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 APPENDIX VOLUME IV

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 Respondent
MAKANI KAI PAYO

ALPHABETICAL INDEX

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 APPENDIX VOLUME IV** 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

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

KURTH LAW OFFICE

P.O. Box 42816 • Las Vegas • Nevada • 89116 • 4800 E. Bonanza Rd. • Ste. 4 • Las Vegas • Nevada • 89110
Office: (702) 438-5810 • Facsimile: (702) 459-1585 • Email: robertk@robertkurth.com

Robert O. Kurth, Jr. Admitted in Nevada & Utah

December 29, 2005

Clark County School District
Risk Management Department
4204 Channel 10 Drive
Las Vegas, NV 89119

Attn: Eileen Wheelan, Claims Management Specialist

Re: Our Client: Makani Payo
Claim No.: GL200403260
Date of Loss: May 12, 2004

Dear Ms. Wheelan:

I apologize for the delay. Please find enclosed the properly executed claim form for your review. As such, please process the above claim. Currently, I am in the process of obtaining current medical information. Once I receive such, I will forward it to your attention. Should you have any questions or wish to discuss this matter further, please contact me. Thank you for your cooperation and have a great day.

Best regards,
KURTH LAW OFFICE

Robert O. Kurth, Jr.

ROK:jm
Enclosure

CLAIM AGAINST CLARK COUNTY SCHOOL DISTRICT

TO: Liability Claims
Clark County School District
Risk Management Department
4204 Channel 10 Drive
Las Vegas NV 89119
(702) 799-2967 Ext. 310

For CCSD Use Only
Received – RM Office: *(Date Stamp)*
Category_____ Policy_____

The following information is necessary to fairly evaluate your claim. Please provide complete information. If you need more space, attach a separate sheet of paper. Additional paperwork such as medical narratives, billings, photos, estimate of damage, etc. should be attached if available. However, please send copies, since the forms will not be returned. PLEASE PRINT LEGIBLY OR TYPE. You must *sign the claim form*. If the amount being claimed is over $200, *your signature must be notarized*.

YOU ARE NOT REQUIRED TO MAKE A CLAIM PRIOR TO FILING A LAWSUIT. THE MAKING OF A CLAIM WILL NOT STOP THE RUNNING OF THE APPLICABLE STATUTE OF LIMITATIONS.

A Claim For $_____ is hereby made against the CLARK COUNTY SCHOOL DISTRICT, based upon the following facts:

1. CLAIMANT'S NAME: MAKANI PAYO, through his mother, LORI PAYO
   ADDRESS: 9642 Cedar Park Ave.
   Las Vegas, NV 89148
   Daytime TELEPHONE NUMBER: (702 576-4414
   Claimant's SOCIAL SECURITY NUMBER: [redacted]
   Parent/Guardian's SOCIAL SECURITY NUMBER *if Claimant is a m*[redacted]
   EMPLOYEE NUMBER if applicable: N/A

IF CLAIMANT IS AN INSURANCE CO., PLEASE PROVIDE THE FOLLOWING INFORMATION:
Insured: File/Reference #: Representative:

2. Date and Time when damage or injury occurred: May 12, 2004 at approx. 9:30 a.m.
3. Exact LOCATION where your damage or injury occurred: WOODBERRY M.S./PLAYING FIELD
4. Describe how damage or injury occurred. Give full details. Include all pertinent information and documentation:
   On May 12, 2004 at approximately 9:45 a.m., the school nurse called me while I was getting ready for work and advised that my son was playing field hockey during P.E. and was struck on his face and left eye. I asked her if he needed immediate medical attention and she said she would call me. The nurse never called me back. See 09/01/04 letter
5. What did the SCHOOL DISTRICT or its employees do to cause your damages or injury?
   Negligent supervision, failed to provide adequate equipment, negligence, etc.
6. State the full names, addresses and phone numbers of all witnesses:
   P.E. Teacher, Nurse, and children at Woodberry M.S.
7. Please provide any other pertinent information regarding your claim:

8. Explain and support the amount of damages you have claimed. Please provide all pertinent supporting documentation. Damages are ongoing and continuing. Makani's vision in his left eye is decreasing and he is suffering from headaches, blacking out, etc. Further, he will need cataract surgery at some time in the near future. Estimated Medical Expenses: $32,906.71 PLUS.

9 If this is an automobile accident, please supply the following information:

YOUR VEHICLE

Year _____ Make _____ Model _____ License Number _____

CLARK COUNTY SCHOOL DISTRICT VEHICLE

Year _____ Make _____ Model _____ License Number _____

I, _____, do hereby swear under penalty of perjury that I am the claimant named above or the claimant's legal parent/guardian, that I have read the foregoing claim and know the contents thereof, that the same is true of my own knowledge, except those matters stated upon information and belief, and as to those matters, I believe them to be true, and that THIS IS MY ENTIRE CLAIM AGAINST THE CLARK COUNTY SCHOOL DISTRICT.

If you have retained an attorney, (not necessary), please consult with your attorney prior to filling out this form. We will need a letter of representation included with this form.

IF YOUR CLAIM IS IN EXCESS OF $200, YOUR SIGNATURE MUST BE NOTARIZED

I FULLY UNDERSTAND THAT I WILL HAVE TO SIGN A GENERAL RELEASE OF ALL CLAIMS OR OTHER APPLICABEE RELEASE, IF CLAIMANT IS A MINOR, BEFORE ANY PAYMENT WILL BE OFFERED TO ME. THIS RELEASE WILL BECOME EFFECTIVE ONLY UPON ACTUAL PAYMENT OF THE CLAIM BY CLARK COUNTY SCHOOL DISTRICT.

DATED this 21 Day of OCT 2005

Lora B. Paige Makani Paige

Signature of Claimant or Parent/Guardian

STATE OF NEVADA)
) ss
COUNTY OF Clark)

SUBSCRIBED AND SWORN TO before me this 21st day of October, 2005

Cindy Kurth

Notary Public

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
CINDY KURTH
Appt. No. 98-2942-1
My Appt. Expires June 15, 2006

NOTICE: 197.160 of Nevada Revised Statutes provides that every person who knowingly presents a false claim is guilty of a gross misdemeanor, and is subject to criminal penalties of imprisonment of up to one year, and a fine of up to $2,000.

CONDITIONS

Vitreous Hemorrhage

A vitreous hemorrhage occurs when retinal blood vessels rupture and vitreous humor. These hemorrhages result from leakage from abnorm vessels and are associated with diabetic retinopathy, trauma and othe immediate consequence of a vitreous hemorrhage is a reduction in the light that can pass through the normally clear vitreous humor to the re effects of a hemorrhage can be limited to a few dark spots in vision or a severe vitreous hemorrhage, can result in completely obscured visio on the severity of the vitreous hemorrhage, it may take several montl significantly longer for the body to reabsorb the blood and for the pati vision. In addition to obstructing the patient's vision, a vitreous hemor prevents physicians from seeing into the back of the eye to diagnose c cause of the hemorrhage. If extensive or repeated bleeding occurs, fib scarring can form on the retina, which can lead to a detachment of the permanent vision loss or blindness.

Patients who seek medical care for a vitreous hemorrhage often visit a who then refers them to a retinal specialist. Treatment options for pati vitreous hemorrhage are limited. Currently, there is no drug treatment hemorrhage and most retinal specialists initially recommend a "watchf period, during which the attending physician provides no medical treat hope that the hemorrhage will clear on its own. The risks related to wa may include continued bleeding and, if caused by diabetic retinopathy, progression during the time it takes for the blood to clear on its own, i alternative to watchful waiting is a surgical procedure called a vitrecto the vitreous humor and hemorrhage are surgically removed and replac balanced salt solution. There are serious risks associated with a vitrect both cataract formation and possible loss of vision associated with reti detachment. These risks contribute to the limited use of vitrectomy as treatment option for vitreous hemorrhage patients.

Hemorrhage density can vary significantly between patients who expe hemorrhage, but even a mild hemorrhage indicates the existence of a problem. Because of the absence of a validated and generally accepte definition of the various densities of vitreous hemorrhage, we classify hemorrhage as either mild, moderate or severe depending on the den vitreous hemorrhage as observed by the physician:

- mild vitreous hemorrhage is characterized by trace blurring of re vessels
- moderate vitreous hemorrhage is characterized by partial obscu blood vessels and/or the optic nerve

- severe vitreous hemorrhage is characterized by complete obscur blood vessels and/or the optic nerve

Market Opportunity. Based on data compiled by Business Genetics, commissioned in February 1999, we believe that approximately 450,0(vitreous hemorrhage occur each year in the United States, a total of 4 occur each year in the five largest European markets and 190,000 cas year in Japan. Approximately 60% of all of these cases are due to diat retinopathy, 15% are due to trauma and 25% are due to other factors approved for the vitreous hemorrhage indication, is unlikely to be usec vitreous hemorrhage.

CCSD000013

RA 0275

McCarthy v. Underhill

United States District Court for the District of Nevada

February 16, 2006, Decided

03:05-CV-0177-LRH-RJJ

Reporter
2006 U.S. Dist. LEXIS 25555; 2006 WL 383520

TINA McCARTHY, an individual; and as the guardian for DARYL McCARTHY, a minor, by and through his mother, TINA McCARTHY; and JUSTIN McCARTHY, a minor, by and through his mother, TINA McCARTHY, Plaintiffs, vs. GARY UNDERHILL, in his official and individual capacity; MIKE MIERAS, in his official and individual capacity; TOM KALLAY, in his official and individual capacity; WASHOE COUNTY SCHOOL DISTRICT; and DOES 1 through 10, Defendants.

Subsequent History: Summary judgment granted by McCarthy v. Washoe County Sch. Dist., 2008 U.S. Dist. LEXIS 24573 (D. Nev., Mar. 25, 2008)

Core Terms

arrest, rights, allegations, campus, subsumed, detained, motion to dismiss, regulations, trespassing, private right of action, qualified immunity, statutory scheme, cause of action, administrative regulation, intent of congress, court finds, discretionary, supervision, detention, immunity, provides, remedies, training, funding, infliction of emotional distress, individual defendant, complaints, foreclose, federal financial assistance, light most favorable

Case Summary

Procedural Posture

Defendants, a school district, a campus police officer, and two school officials, filed a motion to dismiss a civil rights action brought by plaintiffs, a current student, a former student, and their mother, alleging violations of their Fourth and Fourteenth Amendment rights through 42 U.S.C.S. § 1983, and violations of Title VI, 42 U.S.C.S. § 2000d et seq., and numerous state law claims, including battery and false imprisonment.

Overview

The former student alleged three instances where the officer improperly detained or arrested him for being on campus. The current student alleged that the officer improperly detained him. The mother alleged that she was threatened by the officer every time she objected to his actions, and that the officials ignored her complaints. Only the current student brought a claim under Title VI. The court held that his equal protection claim was subsumed by his claim under Title VI, because Title VI provided the exclusive mechanism for recovery to individuals who were discriminated against on the basis of race by any program or activity receiving federal financial assistance. The court held, however, that his Fourth Amendment claim under § 1983 was not subsumed because Title VI was not intended to remedy instances of unreasonable seizures in violation of the Fourth Amendment. The court dismissed the mother's claims against the officials because there were no allegations that the failure to act on her complaints was based on her race. The court further held that the former student suffered no Fourth Amendment violation because a non-student visitor had lower expectations of privacy.

Outcome

The court granted in part and denied in part defendants' motion to dismiss.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1 In considering a motion to dismiss, all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party. However, a court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2 There is a strong presumption against dismissing an action for failure to state a claim. The issue is not whether a plaintiff will ultimately prevail but whether he or she is entitled to offer evidence in support of the claims. Consequently, the trial court should not grant a motion to dismiss for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Rights Law > Protection of Rights > Federally Assisted Programs > Scope

Education Law > ... > Racial Discrimination > Title VI > Proof of Discrimination

HN3 Title VI, 42 U.S.C.S. § 2000d et seq., provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. 42 U.S.C.S. § 2000d. To properly plead a cause of action, a plaintiff must allege both that the defendant is an entity engaging in racial discrimination and that it is receiving federal funding.

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

HN4 A court may take judicial notice of facts that are generally known within the court's jurisdiction or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN5 42 U.S.C.S. § 1983 supplies a cause of action to a plaintiff when a person acting under the color of law deprives that plaintiff of any rights, privileges, or immunities secured by the Constitution and laws of the United States. However, when the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983. In determining whether an act subsumes a § 1983 action, a court must determine whether Congress intended that act to supplant any remedy that would otherwise be available under § 1983. Such Congressional intent may be found directly in the statute creating the right or inferred when the statutory scheme is incompatible with individual enforcement under § 1983. The defendant bears the burden of demonstrating that Congress has expressly withdrawn the § 1983 remedy.

Civil Rights Law > Protection of Rights > Federally Assisted Programs > Scope

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Education Law > ... > Racial Discrimination > Title VI > Coverage of Title VI

HN6 Title VI, 42 U.S.C.S. § 2000d et seq., is sufficiently comprehensive to evince congressional intent to foreclose a 42 U.S.C.S. § 1983 remedy.

Civil Rights Law > Protection of Rights > Federally Assisted Programs > Remedies

Education Law > ... > Racial Discrimination > Title VI > Remedies

HN7 The administrative scheme under Title VI, 42 U.S.C.S. § 2000d et seq., allows persons who believe they were discriminated against to file a written complaint with the responsible department official. 34 C.F.R. § 100.7(b). A complaint that indicates noncompliance with Title VI triggers a prompt investigation. 34 C.F.R. § 100.7(c). If the investigation reveals a failure to comply with Title VI, the department will take steps necessary to ensure compliance. 34 C.F.R. §§ 100.7, 100.8, 100.9. Although the regulations do not provide a monetary remedy for a complainant who was discriminated against, the regulations do provide a process designed to

effectuate compliance with Title VI. A federally funded entity that does not comply with Title VI may ultimately lose its federal financial assistance. 34 C.F.R. § 100.8. In addition to the administrative remedies, Title VI contains an implied private cause of action through which individuals can obtain both injunctive relief and damages.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN8 An additional consideration in determining whether a particular statutory scheme should bar a 42 U.S.C.S. § 1983 action, apart from administrative and private remedies, is whether that scheme provides a more restrictive private remedy for statutory violations than would otherwise be available pursuant to § 1983.

Civil Rights Law > Protection of Rights > Federally Assisted Programs > Remedies

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Education Law > ... > Racial Discrimination > Title VI > Coverage of Title VI

HN9 Given the fact that Title VI, 42 U.S.C.S. § 2000d et seq., offers an administrative enforcement scheme, a private right of action, and damages that are more restrictive than those available through 42 U.S.C.S. § 1983, a remedy under § 1983 for conduct within the scope of Title VI would be incompatible with Title VI. Title VI provides the exclusive mechanism for recovery to individuals who were discriminated against on the basis of race by any program or activity receiving federal financial assistance. 42 U.S.C.S. § 2000d.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

HN10 State officials are provided with a qualified immunity against 42 U.S.C.S. § 1983 claims insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The immunity is granted broadly and provides ample protection to all but the plainly incompetent or those who knowingly violate the law.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

HN11 The first step taken by a court in an evaluation of qualified immunity is to make a constitutional inquiry by determining the following issue: based upon the facts taken in the light most favorable to the party asserting the inquiry, did the officer's conduct violate a constitutional right? If the court finds that the officer's conduct violated a constitutional right, the second step of the analysis is that the court determines whether the officer is entitled to qualified immunity. As part of its qualified immunity analysis, the court should consider whether the law governing the conduct was clearly established when the conduct occurred. If the right violated was clearly established, the court should also decide whether the officer could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right. The first step in the two-step process is intended to set forth principles which will become the basis for a holding that a right is clearly established. If a court were to skip the initial step, the law might be deprived of the explanation, thereby inhibiting the development of Fourth Amendment law. It is therefore necessary to first consider the constitutional inquiry. Only if the court determines that the plaintiff's Fourth Amendment rights were violated will the court address the immunity issue.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

HN12 An officer is entitled to make brief investigatory stops when there is a reasonable suspicion that a crime has been committed. Any allegations of the officer's subjective intent for making the stop is irrelevant.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Arrests

HN13 An officer with knowledge that an individual is trespassing does not violate that person's rights by making an authorized arrest.

Torts > Public Entity Liability > Immunities > Qualified Immunity

HN14 See Nev. Rev. Stat. § 41.032.

Torts > Public Entity Liability > Immunities > Qualified Immunity

HN15 Discretionary acts under Nev. Rev. Stat. § 41.032 are those which require the exercise of personal deliberation, decision, and judgment. An action can be brought, however, if the acts in question are merely ministerial, amounting only to obedience to orders, or the performance of a duty in which the officer is left with no choice of his own.

Torts > Public Entity Liability > Immunities > Qualified Immunity

HN16 A police officer's decision to make a traffic stop and arrest a person for failing to sign a traffic ticket are discretionary acts because they require the officer to use his judgment.

Torts > Business Torts > Negligent Hiring, Retention & Supervision > Defenses

Torts > Public Entity Liability > Immunities > Qualified Immunity

HN17 Supervision and training of employees is not a discretionary act subject to immunity under Nev. Rev. Stat. § 41.032.

Torts > Business Torts > Negligent Hiring, Retention & Supervision > General Overview

HN18 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.

Civil Rights Law > Protection of Rights > Implied Causes of Action

Governments > Legislation > Statutory Remedies & Rights

HN19 The Washoe County School District Administrative Regulations do not provide an explicit private right of action for violations of their requirements. However, in certain circumstances courts will imply a private right of action into a statutory scheme. The four factors to consider when determining whether a private right of action should be implied are: (1) whether the plaintiff was one of the class for whose special benefit the statute was enacted; (2) whether there was an indication of legislative intent to create or deny such a remedy; (3) whether the remedy was consistent with the underlying purposes of the legislative theme; and (4) whether the cause of action was one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law.

Counsel: **[*1]** For Tina McCarthy, Plaintiff: Jeffrey S. Blanck, Winograd & Blanck, Ltd, Reno, NV.

For Tom Kallay, Mike Mieras, Gary Underhill, Washoe County School District, Defendant: C. R. Cox, Debra O Waggoner, Michael E. Malloy, Walther Key Maupin Oats Cox & Legoy, Reno, NV.

Judges: LARRY R. HICKS, United States District Judge.

Opinion by: LARRY R. HICKS

Opinion

ORDER

Presently before this Court is Defendants' Motion to Dismiss (# 20) [1]. Plaintiffs have submitted an opposition (# 22), to which Defendants subsequently replied (# 26). Additionally, Plaintiffs have requested the Court take judicial notice of the fact that the Washoe County School District receives federal funding (# 22).

FACTUAL AND PROCEDURAL BACKGROUND

The present suit arises out of alleged racial discrimination at Hug High School ("HHS") in the Washoe County School District ("WCSD") manifesting itself in the form of the unlawful detentions and arrests of Plaintiffs Tina McCarthy, Daryl McCarthy **[*2]** and Justin McCarthy ("Tina," "Daryl," and "Justin") by campus police officer Gary Underhill ("Underhill").

Daryl is a former HHS student who now attends a charter school in the WCSD. He alleges three

[1] All references to (# XX) refer to the Court's docket.

instances where Underhill improperly detained or arrested him for being on the HHS campus. The first incident occurred in the first week of September, 2004. Daryl entered the HHS campus to meet his brother Justin, a HHS student. Underhill detained Daryl, asking for identification and the purpose for his visit. Underhill told Daryl he was trespassing on the HHS campus and should not return for any reason. Later that week, on September 7, 2004, Daryl returned to campus, driving his mother Tina's van. The second incident occurred when Underhill noticed Daryl on campus and arrested him for trespassing. The third incident occurred on November 5, 2004. Daryl once again entered the HHS campus to pick up his brother. Underhill detained him, reminded him that he was trespassing and told him he could be arrested.

Justin, a current student at HHS, alleges one incident where Underhill improperly detained him. Sometime after the November 5 incident with Daryl, Justin was leaving school with a group **[*3]** of friends. Underhill stopped the entire group and asked if any of them had thrown a rock at the school building. Underhill told Justin that he could not leave until Underhill had finished his questioning, and that if Justin did leave he could be arrested. This was the only interaction between Underhill and Justin during the detention.

Tina complains that she was threatened by Underhill every time she objected to his actions on her children's behalf. Specifically, however, Tina alleges that she filed at least two complaints with Tom Kallay and the WCSD but that neither was acted upon. At least one of the complaints was a public complaint and both regarded the alleged discrimination. Tina alleges no action has been taken on these complaints as required by school district administrative regulations.

Plaintiffs have now filed the present lawsuit, seeking damages under federal and state law for the discrimination they allege they suffered. Defendants have moved to dismiss the claims.

LEGAL STANDARD FOR MOTION TO DISMISS

HN1 In considering "a motion to dismiss, all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving **[*4]** party." Wyler Summit P 'Ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, a court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint. Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994).

HN2 There is a strong presumption against dismissing an action for failure to state a claim. Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). "The issue is not whether a plaintiff will ultimately prevail but whether [he or she] is entitled to offer evidence in support of the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 807, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Consequently, the court should not grant a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); see also Hicks v. Small, 69 F.3d 967, 969 (9th Cir. 1995). **[*5]**

DISCUSSION

Plaintiffs filed the present complaint alleging eleven claims for relief: violation of their Fourth and Fourteenth Amendment rights through 42 U.S.C. section 1983; violation of Title VI, 42 U.S.C. section 2000d; conspiracy in violation of 42 U.S.C. section 1985; complacency to conspiracy in violation of 42 U.S.C. section 1986; battery; false imprisonment; intentional infliction of emotional distress; negligent infliction of emotional distress; violation of Nevada Revised Statute sections 388.132-.135; negligent supervision and training; and violation of administrative regulations. However, in their opposition to Defendants' motion to dismiss, Plaintiffs have acquiesced in dismissal of their claims arising under section 1985, section 1986 and Nevada Revised Statute sections 388.132-.135. Thus, the Court will dismiss these claims and will not discuss them further in this order.

A. FEDERAL CLAIMS

Through the briefing of the motion to dismiss, the Court has been notified of refinements to the federal **[*6]** claims brought in this matter. Specifically, the Title VI claim is brought only by Justin, and only against the WCSD. This was done because individual defendants cannot be sued under Title VI. Further, the request for punitive damages under Title VI has been dropped, as Title VI does not allow for such an award. The section 1983 claim, however, is brought by all plaintiffs and is against all defendants.

1. Title VI of the Civil Rights Act of 1964 Claim

HN3 Title VI provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. To properly plead a cause of action, a plaintiff must allege both that the defendant is an entity engaging in racial discrimination and that it is receiving federal funding. Fobbs v. Holy Cross Health System Corp., 29 F.3d 1439, 1447 (9th Cir. 1994), overruled in part on other grounds by Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131 (9th Cir. 2001).

Defendants have **[*7]** argued that Plaintiffs failed to provide allegations sufficient for the federal funding requirement, and that the claims should be dismissed. Plaintiffs have responded by requesting this Court to take judicial notice of the fact that the WCSD is a federally funded entity. **HN4** This Court may take judicial notice of facts that are generally known within the Court's jurisdiction or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). Such information is clearly the type known within the territorial jurisdiction. Accordingly, the Court will take judicial notice of the fact that the WCSD is a federally funded entity.

Tina and Daryl are not bringing Title VI claims as they admit they are not proper plaintiffs. [2] Thus, only Justin remains. Justin is a student at HHS, satisfying the remaining requirements of Title VI, as HHS is a part of the WCSD.

[*8] 2. Section 1983 Claims

Section 1983 claims have been brought by Tina, Daryl and Justin against all defendants and allege violations of their Fourth and Fourteenth Amendment rights. Defendants argue that the claims raised by Plaintiffs are subsumed by their second claim for relief, seeking compensation for violation of Title VI. The Court notes that the refinements made in the pleadings show that Tina and Daryl are not bringing Title VI claims. Thus, at the outset, the Court can conclude that Tina and Daryl's section 1983 claims are not subsumed by any Title VI claims. In addition, Defendants argue that any claims not subsumed are barred as to the individual defendants under the doctrine of qualified immunity.

Also, the court is cognizant of Defendants' arguments made pursuant to Heck v. Humphrey, 512 U.S. 477, 486-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). Specifically, Defendants argue that a favorable judgment on Plaintiffs' section 1983 claim would imply that any juvenile proceedings against Plaintiffs' following their arrests are invalid. [3] Therefore, Defendants argue that Heck's protections against such collateral attacks serve as a bar to one or

[2] The court notes that Plaintiffs have alleged Daryl is a student in a charter school which is part of the WCSD. The court believes that such an allegation is sufficient to satisfy the requirements of a Title VI claim. However, Plaintiffs have also acquiesced to Defendants' argument that Daryl is not a proper Title VI plaintiff and dismissed any Title VI claim involving Daryl. The court does not have sufficient briefing before it to determine whether Daryl is a student of the WCSD and therefore a proper Title VI plaintiff. If he is, he would be entitled to bring a Title VI claim but would be barred from bringing certain 1983 claims. Thus, the court will proceed assuming, as the parties have, that Daryl is not a proper Title VI plaintiff. Should further facts come to light the court will revisit the issue to determine the proper claims that should be brought by Daryl.

[3] At the motion to dismiss stage any external documents relating to criminal and or juvenile court proceedings against Plaintiffs are not properly before the court. Thus, while there are allegations that Daryl was arrested,

more of Plaintiffs' section 1983 **[*9]** claims. At this stage of the proceedings, the facts relative to a Heck argument are not clearly before the court. For this reason, the court will reserve ruling on this issue at this time.

a. Subsuming Analysis

Justin has brought two section 1983 claims in the present lawsuit. The first is a claim for violation of his equal protection rights, the second a claim for violation of his due process rights. Defendants have moved to dismiss both section 1983 claims, arguing they are subsumed by Justin's Title VI claim because the conduct giving rise to the claim arises out of the same facts **[*10]** as the Title VI claim.

HN5 42 U.S.C. § 1983 supplies a cause of action to a plaintiff when a person acting under the color of law deprives that plaintiff of any "rights, privileges, or immunities secured by the Constitution and laws [of the United States.]" However, "when the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981). In determining whether an act subsumes a section 1983 action, the court must determine whether Congress intended that act to supplant any remedy that would otherwise be available under section 1983. Id. at 21. Such Congressional intent may be found directly in the statute creating the right or inferred when the statutory scheme is incompatible with individual enforcement under section 1983. City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 125 S.Ct. 1453, 1458, 161 L. Ed. 2d 316 (2005). The defendant bears the burden of demonstrating that Congress has expressly withdrawn the section 1983 remedy. Golden State Transit Corp. v City of Los Angeles, 493 U.S. 103, 107, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989). **[*11]**

The Ninth Circuit has not decided the specific issue of whether section 1983 is subsumed by Title VI. However, the Ninth Circuit has recognized the Supreme Court's Sea Clammers doctrine when construing other federal statutes and found that those statutes precluded a section 1983 remedy. See, e.g., Dittman v. California, 191 F.3d 1020 (9th Cir. 1999); Dep't of Educ., State of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1984). In addition, the District of Nevada has recognized that a section 1983 action is barred in the context of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 et seq. Henkle v. Gregory, 150 F.Supp.2d 1067 (D. Nev. 2001).

In the present case, this court is called upon to decide whether Title VI serves to bar an action brought pursuant to section 1983. While Title VI does not explicitly purport to limit section 1983 relief, 42 U.S.C. § 2000d, congressional intent to foreclose such a remedy can still be inferred from the creation of a comprehensive statutory scheme. Sea Clammers, 453 U.S. at 20. Therefore, the first question **[*12]** this court must decide is whether Title VI is sufficiently comprehensive to demonstrate the congressional intent to foreclose a section 1983 remedy. If Title VI is sufficiently comprehensive, the court must determine whether Plaintiffs' section 1983 claims seek to remedy conduct that is within the scope of Title VI. Only section 1983 claims that are within the scope of a comprehensive statutory scheme are subsumed by that scheme. See Smith v. Robinson, 468 U.S. 992, 1003 n.7, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984) superseded by Education of the Handicapped Act, § 615(e)(4), as amended, 20 U.S.C. § 1415(e)(4).

The courts are split as to whether Title VI subsumes section 1983. The Seventh Circuit [4] and the Western District of New York [5] have found that Title VI is sufficiently comprehensive to preclude a plaintiff from bypassing its enforcement mechanisms through a section 1983

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and proceeded against in juvenile court, for trespassing, the court is not in a position to consider any arguments regarding how Heck's bar to collateral attacks may affect Plaintiffs' 1983 actions.

[4] Boulahanis v. Bd. of Regents, 198 F.3d 633, 641 (7th Cir. 1999).

[5] Bayon v. State Univ. of New York at Buffalo, 2001 U.S. Dist. LEXIS 1511, 2001 WL 135817, *3 (W.D.N.Y. 2001).

action. Conversely, The Third Circuit [6] and the First Circuit [7] have found that Title VI is not sufficiently comprehensive. After examining the relevant case law and the statutory scheme of Title VI, this court finds that **HN6** Title VI is sufficiently comprehensive to evince congressional intent **[*13]** to foreclose a section 1983 remedy.

As mentioned previously, this district has found that Title IX is sufficiently comprehensive to foreclose a section 1983 remedy. Henkle, 150 F.Supp.2d at 1074. Title IX was patterned after Title VI and is enforced and interpreted in the same manner as Title VI, Barnes v. Gorman, 536 U.S. 181, 185, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002) **[*14]** (citations omitted); Alexander v. Sandoval, 532 U.S. 275, 280, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (citations omitted). As with Title IX, the court finds that Title VI contains a comprehensive administrative enforcement scheme. [8] See 34 C.F.R. § 100.1 et seq.; Henkle, 150 F.Supp.2d at 1073.

HN7 Title VI's administrative scheme allows persons who believe they were discriminated against to file a written complaint with the responsible department official. 34 C.F.R. § 100.7(b). A complaint that indicates noncompliance with Title VI triggers a prompt investigation. 34 C.F.R. § 100.7(c). If the investigation reveals a failure to comply with Title VI, the department will take steps necessary to ensure compliance. 34 C.F.R. §§ 100.7, 100.8, 100.9 **[*15]** . Although these regulations do not provide a monetary remedy for a complainant who was discriminated against, the regulations do provide a process designed to effectuate compliance with Title VI. A federally funded entity that does not comply with Title VI may ultimately lose its federal financial assistance. 34 C.F.R. § 100.8. In addition to the administrative remedies, Title VI contains an implied private cause of action through which individuals can obtain both injunctive relief and damages. Sandoval, 532 U.S. at 279.

HN8 An additional consideration in determining whether a particular statutory scheme should bar a section 1983 action, apart from administrative and private remedies, is whether that scheme provides a more restrictive private remedy for statutory violations than would otherwise be available pursuant to section 1983. Abrams, 125 S.Ct. at 1458. In the context of Title VI, the Supreme Court has recognized that the available remedies should sometimes be limited to declaratory and injunctive relief. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 595-97, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983). Furthermore, a Title VI plaintiff **[*16]** can only seek recovery from the recipient of the federal funding. Shotz v. City of Plantation, 344 F.3d 1161, 1169-70 (11th Cir. 2003). In other words, individuals may not be held liable under Title VI. Id.

HN9 Given the fact that Title VI offers an administrative enforcement scheme, a private right of action and damages that are more restrictive than those available through section 1983, the court finds that a remedy under section 1983 for conduct within the scope of Title VI would be incompatible with Title VI. See Abrams, 125 S.Ct. at 1458. Title VI provides the exclusive mechanism for recovery to individuals who were discriminated against on the basis of race by any program or activity receiving federal financial assistance. See 42 U.S.C. § 2000d.

Although the court has concluded that Title VI subsumes a section 1983 remedy, the inquiry does not end here. The next question seeks to determine which section 1983 remedies are subsumed by Title VI. In Henkle, the court stated that the plaintiff could not bring a constitutional equal protection claim based upon the same facts as a Title IX claim. 150 F.Supp.2d at 1074. **[*17]** Relying on Smith, the Henkle court found

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[6] Powell v. Ridge, 189 F.3d 387, 402 (3rd Cir. 1999) overruled on other grounds by Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[7] Cousins v. Sec'y of the United States Dep't of Transp., 857 F.2d 37, 44-45 (1st Cir. 1988) (indicating that Title VI remedies, sought pursuant to section 505 of the Rehabilitation Act of 1973, are not "so comprehensive as to indicate a congressional intent to foreclose alternate avenues of relief").

[8] In fact, Title IX relies on many of the provisions applicable to Title VI. 34 C.F.R. § 106.71.

that "it would be inconsistent to allow a plaintiff to circumvent [the Title IX] scheme by pursuing an equal protection claim under § 1983 based upon the same set of facts." Id. This inconsistency would result from allowing a plaintiff to bypass the scheme Congress created to remedy such violations. However, this reasoning is inapplicable where a plaintiff brings a cause of action pursuant to section 1983 to redress conduct that is outside the scope of the statutory scheme. See Smith, 468 U.S. at 1003 n.7 ("Claims not covered by the EHA should still be cognizable under § 1983, with fees available for such actions.").

In the case at bar, Plaintiffs' first cause of action, brought under section 1983, alleges violations of the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment. In order to determine whether these claims for relief are subsumed by Title VI, the court must determine whether Title VI proscribes the alleged conduct for which Plaintiffs are seeking relief. Title VI provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded **[*18]** from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

Plaintiffs' Equal Protection claim alleges that they were denied the same treatment as other students on account of their race. The court finds that such allegations fall squarely within the conduct that Title VI was designed to remedy. Title VI essentially proscribes conduct that would violate the Equal Protection Clause of the Fourteenth Amendment. Regents of Univ. of California v. Bakke, 438 U.S. 265, 287, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978) ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment."). However, as previously discussed, the remedies available under Title VI are different than those that would otherwise be available pursuant to section 1983. Because Congress enacted a statutory scheme sufficiently comprehensive to remedy racial discrimination committed by an entity receiving federal financial assistance, a plaintiff cannot pursue a section 1983 remedy for the same conduct.

The Court, however, reaches **[*19]** a different result with respect to Plaintiffs' Fourth Amendment claims. Plaintiffs allege that their detentions and arrests were made without probable cause or reasonable suspicion. The Court finds that this claim is not subsumed by Title VI as Title VI was not intended to remedy instances of unreasonable seizures in violation of the Fourth Amendment. Although Plaintiffs allege a discriminatory motive behind their arrests, the cause of action asserts a claim for unreasonable seizure rather than discrimination.

b. Qualified Immunity

After the foregoing discussion on whether claims brought under section 1983 are subsumed by Title VI, the court is left with the following section 1983 claims: (1) Tina versus all defendants on both claims; (2) Justin versus all defendants on the due process claim; and (3) Daryl versus all defendants on both claims. Defendants argue that the claims against the individual defendants, Underhill, Kallay and Mieras, should be dismissed under the doctrine of qualified immunity.

HN10 State officials are provided with a qualified immunity against section 1983 claims "insofar as their conduct does not violate clearly established statutory or constitutional rights **[*20]** of which a reasonable person would have known." Spoklie v. Montana, 411 F.3d 1051, 1060 (9th Cir. 2005); Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). This immunity is granted broadly and "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Moran v. Washington, 147 F.3d 839, 844 (9th Cir. 1998) (quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)).

In Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), the Supreme Court established a two-step evaluation of qualified immunity, which has also been adopted by the Ninth Circuit. See, e.g., Johnson v. County of Los Angeles, 340 F.3d 787, 791 (9th Cir. 2003); Jackson v. City of Bremerton, 268 F.3d 646, 651 (9th Cir. 2001). **HN11** The first step taken by the court is to make a constitutional

inquiry by determining the following issue: "based upon the facts taken in the light most favorable to the party asserting the inquiry, did the officer's conduct violate a constitutional right?" Johnson, 340 F.3d at 791 (citing Jackson v. City of Bremerton, 268 F.3d 646, 651 (9th Cir. 2001)); **[*21]** Saucier, 533 U.S. at 201. If the court finds that the officer's conduct violated a constitutional right, the second step of the Saucier analysis is that the court determine whether the officer is entitled to qualified immunity. Johnson, 340 F.3d at 791-92. As part of its qualified immunity analysis, the court should consider whether the law governing the conduct was clearly established when the conduct occurred. Robinson v. Solano County, 278 F.3d 1007, 1012 (9th Cir. 2001) (en banc). If the right violated was clearly established, the court should also decide "whether the officer could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right." Id. at 201-02; Saucier, 533 U.S. at 201-05.

The first step in the two-step process is intended to "set forth principles which will become the basis for a holding that a right is clearly established." Saucier, 533 U.S. at 201. If a court were to skip this initial step, "the law might be deprived of this explanation," Id., thereby inhibiting the development of Fourth Amendment **[*22]** law. See Robinson, 278 F.3d at 1012. It is therefore necessary to first consider the constitutional inquiry. Only if the court determines that Plaintiff's Fourth Amendment rights were violated will the court address the immunity issue. Johnson, 340 F.3d at 793-94; Saucier, 533 U.S. at 201, 121 S.Ct. 2151.

i. Tina's Claims

The action giving rise to a section 1983 claim by Tina against the individual defendants is the school administrators' failure to move forward on her complaints of discrimination in violation of the Fourteenth Amendment. There are no allegations in the complaint that the failure to proceed on Tina's complaints by the individual defendants was based on Tina's race. Cf. Monteiro v. Tempe Union High School Dist., 158 F.3d 1022, 1032 (9th Cir. 1998) (dismissing claim based on school assigning books with objectionable racist language while noting that allegations of racism in the school would be actionable). While there are allegations that a custom of failing to investigate claims within the administration led to the lawless arrest and detentions of her children, the underlying section 1983 claim **[*23]** cannot be based on respondeat superior, but instead must be based on individual actions of the defendants that lead to a constitutional deprivation of Tina's rights. Graves v. City of Coeur D'Alene, 339 F.3d 828, 848 (9th Cir. 2003). The failure to plead refusal to act based on race as opposed to discretionary determinations of the validity of the complaint is fatal as even in the light most favorable to Plaintiff there are no facts which would suggest her individual rights were violated by the individual defendants. Accordingly, further analysis under qualified immunity need not be undertaken.

ii. Justin's Claim

Justin has only one claim surviving under section 1983, the complaint that he was improperly detained by Underhill as he walked away from school. The court has reviewed the facts and, taken in the light most favorable to Justin, they show that he was detained with a large group of friends for the limited purpose of determining if any of those students had thrown a rock at the school building. No facts or allegations suggest that Underhill's purpose for detaining the group was pretextual. **HN12** An officer is entitled to make brief investigatory stops when **[*24]** there is a reasonable suspicion that a crime has been committed. Terry v. Ohio, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Any allegations of the officer's subjective intent for making the stop is irrelevant. See Whren v. United States, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) (holding that reasonableness of traffic stops does not depend of the actual motivations of the individual officer so long as probable cause exists for the stop). The only conclusion that can be drawn from these facts is that Underhill properly detained Justin in his attempt to determine who had thrown the rock. Such a detention is not a violation of Justin's Fourth Amendment rights. Since Justin's rights were not violated, Kallay and Mieras cannot be responsible for any custom

or policy leading to a deprivation of his civil rights.

iii. Daryl's Claims

Daryl's section 1983 claims are based on three incidents involving Underhill. The first incident occurred in the first week of September, 2004, when he was on the HHS campus, apparently to meet his brother. Daryl was detained by Underhill, told he was trespassing and informed that he should not return to campus for any reason. The second incident occurred **[*25]** on September 7, 2004, when Daryl once again entered the HHS campus, this time driving his mother's van into the parking lot. Daryl was arrested for trespassing by Underhill on this occasion. The third incident occurred on November 5, 2004, when Daryl once again entered the HHS campus and was detained by Underhill for trespassing. The facts presented by Plaintiffs demonstrate that Daryl was not a HHS student the times he was detained on campus. Nor do the facts demonstrate that either detention Daryl suffered was anything greater than an investigatory stop based on the reasonable suspicion that he did not belong on campus, as allowed by Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In addition, the court finds nothing inappropriate about the arrest on September 7. The facts do not demonstrate that Underhill exceeded his authority in effectuating an arrest, and do not contradict the fact that Daryl had been stopped as a trespasser less than a week earlier, told not to return to campus, and then was found on campus. Such a scenario demonstrates that probable cause existed from Underhill's knowledge of their previous encounter to allow for the arrest.

Accordingly, when the court **[*26]** considers the lower expectations of privacy one must have when on a public school's campus, New Jersey v. T.L.O., 469 U.S. 325, 339, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985), and the logical conclusion that a non-student visitor must also lower their expectations of privacy, United States v. Aguilera, 287 F.Supp.2d 1204, 1209 (E.D.Cal. 2003), it becomes apparent that Daryl's Fourth and Fourteenth Amendment rights were not violated when he was stopped and asked for identification and the purpose of his presence. Further, **HN13** an officer with knowledge that an individual is trespassing does not violate that person's rights by making an authorized arrest.

Daryl has also raised a claim that Kallay and Mieras are also responsible for the Fourth Amendment violation he claims to have suffered. As noted when discussing Justin's claim, since Daryl suffered no Fourth Amendment violation at the hands of Underhill he cannot show that Kallay and Mieras created a custom or policy that led to the violation of his civil rights.

B. State Law Claims

In addition to the federal claims discussed above, Plaintiffs also bring state law claims alleging battery, false imprisonment, intentional infliction **[*27]** of emotional distress, negligent infliction of emotional distress, negligent supervision and training, and violation of administrative regulations.

Defendants argue they are entitled to immunity on these claims pursuant to Nevada Revised Statute section 41.032. Specifically, Defendants argue the actions of all Defendants were discretionary acts that cannot form the basis for a lawsuit in Nevada.

> Section 41.032(2) of the Nevada Revised Statutes provides as follows: **HN14** no action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is: based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor or any of these, whether or not the discretion involved is abused.

Nev. Rev. Stat. § 41.032. **HN15** "Discretionary acts are those which require the exercise of personal deliberation, decision and judgment." **[*28]** Travelers Hotel, Ltd. v. City of Reno, 103 Nev. 343, 741 P.2d 1353, 1354 (Nev. 1987) (citing Parker v. Mineral County, 102 Nev. 593, 729 P.2d 491, 493 (Nev. 1986)). An action can

be brought, however, if the acts in question are merely "'ministerial,' amounting only to obedience to orders, or the performance of a duty in which the officer is left no choice of his own." Maturi v. Las Vegas Metro. Police Dep't, 110 Nev. 307, 871 P.2d 932, 934 (Nev. 1994).

1. State Claims Arising Directly From Arrest

The Nevada Supreme Court has specifically concluded that **HN16** a police officer's decision to make a traffic stop and arrest a person for failing to sign a traffic ticket are discretionary acts because they require the officer to use his judgment. Ortega v. Reyna, 114 Nev. 55, 953 P.2d 18, 23 (Nev. 1998). In the present case, Underhill used his discretion to determine when to detain Plaintiffs and how to treat them once detained. See Maturi v. Las Vegas Metro. Police Dep't, 110 Nev. 307, 871 P.2d 932, 933 (Nev. 1994) (holding officer's decision to handcuff suspect behind back instead of in front despite complaints of medical problems was discretionary). Accordingly, all state **[*29]** law claims arising directly out of Plaintiffs' detention by Underhill are dismissed under Nevada's state immunity law. These claims are battery, false imprisonment, intentional infliction of emotional distress and negligent infliction of emotional distress.

2. Negligent Supervision and Training

This court has held that the **HN17** supervision and training of employees is not a discretionary act subject to immunity under Nevada Revised Statute 41.032. Herrera v. Las Vegas Metro. Police Dep't., 298 F.Supp.2d 1043, 1054-55 (D. Nev. 2004). In addition, viewing the complaint in the light most favorable to Plaintiffs, the court cannot say that a claim for negligent supervision and training has not been stated. Plaintiffs have alleged that previous incidents occurred which demonstrated to Defendants that they were negligent in their supervision or training of Underwood. As such, Plaintiffs have pled the minimal requirements of the tort. See Hall v. SSF, Inc., 112 Nev. 1384, 930 P.2d 94, 99 (Nev. 1996) (noting that **HN18** an "employer has a duty to use reasonable care in the training, supervision, and retention of his or her employees to make sure that **[*30]** the employees are fit for their position").

3. Violation of Administrative Regulations

Plaintiffs bring this claim pursuant to WCSD Administrative Regulation 5144.21. **HN19** The WCSD Administrative Regulations do not provide an explicit private right of action for violations of their requirements. However, in certain circumstances courts will imply a private right of action into a statutory scheme. See Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975) (noting the four factors to consider when determining whether a private right of action should be implied are (1) whether the plaintiff was one of the class for whose special benefit the statute was enacted; (2) whether there was an indication of legislative intent to create or deny such a remedy; (3) whether the remedy was consistent with the underlying purposes of the legislative theme; and (4) whether the cause of action was one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law) [9] ; see also Sports Form, Inc. v. LeRoy's Horse & Sports Place, 108 Nev. 37, 823 P.2d 901, 902 (Nev. 1992) (noting the factors in Cort are helpful for determining private **[*31]** right of actions in state statutes as well).

In this matter Plaintiffs are part of the class for which the regulations were created. However, it is clear that the regulations do not contemplate a private cause of action for damages arising out of a failure **[*32]** to follow the regulations and that such a remedy would be inconsistent with the goal of the regulations; namely encouraging

[9] Some courts consider the Cort four factor test to be implicitly overruled and reduced to a single factor test seeking to determine the congressional intent behind a statute. See Parry v. Mohawk Motors of Mich., Inc., 236 F.3d 299, 308 (6th Cir. 2000). However, the Ninth Circuit although recognizing the potential conflict between Cort and subsequent Supreme Court cases and the Nevada Supreme Court still consider the full four factor test relevant to determining if a private right of action exists. See First Pac. Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1121-22 (9th Cir. 2000). Thus, the four factor test is the appropriate test for determining whether a private right of action exists in an action governed by Nevada state law.

the school district and its students to work together and within the system to resolve grievance disputes based on perceived discrimination. [10] In fact, the regulations provide an alternative avenue to the court system, without foreclosing that option, by which an aggrieved may attempt to resolve disputes. In essence, the school district gives individuals the ability to resolve their problems internally if they wish, without mandating that they give up their legal rights. When weighed in this light, the relevant factors discussed in Cort do not imply a private right of action in the WCSD Administrative Regulations that would allow an aggrieved student to sue the WCSD based on a violation of those regulations. Accordingly, Plaintiffs' claim for relief must be dismissed.

[*33] IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (# 20) is GRANTED in part and DENIED in part as discussed in this order.

DATED this 16th day of February, 2006

LARRY R. HICKS

United States District Judge

[10] The regulation provides a brief note on its purpose and scope, stating: "The best solutions are those that involve input from those closest to the concern. . . . At any time, a student may choose to initiate the following grievance procedure along with having the legal right to file a grievance with . . . a court of competent jurisdiction. . . ." WCSD Reg. 5144.21 at 3. Thus, the grievance procedure is designed as an alternative to litigation in the courts with the purpose of using those closest to the situation to work out an amicable solution outside of the court system.

Williams v. Underhill

United States **District** Court for the **District** of Nevada

February 16, 2006, Decided ; February 17, 2006, Filed

03:05-CV-0175-LRH (RAM)

Reporter
2006 U.S . Dist. LEXIS 24929; 2006 WL 383518

ZENA WILLIAMS, an individual; and as the mother and guardian for CORNELIUS PERRY a minor; and as guardian of TERRY ROLLINS, a minor, Plaintiffs v. GARY UNDERHILL in his official and individual capacity; MIKE MIERAS in his official and individual capacity; ED SHEPPARD in his official and individual capacity; the WASHOE COUNTY SCHOOL **DISTRICT**; and DOES 1 through 10, Defendants

Subsequent History: Summary judgment granted by Williams v. Underhill, 2008 **U.S**. Dist. **LEXIS** 24564 (D. Nev., Mar. 26, 2008)

Core Terms

subsumed, regulations, infliction of emotional distress, private right of action, qualified immunity, statutory scheme, allegations, supervision, violations, training, arrest, rights, intent of congress, claim for relief, cause of action, immunity, remedies, administrative regulation, constitutional right, court finds, discretionary, citations, foreclose, provides, boys, deprivations, trespassing, damages

Case Summary

Procedural Posture

Plaintiff mother and guardian of two minor students and the students sued defendants, a school **district**, a school police officer, a school **district** chief of police, and a dean, alleging violations of their Fourth and Fourteenth Amendment rights through 42 **U.S**.C.S. § 1983 and violations of 42 **U.S**.C.S. § 2000d, Title VI of the Civil Rights Act of 1964 (Title VI). Defendants moved to dismiss the § 1983 claims pursuant to Fed. R. Civ. P. 12(b)(6).

Overview

Since Title VI offered an administrative enforcement scheme, a private right of action, and damages that were more restrictive than those available through § 1983, a remedy under § 1983 for conduct within the scope of Title VI was incompatible with Title VI. The equal protection claims fell squarely within the conduct that Title VI was designed to remedy, but the Fourth Amendment claims were not subsumed by Title VI as Title VI was not intended to remedy instances of unreasonable seizures in violation of the Fourth Amendment. As the students had properly alleged violations of clearly established constitutional rights, the officer was not, at the present time, entitled to qualified immunity. At the present time it could not be said that the students would be unable to offer facts to prove that the chief and the dean were responsible for the alleged Fourth Amendment violations or that the dean and chief were entitled to qualified immunity. The officer was entitled to immunity under Nev. Rev. Stat. § 41.032 for all the state law claims arising from the students' detention. The students pled the minimal requirements for their negligent supervision or training claim.

Outcome

Defendants' motion was granted in part and denied in part. The motion was granted as to the students' equal protection claims, the state law claims against the officer arising from their detention, and the claim brought under the school **district** administrative regulations. The motion was denied as to the Fourth Amendment claims and the negligent supervision and training claim.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1 In considering a motion to dismiss, all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party. However, a court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2 There is a strong presumption against dismissing an action for failure to state a claim. The issue is not whether a plaintiff will ultimately prevail but whether he or she is entitled to offer evidence in support of the claims. Consequently, a court should not grant a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Evidence > Burdens of Proof > Allocation

HN3 42 **U.S**.C.S. § 1983 supplies a cause of action to a plaintiff when a person acting under the color of law deprives that plaintiff of any rights, privileges, or immunities secured by the Constitution and laws of the United States. However, when the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983. In determining whether an act subsumes a § 1983 action, the court must determine whether Congress intended that act to supplant any remedy that would otherwise be available under section 1983. Such Congressional intent may be found directly in the statute creating the right or inferred when the statutory scheme is incompatible with individual enforcement under § 1983. The defendant bears the burden of demonstrating that Congress has expressly withdrawn the § 1983 remedy.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Scope

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

HN4 The United States Court of Appeals for the Ninth Circuit has not decided the specific issue of whether 42 **U.S**.C.S. § 1983 is subsumed by Title VI of the Civil Rights Act of 1964. However, the United States Court of Appeals for the Ninth Circuit has recognized the United States Supreme Court's Sea Clammers doctrine when construing other federal statutes and found that those statutes precluded a § 1983 remedy. In addition, the United States **District** Court for the **District** of Nevada has recognized that a § 1983 action is barred in the context of Title IX of the Education Amendments Act of 1972, 20 **U.S**.C.S. § 1681 et seq.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Remedies

HN5 While Title VI of the Civil Rights Act of 1964 (Title VI) does not explicitly purport to limit 42 **U.S**.C.S. § 1983 relief, 42 **U.S**.C.S. § 2000d, Congressional intent to foreclose such a remedy can still be inferred from the creation of a comprehensive statutory scheme. Therefore, the first question a court must decide is whether Title VI is sufficiently comprehensive to demonstrate the congressional intent to foreclose a § 1983 remedy. If Title VI is sufficiently comprehensive, the court must determine whether a plaintiff's § 1983 claims seek to remedy conduct that is within the scope of Title

VI. Only § 1983 claims that are within the scope of a comprehensive statutory scheme are subsumed by that scheme.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Remedies

HN6 The courts are split as to whether Title VI of the Civil Rights Act of 1964 (Title VI) subsumes 42 **U.S**.C.S. § 1983. The United States Court of Appeals for the Seventh Circuit and the United States **District** Court for the Western **District** of New York have found that Title VI is sufficiently comprehensive to preclude a plaintiff from bypassing its enforcement mechanisms through a § 1983 action. Conversely, the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the First Circuit have found that Title VI is not sufficiently comprehensive.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Remedies

HN7 Pursuant to the United States **District** Court for the **District** of Nevada, Title VI of the Civil Rights Act of 1964 is sufficiently comprehensive to evince congressional intent to foreclose a 42 **U.S**.C.S. § 1983 remedy.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Remedies

HN8 Pursuant to the United States **District** Court for the **District** of Nevada, Title VI of the Civil Rights Act of 1964 contains a comprehensive administrative enforcement scheme. 34 C.F.R. § 100.1 et seq.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Business & Corporate Compliance > ... > Discrimination in Schools > Equal Educational Opportunities Act > Enforcement of Equal Educational Opportunities

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Remedies

HN9 Title VI of the Civil Rights Act of 1964's (Title VI) administrative scheme allows persons who believe they were discriminated against to file a written complaint with the responsible department official. 34 C.F.R. § 100.7(b). A complaint that indicates noncompliance with Title VI triggers a prompt investigation. 34 C.F.R. § 100.7(c). If the investigation reveals a failure to comply with Title VI, the department will take steps necessary to ensure compliance. 34 C.F.R. §§ 100.7, 100.8, and 100.9. Although those regulations do not provide a monetary remedy for a complainant who was discriminated against, the regulations do provide a process designed to effectuate compliance with Title VI. A federally funded entity that does not comply with Title VI may ultimately lose its federal financial assistance. 34 C.F.R. § 100.8 . In addition to the administrative remedies, Title VI contains an implied private cause of action through which individuals can obtain both injunctive relief and damages.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Civil Rights Law > Protection of Rights > Immunity From Liability > General Overview

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Remedies

HN10 An additional consideration in determining whether a particular statutory scheme should bar a 42 **U.S**.C.S. § 1983 action, apart from administrative and private remedies, is whether that scheme provides a more restrictive private remedy for statutory violations than would otherwise be available pursuant to § 1983. In the context of Title VI of the Civil Rights Act of 1964 (Title VI), the United States Supreme Court has recognized that the available remedies should sometimes be limited to declaratory and injunctive relief. Furthermore, a Title VI plaintiff can only seek recovery from the recipient of the federal funding. In other words, individuals may not be held liable under Title VI.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Scope

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Remedies

HN11 Given the fact that Title VI of the Civil Rights Act of 1964 (Title VI) offers an administrative enforcement scheme, a private right of action and damages that are more restrictive than those available through 42 **U.S**.C.S. § 1983, a remedy under § 1983 for conduct within the scope of Title VI would be incompatible with Title VI. Title VI provides the exclusive mechanism for recovery to individuals who were discriminated against on the basis of race by any program or activity receiving federal financial assistance. 42 **U.S**.C.S. § 2000d.

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Scope

HN12 Title VI of the Civil Rights Act of 1964 provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. 42 **U.S**.C.S. § 2000d.

Constitutional Law > Equal Protection > General Overview

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Scope

HN13 Title VI of the Civil Rights Act of 1964 (Title VI) essentially proscribes conduct that would violate the Equal Protection Clause of the Fourteenth Amendment. Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Education Law > Discrimination in Schools > Equal Educational Opportunities Act > Scope

HN14 Title VI of the Civil Rights Act of 1964 is not intended to remedy instances of unreasonable seizures in violation of the Fourth Amendment.

Civil Rights Law > ... > Immunity From Liability > Local Officials > General Overview

HN15 State officials are provided with a qualified immunity against 42 **U.S**.C.S. § 1983 claims insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. That immunity is granted broadly and provides ample protection to all but the plainly incompetent or those who knowingly violate the law.

Civil Rights Law > ... > Immunity From Liability > Local Officials > General Overview

HN16 In the Saucier case, the United States Supreme Court has established a two-step evaluation of qualified immunity, which has also been adopted by the United States Court of Appeals for the Ninth Circuit. The first step to be taken by a court is to make a constitutional inquiry by determining the following issue: based upon the facts taken in the light most favorable to the party asserting the inquiry, did the officer's conduct violate a constitutional right?" If the court finds that the officer's conduct violated a constitutional right, the second step of the Saucier analysis is for the court to determine whether the officer is entitled to qualified immunity. As part of its qualified immunity analysis, the court should consider whether the

law governing the conduct was clearly established when the conduct occurred. If the right violated was clearly established, the court should also decide whether the officer could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right.

Civil Rights Law > ... > Immunity From Liability > Local Officials > General Overview

HN17 The first step in the Saucier two-step process is intended to set forth principles which will become the basis for a holding that a right is clearly established. If a court were to skip that initial step, the law might be deprived of that explanation. It is therefore necessary to first consider the constitutional inquiry. Only if the court determines that plaintiff's constitutional rights were violated will the court address the immunity issue.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN18 Supervisory officials can be held liable under 42 **U.S**.C.S. § 1983 only if they play an affirmative part in the alleged deprivation of constitutional rights. Supervisory liability is imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivations of which the complaint is made; or for conduct that showed a reckless or callous indifference to the rights of others.

Governments > State & Territorial Governments > Claims By & Against

HN19 Nev. Rev. Stat. § 41.032 provides that no action may be brought under Nev. Rev. Stat. § 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is: based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer, employee or immune contractor or any of these, whether or not the discretion involved is abused. Discretionary acts are those which require the exercise of personal deliberation, decision and judgment. An action can be brought, however, if the acts in question are merely ministerial, amounting only to obedience to orders, or the performance of a duty in which the officer is left no choice of his own.

Governments > State & Territorial Governments > Claims By & Against

HN20 Pursuant to the United States **District** Court for the **District** of Nevada, the supervision and training of employees is not a discretionary act subject to immunity under Nev. Rev. Stat. 41.032.

Torts > ... > Affirmative Duty to Act > Types of Special Relationships > Employers

HN21 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.

Education Law > Administration & Operation > School Districts > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN22 The Washoe County (Nevada) School **District** Administrative Regulations do not provide an explicit private right of action for violations of their requirements. However, in certain circumstances courts will imply a private right of action into a statutory scheme.

Governments > Legislation > Statutory Remedies & Rights

HN23 The four factors to consider when determining whether a private right of action should be implied are whether: (1) the plaintiff is one of the class for whose special benefit the statute was enacted, (2) there is an indication of legislative intent to create or deny such a remedy, (3) the remedy is consistent with the underlying purposes of the legislative theme, and (4) the cause of action was one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law.

Education Law > Students > General Overview

HN24 Washoe County (Nevada) School Regulation 5144.21 provides a brief note on its purpose and scope, stating that the best solutions are those that involve input from those closest to the concern. At any time, a student may choose to initiate the following grievance procedure along with having the legal right to file a grievance with a court of competent jurisdiction. Thus, the grievance procedure is designed as an alternative to litigation in the courts with the purpose of using those closest to the situation to work out an amicable solution outside of the court system.

Counsel: **[*1]** For Zena Williams, Plaintiff: Jeffrey S. Blanck, Winograd & Blanck, Ltd, Reno,NV

For Tom Kallay, Defendant: Debra O Waggoner, Walther Key Maupin Oats Cox & Legoy, Reno, NV

For Mike Mieras, Defendant: C. R. Cox, Walther Key Maupin Oats Cox & Legoy, Reno, NV; Christopher D. Jaime, Walther Key Maupin Oats Cox & Legoy, Reno, NV; Debra O Waggoner, Walther Key Maupin Oats Cox & Legoy, Reno, NV; Michael E. Malloy, Walther Key Maupin Oats Cox & Legoy, Reno, NV

For Ed Sheppard, Defendant: C. R. Cox, Walther Key Maupin Oats Cox & Legoy, Reno, NV; Christopher D. Jaime, Walther Key Maupin Oats Cox & Legoy, Reno, NV; Debra O Waggoner, Walther Key Maupin Oats Cox & Legoy, Reno, NV; Michael E. Malloy, Walther Key Maupin Oats Cox & Legoy, Reno, NV

For Gary Underhill, Defendant: C. R. Cox, Walther Key Maupin Oats Cox & Legoy, Reno, NV; Christopher D. Jaime, Walther Key Maupin Oats Cox & Legoy, Reno, NV; Debra O Waggoner, Walther Key Maupin Oats Cox & Legoy, Reno, NV; Michael E. Malloy, Walther Key Maupin Oats Cox & Legoy, Reno, NV

For Washoe County School **District**, Defendant: C. R. Cox, Walther Key Maupin Oats Cox & Legoy, Reno, NV; Christopher D. Jaime, Walther Key Maupin Oats **[*2]** Cox & Legoy, Reno, NV; Debra O Waggoner, Walther Key Maupin Oats Cox & Legoy, Reno, NV; Michael E. Malloy, Walther Key Maupin Oats Cox & Legoy, Reno, NV

Judges: LARRY R. HICKS, United States **District** Judge

Opinion by: LARRY R. HICKS

Opinion

ORDER

Presently before this court is Defendants' Motion to Dismiss (# 19) [1]. Plaintiffs have submitted an opposition (# 22), to which Defendants subsequently replied (# 24).

FACTUAL AND PROCEDURAL BACKGROUND

The present case arises out of an allegedly unlawful detention and arrest at Hug High School ("HHS"), a school within the Washoe County School **District**. The plaintiffs, Zena Williams, Cornelius Perry ("Cornelius") and Terry Rollins ("Terry")(collectively "Plaintiffs"), represent one in a number of families who have resorted to legal action against Defendants Gary Underhill ("Underhill"), a school police officer, Mike Mieras ("Mieras"), the Washoe County School **District** Chief of Police, Ed Sheppard ("Sheppard"), the **[*3]** Dean of Student Discipline at HHS, and the Washoe County School **District** ("WCSD")(collectively "Defendants"), to remedy alleged racial discrimination on the HHS campus.

Cornelius and Terry are both students of HHS. Their claims arise out of two encounters with Underhill. The first occurred on February 18, 2005. On that date Cornelius and Terry were waiting for Zena Williams to pick them up after school. They had chosen to wait in the school gym because of inclement weather. Nearly twenty other students are alleged to have been inside the gym at that time.

According to Plaintiffs, Underhill approached Cornelius and Terry and told them they were trespassing and would need to leave the school. When Cornelius and Terry protested that they

[1] All references to (# XX) refer to the court's docket.

were simply waiting for their ride and did not want to be in the rain, Underhill handcuffed both boys and placed them under arrest. Zena Williams arrived at that time and confronted Underhill. Ms. Williams told Underhill the boys were students at the school and demanded their release. Underhill did not release the boys.

Instead of taking the boys to the school police office or the main office Underhill took Cornelius and Terry to a separate building, **[*4]** named the G building. Underhill kept the boys in a room in the G building for an hour, during which time it is alleged he threatened them and struck Terry in the head three times. Sheppard is alleged to have been present and is accused of failing to prevent the threats or violence.

After the hour, Underhill released the boys to Ms. Williams with citations for trespassing. During the release it is alleged Underhill called Cornelius a sexual predator.

The second incident occurred on March 16, 2005. On that day both Cornelius and Terry were walking on campus with the track team, of which they were members, after track practice had ended. Underhill allegedly detained Cornelius and Terry as well as the roughly 10 other members of the track team. Underhill told all the students that they were trespassing and took them all to the office. Cornelius and Terry received trespassing citations from that incident.

LEGAL STANDARD FOR MOTION TO DISMISS

HN1 In considering "a motion to dismiss, all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." Wyler Summit P 'Ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) **[*5]** (citation omitted). However, a court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint. Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994).

HN2 There is a strong presumption against dismissing an action for failure to state a claim. Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)(citation omitted). "The issue is not whether a plaintiff will ultimately prevail but whether [he or she] is entitled to offer evidence in support of the claims." Scheuer v. Rhodes, 416 **U.S**. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 **U.S**. 800, 807, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Consequently, the court should not grant a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 **U.S**. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); see also Hicks v. Small, 69 F.3d 967, 969 (9th Cir. 1995).

DISCUSSION

Plaintiffs filed the present complaint alleging eight **[*6]** claims for relief: violation of their Fourth and Fourteenth Amendment rights through 42 **U.S**.C. § 1983; violation of Title VI, 42 **U.S**.C. § 2000d; battery; false imprisonment; intentional infliction of emotional distress; negligent infliction of emotional distress; negligent supervision and training; and violation of administrative regulations. Defendants have sought to dismiss all claims except for those brought pursuant to Title VI. [2]

A. Federal Claims [3]

[*7] 1. 42 **U.S**.C. § 1983

[2] Defendants have sought to dismiss the Title VI claim as it relates to the individual defendants and in so far as it seeks punitive damages. Plaintiffs have noted in their opposition that the claim is not against the individual defendants and does not seek punitive damages. Thus, Defendants' arguments on this point are moot and will not be discussed.

[3] The federal claims in this matter are brought on behalf of Cornelius Perry and Terry Rollins. Zena Williams has only alleged claims of Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress as direct actions on her behalf. Thus, the term Plaintiffs refers in this section to Cornelius, Terry and Zena Williams as the juveniles' guardian only.

Plaintiffs' first claim for relief, brought pursuant to 42 U.S.C. § 1983, alleges deprivations of their civil rights in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

a. Plaintiffs' Equal Protection Claim is Subsumed by Title VI

In seeking dismissal of the first claim for relief, Defendants note that Plaintiffs' second claim for relief, based upon the same set of facts alleged for the constitutional claims, alleges that Cornelius and Terry were discriminated against on account of their race in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Since the first two claims for relief are based upon the same set of facts, Defendants argue that Plaintiffs' section 1983 claim is subsumed by the Title VI claim and must be dismissed.

HN3 42 U.S.C. § 1983 supplies a cause of action to a plaintiff when a person acting under the color of law deprives that plaintiff of any "rights, privileges, or immunities secured by the Constitution and laws [of the United States.]" However, "when the remedial devices provided **[*8]** in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981). In determining whether an act subsumes a section 1983 action, the court must determine whether Congress intended that act to supplant any remedy that would otherwise be available under section 1983. Id. at 21. Such Congressional intent may be found directly in the statute creating the right or inferred when the statutory scheme is incompatible with individual enforcement under section 1983. City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 125 S.Ct. 1453, 1458, 161 L. Ed. 2d 316 (2005). The defendant bears the burden of demonstrating that Congress has expressly withdrawn the section 1983 remedy. Golden State Transit Corp. v City of Los Angeles, 493 U.S. 103, 107, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989).

HN4 The Ninth Circuit has not decided the specific issue of whether section 1983 is subsumed by Title VI. However, the Ninth Circuit has recognized the Supreme Court's Sea Clammers doctrine when construing other federal statutes and found **[*9]** that those statutes precluded a section 1983 remedy. See, e.g., Dittman v. California, 191 F.3d 1020 (9th Cir. 1999); Dep't of Educ, State of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1984). In addition, the District of Nevada has recognized that a section 1983 action is barred in the context of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 et seq. Henkle v. Gregory, 150 F.Supp.2d 1067 (D. Nev. 2001).

In the present case, this court is called upon to decide whether Title VI serves to bar an action brought pursuant to section 1983. **HN5** While Title VI does not explicitly purport to limit section 1983 relief, 42 U.S.C. § 2000d, congressional intent to foreclose such a remedy can still be inferred from the creation of a comprehensive statutory scheme. Sea Clammers, 453 U.S. at 20. Therefore, the first question this court must decide is whether Title VI is sufficiently comprehensive to demonstrate the congressional intent to foreclose a section 1983 remedy. If Title VI is sufficiently comprehensive, the court must determine whether Plaintiffs' section **[*10]** 1983 claims seek to remedy conduct that is within the scope of Title VI. Only section 1983 claims that are within the scope of a comprehensive statutory scheme are subsumed by that scheme. See Smith v. Robinson, 468 U.S. 992, 1003 n.7, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984) superseded by Education of the Handicapped Act, § 615(e)(4), as amended, 20 U.S.C. § 1415(e)(4).

HN6 The courts are split as to whether Title VI subsumes section 1983. The Seventh Circuit [4] and the Western District of New York [5] **[*11]** have found that Title VI is sufficiently comprehensive to preclude a plaintiff from

[4] Boulahanis v. Bd. of Regents, 198 F.3d 633, 641 (7th Cir. 1999).

[5] Bayon v. State Univ. of New York at Buffalo, 2001 U.S. Dist. LEXIS 1511, 2001 WL 135817, *3 (W.D.N.Y. 2001).

bypassing its enforcement mechanisms through a section 1983 action. Conversely, The Third Circuit [6] and the First Circuit [7] have found that Title VI is not sufficiently comprehensive. After examining the relevant case law and the statutory scheme of Title VI, **HN7** this court finds that Title VI is sufficiently comprehensive to evince congressional intent to foreclose a section 1983 remedy.

As mentioned previously, this **district** has found that Title DC is sufficiently comprehensive to foreclose a section 1983 remedy. Henkle, 150 F.Supp.2d at 1074. Title IX was patterned after Title VI and is enforced and interpreted in the same manner as Title VI. Barnes v. Gorman, 536 **U.S**. 181, 185, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002)(citations omitted); Alexander v. Sandoval, 532 **U.S**. 275, 280, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)(citations omitted). As with Title DC, **HN8** the court finds that Title VI contains a comprehensive administrative enforcement scheme. [8] See 34 C.F.R. § 100.1 et seq.; Henkle, 150 F.Supp.2d at 1073. **[*12]**

HN9 Title VI's administrative scheme allows persons who believe they were discriminated against to file a written complaint with the responsible department official. 34 C.F.R. § 100.7(b). A complaint that indicates noncompliance with Title VI triggers a prompt investigation. 34 C.F.R. § 100.7(c). If the investigation reveals a failure to comply with Title VI, the department will take steps necessary to ensure compliance. 34 C.F.R. §§ 100.7, 100.8, 100.9. Although these regulations do not provide a monetary remedy for a complainant who was discriminated against, the regulations do provide a process designed to effectuate compliance with Title VI. A federally funded entity that does not comply with Title VI may ultimately lose its federal financial assistance. 34 C.F.R. § 100.8 **[*13]** . In addition to the administrative remedies, Title VI contains an implied private cause of action through which individuals can obtain both injunctive relief and damages. Sandoval, 532 **U.S**. at 279.

HN10 An additional consideration in determining whether a particular statutory scheme should bar a section 1983 action, apart from administrative and private remedies, is whether that scheme provides a more restrictive private remedy for statutory violations than would otherwise be available pursuant to section 1983. Abrams, 125 S.Ct. at 1458. In the context of Title VI, the Supreme Court has recognized that the available remedies should sometimes be limited to declaratory and injunctive relief. Guardians Ass'n v. Civil Serv. Comm'n, 463 **U.S**. 582, 595-97, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983). Furthermore, a Title VI plaintiff can only seek recovery from the recipient of the federal funding. Shotz v. City of Plantation, 344 F.3d 1161, 1169-70 (11th Cir. 2003). In other words, individuals may not be held liable under Title VI. Id.

HN11 Given the fact that Title VI offers an administrative enforcement scheme, a private right of action and damages that are more **[*14]** restrictive than those available through section 1983, the court finds that a remedy under section 1983 for conduct within the scope of Title VI would be incompatible with Title VI. See Abrams, 125 S.Ct. at 1458. Title VI provides the exclusive mechanism for recovery to individuals who were discriminated against on the basis of race by any program or activity receiving federal financial assistance. See 42 **U.S**.C. § 2000d.

Although the court has concluded that Title VI subsumes a section 1983 remedy, the inquiry does not end here. The next question seeks to determine which section 1983 remedies are subsumed by Title VI. In Henkle, the court stated that the plaintiff could not bring a constitutional equal protection claim based upon the same facts as a Title IX claim. 150 F.Supp.2d at 1074. Relying on Smith, the Henkle court found that "it

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[6] Powell v. Ridge, 189 F.3d 387, 402 (3rd Cir. 1999) overruled on other grounds by Alexander v. Sandoval, 532 **U.S**. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[7] Cousins v. Secretary of United States DOT, 857 F.2d 37, 44-45 (1st Cir. 1988)(indicating that Title VI remedies, sought pursuant to section 505 of the Rehabilitation Act of 1973, are not "so comprehensive as to indicate a congressional intent to foreclose alternate avenues of relief").

[8] In fact, Title DC relies on many of the provisions applicable to Title VI. 34 C.F.R. § 106.71.

would be inconsistent to allow a plaintiff to circumvent [the Title DC] scheme by pursuing an equal protection claim under § 1983 based upon the same set of facts." Id. This inconsistency would result from allowing a plaintiff to bypass the scheme Congress created to remedy **[*15]** such violations. However, this reasoning is inapplicable where a plaintiff brings a cause of action pursuant to section 1983 to redress conduct that is outside the scope of the statutory scheme. See Smith, 468 **U.S**. at 1003 n.7 ("Claims not covered by the EHA should still be cognizable under § 1983, with fees available for such actions.").

In the case at bar, Plaintiffs' first cause of action alleges violations of the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment. In order to determine whether these claims for relief are subsumed by Title VI, the court must determine whether Title VI proscribes the alleged conduct for which Plaintiffs are seeking relief. **HN12** Title VI provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 **U.S**.C. § 2000d.

Plaintiffs' Equal Protection claim alleges that they were denied the same treatment as other students on account of their race. The court finds that such allegations **[*16]** fall squarely within the conduct that Title VI was designed to remedy. **HN13** Title VI essentially proscribes conduct that would violate the Equal Protection Clause of the Fourteenth Amendment. Regents of Univ. of California v. Bakke, 438 **U.S**. 265, 287, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978)("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment."). However, as previously discussed, the remedies available under Title VI are different than those that would otherwise be available pursuant to section 1983. Because Congress enacted a statutory scheme sufficiently comprehensive to remedy racial discrimination committed by an entity receiving federal financial assistance, Plaintiffs cannot pursue a section 1983 remedy for the same conduct.

The court, however, reaches a different result with respect to Cornelius and Terry's Fourth Amendment claims. Cornelius and Terry allege that their detention and arrest was made without probable cause or reasonable suspicion and Terry's arrest was effectuated through the use of excessive force. The court finds that these claims are not subsumed by Title VI as **HN14** Title VI was not intended to remedy **[*17]** instances of unreasonable seizures in violation of the Fourth Amendment. Although Plaintiffs allege a discriminatory motive behind their arrests, the causes of action assert a claim for unreasonable seizure rather than discrimination.

b. Qualified Immunity

After the foregoing discussion on whether claims brought under section 1983 are subsumed by Title VI, the court is left with the alleged Fourth Amendment violations against Defendants. Defendants note that the claims are brought in two distinct manners. One set of claims is against Defendant Underhill for his direct actions. The second is against Defendants Sheppard and Mieras under a supervisor liability theory. Defendants then claim that all defendants are entitled to qualified immunity.

HN15 State officials are provided with a qualified immunity against section 1983 claims "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Spoklie v. Montana, 411 F.3d 1051, 1060 (9th Cir. 2005); Harlow v. Fitzgerald, 457 **U.S**. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). This immunity is granted broadly and "provides ample protection to all but **[*18]** the plainly incompetent or those who knowingly violate the law." Moran v. Washington, 147 F.3d 839, 844 (9th Cir 1998)(quoting Malley v. Briggs, 475 **U.S**. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271(1986)).

HN16 In Saucier v. Katz, 533 **U.S**. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), the Supreme Court established a two-step evaluation of qualified immunity, which has also been adopted by the Ninth Circuit. See, e.g., Johnson v. County of Los Angeles, 340 F.3d 787, 791 (9th Cir. 2003); Jackson v. City of Bremerton, 268 F.3d 646, 651 (9th Cir. 2001). The first step taken by the court is to make a constitutional

inquiry by determining the following issue: "based upon the facts taken in the light most favorable to the party asserting the inquiry, did the officer's conduct violate a constitutional right?" Johnson, 340 F.3d at 791 (citing Jackson v. City of Bremerton, 268 F.3d 646, 651 (9th Cir. 2001)); Saucier, 533 **U.S**. at 201. If the court finds that the officer's conduct violated a constitutional right, the second step of the Saucier analysis is that the court determine whether the officer is entitled to qualified immunity. **[*19]** Johnson, 340 F.3d at 791-92. As part of its qualified immunity analysis, the court should consider whether the law governing the conduct was clearly established when the conduct occurred. Robinson v. Solano County, 278 F.3d 1007, 1012 (9th Cir. 2001)(en banc). If the right violated was clearly established, the court should also decide "whether the officer could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right." Id. at 201-02; Saucier, 533 **U.S**. at 201-05.

HN17 The first step in the two-step process is intended to "set forth principles which will become the basis for a holding that a right is clearly established." Saucier, 533 **U.S**. at 201. If a court were to skip this initial step, "the law might be deprived of this explanation," Id., thereby inhibiting the development of Fourth Amendment law. See Robinson, 278 F.3d at 1012. It is therefore necessary to first consider the constitutional inquiry. Only if the court determines that Plaintiff's Fourth Amendment rights were violated will the court address the immunity **[*20]** issue. Johnson, 340 F.3d at 794; Saucier, 533 **U.S**. at 201, 121 S.Ct. 2151.

The court notes that at this stage in the proceedings, the allegations contained in the complaint are viewed in the light most favorable to the Plaintiffs. Viewing the facts in this light, Plaintiffs have properly alleged violations of clearly established constitutional rights. See Kaupp v. Texas, 538 **U.S**. 626, 630, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003)(requiring probable cause to effectuate a seizure); Graham v. Connor, 490 **U.S**. 386, 396-99, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)(discussing the Fourth Amendment right to be free from unreasonable seizures). Whether or not the Plaintiffs' arrests lacked probable cause or were effectuated by using excessive force cannot be determined at this time. Accordingly, the court cannot say at this time that Defendant Underhill is entitled to qualified immunity.

Defendants Sheppard and Mieras as **HN18** supervisory officials "can be held liable under section 1983 'only if they play an affirmative part in the alleged deprivation of constitutional rights.'" Graves v. City of Coeur D'Alene, 339 F.3d 828, 848 (9th Cir. 2003)(quoting Rise v. Oregon, 59 F.3d 1556, 1563 (9th Cir. 1995)). **[*21]** "Supervisory liability is imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivations of which the complaint is made; or for conduct that showed a reckless or callous indifference to the rights of others." Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991)(internal quotations and citations omitted). In their complaint, Plaintiffs allege that their rights were violated because Defendants implemented discriminatory procedures, policies, and customs. Therefore, at this time, the court cannot say that Plaintiffs will be unable to offer facts to prove that Sheppard and Mieras were responsible for the alleged Fourth Amendment violations. Similarly, the court cannot determine whether Sheppard and Mieras are entitled to qualified immunity at this time as it is not clear what role, if any, these defendants played in the alleged violations.

Also, the court is cognizant of Defendants' arguments made pursuant to Heck v. Humphrey, 512 **U.S**. 477, 486-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). Specifically, Defendants argue **[*22]** that a favorable judgment on Plaintiffs' section 1983 claim would imply that any juvenile proceedings upon Cornelius and Terry's trespassing citations are invalid. Therefore, Defendants argue that Heck's protections against such collateral attacks serve as a bar to one or more of Plaintiffs' section 1983 claims. At this stage of the proceedings, the facts relative to a Heck argument are not clearly before the court. For this reason, the court will reserve ruling on this issue at this time.

B. State Law Claims

In addition to the federal claims discussed above, Plaintiffs also bring state law claims alleging battery, false imprisonment; intentional infliction of emotional distress, negligent infliction of emotional distress, negligent supervision and training, and violation of administrative regulations.

Defendants argue they are entitled to immunity on these claims pursuant to Nevada Revised Statute section 41.032. Specifically, Defendants argue the actions of all Defendants were discretionary acts that cannot form the basis for a lawsuit in Nevada.

HN19 Section 41.032(2) of the Nevada Revised Statutes provides as follows: **[*23]**

> no action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is: based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor or any of these, whether or not the discretion involved is abused.

Nev. Rev. Stat. § 41.032. "Discretionary acts are those which require the exercise of personal deliberation, decision and judgment." Travelers Hotel, Ltd. v. City of Reno, 103 Nev. 343, 741 P.2d 1353, 1354 (Nev. 1987)(citing Parker v. Mineral County, 102 Nev. 593, 729 P.2d 491, 493 (Nev. 1986)). An action can be brought, however, if the acts in question are merely "'ministerial,' amounting only to obedience to orders, or the performance of a duty in which the officer is left no choice of his own." Maturi v. Las Vegas Metro. Police Dep't, 110 Nev. 307, 871 P.2d 932, 934 (Nev. 1994).

1. State Claims Arising Directly From Arrest

The Nevada Supreme **[*24]** Court has specifically concluded that a police officer's decision to make a traffic stop and arrest a person for failing to sign a traffic ticket are discretionary acts because they require the officer to use his judgment. Ortega v. Reyna, 114 Nev. 55, 953 P.2d 18, 23 (Nev. 1998). In the present case, Underhill used his discretion to determine when to detain Plaintiffs and how to treat them once detained. See Maturi v. Las Vegas Metro. Police Dep't, 110 Nev. 307, 871 P.2d 932, 933 (Nev. 1994)(holding officer's decision to handcuff suspect behind back instead of in front despite complaints of medical problems was discretionary). Accordingly, all state law claims arising directly out of Plaintiffs' detention by Underhill are dismissed under Nevada's state immunity law. These claims are battery, false imprisonment, intentional infliction of emotional distress and negligent infliction of emotional distress.

2. Negligent Supervision and Training

HN20 This court has held that the supervision and training of employees is not a discretionary act subject to immunity under Nevada Revised Statute 41.032. Herrera v. Las Vegas Metro. Police Dep't., 298 F.Supp.2d 1043, 1054-55 (D. Nev. 2004). **[*25]** In addition, viewing the complaint in the light most favorable to Plaintiffs, the court cannot say that a claim for negligent supervision and training has not been stated. Plaintiffs have alleged that previous incidents occurred which demonstrated to Defendants that they were negligent in their supervision or training of Underwood. As such, Plaintiffs have pled the minimal requirements of the tort. See Hall v. SSF, Inc., 112 Nev. 1384, 930 P.2d 94, 99 (Nev. 1996)(noting that **HN21** 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").

3. Violation of Administrative Regulations

Plaintiffs bring this claim pursuant to WCSD Administrative Regulation 5144.21. **HN22** The WCSD Administrative Regulations do not provide an explicit private right of action for violations of their requirements. However, in certain circumstances courts will imply a private right of action into a statutory scheme. See Cort v. Ash, 422 **U.S**. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)(noting **HN23** the four factors to consider when determining whether a private right of

action should be implied are (1) whether the plaintiff **[*26]** was one of the class for whose special benefit the statute was enacted; (2) whether there was an indication of legislative intent to create or deny such a remedy; (3) whether the remedy was consistent with the underlying purposes of the legislative theme; and (4) whether the cause of action was one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law) [9]; see also Sports Form, Inc. v. LeRoy's Horse & Sports Place, 108 Nev. 37, 823 P.2d 901, 902 (Nev. 1992)(noting the factors in Cort are helpful for determining private right of actions in state statutes as well).

[*27] In this matter Plaintiffs are part of the class for which the regulations were created. However, it is clear that the regulations do not contemplate a private cause of action for damages arising out of a failure to follow the regulations and that such a remedy would be inconsistent with the goal of the regulations; namely encouraging the school **district** and its students to work together and within the system to resolve grievance disputes based on perceived discrimination. [10] In fact, the regulations provide an alternative avenue to the court system, without foreclosing that option, by which an aggrieved may attempt to resolve disputes. In essence, the school **district** gives individuals the ability to resolve their problems internally if they wish, without mandating that they give up their legal rights. When weighed in this light, the relevant factors discussed in Cort do not imply a private right of action in the WCSD Administrative Regulations that would allow an aggrieved student to sue the WCSD based on a violation of those regulations. Accordingly, Plaintiffs' claim for relief must be dismissed.

[*28] It is therefore ORDERED that the Defendants' Motion to Dismiss (# 19) is GRANTED in part and DENIED in part as discussed above.

DATED this 16th day of February, 2006.

LARRY R. HICKS

United States **District** Judge

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[9] Some courts consider the Cort four factor test to be implicitly overruled and reduced to a single factor test seeking to determine the congressional intent behind a statute. See Parry v. Mohawk Motors of Mich., Inc., 236 F.3d 299, 308 (6th Cir. 2000). However, the Ninth Circuit -- although recognizing the potential conflict betweenCort and subsequent Supreme Court cases -- and the Nevada Supreme Court still consider the full four factor test relevant to determining if a private right of action exists. See First Pac. Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1121-22 (9th Cir. 2000). Thus, the four factor test is the appropriate test for determining whether a private right of action exists in an action governed by Nevada state law.

[10] **HN24** The regulation provides a brief note on its purpose and scope, stating: "The best solutions are those that involve input from those closest to the concern . . . . At any time, a student may choose to initiate the following grievance procedure along with having the legal right to file a grievance with . . . a court of competent jurisdiction. . . ." WCSD Reg. 5144.21 at 3. Thus, the grievance procedure is designed as an alternative to litigation in the courts with the purpose of using those closest to the situation to work out an amicable solution outside of the court system.

Kerns v. Hoppe

Supreme Court of Nevada

March 21, 2012, Filed

No. 55615

Reporter
2012 Nev. Unpub. LEXIS 425; 2012 WL 991651

STEPHANIE KERNS, INDIVIDUALLY, AS HEIR TO WARNER KERNS AND PERSONAL REPRESENTATIVE OF THE ESTATE OF WARNER SCOTT KERNS, AND ON BEHALF OF KYLE KERNS, A MINOR, Appellant, vs. PATTY HOPPE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WALTER J. HOPPE, D.O., NOT INDIVIDUALLY; DAVID ARMITAGE, P.A.-C., AN INDIVIDUAL; DESERT TRAILS MEDICAL, INC., A NEVADA CORPORATION; WAL-MART STORES, INC., A DELAWARE CORPORATION; ANN WATKINS F/K/A ANN FOLEY, AN INDIVIDUAL; LISA SPINK, AN INDIVIDUAL; AND JUDY STINSON, AN INDIVIDUAL, Respondents.

Notice: AN UNPUBLISHED ORDER SHALL NOT BE REGARDED AS PRECEDENT AND SHALL NOT BE CITED AS LEGAL AUTHORITY. SCR 123.

Subsequent History: Rehearing granted by, in part, Rehearing denied by, in part, Clarified by, Remanded by Kerns v. Hoppe, 2012 Nev. Unpub. LEXIS 1103 (2012)

Core Terms

decedent, prescribed, methadone, district court, prescription, addiction, Pharmacy, pill, dispense, granting summary judgment, medications, pharmacist, narcotics, bottles, argues, controlled substance, causation, contracts, assumption of risk, patient, drugs, fill, express assumption of risk, proximate, contends, genuine issue of material fact, implied assumption of risk, summary judgment, adverse-inference, malpractice

Judges: **[*1]** Cherry, J., Gibbons, J., Pickering, J.

Opinion by: Cherry; Gibbons; Pickering

Opinion

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court summary judgment in a medical malpractice and negligence action. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Warner Kerns (the decedent) received treatment from respondents Dr. Walter J. Hoppe, D.O.,[1] David Armitage, PA-C, and Desert Trails Medical, Inc. (collectively, the Medical Defendants), for a long history of intense knee pain resulting from multiple motorcycle accidents that led to narcotics dependence. The decedent's pain was managed through interchanging prescriptions for painkillers including Norco, OxyContin, Vicodin, and methadone as to not encourage addiction to any one medication. The goal was to use the medications for pain management purposes until the decedent had surgery. Because Desert Trails was not licensed as an addiction clinic, it could only prescribe these drugs for pain management purposes and not for addiction. However, in 2005, the Medical Defendants diagnosed the decedent with addiction to OxyContin. The Medical Defendants weaned the decedent off OxyContin over a seven-day period **[*2]** and replaced it with methadone that was then to be slowly decreased until the decedent was off of both medicines. While the decedent was receiving painkillers from the Medical Defendants, he 'doctor shopped' by visiting other physicians to procure extra

[1] Dr. Hoppe passed away shortly after litigation was initiated and his estate is represented in this appeal by respondent Patty Hoppe.

narcotics. He then filled these prescriptions at various pharmacies. In the years leading up to the decedent's death, Desert Trails and three of the decedent's other medical providers had the decedent sign narcotics contracts acknowledging that it is illegal to obtain multiple prescriptions from various doctors and that it might endanger his health. The contracts also stated that the decedent would not request or accept controlled substances from any other medical providers. Subsequently, the decedent died in his sleep from methadone intoxication. The methadone was prescribed to him at Desert Trails. It was unknown whether the decedent was taking his prescribed dose of the methadone at the time of his death because the decedent's widow, appellant Stephanie Kerns (Kerns), refused to look for the pill bottles. Kerns was asked to produce the pills on two separate occasions and her response was that she did not look for the pill bottles **[*3]** and does not know of the pill bottles whereabouts.

After the decedent's death, Kerns sued the physicians and pharmacy that provided the decedent with the methadone pills. Kerns asserted claims for medical malpractice, negligence, and statutory violations against respondents Wal-Mart Stores, Inc., and various Wal-Mart pharmacists (collectively, the Pharmacy Defendants), in addition to the Medical Defendants. Kerns accused respondents of providing medications to an addict in violation of state and federal law. Because the pharmacy was not a Drug Enforcement Administration (DEA)-registered narcotics-treatment program, it could only legally fill methadone prescriptions for treating pain—not narcotics addiction.

Respondents moved for, and the district court granted, summary judgment in their favor, finding that the decedent assumed the risk of his death by abusing the various drugs prescribed to him, and that Kerns failed to prove that respondents' actions in prescribing and dispensing the medication to the decedent were the cause of his death. In addition, **[*4]** in the event that summary judgment is reversed on appeal, the district court issued an order granting the Medical Defendants an adverse-inference instruction at trial because of Kerns' failure to attempt to locate the pill bottles.[2]

On appeal, Kerns argues that the district court erred in granting summary judgment in favor of respondents.[3] Kerns also argues that the district court abused its discretion in concluding that, if its grant of summary judgment is reversed on appeal, any jury hearing the case shall be given an adverse-inference instruction that the decedent, prior to his death, took more of the prescription drugs than he was instructed.

We conclude that the district court erred in granting summary judgment based on both the assumption of risk doctrine and causation concerning the alleged negligence of the Medical Defendants. However, we conclude that the district court appropriately granted summary judgment on the claims against the Pharmacy Defendants. We further conclude that the district court properly decided that an adverse-inference instruction should be given upon remand should this case **[*6]** proceed to trial.

Standard of review

This court reviews an order granting summary judgment de novo. Pegasus v. Reno Newspa-

[2] The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

[3] When handwriting analysis revealed that Armitage may have forged Dr. Hoppe's signature on the notes that authorized treating the decedent's opioid addiction with methadone, Kerns amended the complaint to add a claim against Armitage for fraud and violation of **NRS 630.3062**, which prohibits tampering with medical records. Kerns contends that the order granting summary judgment did not dispose of these claims. However, as **NRS 630.3062** **[*5]** does not expressly or impliedly afford a private cause of action for individuals or patients affected by medical record tampering, Kerns is unable to pursue this claim. See Baldonado v. Wynn Las Vegas, 124 Nev. 951, 958-60, 194 P.3d 96, 100-02 (2008). Because no private remedy may be implied under **NRS 630.3062** by this court, Kerns had no right to obtain relief in the district court. Moreover, we conclude that Kerns waived any separate fraud claim by failing to raise it before the district court. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

pers, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002). "Summary judgment is appropriate . . . when the pleadings [and other evidence in the record] demonstrate that no genuine issue of material fact [remains], and the moving party is entitled to judgment as a matter of law." Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005); NRCP 56(c). Under NRCP 56, the burden of proving that there is no genuine issue of material fact lies with the moving party. Maine v. Stewart, 109 Nev. 721, 726-27, 857 P.2d 755, 758 (1993). However, once the moving party satisfies his or her burden as required by NRCP 56, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. Id. at 727, 857 P.2d at 759. "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Wood, 121 Nev. at 729, 121 P.3d at 1029.

The district court's factual findings are given deference and will be upheld "unless they are clearly erroneous and not **[*7]** based on substantial evidence." International Fid. Ins. v. State of Nevada, 122 Nev. 39, 42, 126 P.3d 1133, 1134-35 (2006). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." Whitemaine v. Aniskovich, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008).

Assumption of risk

Kerns argues that the fact that the decedent knowingly encountered the dangers posed by abusing prescription drugs does not provide respondents with a complete defense to negligently and illegally providing him with methadone. Kerns contends that respondents cannot invoke express assumption of risk by relying on the narcotics contracts signed by the decedent when the contracts do not purport to release respondents from liability for the negligence that took the decedent's life. Kerns also argues that the question of whether the decedent willfully encountered a known risk and what portion of fault he should bear if he did are factual issues that must be submitted to a jury. We agree and conclude that the district court erred in granting summary judgment on this issue.

Generally, assumption of risk is classified into three categories—express, implied primary, and implied **[*8]** secondary assumption of risk. **Turner v. Mandalay Sports Entm't**, 124 Nev. 213, 220, 180 P.3d 1172, 1177 (2008). Both express and primary implied assumption of risk are at issue here. We will discuss each in turn.

Express assumption of risk

"Express assumption of risk . . . stems from a contractual undertaking that expressly relieves a putative defendant from any duty of care to the injured party; such a party has consented to bear the consequences of a voluntary exposure to a known risk." Mizushima v. Sunset Ranch, 103 Nev. 259, 262, 737 P.2d 1158, 1159 (1987), overruled on other grounds by **Turner v. Mandalay Sports Entm't**, 124 Nev. 213, 219-21, 180 P.3d 1172, 1176-77 (2008). An agreement dealing with the express assumption of risk is governed by the law of contracts and will generally be enforced unless it: (1) is barred by an applicable statue, (2) extends protection to willful or gross negligence, or (3) otherwise offends public policy. 57B Am. Jur. 2d Negligence § 766 (2004). To form the predicate for express assumption of the risk, a document must indicate that the plaintiff agrees to assume the risk of injury caused by the other party's negligence. Mizushima, 103 Nev. at 264, 737 P.2d at 1161.

Here, **[*9]** the decedent signed numerous narcotics contracts that provided that he would not request or accept controlled substances from any other medical providers and would only receive prescriptions from the doctor providing the contract. The Desert Trails narcotics contract informed the decedent that abusing his medications was dangerous and warned him that his medical providers would terminate his treatment and report him to the police if they became aware of any abuse.

Acknowledgement of a risk is not enough for an express assumption of risk—the decedent must have agreed to assume the risk of injury caused by respondents' negligence, if any, in prescribing and dispensing him the methadone that caused his death. From the language of the narcotics contracts, there is no reason that the decedent

would have the expectation that he was assuming the risk of injury caused by any negligent conduct on the part of respondents. The form contracts did not act as formal instruments to reapportion legal liability or to forfeit future legal remedies for medical malpractice. See Hurst v. Lexington-Fayette Urban County Government, 446 F. Supp. 2d 739, 739-41 (E.D. Ky. 2006) (a prison release form for the **[*10]** return of confiscated property did not purport to waive any claim based on personal injury or negligence as it only waived liability for property damage); Mizushima, 103 Nev. at 264, 737 P.2d at 1161 (determining that a sign-up sheet that contained assumption of risk language did not result in an express assumption of risk when the form did not indicate that there was assumption of risk for the defendant's negligence). Accordingly, we conclude that because the language of the contract did not clearly indicate that the decedent was assuming the risk of injury caused by any negligent conduct on the part of respondents, no express assumption of risk occurred.

Primary implied assumption of risk

Primary implied assumption of risk "arises when 'the plaintiff impliedly assumes those risks that are inherent in a particular activity.'" **Turner**, 124 Nev. at 220, 180 P.3d at 1177 (quoting Davenport v. Cotton Hope Plantation, 333 S.C. 71, 508 S.E.2d 565, 570 (S.C. 1998)). Implied assumption of risk is based on a theory of consent and contains two elements: "(1) voluntary exposure to danger, and (2) actual knowledge of the risk assumed." Sierra Pacific v. Anderson, 77 Nev. 68, 71, 358 P.2d 892, 894 (1961) (internal **[*11]** quotations omitted). The knowledge inquiry is a subjective one, 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. "[T]he primary implied assumption of risk doctrine merely 'goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff.'" **Turner**, 124 Nev. at 221, 180 P.3d at 1177 (quoting Davenport, 508 S.E.2d at 570).

We conclude that there is a genuine issue of material fact as to whether the decedent knew of and fully appreciated the risks of doctor shopping in order to procure drugs to feed his addiction. The decedent was a man of 31 years who had been warned of the risks of death or injury that can result from narcotic-seeking behavior by at least four doctors when presented with the narcotics contracts. However, expert testimony was provided that he was not adequately counseled by the Medical Defendants, such that he did not fully understand the risks to his health.

Kerns cites to Argus v. Scheppegrell, 472 So. 2d 573, 574 (La. 1985), for the assertion that "[t]he patient's conduct cannot be, at the same time, both the foreseen risk **[*12]** which imposes the duty on the physician and the defense which totally excuses the physician's breach of that very duty." The Louisiana Supreme Court concluded that "when the rule of law which gave rise to a duty was specifically designed to protect the victim against the risk of his own negligence, recovery should not be absolutely barred for the injury or death which the rule of law was designed to prevent." Id. at 577. While we recognize that there are factual differences in this case and in Argus, we agree with these underlying principles. Drug-seeking behavior by a patient cannot automatically relieve a physician from a duty to monitor the patient for signs of abuse or addiction and to decline to prescribe the medications when addiction is suspected. To decide otherwise would render meaningless a physician's statutory obligations. See 21 C.F.R. § 1306.07(a); NAC 630.230(1); NRS 453.226(1); NRS 453.231.

Accordingly, while the decedent knowingly acquired numerous medications in the weeks prior to his death, issues of material fact remain as to whether he was fully apprised of the risks of injury or death by the Medical Defendants such that he could have assumed them under primary **[*13]** implied assumption of risk. Thus, we conclude that the district court erred in granting summary judgment on this issue.

Medical malpractice

Kerns argues that the district court erred in concluding that the possibility that the decedent took more than his prescribed methadone dosage legally foreclosed proximate causation. Kerns contends that whether the decedent took more than his prescribed dose of methadone is a

triable issue of fact and argues that she has provided substantial evidence that the highly dangerous cocktail of drugs that respondents provided the decedent with in an unsupervised manner caused his death. Kerns contends that even if the decedent exceeded his dosages, respondents still cannot escape liability as they illegally prescribed and dispensed methadone to the decedent.

To prevail on a medical malpractice action, the plaintiff must establish the following: (1) that the doctor's conduct departed from the accepted standard of medical care or practice, (2) that the doctor's conduct was both the actual and proximate cause of the plaintiff's injury, and (3) that the plaintiff suffered damages. Prabhu v. Levine, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996); Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991). **[*14]** "Negligence is never presumed but must be established by substantial evidence." Gunlock v. New Frontier Hotel, 78 Nev. 182, 185, 370 P.2d 682, 684 (1962). To establish proximate causation, the injury must appear to be the natural and probable consequence of the negligence, and it ought to have been foreseen in light of the attending circumstances. Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998). Medical malpractice cases require expert testimony to make this showing. See NRS 41A.100; see also Bronneke v. Rutherford, 120 Nev. 230, 235 n.9, 89 P.3d 40, 44 n.9 (2004). A medical expert's opinion regarding causation of an injury or disease and standard of care must be stated to a reasonable degree of medical probability. Morsicato v. Sav-On Drug Stores, Inc., 121 Nev. 153, 158, 111 P.3d 1112, 1116 (2005).

"The courts are reluctant to grant summary judgment in negligence cases because foreseeability, duty, proximate cause and reasonableness usually are questions of fact for the jury." Thomas v. Bokelman, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970). Additionally, "[i]n Nevada, issues of negligence and proximate cause are considered issues of fact and not of law, and **[*15]** thus they are for the jury to resolve." Nehls v. Leonard, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981). However, summary judgment is proper when the plaintiff cannot recover as a matter of law. Thomas, 86 Nev. at 13, 462 P.2d at 1022.

The Medical Defendants

Kerns contends that if the Medical Defendants had complied with NAC 630.187 after labeling the decedent an addict and referred the decedent to addiction experts for a specialized evaluation and treatment, then the decedent would have received the supervision needed to prevent any misuse of his prescriptions. Kerns points out that neither Armitage, Dr. Hoppe, nor Desert Trails were ever part of a certified narcotics-treatment program that could legally use methadone to treat addicts.

The relevant inquiry on appeal is whether Kerns presented competent expert testimony that tended to show to a reasonable medical probability that the Medical Defendants' allegedly negligent act of prescribing the decedent the methadone caused the decedent's death. Viewing the evidence in the light most favorable to Kerns, we conclude that Kerns demonstrated that there was a genuine issue of material fact as to causation.

Kerns provided testimonial evidence **[*16]** that the Medical Defendants breached the standard of care in prescribing an addict a high dosage of methadone while on a central nervous system depressant—OxyContin—in violation of state and federal law and without adequate monitoring and supervision. See 21 C.F.R. § 1306.07 (stating that in order for a practitioner to prescribe methadone to an addict without obtaining a DEA registration, the practitioner must submit a notification to the Secretary of Health and Human Services stating the practitioner's intent to dispense or prescribe narcotic drugs and comply with 21 C.F.R. § 1301.28); NRS 453.226 (requiring that every practitioner who dispenses or proposes to dispense any controlled substance within this State shall biennially register with the Nevada Board of Medical Examiners in accordance with its regulations."); NRS 453.231 (requiring registration before dispensing a controlled substance or conducting research with respect to a controlled substance); NRS 453.056 (providing that the term "dispense" includes prescribing a controlled substance). If a person

dispenses a controlled substance without being registered by the Board, that person is guilty of a category D felony. NRS 453.232. **[*17]** The Medical Defendants failed to send the decedent to an addiction specialist upon acknowledging that he was an addict, and instead prescribed him controlled substances without being properly registered or in compliance with the special regulatory standards imposed for such programs. The Medical Defendants presented expert testimony that the standard of care was not breached, however, "it is the jury's province to weigh the experts' credibility." Prabhu v. Levine, 112 Nev. 1538, 1544, 930 P.2d 103, 108 (1996).

The Medical Defendants argue that regardless of their potential negligence, Kerns must still establish through expert testimony that any alleged negligent act caused the injury. While Kerns' only causation expert, Dr. Saeed Jortani, Ph.D., a pathologist, could only testify that it was possible that the decedent only took the prescribed doses, he also testified to a reasonable scientific probability that the methadone caused the decedent's death and that the prescribed amount could have killed him. He stated that methadone's therapeutic range and lethal range overlap almost directly on top of each other. Regardless of whether the decedent took the prescribed amount, the Medical **[*18]** Defendants still prescribed the methadone that ultimately caused his death. A natural and logical consequence of continuing to provide highly addictive controlled substances prescriptions to a patient that is suspected of being an addict is that the patient would abuse the drugs resulting in injury or death. See Taylor v. Silva, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980) ("A negligent defendant is responsible for all foreseeable consequences proximately caused by his or her negligent act."). Under the circumstances of this case, a reasonable jury could find that the Medical Defendants' actions constituted a proximate cause of the decedent's death. Accordingly, we conclude that Kerns demonstrated that there was a genuine issue of material fact as to causation. Thus, the district court erred in granting summary judgment on this issue in regard to the Medical Defendants.

The Pharmacy Defendants

Kerns argues that the foreseeable risk that the decedent would overdose made it negligent for the Pharmacy Defendants to illegally fill his prescription for methadone. Kerns contends that not only did the Pharmacy Defendants fail to check for the purpose of the drug, but also ignored two red flags—the **[*19]** prescription was for a high dosage and the pharmacy had dispensed a 30-day supply of OxyContin to the decedent only 11 days earlier.

The Pharmacy Defendants argue that the district court properly granted summary judgment in their favor because Kerns failed to establish causation—it was impossible to determine if the prescriptions filled by the Pharmacy Defendants caused the decedent's death. The Pharmacy Defendants contend that Kerns has failed to present any legal authority that provides that a pharmacy may be held liable to a customer for his or her overdose where it is undisputed that the pharmacy dispensed the medication exactly as prescribed by the doctor.

We conclude that Kerns failed to make the mandatory causation showing. While only pharmacies that are registered as narcotics-treatment programs can dispense methadone for treating addiction, there are no restrictions for a licensed pharmacy to fill methadone prescriptions for pain management. See 42 C.F.R. § 8.12; 21 C.F.R. § 1306.04(a); NRS 453.381. Pursuant to 21 C.F.R. § 1306.04(a) and NRS 453.381(4), a pharmacist must decline to fill a purported prescription if he or she has reason to believe that it was not issued in the **[*20]** usual course of professional practice or treatment. However, the evidence does not support that the prescription was not issued in the usual course of business such that the Pharmacy Defendants should have declined to fill the prescription.

Moreover, in Klasch v. Walgreen Co., 127 Nev. , , 264 P.3d 1155, 1157-58 (2011), this court adopted the learned-intermediary doctrine and held that pharmacists do not have a duty to warn a customer of the generalized risks inherent in a prescribed medication. It is up to the doctor who has knowledge of the patient's particular situation to convey any relevant safety information to that patient. Id. at , 264 P.3d at 1158. The rationale behind this rule is "that between the doctor and the pharmacist, the

doctor is in the best position to warn the customer of a given medication's generalized risks" and it "prevents pharmacists from constantly second-guessing a prescribing doctor's judgment simply in order to avoid his or her own liability to the customer." Id. at , 264 P.3d at 1159. "[T]he learned-intermediary doctrine preserves the pharmacist's role as a conduit for dispensing much-needed prescription medications." Id.

While the pharmacists **[*21]** could have checked to see why the dosage for the methadone was high and why the OxyContin was dispensed to the decedent 11 days earlier, under the relevant statutes and our decision in Klasch, this was not required. "No civil or criminal liability or administrative sanction may be imposed on a pharmacist for action taken in good faith in reliance on a reasonable belief that an order purporting to be a prescription was issued by a practitioner in the usual course of professional treatment. . . ." NRS 453.256(6).[4] Accordingly, we affirm the grant of summary judgment as to the Pharmacy Defendants.

Adverse-inference instruction

The district court determined that, in the **[*22]** event of a reversal, an adverse inference instruction was permissible in that it would inform the jury that the decedent took more medicine than prescribed. Kerns takes issue with this determination and contends that the district court abused its discretion by granting the request when she was never in control of the decedent's pill bottles and the decedent was not on notice of a potential legal claim.

We conclude that in light of the fact that the decedent had control over the pills and then, when he passed away, Kerns had control over the premises containing the pills, that the adverse inference instruction may be proper. See Bass-Davis v. Davis, 122 Nev. 442, 447-49, 450-51, 134 P.3d 103, 106, 108-09 (2006) (noting that the district court has broad discretion to give an inference instruction that missing evidence would be adverse). Kerns was asked to produce the pills on two separate occasions and her response was that she did not look for the pill bottles and does not know of the pill bottles whereabouts. She was not obliging with the request and, in not searching for the pills, she caused them to be permanently lost. Because either the decedent or Kerns was the last person known **[*23]** to be in possession of the crucial pill bottle evidence, Kerns should bear the burden of its misplacement. See id. at 449, 134 P.3d at 107 (stating that a permissible inference instruction provides a "necessary mechanism for restoring the evidentiary balance . . . the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss" (internal quotation omitted)). While Kerns claims that neither she nor the decedent knew that the pill bottles were relevant or were on notice of a potential legal claim, we conclude that both Kerns and the decedent were cognizant of the pill bottles' importance. See id. at 450, 134 P.3d at 108 (concluding that "a party is required to preserve documents, tangible items, and information relevant to litigation that are reasonably calculated to lead to the discovery of admissible evidence . . . once a party is on 'notice' of a potential legal claim," meaning that when litigation is reasonably foreseeable). The decedent knowingly procured multiple prescriptions from several doctors while cognizant of their danger and in doing that should have been able to foresee that his actions could have legal consequences. **[*24]** Moreover, Kerns was aware that the decedent died as a result of his medications and initiated the suit that has led to this appeal. Given these circumstances, it appears that a permissible adverse-inference instruction would balance the evidence and the district court would be within its discretion to give the adverse-inference instruction should this case proceed to trial upon remand.

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[4] Kerns argues that the decedent's asthma, which created a higher risk of respiratory death from methadone, should have raised a red flag. However, there is no evidence that Wal-Mart pharmacists ever filled a prescription for the decedent for asthma or knew that he had asthma. See Klasch, 127 Nev. at , 264 P.3d at 1158 (providing that where a pharmacist has knowledge of a customer-specific risk, the pharmacist has a duty to exercise reasonable care by warning the customer or notifying the prescribing doctor of the risk).

Accordingly, we[5]

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

/s/ Cherry, J.

Cherry

/s/ Gibbons, J.

Gibbons

/s/ Pickering, J.

Pickering

[5] All other issues on appeal lack merit.

OPPS
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,

vs.

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.: II

Date of Hearing: July 15, 2013
Time of Hearing: 9:00 a.m.

OPPOSITION TO MOTION TO DISMISS

COMES NOW the Plaintiff, MAKANI KAI PAYO ("PAYO"), by and through his counsel, Robert O. Kurth, Jr., of the KURTH LAW OFFICE, and hereby files his Opposition to the Defendant's Motion to Dismiss. This Motion is based on the Points and Authorities submitted herewith, the pleadings and papers on file herein, the affidavit(s) attached hereto, together with such evidence to be adduced at the hearing of this matter.

POINTS AND AUTHORITIES

I.
STATEMENT OF FACTS

On or about May 12, 2004, the Plaintiff PAYO was a minor child and student attending William E. Ferron Elementary School in Clark County, Nevada. At or around that time,

PAYO was attending his physical education class and was required to participate and play field hockey.

During the field hockey game, another student lifted his hockey stick to strike the ball and struck PAYO in his head and left eye, causing him to briefly black out. That after PAYO was struck with the hockey stick, he was escorted by another student to the nurse's office at William E. Ferron Elementary School, wherein he was examined by the nurse and/or nurse's assistant. PAYO's symptoms worsened; whereas, he was transported by ambulance to University Medical Center, and was admitted to the hospital on or about May 19, 2004 for head pressure, left eye hyphema with associated increased intraocular pressure and corneal blood staining, which resulted in an anterior chamber washout.

PAYO continues to suffer from decreased eyesight in his left eye and blurred vision, as a result of the subject incident, and has filed the Complaint in this matter to seek relief as a result of the injuries he sustained.

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

II.
ARGUMENT/ANALYSIS

A.
LACHES

The doctrine of LACHES is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable. See Moseley v. Eighth Judicial Dist. Court ex rel. County of Clark, 124 Nev. 654, 188 P.3d 1136 (2008). Excusable neglect may be established when the party seeking the extension "demonstrates good faith, a reasonable basis for not complying within the specified period, and an absence of prejudice to the nonmoving party." Id. at 667-68. In Moseley, the Court held that the 30 day statutory limit does not apply because the Plaintiff's delay was not unreasonable since she did file her complaint within the statute of limitations which is within thirty days of receiving the petition in which someone else listed her land as part of the territory to be annexed.

In the present case, the Complaint was timely filed within the statute of limitations. The incident occurred on May 12, 2004, and the Defendant(s) were admittedly notified of the Claim on or about December 14, 2004 and December 29, 2005. With such knowledge, the Defendant(s) should have preserved any contact information of witnesses and evidence. Therefore, the Plaintiff PAYO did not cause any disadvantage to Defendant(s), rather, any perceived disadvantage resulted from the Defendant(s) failure to preserve any documents and witness information concerning this Claim. Additionally, after the Claim was filed, the Plaintiff PAYO's damages were ongoing and continuing where cataract surgery was thought to be needed sometime in the near future. Since medical documentation corresponding to treatment was not yet available upon requests from Defendant(s), the Plaintiff PAYO was unable to provide the Defendant(s) those documents. Moreover, the Plaintiff PAYO moved and lost contact with his current counsel. As such, for the above-stated reasons, the Court should deny the Defendant's Motion to Dismiss based upon the doctrine of LACHES.

B.
COVERDELL ACT

The Coverdell Act immunizes teachers, principals, and other school professionals from liability when they take "reasonable actions to maintain order, discipline, and an appropriate educational environment." Husk v. Clark County School Dist., 281 P.3d 1183 (Nev. 2009). The intent of the Coverdell Act is to allow "teachers and other school professionals" to perform the duties of their job and not worry about being sued for everything they do unless their act caused "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher." Id. The intent is not to keep the Clark County School District from liability for anything that occurs on campus, rather, the Coverdell Act specifically states that "[t]he limitations on the liability of a teacher under this subpart shall not apply to misconduct during background investigations, or during other actions" such as those acts committed by the Clark County School District. Husk v. Clark County School Dist., 281 P.3d 1183 (Nev. 2009).

This case is on point because the Complaint named the Clark County School District ("CCSD") as a defendant and did not specifically name the teacher. The Coverdell Act immunizes teachers and other professionals, but does not protect the misconduct of CCSD. Id. As such, the Coverdell Act does not require the district court to dismiss the CCSD from any litigation for their

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

negligent acts or omissions, and to do so would cause a grave injustice. Whereas, this case should be allowed to proceed and discovery will flesh out the various policies and procedures, actions or omissions by the CCSD, to determine the existence of their negligence, etc.

C.
INDISPENSABLE PARTY

"All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." Rule 20 of the Nevada Rules of Civil Procedure. The Defendant(s) are given the opportunity to file a third party complaint against the student allegedly liable to Plaintiff PAYO for his injuries. As such, the Plaintiff PAYO has not created a situation that will prejudice the Defendant's defense because the Defendant(s) could have joined (and still can) the student who struck the Plaintiff PAYO with a hockey stick, along with the student's parents. Under NRCP 19(a) "if the person has not been so joined, the court shall order that the person be made a party." Rule 19 of the Nevada Rules of Civil Procedure.

Defendant(s) have continuously been in the best position to find out the nature of the incident and should have taken a report which is in their control. Moreover, the Defendant(s) CCSD apparently did not appropriately investigate and document the event, especially after they knew that a claim was made. If the Defendant(s) CCSD failed to act appropriately in investigating this matter, such act/omission should be held against the Defendant(s) and not the Plaintiff PAYO. Consider that most claims are investigated, analyzed, and resolved without the necessity of filing a formal complaint and proceeding through litigation. Under these circumstances, the Plaintiff PAYO's claims are proper and should proceed forward.

D.
ASSUMPTION OF THE RISK

The Defendant CCSD cites Turner, in which the court held "no duty is owed for risks inherent to a particular activity, unless acts or omissions occur which increase the risk beyond what would be expected." See *Turner v. Mandalay Sports Entm't.*, 124 Nev. 213, 180 P.3d 1172, 1177 (2008). The Defendant CCSD claims that the risk of being hit by a hockey stick is no less an

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

inherent risk in the game than being hit by a baseball bat while playing baseball, or by being struck by a skate while competing in a pairs competition. Simply put, the Defendant's argument misapplied the court's interpretation of the limited duty rule to establish the totality of the duty owed by the defendant baseball stadium. In that situation, the Plaintiff Turner was injured while eating in the Beer Garden at a baseball game, a concessions area located several hundred feet from home plate on the top viewing level of Cashman Field. Because Turner chose not to sit in a protected seating area, the relevant inquiry under the limited duty rule is whether the Beer Garden was one of the most dangerous areas of the ballpark or, more specifically, whether it posed "an unduly high risk of injury" from foul balls. Turner v. Mandalay Sports *Entm't.*,_124 Nev. 213, 218-19, 180 P.3d 1172, 1176 (2008). The court held that since Turner was sitting in the Beer Garden and not in the stands at the time of her injury, the limited duty rule should not apply. Id.

It is clear that the Defendant misapplied the rules of this case. By defining the duty of a baseball stadium owner or operator with specificity, the limited duty rule shields the stadium owner or operator from the need to take precautions that are clearly unreasonable, while also establishing the outer limits of liability. This case is distinguishable from Turner because the Plaintiff PAYO was required by the CCSD to engage in the game of field hockey at the time of injury without providing the proper safety equipment. Though, according to the Defendant CCSD, the risk of getting hit in the eye with a hockey stick is not within the inherent risk when playing field hockey because it is undisputed that the game was to be played as a non-contact sport.

Courts that have recognized duty as a legal question also have recognized that the primary implied assumption of risk doctrine merely "goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff. Turner v. Mandalay Sports Entertainment, LLC, 124 Nev. 213, 221, 180 P.3d 1172, 1177 (2008). Primary implied assumption of risk "arises when 'the plaintiff impliedly assumes those risks that are inherent in a particular activity.'" Rolain v. Wal-Mart Stores, Inc. (D. Nev., Mar. 26, 2013, 2:11-CV-01900-KJD) 2013 WL 1249624. To do so, at the least, the Plaintiff PAYO would have had to be of reasonable age and intelligence and it must be shown that he understood and appreciated the risk(s) involved in being required to play field hockey. In light of the foregoing, the Plaintiff PAYO's claim of negligence should not be barred by the doctrine of assumption of the risk and should proceed accordingly.

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

E.
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

In Hutton, the Nevada Supreme Court held: "We reject the [plaintiffs'] contention and decline the invitation to follow certain case law from other jurisdictions which they claim is in their favor ... We believe the better rule is to allow recovery only in cases which pertain to emotional distress arising from harm to another person ..." Hutton v. General Motors Corp., 775 F.Supp. 1373, 1382 (D. Nev. 1991). The Court made this statement in addressing whether a plaintiff should recover for NIED when the emotional distress arises from defendant's harm to property. However, the Court acknowledged that the only NIED law in Nevada relates to the bystander situation. Id. This language indicates that the Nevada Supreme Court would not extend NIED beyond the bystander situation. Id.

Plaintiff PAYO concedes to Defendant's claim set forth stating that NIED is not available to a direct victim of negligence. However, Plaintiff reserves the right to bring forth such Cause of Action if later it is found to be recoverable.

F.
NEGLIGENCE PER SE

Although Cervantes pleaded negligence and negligence per se in her complaint as separate causes of action, they are in reality only one cause of action. Negligence per se is only a method of establishing the duty and breach elements of a negligence claim. Cervantes v. Health Plan of Nevada, Inc., 263 P.3d 261, 264 (Nev. 2011). Because Cervantes' general negligence and negligence per se theories are based on her claim that HPN failed to evaluate, audit, monitor, and supervise ECSN, whether they are preempted by ERISA necessarily stand or fall together. Id.

Plaintiff PAYO concedes to Defendant's claim set forth stating that the Third Cause of Action as sounding in negligence per se does not constitute a separate and distinct cause of action, but is proof of negligence and contained within the negligence claim for relief. However, Plaintiff reserves the right to bring forth such Cause of Action if later it is found to be recoverable.

G.
PUNITIVE DAMAGES / LIMITATION OF DAMAGES

"An award for damages in an action sounding in tort brought under NRS 41.031 or against a present or former officer or employee of the State or any political subdivision, immune

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

contractor or State Legislator arising out of an act or omission within the scope of the person's public duties or employment may not exceed the sum of $100,000, exclusive of interest computed from the date of judgment, to or for the benefit of any claimant. An award may not include any amount as exemplary or punitive damages." Nev. Rev. Stat. Ann. § 41.035 (West). In Nevada, a plaintiff is entitled to punitive damages only after proving by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, for the sake of example and by way of punishing the defendant. Ford v. Marshall, WL 1092060 (2013). Though, punitive damages also include willful and wanton conduct in reckless disregard of another.

The Plaintiff PAYO alleges that he should be allowed to proceed thru discovery to determine if he can satisfy any burden of proof concerning punitive damages. Whereas, said claim should survive so that the Plaintiff PAYO can discover and ascertain more information about the conduct of the Defendant(s) in this matter.

H.
SPECIAL DAMAGES

The rule requiring specific pleading of special damages applies to disparagement of title case, but failure to comply did not deprive court of power to award such fees as damages. NRCP 9. Although Rule 9(g) requires that "when items of special damages are claimed, they shall be specifically stated," this language is construed to require that special damages be identified within the causes of action that permit the special damages. Ford v. Marshall,WL 1092060 (2013). Special damages remain a damage that must be the natural and proximate consequence of the injurious conduct and proved by competent evidence just as any other element of damages. Id.

Plaintiff's Complaint alleges special damages, under Prayer for Relief, lines 3-5, and further stated under each Cause of Action, as Defendants negligent actions/omissions is the direct and proximate result of Plaintiff PAYO's injuries. In Plaintiff's PAYO's Complaint, special damages are alleged with each cause of action, Plaintiff PAYO has the right to recover for medical expenses incurred on behalf of the injuries suffered both physical and mental in nature. These injuries are an inevitable and necessary result of the negligent act(s)/omission(s) from the Defendant(s) and are specifically stated in the Complaint. Further, an amount in excess of Ten Thousand Dollars ($10,000.00) is included in each Cause of Action, which is the appropriate way of pleading the same. There is no requirement of specifying the individual damages in the Complaint.

In accordance with N.R.S. 12.080, there is no limit on recovery for a minor. NRS 12.080 states:

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

> 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." Nev. Rev. Stat. Ann. § 12.080 (West).

Although parents have a statutory right of action for tortious injury of a minor child, it was not the legislature's intent to deprive an "infant" of his common law right to sue for damages for such injury, though elements of damages recoverable by him may be limited to such items as pain, suffering, disfigurement, and the like; in suit by parents, they would be entitled to recover only such damages as they may have sustained, such as their loss of child's services and earnings, and medical expenses incurred by them in effecting a cure. Hogle v. Hall By and Through Evans 112 Nev. 599, 916 P.2d 814 (1996). The Defendant(s) cite Armstrong, but fail to disclose that the case involves an unborn child who sustains injury prior to birth and may sue for damages unless the parent has paid the expenses for the minor or incurred them by him or herself. Armstrong v. Onufrock, 75 Nev. 342, 347, 341 P.2d 105, 107 (1959). This case is distinguishable from the present where the Plaintiff PAYO was 11 years old on the day of the accident.

Moreover, "[i]n a suit by the parents, minors would be entitled to recover damages as may have been sustained by them, such as their loss of the child's services and earnings and medical expenses incurred by them in effecting a cure." McGarvey v. Smith's Food Drug Centers, Inc. (D. Nev., May 13, 2011, 2:10-CV-1268 JCM LRL) WL 1832787. Either way, an action was filed within the statute of limitations for negligence, and the Plaintiff PAYO should be allowed to proceed with discovery where specifics concerning the special damages will be provided to the Defendant(s). For these reasons, Plaintiff PAYO has plead a valid claim for recovery of special damages.

I.

NEGLIGENT SUPERVISION

The Complaint specifically refers to the Defendant(s) failure to supervise their employee(s), agents, students, or other persons under their supervision by neglecting to supervise, warn, or safely protect PAYO which is a direct and proximate result of the Defendants' afore-stated negligent supervision, and that PAYO suffered injuries, both physical and mental in nature. As stated in the Complaint at page 5, Paras. 39, "that the Defendant had a duty to use efforts no less than a reasonable, ordinary prudent person, to supervise their employee(s), agents, students or other persons under their supervision and control at the time of the incident." In light of the

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

foregoing, the Plaintiff PAYO's claim for NEGLIGENT SUPERVISION should not be dismissed as the Plaintiff PAYO has successfully stated a claim upon which relief can be granted.

III.

CONCLUSION

It is well known that Nevada is a notice pleading state and the Defendant(s) have been aware of the allegations against them concerning the basis for the Complaint in this matter for quite some time. As such, they have/had a duty to investigate this matter and preserve evidence. The pertinent law for the Court to consider concerning a Motion to Dismiss is set forth as follows:

> A Complaint should not be dismissed for insufficiency, or for failure to state a cause of action, unless it appears to a certainty that the Plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim; this, for the reason, that the motion to dismiss for failure to state a claim raises matter in bar and, if sustained without leave to plead further, results in a judgment on the merits. Zalk-Joseph Co. v. Wells Cargo, Inc., 81 Nev. 163, 400 P.2d 62d1 (1965); see also Edgar v. Wagner, 101 Nev. 226, 699 P.2d 110 (1985). Additionally, a Complaint will not be dismissed for failure to state a claim unless it appears beyond a reasonable doubt that the Plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. Simpson v. Mars Inc., 113 Nev. 188, 929 P.2d 966 (1997).

Moreover, the Nevada Supreme Court reiterated their decision in Zalk-Josephs and stated that "[w]hen considering a motion to dismiss made under NRCP 12(b)(5), a district court must construe the complaint liberally and draw every fair inference in favor of the plaintiff." Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 22 (Nev. 2003).

WHEREFORE, the Plaintiff PAYO respectfully requests that this Court deny the Defendant's Motion to Dismiss, and allow the Plaintiff PAYO to proceed with the prosecution of his case. Additionally, the Plaintiff PAYO requests such other relief this Court deems appropriate.

DATED this 1st day of July, 2013.

Respectfully Submitted by,
KURTH LAW OFFICE
/s/Robert O. Kurth, Jr.
ROBERT O. KURTH, JR.
Nevada Bar No. 4659
Attorney for Plaintiff

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of July, 2013, I deposited a true and correct copy of the foregoing **Opposition to Motion to Dismiss** in a sealed envelope in the U.S. Mail, first class, postage prepaid, and addressed to:

CLARK COUNTY SCHOOL DISTRICT
Office of the General Counsel
Daniel L. O'Brien, Esq.
Carlos L. McDade, Esq.
5100 W. Sahara Ave.
Las Vegas, NV 89146
Attorneys for Defendant

/s/ Marisela Galindo
An employee of **KURTH LAW OFFICE**.

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

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CLERK OF THE COURT

NEOJ
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, FAMILY DIVISION

CLARK COUNTY, NEVADA

MAKANI KAI PAYO,

Plaintiff,

vs.

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. II

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order was entered in the above-referenced matter on or about the 30th day of April, 2014, and was filed on the 13th day of May, 2014; a copy of which is attached hereto.

DATED this 19th day of May, 2014.

Respectfully submitted by:
KURTH LAW OFFICE

/s/Robert O. Kurth, Jr.
ROBERT O. KURTH, JR.
Nevada Bar No. 4659
Attorney for Defendants

///

///

CERTIFICATE OF SERVICE/MAILING

I HEREBY CERTIFY that on the 19th day of May, 2014, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** in the above-entitled case by placing a copy of the same in a sealed envelope in the U.S. Mail, first class, postage prepaid, and addressed as follows:

CLARK COUNTY SCHOOL DISTRICT
Office of the General Counsel
Daniel L. O'Brien, Esq.
Carlos L. McDade, Esq.
5100 W. Sahara Ave.
Las Vegas, NV 89146
Attorneys for Defendants

/s/Janina A. Moser
An employee of **KURTH LAW OFFICE.**

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,

vs.

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. 2

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

ORDER

THIS MATTER having come before this Court on April 7, 2014, for the hearing of the Defendant's CLARK COUNTY SCHOOL DISTRICT's ("CCSD"), Motion to Dismiss and the Plaintiff's, MAKANI KAI PAYO's ("PAYO") Opposition thereto. The Plaintiff PAYO 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:

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

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

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

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

IT IS SO ORDERED.

DISTRICT COURT JUDGE

Respectfully Submitted By:
KURTH LAW OFFICE

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

APPROVED BY:

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

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

RSPN
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 Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

MAKANI KAI PAYO,

Plaintiff,

vs.

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. II

PLAINTIFF'S, MAKANI KAI PAYO'S, ANSWERS TO DEFENDANT'S, CLARK COUNTY SCHOOL DISTRICT'S, REQUESTS FOR PRODUCTION OF DOCUMENTS

TO: CLARK COUNTY SCHOOL DISTRICT, Defendant:
TO: DANIEL L. O'BRIEN, ESQ. and CARLOS L. MCDADE, ESQ., attorneys for Defendant:

COMES NOW the Plaintiff, MAKANI KAI PAYO ("PAYO"), by and through his counsel, Robert O. Kurth, Jr., of the KURTH LAW OFFICE, and responds to Defendant CLARK COUNTY SCHOOL DISTRICT's Requests For Production of Documents, pursuant to Rule 36 of the Nevada Rules of Civil Procedure, as follows:

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REQUEST NO. 1:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which describes or references the incident referenced in your amended complaint wherein you allege that on May 12, 2004, you were injured while playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 1:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, see **Plaintiff's N.R.C.P. 16.1 Exhibit and Witness List/Disclosure of Exhibits and Witnesses and any supplements thereto**; specifically, medical records from University Medical Center (Bate stamped 000115 - 000264); medical records from Dr. Carr (Bate stamped 000018 - 000092, 000094 - 000101); and medical records from Retina Consultants of Nevada (Bate stamped 000093, 000102, 000106, 000110 - 000114). Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 2:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which pertains to or references any investigation that has been conducted into the facts of the incident on May 12, 2004, where you were injured while playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 2:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of any documents

pertaining to or referencing any investigation that had been conducted into the facts of the incident on May 12, 2004 as the Defendant, Clark County School District was believed to have conducted an investigation and is in possession of said documents. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 3:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which pertains to or references any claim that you or anyone acting on your behalf has made to any individual, liability insurance company, health insurance company, or other entity, arising out of the incident on May 12, 2004, where you were injured while playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 3:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, at this time PAYO is not in possession of any documents pertaining to or referencing any claims made to any individual, liability insurance company, health insurance company, or other entity, from the May 12, 2004 incident, wherein PAYO was injured while playing field hockey at C.W. Woodbury Middle School. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 4:

Each an every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which identifies any witnesses to the incident on May 12, 2004, where you were injured while playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 4:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any

defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, see **Plaintiff's N.R.C.P. 16.1 Exhibit and Witness List/Disclosure of Exhibits and Witnesses and any supplements thereto**; specifically, Makani Payo, Todd Peterson, Brandon Higgins, and other students not yet named. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 5:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which pertains to or references your class schedule at the time of the incident on May 12, 2004, where you were injured while playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 5:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of his class schedule at the time of the incident on May 12, 2004 relating to the injury sustained as a result of playing the game of field hockey. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 6:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which contains, pertains to or references any instructions that you were given prior to starting to play field hockey at William E. Ferron Elementary School, including specifically any documents pertaining to the rules of the game and/or safety instructions.

RESPONSE TO REQUEST NO. 6:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive,

burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of any instructions that was given prior to starting to play field hockey, including specifically any documents pertaining to the rules of the game and/or safety instructions. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 7:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which you contend demonstrates that you were "required" to play field hockey at William E. Ferron Elementary School on or about May 12, 2004.

RESPONSE TO REQUEST NO. 7:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents requiring him to play field hockey on May 12, 2004. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 8:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which you contend demonstrates that students who were unable to participate, or who elected not to participate in the game of field hockey at William E. Ferron Elementary School on or about May 12, 2004, were not given alternative activities to perform instead.

RESPONSE TO REQUEST NO. 8:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive,

burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents giving PAYO or other students alternative activities to perform if elected or unable to participate in the game of field hockey. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 9:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which you contend demonstrates that the District was under some sort of duty to provide you with helmets, face protectors, safety glasses or other safety glasses or other safety equipment for your use while playing field hockey at William E. Ferron Elementary School on or about May 12, 2004.

RESPONSE TO REQUEST NO. 9:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents requiring the Defendant CCSD to provide PAYO and other students protective gear or safety equipments for use while playing field hockey at C.W. Woodbury Middle School on or about May 12, 2004. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 10:

Each and every document of any kind or nature whatsoever, regardless of how created,

stored, maintained or accessed which you contend demonstrates that any District employee did anything to increase the risk inherent in the game of field hockey at William E. Ferron Elementary School on or about May 12, 2004.

RESPONSE TO REQUEST NO. 10:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents demonstrating that the District employee did anything to increase the risk inherent in the game of field hockey at C.W. Woodbury Middle School on or about May 12, 2004. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 11:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which identifies, describes or contains any sort of still or video picture of the student who you allege accompanied you to the school nurse's office following the incident on May 12, 2004, where you were injured while playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 11:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents describing or containing any sort of still or video picture of the student who accompanied PAYO to the school nurse's office following the incident on May 12, 2004 immediately after PAYO was injured while playing field hockey at C.W. Woodbury Middle School. Discovery is continuing. This response

will be supplemented upon the receipt of additional information.

REQUEST NO. 12:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which identifies, describes or contains any sort of still or video picture of the individual or individuals who you allege examined you in the school nurse's office following the incident on May 12, 2004, where you were injured while playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 12:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents describing or containing any sort of still or video picture of the individual who examined PAYO in the school nurse's office following the incident on May 12, 2004 immediately after PAYO was injured while playing field hockey at C.W. Woodbury Middle School. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 13:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which identifies, describes or contains any sort of still or video picture of any and all individuals who you allege called your mother to inform her of the incident on May 12, 2004, where you were injured while playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 13:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive,

burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents describing or containing any sort of still or video picture of the individual who contacted and informed PAYO's mother of the incident on or about May 12, 2004 wherein PAYO was injured while playing field hockey at C.W. Woodbury Middle School. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 14:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which identifies, describes or contains any sort of still or video picture of the individual or individuals who you allege overheard a District employee tell your mother that you did not require immediate medical attention following the incident on May 12, 2004, where you were injured while playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 14:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents describing or containing any sort of still or video picture of the individual who overheard a CCSD employee telling PAYO's mother that he did not require immediate medical attention following the incident on or about May 12, 2004. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 15:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which consists of, identifies or references any accident reports

pertaining to the incident on May 12, 2004, where you were injured while playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 15:

Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO's only known accident report following the incident on May 12, 2004 was received from Defendant CCSD in its N.R.C.P. 16.1 initial disclosure of documents titled Student Injury Accident Report dated May 13, 2004 and bate-stamped as CCSD000039. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 16:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which identifies the individuals who you contend were not properly supervised at the time of the incident on May 12, 2004, where you were injured while playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 16:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents identifying the individuals who were not properly supervised at the time of the incident on May 12, 2004, wherein PAYO was injured while playing field hockey at C.W. Woodbury Middle School. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 17:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which you contend demonstrates that, had there been more or different supervision during the field hockey game on May 12, 2004, your injury would have been

avoided.

RESPONSE TO REQUEST NO. 17:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents demonstrating that, had there been more or different supervision during the field hockey game on May 12, 2004, PAYO's injury would have been avoided. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 18:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which you contend demonstrates that there had been accidents or injuries to students at William E. Ferron Elementary School prior to May 12, 2004, while playing field hockey.

RESPONSE TO REQUEST NO. 18:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents of prior accidents or injuries to students at C.W. Woodbury Middle School prior to the May 12, 2004 incident. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 19:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which was provided to students at William E. Ferron Elementary

School prior to May 12, 2004, concerning the fact that the students would be playing field hockey.

RESPONSE TO REQUEST NO. 19:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents concerning the fact that the PAYO or any other student would be playing field hockey prior to May 12, 2004. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 20:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which was provided to students at William E. Ferron Elementary School prior to May 12, 2004, concerning the risks of playing field hockey at William E. Ferron Elementary School.

RESPONSE TO REQUEST NO. 20:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents concerning the risks of playing field hockey at C.W. Woodbury Middle School prior to May 12, 2004. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 21:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which you contend demonstrates that you, or anyone acting on your

behalf, was prevented from making a claim against the Clark County School District between 2004 and 2014, for recovery of injuries sustained at William E. Ferron Elementary School on May 12, 2004, while playing field hockey.

RESPONSE TO REQUEST NO. 21:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents demonstrating that PAYO was prevented from making a claim against Clark County School District between 2004 and 2014, for recovery of injuries sustained at C.W. Woodbury Middle School on May 12, 2004, while playing field hockey. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 22:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which you contend demonstrates that you, or anyone acting on your behalf, ever inquired of anyone at William E. Ferron Elementary School, prior to May 12, 2004, about the sports that might be played in the P.E. class in which you were enrolled.

RESPONSE TO REQUEST NO. 22:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents prior to May 12, 2004 regarding the sports that might be played in PAYO's Physical Education class in which he was enrolled. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 23:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which you contend demonstrates that you, or anyone acting on your behalf, ever objected to playing field hockey at William E. Ferron Elementary School, prior to May 12, 2004.

RESPONSE TO REQUEST NO. 23:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents of him objecting to playing field hockey at C.W. Woodbury Middle School prior to the May 12, 2004 injury. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 24:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which you contend demonstrates that you, or anyone acting on your behalf, ever expressed any concern for your safety while enrolled in P.E., prior to May 12, 2004.

RESPONSE TO REQUEST NO. 24:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents demonstrating that PAYO, or anyone acting on his behalf, expressed concern for his safety while enrolled in Physical Education class prior to the May 12, 2004 injury. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 25:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which you contend demonstrates that the student who struck you in the face while playing field hockey at William E. Ferron Elementary School on May 12, 2004, intended to cause you injury.

RESPONSE TO REQUEST NO. 25:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents demonstrating that Brandon Higgins, the student who struck PAYO in the head and eye with a hockey stick while playing field hockey at C.W. Woodbury Middle School, intended to cause PAYO injury. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 26:

Each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained or accessed which you contend demonstrates that had you been provided with additional safety equipment at William E. Ferron Elementary School on May 12, 2004, while playing field hockey, you would not have been injured.

RESPONSE TO REQUEST NO. 26:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of documents demonstrating that had PAYO been provided with additional safety equipment at C.W. Woodbury Middle School on May 12, 2004, he would not have been injured. Discovery is continuing. This

response will be supplemented upon the receipt of additional information.

REQUEST NO. 27:

Each and every medical record, including medical billing records from each and every health care provider who has provided you with medical treatment, referrals, opinions, diagnosis or prognosis arising from injuries, either physical, emotional or mental, which you contend were sustained as a result of the incident which occurred at William E. Ferron Elementary School on May 12, 2004, while you were playing field hockey.

RESPONSE TO REQUEST NO. 27:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, see **Plaintiff's N.R.C.P. 16.1 Exhibit and Witness List/Disclosure of Exhibits and Witnesses and any supplements thereto**; specifically, medical records from University Medical Center (Bate stamped 000115 - 000264); medical records from Dr. Carr (Bate stamped 000018 - 000092, 000094 - 000101); and medical records from Retina Consultants of Nevada (Bate stamped 000093, 000102, 000106, 000110 - 000114). Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 28:

Each and every medical record, including medical billing records from each and every health care provider who has provided you with medical treatment, referrals, opinions, diagnosis or prognosis arising from injuries, either physical, emotional or mental, which you contend were not sustained as a result of the incident which occurred at William E. Ferron Elementary School on May 12, 2004, while you were playing field hockey, for the time period commencing five years prior to May 12, 2004, through the present.

RESPONSE TO REQUEST NO. 28:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of any medical record from any health care provider who has provided him with medical treatment, referrals, opinions, diagnosis or prognosis arising from injuries, either physical, emotional or mental, which were not sustained as a result of the incident which occurred at C.W. Woodbury Middle School on May 12, 2004, while he was playing field hockey, for the time period commencing five years prior to May 12, 2004, through the present. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 29:

Each and every expert medical report, opinion, analysis, conclusion or proposed testimony as to causation which you have received from any health care provider who has provided you with any medical treatment, treatment for emotional distress or mental issues following the incident which occurred at William E. Ferron Elementary School on May 12, 2004, while you were playing field hockey.

RESPONSE TO REQUEST NO. 29:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of any expert medical reports at this time other than from the medical providers. However, see **Plaintiff's N.R.C.P. 16.1 Exhibit and Witness List/Disclosure of Exhibits and Witnesses and any**

supplements thereto; specifically, medical records from University Medical Center (Bate stamped 000115 - 000264); medical records from Dr. Carr (Bate stamped 000018 - 000092, 000094 - 000101); and medical records from Retina Consultants of Nevada (Bate stamped 000093, 000102, 000106, 000110 - 000114) who provided PAYO with medical treatment following the incident which occurred at C.W. Woodbury Middle School on May 12, 2004 while PAYO was playing field hockey. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 30:

Each and every expert medical report, opinion, analysis, conclusion or proposed testimony as to causation which you have received from any health care provider who has not provided you with any medical treatment, treatment for emotional distress or mental issues following the incident which occurred at William E. Ferron Elementary School on May 12, 2004, while you were playing field hockey.

RESPONSE TO REQUEST NO. 30:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of any expert medical report, opinion, analysis, conclusion or proposed testimony as to causation from any health care provider who has not provided PAYO with medical treatment, treatment for emotional distress or mental issues following the May 12, 2004 incident at C.W. Woodbury Middle School, wherein PAYO was injured while playing field hockey. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 31:

Each and every expert medical report, opinion, analysis, conclusion or proposed testimony

as to any permanent disability which you claim to have suffered as a result of the incident which occurred at William E. Ferron Elementary School on May 12, 2004, while you were playing field hockey.

RESPONSE TO REQUEST NO. 31:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, at this time PAYO is not in possession of any expert medical report, opinion, analysis, conclusion or proposed testimony as to any permanent disability which PAYO suffered as a result of the incident which occurred at C.W. Woodbury Middle School on May 12, 2004, while he was playing field hockey. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 32:

Each and every expert medical report, opinion, analysis, conclusion or proposed testimony as to any past or future loss of income or diminished earning capacity which you claim to have suffered as a result of the incident which occurred at William E. Ferron Elementary School on May 12, 2004, while you were playing field hockey.

RESPONSE TO REQUEST NO. 32:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, at this time PAYO is not in possession of the requested information. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 33:

Each and every expert medical report, opinion, analysis, conclusion or proposed testimony as to any past or future medical treatment, including the projected costs therefore, which you claim to have suffered as a result of the incident which occurred at William E. Ferron Elementary School on May 12, 2004, while you were playing field hockey.

RESPONSE TO REQUEST NO. 33:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, at this time PAYO is not in possession of such information. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 34:

Each and every expert medical report, opinion, analysis, conclusion or proposed testimony as to any past or future loss of income or diminished earning capacity which you claim to have suffered as a result of the incident which occurred at William E. Ferron Elementary School on May 12, 2004, while you were playing field hockey.

RESPONSE TO REQUEST NO. 34:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of such information

at this time. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 35:

A complete copy of the investigative file of each retained expert witness as to causation and/or damages, who have rendered or are expected to render any opinion as to causation or damages on behalf of Plaintiff in this case, including each and every document provided thereto, consulted therapy, relied upon or referenced in any correspondence, draft or final expert report, opinion, analysis, conclusion or proposed testimony concerning the matters alleged in your Complaint.

RESPONSE TO REQUEST NO. 35:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of any investigative file or document of such. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 36:

A copy of each and every authoritative reference consulted by you, your attorneys, your medical and mental health care providers and/or experts which you contend supports the claims set forth in your Amended Complaint.

RESPONSE TO REQUEST NO. 36:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, see **Plaintiff's N.R.C.P. 16.1 Exhibit and**

Witness List/Disclosure of Exhibits and Witnesses and any supplements thereto; specifically, medical records from University Medical Center (Bate stamped 000115 - 000264); medical records from Dr. Carr (Bate stamped 000018 - 000092, 000094 - 000101); and medical records from Retina Consultants of Nevada (Bate stamped 000093, 000102, 000106, 000110 - 000114) who provided PAYO with medical treatment following the incident which occurred at C.W. Woodbury Middle School on May 12, 2004 while PAYO was playing field hockey. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 37:

Each and every expert medical report, opinion, analysis, conclusion or proposed testimony as to any past or future loss of income or diminished earning capacity which you claim to have suffered as a result of the incident which occurred at William E. Ferron Elementary School on May 12, 2004, while you were playing field hockey.

RESPONSE TO REQUEST NO. 37:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of such information at this time. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 38:

Each and every witness statement of any kind or nature whatsoever, including statements of the parties, regardless of how created, stored, maintained or accessed which describes, discusses, references or relates to the incident wherein you were injured at William E. Ferron Elementary School on May 12, 2004, while playing field hockey.

RESPONSE TO REQUEST NO. 38:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive,

burdensome, vague, irrelevant, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is in the process of gathering such information. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

REQUEST NO. 39:

Each and every settlement agreement, waiver, accord and satisfaction, release or judgment of any kind or nature whatsoever, between Plaintiff or anyone acting on his behalf, and any other party, insurance company or other person or entity, regardless of how created, stored, maintained or accessed, which references or relates to the incident wherein you were injured at William E. Ferron Elementary School on May 12, 2004, while playing field hockey.

RESPONSE TO REQUEST NO. 39:

OBJECTION: PAYO objects to this interrogatory as overbroad, oppressive, burdensome, vague, irrelevant, calls for a legal conclusion or expert opinion, attorney client privilege, work product, and an invasion of the privacy of PAYO. Without waiving any defenses, PAYO states that the incident alleged in my First Amended Complaint occurred on the tennis courts at C.W. Woodbury Middle School, not William E. Ferron Elementary School as erroneously mentioned in the First Amended Complaint. Further, PAYO is not in possession of such documents requested. Discovery is continuing. This response will be supplemented upon the receipt of additional information.

DATED this 15th day of January, 2015.

Respectfully submitted by,
Objections submitted by,
KURTH LAW OFFICE

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of January, 2015, I served a true and correct copy of the foregoing **PLAINTIFF'S, MAKANI K. PAYO'S, RESPONSE TO DEFENDANT CLARK COUNTY SCHOOL DISTRICT'S REQUEST FOR PRODUCTION OF DOCUMENTS** by providing such via hand delivered to:

CLARK COUNTY SCHOOL DISTRICT
Office of the General Counsel
Daniel L. O'Brien, Esq.
Carlos L. McDade, Esq.
5100 W. Sahara Ave.
Las Vegas, NV 89146
Attorneys for Defendant

An employee of **KURTH LAW OFFICE.**

TYREE CARR, M.D., LTD.

THE NEVADA INSTITUTE OF OPHTHALMOLOGY

2800 N. TENAYA WAY, SUITE 102
LAS VEGAS, NV 89128
PHONE: (702) 240-2820
FAX: (702) 240-2830

1703 CIVIC CENTER, SUITE 2
N. LAS VEGAS, NV 89030
PHONE: (702) 642-7952
FAX: (702) 642-3955

Name: PAYO, MAKANI B
Technician:R. Brown Scribe: M. Martinez
Exam Type: NEWPT-NEW PATIENT EXAM

Date: 01-21-2015
Dob: 09-22-1992
Age: 22 Y/O

Complaints:

DATE	COMPLAINT	COMMENT
01-21-2015	Makani is here for a medical eye exam recommended by his lawyer after having an left eye injury 2004. He needs to know if any other procedures will be needed in the future with the left eye. Doing well right now denies any problems.	last seen in 8/9/2007 by our office

History Present Illness:

HISTORY PRESENT ILLNESS	COMMENT
Makani is here for a medical eye exam has history of left eye injury in 2004, was hit by a ground hockey stick during PE. He did have a Crystalens implanted in 2007. He denies any problems or concerns at this time. He is not using any drops at this time.	

☐ Unknown meds, patient was unable to provide medication information

INTRAOCULAR PRESSURES: Goldmann

	OD	OS	TIME
IOP1	14	16	2:52 PM
IOP2			

Visual Acuity: Glasses

	cc DISTANCE	cc NEAR	sc DISTANCE	sc NEAR
OD	20/20	20/25	20/250	20/25
OS	20/30	20/60	20/30	20/80
OU				

	PH	GLARE
OD		
OS		

Present Glasses: Distance

	SPH	CYL	AXIS	ADD	HZ Prism/Base	Vt Prism/Base
OD	-3.50	+1.00	178			
OS	-1.25	+2.00	110			

Comments:

000291

Present Contacts:

	BC	Power	Diameter	Brand Name
OD				
OS				

Retinoscopy	SPH	CYL	AXIS
OD			
OS			
Auto Refraction			
OD New	-4.00	+1.25	001
OS	-1.00	+2.75	127

REFRACTION 1: Manifest (no improvement)
Refraction 1:

EYE	SPH	CYL	AXIS	ADD	VADT	VAN	HZ PRISM BASE	VT PRISM BASE	VERTEX
OD	-3.50	+1.00	175		20/20	20/20			
OS	-1.25	+2.00	120	+2.25	20/40+	20/40			

REFRACTION 2:
Refraction 2: None Recorded.

Comments:

Optical Order: deferred

K Readings: Automatic

OD	43.25	/	43.75	@	098	/	008
OS	42.87	/	43.50	@	004	/	094

Pachymetry

OD	
OS	

Alignment and Ocular Motility: Ortho and Full

COVER TEST:

			NOTES:
Distance @			
Near @			

Color: 15/15, Ishara Plates, OU Stereo: 100 sec

Amsler Grid:

OD	
OS	

Mental status: Alert & Oriented x3 (person, place, time)

Pupils: Equal Round Reactive
APD No

Visual Field: Confrontation Fields Full OU

DILATED:
DILATION DENIED: ☐

EYE	DROPS	TIME
RIGHT (OD), LEFT (OS)	Tropicamide 1%/Phenylephrine 2.5%	2:52 PM

External Exam: Normal without abnormalities

SLIT LAMP EXAM:

	OD	OS
Lids	Normal and Symmetric	Normal and Symmetric
Conjunctiva	Trace Papillary hyperplasia	Trace Papillary hyperplasia
Cornea	Epithelium/Stroma/Endothelium/ Grossly WNL	Decrease Tear film/Tear lake
Anterior Chamber	Deep and quiet	Deep and quiet
Iris	Brown	Brown
Lens	Clear, without abnormalities	PC IOL Crystalens, 2+ PCO

POSTERIOR SEGMENT EXAM:

	OD	OS
Vitreous	Clear	Clear
Optic Nerve	C:D ratio 0.15	C:D ratio 0.15
Macula	Bright foveal reflex	Bright foveal reflex
Vessels	Normal	Normal
Periphery	Normal	Normal

Diagnoses:

#	ICD9	Description	Comment
1	366.53	After Cataract Obscurring Vision	left eye
2	V43.1	Lens Replacement	left eye

Digital Photos
☐ External
☐ Internal

Plan: Eye findings was explained to both patient and mother noting after-cataract membrane formation in left eye, this is not an uncommon finding post operative cataract surgery especially in children and young adults. It was explained that his left eye best corrected vision is 20/40 as opposed to prior best correction 20/20 noted in medical records August 2007. He will benefit from a YAG laser capsulotomy for best visual rehabilitation in left eye.

Medications Prescribed: None.

☐ Electronic Prescription Sent
Recall:

TNC102-S-2015-01-21_18:49:38_Digitally Signed

ELECTRONICALLY SERVED
02/06/2015 04:56:00 PM

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 REQUESTS FOR ADMISSIONS

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

REQUEST NO. 1:

Admit that on May 12, 2004, C.W. Woodbury Middle School required PAYO to play field hockey in his Physical Education class.

RESPONSE NO. 1:

DENY.

REQUEST NO. 2:

Admit that on May 12, 2004, PAYO was struck in his head and left eye by another student while playing field hockey at C.W. Woodbury Middle School.

RESPONSE NO. 2:

Upon information and belief, admit.

REQUEST NO. 3:

Admit that Todd H. Peterson is the Physical Education teacher who witnessed the May 12, 2004 accident and was in charge of supervising and controlling the game of field hockey, wherein PAYO was struck in his head and left eye by another student while playing the game of field hockey.

RESPONSE NO. 3:

OBJECTION, Compound such that this Request cannot be answered with a simple admission or denial. Without waiving this objection, the District admits only that on May 12, 2004, Todd H. Peterson was a physical education teacher at Woodbury Middle School and that he was supervising a game of field hockey at the time Plaintiff was injured.

REQUEST NO. 4:

Admit that on May 12, 2004, PAYO was checked into C.W. Woodbury Middle School's health office at or around 9:45 a.m. and checked out of the office at around 11:00 a.m.

RESPONSE NO. 4:

OBJECTION: vague and ambiguous as to the terms "checked in" and "checked out." Without waiving these objections, the District admits that Plaintiff was sent to the Health Office on May 12, 2004, following his injury and that the records previously produced identify the time he arrived and the time he departed.

REQUEST NO. 5:

Admit that after the May 12, 2004 injury, PAYO was examined

by the alleged nurse and/or nurse's assistant and was later advised that PAYO did not require immediate medical attention.

RESPONSE NO. 5:

OBJECTION, Compound such that this Request cannot be answered with a simple admission or denial. This request is further objected to on the ground that it is misleading by suggesting that the Health Care employees in the Health Office were not properly trained or qualified for their positions or that the District may have substituted individuals without proper training or qualifications to serve in the Health Office. Without waiving this objection, and ignoring the reference to their "alleged" status, the District admits that Plaintiff was examined by a District employee (First Aid Safety Assistant, or FASA) by the name of Wally Morton while in the Health Office. The District categorically denies that either Plaintiff or his mother was advised that no immediate medical attention was required.

REQUEST NO. 6:

Admit that Wally R. Morton was the alleged nurse and/or nurse's assistant who assisted PAYO on the day of the May 12, 2004 injury, wherein PAYO was struck in his left eye while playing field hockey.

RESPONSE NO. 6:

See Response to Request No. 5, above.

REQUEST NO. 6 [sic]:

Admit that within 30 days after the May 12, 2004 injury, the only investigative report completed was the Student Injury Accident Report dated May 13, 2004.

RESPONSE NO. 7:

OBJECTION: vague and ambiguous as to the term "investigative report." Without waiving this objection, the District denies that no further investigation was conducted after May 13, 2004, although information regarding that investigation may not have been summarized in what Plaintiff considers to be an "investigative report."

REQUEST NO. 8:

Admit that C.W. Woodbury Middle School is required to provide safety equipment or protective gear for their students in playing field hockey near or around the time of the May 12, 2004 incident.

RESPONSE NO. 8:

OBJECTION: Vague and ambiguous as to what Plaintiff considers to be "safety equipment or protective gear." Without waiving this objection, to the extent the District believes it understands this request: DENY.

REQUEST NO. 9:

Admit that on May 12, 2004, C.W. Woodbury Middle School did not provide any protective gear or safety equipment to PAYO for the purposes of playing field hockey.

RESPONSE No. 9:

OBJECTION: Vague and ambiguous as to what Plaintiff considers to be "safety equipment or protective gear." Without waiving this objection, to the extent the District believes it understands this request: DENY.

REQUEST NO. 10:

Admit that C.W. Woodbury Middle School did not possess its

own formal rules for the game of field hockey near or around the time of the May 12, 2004 incident.

RESPONSE NO. 10:

OBJECTION: Vague and ambiguous as to what Plaintiff considers to be "its own formal rules" for the game of field hockey. Without waiving this objection, to the extent the District believes it understands this request: DENY.

DATED this 6th day of February, 2015.

Daniel L. O'Brien

DANIEL L. O'BRIEN, ESQ.
Nevada Bar No. 983
5100 West Sahara Avenue
Las Vegas, NV 89146
Attorney for Defendant, CLARK COUNTY SCHOOL DISTRICT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of February, 2015, I served a true and correct copy of the foregoing CLARK COUNTY SCHOOL DISTRICT'S RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS via electronic filing and electronic service through the EFP Vendor System to all registered parties pursuant to the order for electronic filing and service.

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

Joan M. Mortimer
An Employee of CCSD

MEDICAL BILLING SUMMARY OF DAMAGES
FOR THE PLAINTIFF, MAKANI PAYO

The Plaintiff, MAKANI PAYO, incurred the following medical bills with the following medical providers with regard to this claim:

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**