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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ELIZABETH NICKS, a minor, by and through her Guardian Ad Litem, GERRY NICKS, Plaintiff, v. PACIFIC COAST YOUTH FOOTBALL AND CHEERLEADING CONFERENCE, INC.; JAMZ AMERICAN SPIRITCONNECTION, INC.; PACIFIC COAST CONFERENCE, INC.; and DOES 1 to 100, Inclusive, Defendants.	CASE NO.: YC058864 (Case Assigned for All Purposes to Judge Dudley W. Gray II, Dept. "M") PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT; DECLARATION OF KIMBERLY ARCHIE; DECLARATION GERRY NICKS; DECLARATION OF LADDIE NICKS [Filed Concurrently with Plaintiff's Response to Defendants' Separate Statement of Undisputed Material Facts; and Plaintiffs' Additional Disputed/undisputed Facts] DATE: August 11, 2010 TIME: 8:30 a.m. DEPT: "M" TRIAL DATE: Sept. 14, 2010

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiffs will oppose defendants' Motion for Summary Judgment of at the time, place and date scheduled.

This opposition will be upon the grounds that:

1. The Release does not expressly apply to Redondo Beach Youth Football and Cheerleading Association.

2. The release language is not conspicuous, hidden in a section misleading labeled "PARENTS AUTHORIZATION TO PARTICIPATE."

3. The Release does not apply to gross negligence or recklessness.

4. Plaintiffs' expert concludes that defendants acted with gross negligence or recklessness.

5. The Release affords no defense because Elizabeth Nicks was injured because defendants acted with gross negligence and/or recklessness.

6. The risk of serious head injury under these circumstances is not inherent in cheerleading. Elizabeth Nicks did not assume increased risk of serious injury caused by defendants' grossly negligent and/or reckless conduct violating several fundamental rules regarding training for cheerleading.

7. Plaintiffs' expert concludes that defendants' conduct increased the risk of injury by grossly negligent and/or reckless conduct violating several fundamental rules regarding training for cheerleading .

8. The doctrine of primary assumption of risk affords no defense in this case.

9. Material issues of fact exist regarding the defendants' negligence and failure to comply with coaching standards. The jury will be determine liability in accordance with comparative negligence law.

10. Defendants have not otherwise shown as a matter of law that plaintiffs cannot establish liability at trial.

The opposition will be based upon this Memorandum of Points and Authorities, the attached Separate Statement, the Declaration of Kimberely Archie, Declaration of Gerry Nicks, Declaration of Laddie Nicks and on such other evidence as may be presented at the time of the hearing of this matter.

DATED: April 3, 2013 LAW OFFICES OF GARY A. DORDICK

By: _____
Gary A. Dordick, Esq.
David Azizi, Esq.
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Elizabeth Nicks sustained severe injury while training as a cheerleader under defendants direction. Defendants conduct was grossly negligent and/or reckless and violated several fundamental coaching standards. Defendants' conduct materially increased the risk of serious injury to cheerleaders such as Elizabeth. Summary judgment is inappropriate because liability and damages are based on comparative negligence law.

In the opinion of Plaintiffs' expert, Kimberely Archie, "Elizabeth Nicks did not assume increased risk of serious injury caused by defendants' grossly negligent and/or reckless conduct violating several fundamental rules regarding training for cheerleading. Prevention of head injuries will not restrict, curtail or inhibit cheerleading. In fact, under direct supervision of a qualified coach and appropriate conditions, cheerleading is a reasonable sport for kids and young adults." Archie Decl, para. 5.

As set forth in plaintiffs' additional disputed facts, Ms. Archie's declaration details numerous instances of gross negligence and/or reckless conduct which were extreme departures from customary care expected in these circumstances. Archie Decl., paras. 6-26. Inter alia, Defendants provided improper instructions, practiced on an unsafe surface, and disregarded Elizabeth's Sickle Cell stress, all of which increased the risk of injury.

Ms. Archie's concludes that "the training, supervision, and instructions provided by the defendants on and before August 30, 2007, constituted gross negligence and reckless misconduct which substantially increased the risk of injury to participants such as Elizabeth." Archie Decl., para 27.

Ms. Archie disagrees with Defendants' assertion "in paragraph three (3) of his declaration, Mr. Kirschner declares that "a half is a beginner stunt that can be performed by cheer participants as young as 10 years old". The stunt referred to a half is not a beginner stunt it is an intermediate stunt that requires minimum of fifteen (15) strength drills and stunt progressions that are pre-requisite before the half can be attempted. Also, age is not clearly defined as a criterion in attempting stunts. Cheer coaches rely on proper progression based on the skills of the athlete. In All Stars, children as young as five (5) years old can perform stunts as long as they have the skills required before attempting the half; while athletes as old as seventeen (17) may not be allowed without the mastery of less difficult skills." Archie, Decl., para 29.

Ms. Archie also disagrees with Defendants' assertion "Iin paragraph four (4) of his declaration, Mr. Kirschner declares that "the rear spotter grabs the ankles of the flyer once she is in the hang drill position. The base girls lift the flyer toward their chest height and as the flyer is lifted, she straightens her legs as to stand and erect in the stunt." However, according to the Spirit Rules adopted by the PCCYFC a back spotter must not put their torso under the stunt and the spotter must be in position to catch the flyer. If the back spotter was told to hold the ankles from the hang drill to the final position at chest level, the back spotter would no longer be in position to catch the flyer and would be placing her torso under the stunt making it impossible for the back spotter to catch Elizabeth. The instruction of holding the ankles during "hang drill" it is totally outside the range of ordinary activity involved in teaching or coaching cheerleading and constitutes gross negligence and reckless misconduct which substantially increases the risk of injury to participants." Archie Decl., para 30.

Finally, Ms. Archie disagrees with Defendants' assertion "In paragraph six (6) Mr. Kirschner refers to how a half is "performed by cheer participants at this age...." Mr. Kirschner states that "there are typically two bases, a flyer and hands on back spotter".

However, the Plaintiff's stunt group was ***learning*** a stunt not only new to Elizabeth Nicks but beyond her capability, not performing. While learning a "half", additional spotters are required until mastery is obtained for that skill. So any reference to performance would be inapplicable in this case." Archie Decl., para. 31.

The Release provides no defense in this case.

Contrary to defendants' motion, the Release does not expressly apply to Redondo Beach Youth Football and Cheerleading Association.

Additionally, the release language is not conspicuous, hidden in a section misleading labeled "PARENTS AUTHORIZATION TO PARTICIPATE."

Moreover, the Release does not apply to gross negligence or recklessness.

Plaintiffs' expert concludes that defendants conduct was an extreme departure from customary care expected in these circumstances acted and that defendants acted with gross negligence of recklessly. The Release affords no defense because Elizabeth Nicks was injured because defendants acted with gross negligence and/or recklessness.

The doctrine of primary assumption of risk provides no defense in this case.

The risk of head injury is not inherent in cheerleading. Elizabeth Nicks did not assume increased risk of serious injury caused by defendants' grossly negligent and/or reckless conduct violating several fundamental rules regarding training for cheerleading.

Plaintiffs' expert concludes that defendants' conduct was an extreme departure from customary care which increased the risk of injury by grossly negligent and/or reckless

conduct violating several fundamental rules regarding training for cheerleading.

Defendants have not otherwise shown as a matter of law that plaintiffs cannot establish liability at trial. Accordingly, the motion should be denied.

II.

DEFENDANTS HAVE NOT SATISFIED THE BURDEN FOR JUDGMENT

Summary judgment is not proper unless the moving party "would prevail at trial without submission of any issue of material fact to a trier of fact for determination," i.e., the moving party would be entitled to a nonsuit or directed verdict at trial. *Aguilar v. Atlantic-Richfield Co. (2001) 25 Cal.4th 826, 855*. "A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (*Code Civ. Proc, § 437c, subd. (c)*; see also id., *§ 437c, subd. (f)* [summary adjudication of issues].) The moving party bears the burden of showing the court that the plaintiff' has not established, and cannot reasonably expect to establish, a prima facie case ....' [Citation.]" *Miller v. Department of Corrections (2005) 36 Cal.4th 446, 460*.

"Summary judgment is a drastic measure that deprives the losing party of a trial on the merits. [Citation.] It should therefore be used with caution, so that it does not become a substitute for trial. [Citation.] The affidavits of the moving party should be strictly construed, and those of the opponent liberally construed. [Citation.] Any doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. [Citation.] A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiffs asserted causes of action can prevail. [Citation.] To succeed, the defendant must conclusively negate a necessary element of the plaintiffs case, and demonstrate that under no hypothesis is there a material issue of fact that requires the process of a trial." *Daniels v. Desimone (1993) 13 Cal. App. 4th 600,*

606-607.

As explained below, neither the Release nor doctrine of primary assumption of risk is a defense in this case.

Defendants have established no affirmative defense.

Defendants have not shown that plaintiffs cannot present a case at trial.

As set forth below defendant's liability for gross negligence and/or recklessness in coaching Elizabeth which increased the risk of injury to cheerleaders raises factual issues for jury determination under comparative negligence law.

III

SUMMARY ADJUDICATION UNAVAILABLE ON RELEASE

A. Release Strictly Construed

Perhaps a knowledgeable person could devine that "RBYFCA" was intended to refer to Redondo Beach Youth Football and Cheerleading Association, but nothing in one page "contract" plainly and expressly purports to release that organization by name from liability for damages. Nothing in the one page "contract" purports to release anyone from liability caused by gross negligence.

"However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Civil Code section 1648.

Courts will not isolate seemingly broad language from its context, and will observe the rule of strict construction when reading such agreements. *Celli v. Sport Car Club of*

America, Inc. *(1972) 29 Cal.App.3d 511, 519* ["[T]he language of the pit passes must be construed most strongly against defendants as a product of their own draftsmanship and "designed to whittle down the normal and ordinary rights of a customer."].

The release must be narrowly construed against both defendants.

B. Not Conspicuous

Reference to Redondo Beach Youth Football and Cheerleading Association is inconspicuous. Additionally, the release language is not conspicuous, hidden in a section misleading labeled "PARENTS AUTHORIZATION TO PARTICIPATE."

The language purportedly waiving any claim for injuries is buried under a misleading caption and fails the conspicuity test which requires that such language be conspicuously placed in a position which commands notice and must be distinguishable from other sections of the document. *Conservatorship of Link* *(1984) 158 Cal.App.3d 138, 142*; see also *Leon v. Family Fitness Center (#107), Inc.* *(1998) 61 Cal.App.4th 1227, 1234* [release clause not separate or conspicuous, dicta says might release exercise-related hazards but "no Family Fitness patron can be charged with realistically appreciating the risk of injury from simply reclining on a [defective] sauna bench."].

C. No Waiver Of Gross Negligence

Finally, the Release does not apply to gross negligence or recklessness.

Even assuming that the waiver agreement were applicable, "there can be no exemption from liability for intentional wrong, gross negligence, or violation of law." *1 Witkin, Summary of California Law (9th ed.), Contracts § 631, p. 569*.

Gross negligence has been defined as the "want of even scant care or an extreme departure from the ordinary standard of conduct." *Van Meter v. Bent Construction Co. (1956) 46 Cal.2d 588, 594*. Gross negligence falls short of a reckless disregard of consequences and differs from ordinary negligence only in degree and not in kind. *Gore v. Board of Medical Quality Assurance (1980) 110 Cal.App.3d 184, 197*.

Here, Kimberely Archie details the several ways in which defendants' grossly negligent and/or reckless conduct was a cause of Elizabeth's injury. "[T]he training, supervision, and instructions provided by the defendants on and before August 30, 2007, constituted gross negligence and reckless misconduct which substantially increased the risk of injury to participants such as Elizabeth." Archie Dec., para 27.

Summary judgment should be denied because the release agreements cannot exculpate defendants from their "extreme departure from the ordinary standard of conduct." The question of gross negligence creates a factual issue which precludes summary judgment. *Colich & Sons v. Pacific Bell (1988) 198 Cal.App.3d 1225, 1241* ["Whether there has been such a lack of care as to constitute gross negligence is generally a triable question of fact. [Citations.] We cannot rule out the possibility that [defendant's] behavior at the site was an extreme departure from the ordinary standard of conduct."].

Summary adjudication cannot be granted based upon the release.

As explained below, assumption of the risk is not applicable because defendants increased the risk of injury to Elizabeth by their gross negligence.

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IV.

NOT BARRED BY ASSUMPTION OF RISK

A. Defendants Owed A Greater Duty Of Care

Defendants had a duty to exercise reasonable care in coaching cheerleaders. *Civil Code §1714*. Indeed, California courts have recognized that in dealing with a minor youth, defendants must exercise greater caution than in dealing with an adult. *Schwartz v. Helms Bakery Limited (1967) 67 Cal.2d 232, 240*; *Calandri v. Ione Unified School Dist. (1963) 219 Cal.App.2d 542, 547, fn 4; CACI 412*.

The duty extends even to minor children approaching adult years. *Satariano v. Sleight (1942) 54 Cal.App.2d 278* ["[E]ven boys of seventeen and eighteen years ... are not accustomed to exercise the same amount of care for their own safety as persons of more mature years."].

Defendants had a duty to exercise due care under the circumstances.

Defendants's conduct increased the risk of injury to Elizabeth. The jury must be allowed to consider defendants' liability under comparative negligence law.

B. Not Barred By Assumption of Risk

The doctrine of primary assumption of the risk is not applicable to these facts.

First, defendant's citation of *Aaris v. Las Virgenes (1998) 64 Cal.App.4th 1112* [MSJ, p. 6] is misleading. In *Aaris* one cheerleader was launched into the air, wobbled, and fell on Aaris, injuring plaintiff's leg. The appellate court noted that "Whenever gravity is at play with the human body, the risk of injury is inherent. While an appellate court has the power to change the law, we cannot change the law of gravity." *64*

Cal.App.4th at 1114-1115. Summary judgment was appropriate in Aaris because, unlike the present case, "The record shows that Coach McGrew did not increase the risk of harm inherent in the gymnastic stunt. The cheerleaders were told to practice and develop their technique. There was no evidence that Coach McGrew took the team beyond its level of experience and capability and the action is barred by the doctrine of primary assumption of the risk." *64 Cal.App.4th at 1118*.

Here, of course, Kimberely Archie details numerous acts of gross negligence and recklessness which did materially increase the risk of injury to Elizabeth.

"The coach drastically increased the risk of injury far beyond normal risk by directing the back spotter to hold Elizabeth's ankles and not her waist. This was, in effect, almost like tripping her or tying her shoe laces together, preventing Elizabeth from being able to self-correct because the back spotter was underneath Elizabeth still holding onto her ankles along with the bases. A pendulum effect was created swinging Elizabeth head into the Astroturf. [Cushinberry Depo., 213:1-25;214:1-25;215:1-25;126:1-24] Elizabeth's safety net was completely taken out from underneath her causing exactly the type of injury the spotter was intended to protect against and essentially creating a situation where the maneuver was made much more dangerous and with no effective spotter. The back spotter in the proper position ready to catch is the only thing between a flyer and the hard ground. Coach Cushinberry's conduct was an extreme departure from ordinary care." Archie Decl., para. 14.

Summary judgment should be denied because this case is all about defendants' gross negligence and recklessness which increased the risk of injury to Elizabeth.

Second, imposition of a duty is consistent with *Knight v. Jewett (1993) 3 Cal.4th 296, 317*, where the court noted that "...the scope of the legal duty owed by a defendant

frequently will ... depend on the defendant's role in, or relationship to, the sport."

Elizabeth was a minor under defendants' supervision which imposed a duty of care because of the vastly different levels knowledge and control between Elizabeth and defendants. Cf. *Galardi v. Seahorse Riding Club (1993) 16 Cal.App.4th 817* [duty owed by coach to refrain from raising jumps beyond rider's experience absent warning]; *Tan v. Goddard (1993) 13 Cal.App.4th 1528* [inexperienced rider on lame horse]; *Wattenbarger v. Cincinnati Red, Inc. (1994) 28 Cal.App.4th 746* [duty owed to young pitcher to refrain from instruction to continue pitching at tryout despite report of arm pain].

Defendants' violation of fundamental cheerleading precepts increased the risk of injury to participants. This is not a case of injuries flowing from obvious risks associated with cheerleading. "Sound administrative decisions, proper teaching progression, proper spotting, adequate supervision and constant vigilance specific to the welfare of the participants are key components to insuring a reasonably safe sport. Defendants failed in these tasks miserably and acted grossly negligent and/or recklessly." Archie Decl., para 16.

Finally, defendants generally have a duty "to use due care not to increase the risks to a participant over and above those inherent in the sport." *Knight v. Jewett (1993) 3 Cal.4th 296, 316*. Assumption of risk has no application here because defendants unilaterally increased the risk of injury to Elizabeth. *Von Beltz v. Stuntman (1989) 207 Cal.App.3d 1467, 1478-1480* [summary judgment reversed where nature of a movie stunt had been altered without the stuntperson's knowledge, thereby increasing the risk of harm.].

Defendants' citation of *Lupash v. City of Seal Beach (1999) 75 Cal.App.4th 1428*, is inapposite. Lupash involved a concealed natural underwater hazard and acknowledges that "coaches and sports instructors ... owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.'"

Defendants conduct was reckless and increased the risk of injury. Assumption of the risk is not available where a trier of fact can find that each defendant's conduct affirmatively increased the risks inherent in a sport. Cf. *Morgan v. Fuji Country USA, Inc. (1995) 34 Cal.App.4th 127* [design of golf course increased risk of being struck by golf balls]; *Branco v. Kearny Moto Park, Inc. (1995) 37 Cal.App.4th 184, 193* [motocross operator owed duty to bicycle racer not to design jumps in such a way to create an extreme risk of injury, such dangerously designed jumps are not inherently required in the sport]; *Solis v. Kirkwood Resort Co. (2001) 94 Cal.App.4th 354, 364* ["a resort cannot increase the risks associated with skiing without incurring a duty of care toward its patrons."]; *Huffman v. City of Poway (2000) 84 Cal.App.4th 975* [assumption of risk did not apply to actor injured falling through trapdoor on stage because there was evidence defendants increased risk beyond those inherent in using open trapdoor on stage]; *Saffro v. Elite Racing, Inc. (2002) 98 Cal. App. 4th 173, 175* ["In this case we conclude that the organizer of a marathon has a duty to produce a reasonably safe event."].

Defendants' conduct significantly increased the normal risk of injury to Elizabeth and other participants. Ms. Archie's concludes that "the training, supervision, and instructions provided by the defendants on and before August 30, 2007, constituted gross negligence and reckless misconduct which substantially increased the risk of injury to participants such as Elizabeth." Archie Decl., para 27.

Defendants' liability will be judged under the standards of comparative fault applicable to minors. *Wattenbarger v. Cincinnati Red, Inc. (1994) 28 Cal.App.4th 746, 751*; *Knight v. Jewett (1993) 3 Cal.4th 296, 314 -315*.

The evidence in this case, when viewed in the light most favorable to plaintiffs, establishes that defendants acted grossly negligent and/or recklessly in coaching Elizabeth. Defendants have not shown that a jury could not conclude that their conduct increased the risks of injuries to participants such as Elizabeth.

V.

CONCLUSION

The release is not a defense in this case. The motion should be denied because the defendants' reckless conduct increased the risk of injury to cheerleaders.

Defendants have not negated every possible basis of liability alleged in the complaint. Any doubts as to the propriety of granting such motion must be resolved against the moving party. "Only when the inferences are indisputable may the court decide the issues as a matter of law. If the evidence is in conflict, the factual issues must be resolved by trial. 'Any doubts about the propriety of summary judgment . . . are generally resolved against granting the motion, because that allows the future development of the case and avoids errors.'" *Binder v. Aetna Life Ins. Co. (1999) 75 Cal.App.4th 832, 839*.

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The factual issues of this case cannot properly be decided on summary judgment. For all the above reasons, it is respectfully submitted that the motion should be denied.

DATED: April 3, 2013 LAW OFFICES OF GARY A. DORDICK

By: _____
Gary A. Dordick, Esq.
David Azizi, Esq.
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