

PARKS AND RECREATION COMMISSION

STAFF REPORT

MEETING DATE: October 1, 2013

AGENDA ITEM NUMBER: 3B

APPLICANT: Roger Moellendorf / Kurt Meyer Aquatics Facility Operations Manager

REQUEST: Discussion only regarding the Aquatics Facility's rule on the supervision of children six years and younger in the facility.

GENERAL DISCUSSION: This item was brought to the Parks & Recreation Commission during the September 3, 2013 meeting as an action item requesting a recommendation from the Commission to recommend to staff to maintain an existing rule of the Aquatics Facility that requires adults to be attired in swimming attire and supervising children under their care who are using our pool facilities. After much discussion during that meeting among the Commission, staff and Ron Piersanti (the individual protesting the rule) the Commission requested that the issue be continued. A meeting was held with Sean Lehmann, Janet Brod, Joe Ward, Senior Deputy Attorney, Kurt Meyer, Aquatics Facility Manager, and Roger Moellendorf at the Aquatics Facility to discuss the issue further. Staff believes there was concurrence at this meeting that the rule should remain in place. Since this issue represents an "operations" situation, staff decided to bring this issue back to the Commission as a "discussion only" item in order to more effectively explain the purpose of the rule and to gain feedback from the Commission. Staff believes that this rule is a basic and important safety issue and as a result we will continue to enforce the rule.

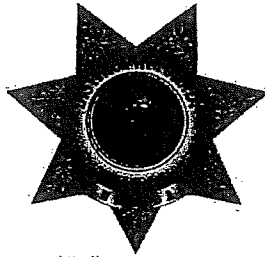
The Commission questioned during the September 3 meeting whether a supervising adult could sign a waiver of liability for the child in their care in place of the dressing in swimming attire. Attorney Joe Ward did some research regarding this and he has found that court cases have consistently ruled that parents or legal guardians cannot release a minor child's claim or potential action for personal injuries resulting from a third party's negligence. Please refer to Exhibit A, a Memorandum from Joe Ward to Sean Lehmann dated September 11, 2013. In essence, a parent or legal guardian cannot legally waive a minor child's right to take legal action.

As the Commission knows we received a complaint from Ron Piersanti regarding this rule. The rule (Exhibit B) states, "Children six years of age and younger must be accompanied in the water at all times by a swimming adult who has paid, is wearing a swimsuit and is at least 15 years or older (6/1 ratio) and within arm's reach of the child." Mr. Piersanti has indicated that he will not comply with the rule.

Staff has surveyed other area pool facilities and has found that these facilities all have similar rules. Once again staff believes that this rule is reasonable and that it is important to have adults involved and engaged in providing for the safety of children (under six) that they are caring for that are using the pool. Adults, who are in the pool with the children they are supervising, are less likely to have their attention diverted away from them. Removing or changing this rule which has been in place for many years would compromise the safety of the children in the Aquatics Facility. Making exceptions to this rule in staff's opinion sets a dangerous precedent and represents an unwarranted risk to the safety of the children who use the pools in the Aquatics Facility.

RECOMMENDED ACTION: This is a “discussion only” item therefore no action can be taken; however, staff is interested in hearing opinions and comments from the Commission.

NEIL A. ROMBARDO
District Attorney



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MEMORANDUM

To: Sean Lehman, Chairman
Parks and Recreation Commission

From: Joe Ward, Senior Deputy DA

Date: September 11, 2013

Subject: Waiver or release for children 6 & under

ATTORNEY CLIENT

A question came up during the deliberations pertinent to Item 3C of the Parks and Recreation Commission (Commission) agenda for its September 3, 2013 meeting. This action item sought review of an existing Aquatics Facility rule on the supervision of children six years of age and younger. It also sought recommendations from the Commission.

QUESTION

May the Aquatic Facility allow a parent or legal guardian of a child six years of age or younger to sign a waiver, which would relieve that person from abiding by the rule?¹

ANALYSIS

The parent or legal guardian "cannot release a minor child's claim or

¹ The "rule" requires "children 6 years of age and under" to be "accompanied in the water at all times by a swimming adult who has paid, is wearing a swim suit, and is at least 15 years or older (6 to 1 ratio) within arms reach of the child. ..."

potential cause of action without prior court approval." *Arnold v. AMTRAK*, 13 Fed. Appx. 573, 578-579 (9th Cir. Wash. 2001) (Emphasis added) and see also *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 492-495, 834 P.2d 6 (Wash. 1992) (en banc) (holding that **parents do not have legal authority to waive a child's own future causes of action for personal injuries resulting from a third party's negligence**). Nevada is in the Ninth Circuit Court of Appeals and the *Arnold* case is persuasive in this regard.

Law review articles likewise pronounce this position. In 32 Akron L. Rev. 699, 714-15 (1999), in an article written by Melinda Smith entitled "Tort Immunity for Volunteers in Ohio: *Zivich v. Mentor Soccer Club, Inc.*" the following is stated:

The majority of jurisdictions have held that parents are not capable of releasing their children's causes of action for personal injury. 70 The primary reason for the [*715] general refusal to enforce such agreements is that most states do not allow parents to release a cause of action belonging to their minor child without specific judicial or legislative approval.

32 Akron L. Rev. 699, 714-715 (Emphasis added).²

In 37 Suffolk U. L. Rev. 439 (2004), in an article written by Allison M. Foley entitled "We, The Parents and Participant, Promise Not to Sue ... Until There is an Accident. The Ability of High School Students and their Parents to Waive Liability for Participation in School-Sponsored Athletics" it is explained:

When adults enter into exculpatory agreements, courts usually allow such transactions to occur. 55 **Courts are reluctant, however, to allow those with a duty of exercising reasonable care towards school-aged children to remove their obligation by contract when children are engaged in risky activities like sports.** 56 ... Although a minor can sign a waiver, contract law allows minors to disaffirm contracts any time before or within a reasonable period after reaching the age of majority, unless the child contracts for necessities. 58 Most courts have not categorized athletics as a necessity. 59 Regardless of this classification, many [*448]

² Footnote 70 of this law review articles read in part:

n70 King, *supra* note 27, at 684. In the *Zivich* case, Judge Ford concurs in the appellate opinion admitting, **"courts have almost unanimously held that waivers and/or releases executed by parents in behalf of minor children are void as against public policy."** *Zivich*, 1997 WL 203646 at *14 (Ford, J., concurring). ... "[N]umerous cases in other jurisdictions have ... concluded that such releases do not bar the child's cause of action for personal injuries. ...

school sports programs require liability waivers from children before participation. 60

Some school athletic programs attempt to cure the problem of contracting with minors by requiring a parent or guardian's signature. 61 In most cases, however, a **parent's signature does not constitute a waiver of liability for the student's own claims of negligence.** 62 Despite these results, schools continue to include exculpatory language, hoping the waiver will restrict the rights of both children and parents. 63

37 Suffolk U. L. Rev. 439, 447-452 (Emphasis added).

ANSWER

A waiver could easily be viewed as being contrary to the City's paramount concern; the safety of children. Moreover, it would not shield the City from all liability. Accordingly, the City's Aquatic Facility should not allow a parent or legal guardian of a child six years of age or younger to sign a waiver purportedly relieving such parent or legal guardian from compliance with the rule.³

³ Reference to the "rule" is as it exists or as it may be modified.