2nd Civil No. B317548

Public Entity
~ No Fee Required ~
Gov. Code, § 6103

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 5

N.B., a minor, by and through his Guardian Ad Litem, Robin Brigstocke, et al.,

Plaintiff and Respondent,

v.

BURBANK UNIFIED SCHOOL DISTRICT, et al.,

Defendants and Appellants.

Appeal from Los Angeles County Superior Court
Case No. 18STCV06782
Honorable William D. Stewart

APPELLANTS' OPENING BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: B317548

Case Name: *N.B. v. Burbank Unified School District, et al.*

Please check the applicable box:

X There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

□ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	

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INTRODUCTION

Based on multiple errors, a jury awarded over $1.7 million to an eighth grader who sustained a knee injury during a touch football game in gym class. Absent JNOV or reversal for new trial, the judgment threatens to undermine physical education programs throughout California, as well as the financial viability of California school districts.

Nigel Brigstocke (N.B.), an eighth-grade student at John Muir Middle School, tore his anterior cruciate ligament in physical education class after another student, Gianni Maucere, forcefully tagged him to end a touch football play, knocking him to the ground. N.B. sued Burbank Unified School District and his physical education teacher, Dylan Washausen, for negligence based on allegations that Washausen created a *Lord of the Flies* atmosphere. N.B. also sued the District for breach of its mandatory statutory duty to report physical violence by a student, asserting the District's oversights *after* N.B. hurt his knee proximately caused that injury.

At the jury trial, the trial court erroneously denied the District's request for a form instruction on the primary assumption of risk doctrine explaining Washausen was only responsible for N.B.'s injury if his conduct increased the inherent risks of touch football.[1] The court also wrongly precluded the jury from allocating *any* fault to Maucere if it found his conduct was intentional (an inherently blurry line in a touch football game).

[1] We refer to the District and Washausen collectively as the District, except where the distinction between the two is relevant.

The jury found Maucere acted intentionally and awarded N.B. $1.7 million against the District, including over $1.2 million in noneconomic damages.

The District appeals the judgment on three grounds:

First, the District is entitled to JNOV on N.B.'s claim that the District breached a mandatory duty to apprise teachers about serious misconduct. There was no evidence that Maucere's conduct predating the incident triggered the District's mandatory reporting duties, and any reporting oversights by the District *after* N.B. hurt his knee could not have been a proximate cause of that injury. The District's entitlement to JNOV on this claim requires a defense judgment on the entire case or, at a minimum, a new trial on N.B.'s only other claim—his negligence claim against Washausen—because eliminating the mandatory duty claim renders the special verdict legally deficient.

Second, the District is entitled to a new trial because the trial court refused to instruct the jury on the primary assumption of risk doctrine. Washausen could only be held liable for negligent supervision if he unreasonably increased the inherent risks of touch football, which include aggressive play, deliberate contact, and collisions. Because school districts' statutory duty of supervision does not modify the primary assumption of risk doctrine and the same policy justifications for applying the doctrine to extracurricular school sports apply to classroom physical education, the District was entitled to an instruction on this crucial defense. The court's failure to so instruct the jury was prejudicial and requires a new trial.

Third, the judgment rests on plain error because the special verdict form permitted the jury to allocate a percentage of fault to Maucere *only* if it found his conduct was negligent, not intentional. Because the jury found Maucere's conduct was intentional, the verdict form made the District fully liable for all noneconomic damages. California precedent applying Proposition 51 holds negligent tortfeasors' responsibility for noneconomic damages may be reduced to the extent intentional tortfeasors contributed to the plaintiff's injury. Even though this precedent was binding on the trial court, the court adopted the contrary reasoning of an irrelevant Tennessee Supreme Court opinion applying that state's comparative-fault law, which differs from California law. The absence of the required comparative-fault finding requires a new trial.

This Court should reverse the judgment with directions to enter a defense judgment. Alternatively, at a minimum, it should order entry of JNOV for the District on the breach-of-mandatory duty claim and remand the negligence claim for new trial.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Although the issues presented are subject to differing standards of review (see Standards of Review, *post*), our factual statement summarizes the trial evidence under the deferential substantial evidence standard.

A. N.B.'s advanced physical education class.

Physical education (P.E.) at John Muir Middle School is a mandatory subject, with both regular and advanced classes. (3RT/990, 1002-1003; 4RT/1206-1207.) Although there are no set criteria, advanced classes are intended for more physically gifted students who teachers recommend for the class. (3RT/990; 4RT/1206-1208, 1210.) N.B.'s class was co-ed, had between 50 and 60 students, and was supervised by one teacher, Dylan Washausen. (3RT/990-991; 4RT/1205-1206.) The students rotated between sports, including basketball, paddle tennis, hockey, tumbling, soccer, and touch football. (3RT/992; 4RT/1210-1211.)

1. The touch football unit.

Touch football at John Muir did not resemble traditional tackle football. Washausen did not allow tackling, the returning of interceptions, kicks, or any "running of the ball"; the teams were limited to only seven players and there were no "blockers" or "rushers."[2] (3RT/1004; 4RT/1253-1254, 1256.) The only way

[2] The games were structured like the drills in *Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 433 (*Fortier*): "Seven offensive players (quarterback, receivers, and running backs) practice against seven defensive players (cornerbacks,

to move the ball down the field was to throw it. (4RT/1255.) Washausen asked students who understood the rules of the game to volunteer as captains and set guidelines for the team selection process to ensure teams were balanced. (4RT/1257-1258; 6RT/1975.)

According to Washausen, he instructed students on the rules for touch football, watched the students to check for understanding, and explained the rules in greater detail if he saw problems. (4RT/1255.) Of the six students who testified at trial, five, including N.B., agreed Washausen provided some level of instruction regarding the rules. (3RT/1003; 5RT/1624; 8RT/2454-2455.) N.B. characterized the instruction as "very brief," while other students stated it was more extensive and included practice drills. (3RT/1003; 6RT/1975; 8RT/2409-2410, 2454-2455, 2469.) The one student who testified Washausen did not instruct students admitted that he provided "non-specific safety instructions" on multiple occasions. (6RT/1920, 1938; see also 4RT/1257.)

On the day of N.B.'s injury, Washausen was supervising eight teams of students playing touch football games on four adjacent fields from a bench located between fifty and seventy-two yards from the middle of the field where N.B.'s team was

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safeties and linebackers). Offensive and defensive linemen do not participate. In a seven-on-seven drill the offensive players run pass plays and the defensive players attempt to defense such plays. The play ends when a pass is incomplete or intercepted or the receiver to whom a pass is completed is touched by a defensive player." (See 4RT 1253-1256.)

playing. (4RT/1220-1221, 1258.) Washausen claimed he had a clear view of all the fields. (4RT/1258.) At least one student said that every time he looked over, he saw Washausen watching the game and occasionally walking from field to field. (8RT/2470.) Others described him as often disengaged during class, although they were not speaking to his specific conduct on the day N.B. was injured. (See § A.2., *post*.)

The games lacked referees or any other adults to call penalties. (6RT/1931.) Games were competitive and involved "trash talking" between the students. (3RT/1006-1007; 6RT/1933, 1968.) When disputes arose regarding plays or cheating allegations, the students did not seek or obtain adult intervention; they argued with each other until coming to "some sort of agreement." (3RT/1006; 6RT/1932-1933.) Students regularly fell, sometimes because of tags, other times because they were clumsy or off-balance or accidentally bumped into each other. (8RT/2432-2433, 2441-2442, 2464-2465, 2481.)

2. Washausen's supervision and conduct during P.E. class.

When he observed students playing too competitively, Washausen told them to "calm down" and keep their competitiveness in check. (5RT/1627-1628.) One of the students who received this message was Gianni Maucere, the other child involved in the play causing N.B.'s knee injury. (*Ibid*.; see also, 4RT/1249-1250.)

Students reported frequent roughhousing during P.E. class; Washausen sometimes intervened, but generally disciplined

students only when they interrupted him. (3RT/993-994; 5RT/1608, 1628-1629; 6RT/1917.) Students also said Washausen used his phone during class, although their perspectives varied as to whether the usage was occasional or frequent. (3RT/995-996, 1034; 5RT/1605-1606; 6RT/1918-1919, 1952.)

Students reported that Washausen "yelled" at them; called them idiots and losers; said "they suck"; repeated what they said in a high-pitched, mocking voice; and told them "not to go home and whine to their parents." (3RT/993, 995; 5RT/1606-1608; 6RT/1918.) Washausen denied using such language. (4RT/1234-1235.)

Washausen did not have training on supervisory techniques, and the school principal could not recall whether that training ever took place. (4RT/1245-1246; 6RT/1859-1860.) The year after N.B. graduated from John Muir, Washausen's supervisor discussed with him "supervising [his] classes more actively" and suggested he "interact with [his] classes more and not just sit and watch." (Vol. 2 Appellants' Appendix ("AA")/511.)

3. Other students' treatment of N.B.

N.B. was smaller than other students in his P.E. class; he was around four-foot-eight inches tall, weighed approximately seventy pounds, and was one of the "weaker players." (3RT/988; 6RT/1915.) Some students in the P.E. class mistreated him:

- Richard Egoyan pushed N.B. during class, and in a game of ultimate frisbee, grabbed and twisted his arm, and asked him if he wanted to die. (3RT/996-997.) N.B. reported this incident to a school administrator but

did not tell Washausen. (3RT/997-998, 1030.) Egoyan's conduct was not recorded in the school's log of bullying behavior. (5RT/1590-1591, 1669.)

- Nick Franco threw N.B. around "like a log" during a soccer game and hit him in the shins with a hockey stick. (3RT/998-999.) Four days before the injury at issue, Franco "slammed" into N.B. during the touch football unit and N.B.'s head "bashed" against the ground. (3RT/999-1001.) Washausen reprimanded Franco for knocking N.B. down but did not report it to the administration. (3RT/998, 1001-1002; 6RT/1823-1824.) N.B. chose not to report it either. (3RT/1000.)

According to N.B. himself, Maucere—the boy who caused his knee injury—did *not* engage in the same kind of behavior exhibited by Egoyan and Franco. (3RT/1028-1029.) N.B. could not remember Maucere ever saying anything derogatory to him, or being too rough during touch football, or physical with him other than the contact that led to the subject knee injury. (3RT/1028-1029, 1039-1040.) N.B.'s testimony was consistent with Washausen's, Maucere's and other students' recollection. (4RT/1327-1328; 5RT/1621-1622; 8RT/2426, 2449.) Outside of P.E., some students recalled that—out of N.B.'s earshot—Maucere joked about N.B. singing soprano and suggested he made a "nice couple" with another boy. (6RT/1913-1914, 1956; 8RT/2447-2449.)

When Maucere was in seventh grade, an English teacher notified his counselor that he was "pushing students over" in the

hallway during a single incident in 2017 that was reported and documented in school records. (7RT/2157.) Maucere's disciplinary record and other teachers' and students' reports about his behavior did not otherwise reflect any history of physically aggressive conduct. (6RT/1837, 1843.)

B. The touch football injury.

N.B. was injured during a touch football game in P.E. class on April 17, 2018, when he fell after Maucere's "tag" took the form of a push, resulting in a torn anterior cruciate ligament (ACL) that required surgery to repair. (3RT/1006, 1015-1016.)

1. Witness accounts.

The trial witnesses had very different recollections of what happened. Some thought N.B. was in mid-sprint when Maucere approached, while others thought the touch happened after N.B. made a "stutter-step" or was running slowly. (3RT/1007-1008, 1043; 4RT/1322-1325; 5RT/1647; 6RT/1952-1953.) There was conflicting testimony that Maucere pushed N.B. from the front, back, right, straight behind, or from a diagonal direction. (3RT/1045; 6RT/1968-1969; 8RT/2417.)

Witness accounts also varied widely as to the amount of force applied. Some reported the tag seemed like a "normal touch, any normal play" and not "overly aggressive," likening the tag to a light push. (4RT/1316; 5RT/1615, 1632-1633; 8RT/2417-2418, 2528.) Others, including N.B. himself, said Maucere "rammed" into N.B., causing him to fly "ten feet in the air." (3RT/1008; 6RT/1927-1928; 2AA/332, 512-513.) N.B. resisted Maucere's push by planting his left foot but then fell. (3RT/1008-

1009, 1041-1042, 1045-1046.) Some students reported seeing N.B. fall "awkwardly" and his legs land in a "weird position." (8RT/2411-2412, 2528.)

No one reported having seen Maucere knock other students down before, or anyone else pushing or engaging in rough play during the touch football game. (6RT/1976; 7RT/2141; 8RT/2418.) When a student ran to get Washausen's help, she said Washausen responded by stating, "what's up" or "what's happening," unaware of what occurred. (6RT/1971-1972.) After he fell, Maucere laughed at N.B., and thought he was faking his injury. (5RT/1616-1617.) Washausen later told the assistant principal that Maucere was "playing like a jackass" and "playing too hard." (5RT/1659.)

After N.B.'s injury, the assistant principal disciplined Maucere by barring him from playing touch football at lunch but did not document her decision in the student database system, fill out an incident report, or tell Washausen. (5RT/1579-1580, 1582-1583, 1589; 6RT/1814-1815.) Three weeks after N.B. was injured, the assistant principal conducted a more thorough investigation at N.B.'s parents' request, which resulted in further discipline of Maucere—including lunch detention and not being able to participate in certain end-of-year events. (5RT/1661, 1664; 6RT/1825, 1846-1847.) The administration did not inform Washausen or the teachers about these additional disciplinary actions. (6RT/1825-1826.)

2. Expert testimony.

a. Expert testimony on the mechanism of injury.

The doctor who operated on N.B. stated he had no opinion on what caused the ACL injury because he was not at the game and didn't know what happened. (5RT/1548.) Expert witnesses nonetheless testified about what *could have* caused the injuries, based upon the contradictory witness reports.

N.B.'s medical expert assumed he was pushed from behind and to the right, and opined, based on that assumption, that the mechanism of injury was N.B.'s body "going forward" and turning clockwise, with the knee "twisting with the foot planted and the thigh bone sort of rotates in." (4RT/1286-1287, 1293-1294, 1296.) He said a push from the back was "consistent" with this type of injury, but acknowledged such injuries occur without contact, including "with a sudden cutting of a planted foot." (4RT/1287, 1292.)

N.B.'s biomechanics expert admitted he had "no idea" whether N.B. was running, what the push angle was, or how much force Maucere applied, so he made assumptions. (5RT/1527-1528, 1545.) Based on those assumptions, he opined it was possible but "unlikely" that the ACL injury occurred because of N.B.'s pivot before the push or the impact of N.B. hitting the ground. (5RT/1530, 1532.)

The District's experts opined that N.B.'s injury was consistent with a non-contact tear, caused by N.B. planting his

left foot and his body moving to the right as he tried to avoid falling. (7RT/2190-2194, 2197-2199, 2200-2203; 8RT/2498-2501.)

b. Other expert causation testimony.

N.B. called an expert educational consultant, Dr. Marian Stephens, who opined that Washausen's lack of supervision was a substantial cause of N.B.'s injury, and that the District's practices and procedures "contributed." (7RT/2111, 2122.)

Washausen's conduct. Dr. Stephens opined Washausen's inadequate supervision was a substantial factor in causing N.B.'s injury, because he: (1) was seated too far from the game; (2) sometimes was on his phone; (3) did not routinely deescalate trash-talking and competitive behavior; (4) occasionally participated in games (although not the one in question); (5) was not immediately aware of N.B.'s injury; and (6) had no "supervisory techniques" training. (7RT/2113-2116, 2134, 2144.) Stephens also criticized the lack of instruction in class and said Washausen created an unstructured atmosphere where roughhousing was allowed and teasing tolerated, which could lead to dangerous behavior. (7RT/2118-2122.)

When asked what Washausen *should* have been doing during his P.E. class that would have prevented N.B.'s injury, Stephens could not say. (7RT/2117.) She instead criticized a hypothetical chemistry teacher who was on his phone and walked away, while students were mixing chemicals and using a Bunsen burner. (*Ibid.*) Her only other comment was that children "need

boundaries" and "that's very important" to prevent harm to students.[3] (7RT/2117-2118.)

Stephens admitted that she didn't know whether Maucere's conduct was intentional. (7RT/2135.) She did not address and expressed no opinion on whether her recommended supervisory techniques would have changed the outcome of the play that caused N.B.'s injury, nor did she express an opinion that Washausen's actions or omissions increased the inherent risks of touch football.

The District's practices and procedures. Dr. Stephens also opined that the school's practices and procedures "contributed" to N.B.'s injury, but she did not characterize them as a substantial factor. (7RT/2122.) She said documentation was important to holding students accountable and the District's documentation was lacking. (7RT/2123, 2131.) She opined:

- The principal should have documented other students playing touch football too aggressively during lunch and notified parents about their children's lunchtime misbehavior. (7RT/2123-2124.)
- The assistant principal should have documented her conversations with other students investigating N.B.'s injury; proactively reached out to N.B.'s parents; and conducted a more robust investigation. (7RT/2124-2127.)

[3] The school principal offered a similar generality, agreeing that in the abstract failing to hold students accountable made them more likely to misbehave and more active supervision could be an effective deterrent. (6RT/1862, 1864-1865, 1872.)

- Maucere should have been more harshly punished for injuring N.B. (7RT/2127-2128.)
- Every teacher at the school should have been notified about Maucere's injuring of N.B. and about Nick Franco's and Richard Egoyan's prior mistreatment of N.B., so that they could be on guard to stop similar behavior. (7RT/2129-2133.) Every time a teacher addressed a student acting up, the discipline should have been documented and brought to an administrator's attention. (7RT/2139.)

Again, Dr. Stephens did not address and expressed no opinion whether her recommended practices would have changed the outcome of the play that caused N.B.'s injury, or whether the District's shortcomings increased the inherent risks of touch football.

C. The Complaint.

N.B. sued the District and Washausen for negligence, alleging Washausen's inadequate supervision "created an atmosphere which increased the likelihood of injury to students in the class" and the District was vicariously liable for his negligence. (1AA/12-13.) N.B. also sued the District for breach of mandatory duty under Education Code section 49079, alleging the District's failure to inform Washausen about Maucere's violent proclivities before the incident proximately caused his injuries.[4] (1AA/13-14.)

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[4] N.B. also alleged Washausen breached a "mandatory duty" to supervise students under Education Code section 44807. (1AA/13.) Because section 44807 does not impose a mandatory

N.B. also sued Maucere and his parents for battery, intentional infliction of emotional distress, and violation of Civil Code section 1714.1, which imputes a minor's willful misconduct to his parents, seeking punitive damages. (1AA/15-17.) N.B. alleged that Maucere intentionally and maliciously pushed him to the ground, and that his conduct was "completely outside the range of ordinary activity involved in the sport." (1AA/10.) Before trial, N.B. settled his claims with the Maucere family for $50,000. (1AA/168-171.)

D. The District's summary judgment motion.

The District moved for summary judgment, arguing in part that the primary assumption of risk doctrine barred N.B.'s claims. (1AA/22-48, 72-84.) The trial court denied the motion. (1AA/85-94.) It found the District satisfied its prima facie burden to show the primary assumption of risk doctrine was "applicable to the instant action," but concluded there were triable issues of fact because the doctrine did not apply whenever (1) "facts indicate a lack of ordinary care on the part of school authorities," citing *Jimenez v. Roseville City School District* (2016) 247 Cal.App.4th 594, 604-605 (*Jimenez*), or (2) the plaintiff proves the defendant "increased the risks inherent" to the game. (1AA/89-90.)

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duty (*Hoff v. Vacaville Unified Sch. Dist.* (1998) 19 Cal.4th 925, 939), N.B. ultimately abandoned this theory.

E. Trial proceedings.

1. Motions in limine and for nonsuit.

The District moved in limine to preclude arguments that the primary assumption of risk doctrine was inapplicable. (1AA/95-103.) The trial court denied the motion, stating "primary assumption doesn't belong here" and *Jimenez* was "the case to follow." (2RT/19-20, 306; 1AA/152.)

At the close of N.B.'s case-in-chief, the District moved for nonsuit. (8RT/2401.) The trial court denied the motion, without explanation. (8RT/2401-2402; 1AA/185.)

2. Jury instructions and special verdict.

After the non-suit denial, the District requested a standard CACI instruction on Primary Assumption Of Risk—Exception To Nonliability—Instructors, Trainers Or Coaches. (1AA/112; 9RT/2748.) The trial court denied the request, ruling for the first time that the primary assumption of risk doctrine doesn't apply "to a student going to a required class." (9RT/2748-2749, 2762-2765.)

The parties proposed very different special verdict forms. The District proposed three separate forms. (1AA/157-167.) Two covered primary assumption of risk: (1) CACI VF-404, Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches; and (2) CACI VF-405, Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors. (1AA/161-166.) The forms asked the jury to decide whether Washausen or the District increased the risks to N.B. above those inherent in touch football. (*Ibid.*) The District's third form was

based on CACI VF-402, Negligence—Fault of Plaintiff and Others At Issue, and asked the jury to assign a fault percentage to the District, Washausen, N.B., and Maucere. (1AA/157-159.) Plaintiff proposed a single special verdict form that included no allocation of fault and did not address his breach of mandatory duty claim against the District. (1AA/153-155.)

In connection with the special verdict form, both parties filed briefs on fault allocation. (1AA/173-184.) N.B. argued no allocation of fault to Maucere should be allowed if his conduct was intentional because school districts would otherwise avoid liability for breaching their duty to protect students by "blaming the wrongdoer." (1AA/175.) The District, relying on Civil Code section 1431.2 and *Weidenfaller v. Star & Garter* (1991) 1 Cal.App.4th 1, 15-16 (*Weidenfaller*), argued the jury must allocate a fault percentage to Maucere regardless of whether it found his conduct negligent or intentional. (1AA/178-183; 8RT/2531.)

With the parties unable to agree, the trial court drafted its own special verdict form.[5] (9RT/2766-2775.) The District reiterated the verdict should account for Maucere's comparative fault even if he acted intentionally. (9RT/2769-2770.) The trial court disagreed, determining the special verdict should only allow the jury to decide comparative fault if the jury found Maucere's

[5] In light of the court's categorical ruling that the primary assumption of risk doctrine did not apply to P.E. class, no consideration was given to the District's proposed special verdict forms on the doctrine.

conduct was negligent, not intentional. (*Ibid*.) After the trial court overruled its objections, the District signed the verdict approval form. (1AA/187-190.)

The special verdict form that went to the jury asked: "Did Gianni Maucere act towards Nigel Brigstocke on April 17, 2018 in the touch football game in a manner that was negligent or intentional?" (1AA/193.) *Only* if the jury answered Maucere's conduct was negligent was it directed to answer the form's question 5: "Assuming that the total fault (whether it be negligence of [*sic*] failure to carry out a mandatory duty) of any or all of the following is equal to 100%, what percentage of fault do you attribute to the following?," listing Washausen, the District, and Maucere. (*Ibid*.)

3. Closing argument.

N.B.'s counsel argued that Washausen's failure to systematically monitor the P.E. class caused N.B.'s injury, and that Washausen's supervision was inadequate because he should have talked to students more about their behavior, tried to calm them down, benched out-of-control players, or stopped games altogether. (9RT/3030-3034, 3083.) N.B.'s counsel did not "go into the details of what happened at the game" because there was "clearly conflicting testimony" and she "didn't know" what happened on the field other than Maucere pushed N.B. (9RT/3052.) But she emphasized that if the jury found Maucere acted intentionally, it need not allocate any fault to him. (9RT/3053.)

N.B. argued the District's breach of a mandatory duty was a substantial cause of N.B.'s injury because (1) the District failed to report to Washausen or other teachers the administration's decision to discipline Maucere and ban him from playing football during lunch *after* N.B.'s injury, and (2) the District's failure to do so indicated it had probably failed to document other incidents involving Maucere predating the injury. (9RT/3034-3036, 3084-3085 ["It's not that her failure to write it down after the fact caused the incident. What the fact is that because she doesn't write things down and she doesn't document things, we don't know what happened before."].)

F. The jury verdict and judgment.

By special verdict, the jury found: (a) the District failed to carry out a mandatory duty; and (b) Washausen was negligent. (1AA/191-194.) The jury answered "Yes" as to whether "the negligence or failure to carry out a mandatory duty" was "a substantial factor in causing harm" to N.B. (1AA/192.)

The jury awarded $1.75 million in damages, consisting of $500,000 in future medical damages and $1.25 million in past and future noneconomic damages. (1AA/192.) It also found that Maucere "act[ed] towards" N.B. during the touch football game "in a manner" that was intentional; as a result, based on the verdict's instructions, the jury skipped over any fault allocation among Washausen, the District, and Maucere. (1AA/193.)

The trial court reduced the jury's awards to account for N.B.'s $50,000 settlement with Maucere. (1AA/193.) As a result, the court entered a judgment awarding $485,714.29 in economic

damages and $1,214,285.71 in noneconomic damages, plus costs, against the District and Washausen, jointly and severally. (1AA/194.) Plaintiff filed notice of entry of judgment on October 6, 2021. (1AA/198-204.)

G. The District's post-trial motions.

The District moved for judgment notwithstanding the verdict (JNOV), renewing its causation and primary assumption of risk arguments. (2AA/206-229, 283-295.) The District also moved for new trial, renewing its argument that the special verdict form erroneously prevented the jury from apportioning fault to Maucere. (2AA/230-253, 296-308.)

The court denied both motions. (2AA/309-311.) It ruled the primary assumption of risk doctrine was inapplicable because the P.E. class was mandatory. (2AA/309.) And it upheld the special verdict form, despite acknowledging that *Weidenfeller*, *supra*, 1 Cal.App.4th 1, supported the District's position. (2AA/309-310.) The court relied upon a Tennessee Supreme Court decision, cited by neither party, holding that, under Tennessee law, a plaintiff should not be "penalized by allowing the negligent party to use the intentional act it had a duty to prevent to reduce its liability." (2AA/310, citing *Turner v. Jordan* (Tenn. 1997) 957 S.W.2d 815 (*Turner*).)

The District and Washausen timely appealed. (2AA/312.)

APPEALABILITY

As an appeal from a final judgment, this Court has jurisdiction pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1).

STANDARDS OF REVIEW

Causation. Proximate causation is generally a question of fact, reviewed under the substantial evidence standard. (*Lawson v. Safeway, Inc.* (2010) 191 Cal.App.4th 400, 416.) But "'where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact'" and subject to de novo review. (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 353 (*State Hospitals*).) Speculation and hypotheses as to what might have occurred are not substantial evidence. (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1104.)

Primary assumption of risk. The applicability of the primary assumption of risk doctrine resolves whether a defendant owes a duty of care and is a legal question that is reviewed de novo. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 313 (*Knight*); *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 838 (*Eriksson*).) What qualifies as an inherent risk for a recreational activity is also a question of law. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1158 (*Nalwa*).) But factual conflicts underlying the legal question of duty are resolved in favor of the judgment. (*M.W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 516-517.)

Verdict form and instructional error. This Court reviews de novo whether a special verdict form correctly states the law and may not infer or imply findings in favor of the prevailing party. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678 (*City of San*

Diego); *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 (*Trujillo*) ["The [special] verdict's correctness must be analyzed as a matter of law."].) The Court reviews claims of instructional error de novo, "viewing the evidence in the light most favorable to the appellant." (*Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1333.)

ARGUMENT

I. The District Is Entitled To JNOV On All Claims, Or At Least JNOV On The Mandatory Duty Claim And A New Trial On The Negligence Claim.

A. The District is entitled to JNOV on the breach-of-mandatory-duty claim because there is no evidence any such breach proximately caused N.B.'s injury.

Setting aside its vicarious liability for Washausen's negligence, N.B. asserted only one claim against the District directly: N.B. argued, and the jury found, the District breached a "mandatory duty" under Education Code section 49079. (1AA/191-194.) N.B. based its section 49079 theory on two purported reporting failures: (1) the District's failure to report the administration's decision to ban Maucere from playing football during lunch a*fter* N.B.'s injury, and (2) the District's probable failure to document other incidents involving Maucere predating the injury. (9RT/3034-3036, 3084-3085.)

As we demonstrate below, the evidence supporting any breach of mandatory duty is so deficient "'that the only

reasonable conclusion is an absence of causation," making lack of causation a question "of law, not of fact.'" (*State Hospitals*, *supra*, 61 Cal.4th at pp. 353, 357.) But even construing the record in N.B.'s favor, there is insufficient evidence either of these purported breaches was a proximate cause of N.B.'s injury.

1. Governing law.

a. Proximate causation.

Public entities are only liable for breach of a mandatory duty that "proximately caused" a plaintiff's injury. (*B.H. v. County of San Bernadino* (2015) 62 Cal.4th 168, 179; Gov. Code, § 815.6.) Proximate causation has two aspects: (1) cause in fact; and (2) a normative component.

Cause in fact. ""'An act is a cause in fact if it is a necessary antecedent of an event.'"" (*State Hospitals, supra,* 61 Cal.4th at p. 352.) "No matter how inexcusable a defendant's act or omission might appear," a plaintiff must "show the act or omission caused, or substantially contributed to [the] injury." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780 (*Saelzler*).) Negligence in the abstract or a "mere possibility" of causation is insufficient. (*Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1371 (*Thompson*).) Expert testimony cannot bridge the gap and turn possibility into probability: "[A]n expert's speculative and conjectural conclusion that different measures might have prevented an injury cannot be relied upon to establish causation." (*Id.* at p. 1372; *Saelzler*, *supra*, at pp. 776-777.)

Normative aspect. The second aspect focuses on "public policy considerations." (*State Hospitals*, *supra*, 61 Cal.4th at p. 353.) Because "the purported [factual] causes of an event may be traced back to the dawn of humanity, the law has imposed additional limitations on liability other than simple causality." (*Ibid.*, internal quotation marks omitted.) Proximate cause includes an assessment of "the extent to which a defendant should be held liable for unforeseeable consequences" and "intervening forces operating independent of defendant's conduct." (*Novak v. Continental Tire North America* (2018) 22 Cal.App.5th 189, 197.)

b. Education Code section 49079.

Education Code section 49079 requires a school district to inform a student's teacher when the district suspects a pupil has been involved in conduct that merits suspension or expulsion, such as willful use of force or violence, sexual assault, possession of firearms or explosives, terroristic threats, and bullying. (Educ. Code, §§ 49079, 48900; *Skinner v. Vacaville Unified School Dist.* (1995) 37 Cal.App.4th 31, 39 (*Skinner*) ["(S)ection 49079 may impose on a school district a mandatory duty to inform teachers of a student's record of physical violence"].)

Skinner is the only published case applying section 49079; it reversed a jury verdict with instructions to enter JNOV for a school district. Plaintiff brought a negligence claim against the district and another student who assaulted her during a volleyball game in P.E. class, inflicting severe and permanent injuries. (*Skinner*, *supra*, 37 Cal.App.4th at pp. 34-35.) The

school had not warned the P.E. teacher about the assailant's extensive disciplinary history, which included multiple suspensions for fighting. (*Id.* at pp. 35-36.) A jury awarded damages, but the Court of Appeal reversed, concluding there was nothing "from which the jury could infer a causal relationship between plaintiff's injuries" and the administration's failure to report its disciplinary actions. (*Id.* at p. 39.) No reasonable juror could conclude the failure to report was a substantial factor because the P.E. teacher already independently knew about the student's volatile nature. (*Id.* at p. 42 [no reasonable jury could infer the administration's failure to share "the dry communication of his eighth grade disciplinary record" was a substantial factor].)

2. Any breach of the District's section 49079 reporting duties was not a proximate cause of N.B.'s injury.

N.B. asserted the District breached a mandatory reporting duty under section 49079, *after* N.B. was injured, to report the administration's disciplinary decision to ban Maucere from playing football at lunch. (9RT/3034-3036, 3084-3085.) N.B. couched this post-injury oversight as a substantial cause of his injury by claiming it indicated (1) the District probably also failed to report earlier misconduct by Maucere, and (2) if the District *had* reported Maucere's violent proclivities, Washausen could have kept a closer eye on him. (7RT/2122-2139; 9RT/3034-3035, 3085.) But N.B.'s extrapolation is pure speculation and conjecture, not evidence.

There is *no evidence* that Maucere had violent proclivities towards N.B. or anyone else at John Muir before N.B.'s touch football injury. (4RT/1327-1328; 5RT/1621-1622; 8RT/2426, 2449.) N.B. admitted that Maucere *never* bullied or physically threatened him, and his testimony was corroborated by several others' recollection. (3RT/1028-1029, 1039-1040.) The record does not reflect Maucere had any prior disciplinary record whatsoever. (6RT/1837, 1843.) No one had ever seen Maucere engage in any form of physical violence at school, not even in P.E. class. (6RT/1976; 7RT/2141; 8RT/2418.) At most, there was a passing reference by Plaintiff's expert that an English teacher once reported Maucere "pushing students over" in the hallway, but nothing to indicate that conduct ever even resulted in discipline. (7RT/2157.)

Maucere was a "ball hog" who did not always endear himself to other students. (4RT/1327.) He did not take show choir seriously. (5RT/1626.) He made gay jokes out of N.B. earshot. (6RT/1913-1914, 1956; 8RT/2447-2449.) But nothing in Maucere's school record *before* his touch football play injuring N.B. indicated Maucere's behavior was generally violent, harmful to other students, or even merited discipline, let alone that he exhibited the type of conduct warranting suspension or expulsion that underlies section 49079's reporting requirement.

That's why N.B. based his breach-of-mandatory-duty argument on the District failing to report information about Maucere to teachers *after* N.B.'s injury. But the proximate cause requirement defeats that argument. Even assuming Maucere's excessive tag of N.B. during the touch football game was enough

to trigger section 49079's reporting requirement (and it remains unclear whether this sort of isolated, sport-related conduct would warrant suspension or expulsion), the District's failure to report *after* N.B. tore his ACL irrefutably was not a substantial factor *in causing that injury*. The harm had already occurred; nothing the District could have done afterwards could change that. As a matter of law (and common sense), any post-injury acts or omissions were *not* a proximate cause of N.B.'s injury.

That leaves N.B.'s only other mandatory duty theory: That the District's imperfect reporting of student misconduct and disciplinary action meant the school *probably* had failed to record prior misconduct by Maucere, and that failure substantially caused N.B.'s injury. (9RT/3034-3036, 3084-3085.) But that is not evidence—only speculation. It has no merit whatsoever.

The bottom line: The insufficient evidence of proximate causation defeats N.B.'s breach-of-mandatory-duty claim. The District is entitled to JNOV on that claim.

B. The District's entitlement to JNOV on the mandatory duty claim renders the special verdict fatally defective on the negligence claim, requiring JNOV on both claims or, at a minimum, a new trial on the negligence claim.

The District's entitlement to JNOV on the mandatory duty claim compels reversal of the negligence claim too. Eliminating the mandatory duty claim renders the special verdict fatally defective on both claims: The verdict form correctly requested separate findings as to whether the District breached a

mandatory duty and Washausen was negligent, but then lumped the two claims together on the causation question, asking in *the disjunctive* whether "the negligence *or* failure to carry out a mandatory duty" was "a substantial factor in causing harm" to N.B. (1AA/192, italics added.)

This requires a defense judgment. It was N.B.'s burden to submit a special verdict that facially "resolve[s] *all* of the ultimate facts so that 'nothing shall remain to the court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.)" (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959-960 (*Myers*), italics added.) "If a fact necessary to support a cause of action is not included in . . . a special verdict, judgment on that cause of action cannot stand." (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 531.)

Here, eliminating the non-viable mandatory duty claim on appeal leaves the verdict without the causation finding required to enter a negligence judgment. The causation question's use of the disjunctive "or" precludes a court from construing the jury's "yes" answer as a finding on the negligence claim. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 622 [The ""meaning of the word 'or' is well settled. [Citation.] *It has a disjunctive meaning*: 'In its ordinary sense, the function of the word "or" is to mark an alternative such as "*either this or that*,"'" italics added.) Thus, the jury's "yes" answer to the disjunctive causation question only means with certainty that the jury found one of the two claims met the causation standard. The jury could have found that "the failure to carry out a mandatory duty" was a substantial factor in

causing harm but that Washausen's negligence was not, or the jury could have decided it need not consider the negligence claim.

Because the disjunctive form makes it impossible to know what the jury found, the jury's "yes" answer is *not* a factual finding on negligence causation. (See *Myers*, *supra*, 13 Cal.App.4th at p. 961 ["[T]he special verdict on 'oppression, fraud, or malice' was presented in the disjunctive, and the jury could have found only oppression or malice. Thus, the finding does not constitute a factual finding on a fraud cause of action"].)

With no presumption or implied findings favoring the prevailing party with a special verdict, it makes no difference whether substantial evidence might support Washausen's negligence was a substantial factor in causing N.B.'s injury. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 327, fn. 7 (*Saxena*); *Trujillo*, *supra*, 63 Cal.App.4th at p. 285; *City of San Diego*, *supra*, 126 Cal.App.4th at p. 679.) The required finding must be *in the special verdict*. (*Trujillo*, *supra*, 63 Cal.App.4th at p. 285.) The lack of a conclusive, unambiguous finding that negligence was a substantial factor of N.B.'s harm precludes a negligence judgment. Courts cannot "speculate on the basis of the verdict." (*Saxena*, *supra*, 159 Cal.App.4th at p. 327, citations and internal quotation marks omitted.)

Because N.B. had the duty as plaintiff to ensure a sufficient special verdict, JNOV on the negligence claim is a proper remedy for the lack of a necessary finding, which results in a full defense judgment when coupled with JNOV on the mandatory duty claim. (See, e.g., *Pinto v. Farmers Insurance Exchange* (2021) 61

Cal.App.5th 676, 690, 694 [JNOV for defense required because special verdict form failed to determine whether insurer's actions were reasonable in insurance bad faith action]; *Saxena*, *supra*, 159 Cal.App.4th at pp. 325, 326 [JNOV for defense required on battery claim, because special verdict only requested finding on "informed consent," not "no consent"]; *Myers, supra,* 13 Cal.App.4th at p. 961 [JNOV for defense on punitive damages claim because special verdict did not require jury to make findings on all elements of fraud liability].)

But, at an absolute minimum, the lack of the required causation finding as to negligence requires a new trial on the negligence claim. As we now demonstrate, other errors compel a new trial too.

II. The Judgment Must Be Reversed For A New Trial Because The Trial Court Prejudicially Erred By Refusing To Instruct The Jury On The Primary Assumption Of Risk Doctrine.

Among the District's key defenses was that Washausen's duty of care was limited because the primary assumption of risk doctrine applies to touch football. The trial court rejected the District's proposed CACI instructions and special verdict forms instructing the jury on the doctrine, ruling it could not apply to a mandatory P.E. class. (9RT/2748-2749, 2762-2765.) That was prejudicial error.

A. The trial court erred in refusing to instruct the jury.

1. The primary assumption of risk doctrine and schools' duty of supervision.

The primary assumption of risk doctrine applies to activities—and, specifically, many sports—that are inherently dangerous. Courts recognize that the duty of ordinary care must be modified in this context because it would otherwise "alter the nature of the activity or inhibit vigorous participation." (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003 (*Kahn*).) "The primary assumption of risk doctrine, a rule of limited duty, developed to avoid such a chilling effect." (*Nalwa*, *supra*, 55 Cal.4th at p. 1154.)

In some cases, the doctrine's application bars recovery altogether. In others, including in the student-coach scenario, it *reduces* the duty of care. Coaches and instructors only have the "duty not to act so as to *increase* the risk of injury over that inherent in the activity." (*Nalwa*, *supra*, 55 Cal.4th at p. 1154, original italics.) A breach occurs "if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport." (*Kahn,* 31 Cal.4th at p. 996, internal citation omitted; *Eriksson*, *supra*, 191 Cal.App.4th at p. 845.)

Schools' duty of supervision under Education Code section 44807 does *not* modify common law assumption of risk principles. (*Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th

939, 941, 945 (*Lilley*); *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1119 (*Aaris*) ["Education Code section 44807 does not 'trump' the doctrine of primary assumption of risk"]; *Peart v. Ferro* (2004) 119 Cal.App.4th 60, 79 [statutory provisions "do not abrogate, supersede or displace the primary assumption of risk doctrine unless the legislative authority has explicitly and unambiguously manifested a clear intent to do so."].)

Thus, the determination of whether the doctrine applies is no different than in any other context. Courts evaluate (1) "the fundamental nature" of the activity, and (2) "the defendant's role in or relationship to" that activity." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161 (*Avila*).) Here, the first part of inquiry is straightforward. It has already been established that touch football is the kind of activity the primary assumption of risk doctrine applies to, and its inherent risks are well-defined as a matter of law.

The second question—and one of first impression in California—requires this Court to consider whether the primary assumption of risk doctrine applies to physical education that is a required part of schools' curriculum. The answer should be "yes." As shown below, the policy rationale for applying the doctrine to extracurricular school sports applies with equal force to classroom physical education. Excepting mandatory P.E. classes from the rules otherwise governing school sports would contravene California public policy.

2. The doctrine applies to touch football, as its inherent risks—aggressive play, deliberate contact, and collisions—cannot be eliminated without fundamentally altering the sport.

Knight, the Supreme Court case that created the primary assumption of risk doctrine, involved touch football. The Court applied the doctrine to bar a plaintiff's negligence claim against a coparticipant who collided with plaintiff during a rough game of touch football at a Super Bowl party. (*Knight*, *supra*, 3 Cal.4th at pp. 300-301.) Affirming summary judgment for the defendant, the Court compared intentional misconduct by coparticipants—such as "wantonly assault[ing] a player on the opposing team" or punching another football player in the head while he was kneeling, watching the game—with "ordinary careless conduct"—like accidentally striking someone with a bat or colliding with or tripping over another player. (*Id.* at pp. 318-320.) Though plaintiff characterized defendant's conduct as reckless, the Court clarified conduct had to be "totally outside the range of the ordinary activity involved in the sport" to fall outside the doctrine—which defendant's was not. (*Ibid.*)

The inherent risks of touch football have since been defined as a matter of law. Aggressive play is integral to the game: Touch football cannot be "authentically performed if the participants are not carrying out their respective roles aggressively." (*Fortier*, *supra*, 45 Cal.App.4th at pp. 436-437 ["To encourage aggressive play in football is simply to encourage the participants to play the game as it should be played."].)

"Accidental collision" in touch football "is known, acknowledged, and accepted." (*Id.* at p. 440.) So is "deliberate contact, e.g., the touching of an offensive player by a defensive player to end a play." (*Id.* at p. 438; *Dorley v. South Fayette Township School Dist.* (W.D.Pa. 2015) 129 F.Supp.3d 220, 245 [discussing non-contact football drill, "football as a general matter involves tackling, blocking, pushing, and shoving"]; cf. *Avila*, *supra*, 38 Cal.4th at p. 164 [even being intentionally hit with a pitch is an inherent risk of baseball].)

As the touch football game at issue demonstrates, even where no tackling is permitted or intended, middle school football players run at fast speeds and quickly change directions; larger players are pitted against smaller ones with different experience levels; balls are intercepted; and chaos sometimes reigns. A violent, premeditated shove may not be an inherent risk of the sport, but a tag that is too hard is, even if it violates the rules of the game and results in a player falling and sustaining serious injury. (*Fortier*, *supra*, 45 Cal.App.4th at p. 438; *Patterson v. Sacramento City Unified Sch. Dist.* (2007) 155 Cal.App.4th 821, 839 [conduct that could subject the violator to "internal sanctions prescribed by the sport itself" is an inherent risk of the sport if "imposition of *legal liability* for such conduct" would "alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule," original italics].)

A version of touch football that eliminates all inherent risks of unexpected bodily contact and aggressive play would be a largely unrecognizable version of the game. The sport *requires*

some level of contact: The only way to end a play is to apply a tag, i.e., apply a deliberate touch on another player. Even if it were possible to make the activity safer—by wholly eliminating contact between players or restricting competition altogether—that is not touch football. It is playing catch.

3. The doctrine applies to all school sports—inside and outside the classroom.

It is well-established that the primary assumption of risk doctrine applies to extracurricular school sports—and limits (but does not eliminate) the duty of care owed by school districts and coaches. (*Lilley*, *supra*, 68 Cal.App.4th at pp. 945-946; *Aaris*, *supra*, 64 Cal.App.4th at p. 1119.) This balancing of duty and risk is policy driven. Courts recognize that if schools and coaches were required to protect student athletes from the inherent risks of active sports—i.e., risks that, by definition, *cannot* be eliminated unless the sports are fundamentally altered—they would only have two choices: Change the way the sports are played or preclude participation altogether. (*Lilley,* 68 Cal.App.4th at p. 946.)

Both options have "significant social ramification" and diminish sports' educational value. (*Lilley,* 68 Cal.App.4th at p. 946 [sports teach "students how to deal properly with both success and failure," instill "an understanding of the importance of teamwork, good sportsmanship, discipline, and respect for coaches, teammates and opposing players," and teach students to "accept responsibility for the consequences of one's choices and actions."].) There are also cost considerations for resource-

constrained public entities that necessarily inform the duty analysis. (*Thompson*, *supra*, 107 Cal.App.4th at p. 1365; accord, *Bartell v. Palos Verdes Peninsula Sch. Dist.* (1978) 83 Cal.App.3d 492, 500 ["To require virtual round-the-clock supervision or prison-tight security for school premises" would "impose a financial burden which manifestly would impinge on the very educational purpose for which the school exists."].)

The same policy dynamics that limit schools' and coaches' duty of care for extracurricular school sports exist for classroom sports. Schools *cannot* eliminate all the inherent risks of sports such as touch football, soccer, hockey and basketball, and don't have the resources to closely referee 50 to 60 person classes. If courts choose to impose an entirely different, and far broader, scope of liability for P.E classes, making schools and teachers potentially liable every time a student intentionally pushes, elbows, or interferes with another, school districts will need to take further steps to mitigate risk—either by eliminating some sports from the curriculum in favor of safer activities like walking or running or removing competition from classroom sports.

The trial court's conclusion that the primary assumption of risk doctrine could not apply to classroom sports poses a threat to all California elementary and middle schools. The class was mandatory because *the state* requires P.E. classes for *all* elementary and middle school students. (See Educ. Code, §§ 51210, subd. (7), 51210.1, 51210.2, 51220, subd. (d), 51222, 51223; *Doe v. Albany Unified School Dist.* (2010) 190 Cal.App.4th 668, 678; *Hemady v. Long Beach Unified School Dist.* (2006) 143

Cal.App.4th 566, 583 (*Hemady*).) Rotating younger children through multiple sports in a safe environment allows them to reach high school with sufficient exposure and experience to decide whether to play an extracurricular school sport (in lieu of more mandatory P.E.) and to do so more safely and competitively. (See *Kahn*, *supra*, 31 Cal.4th at p. 1011 ["Novices and children need instruction if they are to participate and compete," and become "competent or competitive" in sports].) Treating elementary and middle school sports differently from extracurricular high school sports, in terms of applying the primary assumption of risk doctrine, will likely deny younger students the health and social benefits of trying multiple sports and receiving instruction and training the Legislature has determined is beneficial.

It is also unnecessary from a policy perspective. Applying primary assumption of risk in P.E. classes will not result in a parade of horribles or unchecked immunity. The doctrine simply articulates "what kind of duty is owed and to whom." (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499, original italics omitted.) Here, for example, the jury would still need to decide whether Washausen unreasonably increased the risks of touch football over and above those inherent in the sport. And N.B.'s negligent supervision claim would still proceed, appropriately scoped to eliminate liability for the inherent risks of touch football.[6] The

[6] The Directions for Use in the form instruction requested by the District make this clear: If a plaintiff alleges an instructor's failure to use ordinary care increased the risk of injury "for example, by encouraging or allowing the plaintiff to participate in the sport or activity when the plaintiff was physically unfit to

upshot is that schools would not become insurers of students' physical safety in P.E. classes but would still face liability for coaches acting recklessly or outside the range of a P.E. teachers ordinary conduct. This result appropriately balances schools' duty of care, while letting schools teach sports to younger children without the fear of crushing liability.

The negligent supervision cases cited by N.B. do not hold any differently. His lead case, *Jimenez*, explicitly states the case is "not about" the "possible liability of an instructor of a recreational activity towards a student." (247 Cal.App.4th at p. 601 [school could be held liable where teacher "broke school rules" and allowed students to break dance without supervision].) Another case cited by N.B., *Lucas v. Fresno Unified School District* (1993) 14 Cal.App.4th 866, 868, which involved students throwing dirt-clods at recess, stands for the proposition that assumption of risk does not bar a plaintiff from holding districts liable for negligent supervision on school grounds. That is beside the point. The District is not challenging that Washausen owes a duty of care. It is arguing that duty does not include one to eliminate the inherent risks of touch football, and that it was entitled to an instruction that N.B. had the burden to prove Washausen "unreasonably increased" those risks "over and above those inherent" in touch football. (CACI 471.) The trial court erred when it failed to give this form CACI instruction.

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participate or by allowing the plaintiff to use unsafe equipment or instruments," the CACI form instruction on negligence must also be given. (CACI 471, Directions for Use.)

4. N.B.'s cases are inapposite.

Not surprisingly, since there is no principled reason why the duty owed to a student in a mandatory P.E. class should differ from the duty owed during extracurricular school sports, no California court has held the primary assumption of risk doctrine is inapplicable to P.E. classes. Arguing to the contrary, N.B. relied in the trial court on one California case and two out-of-state authorities. Those cases are inapposite.

The California case, *Hemady*, *supra*, 143 Cal.App.4th 566, actually undermines N.B.'s position, as it concluded that the "voluntary or mandatory" nature of a class is "irrelevant under *Knight* and *Kahn*" because "the issue of whether a coach or coparticipant owes a duty of care to an injured player is an objective test dependent upon the nature of the sport and the relationship of the parties to the sport." (*Id.* at pp. 582-583.) *Hemady* applied the prudent person standard of care to a student being hit by a golf club *not* because the golf class was mandatory but because "being hit by a golf club" is not an inherent risk of golf, so imposing that standard of care would not "alter the fundamental nature of the game of golf" or discourage participation. (*Id.* at pp. 571, 583; cf. *Shin v. Ahn*, *supra*, 42 Cal.4th at p. 486 [assumption of risk applies to being struck by errant golf ball because it is an inherent risk of the game].)

Hemady also has nothing to do with touch football. The seven-on-seven touch football scrimmage in Washausen's class was already designed to limit many of the inherent risks of football. No tackling or pushing was allowed. Students were not

permitted to intercept the ball. And Washausen set guidelines for the team selection process to ensure teams were balanced. (3RT/1004; 4RT/1253-1258; 6RT/1975.) But it was impossible to eliminate all the inherent risks of sport—including accidental collisions, deliberate contact, and aggressive play—unless the District fundamentally altered the nature of the game. *Hemady* is inapposite. (See *Hemady*, *supra*, 143 Cal.App.4th at pp. 578, 582 [acknowledging a limited duty of care *would* be appropriate for certain athletic activities].)

The non-California cases that N.B. cited to the trial court—*Stoughtenger v. Hannibal Cent. School Dist.* (N.Y.App.Div. 2011) 935 N.Y.S.2d 430 (*Stoughtenger*) and *Clark County School Dist. v. Payo* (Nev. 2017) 403 P.3d 1270, 1275 (*Payo*)—are even more irrelevant. They follow New York and Nevada law, respectively, which hold that the assumption of risk doctrine only applies where someone voluntarily exposes themselves to danger because the doctrine rests "'on the theory of consent.'" (*Payo*, at p. 1275; see *Stoughtenger*, at pp. 431-432; *Morgan v. State* (N.Y. 1997) 685 N.E.2d 202, 207] [sports participant "consents to those commonly appreciated risks"], cited by *Stoughtenger*, at p. 432.)

California law fundamentally differs. Although older cases had required a voluntary assumption of risk, the Supreme Court explained in *Knight* that application of the primary assumption of doctrine depends on whether "defendant's conduct breached a legal duty of care to plaintiff," and does *not* involve considerations of "whether plaintiff subjectively knew of, and *voluntarily* chose to encounter, the risk of defendant's conduct, or *impliedly*

consented to relieve or excuse defendant from any duty of care to her." (*Knight*, *supra*, 3 Cal.4th at p. 315, italics added.)

Thus, *Knight* adopted a "duty approach" and rejected the "implied consent approach" that New York and Nevada follow. (*Knight*, *supra*, 3 Cal.4th at p. 316; see *Avila*, *supra*, 38 Cal.4th at p. 161 ["[t]he traditional version of the assumption of risk doctrine required proof that the plaintiff *voluntarily accepted* a specific known and appreciated risk," but *Knight* "reconceptualize[ed]" the doctrine as resting on duty, not consent, italics added]; *Lilley, supra,* 68 Cal.App.4th at p. 943 [primary assumption of risk turns on the "legal question of duty," and "does not depend upon a plaintiff's implied consent to injury, nor is the plaintiff's subjective awareness or expectation relevant"]; *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1767 [the doctrine "is not about what the plaintiff knew and when she knew it, or … a 'plaintiff's subjective, *voluntary assumption* of a known risk,'" italics added, quoting *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 537 (*Neighbarger*).)

In contrast to implied-consent jurisdictions, California courts may apply primary assumption of risk to limit the duty of care because it makes sense from a public-policy standpoint, even where the plaintiff's involvement is mandatory rather than voluntary or consensual. (See, e.g., *Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 469 [doctrine applied to UCLA swim team member's injury in mandatory weight training, despite argument she "did not impliedly consent to having a weight dropped on her head"]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012, 1027 [doctrine applied to corrections officer

injured in mandatory training course]; *Neighbarger*, *supra*, 8 Cal.4th at pp. 541, 544-545 [doctrine applies to certain occupational injuries, e.g., firefighters, veterinarians, which "cannot properly be said to rest on the [worker's] voluntary acceptance of a known risk of injury in the course of employment"].)

B. The error was prejudicial.

The court's failure to instruct on primary assumption of risk was prejudicial, that is, it is "reasonably probable" the error "'prejudicially affected the verdict.'" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570, 580.) "'[P]robability' in this context does not mean more likely than not, but merely *a reasonable chance*, more than an *abstract possibility*." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, original italics.) This Court must view the evidence in the light most favorable to the District (*Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 4-5 (*Veronese*)), and "assume the jury might have believed appellant's evidence and, if properly instructed, might have decided in appellant's favor" (*Mayes v. Brown* (2006) 139 Cal.App.4th 1075, 1087). [7]

Applying this standard, the prejudice is obvious. "It is incumbent upon the trial court to instruct on all vital issues involved." (*Estate of Mann* (1986) 184 Cal.App.3d 593, 612,

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[7] A properly instructed jury also would have received the District's special verdict form, crystallizing the primary assumption of risk issue: "Did Dylan Washausen's failure to use reasonable care increase the risks to Nigel Brigstocke over and above those inherent in touch football?" (1AA/161-163.)

internal quotation marks omitted.) The primary assumption of risk doctrine was vital to the District's defense. Construed in the District's favor, the evidence strongly supports that the inherent risks of touch football—aggressive play, deliberate contact, and collisions—caused N.B. to tear his ACL, not Washausen's conduct. Maucere's tag was not a wanton assault. Stripped of rhetoric and imputed motives, the injury was caused by the most prosaic of touch football plays: N.B. caught the ball, and Maucere ran towards and deliberately tagged him; N.B. planted his left foot, and fell awkwardly, causing his ACL to tear.

Evidence, construed in the District's favor, also would support a finding that Washausen did not unreasonably *increase* the sport's inherent risks:

- There was no evidence that Maucere was physically aggressive towards N.B. or anyone else during P.E. class. (3RT/1028-1029, 1039-1040; 4RT/1327-1328; 5RT/1621-1622; 6RT/1976; 8RT/2426, 2449.) And there was evidence that Maucere intentionally *tagged* N.B. and that N.B.'s fall resulted from overzealous play, *not* a premeditated assault. (4RT/1316; 5RT/1632-1633; 8RT/2417-2418, 2528, 2644, 2648.)
- There was evidence Washausen's conduct was typical for a P.E. teacher tasked with supervising a large cohort of children. He monitored eight teams playing games on four different fields, either from a bench where the fields were within his line of sight or by periodically walking the fields. (4RT/1220-1221, 1258; 8RT/2470.) He

instructed students regarding the rules of the game; pulled aside students playing too competitively and told them to calm down; and worked to create balanced teams. (4RT/1255, 1257-1258; 5RT/1627-1628; 6RT/1975.)

- The jury did not have to believe Dr. Stephens' testimony that different measures would have prevented the accident. Nor was her testimony competent evidence of causation. (*Saelzler*, *supra*, 25 Cal.4th at pp. 776-777; *Thompson*, *supra*, 107 Cal.App.4th at p. 1372.)

Given how quickly the touch football play unfolded, there is a reasonable chance that a jury—(1) believing the District's evidence, (2) properly informed about the sport's inherent risks and Washausen's limited duty not to increase them, and (3) understanding N.B. had the burden of proof—would find that lax supervision was *not* a substantial causative factor. (Cf. *Thompson, supra,* 107 Cal.App.4th at pp. 1371-1372 [when injury occurs with "such rapidity that supervisorial personnel could have no opportunity to discover and respond to the situation, then claims of abstract negligence will not support recovery"]; *Skinner*, *supra*, 37 Cal.App.4th at p. 38 [where confrontation in P.E. class "erupted suddenly" the teacher could not "be faulted without imposing an unrealistically high standard of care on teachers that would in effect make them 'insurers of the safety of children on the premises'"]; *Woodsmall v. Mt. Diablo Unified School Dist.* (1961) 188 Cal.App.2d 262, 265 [lack of supervision "made no difference" where the "proximate cause of the accident was the pupil who pushed [plaintiff]"].)

The error was prejudicial. A new trial is required.

III. The Judgment Must Be Reversed For A New Trial Because The Trial Court Prejudicially Erred In Refusing To Have The Jury Determine Comparative Fault If Maucere Acted Intentionally.

At N.B.'s insistence and over the District's repeated objections, the special verdict form given to the jury directed the jury to allocate fault between Washausen, the District, and Maucere *only* if it found Maucere's conduct was negligent. (8RT/2531; 9RT/2769-2770; 1AA/191-194.) Because the jury found Maucere's conduct was intentional, it never made comparative fault findings and the trial court entered a judgment that holds the District and Washausen liable for all damages, economic and noneconomic. (1AA/193-194.) As this section demonstrates, the failure to determine Maucere's percentage of fault and to reduce the noneconomic damages by that percentage violates Proposition 51 (Civil Code sections 1431 to 1431.5) and makes the judgment excessive as a matter of law.

Proposition 51, which voters approved in 1986, retains traditional joint and several liability for a plaintiff's economic damages but adopts comparative fault principles for noneconomic damages. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1192 (*Evangelatos*); 1431.2, subd. (a) ["Each defendant shall be liable *only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault*, and a separate judgment shall be rendered against the defendant for that amount," italics added.) The trial court

prejudicially erred in failing to apply this statute. That error requires a new trial because only a jury can determine the necessary fault allocation.

A. The trial court erred in not following *Weidenfeller*'s binding Proposition 51 holding that a negligent party can reduce its noneconomic damages by an intentional wrongdoer's proportionate fault.

Whether the trial court erred is not subject to debate. The District's position that N.B.'s noneconomic damages had to be reduced by Maucere's percentage of fault, regardless of whether he acted intentionally or negligently, is directly supported by *Weidenfeller*, *supra*, 1 Cal.App.4th at pp. 5-6. The trial court understood that and knew there was "no California authority to the contrary . . . ." (2AA/309.) But it nonetheless chose to flout *Weidenfeller* and follow the reasoning of a Tennessee Supreme Court decision that disagreed with California's approach. (2AA/310, citing *Turner*, *supra*, 957 S.W.2d 815.)

That was not the trial court's prerogative. A California trial court "has *no choice* but to follow the declared law" in an on-point California Court of Appeal opinion; it is inappropriate for the court "to state its disagreement and rule contrary to the appellate opinion." (*Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347, 353-354 (*Cuccia*), italics added.) The trial court's failure to follow *binding* precedent was erroneous as a matter of law.

Weidenfeller—which held, over thirty years ago, that Section 1431.2 applies when a negligent tortfeasor's liability is impacted by an intentional tortfeasor's fault for the same injury—is directly on point. Plaintiff, the victim of an unprovoked armed assault in defendant's parking lot, had sued the defendant for having inadequate lighting and security. (*Weidenfeller*, *supra*, 1 Cal.App.4th at p. 5.) After the jury rendered a verdict attributing 75% fault to his assailant, Plaintiff appealed, arguing comparative fault principles don't apply when one party acted intentionally. (*Ibid.*)

Weidenfeller dismissed plaintiff's "hypertechnical" interpretation of section 1431.2—which would benefit a negligent tortfeasor where "there are other equally culpable defendants" but eliminate that benefit "where the other tortfeasors act intentionally"—as "myopic" and an "absurdity." (*Weidenfeller*, *supra*, 1 Cal.App.4th at p. 6.) It was "inconceivable the voters intended that a negligent tortfeasor's obligation to pay its proportionate share" of loss—20% in that case—should increase to 95% "solely because the only other responsible tortfeasor acted intentionally." (*Ibid.*) That would "frustrate[] the purpose of the statute" and "violate[] the commonsense notion that a more culpable party should bear the financial burden caused by its intentional act." (*Ibid.*)

Weidenfeller also rejected plaintiff's contention that applying section 1431.2 under such circumstances "contravenes public policy." (*Weidenfeller*, *supra*, 1 Cal.App.4th at pp. 7-8.) "Even if it were true" that "an intentional tortfeasor generally has less financial resources than an unintentional tortfeasor,"

the Supreme Court decided in *Evangelatos* that a plaintiff's inability to obtain a full recovery under section 1431.2 was *not* contrary to public policy. (*Ibid.* ["a legitimate 'consequence of the statute . . . will be" that some plaintiffs "will not be able to obtain full recovery for their noneconomic losses"'].)

Weidenfeller similarly rejected plaintiff's policy argument that application of section 1431.2 would fail to effectively deter negligent tortfeasors. (1 Cal.App.4th at p. 8.) The Court of Appeal emphasized that negligent actors "remain liable for *all* economic damages and for noneconomic damages in proportion to their fault," and "a legitimate purpose of the code section is to deter the more culpable defendant." (*Ibid.*, original italics.)

There is no getting around it. The trial court here "exceeded its jurisdiction by refusing to follow [*Weidenfeller*]." (*Cuccia*, *supra*, 153 Cal.App.4th at p. 354.)

B. This Court should uphold *Weidenfeller*.

Although this Court, unlike the trial court, is not bound by *Weidenfeller*, Courts of Appeal still "respect stare decisis" and "the important goals of stability in the law and predictability of decision." (*The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529.) So, they "ordinarily follow the decisions of other districts without good reason to disagree." (*Ibid.*) "Courts are especially hesitant to overturn prior decisions where, as here, the issue is a statutory one that our Legislature has the power to alter." (*Lucent Technologies, Inc. v. Board of Equalization* (2015) 241 Cal.App.4th 19, 35 (*Lucent*).)

The trial court's failure to follow *Weidenfeller* is fatal to the judgment. And there is no good reason for this Court to reject this long-standing precedent.

1. *Weidenfeller* remains good law.

Weidenfeller's Proposition 51 holding has been consistently applied in California *for over three decades*, and, as the trial court recognized, there "is no California authority to the contrary." (2AA/309; see, e.g., *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 136, 150-151 (*Scott*) [reversing judgment and remanding for a proper comparative fault allocation where defendant's negligence consisted of failing to protect plaintiff from non-party's intentional acts]; *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1233-1235 [affirming apportionment of greater fault to negligent tortfeasor than intentional tortfeasor, noting juries are "'fully competent'" to apportion fault "where different classes of tortfeasors are involved."]; *Martin By & Through Martin v. U.S.* (9th Cir. 1993) 984 F.2d 1033, 1039-1040 [reversing district court's determination that section 1431.2(a) "does not apply to cases in which one tortfeasor acts intentionally and the other negligently"]; *Samantha B. v. Aurora Vista Del Mar, LLC* (2022) 77 Cal.App.5th 85, 94 [fault allocation among negligent hospital and management company and employee who sexually abused hospital's patients].)

Several cases applying these fault allocation principles involve negligent school districts and intentional tortfeasors. (See, e.g., *Cleveland v. Taft Union High Sch. Dist.* (2022) 76

Cal.App.5th 776, 794 [affirming judgment allocating fault to negligent school district, the student shooter, and other responsible parties]; *Skinner*, *supra*, 37 Cal.App.4th at p. 31 [fault allocation between negligent school district and intentionally violent former student].)

The Supreme Court has yet to specifically rule on whether *Weidenfeller* got it right. (See *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 29, fn. 4 (*B.B.*) [not reaching issue].) But *B.B.*, in ruling that section 1431.2 does not authorize a reduction in the liability of *intentional* tortfeasors for the negligent acts of others, went out of its way to say that it was *not* overruling or casting doubt on *Weidenfeller*. (*Id.* at pp. 21-22.) The Supreme Court discussed the case at length and characterized the decision's reasoning as consistent with its own. (*Id.* at p. 22 [*Weidenfeller* distinguished, but "endorsed and ultimately relied on" cases precluding intentional actors from shifting their financial burden to a negligent party].)

Weidenfeller remains good law. N.B. urges an unwarranted sea change.

2. *Weidenfeller*'s holding comports with Proposition 51's purpose.

Proposition 51 was enacted to redress plaintiffs seeking to impose disproportionate liability on perceived "deep pocket" defendants, which had resulted in taxpayers and consumers underwriting those costs "'through high taxes, increased costs of goods and services, and reduced governmental services.'" (*B.B.*, *supra*, 10 Cal.5th at pp. 28-29.)

The legislative solution—joint liability for economic damages and several liability for noneconomic damages—was a "compromise." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1198.) The relative solvency of tortfeasors meant some plaintiffs would not obtain a "full recovery for their noneconomic losses." (*Id.* at p. 1204.) But this was "necessary and proper to avoid the catastrophic economic consequences" of traditional joint and several liability for all damages (Civ. Code, § 1431.1), particularly for those tortfeasors less culpable than others. (*Id.* at p. 1232; see also *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600, 603-604 (*DaFonte*) [defendants entitled to apportion fault to nonparties and entities that are statutorily immune, even though plaintiffs won't be able to recover from all responsible parties]; *Union Pacific Corp. v. Wengert* (2000) 79 Cal.App.4th 1444, 1450 (*Wengert*) ["While the plaintiff must bear the risk of inability to collect from some defendants, it was the express purpose of Proposition 51 to shift that risk away from defendants with 'deep pockets.'"].)

But plaintiffs can also obtain a windfall. If a plaintiff settles with some defendants and pursues others to trial, he "may recover more through settlement and litigation than the total amount of damages ultimately determined by the jury"—a result that was not possible before Proposition 51. (*Wengert*, *supra*, 79 Cal.App.4th at p. 1450; *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 65 (*Hoch*) [Section 1431.2 "reallocates the risks and potential benefits of settlement-verdict divergence as to noneconomic damages"].)

In other words, some plaintiffs end up better off, others worse off. Neither result contravenes public policy. (*Hoch*, *supra*, 24 Cal.App.4th at pp. 65-66; *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1807, fn. 11.)

Weidenfeller is entirely consistent with this statutory purpose and legislative compromise. The trial court's refusal to allow a comparative-fault reduction to the District threatens taxpayers with the "high taxes . . . and reduced governmental services" that would likely come with saddling school districts with joint noneconomic damage liability. (*B.B.*, *supra*, 10 Cal.5th at pp. 28-29.)

3. The Supreme Court has implicitly endorsed *Weidenfeller*'s holding.

Although the Supreme Court has not specifically ruled on *Weidenfeller*'s holding, it has implicitly endorsed the holding by recognizing the importance of comparative fault allocations to limiting school districts' financial exposure for others' intentional misconduct. (See *C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861 (*C.A.*).)

C.A. addressed a school district's liability for a school counselor's intentional sexual abuse. (53 Cal.4th at p. 866.) It held that districts can be vicariously liable for supervisory or administrative personnel who should have known of an intentional wrongdoer's propensities and negligently hired, supervised, or retained them. (*Id.* at p. 865.) In addressing factors that should *limit* school district liability, the Court emphasized that "even when negligence by an administrator

or supervisor is established, *the greater share of fault* will ordinarily lie with the individual who intentionally abused or harassed the student than with any other party, and *that fact should be reflected in any allocation of comparative fault*." (*Id.* at pp. 878-879, italics added.)

That explanation becomes meaningless and this limitation illusory if, as the trial court ruled, there's no need for a comparative fault allocation where negligence leads to intentional wrongdoing. Denying school districts a comparative-fault reduction for intentional injuries in P.E. class would open liability floodgates because the distinction between intentional and negligent conduct in sports is amorphous, e.g., when is an intentional tag in touch football (a required part of the game) more than just an intentional tag? And in cases involving egregious conduct with extremely high noneconomic damages, such as a teacher sexually abusing students, a single judgment without a section 1431.2 reduction could bankrupt a school district. Proposition 51 is supposed to limit such liability.

4. *Turner* is inapposite.

Not only did the trial court err in failing to follow the binding *Weidenfeller*, it compounded that error by following *Turner*, 957 S.W.2d 815. (2AA/310.)

Turner is a Tennessee Supreme Court decision applying Tennessee law, not California law. The two states treat comparative fault differently. (See *McIntyre v. Balentine* (Tenn. 1992) 833 S.W.2d 52, 57-58, fn. 5 [rejecting the "pure" form of comparative fault adopted by several states, including California,

in favor of a 49% rule—permitting a plaintiff to recover only if his fault is "less than the combined fault of all tortfeasors."].) Tennessee doesn't have a statute analogous to section 1431.2, and *Turner* certainly wasn't interpreting or applying section 1431.2's rule for noneconomic damages.

Turner noted that some states, such as California (citing *Weidenfeller*), New Mexico and Arizona, allow negligent parties to reduce liability by the fault percentage of intentional wrongdoers to avoid "burdening the negligent tortfeasor with liability in excess of his or her fault," while other jurisdictions are more concerned "that the plaintiff not be penalized …." (*Turner*, *supra*, 957 S.W.2d at pp. 821-823.) *Turner* chose to adopt the latter approach as Tennessee law, and not in conjunction with analyzing any statute analogous to section 1431.2. (*Id.* at p. 823.)

The California Supreme Court and the *Weidenfeller* court, however, have *rejected* the policy considerations that animated *Turner,* by recognizing that under Proposition 51's "compromise" approach some plaintiffs will *not* be made whole for noneconomic damages and that negligent tortfeasors' continued joint liability for economic damages adequately incentivizes compliance with their duties of care. (*DaFonte*, *supra*, 2 Cal.4th at pp. 599-604; *Evangelatos*, *supra*, 44 Cal.3d at pp. 1198-1199; *Weidenfeller*, *supra*, 1 Cal.App.4th at p. 8.)

Turner is irrelevant. Where "out-of-state authority is at odds with California law, it lacks even persuasive value." (*Lucent*, *supra*, 241 Cal.App.4th at p. 35).

C. The lack of a comparative-fault finding requires a new trial.

The jury's failure to make a comparative fault finding, based on the special verdict's erroneous instructions, requires a new trial.

1. The verdict's omission of a comparative-fault finding requires reversal.

Reversal is required where a special verdict omits necessary findings. (See § I.B, *ante*.) The verdict here is fatally defective because it erroneously instructed the jury not to apportion fault if Maucere acted intentionally. (S*cott*, *supra*, 27 Cal.App.4th at pp 150-153 [reversal for new trial required where special verdict form misled jury on fault apportionment]; *Vollaro v. Lispi* (2014) 224 Cal.App.4th 93, 104 [reversal for new trial required where special verdict form failed to ask jury to consider non-party's proportionate fault].)

2. The absence of a fault allocation renders the judgment legally excessive.

Even apart from the defective special verdict, a new trial is required because the lack of comparative fault findings is, by definition, prejudicial because the defendants' noneconomic damages were never reduced as section 1431.2 requires.

Evan assuming negligent supervision by Washausen, Maucere's intentional conduct (as found by the jury) was the direct, immediate cause of N.B.'s injury and obviously supported apportionment of some—if not most—of the fault. (Cf. *Scott*, *supra*, 27 Cal.App.4th at pp. 152-154 [prejudicial error where

evidence supported "much larger apportionment" to intentional tortfeasor than amount in verdict].) As the Supreme Court advises, "the *greater share* of fault will ordinarily lie with the individual who intentionally [harmed] the student than with any other party, and that fact should be reflected in any allocation of comparative fault." (*C.A., supra,* 53 Cal.4th at pp. 878-879, italics added.)

3. The error requires a new trial on all issues.

As explained, the deficient mandatory duty claim and the trial court's failure to instruct the jury on the primary assumption of risk doctrine require a new trial on all issues. The lack of comparative fault findings compels the same result.

The failure to conduct apportionment precludes construing the verdict as a finding of liability, let alone in any specific percentage. (See *Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 854-855 [where jury determined defendant's negligence and proximate cause but did not consider "how the negligence of defendant and plaintiff should be apportioned", it did not resolve the issue of liability in plaintiff's favor "since in order to do so it would have to reach the question of plaintiff's comparative negligence, if any, or the contributory negligence of the settling defendant . . . . The liability issue as it now stands is like a puzzle with pieces missing; the picture is not complete."].) Also, the jury's findings reflect an improper conclusion that the District violated a mandatory duty (§ I.A, *ante*); on re-trial, the District shouldn't be listed on the verdict form.

Given the absence of binding liability findings, damages must be re-tried too. The same evidence at the first trial about Maucere's and Washausen's conduct must be presented at the re-trial. Where there is "virtually no evidence relating to the matter of liability which would not also be pertinent to the issue of damages," the "proper course is to remand for a new trial on all issues." (*Zhadan v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 502-503; see *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 285-286 [limited new trials "should be granted . . . only if it is clear that no injustice will result" and "should be considered with the utmost caution" with "any doubts" resolved "in favor of granting a complete new trial"].)

4. There was no waiver.

N.B. argued in opposing the District's post-judgment motions that the District waived any comparative-fault challenge to the special verdict. (2AA/272-275.) The trial court did *not* find waiver, choosing to address the District's arguments on the merits. (2AA/309-311.) And for good reason: Any waiver argument is specious.

The District repeatedly made its position known—in briefing, special verdict proposals and objections—that fault should be allocated to Maucere regardless of whether the jury finds he acted intentionally or negligently. (1AA/161-167, 178-184; 8RT/2531; 9RT/2769-2770.) After the trial court (1) shot down the District's apportionment trial brief, (2) rejected its proposed special verdict forms, and (3) overruled its renewed objections when the court itself crafted the form presented to the

jury, the District did not waive anything by making the "best of a bad situation" and submitting to "the authority of an erroneous, adverse ruling." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213.)

Having made its position clear, the District did not waive or invite error when it ultimately signed the verdict approval form. (*Saxena*, *supra*, 159 Cal.App.4th at p. 329 [holding defendant did not invite error by submitting to special verdict form containing improper liability theory where defendant had previously "lost his argument on plaintiffs' erroneous special battery instruction and his motion for nonsuit had already been denied".) "[T]here is no evidence [the District] made a deliberate tactical choice to keep quiet about the verdict form at trial and then profit from it on appeal, nor is there any evidence [the District] misled the trial court. In fact, the opposite is true: [The District] repeatedly—but unsuccessfully—advised the court" about its position. (*Ibid.*)

Regardless, a litigant has an inherent objection to an erroneous special verdict. (Code Civ. Proc., § 647 ["All of the following are deemed excepted to: the verdict of the jury…."].) By statutory directive, the jury must resolve all the ultimate facts presented to it in the special verdict, so that "nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc., § 624.) The absence of the requisite comparative fault findings renders the verdict findings insufficient to render judgment. (*Saxena*, *supra*, 159 Cal.App.4th at pp. 327-328.) And that failure falls on N.B. because a plaintiff has the burden to ensure a special verdict contains all requisite findings. (*Behr*, *supra*, 193 Cal.App.4th at p. 532; § I.B, *ante*.)

CONCLUSION

This Court should reverse with directions to enter a defense judgment, given the deficient mandatory duty claim and the resulting deficient special verdict.

But, at a minimum, it should order JNOV for the District on the mandatory duty claim and remand the remaining negligence claim for a new trial at which a jury can make findings required by the primary assumption of risk doctrine and conduct a proper comparative fault evaluation.

Date: June 16, 2022

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this **APPELLANTS' OPENING BRIEF** contains 13,662 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: June 16, 2022 /s/ Nadia A. Sarkis

Nadia A. Sarkis

PROOF OF SERVICE

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036, my email address is chsu@gmsr.com.

On June 16, 2022, I served the foregoing document(s) described as: **APPELLANTS' OPENING BRIEF** on the interested party(ies) in this action, addressed as follows:

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(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed June 16, 2022 at Los Angeles, California.

(X) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Digitally signed by Chris Hsu
Date: 2022.06.16 10:01:44 -07'00'

Chris Hsu