In the Supreme Court of the State of Nevada

CLARK COUNTY SCHOOL DISTRICT,

Appellant,

v.

MAKANI KAI PAYO,

Respondent.

Supreme Court No. 68443

RESPONDENT'S ANSWERING BRIEF

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
Email: kurthlawoffice@gmail.com
Attorney for Respondent,
MAKANI KAI PAYO

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COMES NOW the Respondent, Makani Kai Payo ("MAKANI"), by and through his counsel of record, Robert O. Kurth, Jr. of the KURTH LAW OFFICE, and hereby submits his Respondent's Answering Brief in accordance with the provisions of NRAP 28.

Dated this 17th of March, 2016.

Respectfully Submitted by:
KURTH LAW OFFICE

/s/ Robert O. Kurth, Jr.
ROBERT O. KURTH, JR.
Nevada Bar No. 4659
Attorney for Respondent,
MAKANI KAI PAYO

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NRAP 26.1 DISCLOSURES

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed:

Corporate Affiliations:	None
Counsel for Respondent:	Robert O. Kurth, Jr.
Pseudonyms:	None

Dated this 17th day of March, 2016.

Respectfully Submitted by:
KURTH LAW OFFICE

/s/ Robert O. Kurth, Jr.
ROBERT O. KURTH, JR.
Nevada Bar No. 4659
Attorney for Respondent,
MAKANI KAI PAYO

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- NRS 41.031
- NRS 41.032
- NRS 41.033
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JURISDICTIONAL STATEMENT

A. The Basis for the Supreme Court's Jurisdiction.

Nevada Constitution Article 6 Section 4 states:

> 1. The Supreme Court and the court of appeals have appellate jurisdiction in all civil cases arising in district courts, and also on questions of law alone in all criminal cases in which the offense charged is within the original jurisdiction of the district courts. The Supreme Court shall fix by rule the jurisdiction of the court of appeals and shall provide for the review, where appropriate, of appeals decided by the court of appeals.

NRS 2.090. The Supreme Court has jurisdiction to review upon appeal:

> 1. A judgment in an action or proceeding, commenced in a district court, when the matter in dispute is embraced in the general jurisdiction of the Supreme Court, and to review upon appeal from such judgment any intermediate order or decision involving the merits and necessarily affecting the judgment and, in a criminal action, any order changing or refusing to change the place of trial of the action or proceeding.
>
> 2. An order granting or refusing a new trial in such cases; an order in a civil action changing or refusing to change the place of trial of the action or proceeding after motion is made therefor in the cases in which that court has appellate jurisdiction; and from an order granting or refusing to grant an injunction or mandamus in the case provided for by law.

NRS 2.110 provides that:

> The Supreme Court may reverse, affirm or modify the judgment or order appealed from as to any or all of the parties, and may, if necessary, order a new trial, and in a criminal action, order the new trial to be had in the proper place. On a direct appeal from an order in a civil action granting a motion to change the place of trial of an action or refusing to change the

> place of trial, the Court may affirm or reverse the order and order the trial to be had in the proper place. An order in a civil action changing or refusing to change the place of trial must not be appealed from on an appeal from a judgment, but only on direct appeal from the order changing or refusing to change the place of trial. When the judgment or order appealed from is reversed or modified, this Court may make, or direct the inferior court to make, complete restoration of all property and rights lost by the erroneous judgment or order.

The Supreme Court has jurisdiction to affirm or modify a judgment or order. Additionally, the Supreme Court has the authority to refuse a new trial if a matter has been argued before a lower court and the lower court did not err in its judgment.

STATEMENT OF THE ISSUES

1. **The District Court did not commit legal error when it denied CCSD's motion to dismiss and subsequent motion for summary judgment and allowed MAKANI's case to proceed to trial because CCSD owed a duty of care to MAKANI that is not covered by the inherent risk doctrine.**

2. **The District Court did not commit reversible error when it denied CCSD's motion for summary judgment and allowed MAKANI's case to proceed to trial because MAKANI clearly identified a substantial question of material fact.**

3. **The District Court did not abuse its discretion when it allowed MAKANI to argue that CCSD's decision to offer floor hockey as an optional sport in the physical education curriculum constituted actionable negligence when CCSD failed to provide sufficient safety equipment and procedures.**

4. **The District Court did not commit legal error or abuse its discretion when it permitted MAKANI to pursue and recover past medical expenses, which were incurred by his parents when he was a minor.**

5. **The District Court did not abuse its discretion when it permitted MAKANI to pursue recovery of future medical expenses where an expert witness did not testify at the trial as to proximate cause, reasonableness or necessity.**

STATEMENT OF THE CASE

On or about May 12, 2004, the Respondent, Makani Kai Payo ("MAKANI") was struck by another student's hockey stick while playing field/floor hockey in his physical education class. The student's strike seriously injured MAKANI's head and left eye. MAKANI required extensive surgery to repair the damage done to his left eye. MAKANI argued that the Appellant, Clark County School District ("CCSD"), owed him, as well as other students, a duty to

provide helmets, face protector(s), safety glasses, or other safety equipment to MAKANI prior to playing field/floor hockey. He also argued that the rules were not properly followed.

MAKANI filed his Complaint on or about September 21, 2012. MAKANI's Complaint detailed the medical expenses he incurred between 2004 and 2007. CCSD did not dispute the medical expenses incurred by MAKANI, as MAKANI provided CCSD with numerous supporting documents of medical expenses incurred by MAKANI as a result of the May 12, 2004 incident, which summary is set forth as follows:

University Medical Center	$	29,416.50
Southwest Ambulance	$	654.72
Medschool Assoc. South	$	466.44
Summit Anesthesia Consultants	$	1,170.00
EPMG	$	304.80
Dr. Carr / NV Institute of Ophthalmology	$	12,075.00 PLUS
Dr. Loo / Retina Consultants of NV	$	1,407.60
Southern Hills Hospital	$	599.00
Tenaya Surgical Center	$	2,194.00
TOTAL MEDICAL EXPENSES:	**$**	**48,288.06 PLUS**

Respondent MAKANI filed an amended complaint on or about October 14, 2013 in accordance with the ruling from Appellant's Motion to Dismiss which was granted in part, and denied in part on August 21, 2013. Appellant proceeded to file another Motion to Dismiss on or about March 5, 2014

which was denied on April 7, 2014. Appellant CCSD filed a Motion for Summary Judgment on April 8, 2015, which was denied on May 11, 2015. The District Court held that there was a genuine issue of a material fact to be determined and a judgment could not be granted as a matter of law.

On June 2, 2015, the jury entered a verdict in favor of MAKANI as follows:

1)	Past medical and related expenses:	$48,288.06
2)	Future medical and related expenses:	$10,000.00
3)	Past pain, suffering, disability, and loss of enjoyment of life:	$2,000.00
4)	Future pain, suffering, disability, and Loss of enjoyment of life:	$ 0.00
	TOTAL AWARD:	**$60,288.06**

However, on June 16, 2015, the District Court entered an Order reducing the jury verdict's judgment to $50,000.00 per NRS 41.035.

STATEMENT OF THE FACTS

On or about May 12, 2004, the Respondent, Makani Kai Payo ("MAKANI"), was an 11 year old minor child and 6th grade student who sustained injuries, which are the subject matter of his Second Amended Complaint. The Appellant, Clark County School District ("CCSD") is a political subdivision of the State of Nevada or other governmental entity, whose purpose is to administer the state system of public education. C.W. Woodbury Middle School ("Woodbury") is

a school located within the CCSD; MAKANI attended Woodbury and sustained his injuries during school hours.

MAKANI was attending his physical education class where he was required to participate and play field/floor hockey (hereinafter referred to as either "field" or "floor" hockey). Todd Petersen was MAKANI's Physical Education teacher, who supervised the class and the game of field hockey. Mr. Petersen went over some of the rules of field hockey before MAKANI and other students were permitted to play. Mr. Petersen was the only referee/teacher in charge of monitoring, supervising, and watching the game of field hockey that day. AA VIII-1490. However, Mr. Petersen did not provide helmets, face protector(s), safety glasses or other safety equipment to MAKANI or the other students prior to playing field hockey. AA VIII–1493. Moreover, instead of using five members in a team, as recommended by the intramural rules, Mr. Petersen split a large group of at least 40 students into four different teams of at least 10 students per team. AA VII–1320. Additionally, instead of using a disc or hockey puck, a tennis ball was used. AA VIII-1491. Lastly, the school did not require the students or parents to sign a liability waiver based on the potential hazards of the game. The school did not require any students or parents to sign any type of liability waiver prior to the May 12, 2004 incident. AA VIII–1492.

The evidence adduced at trial showed that they played the game

with a hockey stick and a tennis ball with approximately 12 players on each team. AA VI-0996 ll. 6-9. Mr. Petersen was off to the side somewhere. AA VI-1122 ll. 17-24. The class was split in half for two teams to play each other in floor hockey on the tennis courts. AA VI-1104 ll. 1-6.

In trial, Eileen Wheelan, a CCSD risk management employee and PMK for the CCSD, who oversaw the claim filed by MAKANI, admitted that CCSD's curriculum for field/floor hockey rules were similar to intramural collegiate field/floor hockey rules. AA VII–1249. According to those intramural rules, participants are required to wear safety gear for protection purposes. Also, field/floor hockey should be played with a hockey puck, rather than a tennis ball. AA VII–1238. There is conflicting testimony from Mr. Petersen that an orange ball, not a tennis ball was used. AA VII–1341. However, MAKANI testified that they played floor hockey with a tennis ball on the date he was injured. AA VI-1097 ll. 12-25. A tennis ball bounces higher and is more prone to being hit higher than ground level, than a flat rubber ball.

Even though MAKANI wore a pair of his personal glasses during the floor hockey game, another student lifted his hockey stick to strike the tennis ball and struck MAKANI in his head and left eye, causing him to black out. AA VI–1105. MAKANI knew his eyes were open but could not see anything for a brief period of time. After MAKANI was struck with the hockey stick, he was escorted

by another student to the nurse's office at C.W. Woodbury Middle School, wherein he was examined by the First Aid Safety Assistant ("FASA") as a nurse was not present or available. It was undisputed that MAKANI had serious injuries. AA VI-0997 ll. 1-7.

MAKANI's mother was contacted concerning his injuries and asked his grandmother to pick him up as they resided close to the school. Neither a school nurse nor the FASA had any further conversations or communications regarding his injuries with MAKANI, his mother or his grandmother. Additionally, neither were told that they should seek emergency medical treatment for MAKANI's injuries. MAKANI's symptoms worsened once he arrived at home. He had to lie on the ground and close his eyes because he felt dizzy and nauseated. AA VI–1108. MAKANI was taken to UMC Quick Care and then transported by ambulance to University Medical Center on or about Friday, May 14, 2004 and was later admitted to the hospital for head pressure, left eye hyphema with associated increased intraocular pressure and corneal blood staining, which resulted in an anterior chamber washout.

CCSD argued in their opening statement that, "There's always a chance that somebody can get hurt. It's what they call an inherent risk in the sport. Plaintiff has admitted that the risk of getting hit by a hockey stick is a risk that's inherent in this activity. So you can take that as established fact." AA VI-0999-

1000 ll. 2-4. Therefore, CCSD was aware of the foreseeable dangers of having their students participate in field/floor hockey and did not provide recommended equipment or even have them sign a waiver of liability form; thus being liable for MAKANI's injuries.

Eileen Wheelan, testified that she requested a copy of the floor hockey rules being used at the time of the incident at Woodbury and was provided with the floor hockey rules identified as Exhibit 8, which was admitted by the District Court. AA VII-1228 ll. 3-25 and 1229 ll. 1-25 and 1230 ll. 1-11. It was determined from those floor hockey rules that six players consist of a team. AA VII-1235 ll. 17-23. The floor hockey rules required a soft rubber ball to be used for the puck, and a tennis ball was used instead. AA VII-1238 ll. 21-25 and 1239 ll. 1-8 and 1293 ll. 20-25 and 1240 ll. 1-7. Ms. Wheelan did additional research and found floor hockey rules used by Rice University for intramural play. AA VII-1248 ll. 5-25. The Rice floor hockey intramural rules were set forth in Exhibit 18 that was admitted into evidence, and were reviewed by the jury. AA VII-1249 ll. 5-25 and 1250 1-21. It was determined that those rules recommended 5 players on a team with recommended equipment of shin protectors, a helmet, mouthpiece and a lightweight puck or ball. AA VII-1288 ll. 1-9.

Todd Petersen testified that he determined how many players on each team by how many were in his class that particular day. AA VII-1308 ll. 1-14. He

did not hand out the rules to the players beforehand. AA VII-1311 ll. 12-20. Mr. Petersen would move around the perimeter of the tennis courts during the game. AA VII-1328 ll. 1-16. Mr. Petersen stated in his Answers to Interrogatories, admitted as Exhibit 9, that they had "teams of 10 to 12 players on each side." AA VII-1336 ll. 15-25.

Joseph Murphy testified that he was the principal at the time of MAKANI's injury and was an assistant chief student achievement officer at the time of his testimony supervising 21 principals and evaluating the operations of their schools. AA VII-1362 ll. 2-7. Mr. Murphy went on to testify that he always sees a tennis ball used in the floor hockey game. AA VII-1363 ll. 17-25.

It was mutually agreed to have jury instruction no. 23 that provides: "Defendant, Clark County School District, owed plaintiff a duty to use reasonable care." AA VIII-1441 ll. 9-15 and 1569. A jury instruction was even presented to the jury stating that 'the mere fact that there was an accident or other event and someone was injured is not of itself sufficient to predicate liability."

Many jury instructions were agreed upon by both CCSD and MAKANI, including but not limited to the following: Instruction No. 14 providing that "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" AA VIII-1560; Instruction No. 24 about evidence of conformance to a custom can be

considered in determining whether someone exercised ordinary care, etc. AA VIII-1570; Instruction No. 27 that provides if Todd Peterson was negligent, then CCSD is liable for his conduct AA VIII-1573-1574; Instruction No. 31 that provides that MAKANI had the right to rely on the recommendations of his healthcare providers AA VIII-1577; Instruction No. 32 that the mere fact that "someone was injured is not of itself sufficient to predicate liability" and negligence must still be established AA VIII-1578; and Instruction No. 34 concerning determination of damages including reasonable medical expenses incurred and that may be incurred AA VIII-1580.

The proposed jury instruction about inherent risk was not allowed. AA VIII-1589. This instruction was inapplicable and prejudicial as it stated that CCSD could not be responsible for the "results of conduct that is inherent in the sports activity being played" and stated that MAKANI "must prove that the District acted in such a manner as to unreasonably increase the inherent risks", but then also included a statement not supported by the law or the facts that a "failure to provide safety equipment does not increase the risks associated with the game of field hockey". AA VIII-1589. The assumption of risk instruction proposed by CCSD was also unfairly prejudicial and not a correct statement of the law and the facts in this matter. AA VIII-1590.

The District Court discussed their ruling on the assumption of risk and inherent risk instructions when denying to use them. AA VIII-1475 ll. 6-25 and 1476 ll. 1-12. The facts and evidence showed that MAKANI was required to participate in his physical education class concerning an activity that he was involved in and that the CCSD knew that somebody could get hurt by the use of hockey sticks in the game of floor hockey.

MAKANI continues to suffer from decreased eyesight in his left eye and blurred vision as a result of the incident. CCSD argues that an expert witness should have been deposed or testified in trial about MAKANI's injuries. However, CCSD did not dispute the medical expenses incurred by MAKANI between 2004 and 2007, as MAKANI has provided CCSD with numerous supporting documents of medical expenses incurred by MAKANI as a result of the May 12, 2004 incident. Moreover, exhibits like the student injury accident report, medical records from Nevada Institute of Opthalmology, Retina Consultants, University Medical Center, Dr. Tyree Carr, and a medical summary of damages were admitted by the Court and detailed MAKANI's injuries and medical expenses. RA III 0348-0350; III 0247-0268; III 0153-0227; I-II 0002-0152; IV 0356; AA VI-0972 ll. 21-23. Nevertheless, CCSD later argued that the document should not state that MAKANI "incurred the following medical bills with the following medical providers with regard to this claim." AAVI-0972 ll. 8-13.

For many months after the May 12, 2004 incident, MAKANI had to wear an eye patch and constantly take care of his eye until it was suitable for surgery. AA VI-1112-1113. In addition, MAKANI endured many eye surgeries and doctors' visits for most of his high school career until the eye healed. AA VI–1113. Even though MAKANI enjoyed watching physical sports like football, basketball, etc., he feared playing and was told by Dr. Carr, his doctor, that he should not play because of his eye injury. AA VI-1114-1115. To this day, MAKANI does not like discussing or disclosing his eye injury to friends or employers because he fears that he may be viewed differently because of his eye injury. AA VI-1119-1120. MAKANI testified that he was afraid to see Dr. Carr again and "go under his knife again and do another surgery." AA VII-1184 ll. 2-6. MAKANI also testified that seeing for him is like looking through a "glass with fog on it" and the membrane needed to be removed. AA VII-1184 ll. 10-13. MAKANI saw Dr. Carr in January of 2015, whose medical records were admitted as Exhibit 7. MAKANI testified that he needed to have a surgery to remove the membrane and install a new crystal lens. AA VI 1102 ll. 9-25 and 1103 ll. 1-6. Moreover, Dr. Carr's January 2015 assessment of MAKANI stated that he would require additional surgery to repair the after-cataract membrane formation in his left eye, which is not uncommon in post-operative cataract surgery in children and

young adults. RA IV 0350. It is undisputed that MAKANI would also benefit from a YAG laser capsulotomy for best visual rehabilitation in his left eye. *Id.*

MAKANI has required ongoing treatment throughout his life since the incident and was informed that he may require additional surgeries in the future. MAKANI had a Crystalens implanted in 2007, and Dr. Carr, stated that he would need to undergo additional surgery in order to continue to rehabilitate his left eye. *Id*. Therefore, MAKANI will need another eye surgery as he is still suffering and incurring damages related to the May 12, 2004 incident. In trial, MAKANI provided estimates of the surgery between $8,000 to $12,000. RA 0356. The jury awarded future medical expenses in between these estimates. Counsel for CCSD admitted that they did not challenge the medical records, and did not object to "any of the treatment or reasonableness or necessity of the treatment." AA VII 1374 l. 25 and 1375 ll. 1-6.

ARGUMENT/ANALYSIS

I. The District Court did not commit legal error when it denied CCSD's motion to dismiss and subsequent motion for summary judgment and allowed MAKANI's case to proceed to trial, when MAKANI's actions were not barred by the inherent risk doctrine.

The inherent risk doctrine is based on a theory of consent and contains two elements: 1) voluntary exposure to danger, and 2) actual knowledge of the risk assumed. *Kerns v. Hoppe*, No. 55615, 2012 Nev. LEXIS 425, at *10 quoting

Sierra Pacific v. Anderson, 77 Nev. 68, 358 P.2d 892 (1961) (Nev. Mar. 21, 2012) The knowledge inquiry is subjective, and is only satisfied if it is shown that the plaintiff both knew of and fully appreciated the risk at issue. *Id*. at 71-72, 358 P.2d at 894.

In *Mizushima,* the Court claims that an assumption of risk defense is not favored because it focuses on a lack of duty in the defendant rather than the breach of duty by the party in question. *Turner v. Mandalay Sports Entm't, LLC* 103 Nev. 259, 264, 737 P.2d 1158, 1161 (1987) An assumption of the risk defense has been subsumed by Nevada's comparative negligence statute. *Id*.

In *Turner,* the Court distinguishes the *Mizushima* analysis of the doctrine of primary implied assumption of the risk as, "a relationship voluntarily accepted with an imputed understanding that the other party has *no duty* to the injured plaintiff." 124 Nev. 213, 220, 180 P.3d 1172 (2008) *Turner* clarifies that since 2001, the Nevada Supreme Court has clearly and consistently stated that a duty exists is a question of law to be determined solely by the courts. *Id*. The doctrine of primary implied assumption of the risk is used as part of an initial duty analysis, not as an affirmative defense to be decided by the jury. *Id*.

The *Mizushima* court ruled that there was no longer a defense of implied assumption of the risk. *Id*. The *Turner* court reiterated that a defense of implied assumption of the risk can be examined by the Court to determine if the

defendant has a duty. *Id*. Most relevant, the Nevada Supreme Court stated that the implied assumption of risk doctrine is not an affirmative defense to be determined by the jury.

Here, the Respondent MAKANI was 11 years old when the incident occurred. MAKANI did not voluntarily expose himself to danger because he was required to participate/play field hockey as part of the physical education class on May 12, 2004; the students could not participate in any other physical activity because there were no alternative options. Moreover, an 11 year old has a different understanding or knowledge of risk assumed than a 17 year old. MAKANI and other students may have known that high sticking is a possible hazard when playing floor hockey; however, MAKANI did not have the requisite mindset to fully comprehend the risks involved because he was a child when the incident occurred.

CCSD's Coordinator of Property Claims and Liability Claims mentioned that the middle school's curriculum for floor hockey mirrored the basic rules and regulations set forth in collegiate field hockey. AA III 538-546. The collegiate rules state that a waiver of liability should be signed by parties based on the potentially hazardous nature of the sport. *Id.* Since no waiver of liability was signed by any student or parent, CCSD assumed any risk or injury sustained by a student playing floor hockey during school.

CCSD's counsel provides several cases stating that a defendant does not owe a duty of care when an activity may have a risk inherent in the act itself through the doctrine of inherent risk. However, a majority of the cases deal with non-governmental agencies dealing with the harm to an individual or a school dealing with a student's injuries sustained in a voluntary extracurricular activity. CCSD's cases differ from the MAKANI's situation because none of their cited cases deal with mandatory or required participation in an activity by the injured party. CCSD details cases where the participants paid to attend an activity or the participants signed a waiver to participate in an activity and inherently assumed the risk. Here, MAKANI was not in a position to choose whether to participate or have a parent sign a waiver allowing him to play field hockey because he was participating in an activity that happened during a mandatory physical education class during school hours.

California has established a prudent person standard of care to determine the liability of school districts and their employees for injuries sustained by students occurring during school hours in physical education classes. *Hemady v. Long Beach Unified Sch. Dist.*, 143 Cal. App. 4th 566, 576 (2006). Imposing a prudent person standard of care upon defendants will not chill a coach's role to challenge student athletes, nor will it discourage vigorous participation. *Id.*

In this case, the students were informed of the basic rules of floor hockey but were not provided them, nor were they provided any safety equipment by Woodbury Middle School. Hockey sticks are required to play floor hockey. If an individual with a hockey stick swings the hockey stick higher than what the rules allow, it is plausible that another person can be hit anywhere on their body that is not protected by safety gear, which occurred in MAKANI's situation. Since CCSD's curriculum incorporated the same basic rules as collegiate intramural floor hockey which states that safety equipment or a waiver of liability be signed prior to playing, CCSD should have known that either providing safety equipment or having a signed waiver of liability prior to the activity should have been done by schools within CCSD before allowing floor hockey to be played by the students.

Counsel for CCSD made the same argument about the inherent risk doctrine from the beginning and more than one District Court judge ruled against them. CCSD attempted to have the jury instructed on the inherent risk doctrine and Judge Hardy denied their request. This was done after much briefing and consideration. AA VIII 1475 ll. 6-25 and 1476 ll. 1-12. Consequently, this Court can review the District Court's decision as a matter of law concerning the non-applicability of the inherent risk doctrine to the facts of this case, as the District Court did not commit legal error.

II. The District Court did not commit reversible error when it denied CCSD's motion for summary judgment and allowed MAKANI's case to

proceed to trial because MAKANI clearly identified a substantial question of material fact.

Summary judgment is appropriate when the parties' pleadings and other evidence on file, viewed in a light most favorable to the nonmoving party, demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law. *Turner v. Mandalay Sports Entm't LLC*, 124 Nev. 213, 216. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. *Id.* at 216-217. The District Court denied CCSD's motion for summary judgment on May 11, 2015 because they found that "genuine questions of material fact existed as to 1) duty; 2) whether CCSD exercised reasonable care in allowing an eleven year old student to play field hockey in Physical Education without providing any safety equipment; 3) whether CCSD's treatment of the eleven year old student and advice given to MAKANI were reasonable; and 4) whether additional training, supervision or equipment could have prevented the injury to MAKANI." AA IV-720-721.

There were genuine issues of material facts regarding CCSD's liability in regard to MAKANI's injuries. Issues like whether CCSD was negligent and if they owed a duty to provide a safe environment and safe activity for which MAKANI and others could participate; whether MAKANI was required to participate in the activity; that CCSD knew that floor hockey was inherently

dangerous and did not provide any safety equipment whatsoever to their students; that it was reasonable for CCSD to know that an 11 year old is going to appreciate the risks of playing floor hockey in a different manner than a 17 year old; did CCSD have to provide a waiver of liability form to play floor hockey to students or parents; whether CCSD did not take proper care of MAKANI by contacting emergency medical personnel to treat him after the incident; whether CCSD needed to have a school nurse available when MAKANI was injured; and whether MAKANI was injured and incurred damages, and continues to incur damages. These various issues needed to be ruled on by a trier of fact as they dictated whether or not CCSD was liable for MAKANI's injuries or not.

In *Chastain*, the Court ruled whether a particular condition constitutes a hazard is a question of fact for the jury. Also, CCSD could not decide whether a particular condition is hazardous or not. *Chastain v. Clark Cty. Sch. Dist.*, 109 Nev. 1172, 866 P.2d 286 (1993). The *Chastain* court also found the existence of a valid claim for negligent supervision against CCSD based on the Respondent's allegation that CCSD "failed to warn the children attending the school to keep away from this dangerous area and in fact, ordered the children to sit on the wall next to the dangerous area." *Id.* at 1178, 866 P.2d at 290.

In this case, the District Court did not err when it submitted to the jury the question of whether playing floor hockey without proper safety equipment or in

violation of the rules, constitutes a hazard. Playing floor hockey without safety equipment or in violation of the rules was a proper question of fact that a jury needed to assess and rule on rather than an issue that the judge should have ruled on. Furthermore, CCSD's safety instructions for floor hockey were similar to collegiate intramural field/floor hockey. The collegiate intramural field/floor hockey instructions require the participants to sign a waiver acknowledging that there is a risk that they may be harmed. CCSD did not require the students or parents to sign a waiver prior to playing floor hockey.

CCSD negligently supervised the students because MAKANI's physical education instructor did not adequately instruct the students about the potentially dangerous hazards of playing field/floor hockey. CCSD also failed to warn the students that serious injuries would occur if the hockey sticks were used incorrectly. Therefore, the District Court did not commit reversible error when it denied CCSD's motion for summary judgment as there were genuine issues of material fact that needed to be determined by a fact finder regarding CCSD's conduct and liability resulting in MAKANI's injuries.

There was evidence that Todd Petersen negligently supervised the floor hockey game, and was negligent in preparing the students and allowing them to play such. Mr. Petersen testified he would play 8-10 or 12 players at a time when the Woodbury floor hockey rules provided for 5-6 players. AA VIII 1348.

He also testified that he would simply divide the number by the amount of kids in the PE class. MAKANI was wearing glasses and was not provided any safety goggles, headgear, etc. and was allowed to use a bouncy tennis ball, rather than flat rubber ball. Mr. Peterson could have walked thru the middle of the game but simply walked along the perimeter and did not know MAKANI was hit until after he had been lying on the ground for a period of time.

The District Court judge would not allow a separate finding to be made of negligent supervision and general negligence and stated that they were one claim; MAKANI could only prevail once concerning damages. CCSD argues that because they do not think evidence was provided of negligent supervision that the summary judgment should have been granted and that the matter should be reversed. That is nonsense and a misstatement of the law. First, MAKANI survived the summary judgment motion as there were questions of fact. Second, the questions of fact were presented to the jury. Third, the jury heard and considered the evidence and ruled in favor of MAKANI against the CCSD for negligence. They did not discern whether or not it was negligent supervision or general negligence.

MAKANI's counsel argued several things in his closing. First, he argued that CCSD did not have to offer a floor hockey class in physical education, and that since they did offer such, they needed to develop rules and apply them.

Mr. Petersen testified that he probably would have noticed when a kid went down. AA VII 1328 ll. 1-16. The District Court judge did not err when not allowing a jury instruction no. 7 about the "good faith" of public officials. AA VIII 1553. That would have been unfairly prejudicial. The argument by MAKANI, which was not objected to, is/was not that CCSD was liable just because of the mere fact that they offered the course of floor hockey. It was about not providing safety equipment and properly supervising such; resulting in injuries and damages to MAKANI, which were proven.

III. The District Court did not abuse its discretion when it allowed MAKANI to argue that CCSD's decision to offer floor hockey as an optional sport in the physical education curriculum constituted actionable negligence when CCSD failed to provide sufficient safety equipment and procedures.

Under NRS 41.031, around 1965, the State of Nevada waived sovereign immunity. AA VIII 1612. Concerning sovereign immunity, the state and its political subdivision are afforded immunity from actions under NRS 41.033 (failure to inspect or discover hazards) and NRS 41.032 (based upon exercise or performance or the failure to exercise or perform a discretionary function or duty). NRS 41.033 does not provide immunity to a public entity if that entity fails to take reasonable action once it gains knowledge of the hazard. *Nardozzi v. Clark Cty. Sch. Dist.*, 108 Nev. 7, 823 P.2d 285 (1992). The "express knowledge"

requirement bars suits unless the entity has express knowledge of the existence of the hazardous condition.

In *Peterson v. Miranda*, the Court held that, "Although CCSD was entitled to discretionary act immunity on a negligent hiring claim by the parents of a motorist killed by an underage intoxicated driver, who attended a party with CCSD employees, CCSD was not entitled to immunity on the parents' claims of negligent retention and supervision because immunity did not extend beyond the hiring of an employee. *Peterson v. Miranda*, 991 F. Supp. 2d 1109, 1118–1119 (2014).

"Claims of negligent supervision and training against a school district arising from an officer's detention of students were not subject to immunity under NRS 41.032, as these acts were not discretionary." *McCarthy v. Underhill*, 03:05-CV-0177-LRH-RJJ, 2006 U.S. Dist. Lexis 25555, at *29-30 (D. Nev. Feb 16, 2006).

"The supervision and training of employees is not a discretionary act subject to immunity under this section; an employer has a duty to use reasonable care in the training, supervision, and retention of his or her employees to make sure that the employees are fit for their position." *Williams v. Underhill*, 03:05-CV-0175-LRH(RAM), 2006 U.S. Dist. LEXIS 24929, at *24-25 (D. Nev. Feb 16, 2006).

In *Doe ex rel. Knackert v. Estes*, the Court concluded that "The statutory immunity under this section did not apply because, having made the decision to hire a teacher who later molested students, the school district assumed the obligation to use due care to ensure the teacher's employment would not pose an unreasonable threat to the safety of the children in his care." *Doe ex rel. Knackert v. Estes*, 926 F. Supp. 979, 989 (D. Nev. 1996).

Two questions asked during trial were: whether CCSD had express knowledge of the alleged hazardous condition /danger; and whether CCSD's alleged failure to provide adequate safety equipment constituted a hazardous condition. AA VIII 1494. It has been determined that the state's supervision of a CCSD employee is an operational act rather than a discretionary act. Schools generally escape tort liability for negligent supervision by asserting that the school has no duty to protect the student from an unforeseeable event and the school's inaction is not the cause of the unforeseeable event. Liability attaches to schools if the student can show specifically that the school was warned that a threat to the student existed or that the school could have done something specific to prevent the injury. In MAKANI's case, CCSD was aware, or placed on notice, of the risk of harm prior to its occurrence, and admitted to the same as they claim the risk is inherent in playing field / floor hockey.

The presumption of reasonable supervision should arise only upon sufficient evidence that practices and outcomes exist at the school that are characteristic of competent, good faith implementation of effective programs. Similarly, CCSD's failure to implement adequate safety programs/protocols and provide adequate safety equipment and adequately train and supervise physical education teachers, who provide sporting equipment that increases a risk of harm, should also be viewed as a proximate cause of MAKANI's injuries.

There are exceptions to CCSD's claimed sovereign immunity, such as when the school has express notice of the existence of the hazard/danger and in their hiring/retention/supervision of school employees, which is not a discretionary function. In this case, immunity does not apply because CCSD had express knowledge of the risk of injury by a hockey stick. In addition, MAKANI had a valid claim for negligent supervision against CCSD for failing to warn MAKANI of the dangerous risk of using the hockey sticks and in fact, ordering him to use the hockey sticks during a required class without requiring, or making available, the use of safety equipment when it would be otherwise readily available. If funding did not exist to provide the safety equipment, the game should not have been played. He was also required to participate in a game in violation of its own rules that required less players in the game at one time. AA VII 1348. Consequently, MAKANI proved negligent supervision, which is not shielded by immunity.

IV. The District Court did not commit legal error or abuse its discretion when it permitted MAKANI to pursue and recover past medical expenses, which were incurred by his parents when he was a minor.

Pursuant to NRS 12.080:

> The father and mother jointly, or the father or the mother, without preference to either, may maintain an action for the injury of a minor child who has not been emancipated, if the injury is caused by the wrongful act or neglect of another. A guardian may maintain an action for the injury of his or her unemancipated ward, if the injury is caused by the wrongful act or neglect of another, the action by the guardian to be prosecuted for the benefit of the ward. Any such action may be maintained against the person causing the injury, or, if the person is employed by another person who is responsible for his or her conduct, also against that other person.

In *Hogle*, the Court held that a minor who sustains personal injuries may bring suit either through his parents pursuant to NRS 12.080 or through a guardian ad litem appointed by the court. *Hogle v. Hall*, 112 Nev. 599, 606, 916 P.2d 814, 819 (1996). Although MAKANI did not name his parents as a party to the suit, it was never the intention of the legislature in drafting the statute to deprive the minor child of his right to sue for damages for injuries sustained. *Walker v. Burkham*, 63 Nev. 75, 83, 165 P.2d 161, 164 (1946). Rather, the intent of the legislature in drafting NRS 12.080 is to compensate the parents for medical expenses incurred by them for injuries sustained by their minor child. *Hogle*, at 122 Nev. 606, 916 P.2d at 819. The court noted that a parent has a right to pursue a claim for medical expenses incurred to care for an injured minor child. *Id.* at

606, 916 P.2d at 819. The court further noted that the child has his own right of action to damages and that this right is either subordinate or concomitant to a parent's right to bring an action. *Id.* In summary, both cannot bring a separate action for the same claim to the same damages, and MAKANI's parents have given that right to MAKANI. Therefore, Respondent MAKANI has the right to collect his medical expenses as special damages.

MAKANI submitted medical records of his treatment from 2004 through 2007 that CCSD's counsel did not object to during trial. Neither MAKANI nor CCSD designated or produced an expert witness, who could testify in favor of one or the other. It is interesting to note that CCSD never argued that MAKANI's case had to be in the arbitration program because of the statutory cap on damages; even considering their claim that he could not recover for past medical expenses. It does not make sense that although a minor's case does not have to be filed until two years from attaining the age of majority, he could not collect for past medical expenses because they were not claimed within two years from incurring such; especially, when he was still treating. Bugay v. Clark County Sch. Dist., No. 63652, 2014 Nev. LEXIS 1921 (Nev. Nov. 20, 2014), is distinguishable as it does not stand for the proposition that MAKANI cannot collect the medical expenses incurred by him as a result of his injuries that were determined to be caused by CCSD. Further, Bugay was still awarded the

$75,000.00 statutory cap for her total damages claimed, and simply held that one cannot bootstrap a claim of another potential plaintiff into the same complaint after the statute of limitations has run for such.

V. The District Court did not abuse its discretion when it permitted MAKANI to pursue recovery of future medical expenses because both parties stipulated to admit evidence of medical costs that dealt with future medical expenses.

A court may allow stipulated medical bills to be included in an award for future medical expenses if the defendant does not present evidence refuting causation of the injuries at issue. *Shere v. Davis*, 95 Nev.491, 493 (1979). MAKANI did not have to present testimony from any medical provider or medical expert at trial in regards to his future medical expenses because CCSD's counsel did not provide evidence refuting the same. CCSD argued that they were not responsible for MAKANI's injuries because floor hockey carries an inherent risk of harm. Nevertheless, MAKANI and CCSD stipulated to the admission of RA III 0348-0350; III 0247-0268; III 0153-0227; I-II 0002-0152; IV 0356; AA VI-0972 ll. 21-23.

MAKANI saw Dr. Carr many times; his medical records were admitted as RA 0247-0270 and RA 0348-0350. MAKANI testified that he needed to have a surgery to remove the membrane and install a new crystal lens. AA VI-1102 ll. 9-25 and 1103 ll. 1-6. Moreover, Dr. Carr's January 2015 assessment of MAKANI stated that he would require additional surgery to repair the after-

cataract membrane formation in his left eye, which is not uncommon in post-operative cataract surgery in children and young adults. RA IV 0350. It is undisputed that MAKANI would also benefit from a YAG laser capsulotomy for best visual rehabilitation in his left eye. *Id.*

MAKANI requires ongoing treatment throughout his life since the Incident. He was also informed that he may require additional surgeries in the future. MAKANI had a Crystalens implanted in 2007, and his doctor, Dr. Carr, stated that he would need to undergo additional surgery in order to continue to rehabilitate his left eye. Therefore, MAKANI will need another eye surgery as he is still suffering and incurring damages related to the May 12, 2004 incident. In trial, MAKANI provided estimates of the surgery between $8,000 to $12,000. RA IV 0356. The jury awarded future medical expenses in between these estimates. Counsel for CCSD admitted that they have not challenged the medical records, and did not object to "any of the treatment or reasonableness or necessity of the treatment." AA Vol. VII 1374 l. 25 and 1375 ll. 1-6.

CONCLUSION

The Appellant CCSD could have made a proper argument and had this matter submitted thru the arbitration program if it was determined early on that the case was subject to the statutory cap of $50,000.00. Nevertheless, they elected to force MAKANI to go through a 5-day jury trial. To their dismay, CCSD lost at

trial and is now trying to get another bite at the apple through this appeal. Substantial evidence was provided during the trial to support the jury's decision and verdict that the CCSD admittedly owed a duty of care to MAKANI and other students to not be negligent, and it was determined that they were negligent for either failing to provide proper sports, safety equipment, or negligent supervision or for not following their own and other established written rules concerning field / floor hockey, and requiring MAKANI and other students to participate nonetheless. Consider that the jury awarded the amount they felt was proper to compensate MAKANI and would have just put in one amount if there was merely one blank entitled total amount awarded to MAKANI. However, there were different blanks so the jury put in their damages amounts and obviously felt that MAKANI should not be out any monies as a result of the injuries he sustained because of CCSD's negligence based on not following their own floor hockey rules. For the jury to find any damages, they had to determine that CCSD was negligent, and the jury was properly instructed on the same. A mitigation instruction was also given and it appears that the jury did not think that MAKANI properly mitigated his damages, which is why they did not give him a larger award. Regardless, it was determined that the most MAKANI could be awarded was $50,000.00; no matter the decision of the jury.

In light of the foregoing argument and analysis and review of the record, it is clear that the District Court did not abuse its discretion and could not have entered a summary judgment in favor of the Appellant CCSD as material questions of fact existed, and the District Court properly ruled on the matters of law. Further, substantial evidence supports the jury's verdict and decision.

WHEREFORE, in light of the foregoing argument and analysis, the Respondent MAKANI respectfully requests that this Court AFFIRM the Jury Verdict, Award and Judgment Upon Verdict given to MAKANI on June 2, 2015 from the Eighth Judicial District Court's decision in this matter and ENTER JUDGMENT in favor of MAKANI and grant the relief as requested and set forth herein. Moreover, MAKANI should be awarded his attorney's fees and costs incurred with regard to this Appeal. Additionally, the Respondent MAKANI requests such other relief this Court deems appropriate.

DATED this 17th day of March, 2016.

Respectfully Submitted by,
KURTH LAW OFFICE

/s/ Robert O. Kurth, Jr.
ROBERT O. KURTH, JR.
Nevada Bar No. 4659
Attorney for Respondent,
MAKANI KAI PAYO

CERTIFICATE OF COMPLIANCE

1. I hearby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP (a)(6) because:

This brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14 point font, Times New Roman.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

Proportionately spaced, has a type face of 14 points or more and contains _____ words and it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this Respondent's Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all Nevada Rules of Appellate Procedures, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

DATED this 17th day of March, 2016.

Respectfully Submitted by:

KURTH LAW OFFICE

/s/ Robert O. Kurth, Jr.
ROBERT O. KURTH, JR.
Nevada Bar No. 4659
Attorney for Respondent
MAKANI KAI PAYO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of March, 2016, I served via electronic service and by placing a full, true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** in a sealed, first-class postage-prepaid envelope, in the U.S. Mail, and addressed to the following:

Daniel L. O'Brien
Office of the General Counsel
Clark County School District
5100 West Sahara Avenue
Las Vegas, NV 89146
Attorney for Appellant CCSD

/s/ Liberty Ringor
An employee of **KURTH LAW OFFICE**.