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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES**

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| TARON MALKHASHYAN  Plaintiff,  vs.  LOS ANGELES UNIFIED SCHOOL DISTRICT, et al.  Defendants. | Case No.: BC658007  Assigned For All Purposes to:  Judge: Hon. Dennis J. Landin  Dept: 51  **PLAINTIFF’S MEMORANDUM OF**  **POINTS AND AUTHORITIES IN**  **OPPOSITION TO DEFENDANT LOS**  **ANGELES UNIFIED SCHOOL**  **DISTRICT’S MOTION FOR JUDGMENT**  **ON THE PLEADINGS AS TO**  **PLAINTIFF’S FIRST CAUSE OF ACTION**  **IN PLAINTIFF’S THIRD AMENDED**  **COMPLAINT**    **DATE: DECEMBER 19, 2018**  **TIME: 9:00 a.m.**  **DEPT.: 51 06**    **Reservation ID: 180911347821**  **Complaint filed: April 14, 2017**  **Trial Date: October 8, 2019**  **FSC Date: September 27, 2019** |
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I**

**INTRODUCTION**

The LAUSD has copied and pasted its Demurrer to Plaintiff’s Third Amended Complaint and re-titled it a Motion for Judgment on the Pleadings. This Court denied the LAUSD Demurrer to Plaintiff’s Third Amended Complaint and should likewise deny the present LAUSD Motion for Judgment on the Pleadings. Attached hereto as Exhibit 1 to this Opposition is this Court’s prior written tentative adopted as the Court’s final ruling on the LAUSD Demurrer to Plaintiff’s Third Amended Complaint.

The prior LAUSD Demurrer to Plaintiff’s Third Amended Complaint contained the LAUSD argument as to an applicable immunity statute, but this Court did not directly address the immunity argument because it could and did overrule LAUSD’s demurrer on procedural grounds (“a threshold issue that is dispositive,” said the Court).

**II.**

**AS A MOTION FOR JUDGMENT ON THE PLEADINGS IS THE FUNCTIONAL EQUIVALENT OF A DEMURRER, LAUSD SHOULD NOT BE PERMITTED TO MERELY REPEAT ITS PRIOR DEMURRER ARGUMENT AS TO EDUCATION CODE SECTION 35330(d) AS A WAY TO “GET AROUND” ITS VIOLATION OF CCP SECTION 430.41(b)**

A Motion for Judgment on the Pleadings (CCP section 438) is the same as a Demurrer (CCP sections 430.10-432.10) The only significant difference is timing. A demurrer is proper before the adversary’s answer; a motion for judgment on the pleadings is proper after answer.

"A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed. (Citations omitted.)" Cloud v. Northrup Grumman Corp. (1998) 67 Cal.App. 4th 995, 999.

"The standard for granting a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer, that is, under the state of the pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law. Code of Civil Procedure section 438, subdivision (d); Smiley v. Citibank (1995) 11 Cal.4th 138, 146.) [Footnote omitted.]

"Judgment on the pleadings does not depend upon a resolution of questions of witness credibility or evidentiary conflicts. In fact, judgment on the pleadings must be denied where there are material factual issues that require evidentiary resolution. Bach v. McNelis (1989) 207 Cal.App.3d 852, 865-866; Schabarum v. California Legislature (1998) 60 Cal.App.4th 1205, 1216.”

"Because a motion for judgment on the pleadings is the functional equivalent of a general demurrer, the same rules apply. People v. $20,000 U.S. Currency (1991) 235 Cal.App.3d 682, 691.”

“The motion is confined to the face of the pleading under attack, and all facts alleged in the complaint must be accepted as true. Rangel v. Interinsurance Exchange (1992) 4 Cal.4th 1, 7; Hightower v. Farmers Ins. Exchange (1995) 38 Cal.App.4th 853, 858.”

The deadline for such motion is generally within 30 days of the date the action is initially set for trial. CCP section 438(e). The motion for judgment on the pleadings may be made only after the time for the plaintiff or defendant to demur has expired or run out. CCP section 438(f).

Given the foregoing authority, does CCP section 430.41(b) have anything to say about a Motion for Judgment on the Pleadings that is presented exactly as it was when titled a Demurrer? Section 430.41(b) states that a demurring party may not rely on a ground for demurrer as to an amended complaint that it could have raised with a prior version of that complaint but did not. In this case, this Court denied the LAUSD Demurrer to Plaintiff’s Third Amended Complaint because the LAUSD waited until Plaintiff’s Third Amended Complaint to cite to an alleged immunity statute, Education Code section 35330(d), that it could have cited and relied on but did not as to the previous versions of Plaintiff’s lawsuit.

Is it not an unreasonable “end around” CCP section 430.41(b) to be permitted to now raise that immunity defense through the mechanism of a type of motion that the law deems the functional equivalent of a demurrer? It seems that this Court had that issue in mind when it stated in its prior ruling (Exhibit 1 to this Opposition, page 3) ““For clarity, the Court notes that LAUSD remains free to argue immunity at a later point in this proceeding; it can no longer, however, demur on such a basis.”

The only way to give meaning to the purpose behind CCP section 430.41(b) is to acknowledge that the “later point in this proceeding” must be a substantively different mechanism for raising a legal argument; the most obvious being a Motion for Summary Judgment. Since the Court can consider matters beyond the pleadings with a MSJ, it can address factual issues that may be at the heart of analyzing the defense of an alleged statutory immunity. The consideration of the statutory immunity defense in this case by way of MSJ (and not MJP) would thus be in harmony with the words and purpose behind CCP section 430.41(b).

Our substantive and procedural rules should not be read to permit a party to have a second bite at the proverbial apple in the manner pursued by the LAUSD in this present Motion for Judgment on the Pleadings.

**III.**

**THE ROBOTICS EVENT WAS NOT A FIELD TRIP OR EXCURSION AS THOSE WORDS ARE DEFINED AND HAVE BEEN APPLIED**

Education Code section 35330 states in pertinent part as follows:

“The governing board of a school district or the county superintendent of schools of a county may:

(1) Conduct field trips or excursions in connection with courses of instruction or school-related social, educational, cultural, athletic, or school band activities to and from places in the state…

(3) Transport by use of district equipment… provided that, when district equipment is used, the governing board shall secure liability insurance…

(4) Provide supervision of pupils involved in field trips or excursions by certificated employees of the district.

(d) All persons making the field trip or excursion shall be deemed to have waived all claims against the district, a charter school, or the State of California for injury, accident, illness, or death occurring during or by reason of the field trip or excursion.

The statute does not define “field trip” or “excursions,” leaving that task to the appellate courts.” Our courts have uniformly defined a field trip or excursion as a form of education beyond the walls of a school to engage in first hand observation, or as a journey chiefly for recreation, a usual brief pleasure trip, departure from a direct or proper course of deviation from a definite path. Those are the words from the appellate cases quoted by the moving party at pages 2-3 of its Motion, generally attributed to the Court in Castro v. Los Angeles Board of Education (1976) 54 Cal.App.3d 232.

The Helen Bernstein team preparation for and entry into a robotics event is not a field trip or excursion. The facts alleged in this case as to the LAUSD are critical to this analysis; it is those facts that cannot be summarily dismissed through the granting of a motion for judgment on the pleadings. The facts alleged as to the LAUSD in Plaintiff’s TAC include these:

“On or about April 18, 2015, LAUSD student Taron Malkhashyan participated in the NTMA Training Center Robotics League's Regional Competition (hereinafter “competition”) for 2015…the Los Angeles Chapter of the NTMA created Regional Training Centers, which are (according to the NTMA web site) “aimed at bridging the gap between a high-school education and the knowledge necessary to succeed in precision manufacturing…” Among the workforce development programs created by the NTMA and carried out at its regional training centers are robotics competitions through a “National Robotics League.” These robotics programs (again according to the NTMA web site) are intended by Defendant NTMA to assist high school students to “forge partnerships with manufacturers and, as a result, many find bright futures in manufacturing careers;” with such programs falling under “federal and state Science, Technology, Engineering and Math (STEM) development efforts.” The aforementioned April 18, 2015 event took place at the NTMA training center located at 12131 Telegraph Road, Santa Fe Springs, CA 90670.”

“At all times material hereto, Plaintiff was an LAUSD student enrolled in LAUSD's Helen Bernstein High School, a senior high school wholly owned, operated, managed, supervised and maintained by LAUSD. Plaintiff was part of a team that was organized by Helen Bernstein High School, which had designated a chaperone/coach who was an LAUSD employed teacher, PUNJATORN CHANUDOMCHUCK (Mr. C)…LAUSD and its school Helen Bernstein High School signed up for the NTMA Regional Competition, entering a team of its students consisting of the Plaintiff as well as Omar Guzman and Jenny Pimental. At all times material hereto, Plaintiff was informed and believed that his participation in “robotics,” including on April 18, 2015 and in the preparation for the April 18, 2015 event, was under the direct guidance, supervision, control and management of his school, Helen Bernstein High School and his teacher Mr. C, and that once he arrived at Defendant NTMA’s facility in Santa Fe Springs, the event location on April 18, 2015, his well-being and safety would be attended to by his school….”

“A robot - called Optimus - was entered into the competition by LAUSD. It was funded, designed, constructed, built, tested, assembled, managed, owned and, prior to April 18, 2015, controlled by LAUSD. The robot was then taken to the NTMA facility on April 18, 2015, where it was made available to Plaintiff and his fellow student teammates for the competition… Plaintiff is informed and believes and thereon alleges that the LAUSD robot called Optimus, as it was placed into the robotics competition at the NTMA Training Center in Santa Fe Springs, CA on April 18, 2015, was in a dangerous and defective condition of which Defendants LAUSD and NTMA had actual and/or constructive notice before the accident that is the subject of this lawsuit, with sufficient time prior to the accident to have taken steps to eliminate or reduce such danger so that the subject accident would not have taken place. Despite being designated by LAUSD as Plaintiff’s teacher, chaperone and coach, Defendant Mr. C negligently failed to appear at the event and supervise plaintiff and his student teammates, with the express or implied knowledge, approval, understanding and acquiescence of Defendants LAUSD and NTMA, both of which failed to provide a replacement teacher, chaperone, coach, monitor or supervisor. As such, Plaintiff proceeded to participate in the said competition event in his capacity as a LAUSD student with no or inadequate supervision, protection, guidance and instruction.”

“Defendants LAUSD, Mr. C and Does 1-10, inclusive (hereinafter “LAUSD”) are required by California law to carefully supervise their students, including the Plaintiff herein, while engaged in school sponsored activities, school sponsored, organized and promoted athletic and other competitions wherein the LAUSD school has expressly offered its students the opportunity to engage in such activities as an integral part of the LAUSD school and educational experience. Plaintiff is informed and believes and thereon alleges that LAUSD undertook to arrange for Plaintiff and his robotics teammates from Helen Bernstein High School to appear at the site of the said robotics competition, and/or undertook to sponsor plaintiff and his teammates, as representatives of Helen Bernstein High School at the said robotics competition at the NTMA premises in Santa Fe Spring, CA. In such an educational environment, it does not matter, in terms of the LAUSD general duty to carefully and affirmatively supervise its students, whether that activity, program, competition or event is “off campus” or held on a weekend day.”

“At all times relevant hereto, LAUSD undertook to provide educational, instructional, recreational, health and related services to Plaintiff and in particular to supervise Plaintiff during his participation in the aforementioned robotics event.”

(TAC, paragraphs 16, 17, 18, 23, 24, in pertinent part).

There are many practical as well as legal reasons why section 35330 does not apply to our facts. First, the Legislature also enacted Education Code section 44808:

“Notwithstanding any other provision of this code, no school district, city or county board of education, county superintendent of schools, or any officer or employee of such district or board shall be responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when such pupil is not on school property, **unless** such district, board, or person has undertaken to provide transportation for such pupil to and from the school premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances. In the event of such a specific undertaking, the district, board, or person shall be liable or responsible for the conduct or safety of any pupil only while such pupil is **or should be** under the immediate and direct supervision of an employee of such district or board (emphasis added).”

This case sets forth facts as to the LAUSD undertakings both on campus (the assembly of a robot in a negligent manner, resulting in a defective robot the LAUSD entered into the NTMA event) and off, thus taking the facts of this case out of the field trip/excursion immunity. The Legislature clearly had in mind distinct types of activities when adopting sections 35330 and 44808. The facts alleged in Plaintiff’s TAC are facts that match the immunity exceptions set forth in section 44808. The facts in this case are not aligned with the observation and pure recreation ideas associated with section 35330. Pure recreation does not define the robotics event, when it is obvious that the underlying reason for the event and the school’s participation is tied to the career of machining and engineering; the idea being to motivate students to choose that field for their future. But more than that, the LAUSD publically put its name and its school’s name out front as an entrant into the NTMA program; it’s school formed its team made up of students; to go to such lengths to “win” a competition with its students and then to say the students are on their own in terms of safety makes no sense and would essentially render the word “undertaking” in section 44808 meaningless.

The facts in the cited appellate cases further support plaintiff’s assertion that section 35330 does not apply to this case. In Castro v. Los Angeles Board of Education (1976) 54 Cal.App.3d 232, the Court was faced with a student’s outing with his high school ROTC unit. The statutory numbering was different at that time but the dilemma was the same. The Court noted the apparent contradiction between (now) sections 44808 and 35330: “Certainly there would have been no purpose in the Legislature's *adding* section [now section 44808] to the Education Code at its 1972 session if by its amendment of [now section 35330] of the same code, it provided absolute immunity from liability for the same away-from-school activity.” 54 Cal.App.3d at 236. So the Court essentially provided future trial courts with the distinction that makes the most sense:

“The Legislature, by these sections, recognized that: not all educational facilities can be provided within the confines of each school's property. To accomplish a school's educational aims, it therefore is necessary for students to accomplish portions of their study off the school's property. Students who are off of the school's property for required school purposes are entitled to the same safeguards as those who are on school property, within supervisorial limits. Students who participate in nonrequired trips or excursions, though possibly in furtherance of their education but not as required attendance, are effectively on their own; the voluntary nature of the event absolves the district of liability. As we construe the governing sections, we conclude that where a "school-sponsored activity," i.e., one that requires attendance and for which attendance credit may be given, is involved, the event is a "specific undertaking" of the district. In such a case "the district ... shall be liable or responsible for the ... safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district." *Id.*

It would be a different matter if Plaintiff and his friends merely entered the NTMA event on their own, or entered on their own and built their robot at one of their homes, yet called themselves “the kids from Helen Bernstein High School.” But that is not what happened here and it is not what has been alleged in this lawsuit from its inception. Helen Bernstein High School created its robotics team, promoted its team, entered its team in the NTMA event. In that sense, these facts are like the ROTC in Castro; the Court rejecting the Defendant’s claim of the absolute immunity and finding that the facts there alleged came under the provisions of what is now section 44808.

It has been suggested in at least one case that a high school’s traveling sports teams may come under the field trip immunity and that the robotics competition is similar to a high school sport. See Barnhart v. Cabrillo Community College (1999) 76 Cal.App.4th 818. The problem with that analysis is that the Barnhart Court cited Castro with approval regarding the narrow definition of a field trip as a sub-species of the off campus type of school activity that a school undertakes as part of its curriculum. The only reason for the traveling sports team scenario to have been placed under the field trip umbrella in Barnhart was that there was a California Code of Regulations provision then in existence that so characterized such teams. That provision has since been repealed. Thus, the current state of the law is as defined in Castro, Our facts are those contemplated in Education Code section 44808 since the LAUSD undertook to create, lead, and supervise the Helen Bernstein High School involvement in robotics. Plaintiff was thus not involved in a field trip or excursion subject to an immunity from liability.

**IV.**

**CONCLUSION**

The foregoing establishes that the LAUSD Motion for Judgment on the Pleadings should be overruled. First, the moving party should not be permitted to “get around” CCP section 430.41. Second, substantively, the provisions of Education Code, section 35330(d), do not apply to the facts alleged in Plaintiff’s Third Amended Complaint.

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| DATE: December 5, 2018 | CARPENTER, ZUCKERMAN & ROWLEY, LLP  BY:  GARY N. STERN  Attorneys for Plaintiff |
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**PROOF OF SERVICE**

***Malkhasyan v. Los Angeles Unified School District, et al.***

Los Angeles County Superior Court Case No. BC658007

**STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

On December 5, 2018, I served the following document described as **PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT LOS ANGELES UNIFIED SCHOOL DISTRICT’S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO PLAINTIFF’S FIRST CAUSE OF ACTION IN PLAINTIFF’S THIRD AMENDED COMPLAINT** on all parties in this action by placing [ X ] a true copy [ ] the original thereof enclosed in a sealed envelope addressed as follows (this page refers to all parties EXCEPT the moving party Defendant LAUSD):

**[SEE PROOF OF SERVICE LIST]**

[ ] BY MAIL: By placing true and correct copies thereof in individual sealed envelopes, with postage thereon fully prepaid, which I deposited with my employer for collection and mailing by the United States Postal Services. I am “readily familiar” with my employer’s practice for the collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, this correspondence would be deposited by my employer with the United States Postal Service on that same day.

[ X ] BY OVERNIGHT DELIVERY/COURIER: I deposited such envelope in a box or facility regularly maintained by the express service carrier in an envelope or package designated by the express service carrier with delivery fees provided for.

[ ] BY MESSENGER SERVICE: I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed above and providing them to a professional messenger service (A proof of service executed by the messenger will be filed in compliance with Code of Civil Procedure.)

[ ] BY FACSIMILE: I caused such document to be sent via facsimile to the names and facsimile numbers listed in the Mailing list and received confirmed transmission reports indicating that this document was successfully transmitted to such parties.

[ X ] (STATE) I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

[ ] I declare that I am employed in the office of a member of the bar of this court at whose direction the service is made.

Executed on December 5, 2018, at Beverly Hills, California.

LADY LUNA

**PROOF OF SERVICE**

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LADY LUNA

SERVICE LIST

***Malkhasyan v. Los Angeles Unified School District, et al.***

Los Angeles County Superior Court Case No. BC658007

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