DEPARTMENT 46 LAW AND MOTION RULINGS

Case Number: BC526842 **Hearing Date:** December 17, 2014 **Dept:** 46

Case Number: BC526842
CRYSTAL DIXON ET AL VS POP WARNER LITTLE SCHOLARS INC ET AL
Filing Date: 11/05/2013
Case Type: Other PI/PD/WD (General Jurisdiction)

12/17/2014
Hearing on Demurrers & Motions to Strike

Moving Parties on Demurrers and Motions to Strike Second Amended Complaint ("SAC"): (1) Orange Empire Conference, Inc. ("OEC"); (2) Lakewood Pop Warner ("LPW"); (3) Salvador P. Hernandez, Manual Martinez, Reginald Nettles and Kevin Goddard ("Coaches")

Moving Party on second Demurrer to SAC: Pop Warner Little Scholars, Inc. ("PW")

Plaintiffs' have alleged causes of action for:

(1) Negligence (against Coaches);
(2) Respondeat Superior (against Pop Warner Entities);
(3) Negligent Training and Supervision (against Pop Warner Entities);
(4) Negligent Infliction of Emotional Distress ("NIED") (against Pop Warner Entities);
(5) Violation of the Consumers Legal Remedies Act ("CLRA"), Civ. Code § 1750 et seq. (against Pop Warner Entities);
(6) Violation of the Unfair Competition Law ("UCL"), Bus. & Prof. Code § 17200 (against Pop Warner Entities); and
(7) Violation of the False Advertising Law ("FAL"), Civ. Code § 17500 (against Pop Warner Entities).

TENTATIVE RULING: Demurrers to the SAC are PARTIALLY SUSTAINED with 20 days leave to amend as to the 4th cause of action for Negligent Infliction of Emotional Distress only; the demurrers are OVERRULED as to the remaining causes of action: 1st, 2nd, 3rd, 5th, 6th, and 7th; The motions to strike are DENIED. See discussion below.

This tentative ruling is posted at 11:10 a.m. on 12/16/2014 and the matter is set for hearing on 12/17/2014 at 8:30 a.m. / If there are no parties other than Plaintiff/Petitioner, then Plaintiff/Petitioner may submit to the tentative without appearance by telephonic notification to the clerk of Dept. 46 between 8:00 a.m. and 4:30 p.m. on a date prior to the hearing or morning prior to the hearing by calling (213) 974-5665, and the court will issue the tentative ruling as the final ruling. If the other parties have appeared in the action, then the parties must first confer and all agree that the tentative ruling will be the final ruling on the matter. If the parties to the matter before the court all agree, a representative of the parties may call the clerk and submit without an appearance, and the court will issue the tentative ruling as the final ruling. If an order is required, it should be lodged directly in Dept. 46 with a copy to adverse/other parties, if any.

Discussion

1. Summary of pleadings leading to SAC

On 11/5/2013, Plaintiff Crystal Dixon, acting individually and as guardian ad litem for minor Donnovan Hill ("Plaintiffs"), filed an initial complaint for negligence, etc. against a number of defendants including Pop Warner Little Scholars, Inc. ("PW"), Orange Empire Conference, Inc. ("OEC"), Lakewood Pop Warner ("LPW") ("Nonprofits") and various individual defendants, inter alia, Salvador Hernandez, Manuel Martinez, Reginald Nettles and Kevin Goddard ("Coaches").

PW is the national organization which oversees administration of youth football and cheer and dance programs. (SAC, ¶6.) OEC is the local affiliate/member association of PW, the region of which encompasses Orange County and part of Los Angeles County. (SAC, ¶7.) LPW appears to be a member association or affiliate of OEC. (SAC, ¶23.) LPW appears to be the party with whom Plaintiff Hill enrolled to play football. (SAC, ¶17.) PW, OEC and LPW will be collectively referred to herein as "Pop Warner Entities."

On 3/6/2014, Plaintiffs petitioned to personally sue various Presidents and Directors of the Nonprofit Defendants in their personal capacity. This Court denied Plaintiffs' petition without prejudice on 9/26/2014. The same day, Plaintiffs filed their First Amended Complaint ("FAC"). On 6/16/2014, OEC, LPW and the Coaches filed a demurrer to the FAC. On 7/21/2014, this case was reassigned to Dept. 46 following Plaintiffs' peremptory challenge. Consequently, hearing on the demurrer to FAC was advanced and vacated pursuant to a minute order entered on 7/21/2014. The parties subsequently stipulated to allow Plaintiffs to file the Second Amended Complaint ("SAC") presently the subject of these demurrers and motion to strike.

2. Allegations of Facts in SAC

Then 13-year-old Donnovan Hill was rendered a quadriplegic after attempting to tackle another player with his head – a tactic that Hill was allegedly instructed to use the Coaches (Hernandez, Martinez, Nettles, Goddard and Cunningham). His mother, Crystal Dixon, witnessed the injury from the stands.

Proper tackling technique is to keep one's head up and slide it to the outside of the opponent's body, essentially leading with the shoulder instead of the head. (SAC, ¶28.) Leading with one's head – whether with the face or the top of helmet – is widely prohibited at all levels of competitive football. (SAC, ¶29.) The 2011 Pop Warner Official Rules expressly prohibit such techniques. (SAC, ¶30.)

Plaintiffs allege that Coaches "taught and coached Donnovan to lead with his head when tackling opponents and promoted the face tackling technique in both practice and games. Defendant Hernandez insisted that Donnovan tackle in this manner." (SAC, ¶32.)

3. Demurrers to the First Cause of Action for Negligence are Overruled

OEC, LPW and Coaches argue that the SAC alleges that the Coaches were acting as volunteers within the scope of their responsibilities with nonprofit organizations (SAC, ¶¶6-8) and that therefore the Coaches are immune from liability pursuant to the Federal Volunteer Protection Act ("VPA"), 42 U.S.C. §§ 14501-05. Defendants further argue that permitting or instructing on a head-first tackling technique cannot be considered "an extreme departure from the ordinary standard of conduct" in a sport like football that is "characterized by aggressive play." (PW does not demur to Plaintiff's First Cause of Action, as it was not named.)

The federal Volunteer Protection Act provides in relevant part that nonprofit and governmental volunteers shall be immune from liability for negligent acts or omissions as long as: (1) the volunteer was acting within the scope of their responsibilities at the time of the act or omission; (2) the volunteer were properly licensed, certified or authorized, if appropriate or required; (3) the harm was not the result of "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed." (See 42 U.S.C. § 14503(a).)

The immunity statute does not protect the coaches from grossly negligent conduct. 42 U.S.C. § 14503(a).

The adequacy of the first cause of action requires understanding the distinction between ordinary and gross negligence and considering the allegations in the SAC in the context of recreational sports case authority. "Ordinary negligence… consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm." (City of Santa Barbara v. Superior Court (2007) 41 Cal.4th 747, 753-54.) Gross negligence, on the other hand, is defined as the "want of even scant care or an extreme departure from the ordinary standard of conduct." (Id. at 754 [emphasis added].)

In the context of recreational sports, "a coach or sport instructor owes a duty to a student not to increase the risks inherent in the learning process undertaken by the student." (Kahn v. East Side Union High Sch. Dist. (2003) 31 Cal.4th 990, 1005-06; citing Fortier v. Los Rios Cmty. College Dist. (1996) 45 Cal.App.4th 430, 435.) This standard of care necessarily requires the Court to view the Coaches' conduct in light of the aggressive nature of the sport they are coaching. (See Kahn, supra, at 436.) Even so, the Coaches had a duty to not increase the inherent risk embodied within playing football.

Whether conduct is non-negligent, negligent or grossly negligent is almost always a question of fact to be determined by the jury. (People v. Roerman (1961) 189 Cal.App.2d 150, 159.) Courts will only intervene if no reasonable mind could find that the conduct in question was "grossly negligent." (Ibid.) "This is true even where there is no conflict in the evidence if different conclusions upon the subject can reasonably be drawn therefrom. (Ibid.)

It is difficult to say that instructing to tackle with one's head is non-negligent. However, whether the alleged conduct can be considered grossly negligent or worse is a question of fact that should be left for the jury to determine. The pleadings adequately raise the issue such that the trier of fact can determine the level of culpability and therefore the application of the immunity statutes. The SAC is adequate to plead around the immunity statute.

The immunity statute also excepts from its scope "reckless" conduct. 42 U.S.C. § 14503(a). Reckless misconduct "describes conduct by a person who may have no intent to cause harm, but

who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." (City of Santa Barbara, supra, 41 Cal.4th at 754, fn.4.) As with negligence and gross negligence, recklessness (or willfulness) is a question of fact. (See Ingram v. Bob Jaffe Co. (1956) 139 Cal.App.2d 193, 197.)

Therefore, it is also not something that can be resolved as a matter of law based on the pleadings alone.

Consequently the demurrer of OEC, LPW and the Coaches to Plaintiff's First Cause of Action in the SAC is OVERRULED.

2. Demurrers to the Second Cause of action are overruled.

The Pop Warner Entities - OEC, LPW and Coaches - argue that respondeat superior is not a recognized cause of action in California. They cite Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, which explains that conspiracy is not a cause of action, but rather a theory of vicarious liability.

PW joins the OEC (et al.) argument that respondeat superior is not a cause of action in California, citing Perez v. Van Groningen & Sons (1986) 41 Cal.3d 962, and Mattson v. City of Costa Mesa (1980) 106 Cal.App.3d 441, 448-49.

Plaintiffs argue that demurrer is inappropriate because their underlying negligence claims against the Coaches is still in play. At the very least, they argue, the issue is technical and could be easily cured by amendment, citing Blank v. Kirwan (1985) 39 Cal.3d 311, 318.

The court agrees that respondeat superior is a theory of liability in California – not a cause of action; on the other hand, Plaintiffs have incorporated the paragraphs of the First Cause of Action for negligence into the Second Cause of Action and therefore the cause of action in essence re-alleges a negligence claim against the Pop Warner Entities on the basis of vicarious liability.

On general demurrer, these allegations of respondeat superior liability of PW are adequate. (See Gressley v. Williams (1961) 193 Cal.App.2d 636, 639 ["All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief."].)

The allegation of a cause of action against PW for respondeat superior responsibility for the negligence of the coaches and other entities is therefore sufficiently pled.

4. Demurrers to the Third Cause of Action are overruled

OEC, LPW and Coaches argue that because the Coaches are immune from negligence liability under the federal Volunteer Protection Act and the California Corporations Code (no citation to the specific Corp. Code provision is provided), they too are immune from such negligence liability.

The basis for this argument appears to be CACI Nos. 409 and 426. However, these jury instructions are inapposite. This argument is also premised on the notion that the Coaches cannot be found grossly liable under the circumstances – which is false. The conclusion is also false. An immune servant does not mandate an immune master. Plaintiffs do not fail to state a cause of action against OEC, LPW and Coaches.

PW also argues that it was not responsible for hiring, training and retaining coaches – and that such responsibility fell on OEC and LPW and that it "cannot be held liable for failing to develop safety rules and supervisory policies when Plaintiffs themselves admit that the express policies for this exact purpose were in full force and effect." However the premise for this argument is incorrect: The FAC contained allegations to effect that OEC and LPW were responsible for training the Coaches. (See FAC, ¶¶ 90, 111-17.) However, none of these prior allegations are necessarily inconsistent – they do not allege the absence of responsibility on the part of PW.

Plaintiffs do not fail to state a cause of action against PW. Accordingly, both demurrers are OVERRULED.

5. Demurrers to the Fourth Cause of Action for Negligent Infliction of Emotional Distress are Sustained with 20 days leave to amend

OEC, LPW, Coaches, and PW all argue that Plaintiff Dixon (the player's mother) cannot recover for NIED because she lacks contemporaneous sensory awareness of the causal connection between the injury causing event and the resulting injury, citing Fortman v. Förvaltningsbolaget Insulan AB (2013) 212 Cal.App.4th 830, 846.

A necessary element of the cause of action for NIED is awareness of the injury-causing event. "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (Thing v. La Chusa (1989) 48 Cal.3d 644, 647 [emphasis added].)

A reasonable interpretation of the requirements in Thing, as applied to this case, is that Plaintiff Dixon must plead that she was aware, at the time her son lowered his head and tried to tackle the other player, that her son was doing as instructed. (See Fortman v. Förvaltningsbolaget Insulan AB (2013) 212 Cal.App.4th 830, 845-46.) As such allegation is not included in the SAC, it is insufficient.

In Fortman, a deceased scuba diver's sister was barred from recovering for NIED because she possessed "no contemporaneous awareness of the causal connection between the company's defective product and her brother's injuries." (Id. at 845.) At the time, she believed that her brother was dying from a heart attack – it was only months later that she learned her brother actually died from a defective air nozzle. (See id.)

In this case, Plaintiff has not actually alleged her contemporaneous awareness that her son was taught to tackle with this head. Plaintiffs have made such a contention as part of their opposition. (See Combined Opp. at p. 8, lns. 4-15.)

Because Plaintiff Dixon has not plead allegations that satisfying the second Thing requirement, Defendants' demurrers are SUSTAINED, but because the Plaintiff makes this argument in the opposition, Plaintiff is granted leave to amend.

6. Demurrers to the Fifth Cause of Action are overruled.

OEC, LPW, Coaches and PW first argue that they cannot be subject to liability under the Consumers Legal Remedy Act (CRLA), Civil Code section 1750 et seq., because recreation activities are not "services" under the Act.

OEC, LPW, Coaches and PW also argue that the alleged statements (presumably SAC, ¶¶ 68-82) are "mere puffery" and "opinion" – akin to saying that a product is safe.

Finally, OEC, LPW, Coaches and PW argue that Dixon enrolling her son in the Lakewood Pop Warner (LPW) program does not constitute a "transaction" within the meaning of Civil Code sections 1770, subd. (a) 1761, subd. (e) – because she fails to specify any kind of agreement with LPW and OEC. (PW's arguments appear to be identical in wording to that of OEC, LPW and the Coaches. They do not bear repeating.)

Under the Consumer Legal Remedies Act, Civil Code section 1750 et seq., its unlawful to engage in the following "unfair or deceptive acts or practices," inter alia, in furtherance of "a transaction intended to result or which results in the sale or lease of goods or services to any consumer":

(2) Misrepresenting the source, sponsorship, approval, or certification of goods or services…
(3) Misrepresenting the affiliation, connection, or association with, or certification by, another…
(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have…
(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another… (Civ. Code § 1770, subd. (a).)

Civil Code section 1761, subdivision (b) defines "Services" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." Courts have held that gaming software is neither product nor service. (See In re Sony Gaming Networks etc. (S.D. Cal. 2012) 903 F.Supp.2d 942, 972.) Life insurance policies are also not considered goods or services because they involve neither work nor labor. (See Fairbanks v. Superior Court (2009) 46 Cal.4th 56, 61.)

As to the facts of this case there is no case directly on point and therefore the matter is unsettled as to whether a youth sports league can be considered a "service." However, it does appear that the Defendant Entities are providing work and labor to facilitate the playing of competitive football. The omission of "recreation" from Civil Code section 1761, subdivision (b), though perhaps conspicuous, is not compelling.

Consequently, at this point, the court concludes that CLRA does not exclude youth recreation leagues as not being services.

Defendants' demurrers are therefore OVERRULED.

7. Demurrers to Sixth Cause of Action for Unfair Competition Under B & P Code §17200 are overruled.

Because both Defendants' demurrers to Plaintiffs' UCL claim are premised on the Plaintiffs' failure to state a cause of action for violation of the CLRA, their demurrers should be OVERRULED.

8. Demurrers to Seventh Cause of Action for Unfair Competition Under B & P Code §17200 are overruled.

OEC, LPW, Coaches, and PW argue that Plaintiff's cause of action for violation of California's False Advertising Law, Business & Professions Code section 17500 et seq. fails because Plaintiffs have not alleged the statutory elements with sufficient specificity. . However, the cases cited do not address Business & Professions Code section 17500, a FAL claim is not tantamount to fraud, and the heightened pleading with specificity requirement do not apply.

Under California's False Advertising Law (FAL), Business & Professions Code section 17500 et seq.:

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. (Emphasis added.)

Plaintiffs' allegations are sufficiently stated under the statute to state a cause of action under FAL.

9. Motion to Strike Punitive Damages is DENIED as to Coaches but is otherwise GRANTED with leave to amend.

A motion to strike punitive damages from a complaint is appropriate where the facts alleged are insufficient to warrant imposition of punitive damages. (See Turman v. Turning Point of Cent. California, Inc. (2010) 191 Cal.App.4th 53, 64.) Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. (American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal.App.4th 1017.)

Civil Code section 3294, subdivision (a) authorizes the recovery of punitive damages in non-contract cases "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice."

Malice is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code § 3294, subd. (c)(1).) "[T]o establish malice, it is not sufficient to show only that the defendant's conduct was negligent, grossly negligent or even reckless. There must be evidence that defendant acted with knowledge of the probable dangerous consequences to plaintiff's interests and deliberately failed to avoid these consequences." (Flyer's

Body Shop Profit Sharing Plan v. Ticor Title Ins. Co. (1986) 185 Cal.App.3d 1149, 1155.)

"Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton." (Taylor v. Superior Court (1979) 24 Cal. 3d 890, 894 [emphasis added]; see also Grieves v. Superior Court (1984) 157 Cal.App.3d 159, 166.)

Oppression is defined as "despicable "conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code § 3294, subd. (c)(2).) Conduct is despicable when it can be characterized as "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people," or "having the character of outrage frequently associated with a crime." (Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal.App.4th 1269, 1287.) Whereas "malice" requires willful conduct, "oppression" does not. (See Major v. Western Home Ins. Co. (2009) 169 Cal.App.4th 1197, 1225-26.)

Fraud is defined as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the party of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code § 3294, subd. (c)(3).) Intent to injure is prerequisite to punitive damages award for fraud. (In re Molina (9th Cir.) BAP Cal. 1998, 228 B.R. 248.)

Plaintiffs allege a claim for punitive damages as against the coaches only, not the organizational defendants. (Paragraph 105, page 28, lines 20-23 of SAC)

The Plaintiff's allegations that the coaches knew that children would get hurt while tackling as instructed (SAC, Paragraphs 28-44) is theoretically malicious or oppressive.

As such the motion to strike punitive damages is denied.

IT IS SO ORDERED:

Frederick C. Shaller, Judge
