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Oregon Judicial Department  
Washington County Circuit Court  
Twentieth Judicial District

**Opinion Letter**

September 10, 2018

Re: Charmion Freifeld, Jed Freifeld vs Leisure Sports, Inc., SMG Properties Oregon, LLC, CLUBSPORT OREGON VIA ITS OWNER, SMG Properties Oregon, LLC, Samuel Greer

Case #: 18CV12178

Ms. Kristin L. Olson  
Mr. Scott A. Brooksby  
Attorneys at Law

Ms. Connie E. McKelvey  
Attorney at Law

Mr. David E. Artman  
Mr. Kenneth J. Abere Jr.  
Attorneys at Law

Dear Counsel:

The above matter came before the Court August 24, 2018, for hearing on Defendant Leisure Sports, Inc., Clubsport Oregon and SMG Properties Oregon LLC's ("Cclubsport's") ORCP 21 E Motion to Strike. Having reviewed the submissions and oral argument of the parties, and reviewed again the relevant authorities, for the following reasons, the motion to strike is denied.

Cclubsport would have the Court strike certain allegations regarding an alleged prior sexual assault incident at Clubsport. The alleged incident occurred approximately twelve years prior and involved individuals other than plaintiffs or any of the other defendants in this case. The sole issue before the Court is whether or not the allegations Cclubsport seeks to strike are irrelevant, legally insufficient or frivolous. ORCP 21E.

Much of the discussion regarding the motion focused on the whether the allegations of a prior incident are necessary to sufficiently allege foreseeability. However, the basis for the Court's decision lies with the allegations of fault. At paragraph 33 of the First Amended Complaint, Plaintiffs make certain allegations of fault or negligence against Clubsport. Amongst those allegations, Plaintiffs allege that Clubsport had a duty to "take reasonable steps to change its protocol in regard to massage patients\*\*\*." In order to strike that allegation of fault, the Court would have to find that there could be no basis for liability for an alleged failure to change a protocol that would have prevented the current alleged incident. The Court cannot make that finding on a motion to strike.

Because Plaintiffs assert the failure to "change" policies in response to a prior similar incident as a basis for liability, the additional allegations that Clubsport seeks to strike, which relate to the prior alleged incident, become relevant and not legally insufficient or frivolous.

Ms. Olsen, would you please prepare an order.

Signed: 9/11/2018 11:50 AM

Judge Pro Tem,

Drake A. Hood

**Circuit Court Judge – Pro Tem, Drake Hood**