumption of risk, you know, I mean these things are
24 I mean also based on principles of contract and -- it -- I
25 think in this [indiscernible] case even it talks about the

1 decree of assumption of risk is disfavored. The doctrines
2 improperly --

3 THE COURT: You've got to tell me what case you're
4 talking about.

5 MR. KURTH: Let's see if he -- sorry, I thought he
6 cited that case.

7 THE COURT: Mr. O'Brien, while he's looking that up,
8 why don't we go ahead and address both this one and -- and the
9 next assumption of risk like -- like Mr. Kurth has done.

10 MR. O'BRIEN: Thank you, Your Honor. Counsel has,
11 however, mixed these two together and you can't look at them
12 together, they're separate instructions. If one applies the
13 other probably doesn't. In a sports context it's unique from
14 almost any other -- other context. And the courts have in the
15 cases that we've cited have shown that there -- that the
16 person putting on an act -- a sporting activity is not
17 required to take extraordinary measures to reduce the risk.
18 They're simply -- they're not simply, even they're bound not
19 to do something to increase the risk.

20 So if we had had these individuals playing out in
21 the street, for instance, and a car hit him, we clearly did
22 something to increase the risk. But having players who are
23 playing with hockey sticks, striking a ball, even though
24 everybody -- they're instructed not to, everybody knows that
25 it can come up. I mean that's -- it's -- foreseeability isn't

1 an issue in -- in this context. Primary implied assumption of
2 the risk, it states that basically you're not required to
3 provide safety equipment. You're required to do -- not do
4 anything to increase the risk.

5 And it's not just -- it's not just a baseball case.
6 I mean we've cited golf cases. Counsel, we also provide golf
7 instruction if -- under counsel's theory we would have to
8 equip everyone on the golf course with helmets and probably
9 chest protectors then and leg guards because everybody knows
10 somebody's going to hit [indiscernible] ball and somebody's
11 going to get hit. And the Court doesn't impose that duty
12 because it's a risk that can't really be eliminated without
13 fundamentally altering the game. Same thing with any sport,
14 basketball. Everybody knows you're not supposed to undercut
15 somebody when they're going for a -- for a layup but everybody
16 knows it happens.

17 THE COURT: And I can testify that happens but.

18 MR. O'BRIEN: Baseball, you know, we provide helmets
19 to the catcher and the batter but not the base runners
20 usually. And none -- none of the outfielders that I've ever
21 seen wear helmets. Their -- the biggest risk in baseball is
22 getting hit by a hit or a thrown ball, not by a bat. And yet,
23 we don't -- we're not required to take safety precautions to
24 prevent a runner, for instance, from getting beamed when he's
25 trying to get to the base before the ball gets there.

1 These are the types of things that the -- the Court
2 has said a special rule applies, that as long as we've met our
3 regular -- ordinary duty of care, which is to provide proper
4 instruction, supervision and the like, we're not required to
5 go any farther. We're not required to provide safety
6 equipment, helmets or goggles or something for the protection
7 of the employees. And in this case in particular, the
8 evidence, there's been no evidence produced, number one, that
9 there was such equipment available. There's been no -- that
10 it would have prevented the injury. Plaintiff gave his
11 opinion, yeah, I think maybe goggles or something would have
12 prevented the injury.

13 There's -- there's been no expert to come in and say
14 either that it's required or what equipment we're supposed to
15 provide. I mean, the fact of the matter is the jury will have
16 to guess that there's something that we should have provided
17 and they'll have to guess that it would have been effective.
18 And -- and as you know, a jury's decision can never be based
19 on speculation. So I think this is an appropriate instruction
20 in this case.

21 THE COURT: Thank you. Mr. Kurth?

22 MR. KURTH: Your Honor, I think -- I mean yes,
23 there's been no expert testimony either way in this case. But
24 there have been rules that have been provided that are in
25 evidence. And in these rules talk about a certain number of

1 players even playing at the same time. And we have the
2 testimony from Mr. Petersen about how many players -- how he
3 would determine would play this game at -- at a particular
4 time.

5 THE COURT: So if -- if the Court were to use one of
6 these two, the first being in a sport setting Nevada courts
7 provide limitations. The second being defendant seeks to
8 establish that the plaintiff assume the risk. Which would
9 plaintiff prefer?

10 MR. KURTH: Well, I don't think you can use either
11 one, Judge. I mean, first of all --

12 THE COURT: Assuming I'm going to use one of them,
13 which would you prefer?

14 MR. KURTH: Well, let me -- let me give you the
15 reasons why I don't --

16 THE COURT: Okay.

17 MR. KURTH: -- think you can use either one. But on
18 the first one, there's a statement that says a failure to
19 provide safety equipment does not increase the risk associated
20 with --

21 THE COURT: Yeah, I'm not going to say that
22 sentence.

23 MR. KURTH: I mean --

24 THE COURT: So assume that sentence is not going to
25 be given.

1 MR. KURTH: I don't think this -- I don't think this
2 instruction applies. I mean, this is talking about an
3 inherent risk about going to these sporting events and
4 activities that people pay to go to and attend that generally
5 they sign some type of waiver of liability to attend by even
6 playing. Whether it's on the back of their ticket, you know,
7 we're not responsible for any injuries or accidents to you by
8 getting hit with a baseball. I mean, this is not this case.
9 This is --

10 THE COURT: Okay. We -- you know, I'm trying to
11 give you leeway but we have to keep moving.

12 MR. KURTH: Well, and I'm -- and Judge, I want to
13 say these cases here, this Turner case, you know, and you're
14 looking at the other one assumption of risk, that's a question
15 -- it's really a question of law when the -- the Turner versus
16 [indiscernible] sports case that the defendant cited --

17 THE COURT: All right. Here's what the Court's
18 going to do. I'm going to look at both of these and give you
19 my ruling when we come back.

20 MR. KURTH: Okay. Let me give you the cite on this
21 other -- well, the Mizushima case is cited in this Turner
22 case.

23 THE COURT: Yeah, go ahead and give me the citation
24 if you have it there.

25 MR. KURTH: It's 103 Nevada 259737 Pacific Second,

1 1158 --

2 THE COURT: How do you spell the name, that first
3 name of it?

4 MR. KURTH: M-i-z-u-s-h-i-m-a, Mizushima V. Sunset
5 Ranch.

6 THE COURT: Thank you. I'll take a look at -- at
7 that and the other cases. Next is the comparative negligence.
8 This one, as I indicated, I'd be inclined to use but Mr.
9 Kurth, your response?

10 MR. KURTH: Let's see. Well, I would object to
11 comparative negligence instruction just because I don't -- I
12 don't know that there's any proof that he's -- what did he do
13 that would make him negligent? The fact that he played the
14 game? I mean, there's -- there's nothing else that would be
15 confusing to the jury but if the Court's going to grant one of
16 these instructions it should only be -- I don't think any of
17 them should be granted but comparative negligence would be the
18 only one that would even be close. The other two assumption
19 risk and inherent risk shouldn't be granted.

20 THE COURT: Thank you. Mr. O'Brien?

21 MR. O'BRIEN: If the mitigation of damage
22 instruction is given then we don't need this because that was
23 -- I called it comparative negligence but that was what I was
24 really going for.

25 THE COURT: Okay. So the Court, because we are

1 running out of time and I need to do the research, will not
2 give the comparative negligence instruction but will give the
3 mitigation of damages instruction, which is the next one I
4 have.

5 MR. KURTH: Right.

6 THE COURT: Thank you both on that one, by the way.

7 MR. KURTH: And the last one -- do we have one more,
8 Judge?

9 THE COURT: Yeah, hold on one second. I think the
10 mitigation of damages one I think would be given after the
11 P32, which is the plaintiff rely on recommendations of his
12 health care providers. Okay, sorry.

13 So the last one we have is the minor right to
14 recover I think. Is that the last one you both have?

15 MR. KURTH: That's the last one I have.

16 MR. O'BRIEN: Yes, Your Honor.

17 THE COURT: Okay. So Mr. Kurth, it's your
18 objection, so go ahead.

19 MR. KURTH: It's our -- our position on that is that
20 that's a matter for the Court and it's already been heard a
21 couple times to be determined. And if it's going to be
22 readdressed again it should be determined after we get any
23 verdict back.

24 THE COURT: Thank you. Mr. O'Brien?

25 MR. O'BRIEN: I agree it's an issue for the Court

1 and that's -- that's why the medical bills have not been
2 introduced into evidence at this point in time because we've
3 argued -- partly because we've argued that we can't collect
4 them.

5 THE COURT: Okay. Thank you both on that one.
6 Court appreciates counsel's input. I agree -- from what I
7 understand any, I agree with both counsel, that's a -- an
8 issue for the Court to determine. And it may be moot
9 depending on how the jury comes back. So we will not give
10 that instruction but the Court will, depending on what verdict
11 comes back, will have to decide that as a matter of law.
12 Okay.

13 Here's the thing like Mr. O'Brien kind of mentioned
14 earlier, we have some of these that I've marked up, some that
15 have the legal citations on them still. Welcome counsel's
16 thoughts on how to take care of that.

17 MR. KURTH: I was just asking Mr. O'Brien if he had
18 provided that to the JEA in Word or something then we could
19 take --

20 MR. O'BRIEN: I -- I believe we did but I don't
21 recall this.

22 MR. KURTH: And just another thing, Judge, on 31, on
23 the ones that were agreed to, I don't know if we just -- if I
24 should bring it up but it says -- talking about a treating
25 physician can testify but there -- since nobody testified I

1 don't want to -- know if we should pull it out.

2 THE COURT: Good point.

3 MR. O'BRIEN: I have no objection.

4 THE COURT: Okay. We'll -- we'll take 31 out.

5 MR. KURTH: Okay.

6 THE COURT: Thank you.

7 MR. O'BRIEN: I think we only have a couple that
8 would have to be changed and I have undecided copies of the
9 other ones.

10 THE COURT: Okay. I would give you my copy because
11 it'd probably be easiest but I've got notes on some of mine
12 that probably aren't to be seen.

13 MR. KURTH: I don't know if we need to be on the
14 record for this part or not but we could definitely take some
15 -- these ones that are already agreed that even if we -- if we
16 have cites on it, we don't have the one with no cites, we can
17 just --

18 THE COURT: Here --

19 MR. KURTH: -- write that out and copy them.

20 THE COURT: Here's what I'm going to have to do
21 because I have to look at those few other ones. I have my
22 copy marked up, has some that will need blanks for. I assume
23 that you both kept track of what we'll be doing. Work
24 together as best you can, come up with a way where we can get
25 this done. If you -- if you need me or any of the staff knock

1 on the door here, back here.

2 MR. O'BRIEN: Thank you.

3 THE COURT: Okay.

4 (Court recessed at 1:02 p.m. until 2:16 p.m.)

5 (Outside the presence of the jury.)

6 THE COURT: On the rulings on the instructions,
7 here's what we're going to do. We will give the instruction
8 on the -- the mere fact as follows; the mere fact that there
9 was an accident or other event and someone was injured is not
10 of itself sufficient to predicate liability. Negligence is
11 never presumed but must be established by a preponderance of
12 the evidence.

13 Looking at that gunlock case, the school district
14 quoted it verbatim, however, the Court agrees with plaintiff's
15 counsel that using words substantial would be confusing to the
16 jury. On the other proposed instructions, in the sport
17 setting instruction, the Court will not give that instruction.
18 Basically the limited duty rule, the FCH1 case and the Turner
19 Mandalay Bay -- or Mandalay Sports cases, the Court finds that
20 those are not applicable to our case for reasons hopefully
21 counsel is aware of but they're easily distinguished.

22 Same with the assumption of risk instruction, the
23 Court will not be giving that instruction. The Turner V.
24 Mandalay Sports case discusses the assumption of risk and the
25 Mizushima case clarifying that Mizushima is not a hard and

1 fast rule. In Mizushima the court had found that assumption
2 of risk generally doesn't apply in Nevada. Turner kind of
3 clarified that but did state whether a duty exists is an issue
4 of law for the Court to determine. As part of that
5 determination, the Court is to treat the assumption of risk as
6 part of its analysis. The Court has already found that there
7 is a duty of reasonable care in the case so has considered
8 that. Those are the rulings on the instructions.

9 And now what we need to do now is make copies of the
10 instructions without citations both for the jury and for
11 counsel and the record. And also determine what verdict form
12 we'll be using. Thank you.

13 MR. O'BRIEN: Your Honor? Did I -- I didn't hear
14 you comment on the presumption of regulatory for a government
15 entity.

16 THE COURT: Oh, that's probably because I did not
17 speak to that one for some reason. Court asks indulgence of
18 counsel. Thank you for pointing that out. That instruction
19 too will not be given. The Court did review the citations
20 given. Basically NRS 47.2509 refers to an official duty
21 regularly performed. And 16 refers to a presumption that law
22 has been obeyed.

23 The case that addresses -- that's cited in
24 [indiscernible] refers to a ballot inspection by public
25 officials. Court does not find that Clark County School

1 District as a governmental entity is per se entitled to the
2 presumption of an official duty regularly performed. So
3 that's kind of the distinction that -- that the Court found.
4 You're welcome to give input on that one.

5 MR. O'BRIEN: Well, I thought I already had but, you
6 know, the whole case -- a large part of plaintiff's case has
7 to do with whether or not we breached a duty to -- to the
8 plaintiff and it's not just a duty of, you know, super --
9 proper supervision, that we had a duty to train our people,
10 that we had a duty to supervise our people and do things which
11 the courts have said constitute discretionary acts anyway to
12 which discretionary immunity would apply. This basically says
13 that plaintiff, if you don't come forward with evidence that
14 shows that we violated a duty or breached an obligation then,
15 you know, they have to presume that we did what we were
16 supposed to do.

17 So when they come in and say we had too many kids in
18 the class, we violated the teacher student ratio, they have to
19 come in with some evidence that there was a ratio and that we
20 in fact violated it rather than simply arguing that fact. And
21 so that's the type of thing that we -- we've discussed and why
22 we believe that's an inappropriate instruction.

23 THE COURT: Mr. Kurth?

24 MR. KURTH: I am trying to locate that instruction.

25 THE COURT: No worries. The Court is having those

1 same kind of issues as well.

2 MR. KURTH: Judge, I don't -- I don't think -- I
3 think just as the Court already cited, those cases that were
4 cited that were applicable was about some governmental entity
5 or somebody within that authority doing a specific duty,
6 making a specific decision, and this instruction appears to
7 like shift the burden of proof the way it's written. And I
8 don't think it's -- that's our case here. I don't think it's
9 applicable. And there's a lot of -- you know, this statute
10 comes under a lot of governmental entities. It talks about
11 somebody if they're working for the -- you know, is a planning
12 commission or somebody in the legislature or somebody working
13 for the attorney general's office making a decision. But this
14 is the school district and it's inapplicable to our case.

15 MR. O'BRIEN: And Your Honor, if I may just very
16 briefly.

17 THE COURT: Certainly.

18 MR. O'BRIEN: It doesn't shift the burden at all.
19 The burden at all time is on the plaintiff. It merely
20 clarifies that the burden can't meet its burden without
21 evidence. And it has to have evidence or must presume that
22 we've done what we were required by law to do.

23 THE COURT: The instruction as written is overly
24 broad. Again, referring to substantial evidence and the last
25 sentence is troubling to the Court as well.

1 MR. O'BRIEN: Your Honor, if I may?

2 THE COURT: Certainly, yes.

3 MR. O'BRIEN: Given plaintiff would be free to argue
4 that it was our burden to come forward and show what the duty
5 was and to produce evidence to show that we complied with that
6 duty even if they haven't established that we didn't comply.
7 This says that a governmental entity, you have to show there
8 was a duty and we breached it before we have any duty to come
9 forward and say, no, we did comply. This applies where they
10 haven't produced evidence, that we didn't comply with any duty
11 or law and -- and they want to in effect shift the burden to
12 us.

13 MR. KURTH: Our same objection, Judge, regarding the
14 substantial evidence regarding the presumption. I mean, we
15 already have instructions, you know, that the school district
16 does have a duty and we have instructions that we -- the
17 plaintiff has a burden of proof to prove negligence and any
18 other claims for relief. So I don't -- this is creating a
19 presumption with substantial evidence.

20 THE COURT: I'm listening, I'm just also trying to
21 multi-task.

22 MR. KURTH: I think it would be prejudicial to the
23 plaintiff's case to have that instruction given. I don't
24 think it's an accurate statement the way this is written at
25 least.

1 THE COURT: The Court is going to find the proposed
2 verdict and we'll go to that in this instruction when we come
3 back on the record.

4 MR. O'BRIEN: Your Honor, you can certainly use my
5 copies if you wanted to.

6 THE COURT: Say that again?

7 MR. O'BRIEN: You can certainly use my copies if
8 you'd like.

9 THE COURT: I -- I did -- I did find them. They're
10 right in front of my face. On the verdict forms, what I'm
11 inclined to do is provide the verdict form provided by
12 plaintiff that is -- I don't know how to describe it but the
13 two page with the percentage of negligence on the second page
14 and then also the general verdict form, verdict for defendant.
15 But I would like to hear from both counsel on that.

16 MR. KURTH: I have no objection.

17 MR. O'BRIEN: Yeah, the two-page verdict form, Your
18 Honor, goes on to talk about plaintiff's comparative
19 negligence and I thought earlier we had discussed that our
20 complaint -- our claim wasn't really [indiscernible] truly for
21 comparative negligence it was for mitigation.

22 THE COURT: Mitigation, okay.

23 MR. O'BRIEN: You allowed a mitigation instruction
24 so I think that this might cause some confusion.

25 THE COURT: I -- I agree, that's a fair point,

1 counsel.

2 MR. KURTH: That is a good point so maybe just the
3 first page of the --

4 THE COURT: Of the --

5 MR. O'BRIEN: The second one is only one page.

6 THE COURT: The one page? The other -- the one page
7 one?

8 MR. O'BRIEN: Yeah.

9 THE COURT: Okay. The only problem with the one
10 page plaintiff verdict is it's on Mr. Kurth's letterhead.

11 MR. KURTH: Do you want me to take that off? Oh, on
12 the side, we can white that out.

13 THE COURT: You know we could -- I will go do that.
14 I'll be right back.

15 MR. KURTH: I didn't even think about on the little
16 side part.

17 THE COURT: That's okay. Court will provide both
18 counsel with copies of the proposed -- well, of the jury
19 instructions so you can determine whether they are what we've
20 discussed and gone over as well as copies of the verdict
21 forms.

22 MR. KURTH: [indiscernible] take off, I didn't -- I
23 don't know if it matters if we need to white out the front
24 page where it says [indiscernible]. I don't know that it
25 makes a difference but --

1 THE COURT: Court noticed that as well just now but
2 that's okay. They -- they need a copy of that one too.

3 (Pause in proceedings)

4 THE COURT: Going back to the rebuttable presumption
5 instruction, the instruction refers to a rebuttable
6 presumption, whereas it's really under the statute that it is
7 a disputable presumption. The instruction -- the Nevada
8 revised jury instructions from 2011 discuss basic facts that
9 need to be included in the instruction. And at this time, for
10 some of those reasons and reasons discussed earlier, the Court
11 is not going to give that proposed jury instruction.

12 MR. O'BRIEN: Is that the inference instruction,
13 Your Honor?

14 THE COURT: That is what the Court would refer to as
15 the presumption of regularity in the performance of its duty,
16 this presumption is rebuttable, et cetera, et cetera.

17 MR. O'BRIEN: Okay. Thank you.

18 THE COURT: Certainly. Once you've had a chance to
19 go through those instructions and verdict forms let us know if
20 those comport to your understanding of the instructions we
21 should have and that we are giving. Court will not assume
22 that you're waiving the objections that you've already made
23 but want to know that -- make sure we're all on the same page
24 giving the proper instructions.

25 MR. O'BRIEN: Is Your Honor concerned about typos?

1 THE COURT: Depends on how blatant it is.

2 MR. O'BRIEN: The one about requests for admissions,
3 it says that in this case it's permitted by law both parties
4 served, instead of the word on it says [indiscernible]. I
5 mean I just wrote over mine.

6 THE COURT: I will do that as well. Do -- did you
7 go through and number your copies?

8 MR. O'BRIEN: It's toward the --

9 MR. KURTH: In the beginning.

10 MR. O'BRIEN: It's right after the interrogatory
11 instruction.

12 THE COURT: Thank you.

13 MR. O'BRIEN: I have another one. The very next
14 instruction, line -- well it's fourth line up from the bottom.
15 It starts off with possession or under the control as the
16 plaintiff and then it's got the word in that the record is
17 adverse to plaintiff. I'm not sure that the word and is
18 supposed to be there. It's the --

19 THE COURT: I think the that is not supposed to be
20 there.

21 MR. O'BRIEN: I think it's supposed to say you may
22 infer from the fact that it's in their possession or under
23 their control plaintiff that the record is adverse to
24 plaintiff. They're not inferring it's in his possession,
25 they're just inferring that it's adverse.

1 (Pause in proceedings.)

2 THE COURT: Thank you. Okay. Are we good to bring
3 in the jurors?

4 MR. O'BRIEN: Yes, Your Honor.

5 THE COURT: To get this on the record, the Judge
6 instructions refer to each juror having a copy of the
7 instructions while I'm going through them. You want both
8 counsel if you are so able to stipulate that they do not each
9 have their own copy of the instructions and that that is not
10 grounds for an appeal by either side.

11 MR. O'BRIEN: So stipulated, Your Honor.

12 MR. KURTH: So stipulated, Judge.

13 THE COURT: Thank you both.

14 MR. KURTH: Would you like us to put like one up on
15 the -- while you're reading it we can put one up on the Elmo.
16 Somebody can flip that each through -- each time. That might
17 be good.

18 (Jury reconvened at 2:56 p.m.)

19 MR. O'BRIEN: Your Honor, the defendants stipulate
20 to the presence of the jury.

21 MR. KURTH: So stipulated by the plaintiff.

22 THE COURT: Thank you both. Ladies and gentlemen,
23 thank you very, very much for your patience. Sometimes these
24 things take longer than the Court and the parties anticipate.
25 So thank you as always.

1 I'm now going to read the instructions to you. You
2 will be provided a copy of the instructions when you go back
3 to deliberate. And a copy of the jury verdict form will be
4 provided to you as well when -- when you go back there.

5 (Jury instructions read - not transcribed.)

6 THE COURT: Mr. Kurth, you may proceed.

7 MR. KURTH: Judge, I'm going to defer and just let
8 Mr. O'Brien go and then I'll just go at the end, if that's all
9 right? Unless you want me to start off with something in the
10 beginning.

11 THE COURT: Mr. O'Brien, any --

12 MR. O'BRIEN: Any final statements he may have to
13 say after I speak will of course be limited to the matters I
14 discuss on my closing argument. Now, with that understanding,
15 I don't -- have no objection to if he defers.

16 MR. KURTH: I don't think --

17 THE COURT: Is that amendable to you, Mr. Kurth?

18 MR. KURTH: No.

19 THE COURT: Okay. Then --

20 MR. KURTH: That's fine. Then I'll start, Judge.

21 THE COURT: Thank you.

22 MR. KURTH: Can I approach?

23 THE COURT: You certainly may. Do you need the
24 remote one?

25 MR. KURTH: Yes.

1 PLAINIFF'S CLOSING ARGUMENT

2 MR. KURTH: Good afternoon, ladies and gentlemen of
3 the jury. We've been -- we've come a little bit of a long
4 ways now from when we started with jury selection. We know
5 that in jury selection at that time when we were conducting
6 voir dire I asked you some questions and now I'm, you know,
7 relying upon some of your answers that were to those questions
8 and for you to consider all the evidence that's been presented
9 before you during this time. I surely appreciate the
10 attention that you've paid and the detail that's been paid to
11 this case. There's been a lot of questions along the way that
12 we've -- I think we responded to most of those, at least the
13 ones that we could. And I appreciate you taking notes and
14 doing that.

15 In the beginning I asked each one of you if -- well,
16 I might not have asked everyone specifically but did you have
17 a problem or, you know, hearing this case would it you
18 prejudice you at all knowing there was a long lapse -- a time
19 lapse from when the injury occurred and from where we are
20 today. I think we've gone through and -- and you said no, it
21 wouldn't affect you. You could be, you know, fair and
22 impartial. And I think we've gone through and explained that
23 adequately.

24 But just to review a little bit of that. We know
25 that this -- this accident from the evidence that's been

1 presented happened on May 12th, 2004. We know at that time
2 Makani, a little difficult to imagine now since he's 22 years
3 old, was 11 years old and in sixth grade at Woodbury Middle
4 School. Woodbury Middle School was close to where he was
5 living. His mother, his grandmother and they were getting
6 ready to move during this time. And we saw from the medical
7 records there was another address showing that they had
8 actually did move, which confirms, you know, their testimony.

9 So at this time it's any other day, regular day, 11
10 year old coming in to play or participate in his physical
11 education class. As Makani testified, he enjoyed doing during
12 activities with his friends. So he shows up, he's given a
13 hockey stick that day. We don't know how many were in his
14 class exactly and the PE teacher doesn't know, the school
15 district -- nobody could testify as to exactly how many people
16 were in this class, what was the class size on the day.

17 What we do know is that Mr. Petersen said, well, if
18 he has a class of 40 students and he's playing this floor
19 hockey game, he'll divide them up into four teams so they
20 could have 10 on team. When it's 44 students we're going to
21 have 11 on a team. Forty-eight students, 12 on a team or
22 maybe 10 on a team and we have -- you know, let's say we have
23 46 students, we have 11 on a team and we have a couple sitting
24 out for substitutes, you know, substitute in this game.

25 He wasn't sure on that day either. I mean, he had

1 been a PE teacher for many years. He even -- I believe he
2 said that he taught every period, all seven periods. Like he
3 bought out that period so, you know, make a little bit more
4 money and probably felt he didn't need a lesson plan break, he
5 could just teach his physical education class.

6 Now, on that day Makani says there was I mean a lot
7 of kids playing, like the whole class is playing. So is there
8 two games going on at one time? They split the tennis courts
9 so they could play down one side of the tennis courts and then
10 they had the nets, you know, separating off the other game
11 that was playing but we have them divided into four teams.
12 The rules that were provided weren't provided by Mr. Petersen,
13 the physical education teacher at the time. They were
14 provided by a physical education teacher that was there. Mr.
15 Petersen said these rules that we have, they were developed in
16 some type of -- he talked about developing the curriculum but
17 that was based on -- based on somebody else in that department
18 at Woodbury in the physical education department wanting to
19 implement this game, wanting to implement floor hockey.

20 Did they have to implement floor hockey? Did they
21 have to play that game? I mean, there's plenty of other
22 activities and -- and sports and other events that they could
23 do in physical education class, they didn't have to do this.
24 But somebody wanted to do it, they had been doing it and they
25 came up with some rules. And let me show you if -- refresh

1 your recollection on -- on some of these rules. And Mr.
2 Petersen looked at these rules that were provided that are in
3 your exhibit binders admitted into evidence and he said, yeah,
4 those look like, you know, similar, not exactly, not in his
5 handwriting but these rules are posted in the gym.

6 Were they provided to the students to take home?
7 No. Were they provided to the parents to review? No. Were
8 the parents told what this game consisted of that their
9 children -- was Makani's mother told what this game consisted
10 of that he was going to participate in ahead of time? No.
11 Was he required to, you know, sign anything agreeing to
12 participate in that? No, he wasn't. And if anybody wanted to
13 see the rules they had to find them somewhere in the gym.
14 They were there in the athletic office, we don't -- we don't
15 know where they were, we just know they were in the gym I
16 believe is what his testimony was.

17 And -- and in these rules -- well, we have the
18 incident. He says, well, we're trying to teach the kids to,
19 you know, hold the stick with two hands and so they don't, you
20 know, can't raise it too high. Now we're talking about 11
21 year olds and -- and I want you to keep that -- try to keep
22 that fresh too. We're talking about sixth graders. So
23 they're playing this activity with sixth graders, though
24 they're seventh grade classes, though they're eighth classes,
25 we're talking about the sixth grade class. So a bunch of kids

1 out there, 11 year olds, running around going to just
2 participate in this game.

3 And Mr. Petersen said, yeah, I supervise this game,
4 I see it, I'm there. I'm -- I'm standing on the outside of
5 it, you know, I'm walking around. But then he said he
6 probably would notice -- Makani was down for 10 seconds, he
7 didn't say he would notice for sure. He said, well, you know
8 the kids would be reacting differently, other things would be
9 going on and I'd know if something happened. You know. And I
10 asked him a couple times and he said -- he stuck with
11 probably. He didn't say, yeah, I would have noticed 10
12 seconds. But 10 seconds is a long time. And we don't know
13 how long Makani was down on the ground. Makani claims that
14 when he was hit that he was unconscious for some kind of short
15 time, he blacked out. He doesn't know how long he was on the
16 ground. I mean one time he said -- or he said 10 minutes,
17 everybody would have noticed that, right? But what's
18 consistent in some of the testimony is the 10 seconds or even
19 less.

20 And Mr. Petersen, an employee of the school district
21 operating under this curriculum, these rules that their PE
22 department decided to have, that the principal okay'd -- not
23 that the principal ever reviewed the rules or knew what the
24 rules said but he knew, yeah, they -- they play this game out
25 there and I see them playing it with tennis balls. Mr.

1 Petersen said, no, they didn't -- they didn't use a tennis
2 ball. Although I could point in the interrogatories that are
3 in there it says tennis balls, which he helped to answer that
4 question.

5 And -- and other evidence that's presented, Makani's
6 testimony, tennis ball. That tennis ball is part of the
7 equipment too. It's a little bit different. A little bit
8 different than a soft round rubber ball and, you know, we
9 don't have that and I wish we did. I wish we had the exact
10 hockey stick that was being used. I wish we had the balls
11 that were being used but we don't. But, you know, and a
12 tennis ball -- tennis balls bounce. On a tennis court they
13 kind of especially would bounce on a tennis court.

14 So you've got this ball that they're using that
15 somebody's hitting trying to score into a goal on each side
16 and it's going to bounce and somebody's going to try to hit it
17 with their stick. Well, unfortunately, Makani goes to look to
18 hit it and he got hit by the stick, not a ball. Now, we can
19 all think -- but probably it would be reasonably foreseeable
20 that somebody could get hit by -- in the face with a ball.
21 Whether it's a tennis ball or whatever -- especially a tennis
22 ball. It's a little harder, a little rounder, softer, heavier
23 ball that's going to stay on the ground or a puck, soft,
24 readily available for the school district to purchase to use.
25 You want to stay down low. Eleven year olds, not 16 year

1 olds, not 17 year olds, not college age kids like the rules
2 that had been in -- introduced into evidence for when Ms.
3 Wheelan, the person most knowledgeable from the school
4 district handling this claim looked up, hmm, let me look and
5 see what rules were available.

6 She found doing her investigation of this claim,
7 these rules from Woodbury, okay, these must have been the
8 rules. Later on they find out that well, Todd Petersen didn't
9 really actually sign these rules or write these rules but
10 these are rules there. And we find out in court that the
11 rules are, you know, basically the same ones that were being
12 used. She does some more research. Well, let's find out more
13 about this game and she comes up with these rules from Rice
14 Intramural. You know, and what do those rules say? What do
15 they recommend?

16 These are college age kids and they're requiring
17 them to sign a waiver for liability because they know --
18 because it's -- it's a dangerous activity, it's a risky
19 activity. The school district admits it's a risky activity,
20 they admit it in their interrogatories. Let me show you if I
21 can get this -- if this works right for me today. So one of
22 the exhibits in there are these -- these interrogatories that
23 you've been -- that you've been provided. And in the
24 response, number two -- or excuse me, response number one --
25 let's see here. I always say I never did good in passing

1 papers and that's like holding [indiscernible]. Let's see.
2 Is that focused enough? Okay.

3 So he's asked about this and he assists with -- with
4 answering this response to number one and he says, "Well, I
5 don't recall much about the accident itself. I'm not sure if
6 I actually saw the hit or noticed that Mr. Payo was injured
7 only after it occurred." No, he didn't see the hit. He
8 doesn't even know if he was down for 10 seconds because he
9 probably would have seen it. But he is supervising this game.
10 He said we had teams of 10 to 12 players on each side with
11 substitutions. Ten to 12 players.

12 I mean -- I mean he does say further on into the
13 response that, you know, most of the time they just have
14 bruised -- bruised knees and sore knuckles, most common form
15 of injuries. Did they provide shin guards? I mean we're not
16 here for a shin guard case but, no. Going on to ask them in
17 interrogatories, which same thing that we asked him here in
18 court and I apologize for my back being to you right now. He
19 said, "Okay. What's -- what are the risks of these injuries
20 to Makani?" He says, "Well, the game is played with hockey
21 sticks."

22 And then they talk about the term high sticking has
23 been coined to reflect the known, the known possibility,
24 getting hit by a hockey stick. In the rules that we saw, the
25 two different sets of rules, high sticking is a penalty. Why?

1 Because it's known if you're playing this game somebody's
2 going to raise their stick up or they can and they get
3 penalized. But once they've already, you know, hit somebody
4 with it -- and granted, you know, the penalty's probably to,
5 okay, they're raising their stick too much, it's going to get
6 kind of dangerous here. Well, somebody just raised it up and
7 smacked him, that's undisputed.

8 It's undisputed that he was hit in the eye, it's
9 undisputed that he has damages. His medical is undisputed.
10 His treatment, his future treatment that he needs, undisputed,
11 he needs it. That's why there's nobody in here talking about
12 it. No other, you know, medical providers, healthcare
13 providers talking about that because it's undisputed. That
14 the kid hit him, that he didn't intentionally do it, it wasn't
15 somebody that had it out for Makani, that's undisputed.

16 Makani was damaged and injured because of the
17 negligence on the part of the school district by not providing
18 simple safety equipment by playing this game. Why play the
19 game if you don't have the equipment? If you're going to say
20 well, we have budget cuts or -- well, the curriculum didn't
21 say we need it, somebody decided in the PE department at
22 Woodbury well, we don't need headgear or mouth guards or
23 softer sticks or a softer puck or -- we don't need any of
24 this? We don't need to require our students that are already
25 wearing glasses to wear a safety goggle or to not play?

1 Because of the possibility, because it was reasonably
2 foreseeable that he could get injured.

3 Did it happen every day? The testimony is no, it
4 didn't happen every day. It didn't happen to all these other
5 students, but it happened to Makani and it was reasonably
6 foreseeable that it could happen to him.

7 The -- the school district's response is, well, we
8 can't -- you know, we'd have to get rid of these hockey
9 sticks. I mean how else can you keep somebody from getting
10 hit is if we didn't play with hockey sticks. That -- well, I
11 mean, we know they've got to play with it. What did the rules
12 say? They said they were adapted from the game of ice hockey.
13 Now, is this ice hockey? No, it's not ice hockey. We know
14 they're not in full gear and skating down the ice and banging
15 into each other. Well, I guess they're probably -- 11 year
16 olds running around, 10 to 12 against 10 to 12. Even if it
17 was eight against eight. But we know that he didn't have a
18 class that small, 32 kids, no, at least 40 kids, 40, 50
19 playing.

20 Was he in the middle of the game officiating it?
21 Was he standing in the center of the game being a referee,
22 making sure what was going on? No, no, he -- no, he wasn't
23 doing that. He probably didn't want to get hit with
24 something. But he was on the outside. Is that proper
25 supervision for the students? Was he properly supervised by

1 his principal who allowed him to put his fate in this activity
2 or the other head of the PE department?

3 The school district has asked you -- you have some
4 instructions on like request for admissions and in admission
5 number one it requested, "Admit that on May 12th, 2004, CW
6 Woodbury Middle School required Payo to play field hockey in
7 his physical education class." Response number one, "Deny."
8 He was required to participate. You heard Mr. Petersen. Did
9 he say, no, he's not required to do anything? He said he
10 would be marked down if he didn't participate in this
11 activity. And does an 11 year old, whether a boy or a girl, I
12 mean I have three girls and a boy but I mean if it's a boy or
13 a girl, but boy, not want to participate in this activity with
14 his friends?

15 Let me just refresh some recollection on these -- a
16 little bit on these rules. Not trying to -- I really don't
17 want to take too much time on it. But on Exhibit 8 was the
18 Woodbury Middle School rules and it has a whole set of -- a
19 whole set of penalties on the first page. Talking about floor
20 hockey, is a game adapted from ice hockey. Fast paced and it
21 says noncontact game. In this rules talk about how the
22 players need to control their stick and it says, "Team consists
23 of six players." Six. Was anything in Mr. Peterson's
24 testimony about he was going to limit or he did limit any of
25 his floor hockey teams to six players? No, nothing.

1 Absolutely nothing. What did he do? Well, I divided my class
2 by four and, you know, tried to even it out so teams were even
3 so I could have everybody participating at one time. Even in
4 their own PE rules.

5 So the act of having Makani play on that particular
6 day in that particular time in that particular game was
7 negligent. It increased the risk of harm that could happen to
8 Makani by having him play in this game. Because he -- not
9 just not providing safety equipment, they violated their own
10 Woodbury rules by having more than six kids play on a team.
11 So they have more kids in there, crowded, playing with these
12 hockey sticks.

13 And matter of fact, Mr. Petersen said, well, you
14 know, it just depended on how many hockey sticks we had. If
15 we had enough hockey sticks, I mean, you know, everybody could
16 play as long as the teams were even. He was trying to keep
17 the teams even. There was certainly no evidence that they had
18 less than 40 hockey sticks at the time. And even in his own
19 interrogatory answers, again, it was 10 to 12. I usually have
20 10 to 12 play.

21 In Exhibit 18 we had the other hockey rules. Floor
22 hockey rules from Rice. So I would suggest it's something for
23 you to consider because we're talking about what is the
24 appropriate thing that was being done in this case. When
25 you're considering negligence, what's the standard? What's

1 the duty? The duty of the school district is to use ordinary
2 and reasonable care for these students. When you even have
3 rules for older students that are going to be more responsible
4 than 11 year olds. And what do these rules say? These rules
5 say, "Each team shall consist of five players on the floor."
6 Five. Woodbury rules six, this one five. "Players and
7 goalies are recommended to wear the following: Knee and elbow
8 pads, helmet, mouthpiece."

9 I mean nobody's done any expert study with somebody
10 wearing a helmet and be at a nice high speed and somebody come
11 up with a hockey stick. I mean where did the hockey stick hit
12 him? I mean if it hit the helmet is it going to hit his
13 glasses? His glasses were broken. Yes, he had glasses at the
14 time. Probably saved him even more damage that he would have
15 had already. There's nothing that say that the glass got in
16 the eye in the records that say that it caused any damage.
17 But if it did then he should have been provided goggles. So
18 either way -- either way the school district was negligent.

19 And they negligently supervised these -- these
20 people. And then when he was hurt they sent him to the -- the
21 nurse's office but the nurse isn't there. And, you know, more
22 power to that Wally Ruiz and having to deal with that many
23 kids in one day with a little bit of experience. But what do
24 they do? Oh, get back to class or nope, let's call the
25 parent, you're going home. I mean that's usually -- that's

1 what happens. And what does she say she does? Well her --
2 she didn't have any real independent recollection. She had no
3 independent recollection of this event. She had reviewed her
4 information, which she's allowed to do to refresh her
5 recollection. It's been a long time ago.

6 You know, her -- just her statement that she said
7 she saw Makani later who never went back to school, there's
8 absolutely nothing that shows that he went back to school
9 because he didn't go back to school. Did she see him with
10 some eye patch on or anything? No, he wasn't there. What did
11 he do? He went to this FASA, First Aid Safety Assistant. I
12 don't even know if she could really explain what she did. She
13 has some first aid, stop some bleeding, clean the cut, things
14 that we normally, you know, us lay persons would do that
15 aren't specialized in that -- you know, in that skill, that
16 activity. You know, get something ready and if it's more
17 serious let's call the school nurse because the school nurse
18 knows more.

19 Does she call the school nurse? No. She didn't
20 even call her. She's asked questions about well, did Makani
21 say he blacked out or he did this and that? He's an
22 11-year-old kid brought to the nurse's station, the FASA
23 office, which really you only need to have office experience I
24 guess initially to be a FASA she said. Office experience or
25 some first aid experience, then they learn some first aid

1 experience. And then he's in there and does she ask him,
2 well, were you unconscious? You know, did she say, did she
3 ask where does it hurt? I mean she looked at his eye, she
4 said it was bruised, swelling, it was bleeding around that
5 area. She gave him ice, she cleaned it up, she called the
6 mother.

7 The grandmother came and picked him up, the mother
8 was going to work. She's doing two jobs at that time. Trying
9 to do her best to provide for him and his other siblings that
10 she had. Later on the evidence shows that Makani came home,
11 talked to his mother. He progressively got -- it got worse.
12 It progressively got worse, he was nauseated, vomiting. They
13 take him to Quick Care on Friday, so about two days later.
14 Okay. Got picked up around 11 o'clock in the morning, take to
15 Quick Care. Nothing they could do, you know, it's like wait,
16 wait, wait. Let's see, is it going to get better? Is he
17 going to get better? What's going on? Oh, my gosh, it's
18 really bad. Okay, let's take him in.

19 He gets so bad that he gets transported to -- from
20 Quick Care to UMC and then he's at UMC. And then it starts,
21 his visits, the doctors' visits, the appointments. And his
22 mother, Lori, testified that, yeah, she didn't have a car.
23 Her sister would bring her or she'd bring her sister to work
24 and she'd have to borrow the car and take him and that's how
25 they did it. That's how they had to take care of things.

1 When he went -- when he went to the doctor -- so he
2 went to UMC on the 14th, on that Friday and then he saw Dr.
3 Carr the next day on Saturday, then he saw Dr. Carr again on
4 Monday. And I'm not going to go through all the medical
5 records with you but I just want -- I think it's important
6 when you're looking at this, you find negligence, you find
7 negligent supervision and then you get to the damages part.
8 And when you're considering the damages you need to consider
9 everything that happened, everything that was going on. I
10 mean the pain that he was feeling and the discomfort and that
11 he's having to deal with now going into his seventh grade over
12 his summer, lost his summer, can't participate in any
13 activities with his friends. I mean it even got so bad that
14 eventually he was having such a hard time to watch his friends
15 participate in these activities that he decided going into his
16 sophomore year in high school he needed to just go live with
17 his grandparents, his father's parents.

18 So he went and lived with his father's parents in
19 California where he graduated from high school. And then he
20 went on to do his best since then. He's in the cooking
21 industry and he's working on a cruise line right now, a second
22 contract. He's doing the best he can to make the best life
23 for himself. Did he tell anybody that, oh, I have this eye
24 injury? Did he even want to come back and address it again?
25 He knew he needed to but he didn't want to come back and deal

1 with it. And to do it he wanted to see the doctor that he had
2 seen before.

3 And from that visit we find out that what does he
4 need? He has a membrane grown over his lens. It's got to be
5 removed. It was something they knew could happen. And he's
6 got to have this YAG laser capsulotomy done and then he's got
7 to get a new lens put in, a new crystal lens. That has to be
8 done, he has to do that still. I mean what is it like, how
9 does he describe it right now? It's cloudy, a little bit
10 cloudy for him. You know, kind of looking out -- if your
11 glasses aren't -- aren't all the way clean. You're looking
12 out and it's -- you know, it's a little cloudy. So he needs
13 to fix that. He's still living with this. He's going to live
14 with it forever. The injury and damage that he got he's going
15 to live with forever.

16 The FASA, what did -- what did she do? Did she do
17 -- I mean we don't have -- and I'll tell you, we don't have an
18 expert witness, they don't have an expert witness that says
19 the FASA did something right or wrong. Our burden of proof,
20 our plaintiff, true, but what did she do? Did she increase
21 the risk to him? You know, what is the school district doing?
22 Providing a FASA, First Aid Safety Assistant, when somebody
23 that gets hit in the face with a hockey stick in the eye and
24 they don't even ask him the question if he blacked out or was
25 unconscious or if he feels nauseous or is he dizzy? But she

1 said she keeps, you know, pretty much meticulous records.

2 Those records, and what does her records say? She
3 did an ice pack, she cleaned the wound, called mom, mom needs
4 to take care of it. And we want her to call mom, we want her
5 to call the parents. But she didn't even ask those -- those
6 simple questions. Thank goodness nothing else happened with
7 Makani when he was there right at that moment.

8 After Makani went to see Dr. Carr on the Monday, he
9 went back again on Wednesday. And what happened? He had
10 uncontrolled glaucoma. Dr. Carr admitted him to UMC. But now
11 he's admitted again at UMC, this time from May 19th to May
12 23rd. Then he gets out and he goes to see Dr. Carr on May
13 24th. And then what happens? He goes back to UMC on May
14 25th. How traumatic can that be for him? I mean even if it
15 happened to him now at his age 22 but at 11 dealing with this,
16 wearing the eye patch. Then May 26th, finally they get the
17 pressure down so he could go see a retina specialist. So he
18 goes to see Dr. Lou on May 27th. And then he's back to Dr.
19 Carr on June 10th. Then he's back to Dr. Lou on August 19th.
20 And then he's back to Dr. Carr on September 1st. And then
21 he's back to Dr. Lou on September 17th.

22 And I'll tell you, I don't think I have every date
23 here written down but it's a lot of appointments back and
24 forth, back and forth, back and forth. He's back to Dr. Lou
25 on October 14th in '04. Back to Dr. Carr on October 27th.

1 Then back to Dr. Lou again on December 4th. Then he has a
2 little bit of a gap. Come May 18th, '05, waiting for the eye
3 to heal, waiting for everything to get ready and then he can
4 have this YAG laser, he has his YAG laser done. The second
5 membrane decision, somewhere around June 6th, 2005. Dr. Carr
6 says, look, we're waiting to do your cataract, we have to
7 wait. Your age, what's going on in your eye and let it heal.
8 You have to consider, do we need to do this -- remove this
9 traumatic cataract that was caused by it.

10 So he keeps going to his doctors' appointments and
11 he gets down to April 25th of 2007 and he was again referred
12 to Retinal Consultants by Dr. Carr. So he sees Dr. Lou and
13 they're like you need to get the cataract removed. So Dr.
14 Carr sets it up, he removes it, removes the cataract, he puts
15 in the crystal lens somewhere around July, August 2007. And
16 then what does Makani do? He leaves and he goes to California
17 to live. Does he participate in athletic activities there?
18 Does he participate in PE? No. His testimony is no, he
19 doesn't. He would like to. He doesn't want to risk it.

20 Could he have got some specialized goggles or
21 something else? He's worried about -- he was worried about
22 his head getting jarred even if he was wearing a helmet. He
23 had been through so much dealing with this over that
24 three-year time period and this trauma that he did not want to
25 risk doing it again. He -- you know, I mean that's -- that's

1 his testimony. Finally, he comes back to Dr. Carr and finds
2 he's got to do these other things. Does he want to go another
3 doctor? No.

4 Show you a couple of these jury instructions. I
5 know that you don't -- you don't have them in front of you. I
6 just want to go over a couple. You're going to get them in
7 front of you and you're going to be able to look at them very
8 specifically. I don't want to deal with that. Okay. What
9 happened here? Maybe I will, maybe I won't. So this
10 instruction number five says, "You're only considering the
11 case, only the evidence in this case by reaching a verdict.
12 You must bring the consideration of the evidence your everyday
13 common sense and judgment as reasonable men and women. So you
14 can draw reasonable inferences from the evidence which you
15 feel are justified in light of common experience. Keeping in
16 mind that such inferences should not be based on speculation
17 or guess."

18 So I just want you to remember when you're -- when
19 you're reaching your verdict that you're using your common
20 everyday common sense. Okay? Your common experiences.

21 You already heard the -- the insurance instruction
22 so I'm just giving that. There's -- you don't consider
23 whether there's insurance on either side or what's -- what
24 that status is at all. So it's important for -- for both
25 sides for that to -- for it to be fair, a fair decision to be

1 made.

2 Preponderance of the evidence. So this is the
3 evidence that we're talking about when you're thinking about
4 what's happening, is it -- did it produce in your mind a force
5 or belief. And it's more that it's more probably than not
6 true. So more probably than not. So a belief that what is
7 thought to be proved is more probably true than not true.
8 You're going to consider all of the evidence whether produced
9 by either the plaintiff or the defendant in the case.

10 You're going to get this instruction that says it
11 doesn't depend on the -- the greater number of witnesses. I
12 mean you're going to consider the credibility, everything that
13 you've heard, if you heard enough with one witness you can
14 make a decision.

15 So you're getting this instruction number 23 that is
16 instructing you that defendant, Clark County School District,
17 owed plaintiff a duty to use reasonable care and it's your
18 determination to determine whether or not that reasonable care
19 standard was met.

20 In order to establish a claim of negligence, Makani,
21 our side, has to prove the following elements; that school
22 district was negligent, that he sustained damages and that
23 their negligence was a proximate cause of his damages. When
24 you're considering that you're going to be look at the failure
25 to do something which a reasonably careful person would do or

1 the doing of something which a reasonable careful person would
2 not do to avoid injury to themselves or others. It's talking
3 about ordinary or reasonable care. It's not the
4 extraordinarily cautious individual nor the exceptionally
5 skillful one. A person of reasonable and ordinary prudence.
6 That's what's left to you, jury, to determine the type of
7 care. Was it reasonable that was used by the school district?

8 Todd Petersen was acting within his course and scope
9 of employment for the school district. If you find that he
10 did something that was negligent, then the school district is
11 liable for his conduct. So him placing -- and the plaintiff's
12 position is, him placing the plaintiff into this game in
13 violation of their own unit rules, regardless that they didn't
14 even have safety equipment that they never provided, they
15 never should have been playing the game in the first place,
16 was negligence on his part.

17 In considering that you're looking at instruction
18 number 28, which is telling you that an employer, the school
19 district, has a general duty to exercise reasonable care to
20 ensure that their employees are properly trained and
21 supervised. Is it proper supervision a reasonable and
22 ordinary person, reasonable care, proper supervision for his
23 supervisors to allow him to put 10 to 12 kids on a team and
24 play this game without any safety equipment and using a tennis
25 ball? That's for you to determine and we suggest is not, that

1 it was negligence.

2 I want to explain this instruction to you a little
3 bit because it's not necessarily a normal instruction in this
4 particular case but it says, "Plaintiff has the right to rely
5 on the recommendations of his healthcare providers when
6 ordinary care has been exercised in selecting a healthcare
7 provider." This instruction supports a position that Makani
8 wanted to wait to see Dr. Carr. That he wants Dr. Carr to do
9 his surgery because he's been comfortable with Dr. Carr. Dr.
10 Carr's taken care of him in the past, he knows what's wrong,
11 he's visited him. You know, and he has a -- he has a gap in
12 there before coming back to see him again.

13 As Makani testified, you know, he really didn't want
14 to face the situation and look at it. It's -- it was a
15 traumatic experience for him. Now he's got to go back under
16 the knife again to have his eye worked on and it has to be
17 done. So he has to rely -- he has the right to rely on that
18 recommendation and to use Dr. Carr.

19 There's a couple more instructions but just about
20 damages. And -- and the damages aspect I would suggest that
21 -- we'll go over that -- I'll go over that after Mr. O'Brien
22 talks to you a little bit more detail on that.

23 But what do we know? I mean, could this 11-year-old
24 young man appreciate the risk of playing this floor hockey
25 game at the time with that number of students and that this