IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT,

Appellant,

v.

MAKANI KAI PAYO,

Respondent.

No.: 68443

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

District Court Dept. No.: XV

APPELLANT'S REPLY BRIEF

Appeal from a judgment on a jury verdict
and various orders entered prior to trial
in a negligence case,
the Honorable Joe Hardy (trial judge),
Richard F. Scotti and Valorie Vega, presiding.

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REPLY POINTS AND AUTHORITIES

An appellant's reply brief is properly limited to addressing new matter set forth in the respondent's brief. NRAP 28(c).

1. Inherent Risk Doctrine (Primary Implied Assumption of the Risk).

In response to the District's opening brief, Makani does not dispute that being struck in the face with a hockey stick was a risk inherent in the sport of floor hockey. Nor does Makani argue that the teacher did anything to unreasonably increase the risk of harm to Makani.[1] Thus, if the inherent risk doctrine (primary implied assumption of the risk) applies in a physical education class, then the District owed Makani no duty to prevent the injury. Knight v. Jewett, 834 P.2d 696 (Cal. 1992).

Makani argues that, due to his age (eleven years old at the time of the accident), Makani "did not have the requisite mindset to fully comprehend the risks involved" [Resp. Ans. Brf. at page 14, Lines 4-13]. He also argues that the inherent risk doctrine does not apply in a physical education class taught in a

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[1] The District, in its opening brief, referenced authority which holds that the failure to provide safety equipment does not constitute conduct which increases the risk of harm to participants. Makani ignores the topic entirely, providing no argument and citing no authority that holds otherwise. *See:* Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n. 38 (2006) [Matter unsupported by citation to authority or cogent argument is properly disregarded].

public school where attendance is mandatory. Finally, Makani declares that the District assumed the risk of injury to Makani when it failed to require him to sign a written liability waiver[2] prior to playing floor hockey.

A. Makani's age at the time of the accident is irrelevant.

Makani's subjective appreciation of the risk is not relevant to the determination of whether primary implied assumption of the risk applies. *See:* Shin v. Ahn, 165 P.3d 581, 590 (Cal. 2007) [court stating "a court need not ask what risks a particular plaintiff subjectively knew of and chose to encounter, but instead must evaluate the fundamental nature of the sport" in order to determine whether a particular defendant owes a duty to protect a plaintiff from an inherent risk]. *See, also*: Lamphier v. Rome City Sch. Dist., 284 A.D.2d 989 (N.Y. 2001) [court applying inherent risk doctrine to defeat claim against school district by 12 year old struck in face while playing floor hockey].

Moreover, Counsel's *argument* concerning Makani's "mindset" is not *evidence*. Hunter v. Gang, 132 NAO 22 at page 18 (Nev. 04/07/16). The only *evidence* concerning Makani's appreciation of the risks involved in playing floor hockey was Makani's testimony, as an adult, that even at age eleven, he fully

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[2] This argument is a *nonsequiter*. Had there been a written waiver, Makani's claims would have been precluded by express assumption of the risk. Auckenthaler v. Grundmeyer, 110 Nev. 682, 685-686, (1994).

appreciated that he could suffer a serious injury if he was struck in the face with a hockey stick. AA II-0210 [Makani Depos. at page 30, Lines 10-13]. Thus, counsel's *argument* concerning Makani's subjective recognition of the risk in this case is legally irrelevant and factually unsupported.

B. Primary implied assumption of the risk applies to a floor hockey unit conducted as part of a public school P.E. class.

Although Makani *argues* that the inherent risk doctrine does not apply in a physical education class where participation is mandatory, Makani cites no authority in support of this proposition. Moreover, Makani makes no cogent argument why this Court should adopt a policy of discouraging experimentation in physical education classes in this state. Edwards, *supra*.

The policy underlying the inherent risk doctrine is to "avoid chilling vigorous participation in or sponsorship of recreation activities by imposing a tort duty to eliminate or reduce the risks of harm inherent in those activities." Nalwa v. Cedar Fair, LLP, 290 P.3d 1158, 1163 (Cal. 2012). This policy is nowhere better served than in public schools where providing exciting, new and challenging physical education classes serves the salutatory purpose of keeping students interested in maintaining an active lifestyle.

Courts considering this issue have held that compulsory attendance laws, alone, do not make schools insurers of the safety of pupils at play or elsewhere,

Rodrigues v. San Jose Unified School District, 322 P.2d 70, 73 (Cal. 1958), that liability does not turn on whether the activity is organized, unorganized, supervised or unsupervised, Cole v. BSA, 725 S.E.2d 476, 479 (S.C. 2011) [court holding that the nature of the sport and not the level of organized play determines whether primary implied assumption of the risk applies], and that primary implied assumption of the risk is not negated simply because a pupil/teacher relationship exists. Lilley v. Elk Grove Unified School District, 68 Cal.App.4th 939, 943-944 (Cal.App. 1998).

More directly on point (albeit in an unpublished opinion), a California Court of Appeals directly addressed the issue, rejecting the proposition that a greater duty is owed to students enrolled in a physical education class:

> "Appellant is trying to create a distinction where none exists, at least for purposes of liability and application of primary assumption of risk. As far as we can tell, the duty owed by a teacher or school district to a student enrolled in a regularly scheduled class is no different than that owed to a student participating in an extracurricular activity, and appellant has failed to demonstrate otherwise. The only duty owed by school (sic) and teachers with respect to inherently dangerous activities is to avoid increasing the risk beyond what is inherent in the activity."

Baltierra v. Corona-Norco Unified Sch. Dist., 2006 Cal.App. Unpub. LEXIS 4007 (Cal.App. 2006).

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Although not binding authority, the rationale applied by the Baltierra court is persuasive. There is simply no good public policy goal to be served by increasing the liability of public school teachers or coaches simply because instruction is provided in a physical education class rather than in conjunction with an extracurricular activity. The social cost of doing so would be to chill creativity and to deprive students who are unable to participate in extracurricular activities the ability to engage in and receive instruction concerning new and challenging physical activities, simply because it is theoretically[3] possible for them to sustain an injury.

Makani relies upon a single case, Hemady v. Long Beach Unified Sch. Dist., 143 Cal.App.4th 566 (Cal.App. 2006), for the proposition that the inherent risk doctrine does not apply under the facts of this case. Resp. Ans. Brief at page 15, Lines 14-19. Makani's reliance upon Hemady is misplaced.

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[3] This is particularly so in this case, where the undisputed evident is that floor hockey, when adopted, was considered a low risk activity, AA IV-1837 [A/I 5 at page 5], and neither Makani nor the District was aware of any prior, similar injuries. AA II-0211; 0216-0217 [Makani Depos. At page 31, Lines 15-17; at pages 36-37, Lines 25, 1]; AA III 0560 [Wheelan Depos. At page 69, Lines 19-22 (no similar injuries had occurred in the District prior to Makani's injury)]; AA VII-1317 [Peterson Depos. At page 159, Lines 5-15 (teacher testifying that no one in one of his classes had ever suffered a similar injury during floor hockey)] ; AA VII-1357 [Murphy Testimony at page 199, Lines 8-20 (Principal testifying that in all his years at Woodbury Middle School, he was unaware of any prior similar injuries occurring in a floor hockey class)].

Unlike this case, the court of appeals in Hemady first concluded that the inherent risk doctrine did not apply to the sport of golf. The appellate court's conclusion was promptly reversed in Shin v. Ahn, 165 P.3d 581, 590 (Cal. 2007) [court finding that golf does involve inherent risks to which the inherent risk doctrine applies]. *See, also*: Rudzinski v. BB, 2010 U.S.Dist. LEXIS 68471 (Dist. N.C. 2010) [court rejecting holding in Hemady and cataloguing cases applying the inherent risk analysis to golf].

Not only is Hemady no longer good authority, the facts in this case more closely resemble those in Shin than in Hemady. The players in this case were actively competing in a dynamic, competitive, team sport. They were not simply standing in line, as in Hemady, passively waiting to take their turn on a driving range. This was not a situation where, as in Hemady, a co-participant had time to contemplate his next move before swinging his golf club. Nor is it a situation wherein a Coach (or ten coaches) could have intervened in time to prevent Plaintiff's injury. AA II-0214 [the incident occurred suddenly and without warning]; AA I-0166 and AA II-0214 [the incident occurred so quickly that Makani had no time to avoid the injury]; AA II-0236 [incident came "out of the blue" and occurred in a "split second"]. *See, also*, Makani's trial testimony at AA VI-1141, wherein Makani admits that it would not have been possible for Mr. Peterson to intervene in time to prevent the injury.

Makani identified no valid legal authority and produced no evidence (expert, expert report or opinions or learned treatises) supporting the proposition that a different duty should apply in a P.E. class. On this record, the district court committed legal error when it denied the District's motion to dismiss, the subsequent motion for summary judgment and when it submitted this case to a jury on general negligence principles.

2. Negligence.

Makani argues that a substantial issue of material fact existed as to (A) duty [whether the District was negligent for not providing Makani with safety equipment]; and (B) whether additional training, supervision or equipment could have prevented the injury to Makani. Resp. Ans. Brf. at page 17, Lines 7-14.

A. Duty.

Makani does not cite a single case or other authority which holds for the proposition that the District owed him a duty to provide him with safety equipment for use while playing floor hockey. The District, on the other hand, cited to considerable authority which holds that no such duty existed. Lamphier, *supra* [no duty to provide eye protection to 12 year old floor hockey player]; Mehr v. Federation Internationale de Football Ass'n., 2015 U.S. Dist. LEXIS 92779 (N.D. Cal. 2015) [no duty to youth soccer players]; DiGiose v. Bellmore-Merrick Central High School District, 50 A.D.3d 623, 855 N.Y.S.2d 199 (N.Y. 2008) [no duty to

provide mats for protection of cheerleader performing stunt]. The Court need not consider Makani's arguments that are not supported by citation to facts of record or pertinent authority. Edwards, *supra*.

In fact, it was undisputed that the District did not provide any head protection for Makani's use. Thus, there simply was no substantial question of material fact to be resolved by the jury. The remaining issue was purely an issue of law for the court to decide. Butler v. Bayer, 123 Nev. 450, 461 (2007). Summary judgment is appropriate in a negligence action where no duty exists. Foster v. Costco Wholesale Corp., 128 NAO 71, 291 P.3d 150, 153 (2012).

The refusal to grant summary judgment on this issue, together with the subsequent failure to instruct the jury on the applicable duty, constitutes legal error.

B. Negligent supervision.

Makani similarly cites to no authority, and has produced no evidence, to support the proposition that floor hockey constituted an unreasonably dangerous activity.[4]

Makani does not cite to a single thing that Mr. Peterson, his teacher, did that might arguably have been negligent. Makani testified that Mr. Peterson was

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[4] The only *evidence* regarding the issue, as set forth in fn. 3, *ante*, is that floor hockey was not a known, extraordinarily dangerous activity.

present at all times, he acted as referee during the game, he actively supervised the game the entire time, he provided safety instruction prior to play and he enforced safety concerns during play. He specifically testified that he did not believe that Mr. Peterson did anything to cause his injury, AA II-0259 [Makani Depos. at page 79, Lines 23-25]; and that he did not believe that Mr. Peterson did anything wrong. AA II-0260 [Makani Depos. at page 80, Lines 3-6]. Moreover, he could not articulate how more or different supervision might have prevented the accident. AA II-0229 [Makani Depos. at page 49, Lines 1-10].

Nor do the undisputed facts of this case demonstrate that additional or different supervision could have prevented this accident. AA II-0214 [the incident occurred suddenly and without warning]; AA I-0166 and AA II-0214 [the incident occurred so quickly that Makani had no time to avoid the injury]; AA II-0236 [incident came "out of the blue" and occurred in a "split second"]. *See, also*, Makani's trial testimony at AA VI-1141, wherein Makani admits that it would not have been possible for Mr. Peterson to intervene in time to prevent the injury.

Under these circumstances, Makani's negligent supervision cause of action fails as a matter of law. Nestor v. New York, 28 Misc.2d 70, 72-73, 211 N.Y.S.2d 975 (N.Y. 1961) [where injury occurred suddenly, even more vigilant supervision could not have prevented the injury thus proximate cause was not shown]; Nash v. Rapides Parish Sch. Bd., 188 So.2d 508 (La.App. 1996) [court holding that

presence or absence of teacher did not matter where injury occurred so suddenly that even if the teacher had been standing right next to the student, he or she could not have prevented it].

3. The District's decision to offer a floor hockey class is subject to discretionary immunity.

Makani, cites NRS 41.033 and NRS 41.032 interchangeably arguing that sovereign immunity does not shield the District from liability because it had actual knowledge that a student could be injured playing floor hockey. Resp. Ans. Brf. at pages 21-22, Lines 13-20; 1-2; at page 23, Lines 7-10. However, NRS 41.033 applies by its own terms to premises defects, none of which have been alleged or proven to exist in this case. Davenport v. County of Clark, 111 Nev. 467, 469 (1995); Nardozzi v. Clark County School District, 108 Nev. 7, 9 (1992); Chastain v. Clark County School District, 109 Nev. 1172, 1175 (1993).

This argument is a *red herring*. The District never argued that NRS 41.033 provided discretionary immunity in this case.

Makani does not even address the District's extensive argument that NRS 41.032(2) provides discretionary immunity with respect to decisions concerning the adoption of new classes, how to equip those classes, how to staff those classes and how to pay for those classes. *See*: Appellant's Opening Brief at pages 18-20.

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Instead, Makani focuses his arguments exclusively on negligent supervision and retention issues in general. Resp. Ans. Brf., pages 21-24.

Makani asked the District Court to permit the jury in this case to "second-guess" the decisions of the District respecting whether to offer a floor hockey class, how much to spend on equipment and how to staff the activity. These are precisely the sort of "day-to-day" decisions that discretionary immunity was intended to protect. Martinez v. Maruszczak, 123 Nev. 433, 439 (2007).

4. Makani cannot recover medical expenses incurred by his parents during his minority.

Makani argues that his parents gave him their right to recover past medical expenses incurred by them while he was a minor. Resp. Ans. Brf. at page 26, Lines 3-6. However, Makani's parents' right to recover past medical expenses incurred on his behalf expired on May 21, 2006, or two years from the date of the accident. NRS 11.190(4)(e); Petersen v. Bruen, 106 Nev. 271, 281 (1990). Thus, any right that they may have had to recover past medical expenses expired more than six years prior to the filing of Makani's September 21, 2012, Complaint. McGarvey v. Smith's Food and Drug Centers, Inc., 2011 U.S.Dist. LEXIS 52184 (D.Nev. 2001) [holding that minor cannot recover past medical expenses where parents' claim is barred by the statute of limitations].

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Thus, even if the assignment of his parents' chose in action[5] was legally permissible, it expired by operation of law and was no longer enforceable long before the filing of Makani's Complaint.

Nor does Makani's argument that "he was still treating" [Resp. Ans. Brf., at page 26, Lines 13-16], serve to extend the statute of limitations respecting his parents' right to collect past medical expenses. McGarvey, *supra*; Peterson, *supra*; NRS 11.190(4)(e).

The truth is, Makani was *not* still treating at the time he filed his September 21, 2012, Complaint. Makani did not undergo any treatment whatsoever for his injuries between 2007 and January of 2015. AA II-0227 [Depos. at page 47, Lines 9-14 (all of Makani's medical care for injuries resulting from the May 12, 2004, accident occurred between 2004 and 2007)]; AA II-0224-0225 [Depos. at pages 44-45, Lines 21-25, 1-2 (Makani sought no medical treatment at all for his injuries after he turned 18)]; AA II-0226-0227 [Depos. at pages 46-47, Lines 4-25; 1-5 (Makani last sought treatment in 2007)]; AA II-0227 [Depos. at page 47, Lines 19-24 (his ophthalmologist had not treated Makani since some time in 2004 or 2005)].

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[5] Gallegos v. Malco Enterprises of Nevada, Inc., 127 NAO 51, 255 P.3d 1287 (2011), citing Black's Law Dictionary 1617, 275 (9th Ed. 2009.)

Not only is it disingenuous for Makani to suggest that he was still treating, but the argument that such would justify an extension of the statute of limitations is contrary to established law. Id.

5. Makani was not entitled to recover future medical expenses.

Citing to Shere v. Davis, 95 Nev. 491, 493 (1979), Makani argues that he was entitled to recover damages for future medical expenses without having to present testimony from a medical provider "because CCSD's counsel did not provide evidence refuting the same." Resp. Ans. Brf. at page 27, Lines 9-11.

Nothing in this Court's decision in Shere suggests that a plaintiff may shift his burden of proving damages to the defendant by simply refusing to put on competent evidence thereof. A defendant is only required to meet the evidence presented by the plaintiff. Absent the introduction of competent evidence to support plaintiff's position, the defendant has no obligation to introduce any evidence at all. This proposition is so basic, so fundamental to our system of justice as to require no citation.

Furthermore, in Shere this Court said absolutely nothing that could be construed as permitting a Plaintiff to recover future medical expenses without introducing expert medical testimony. The Court did not even discuss future medical expenses in Shere, instead upholding the District Court's decision to grant a new trial because the award of stipulated *past* medical expenses was inadequate.

Makani also fails to mention the fact that in this case, the district court had previously entered a written order, specifically precluding the recovery of future medical expenses in this action. AA II-0491 [Order Granting in Part and Denying in Part Defendant's Motion to Strike Damages Calculation or, in the alternative, Motion in Limine, Hon. Richard Scotti, judge]. That order was the direct result of Makani's failure to provide a timely, competent damages summary itemizing future medical expenses. AA II-0285-0293 [District's motion].

Nor does Makani address the fact that, on January 21, 2015, Makani's doctor commented that he was "Doing well right now, denies any problems" and "He denies having any problems or concerns at this time." AA I-0179. Thus, whether Makani would require future medical treatment and the proximate cause of such treatment more than eight years after the last medical treatment were matters "outside the ken of ordinary laity" which should not have been submitted to the jury without supporting, competent medical testimony. Prabhu v. Levine, 112 Nev. 1538, 1547 (1996). The district court, respectfully, committed legal error when it submitted this issue to the jury to resolve. Wilson v. Biomat USA, Inc., 2011 U.S.Dist. LEXIS 126853 (D.Nev. 2011) [Court disallowing recovery for future medical expenses "because the expenses were not supported by sufficient and competent evidence and Plaintiff did not demonstrate that they were reasonably certain to be incurred."

CONCLUSION

Because Makani's claims were barred by primary implied assumption of the risk, the district court committed legal error by denying the District's NRCP 12(b)(5) motion to dismiss, the subsequent NRCP 56(b) motion for summary judgment, and by submitting this case to the jury under a general negligence theory. Even under a general negligence standard, Makani failed to demonstrate the existence of a substantial question of disputed material fact for submission to the jury. Thus, the district court abused its discretion when it denied the District's motion for summary judgment.

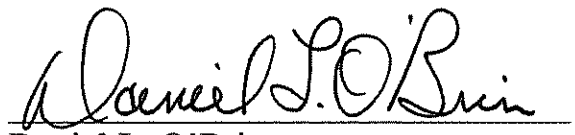
It is inconceivable that this Court would endorse micro-management of the decisions of the School District by a lay jury, who only knows that a child was injured and does not have to weigh such considerations as how to create an interesting and effective curriculum, where to find the money to pay for new and innovative programs, equipment and staff, and what weight to give the minimal risk of injury involved in a sport such as floor hockey.

Makani primarily argued, and continues to argue in his Respondent's Answering Brief, that he is entitled to recover because he was injured *and because his medical bills were so substantial.* Permitting Makani to tell the jury that he owed tens of thousands of dollars in past medical expenses, when the right to recover those expenses was legally foreclosed, invited an award based solely upon

sympathy. Permitting Makani to seek recovery of speculative future medical expenses, in derogation of a prior court order and where no competent medical expert demonstrated proximate cause or that, more than ten years after his last treatment, such was even necessary, encouraged even further a verdict based on passion and prejudice, rather than upon evidence.

This Court must, respectfully, vacate the judgment on the jury verdict entered in this case and direct the district court to enter judgment in favor of the District and against Makani. In the alternative, the award of past and future medical expenses is properly reversed, leaving only the past pain and suffering award intact.

Respectfully submitted this 18th day of April, 2016.



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COMBINED NRAP 28.2 AND NRAP 32 CERTIFICATE OF ATTORNEY AND CERTIFICATE OF COMPLIANCE

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

[X] This brief has been prepared in a proportionally spaced typeface using Word Document in Times New Roman 14 pt. font.

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

[X] The text of this appellant's reply brief does not exceed 7,000 words.

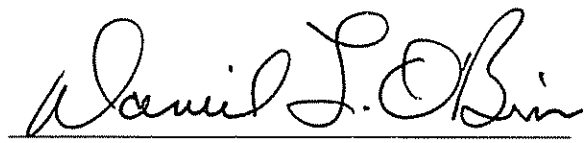
3. I hereby certify that I have read this Appellant's Reply Brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP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

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

Respectfully submitted, this 18th day of April, 2016.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **APPELLANT'S REPLY BRIEF** was initially filed electronically with the Nevada Supreme Court on the 15th day of April, 2016 and that this reformatted version was filed electronically on the 18th day of April, 2016. I further certify that on the same date, I served a copy of this document upon Respondent's counsel by depositing a true and correct copy hereof in the United States mail at Las Vegas, Nevada, postage fully prepaid, addressed as follows:

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