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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE, SOUTHWEST JUSTICE CENTER

SABRINA PIERCE, individually and as Successor-in-Interest to Decedent ALEX PIERCE and RODRIQUEZ PIERCE, individually,

Plaintiffs,

v.

MURRIETA VALLEY UNIFIED SCHOOL DISTRICT and DOES 1 through 50, inclusive,

Defendants.

MURRIETA VALLEY UNIFIED SCHOOL DISTRICT, a public entity,

Cross-Complainant,

v.

DOROTHY McELHINNEY MIDDLE SCHOOL BAND BOOSTERS, and ROES 1 through 50 inclusive,

Cross-Defendants

Case No. MCC1600824
[Assigned for all purposes to Hon. Angel M. Bermudez, Dept: S302]

PLAINTIFFS' OPPOSITION TO DEFENDANT KEITH GOOD'S MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY SUMMARY ADJUDICATION

[*Filed concurrently with Plaintiffs' Separate Statement of Undisputed Material Facts, Plaintiffs' Evidence in Support of Opposition, Plaintiffs' Objections to Defendants' Evidence & Declaration of Robert Glassman In Support of Sanctions*]

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Trial Date: June 8, 2018

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On June 3, 2016, 13-year-old Alex Pierce slowly and in clear sight drowned to death while Defendant Keith Good and a number of student lifeguards he trained and selected to work at a Murrieta Valley Unified School District ("MVUSD") pool party sat idly by and did nothing. What makes Alex's drowning even more tragic is that the only reason Mr. Good, who is a certified lifeguard and lifeguard instructor and the school's head swim and dive coach, failed to aid in the rescue of Alex was because of his own perceived delusional misconception that he was not "*on the clock*" and that his insurance would not cover him getting involved. The evidence in this case, however, completely contradicts Mr. Good's self-serving proclamations and litigation tactics, including multiple MVUSD staff members and students who state Mr. Good was on duty at the pool when Alex drowned.

Shocking video taken from surveillance footage highlights the countless missed opportunities by Good and his lifeguards to bring Alex out of the pool without harm. Rather than pulling Alex out of the pool and saving his life, the lifeguards kept Alex floating on the surface of the pool and failed to perform life-saving measures, including CPR. Alex was without oxygen for approximately nine minutes before the paramedics arrived on scene and started rescue breathing immediately.

When Mr. Good was later questioned by the authorities about how this tragedy happened, he gave evasive answers and acknowledged that he made no efforts at all to rescue Alex. Detective Danny Martin from the Murrieta Police Department testified that he believed Mr. Good was not being honest about his involvement in the incident and was misrepresenting the truth and facts surrounding Alex's drowning. When Officer Brent Sforzini asked Mr. Good if he was in charge of the lifeguards, Mr. Good callously responded: "*This was a district function, I don't want to be sued.*"

Perhaps what is even more startling is that shortly after Alex was taken from the pool while he was fighting for his life at the hospital, Mr. Good only had one thing on his mind—getting his backboard returned to him that was used to float Alex around in the pool by the lifeguards and that

was underneath Alex's body when the paramedics transported him to the ER. Indeed, one MVUSD staff member sent a text to the assistant principal at the school stating: "*OMFG Keith Good is concerned about getting his board back! WTF?? Who cares right now.*" He even went so far to have the junior varsity swim coach call multiple hospitals Alex was taken to asking if they had his board and that he wanted it back. For Mr. Good to now argue that he had no involvement in this tragedy is beyond absurd.

Alex's parents subsequently filed this wrongful death lawsuit against MVUSD and Mr. Good alleging negligence and negligent hiring, retention, supervision and training. Now before the court is yet another completely misguided and frivolous motion filed by Mr. Good[1]. In this Motion, much like his last one, rather than take responsibility or show remorse for the drowning death of young Alex, Mr. Good argues that he had no duty to rescue Alex and that Plaintiffs' claim for negligent hiring, retention, supervision and training lacks merit. Mr. Good is both legally and factually wrong.

As will be discussed in more detail below, Defendant Good's Motion must be denied because the primary assumption of risk doctrine does not apply to children's recreational swimming parties, Defendant Good owed Alex a duty of care based on the special relationship he had with Alex as a school district employee at a school district event and Defendant Good is not immune from liability. Because numerous triable issues of material fact exist, Defendant's Motion must be denied.

II. STATEMENT OF FACTS

A. The Pool Party on June 3, 2016

On the evening of June 3, 2016, the music department students at Dorothy McElhinney Middle School had an end-of-the-year party. (UMF[2] 1). The party took place at the swimming pool at Vista Murrieta High School. (UMF 2). The party was scheduled to start at 5:00 p.m. and end at 7:30 p.m.

[1] On September 25, 2017, this Court denied defendant Keith Good's Special Motion to Strike pursuant to Code of Civil Procedure Section 425.16 and awarded sanctions to the Plaintiffs for bringing the frivolous motion.

[2] Plaintiffs' Undisputed Material Fact

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(UMF 3). Seventh grader Alex Pierce was one of the middle school students who attended the party. (UMF 4).

B. Keith Good Trained, Selected and Assigned MVUSD Student Lifeguards

At the time of the party, Keith Good was the head swim and dive coach at Vista Murrieta High School and the faculty advisor for the lifeguarding club. (UMF 5). Mr. Good oversees the entire swim program at the high school. (UMF 6). Mr. Good was a certified lifeguard and lifeguard instructor at that time too. (UMF 7). At his deposition, he testified that he has a better understanding of lifeguarding than most people, including all of his student lifeguards on duty when Alex drowned. (UMF 8).

In anticipation of the June 3, 2016 end of year pool party at Vista Murrieta High School, a MVUSD administrator requested information from Mr. Good regarding how many lifeguards needed to be present and how to secure them for the event. (UMF 9). Between April and May of 2016, Defendant Good engaged in email correspondences with MVUSD employee Denise Umphress confirming he would assign and secure the lifeguards for the pool party. (UMF 10).

The student lifeguards who were on duty at the time of Alex's drowning also confirmed that Mr. Good specifically selected and hired them to work at this party. (UMF 11). Mr. Good also trained each of these lifeguards. (UMF 12).

C. Keith Good Was On Duty Supervising The Children and MVUSD Lifeguards

Keith Good was on duty at the party and was there at the time Alex drowned. (UMF 13). According to MVUSD student lifeguards Michael Parris and Andrew Romero, Keith Good was working at the party and was there to supervise and oversee them like he would always do. (UMF 14).

Linda Gordon is employed by Murrieta Valley Unified School District and is the band director at Dorothy McElhinney Middle School. (UMF 15). Ms. Gordon also personally observed Coach Good controlling, overseeing and supervising the children and lifeguards from the time she arrived at the party until it ended. (UMF 16). Later following the incident, when Murrieta Police Department Officer Brent Sforzini asked Mr. Good if he was overall in charge of the lifeguards, Mr. Good responded: "*This was a district function, I don't want to be sued.*" (UMF 17).

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D. Mr. Good and the MVUSD Student Lifeguards Did Not Rescue Alex From The Bottom Of The Pool

Despite Mr. Good and several of his lifeguards being at the pool, none of them attempted to assist Alex when he began struggling to stay above the water. (UMF 18). And when he went under, none of them rescued Alex from the bottom of the pool. (UMF 19). Two of Alex's middle school classmates had to pull him up from the bottom of the pool. (UMF 20). No lifeguards or adults helped these children pull Alex up from the bottom of the pool. (UMF 21).

Mr. Good admits that the lifeguards who he trained at the party allowed Alex Pierce to drown and die. (UMF 22). Accordingly, Mr. Good no longer wants the responsibility of having his lifeguards put another person's life at risk. (UMF 23).

E. MVUSD Student Lifeguards Used Keith Good's Backboard to Float Alex

Once Alex was brought back to the surface, two of the student lifeguards, Hailey Stephenson and Michal Parris, took him and placed him onto a floating backboard in the pool. (UMF 24). They floated him around the pool on the backboard for approximately seven minutes before the paramedics arrived. (UMF 25).

When the paramedics arrived, they removed Alex from the pool and placed him on the deck with the backboard underneath him. (UMF 26). After administering CPR, the paramedics transported Alex and the backboard to the ambulance. (UMF 27).

Shortly after Alex was taken to the hospital, Defendant Good was focused on getting his backboard returned and sought the assistance of MVUSD employee Kara Finch who was at the pool party. (UMF 28). Ms. Finch relayed Mr. Good's concerns to the assistant principal Heather Just, both of whom were appalled. (UMF 29). According to Ms. Finch, Alex was already under the care of the paramedics and fighting for his life when Mr. Good asked her to get his board back. (UMF 30). Murrieta's principal also testified that Mr. Good was concerned about his backboard but not Alex or his family. (UMF 31).

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F. Mr. Good and The MVUSD Student Lifeguards Did Not Perform CPR On Alex At Any Time

Despite Defendant Good knowing the importance of immediately engaging in rescue breathing and performing CPR when a victim is not breathing, neither he nor his lifeguards implemented such procedures at the time of Alex's rescue. (UMF 32). Despite Alex not breathing, no one at the pool from the school, including Mr. Good, performed CPR on Alex. (UMF 33).

G. Mr. Good and the MVUSD Student Lifeguards Did Not Remove Alex From The Pool After He Drowned

According to the lead detective for the Murrieta Police Department, Sergeant Jeremy Durrant, there were no efforts by any of the lifeguards to even remove Alex from the pool after he drowned. (UMF 34). Sgt. Durrant testified that he would have "brought Alex out of the pool immediately upon bringing him to the surface…[t]o start CPR to start getting him breathing again." (UMF 35). Indeed, removing Alex from the pool and starting CPR is exactly what the firefighter paramedic Chris Brann did as soon as he arrived on the scene. (UMF 36).

Based on his investigation, Sgt. Durrant concluded that Alex was not breathing when he was brought back up to the surface by his classmates and thus "bringing him out of the pool and starting CPR was obviously the best—the best way to go." (UMF 37).

Mr. Good did not attempt to rescue Alex because he claimed he was not "on the clock" and was concerned his insurance would not cover him. (UMF 38). He also testified that he did not attempt to rescue Alex because he did not want to interfere with the student lifeguard who was floating Alex around in the pool. (UMF 39).

H. Mr. Good And The MVUSD Lifeguards Performed A Negligent Rescue Of Alex

Chris Brann, a firefighter paramedic with the City of Murrieta Fire & Rescue, upon arrival at the scene noted in his report and confirmed in deposition testimony that Mr. Good was "*standing and doing nothing*." (UMF 40). Mr. Brann further testified that the lifeguards "*misevaluated the treatment that was necessary*" and believes that "*inappropriate care was being done*." (UMF 41). The Murrieta

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Police Department determined that: (1) an insufficient number of lifeguards were patrolling the pool; (2) the lifeguards were operating without appropriate supervision; (3) they were all teenagers with minimal experience; (4) the lifeguards had no experience with high stress emergency situations and (5) none of the lifeguards had performed any real world rescues. (UMF 42).

I. Alex Was Without Oxygen For Approximately Nine Minutes And Was Pronounced Dead on July 7, 2016

Alex was underwater for approximately two minutes. (UMF 43). When his classmates brought him back to the surface, the lifeguards then floated him around in the pool for another seven minutes. (UMF 44). During this time, Alex was not breathing and his chest was not moving up and down. (UMF 45). Accordingly, Alex was without oxygen for approximately nine minutes. (UMF 46). The principal at Vista Murrieta High School, Mick Wager, testified that Alex was without air for "a long time, for a concerning amount of time." (UMF 47).

Dr. Matt Brewer, the attending ER physician at Inland Valley Medical Center, indicated that had lifesaving efforts, such as CPR, been taken immediately upon bringing Alex up to the surface of the water, there was a greater likelihood that Alex would have survived. (UMF 48).

Alex was pronounced dead on July 7, 2016 at the Naval Medical Center in San Diego. (UMF 49).

J. The Murrieta Police Department Questioned Mr. Good's Truthfulness

On the evening of June 3, 2016, Murrieta Police Department Officer Brent Sforzini interviewed Keith Good at the pool after Alex drowned. (UMF 50). Officer Sforzini testified that Mr. Good failed to provide straightforward answers to basic questions during the interview. (UMF 51). It was also reported that Mr. Good was being evasive with the officer. (UMF 52).

Detective Danny Martin also investigated Alex Pierce's drowning. (UMF 53) Detective Martin determined that Mr. Good was not being honest about his involvement in the incident. (UMF 54). Detective Martin found Mr. Good to be overstating and misrepresenting the truth and facts

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surrounding Alex's drowning. (UMF 55).

Following the incident, the principal of Vista Murrieta advised Mr. Good that he should seek legal counsel. (UMF 56).

K. The Lifeguarding Club Was Not Reinstated After Alex's Drowning

After Alex's drowning, Vista Murrieta put a moratorium on using the swimming pool. (UMF 57). Further, the principal, Mick Wager, was concerned the lifeguards did not have the proper training at the time of Alex's drowning and refused to approve the lifeguarding club's application to remain an active club on campus with Good as its advisor. (UMF 58).

Mr. Good is no longer qualified to be a lifeguard instructor. (UMF 59). He is also no longer a certified lifeguard. (UMF 60).

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

This Court's sole function on a motion for summary judgment is issue-finding, not issue determination. Pursuant to California Code of Civil Procedure section 437c, summary judgment cannot be granted where there is a triable issue as to any material fact. *Black v. Sullivan* (1975) 48 Cal.App.3d 557, 567. If this Court finds a single triable issue of any material fact, the motion must be denied. *Versa Technologies, Inc. v. Superior Court* (1978) 78 Cal.App.3d 237, 240. In making that determination, the moving party's evidence must be strictly construed while the opposing party's evidence must be liberally construed. *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618 [On a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party].) "Any doubts about the propriety of granting a summary judgment motion must be resolved in favor of the party opposing the motion." *Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 304.

In order to prevail on a motion for summary judgment, the moving party must show that there is no possible hypothesis of a material question of fact which requires examination by trial. *Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548. A moving party, moreover, does not satisfy his or her burden by simply claiming plaintiff cannot prove all the elements of his case, and challenging plaintiff to prove his case by opposition. *Y.K.A. Industries, Inc. v. Redevelopment Agency*

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of City of San Jose (2009) 174 Cal.App.4th 339, 353. The burden does not shift to the plaintiffs unless and until defendant makes a showing, based upon affirmative evidence, that summary judgment must be granted. (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal. 4th 826, 850.) Despite the shifting burdens of production, the defendant, as the moving party, always bears the ultimate burden of persuasion as to whether summary judgment is warranted. (*Ibid*.) In the present case, as discussed in more detail below, Defendants do not meet this considerable burden, and their Motion must be denied. This is particularly true in light of the fact that the burden here rests on the Defendants to establish the defense of assumption of the risk by a preponderance of the evidence. *Pittman v. Pedro Petroleum Corp.* (1974) 42 Cal.App.3d 859, 863.

A defendant seeking summary judgment on the basis of primary assumption of the risk must establish "that the defendant owed no legal duty to prevent the harm of which the Plaintiff complains." *Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1395. Defendant Good has not done so.

Since Defendant cannot, and did not, show that he is entitled to summary judgment as a matter of law, Plaintiffs are entitled to present evidence at the time of trial that Defendant Good is responsible for Plaintiffs' damages.

IV. DEFENDANT GOOD OWED A DUTY OF CARE TO ALEX PIERCE

In California, each person has a general duty to use ordinary care to avoid injury to others, and is liable for injuries caused by his failure to exercise reasonable care in the circumstances. *Capri v. L.A. Fitness Intern., LLC* (2006) 136 Cal.App.4th 1078, 1087.

This general duty of care indisputably applies to Defendant Good and his overseeing of the end of year pool party at Vista Murrieta High School. Defendant Good erroneously contends he owed Alex no duty of care because his tragic death was an inherent risk in the swimming party. Defendant Good's contention fails because: (1) the primary assumption of risk doctrine does not apply to recreational swimming activities; and (2) even if the primary assumption of risk doctrine was applicable to the instant case, there are genuine questions of material fact as to whether Defendant Good increased any risks inherent in recreational swimming activities.

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L. The Primary Assumption Of Risk Doctrine Does Not Apply To A Children's Recreational Swimming Party

Defendant Good erroneously contends that drowning is an inherent risk associated with end of year pool parties and thus under the doctrine of primary assumption of risk he had no duty of general care to prevent Alex Pierce's tragic drowning and death. The primary assumption of risk doctrine refuses to impose a duty to mitigate or eliminate inherent dangers of a sport or activity when doing so could discourage vigorous participation or threaten the activity's very existence and nature. *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1161.

The primary assumption of risk doctrine involves injury-causing conduct by a defendant who, because of the setting and the relationship of the parties, owes no legal duty to protect a plaintiff against ordinary negligence. *Knight v. Jewett* (1992) 3 Cal.4th 296. The question of whether a defendant owes a legal duty to protect a plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather the nature of the activity or sport and the relationship of the defendant and the plaintiff to that activity or sport. *Id* at 309. In the context of active sport co-participants, for example, this means that a defendant generally has no duty to eliminate, or protect a plaintiff against, ordinary careless conduct considered to be part of the sport. *Id* at 315-16. In the context of a coach/instructor there is no liability on a coach or instructor on the basis of ordinary negligence in urging students to go beyond their current level of competence. *Kahn v. East Side union High School Dist.* (2003) 31 Cal.4th 990, 1009.

In evaluating applicability of the primary assumption of risk doctrine, courts look at the fundamental nature of the activity. Primary assumption of the risk generally applies to non-sports activities that are "done for enjoyment or thrill, requires physical exertion **as well as elements of skill**, and involves a challenge containing a potential risk of injury." *Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1221 (internal quotations omitted)(emphasis added). No California court or case law has applied the primary assumption of the risk doctrine to the recreational swimming of children. Application of the primary assumption of the risk doctrine in such a manner would make moot every provision in the California Health and Safety Code designed to make pools safe, including those provisions intended to reduce the risk of drowning.

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The object to be served by the doctrine of primary assumption of risk is to avoid recognizing a duty of care when to do so would alter the nature of an active sport or chill vigorous participation in the activity. *Kahn*, 31 Cal.4th at 1011. Imposing a duty on overseers of a children's pool party to keep a watchful eye on participants would not chill vigorous participation in recreational swimming parties.

Defendant Good cites to *Kahn v. East Side Union* and *Capri v. L.A. Fitness International* to support the assertion that drowning is one of the inherent risks in the "sport of swimming." Defendant Good's reliance on those cases is misplaced for several reasons. First in both cases the court found the doctrine did not apply to preclude liability. In *Kahn*, the court found a swim coach was negligent for forcing one of his athletes to dive in shallow water when she had not been properly trained to do so. The *Kahn* case is particularly distinguishable from the instant case because the plaintiff was part of a competitive swim team as opposed to participating in a recreational end of the year swimming party.

In *Capri*, the court refused to enforce an exculpatory provision of a release agreement when the pool had allowed algae to grow along the walking surface surrounding the pool. There is no dispute that neither Alex nor his parents executed a release of liability waiver in this case, as the plaintiff in the *Capri* case had. Neither the *Khan* nor the *Capri* courts refused to impose liability upon the defendants by applying the primary assumption of the risk doctrine and the doctrine should not be applied to these facts.

Furthermore, the court in both cases analyzed the inherent risks of the "sport of swimming" as opposed to risks inherent in "recreational swimming." The term swimming incorporates a wide variety of activity and the inherent risks associated with those activities are not universal. There are different inherent risks associated with deciding to swim the English Channel as opposed to swimming at a children's school party supervised by more than half-a-dozen lifeguards and a litany of other adults. While the former might include the possibility of drowning as an inherent risk, the fundamental nature of the latter should not include the possibility of drowning as an inherent risk.

By way of further example, California courts have recognized that unwanted contact with the floor is an inherent risk of any kind of dancing, but that does not mean every time a dancer contacts the floor, it is because of an inherent risk of dancing. *Jimenez v. Roseville City School District* (2016) 247 Cal. App. 4th 594, 610. Similarly, while inhaling water may be an inherent risk of swimming not

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every drowning is the result of an inherent risk of swimming.

The cases relied upon by Defendant Good bear little resemblance to the case at hand and are easily distinguishable. In *Huffman v. City of Poway*, the court rejected the assumption of the risk doctrine because the defendant had increased any inherent risks by negligently maintaining stage trap doors. Defendant Good increased the risk of injury, as detailed below, and the assumption of risk doctrine should be rejected. Defendant Good cites to *West v. Sundown* for the proposition that the age and skill level of participants is irrelevant to the primary assumption of risk doctrine. Defendant Good's interpretation of the *West* case is misplaced. In *West*, the question was whether a coach had a duty to take additional care in teaching young children to field "pop-flys." The court found the danger of losing fly-balls in the sun was an inherent risk of baseball regardless of the age of the player. The court did not find that age is never relevant to the primary assumption of risk doctrine as Defendant Good implies in his Motion. Similarly, the *Peart v. Ferro* court found that age was not a factor relevant to that particular case, but did not find age was never relevant.

Inhaling water, drowning, and death should not be considered inherent risks of an end of the year children's swimming party. Defendant Good, should not be relieved of his duty of due to care to avoid such injuries to others, including Alex.

M. <u>Defendants Good Owed a Duty of Supervision to Alex Pierce</u>

Defendant Good erroneously cites to *Rotolo v. San Jose Sports and Entertainment LLC* (2007) Cal.App.4th 307 for the proposition that the only duty either MVUSD or he had to Alex was to summon emergency medical services, after the tragic event had occurred, which he contends he did by calling 911. Notwithstanding the fact that Good was not an owner of the swimming pool, Defendant Good's reliance ignores the special relationship Defendant Good, as a school district employee and overseer of the pool party, had with Alex as a student engaged in a school district activity. The District, and Good, had a duty to supervise students engaged in school activities on school premises.

Defendant Good seemingly concedes that he was acting within his official capacity as an MVUSD employee at all relevant times by filing all his pleadings pursuant to Government Code 6103, which exempts public officials "acting in his or her official capacity on behalf of the …district" from paying the normal filing fees. Gov. Code 6103.

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The primary assumption of risk doctrine limits the duty of a coparticipant or instructor of a recreational activity towards a participant. The doctrine does not limit the duty of a school district, or its employees, to supervise students entrusted to their care. The California Supreme Court has analyzed the duty of school districts to supervise students, providing in pertinent part as follows:

> While school districts and their employees have never been considered insures of the physical safety of students, California law has long imposed on school authorities a duty to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection. The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance other their duties. This uniform standard to which they are held is that degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances. Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care on the part of those responsible for student supervision.

Dailey v. Los Angeles unified School Dist. (1970) 2 Cal.3d at 747. This duty has been reiterated since the adoption of the primary assumption of risk doctrine. *See, Jimenez,* 27 Cal.App.4th at 603.

The fact that the Alex's injuries and death were sustained as a result of behavior engaged in by him and/or a fellow student does not preclude a finding of negligence. *Id* at 603-04. Supervision is required, in part, so that discipline may be maintained and student conduct regulated. *Id* at 604. Such regulation is necessary precisely because of the commonly known tendency of [children] to engage in impulsive behavior, which exposes them and their peers to the risk of serious physical harm. *Id.* The court stated that even adolescent high school students are not adults and should not be expected to exhibit the discretion, judgment, and concern for the safety of themselves and other which is associated with full maturity. *Id* (internal citations omitted). The duty to supervise should be even more stringent for younger adolescents, like Alex. A principal task of supervisors is to anticipate and curb rash student behavior to prevent injuries caused by the intentional or reckless conduct of the victim or a fellow student, and failure to do so constitutes negligence. *Id.*

This duty analysis regarding negligent supervision has survived the changes in the law of assumption of the risk. *See, Lucas v. Fresno Unified School Dist.* (1993) 14 Cal.App.4th 866 (a 10 year old student joined with other students in throwing dirt clods at one another, although he knew he

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was not supposed to, the court found a duty of supervision was breached); *See also Patterson v. Sacramento City Unified School Dist.* (2010) 155 Cal.App.4th 821 (As a matter of policy, we do not want truck driver training instructors to send inexperienced students out to load flatbed trailers without instruction and supervision.) We do not want schools to allow children to congregate unsupervised to engage in physical activities that can easily spiral into dangerous activities given the known proclivities of children to engage in horseplay. *Jimenez* at *605.*

The primary assumption of risk doctrine cannot be construed to eliminate the general duty of supervision in all cases involving children when it is that duty that provides a basis for liability. Defendant Good had a duty of supervision over the children at the June 3, 2016 pool party, including Alex. A jury could find Defendant Good negligently failed to ameliorate a dangerous condition in failing to supervise Alex. As such, Defendant Goods Motion must fail.

N. <u>There Are Genuine Questions of Material Fact as to Whether Defendant Good Increased any Risks Inherent in Recreational Swimming Activities</u>

Defendant Good's Motion must fail because there are genuine questions of material fact as to whether Defendant Good increased any risks inherent in recreational swimming activities.

It is well established that operators, sponsors, and instructors in recreational activities generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. *Knight* at 315-16. If a defendant breaches that duty, it was negligent. *Luna v. Vela* (2008) 169 Cal.App.4th 102. The question of duty depends not only on the nature of the sport, but also on the role of the defendant whose conduct is at issue in a given case. *Knight* 2 Cal.4th at 318. A coach or instructor owes a duty to a student not to increase the risks inherent in the learning process undertaken by the student. *Kahn* 31 Cal.4th at 1005-06.

Defendant Good's Motion must fail because there are genuine questions of fact as to whether he increased the risk of students drowning during the end of the year pool party. By way of specific example, there are material disputes regarding Good's involvement in assigning the lifeguards present at the pool party when Alex drowned. According to his email correspondence with Ms. Umphress, that is a task he usually undertakes. This was later confirmed by the testimony of his lifeguards. Defendant Good admits his lifeguards were negligent in their attempt to rescue Alex. If Good

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assigned lifeguards with no experience handling an emergency or who could not recognize the indications that a child was drowning than he negligently increased the risk of a child drowning, like Alex did, at the pool party. Similarly, if Good was supposed to assign the lifeguards and pawned that task off to someone less qualified than him than a jury could reasonably find Defendant Good negligently responsible for increasing the risk of injury and, thus, ultimately liable in this case for Alex's tragic death.

By way of further specific example, there are genuine material disputes as to whether Defendant Good could have done more after he had become involved in the situation to save Alex. The Murrieta Police Department stated that Alex would have had a greater chance of surviving if he had been pulled out of the pool earlier and CPR had begun immediately. There are genuine disputes of material fact as to whether Defendant Good had the opportunity to inform the student lifeguards to remove Alex from the pool so that CPR could be performed before it was futile.

As an additional example of the genuine material factual disputes regarding whether Good increased the risk of drowning, according to his Motion prior to the incident he went to the pool office to bring snacks to the lifeguards. If Mr. Good's visit distracted some of the lifeguards who should have been watching the pool at the time of the incident than he may be responsible for the increase in risk that resulted from less lifeguards watching the pool. The Murrieta Police found there was an insufficient number of lifeguards on duty and Mr. Good could have exacerbated that problem.

There are genuine factual disputes as to (1) whether Defendant Good negligently trained the lifeguards; (2) whether Defendant Good negligently hired and retained the lifeguards; (3) whether Defendant Good negligently supervised the pool; and (4) whether Defendant Good should have done more than stand around either before or after calling 911.

Defendant Good's Motion must be denied not only because there are genuine material factual disputes but also because the primary assumption of the risk should not be extended to apply to recreational school swimming parties and Defendant Good had a duty to supervise the pool.

V. PLAINTIFF'S CLAIMS DO NOT LACK MERIT

Plaintiff's claims do not lack merit and this court should deny Defendant Good's Motion for summary adjudication. Defendant Good seemingly miscomprehends the scope of Plaintiff's second

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cause of action and the statutory immunity provided pursuant to Health & Safety Code §1799.100. Genuine material factual disputes exist and Defendant Good has failed to demonstrate a lack of evidence regarding whether or not he was responsible for hiring and/or retaining the lifeguards for the end of year pool party. Finally, the "Good Samaritan Doctrine" is not applicable to the instant case because, as detailed above, Defendants had a duty to supervise the children.

A. Plaintiff's Claim for Negligent Training is not Barred by the Health & Safety Code.

As an initial note, Defendant Good fails to provide any authority to support his contention that lifeguard training activities fall within the purview of Health & Safety Code §1799.100. Assuming, *arguendo*, lifeguard training activities are included within the purview of §1799.100, Defendant Good's Motion fails for several reasons. First, Plaintiff's claim for negligent training goes beyond the lifeguard training received by the students supervising the pool party. Additionally, the California case law analyzing §1799.100 only apply the immunity to injuries that occurred during the training and not injuries resulting from negligent training long after the training occurred.

Plaintiff's second cause of action alleges Good's lifeguards were negligently trained to maintain, inspect, supervise, manage, regulate, warn, patrol, protect, guard, and control the subject pool, in addition to asserting negligent lifeguard training. Defendant Good has admitted his lifeguards were negligent in rescuing Alex. The only training possibly related to §1799.100 is lifeguard training. As Plaintiffs' second claim for relief goes well beyond the lifeguard training, summary adjudication is improper even if lifeguard training was within the statutory immunity under §1799.100.

California courts have narrowly interpreted §1799.100 to limit the statutory immunity to civil damages alleged to result from participation in the training programs. *See Duckett v. Pistoresi Ambulance Service, Inc.* (1993) 19 Cal.App. 4th 1525. Here the injuries occurred long after the training program concluded and were the result of, *inter alia*, the training provided being negligently inadequate. Defendant Good has provided no authority or basis to support his contention that providing lifeguard training in the past creates an everlasting immunity against all future liability. Defendant Good's contention is especially auspicious when considering a contributing cause of the injury was that the training was negligently provided.

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There is no public policy of encouraging inept training, even when it is done by well-intentioned individuals and organizations. There is certainly no public policy that would provide immunity for all future claims arising from said inept training.

B. <u>There is Sufficient Evidence to Create a Genuine Issue as to Plaintiffs' Claim for Negligent Hiring/Retention Against Defendant Good</u>

Defendant Good has failed to provide any evidence which demonstrates Plaintiffs' negligent hiring/retention claims against him lack merit. The email correspondence between Defendant Good and Denise Umphress creates a genuine issue of material fact as to whether an agency relationship existed between Defendant Good and the lifeguards he hired/retained to oversee the end of year pool party. In his email correspondence Defendant Good states that he usually assigns lifeguards to oversee the events. Defendant Good's admission that he is responsible for assigning the lifeguards to events creates a genuine question as to whether there is an agency or employment relationship.

If the admission that Defendant Good was responsible for assigning lifeguards to the event was not sufficient to demonstrate an agency or employment relationship, there is email correspondence between Defendant Good and Ms. Umphress where Defendant Good is informed that he will have to invoice the lifeguards time. The facts construed in the light most favorable to Plaintiffs demonstrate that Defendant Good was responsible for assigning lifeguards to the event and ensuring the lifeguards were paid for working the event. Plaintiff has provided sufficient evidence regarding the negligent hiring/retention claim against Defendant Good such that Defendant's motion must fail.

Defendant Good erroneously asserts that there is no evidence Defendant Good had any reason to believe the lifeguards were unfit to oversee the end of year party. However, Defendant Good knew, or should have known, (1) all of the lifeguards he assigned to the event were high school students; and (2) none of the lifeguards assigned to the event had any experience dealing with actual emergencies. It is also highly likely that Defendant Good knew that the lifeguards he assigned had little to no experience overseeing large crowds, like the hundreds of students at the end of the year party. Defendant Good cannot in good faith contend there was no reason to believe the lifeguards he assigned were unfit to maintain, inspect, supervise, manage, regulate, warn, patrol, protect, guard, and control the subject swimming pool on school property. As such, Defendant Good's Motion fails.

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C. Defendant Good's Negligent Supervision Does Not Fall Within the Purview of the Good Samaritan Rule

The "Good Samaritan doctrine" does not apply when there is a special relationship between plaintiff and defendant which gives rise to a duty to act. *Williams v. State of California* (1983) 34 Cal.3d 18, 23. As detailed above, Good had a duty to supervise Alex during the end of year party, based on the special relationship between Alex, as a student at a school district event, and Defendant Good, as an employee of MVUSD. The special relationship between Alex and Defendant Good imposed an affirmative duty to provide assistance. *City of Santee v. County of San Diego* (1989) 211 Cal.App.3d 1006, 1011. Here, Defendant Good had an affirmative duty to not only prevent the injury but also provide aid after the injury occurred. As such, Defendant Good's negligent supervision and failure to protect Alex do not fall within the purview of the "Good Samaritan doctrine."

Similarly, the "Good Samaritan doctrine" does not apply to persons who created or increased the risk of peril. *Id* at 1010-11. There are material factual disputes as to whether Defendant Good caused the peril and/or increased the risk of Alex's injury occurring, as detailed above. Defendant Good certainly owed a duty of care that went beyond observing the ineffective rescue efforts of his student lifeguards. The "Good Samaritan doctrine" does not apply to Defendant Good's actions because he was responsible for creating/increasing the risk.

Defendant Good's motion should fail because he undertook the service of providing lifeguards for the end of year party. "One who undertakes to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise reasonable care increases the risk of such a harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." *Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 613.

Here, Defendant Good undertook the service of providing lifeguards for the end of year pool party. Defendant Good's failure to exercise reasonable care in providing lifeguard services caused and/or increased the risk of Alex's drowning. The students in attendance relied upon the lifeguards

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provided by Defendant Good to prevent drowning and other injuries at the end of year pool party. Here, Alex's harm was suffered because of the reliance upon Defendant Good to provide lifeguard services for the end of year pool party.

Defendant Good seeks to mislead the court by limiting the scope of this action to the act of inhaling water and the undertakings of conducting a physical assessment of Alex or performing CPR on Alex after the drowning had occurred. Defendant Good cannot in good faith dispute that the undertaking the court should evaluate is the undertaking of providing lifeguard services and ensuring a safe pool environment for the end of year party.

Plaintiffs' claim for negligent supervision does not lack merit under the "Good Samaritan doctrine" and Defendant Good's motion should be denied.

VI. DEFENDANT GOOD'S MOTION IS FRIVOLOUS AND SANCTIONS ARE THEREFORE WARRANTED

This Court has discretion, pursuant to Code of Civil Procedure § 128.5, to award Plaintiffs attorneys' fees in opposing Defendant Good's frivolous Motion.[3] See Glassman Decl. ISO Request for Sanctions at ¶¶ 1-5. "The statute permits the award of attorneys' fees, not simply as appropriate compensation to the prevailing party, but as a means of controlling burdensome and unnecessary legal tactics." *Childs v. PaineWebber, Inc.* (1994) 29 Cal.App. 4th 982, 995-96. An evil motive is not required to sustain a sanctions award: "A review of precedent indicates that the bad faith requirement of § 128.5 does not impose a determination of evil motive. The concept of 'harassment' includes vexatious tactics which, although literally authorized by statute or rule, go beyond that which is by any standard appropriate under the circumstances." *W. Coast Dev. v. Reed* (1993) 2 Cal.App. 4th 693, 702. Sanctions may be awarded against Defendant and/or its attorney. Code Civ. Proc., § 128.5(a).

Sanctions may be awarded because Defendant's Motion is not supported by undisputed facts

[3] Where a request for sanctions under Code Civ. Proc., § 128.5 is made as part of papers opposing a frivolous pleading or motion, the notice required for filing of the opposition papers will be applied to the request for sanctions as well. For example, 5 days' notice was held to be sufficient where the request for sanctions was contained in papers opposing a demurrer, which papers were required to be filed five days before the hearing. *Ellis v. Roshei Corp.* (1983) Cal.App. 3rd 642, 647-648.

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that disprove Plaintiffs' cause of action. A motion is "frivolous" if it is "totally and completely without merit." Code Civ. Proc., § 128.5(b)(2). In that regard, "[w]hen a tactic … utterly lacks merit, a court is entitled to infer the party knew it lacked merit yet pursued the action for some ulterior motive." *Dolan v. Buena Engineers, Inc.* (1994) 24 Cal.App. 4th 1500, 1505. For example, filing a motion for summary judgment on the basis of "undisputed facts" that are clearly in dispute warrants the imposition of sanctions. *Monex Internation, Ltd. v. Peinado* (1990) 224 Cal.App. 3d 1619, 1626 ("Peinado's assertions…as to 'undisputed' facts were 'untrue and frivolous.' Moreover …'prior to hearing of the motion', …counsel gave Peinado's counsel several opportunities to withdraw this frivolous motion.").

Here, Plaintiffs' counsel gave Defendant Good's counsel an opportunity to withdraw this Motion on numerous occasions and advised them of the possibility of sanctions being imposed. See Glassman Decl. ISO Request for Sanctions at ¶¶ 3-4.

VIII. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion.

DATED: April 4, 2018

Respectfully submitted,

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By: _____

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 11111 Santa Monica Boulevard, Suite 700, Los Angeles, CA 90025.

On April 4, 2018, I served true copies of the following document(s) described as **PLAINTIFFS' OPPOSITION TO DEFENDANT KEITH GOOD'S MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY SUMMARY ADJUDICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 4, 2018, at Los Angeles, California.

Claudia Lomeli

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