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### Clark Cty. Sch. Dist. v. Payo, 133 Nev. Adv. Op. 79 (Oct. 26, 2017)

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TORTS: IMPLIED ASSUMPTION OF THE RISK AND  
DISCRETIONARY-FUNCTION IMMUNITY

**Summary**

Implied assumption of the risk does not apply when a student is required to participate in a physical education class because the doctrine’s “voluntariness” element is not satisfied. Discretionary-function immunity does not apply when cases allege inadequate supervision or instruction because such decisions, while discretionary, are not policy-based, as the discretionary-immunity test requires. Decisions are not entitled to discretionary-function immunity unless they entail governmental planning or policy formulation, which involves economic, social, and political considerations.

**Background**

Makani Kai Payo attended a middle school located within appellant Clark County School District (CCSD). In 2004, Payo sustained an eye injury while participating in a floor hockey game during his mandatory physical education class. The jury’s negligence verdict awarded Payo past and future medical damages.

**Discussion**

The Court considers an appeal of a final judgment in a tort action. The Nevada Supreme Court reviewed *de novo* whether the doctrines of implied assumption of risk, and discretionary-function immunity barred a negligence claim, and whether the evidence supported the jury’s finding of proximate cause.

*Implied assumption of the risk doctrine*

Implied assumption of the risk requires “(1) voluntary exposure to danger, and (2) actual knowledge of the risk assumed.”<sup>2</sup> Payo’s participation in the floor hockey game was not “purely voluntary” because NRS 389.018(3)(d) mandates physical education in public schools.<sup>3</sup> Payo was participating in the floor hockey game as part of the required physical education class when the injury occurred. Accordingly, the required “voluntariness” element was not satisfied, and the implied assumption of the risk doctrine was inapplicable. Therefore, the Court concluded that the doctrine of implied assumption of the risk did not bar the negligence claim.

*Discretionary-function-immunity doctrine*

The Nevada Supreme Court had not addressed whether discretionary-function immunity applied to P.E. teachers when an injured student alleged negligent supervision and instruction

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<sup>1</sup> By Alma Orozco.

<sup>2</sup> *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 71, 358 P.2d 892, 894 (1961).

<sup>3</sup> NEV. REV. STAT. § 389.018(3)(d).

during P.E. class. Under NRS 41.032, discretionary-function immunity applies, and a government defendant is not liable for negligent decisions, if the decision (1) involves an “element of individual judgment or choice,” and (2) is based on social, economic, or political policy considerations.<sup>4</sup> To determine whether discretionary-function immunity applies to the government defendant, the Court (1) considers the facts of the case; (2) recognizes that Nevada’s sovereign immunity waiver applies broadly and exceptions are strictly construed; and (3) considers the purpose of the exceptions, which is to “prevent judicial ‘second guessing’ of legislative and administrative decisions grounded in social, economic and political policy.”

In its analysis, the Court considered other courts’ decisions.<sup>5</sup> The Court agreed with decisions determining that discretionary-function does not apply where inadequate supervision or instruction is alleged because such decisions, although discretionary, are not policy based. Hence, such decisions do not meet the second part of the discretionary immunity test.<sup>6</sup> Decisions are not entitled to discretionary-function immunity unless they entail governmental planning or policy formulation, which involves economic, social, and political considerations.

Discretionary-function immunity does not apply to all CCSD’s discretionary decisions. The decisions to (1) allow more players on the floor than the rules indicated; (2) play with a different type of ball than the type detailed in the rules; and (3) to supervise the P.E. class the way it did, although discretionary, were not based on policy considerations to which immunity would apply. These decisions did not involve any economic, social, and political considerations. Accordingly, discretionary-function immunity does not bar Payo’s claims regarding CCSD’s use of a different type of ball, and allowing more players on the floor, as detailed in the rules.

Discretionary-function immunity applies to Payo’s other claims. CCSD’s decisions to add floor hockey to the P.E. class curriculum, and to not provide students with safety equipment were discretionary, and policy based decisions. CCSD decided to add floor hockey to the curriculum and decided not to provide students with safety equipment because of budgetary considerations. As such, the decisions satisfy the discretionary-function immunity two-prong test. Therefore, discretionary-function immunity bars Payo’s claim regarding CCSD’s negligence in adding floor hockey to the P.E. curriculum, and the decision to exclude safety equipment because they were policy based decisions.

### *Proximate cause*

Next, the Court considered the sufficiency of evidence to support the jury’s finding that any conduct on behalf of CCSD was the proximate cause of Payo’s injuries because not all Payo’s claims were barred. The court must assume that the jury “believed all the evidence favorable to Payo and drew all reasonable inferences in his favor” to determine whether the jury’s finding that CCSD was negligent was supported by substantial evidence. The Court will only overturn the jury’s verdict if there is no substantial evidence, which a reasonable mind might deem adequate to support a conclusion. The court will not uphold a verdict where the plaintiff cannot recover as a matter of law.

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<sup>4</sup> *Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007); NEV. REV. STAT. § 41.032 (2017).

<sup>5</sup> *See Mosely v. Dayton City Sch. Dist.*, Case No. 11336, 1989 Ohio App. LEXIS 2695 (Ct. App. July 6, 1989); *Sutphen v. Benthian*, 165 N.J. Super. 79, 397 A.2d 709 (Super. Ct. App. Div. 1979); *Gonzalez v. Univ. Sys. of N.H.*, No. 451217, 2005 Conn. Super. LEXIS 288 (Super. Ct. Jan. 28, 2005).

<sup>6</sup> *Id.* at 11; *Sutphen v. Benthian*, 165 N.J. Super. 79, 397 A.2d 709 (Super. Ct. App. Div. 1979).

A negligence claim requires, the plaintiff to prove: (1) a duty of care exists, (2) breach of that duty, (3) legal causation, and (4) damages. Legal causation requires a showing of actual cause and proximate cause. Proximate cause is any cause producing the injury, which in natural foreseeable and continuous sequence is unbroken by any efficient intervening cause, without which the result would not have occurred.

Payo's negligence claim against CCSD's was based on CCSD's use of a different type of ball, allowing additional players on the floor, and the P.E. teacher's lack of game instruction. Payo failed to provide evidence that the type of ball used caused his injuries, and failed to offer evidence indicating how the large teams contributed to his injuries. Further, Payo failed to offer evidence or expert testimony showing that the lack of safety equipment caused his injuries. Payo testified he didn't know of anything that the teacher did to cause or contribute to his injuries. Payo also could not say "whether additional or different measures could have prevented his injury." Accordingly, the Court concluded that the jury could not have found CCSD's conduct was the proximate cause of Payo's eye injury, or "reached its negligence verdict on any fair interpretation of the evidence." Therefore, the verdict was overturned.

### **Conclusion**

The respondent's claims failed and the Court reversed the judgment against CCSD. The Court held the legal doctrine of implied assumption of risk did not apply in this case, and the discretionary-function immunity doctrine did not bar a negligence claim alleging inadequate instruction and supervision because such discretionary decisions were not policy based. Further, Payo failed to provide sufficient evidence supporting the jury's finding of proximate cause.