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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

NICHOLAS LOTZ, a Minor, etc., et al., Plaintiffs and Appellants, v. THE CLAREMONT CLUB et al., Defendants and Respondents.	B242399 (Los Angeles County Super. Ct. No. KC061412)

APPEAL from a judgment of the Superior Court of Los Angeles County. Peter J. Meeka, Judge. Reversed and remanded.

Magaña, Cathcart & McCarthy and Charles M. Finkel for Plaintiffs and Appellants.

Manning & Kass, Ellrod, Ramirez, Trester, Anthony J. Ellrod and David J. Wilson for Defendants and Respondents.

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The trial court granted summary judgment in favor of defendants and respondents The Claremont Club (Club) and Adam Qasem (Qasem) on the complaint brought by minor Nicholas Lotz (Nicholas) by and through his guardian ad litem Deborah Lotz (Deborah) and Deborah individually (sometimes collectively appellants).[1] Nicholas was injured in a dodgeball game that took place while he was in the Club's childcare program. The trial court ruled that a release signed by Nicholas's father barred appellants' claims and there was no evidence showing the Club's conduct amounted to gross negligence beyond the scope of the release. It further ruled the primary assumption of risk doctrine barred appellants' claims.

We reverse. The evidence offered by appellants showed there were triable issues of material fact regarding the scope and application of multiple releases, whether the Club's and Qasem's conduct constituted gross negligence and whether their conduct increased the risk of harm inherent in the game of dodgeball.

FACTUAL AND PROCEDURAL BACKGROUND

Club Membership.

In 2001, Thomas Lotz (Thomas) signed The Claremont Club Membership Agreement (Membership Agreement) and completed a membership information form indicating that he was seeking a family membership for himself, Deborah and their two children. On the information form, Thomas put a check mark by some of the specified sports and activities in which he and his family were interested in participating. Dodgeball was not included among the list of activities.

The Membership Agreement included a section entitled "Waiver of Liability" that provided in relevant part: "IT IS EXPRESSLY AGREED THAT USE OF THE CLUB FACILITIES, PARTICIPATION IN CLUB-SPONSORED OUTSIDE ACTIVITIES OR EVENTS AND TRANSPORTATION PROVIDED BY THE CLUB SHALL BE UNDERTAKEN BY A MEMBER OR GUEST AT HIS/HER SOLE RISK AND THE CLUB SHALL NOT BE LIABLE FOR ANY INJURIES OR ANY DAMAGE TO ANY

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[1] We use first names for convenience only; no disrespect is intended.

MEMBER OR GUEST . . . ." The provision further stated that the member voluntarily assumed the risk of personal injury and released the Club and its employees from every demand, claim or liability on account of any personal injury.

On the same day he signed the Membership Agreement, Thomas signed a separate document captioned Waiver of Liability, Assumption of Risk and Indemnity Agreement (Waiver) that contained a provision stating: "This Agreement constitutes my sole and only agreement respecting release, waiver of liability, assumption of the risk, and indemnity concerning my involvement in The Claremont Club." The Waiver further provided in part: "I, for myself, my spouse, if any, my heirs, personal representative or assigns, and anyone claiming through or under me do hereby release, waive, discharge, and covenant not to sue The Claremont Club . . . for liability from any and all claims including the negligence of the Claremont Club, resulting in damages or personal injury . . . ." The Waiver further identified certain activities provided at the Club—again excluding dodgeball—together with the risks arising therefrom, and required Thomas to assert that his participation was voluntary and "that I knowingly assume all such risks." The Waiver's concluding paragraph provided for Thomas's understanding "THAT I AM GIVING UP SUBSTANTIAL RIGHTS, INCLUDING MY RIGHT TO SUE."

Together with a Club attorney, Club president and chief executive officer Mike Alpert helped prepare the Waiver. According to Alpert, only the Waiver—not the waiver of liability contained in the Membership Agreement—was in full force and effect at the time Thomas signed both documents. None of the documents that Thomas and Deborah signed in connection with their Club membership informed them that dodgeball would be played on Club premises.

Nicholas Is Injured in a Dodgeball Game at the Club.

The "InZone" was part of the Club's childcare department; it provided a clubhouse environment for older children that included ping pong, foosball and video games. In-house sports and a specialized fitness room were also available as part of the InZone. A document provided to parents describing InZone activities identified a number of sports in which a child might participate; it did not mention dodgeball.

On April 13, 2005, Deborah checked 10-year-old Nicholas into the InZone between 4:30 and 5:00 p.m. No one advised Deborah or Thomas that Nicholas might be playing dodgeball as part of the InZone activities. That day, Club employee Qasem was scheduled to work at the front desk. Eighteen-year-old Qasem had worked part-time at the Club for approximately one year as a lifeguard, weight room attendant and at the front desk. He had never worked in the InZone and the Club had not provided him with any training to work with children.

At some point during his shift, Qasem left the front desk to work in the children's fitness room. He was the only individual supervising approximately eight to 15 children, including Nicholas. One of the children suggested the group play dodgeball, and Qasem agreed. He took the children to the Club's racquetball court because he had observed dodgeball being played there once or twice. The Club's written policies, however, stated "[o]nly racquetball, handball, squash and Wally ball may be played on the racquetball courts." Qasem had never played dodgeball at the Club, nor had he ever seen any written rules concerning dodgeball.

Though Qasem was uncertain whether he provided the children with any rules before they began playing the game, he may have told them to throw the ball below their waists. During the game, anywhere from three to six balls were being thrown at one time; each rubber ball was filled with air and was about the size of a soccer ball. About 20 minutes into the game, Qasem threw a ball using a sidearm motion hard and fast toward Nicholas. The ball hit Nicholas's face and slammed his head into the wall behind him, leaving tooth marks on the wall. Nicholas suffered multiple dental injuries as a result of being hit by the ball.

At the time of the game, Qasem was six feet tall and weighed approximately 145 pounds. According to Nicholas, Qasem had been playing aggressively throughout the game. By playing in the game, Qasem had also violated the Club's then unwritten policy that supervisors not participate in dodgeball games with the children. No one had previously been injured in a dodgeball game at the Club. After that game, Qasem was

disciplined for failing to follow childcare policies and procedures, and one of his superiors instructed him not to play dodgeball at the Club.

Nicholas had previously played dodgeball at school. Though the players were instructed to not throw the ball at other players' heads, he understood there was some risk of being hit in the head with the ball. The balls used at school, however, were similar to a Nerf ball and softer than those used at the InZone. Had Thomas and Deborah been advised that Nicholas would be playing dodgeball on a racquetball court with rubber balls, they would not have given their permission for him to do so.

The Intramural Rules of Dodgeball provide the game is one in which players try to hit others with a ball and avoid being hit themselves. "The main objective is to eliminate all members of the opposing team by hitting them with thrown balls, catching a ball thrown by a member of the opposing team, or forcing them outside of the court boundaries." The National Dodgeball League Rules and Regulations of Play specify that a player committing a "headshot"—hitting another player in the head by a high thrown ball—will be deemed out of the game.

The Pleadings and Summary Judgment.

In June 2011, appellants filed their complaint alleging negligence and gross negligence and seeking general and special damages. They alleged that Nicholas was injured as a result of the Club's negligently and recklessly "a. hiring, employing, training, entrusting, instructing, and supervising defendant ADAM QASEM; [¶] b. failing to adequately [] protect children under the care of defendant ADAM QASEM; [¶] c. participating in a game of dodge ball in an unreasonably forceful and dangerous manner so as to endanger the health, safety and welfare of children placed by their parents into the care of defendants."

In December 2011, the Club and Qasem moved for summary judgment. They argued that appellants' negligence claims were barred by Thomas's execution of a release and express assumption of risk, and according to the assumption of risk doctrine. They further argued their actions did not rise to the level of gross negligence. In support of their motion, they submitted the Membership agreement, appellants' discovery responses,

deposition excerpts and Qasem's declaration. They also sought judicial notice of several principles related to dodgeball rules and manner of play.

Appellants opposed the motion and filed evidentiary objections. They argued that triable issues of material fact existed concerning the scope of the Waiver, whether the Club's conduct amounted to gross negligence and whether Nicholas's injury was the result of an inherent risk of the game of dodgeball. They offered deposition excerpts, Club policies, medical records and several declarations in support of their arguments. Sports and Recreational Consultants president Steve Bernheim opined that the Club "did not take the proper measures to protect the children who were in its care, custody and control during the dodgeball game in which Nicholas Lotz was injured." More specifically, the children were not provided with game-appropriate rules, the racquetball court was an insufficient space, use of the rubber balls was inappropriate and an adult should not have been playing with the children. He further opined that Qasem acted recklessly and that his conduct, coupled with the other conditions of the game, increased the risks inherent in the game of dodgeball and were outside the range of ordinary activity associated with the sport.

The Club replied and also filed evidentiary objections. At a March 2012 hearing, the trial court granted the motion. Though the trial court edited the proposed judgment to eliminate any reasons for its ruling, at the hearing the trial court first referred to childhood dodgeball experience as the basis for its decision: "When I went to school, we called it Warball, and we didn't use Nerf balls because there weren't any. It was a ball. When it hit you, it stung. And we all knew that. Everybody knew it. And it was just one of those games you played in school, and high school for that matter." Turning to the evidence, the trial court construed the Waiver to apply to Thomas's family members as well as Thomas, reasoning that the Club would have expected Thomas to be executing a release on behalf of all family members when he joined. The trial court further explained that even if it were to ignore the Waiver, appellants' claims would be barred by the assumption of risk doctrine. It further found that the Club's and Qasem's conduct did not rise to the level of gross negligence as a matter of law, reasoning there was no evidence

that Qasem was trying to injure Nicholas and that such an injury could have occurred in the context of any type of sport. It did not rule on any of the evidentiary objections.

Judgment was entered in June 2012, and this appeal followed.

DISCUSSION

Appellants maintain that the trial court erred in granting summary judgment and assert they offered evidence sufficient to create triable issues of fact concerning the scope and application of the Waiver, the existence of gross negligence and the application of the assumption of risk defense. We agree that triable issues of fact preclude the granting of summary judgment.

I. Standard of Review.

We review a grant of summary judgment de novo and independently determine whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849–850.) To secure summary judgment, the moving defendant must show that one or more elements of the cause of action cannot be established, or that there is a complete defense to the cause of action, and that it "is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850.) Once that burden is met, the burden "shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra,* at p. 850.)

We assume the role of the trial court and redetermine the merits of the motion. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.) "In doing so, we must strictly scrutinize the moving party's papers. [Citation.] The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. [Citation.] All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. [Citation.]" (*Ibid*.; accord, *Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502.) "Because a summary judgment denies the adversary party a trial, it should be granted with caution. [Citation.]" (*Acosta v. Glenfed Development Corp.* (2005) 128

Cal.App.4th 1278, 1292.) The court's role is to focus "on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (*Ibid.*)

II. Appellants Raised Triable Issues of Fact as to Whether the Waiver Applied to Release Their Claims.

At the hearing on the motion, the trial court indicated that one basis for its ruling was the application of a written release. It stated: "Here, dad is signing the release on behalf of the family. Mom could have signed the release on behalf of the family and had a check and paid for the membership. And even though there are some slight twists and turns here, I guess nothing is ever completely crystal clear. I think the release really hurts the plaintiff or plaintiffs here." Though the trial court's comments fail to demonstrate whether it relied on the Membership Agreement or the Waiver as providing the operative release, the Club argues on appeal that the release contained in the Membership Agreement was clear and unambiguous, and applied to release appellants' claims.

"California courts require a high degree of clarity and specificity in a [r]elease in order to find that it relieves a party from liability for its own negligence." (*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1488 (*Cohen*).) Thus, "to be effective, an agreement which purports to release, indemnify or exculpate the party who prepared it from liability for that party's own negligence or tortious conduct must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releaser or indemnitor of the effect of signing the agreement." (*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.* (1983) 147 Cal.App.3d 309, 318.) Waiver and release forms are strictly construed against the defendant. (*Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 Cal.App.4th 733, 738.) But "a release need not achieve perfection" to be effective. (*National & Internat. Brotherhood of Street Racers, Inc. v. Superior Court* (1989) 215 Cal.App.3d 934, 938.) A release is sufficient if it "'constitutes a clear and unequivocal waiver with specific reference to a

defendant's negligence.'" (*Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 755.)

Here, Thomas represented in his membership application that he sought Club membership on behalf of his family. The release contained in the Membership Agreement provided that the member and guests assumed the risk of Club activities and released the Club from liability for participation in Club activities. A contract in which a party expressly assumes a risk of injury is, if applicable, a complete defense to a negligence action. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 308, fn. 4 (*Knight*); *Sweat v. Big Time Auto Racing, Inc.* (2004) 117 Cal.App.4th 1301, 1304.) Moreover, it is well settled a parent may execute a release on behalf of his or her child. (*Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1120 (*Aaris*); *Hohe v. San Diego Unified Sch. Dist.* (1990) 224 Cal.App.3d 1559, 1565.) By offering evidence of the Membership Agreement, the Club met its threshold burden to demonstrate a complete defense to appellants' negligence claims.

In contrast to the trial court, however, we conclude the evidence offered by appellants showing that the release was not "crystal clear" satisfied their burden to demonstrate triable issues of material fact. As summarized in *Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1357: "The determination of whether a release contains ambiguities is a matter of contractual construction. [Citation.] 'An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. [Citations.] An ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence.' [Citation.] The circumstances under which a release is executed can give rise to an ambiguity that is not apparent on the face of the release. [Citation.] If an ambiguity as to the scope of the release exists, it should normally be construed against the drafter. [Citations.]"

Here, appellants demonstrated an ambiguity by offering evidence that the Waiver—not the Membership Agreement—contained the operative release. The Waiver contained language effectively negating any other release, providing: "This Agreement constitutes my sole and only agreement respecting release, waiver of liability, assumption

of the risk, and indemnity concerning my involvement in The Claremont Club. Any prior written or oral agreements, promises, representations concerning the subject matter contained in this Agreement and not expressly set forth in this Agreement have no force or effect." Club president Alpert testified that only the Waiver was the operative agreement at the time Thomas joined the Club. The Waiver, however, inconsistently provided in one paragraph that Thomas was giving up his right to sue on behalf of his spouse and heirs, and in another paragraph that he was relinquishing only his personal right to sue. Other language in the Waiver that "I hereby assert that my participation is voluntary and that I knowingly assume all such risks" likewise suggested that the Waiver was intended to be personal only. Given appellants' identification of an "alternative, semantically reasonable" construction of the Waiver, the evidence created a triable issue of fact concerning whether and to what extent the Waiver applied to appellants' claims. (See *Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 360.)

Beyond the issue of whether the Waiver or the Membership Agreement contained the operative release, appellants demonstrated a triable issue of fact as to whether the language of either document contemplated the type of injuries suffered by Nicholas. Both the Membership Agreement and the Waiver released the Club from liability for personal injury from Club activities. "'Where a participant in an activity has expressly released the defendant from responsibility for the consequences of any act of negligence, "the law imposes no requirement that [the participant] have had a specific knowledge of the particular risk which resulted in his death [or injury.]" . . . Not every possible specific act of negligence by the defendant must be spelled out in the agreement or discussed by the parties. . . . Where a release of all liability for *any* act of negligence is given, the release applies to any such negligent act, whatever it may have been. . . . *"It is only necessary that the act of negligence, which results in injury to the releasor, be reasonably*

related to the object or purpose for which the release is given."' [Citation.]" (*Leon v. Family Fitness Center* (*#107*), *Inc.* (1998) 61 Cal.App.4th 1227, 1234–1235 (*Leon*).)[2]

Appellants offered evidence creating a triable issue of fact as to whether an injury from a child playing dodgeball was sufficiently related to the purpose of the release. Neither Thomas nor Deborah were ever informed that Nicholas would be playing dodgeball at the Club. Dodgeball was not identified as a Club activity in any of the Club materials. It was not listed as an activity in either the Membership Agreement or the Waiver. It did not appear on the list of Club activities in the membership information form. According to the Club's written policies, it was not among the activities permitted to be played on the Club's racquetball courts. Likewise, the Club maintained a policy to preclude supervisors from engaging in dodgeball games with children.

These circumstances are analogous to those in *Cohen, supra,* 159 Cal.App.4th 1476. There, the plaintiff was injured during a horseback ride when the guide unexpectedly caused his horse to gallop, knowing that it would cause the horses following to do the same, and the plaintiff was unable to control her galloping horse. (*Id*. at p. 1480.) Before riding, the plaintiff had signed a release that described some but not all of the risks inherent in horseback riding and provided that she agreed "'to assume responsibility for the risks *identified herein* and *those risks not specifically identified.*' (Italics added.)" (*Id*. at p. 1486.) Finding this language unambiguous, the trial court granted summary judgment. (*Id*. at pp. 1482–1483.) The appellate court reversed, reasoning the exculpatory provision was problematic, as "[t]he 'risks not specifically identified' could refer to the risks inherent in horseback riding left unidentified by the phrase 'some, but not all,' which seems to us the most reasonable assumption, but it

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[2] The *Leon* court separately evaluated an assumption of risk provision and a general release in a health club membership agreement. (*Leon, supra*, 61 Cal.App.4th at pp. 1234, 1235.) It reasoned that for an assumption of the risk provision to be effective, "'it must also appear that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm.'" (*Id*. at p. 1234.) We find this analysis sufficiently similar to that required for a general release to engage in a single evaluation.

might also refer to risks arising out of respondent's negligence that increase[] the inherent risks." (*Id*. at p. 1486.) Stated another way, the court explained that "[t]he Release presented to appellant clearly does not unambiguously, let alone explicitly, release respondent from liability for injuries caused by its negligence or that of its agents and employees which increase a risk inherent in horseback riding." (*Id*. at p. 1488.)

At a minimum, appellants' evidence that dodgeball was an undisclosed risk and an activity contrary to the Club's written policies raised a triable issue of fact as to whether it was a risk that was reasonably related to the purpose for which any release was given. Evidence of Qasem's conduct likewise raised a triable issue of fact as to whether such a risk was encompassed by the Waiver. (See *Cohen, supra,* 159 Cal.App.4th at p. 1489 ["Nothing in the Release clearly, unambiguously, and explicitly indicates that it applies to risks and dangers attributable to respondent's negligence or that of an employee that may not be inherent in supervised recreational trail riding," italics omitted]; see also *Sweat v. Big Time Auto Racing, Inc., supra,* 117 Cal.App.4th at p. 1308 [release in favor of racetrack owner for injuries suffered while in a racetrack's restricted area did not apply to injuries sustained after defectively constructed bleachers collapsed]; *Leon, supra,* 61 Cal.App.4th at p. 1235 [release that allowed the plaintiff to engage in fitness activities at a health club did not apply to injuries from a collapsed sauna bench].)

On the other hand, the circumstances here bear no similarity to those in *Aaris, supra,* 64 Cal.App.4th 1112, a case on which the Club relies. There, the court found that a high school cheerleader and her family assumed the risk of injuries resulting from cheerleading activities. On the basis of that finding, the court also affirmed summary judgment on the ground that a release of liability for school activities barred any claim for injuries. The court reasoned that the assumption of risk doctrine "embodies the legal conclusion that defendant owed no duty to protect appellant from the risk of harm inherent in the athletic activity. [Citation.] There being no duty, there was no negligence." (*Id.* at p. 1120.) Ignoring that the *Aaris* court's holding was based on a finding of no negligence rather than any application of the release, the Club emphasizes that the release applied notwithstanding its failure to specify "cheerleading," and argues

that the Membership Agreement's and Waiver's references to Club activities must therefore similarly be construed to encompass dodgeball. But in *Aaris*, the only reasonable inference to be drawn from the evidence was that the sole purpose of the release was to address injuries resulting from cheerleading. Here, Thomas and Deborah did not even know that Nicholas would be participating in a dodgeball game. Moreover, the trial court in *Aaris* ruled that the undisputed evidence showed "'that the instructor did not increase the risk of harm inherent in the activity, the participants received adequate and proper[] training in technique and safety, and they were properly and reasonably supervised.'" (*Id*. at p. 1117.) In sharp contrast, appellants' evidence showed that Qasem should not have been playing dodgeball and played aggressively, he violated the Club's written policy concerning use of the racquetball court and no one else was supervising the game.

Finally, appellants offered evidence to show that the InZone was part of the Club's childcare department. On the day of the dodgeball game, Deborah signed Nicholas in to the Club's InZone program. Club wellness director Denise Johnson testified that she was aware children played dodgeball on the racquetball courts while being supervised under the childcare department. To the extent that the Club's Membership Agreement or Waiver purported to release it from liability for injuries occurring in its childcare program, appellants raised a triable issue of fact as to whether such an agreement would be void against public policy. (*Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal.App.4th 662, 676 ["we hold that exculpatory agreements that purport to relieve child care providers of liability for their own negligence are void as against public policy"].)

In sum, the evidence offered on summary judgment demonstrated that the Membership Agreement and/or the Waiver did not clearly and explicitly release the Club from liability for Nicholas's injuries. In view of the ambiguities concerning whether the Membership Agreement or the Waiver applied, whether the language in either document was sufficient to cover the Club's conduct and whether any release violated public policy, a trier of fact could find that the Club was not released from liability. (See *Zipusch v. LA*

Workout, Inc. (2007) 155 Cal.App.4th 1281, 1288 ["if a release is ambiguous, and it is not clear the parties contemplated redistributing the risk causing the plaintiff's injury, then the contractual ambiguity should be construed against the drafter, voiding the purported release"].) The undisputed evidence failed to show the Club and Qasem were absolved from liability as a matter of law according to the Membership Agreement or the Waiver.

III. Appellants Raised Triable Issues of Fact Whether the Club Was Liable for Gross Negligence.

In *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 751 (*Santa Barbara*), our State's highest court held "that an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy." Relying on *Santa Barbara*, appellants opposed the Club's summary judgment motion on the alternative ground that, even if the Club's most comprehensive release language was unambiguous, there was a triable issue of fact as to whether the Club's conduct amounted to gross negligence. The trial court ruled: "It is not gross negligence. He wasn't trying to injure the child on purpose, any more than a child would be injured playing hockey or soccer, or anything like that." Again, we disagree.

California courts define "'gross negligence'" "as either a '"'want of even scant care'"' or '"'an extreme departure from the ordinary standard of conduct.'"' [Citations.]" (*Santa Barbara, supra*, 41 Cal.4th at p. 754; accord, *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 857.) Gross negligence "connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results." (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 729, disapproved on other grounds in *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 853, fn. 19.) In contrast to willful misconduct, gross negligence does not require an intent to do harm or to act with absolute disregard of the consequences. (*Meek v. Fowler* (1935) 3 Cal.2d 420, 425; see also *Hawaiian Pineapple Co. v. Ind. Acc. Com.* (1953) 40 Cal.2d 656, 662 ["While gross negligence may involve an intent to perform the act or omission, wilful misconduct

involves the further intent that the performance be harmful or that it be done with a positive, active and absolute disregard of the consequences"].) Though not always, "[g]enerally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence. [Citations.]" (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358; accord, *Santa Barbara, supra,* at pp. 767, 781.)

Appellants offered sufficient evidence to create a triable issue of fact as to whether the Club's and Qasem's conduct amounted to gross negligence. According to the undisputed evidence, while the Club's policies prohibited dodgeball being played on the racquetball courts, Club employees—including the childcare director—knew the courts were used for children's dodgeball games. Nonetheless, none of the Club's materials identified dodgeball as an available activity. Consistent with the Club's failure to acknowledge dodgeball as an ongoing activity, it failed to promulgate rules to insure the game was played safely. When Nicholas was dropped off at the InZone program, no one advised his parents that he might play dodgeball. In this particular instance, children initiated a dodgeball game while being supervised by an 18-year-old front desk clerk who had no childcare training. Qasem selected inflated rubber balls for the game and participated aggressively in the game with the children, even though the Club's policy was that supervisors not play dodgeball. Nicholas was injured after Qasem threw the ball extremely hard and extremely fast, using a sidearm motion.

On the basis of this evidence, appellants offered Bernheim's expert opinion that "the injury to Nicholas Lotz occurred during an extreme departure from what must be considered as the ordinary standard of conduct when children are playing dodgeball and are supposed to be . . . supervised." We agree that appellants' evidence was sufficient to raise a triable issue of fact as to whether the Club's and Qasem's conduct was an extreme departure from ordinary care or, at a minimum, demonstrated passivity and indifference toward results. A trier of fact could find gross negligence on the basis of the Club's failure to address the repeated violation of its own policy prohibiting dodgeball play on the racquetball courts, failure to implement rules or policies designed to protect those playing dodgeball and failure to provide any training to individuals assigned to supervise

the children in its childcare program. Triable issues existed as to whether the Club's and Qasem's conduct was grossly negligent and therefore outside the scope of any release in either the Membership Agreement or the Waiver.

IV. Appellants Raised Triable Issues of Fact Whether the Assumption of Risk Doctrine Barred Liability.

As a further basis for granting summary judgment, the trial court determined that the Club met its burden to show the primary assumption of risk doctrine was a viable defense and that appellants failed to offer any effective rebuttal. It analogized the circumstances here to those in a previous case in which it found the doctrine barred recovery to a high school student injured during a soccer game. We fail to see the analogy.

"Primary assumption of risk occurs where a plaintiff voluntarily participates in a sporting event or activity involving certain inherent risks. For example, an errantly thrown ball in baseball or a carelessly extended elbow in basketball are considered inherent risks of those respective sports. [Citation.] Primary assumption of risk is a complete bar to recovery. [Citation.] [¶] Primary assumption of risk is merely another way of saying no duty of care is owed as to risks inherent in a given sport or activity. The overriding consideration in the application of this principle is to avoid imposing a duty which might chill vigorous participation in the sport and thereby alter its fundamental nature. [Citation.]" (*Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 751–752, citing *Knight, supra,* 3 Cal.4th 296.) "*Knight* however does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that '. . . it is well established that defendants 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, supra,*] 3 Cal.4th at pp. 315–316, italics added.) Thus, even though 'defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself,' they may not increase the likelihood of injury above that which is inherent. (*Id*. at p. 315.)" (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 827.) Thus, "when the plaintiff claims the defendant's conduct

increased the inherent risks of a sport, summary judgment on primary assumption of risk grounds is unavailable unless the defendant disproves the theory or establishes a lack of causation. [Citations.]" (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 740.)

Much of appellants' evidence that we deemed sufficient to raise a triable issue of fact on the question of gross negligence likewise created a triable issue as to whether the Club and Qasem increased the risk of harm inherent in the game of dodgeball.[3] Certainly, being hit by a ball is one of the objectives of and hence an inherent risk in the game of dodgeball. But appellants' evidence tended to show that the Club and Qasem increased that risk in a number of ways, including by playing on an enclosed racquetball court which was neither intended nor permitted to be used for dodgeball; by selecting rubber balls for the game; by allowing an adult untrained in childcare not only to participate in the game with the children but also to abdicate any supervisory role over them during the game; and by enabling that adult to play aggressively with the children. Given the totality of the circumstances, we cannot say, as a matter of law, that Nicholas assumed the risk of being hit in the head with a ball.

Other courts have similarly reversed a grant of summary judgment where the plaintiff's evidence raised a triable issue of fact as to whether the defendant's conduct increased the inherent risks in a sport or other recreational activity. *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112 is particularly instructive. There, the plaintiff filed suit after he was injured by a foul ball while watching a baseball game, and the trial court granted summary judgment, finding the doctrine of primary assumption of risk barred his claims. (*Id*. at p. 120.) In reversing, the appellate court relied on evidence showing the plaintiff was hit when he turned toward a team mascot who had repeatedly tapped his shoulder. (*Id*. at pp. 117–118, 123.) The court explained

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3 We acknowledge that the application of the primary assumption of risk doctrine is a question of law. (*Knight, supra*, 3 Cal.4th at p. 313.) But where a defendant engages in conduct that is not an inherent risk of the sport and the imposition of a duty of care will neither alter the nature of nor chill participation in the sport, the question becomes one of ordinary negligence, with the remaining elements beyond duty to be determined by a trier of fact. (*Yancey v. Superior Court* (1994) 28 Cal.App.4th 558, 565–567.)

that while foul balls represent an inherent risk to spectators attending a baseball game, "we hold that the antics of the mascot are not an essential or integral part of the playing of a baseball game. In short, the game can be played in the absence of such antics. Moreover, whether such antics increased the inherent risk to plaintiff is an issue of fact to be resolved at trial." (*Id.* at p. 123; see also *Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 591 [though skiers assume the risk of injury from the sport, triable issue of fact existed whether ski resort's jump design increased the risk of harm]; *Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127, 134 [while a golfer assumes the risk of being hit by a golf ball, golf course owner owes a duty to minimize that risk, and the plaintiff raised a triable issue of fact as to whether that duty was breached where evidence showed the design of certain holes may have increased that risk].)

We find no merit to the Club's and Qasem's argument that appellants' evidence demonstrated merely that their conduct may have increased the severity of Nicholas's injuries as opposed to increasing the risk of injury. In *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, the plaintiff suffered injury when he fell off his skateboard and hit a metal pipe protruding from a planter in the defendants' driveway. Finding the primary assumption of risk doctrine barred his claims, the court rejected the plaintiff's argument that the concealed metal pipe increased his risk of harm: "[The plaintiff] was injured because he fell. As [he] concedes, falling is an inherent risk of skateboarding, and the presence of the pipe or the planter had nothing to do with his falling down. The fact that [his] injuries were more severe than they would have been if the pipe had not been in the planter does not make the assumption of risk doctrine inapplicable. The *Knight* exception applies when the defendant increased the *risk of injury* beyond that inherent in the sport, not when the defendant's conduct may have increased the severity of the injury suffered." (*Id.* at p. 116.) Here, in contrast, appellants' evidence showed that the Club and Qasem increased the risk of injury by initiating the dodgeball game in which Nicholas participated. This was not the type of situation where Nicholas would have been playing dodgeball absent the Club's and Qasem's involvement. Moreover, the evidence raised a triable issue of fact as to whether the Club and Qasem increased the risk of injury by

permitting dodgeball play on the racquetball court, by failing to adopt rules for safe play, by Qasem's failing to act as a supervisor during the game, by his selecting rubber balls for the game and by his participating aggressively in the game. The Club and Qasem were not entitled to summary judgment on the ground the primary assumption of risk doctrine barred appellants' claims.

DISPOSITION

The judgment is reversed and the matter is remanded with directions for the trial court to vacate its order granting summary judgment and to enter a new order denying summary judgment. Appellants are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J. *

FERNS

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.

CHAVEZ

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.