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' REPLY BRIEF

LIEBMAN, QUIGLEY & SHEPPARD A PROFESSIONAL LAW CORPORATION
Jack L. Sheppard (SBN 92923)
jsheppard@lqss.com
3255 Wilshire Boulevard, Suite 1200
Los Angeles, California 90010-1404
(213) 387-0777 | Fax: (213) 383-6754

GREINES, MARTIN, STEIN & RICHLAND LLP
*Edward L. Xanders (SBN 145779)
exanders@gmsr.com
6420 Wilshire Boulevard, Suite 1100, Los Angeles, CA 90048
(310) 859-7811 | Fax: (310) 276-5261

Attorneys for Defendants and Appellants BURBANK UNIFIED SCHOOL DISTRICT, A Public Entity, and DYLAN WASHAUSEN

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INTRODUCTION

The Respondent's Brief suggests that it's no big deal for a school district to have to pay $1.7 million to an eighth grader who sustained a knee injury from an overly-aggressive "touch tackle" during a touch football game in P.E. class, even though plaintiff never had to prove that the P.E. teacher increased the game's inherent risks and the court refused to apply Proposition 51 to limit the district's noneconomic damages. But it is a big deal. From a public-policy standpoint, it's a huge deal.

Plaintiff's legal theories, if accepted, would expose schools to substantial liability for sports-related injuries from inherent risks in P.E. classes. And it would bar schools from claiming Proposition 51 protection in the myriad contexts where someone claims that negligent supervision of teachers or students contributed to intentional misconduct, including teachers sexually abusing students. It would effect a sea change in California law that would undermine a core Proposition 51 purpose—to reduce the noneconomic damages exposure of public entities because joint liability causes cuts in services and higher taxes.

Weidenfeller v. Star & Garter (1991) 1 Cal.App.4th 1 (*Weidenfeller*) and the *three decades* of cases following it remain good law. Plaintiff asked the trial court not to let the jury make a comparative fault finding even though *Weidenfeller* was binding on that court. That tactical decision, and the resulting absence of a comparative-fault finding, requires reversal of the judgment.

And the need for reversal doesn't stop there. The claim against teacher Washausen must be reversed because the trial court erred in concluding that the primary assumption of risk doctrine is inapplicable because the P.E. class was mandatory. The Respondent's Brief doubles down on the contention that the doctrine requires a "voluntary" assumption of risk. But that's no longer the law. The California Supreme Court *rejected* and replaced traditional assumption of risk concepts with a duty analysis based on whether holding a coach or participant liable for a sport's inherent risks will chill vigorous competition or chill schools from offering the sport. Courts have repeatedly and uniformly applied the doctrine to touch football because collisions between players are an inherent risk. The doctrine does not support or justify treating a school sport differently just because it is played in a P.E. class rather than an extracurricular program.

The Respondent's Brief also fails to provide any basis to uphold plaintiff's sole claim against the school district—that the district breached a mandatory duty under Education Code section 49079 to report information *to Washausen*. As our opening brief explained, plaintiff argued to the jury that the failure of school administrators to notify Washausen about its disciplining of Gianni Maucere *after* he injured plaintiff would support an inference that Gianni engaged in other misconduct. The Respondent's Brief now backtracks and tries to rely solely on evidence of pre-injury misconduct. But the section 49079 reporting duty only applies to conduct warranting suspension or expulsion, and there was *no* evidence of Gianni previously

engaging in any such conduct. Nor could any of the purportedly non-reported information (most of which Washausen already knew about) have proximately caused plaintiff's injury.

ARGUMENT

I. The Absence Of A Comparative Fault Finding Compels Reversal.

A. *B.B. v. County of Los Angeles* supports the District.

Plaintiff Nigel Brigstocke ("N.B.") (we use the nomenclature in the case caption) argues that the trial court's refusal to let the jury make a comparative fault allocation if it found Gianni acted intentionally was "no[t] error" because "[i]n *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1 (*B.B.*), the Supreme Court held that the principles of comparative fault—which define the scope of Proposition 51—do not include intentional conduct." (RB 14.) N.B. similarly asserts that "[t]he underlying logic of the *B.B.* opinion—specifically its finding that intentional conduct falls outside of the principles of comparative fault—appears to vindicate the trial court's decision here." (RB 62.)

That's wrong. For starters, the Supreme Court expressly stated that it was *not* reaching the issue that *Weidenfeller* addressed, and which is now before this Court: It only held that Proposition 51 (Civil Code sections 1431 to 1431.5) does not allow intentional tortfeasors to reduce their noneconomic damages based on others' negligence, and it "express[ed] no opinion on whether negligent tortfeasors may . . . obtain a reduction in their

liability for noneconomic damages based on the extent to which an intentional tortfeasor contributed to the injured party's injuries." (*B.B.*, *supra*, 10 Cal.5th at pp. 23, 29, fn. 4.)

In suggesting that *B.B.*'s "underlying logic" supports the trial court's decision (RB 62), N.B. gets it backwards. Besides ignoring that settled rules *required* the trial court to apply *Weidenfeller* (AOB 57), he ignores that *B.B.* discusses *Weidenfeller* at length without a wisp of disagreement and, as our opening brief explained, characterized *Weidenfeller*'s reasoning as consistent with its own (AOB 61).

N.B. also ignores *B.B.*'s extensive discussion of the historical difference for comparative-fault purposes between negligent conduct and intentional conduct. (See *B.B.*, *supra*, 10 Cal.5th at pp. 13-24.) In finding that intentional tortfeasors fall outside Proposition 51's protections, the Court emphasized:

(1) "[A]t the time of Proposition 51's adoption, both statutory and common law *precluded* intentional tortfeasors from 'seek[ing] equitable reimbursement from other defendants.'" (*B.B.*, *supra*, 10 Cal.5th at p. 28, original italics.) "[W]hen the electorate adopted Proposition 51 . . . [o]ur Courts of Appeal uniformly held that intentional tortfeasors may not, under comparative fault principles, reduce their liability based on the negligent acts of others. And section 875 of the Code of Civil Procedure authorized pro rata contribution among the defendants held liable 'in a tort action' (*id.,* subd. (a)), but expressly precluded 'contribution in favor of any tortfeasor who

has intentionally injured the injured person' (*id.*, subd. (d))." (*Id.* at p. 20.)

(2) Section 1431.2 refers to "principles of comparative fault," and "at the time the voters considered Proposition 51, the word 'fault' in tort law generally—and in the comparative fault context in particular—included negligent (even willful) conduct and liability based on strict liability, but not intentional conduct." (*B.B.*, *supra*, 10 Cal.5th at p. 24; see also *id.* at pp. 17-20.)

Here, in contrast, N.B. does not and cannot point to *any* pre-Proposition 51 statute *or* case law (let alone any uniform authority) denying a comparative fault reduction to a negligent party where another tortfeasor acted intentionally. The Supreme Court drove home the point in *B.B.* that intentional wrongdoers are categorically more blameworthy than negligent parties and, *unlike negligent parties*, don't warrant Proposition 51 protection. But the District and Washausen were at most negligent.

N.B.'s comparative-fault theory also is irreconcilable with *B.B.*'s recognition that Proposition 51 was intended to prevent plaintiffs from imposing disproportionate liability on negligent government entities and other "deep pocket" defendants, because joint liability for noneconomic damages results in taxpayers underwriting verdicts through "high taxes" and "reduced governmental services." (*B.B.*, *supra*, 10 Cal.5th at pp. 28-29; AOB 61-63.) Denying Proposition 51 protection to negligent school districts, as N.B. urges, would eviscerate that purpose.

So, while *B.B.* did not resolve the question before this Court, its reasoning supports the District. *B.B.* does not even remotely endorse courts parting ways with *Weidenfeller*.

B. *Weidenfeller* and its three-decade progeny remain good law.

Make no mistake: What N.B. urges, and what the trial court did in applying a Tennessee decision that expressly recognizes its holding differs from *Weidenfeller*, is a sea change in California law. (AOB 64-65; *Turner v. Jordan* (Tenn. 1997) 957 S.W.2d 815, 822 (*Turner*).)

The Respondent's Brief's efforts to suggest otherwise are make-weight. The brief presents a confusing argument about the District and Washausen "effectively" being vicariously liable for Gianni's intentional conduct and then discusses out-of-state cases and the Restatement. (RB 62-69.) It buries any *Weidenfeller* discussion until the very end, and then half-heartedly describes *Weidenfeller* as "at odds" with *B.B.* and "distinguishable," despite neither being true. (RB 69-72.)

This Court is not operating on a blank slate. *Weidenfeller* is directly on point and has been followed *uniformly* by other California Courts of Appeal since 1991. (See AOB 60-61.) Yes, *Weidenfeller* and its *three-decade* progeny are not Supreme Court decisions. But stare decisis principles remain relevant because Courts of Appeal "'ordinarily follow the decisions of other districts without good reason to disagree.'" (*The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529.) And Courts of Appeal "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.)

So, the analytical starting point is not out-of-state cases or the Restatement, or the Respondent's Brief's newfound "effectively vicariously liable" theory. It is to examine *Weidenfeller* and its three-decade progeny and decide whether to stay the course or dramatically change California law.

The Respondent's Brief obscures the stare decisis issue by pitching the issue as *Weidenfeller* versus out-of-state cases. (RB 64-74.) It's not. As our opening brief demonstrated, three decades of post-*Weidenfeller* decisions applying California law have *uniformly* applied Proposition 51 to allow negligent defendants to reduce noneconomic damage liability even where the negligence consisted of the failure to protect the plaintiff from someone's intentional acts that the defendant had a duty to prevent. (See AOB 60-61, discussing *Cleveland v. Taft Union High School Dist.* (2022) 76 Cal.App.5th 776, 794 (*Cleveland*), *Samantha B. v. Aurora Vista Del Mar, LLC* (2022) 77 Cal.App.5th 85, 94, *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 136, 150-151, *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1233-1235, *Skinner v. Vacaville Unified School Dist.* (1995) 37 Cal.App.4th 31, 31 (*Skinner*), and *Martin By and Through Martin v. U.S.* (9th Cir. 1993) 984 F.2d 1033, 1039-1040 (*Martin*).)

The Respondent's Brief only mentions *Cleveland* and *Skinner*. But it only cites *Skinner*'s discussion about reporting

duties, ignoring the comparative-fault verdict. (RB 34-35.) And it quotes *Cleveland* for the rule that school personnel must "'use reasonable measures to protect students from foreseeable injury at the hands of third parties acting negligently or intentionally'" (RB 50), ignoring that *Cleveland* upheld a judgment holding a negligent school district only 54% liable for a student's *intentional* shooting of another student, even though the district's liability rested on negligently breaching a duty to prevent such student-on-student violence (76 Cal.App.5th at p. 794).

Nor does the Respondent's Brief acknowledge the District's explanation (AOB 63-64) that the Supreme Court recognized in *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861 (*C.A.*) that letting student-victims of teacher sexual abuse sue school districts for negligent supervision will not expose schools to unfettered liability because "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.) Under the Respondent's Brief's theory that Proposition 51 doesn't apply when a district's negligent supervision contributes to a student being harmed by an intentional wrongdoer, *C.A.*'s comparative-fault discussion makes no sense.

C. Plaintiff's "effectively vicariously liable" theory is spurious.

Instead of addressing this aspect of *C.A.*, N.B. quotes *C.A.* for the principle that "'a school district and its employees have a special relationship with the district's pupil's'" that includes protecting students against foreseeable injuries "'at the hands of third parties acting negligently *or intentionally*.'" (RB 64, original italics.) It then argues that this "special relationship that exists between school districts, their employees, and the districts' pupils" justifies holding the District and Washausen vicariously liable (that is, completely responsible) for "the harm caused by Gianni's intentional conduct because they owed a duty to prevent it." (RB 64). N.B. argues that "Proposition 51 does not apply when, *as here*, the defendant is *effectively* held vicariously liable for an intentional tort." (RB 62, bold omitted, italics added.)

This argument both flips *C.A.* on its head and abrogates California law. The District and Washausen are not "effectively" vicariously liable for Gianni's conduct. A defendant either is or isn't vicariously liable. There's no middle ground. The District and Washausen are *not* vicariously liable for Gianni's conduct. Gianni is a student, not an employee or agent.

The special relationship between schools and students merely creates *a duty of care*, not vicarious liability. (See, e.g., *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 619 ["a duty to warn or protect may be found if the defendant has a special relationship with the potential victim

that gives the victim a right to expect protection"].) That's why N.B. had to prove that Washausen was negligent, instead of simply proving Gianni acted wrongfully and then holding the District or Washausen vicariously liable for Gianni's conduct.[1]

When the negligence of school personnel contributes to an injury caused by a third-party's intentional misconduct, that may create the prospect of joint and several liability. But joint and several liability among concurrent tortfeasors is *not* vicarious liability. (See *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 587.) And the prospect of joint and several liability among concurrent tortfeasors is exactly where Proposition 51 kicks in, by limiting a negligent party's joint liability to economic damages.

N.B.'s argument proves too much. If a school district's "special relationship" with students justified eliminating Proposition 51's protection where a third party commits intentional misconduct, logically the relationship would eliminate protection for third-party negligence too. But even N.B doesn't go that far.

And if, as N.B. claims, the special relationship between school districts and students sufficed to eliminate Proposition 51 protection whenever a district's negligent supervision contributed to an intentional injury, the Supreme Court's comparative-fault comments in *C.A.* would be nonsensical. So would the myriad

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[1] The District *is* vicariously liable for *Waushauen's* negligence, which is why the District could never reduce its noneconomic damages by *his* proportionate fault.

other cases recognizing the need for comparative-fault allocations where a school district's negligent supervision allowed a teacher's intentional sexual assaults, injuries for which a school is not vicariously liable but may be directly liable under a negligent hiring or supervision theory. (E.g., *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1057-1058 (*Ortega*) [remanding for comparative-fault allocation where jury found school district liable for teacher's sexual misconduct under negligent supervision theory but found district 100% liable].) The same is equally true as to the comparative-fault limitation in *Cleveland* for a school district's liability for negligently allowing an *intentional* student-on-student shooting, and the comparative-fault allocation in *Skinner* between the negligent school district and the *intentionally* violent student.

N.B.'s "effectively vicariously liable" argument rests on one case, *Medina v. Graham's Cowboys, Inc.* (N.M.Ct.App. 1992) 827 P.2d 859 (*Medina*). (RB 64-65.) But *Medina* is irrelevant. Not only does it apply New Mexico law, it merely held that a bar owner was liable for all damages for negligently *hiring* an unfit doorman who assaulted plaintiff in the bar parking lot. (827 P.2d at p. 860.) *Medina* concluded that vicarious liability applied because "it is a natural extension of the doctrine of respondeat superior to hold that an employer who is liable for negligently hiring an intentional tortfeasor should be vicariously liable for the fault attributed to the tortfeasor-employee." (*Id*. at p. 863.)

That holding has nothing to do with this case. Here, the only employee involved in N.B.'s injury, and the only person for whom the District is vicariously liable under the respondeat

superior doctrine or otherwise, is Washausen. Even if Gianni acted intentionally, the District is not vicariously liable for Gianni's conduct. There is no liability without fault here as to Gianni's conduct. N.B.'s "effectively vicarious liable" argument is fiction.

D. *Weidenfeller* and its three-decade progeny are reasonable.

When the Respondent's Brief finally gets around to addressing *Weidenfeller*, it provides little analysis and ignores the three decades of cases following *Weidenfeller*. (RB 69-74; see AOB 60-61.)

The brief confusingly asserts that "*Weidenfeller*'s construction of [Civil Code] section 1431.2, subdivision (a), is . . . suspect" because its "statements demonstrate that [it] reached an outcome that was not supported by the language of section 1431.2" and yet it "did not identify any ambiguity in the statutory language." (RB 70-71.) The argument is a smokescreen. Section 1431.2's language supports *Weidenfeller*'s construction. The statute specifies that "[e]ach 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*." (Italics added.) And as *B.B.* explains, California has traditionally construed the word "fault" as negligence. (*B.B.*, *supra*, 10 Cal.5th at pp. 17-20, 24.)

And, while California comparative-fault law in effect when Proposition 51 was adopted barred intentional tortfeasors from reducing their liability (*B.B.*, *supra*, 10 Cal.5th at pp. 20, 28;

§ I.A., *ante*), no such authority barred negligent tortfeasors from contribution just because their negligence contributed to an injury caused by an intentional tortfeasor.

Nor does N.B. address *Weidenfeller*'s correct analysis of Proposition 51's purpose and public-policy predicate, or the opening brief's explanation of the same. (See *Weidenfeller*, *supra*, 1 Cal.App.4th at pp. 7-8; AOB 58-59, 61-63.) N.B. does not even attempt the impossibility of reconciling his argument with Proposition 51's purpose of limiting public entities' noneconomic damages exposure. (See, e.g., Civ. Code, § 1431.1 [defendants "shall be held financially liable in closer proportion to their degree of fault" because joint liability threatens "financial bankruptcy of local governments [and] other public agencies" and forces local government agencies to curtail essential services].)

Instead, N.B. merely argues *Weidenfeller* is "distinguishable" because, there, a bar owner's negligent failure to provide security allowed a fight between two bar patrons, rather than a fight between a bar patron and a bar employee. (RB 71.) But the *Weidenfeller* circumstances are directly analogous to what N.B. claims here—Washausen's negligence allegedly allowed intentional misconduct by a non-employee (Gianni) that the defendant had a duty to protect against.

N.B. suggests that *Weidenfeller* would have come out differently had an employee committed the assault, instead of a bar patron. That's unclear because intentional assaults can fall outside an employee's scope of employment. (E.g., *C.A.*, *supra*, 53 Cal.4th at p. 865 [schools not vicariously liable for teacher's

sexual assaults of students].) But, in any event, that's a distinction without a difference here because student Gianni acted intentionally here, not employee Washausen. Thus, N.B.'s attempted distinction of *Weidenfeller* rests, again, on the false premise that schools are vicariously liable for student conduct.

N.B. confirms that is so by arguing that *Weidenfeller* is consistent with *Reichert v. Atler* (N.M.Ct.App. 1992) 875 P.2d 384, affd. (1994) 875 P.2d 379 (*Reichert*), a New Mexico case that distinguished *Medina*. (RB 71.) *Reichert* limited a negligent defendant's liability to its proportionate fault even though that negligence allowed intentional misconduct the defendant was supposed to prevent. (875 P.2d at p. 389.) In doing so, *Reichert* distinguished *Medina* on the ground that the employer-employee relationship in *Medina* permitted liability on the employer *without fault* under the respondeat superior doctrine. (See *id. at* p. 392 ["[i]n the absence of a special relationship upon which the common law *has predicated liability without fault*, *Medina* provides no basis for making Defendants jointly and severally liable in this case," italics added].) Thus, not only is *Reichert* consistent with *Weidenfeller*, it supports applying Proposition 51 here because the District and Washausen are *not* liable for Gianni's conduct *without fault*. They are only liable if negligent.

Indeed, if the "special relationship" between schools and their students made *Weidenfeller* distinguishable and Proposition 51 inapplicable, California courts have gotten it wrong for three decades by requiring comparative-fault allocations where school teachers sexually assaulted students (*C.A.*, *supra*, 53 Cal.4th at pp. 878-879; *Ortega*, *supra*, 64 Cal.App.4th at pp. 1057-1058), or

where schools failed to prevent student-on-student assaults (*Cleveland*, *supra*, 76 Cal.App.5th at pp. 789, 794; *Skinner, supra,* 37 Cal.App.4th at p. 34), or in other contexts where the defendant had a special relationship with the victim to prevent a third-party assault (*Martin*, *supra*, 984 F.2d at pp. 1038-1040 [applying California law; government-owned day care center entitled to Proposition 51 protection despite special relationship with child victim that third party abducted and raped]).

California law and the intent behind Proposition 51 control here, not how other jurisdictions might approach joint and several liability or comparative fault. California courts have *rejected* the policy considerations that animate cases like *Turner, supra,* 957 S.W.2d 815, the case the trial court relied on (2AA/310) but that the Respondent's Brief now relegates to a string cite after the opening brief's critique (see AOB 64-65; RB 68). As *Turner* itself recognizes, California and other states 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 Tennessee and some other states are more concerned "that the plaintiff not be penalized." (*Turner*, at p. 823.) California courts, including the Supreme Court, have made clear that Proposition 51 is a statutory "compromise" approach that imposes joint liability on negligent parties for economic damages but only several liability for noneconomic damages; and, under this compromise, some plaintiffs may not be made whole for noneconomic damages but negligent parties are sufficiently deterred. (See *DaFonte v. Up-Right*, *Inc.* (1992) 2 Cal.4th 593,

599-604; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1198-1199; *Weidenfeller*, *supra*, 1 Cal.App.4th at p. 8.)

The out-of-state cases and Restatement provision that the Respondent's Brief emphasizes (RB 64-68, 71-74) are inapposite because they don't apply California law, and they reflect policy and statutory language contrary to Proposition 51's compromise approach (such as assuming no joint liability whatsoever). (See, e.g., RB 66 [arguing that the Restatement approach "seeks to avoid under-compensating an injured plaintiff and under-deterring the negligent party"]; *Cortez v. University Mall Shopping Center* (D.Utah 1996) 941 F.Supp. 1096, 1099 (cited at RB 73) ["The split of authority among the jurisdictions indicates differing statutory constructions and policy positions"]; see also *Pacheco v. Regal Cinemas, Inc.* (Ga.Ct.App. 2011) 715 S.E.2d 728, 730, 733-734 [applying Georgia comparative-fault statute to protect defendant theater that negligently failed to protect patron from intentional assault; distinguishing *Turner* (cited at RB 71) on the ground it "did not turn on any statute" and distinguishing *Merrill Crossings Associates v. McDonald* (Fla. 1997) 705 So.2d 560 (cited at RB 73) on the ground that Florida's apportionment statute "expressly provided that the statute was inapplicable where the case was 'based upon an intentional [act]'"]; *Cafe Moda v. Palma* (Nev. 2012) 272 P.3d 137, 141 & fn. 3 [citing *Weidenfeller*, *Reichert* and New York law with approval and holding Nevada comparative-fault statute allows several liability even when the co-defendant acted intentionally; a contrary interpretation would "produce[] the unreasonable result of hinging the extent of a negligent defendant's liability on another

party's mindset"]; *Weidenfeller*, *supra*, 1 Cal.App.4th at p. 7, fn. 10 [rejecting the plaintiff's reliance on Kansas cases]; RB 68 [relying on Kansas case].)

The Respondent's Brief provides no legitimate basis to diverge from *Weidenfeller* and its progeny. Such a sea change in California law should be reserved for the Legislature or the California Supreme Court. The trial court's failure to follow *Weidenfeller* and its three-decade progeny compels reversal.

E. Plaintiff's theory is particularly flawed in the sports context.

Proposition 51's goal of reducing the noneconomic damages exposure of school districts and other government agencies is particularly irreconcilable with eliminating Proposition 51 protection for so-called "intentional" sports injuries, as here. The jury found that Gianni acted toward N.B. in the touch football game "in a manner that was . . . intentional" and that the intentional conduct was *not* "highly unusual, extraordinary, or not reasonably likely to occur." (1AA/193.) Thus, the jury found that Gianni's "intentional" conduct was fairly common or reasonably likely. It did not find that Gianni committed a crime. (See pp. 41-42, *post*.)

There was no "intentional" conduct here unrelated to a sports play. This was not a situation of two students getting into a fight in the middle of a game and throwing punches. Instead, in the heat of the moment of a touch football game, Gianni ran down N.B. after he made a catch and touched tackled him too aggressively. If that is "intentional" conduct warranting the loss

of Proposition 51 protection, school districts would face full noneconomic damage liability for sports injuries that are not even remotely analogous to the criminal assaults at issue in the cases the Respondent's Brief cites. (See pp. 40-42, *post*.) That would fundamentally change California law and expose school districts to the crippling noneconomic damages exposure that Proposition 51 was intended to prevent.

II. The Verdict On The Claim Against Washausen Must Be Reversed Because The Primary Assumption Of Risk Doctrine Applies.

A. Under controlling Supreme Court precedent, the primary assumption of risk doctrine does *not* depend on a "voluntary" assumption.

At N.B.'s urging, the trial court concluded that the primary assumption of risk doctrine is inapplicable here because the injury occurred in a compulsory P.E. class rather than an extracurricular school sport. (See RB 45-50; 9RT/2763-2764 [trial court distinguishing *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990 (*Kahn*) and *Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430 (*Fortier*) on the ground they involved extracurricular school sports, not P.E. programs].) On appeal, N.B. doubles down on this argument, claiming "[t]he doctrine of primary assumption of the risk is grounded on the plaintiff's *voluntary* assumption of the risk at issue" and "[t]hat element is missing in a compulsory P.E. class." (RB 45, original italics, bold omitted.)

But that, decidedly, is not California law. The argument rests on an antiquated concept of the doctrine that the California Supreme Court *rejected* and replaced in *Knight v. Jewett* (1992) 3 Cal.4th 296 (*Knight*) and its progeny.

As the opening brief explained, prior to *Knight*, California courts had required a "voluntary" assumption of the subject risk for the doctrine to apply, but *Knight* replaced that requirement with a "duty approach." (*Knight*, *supra*, 3 Cal.4th at p. 316; see AOB 51-53.) *Knight* held that application of the primary assumption of risk 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, as the Supreme Court has confirmed repeatedly, although "[t]he *traditional* version of the assumption of risk doctrine required proof that the plaintiff *voluntarily accepted* a specific known and appreciated risk," *Knight* "reconceptualize[ed]" the doctrine as resting on duty, not consent. (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161 (*Avila*), italics added; see also *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 537-538 (*Neighbarger*) [explaining that in *Knight*, "we disapproved earlier cases that applied the doctrine as a bar to liability on the basis of plaintiff's subjective, voluntary assumption of a known risk"].)

N.B.'s argument that California requires a "voluntary" assumption of the subject risk thus rests on antiquated concepts that no longer govern. (See also *Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th 939, 943 (*Lilley*) [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'"].)

Consequently, as our opening brief explained *but the Respondent's Brief ignores* (AOB 52-53; RB 7-11), post-*Knight* cases have applied the primary assumption of risk doctrine to contexts where plaintiff's involvement in the injury-causing activity was mandatory:

- In *Cann v. Stefanec* (2013) 217 Cal.App.4th 462 (cited at AOB 52), the doctrine was applied to a UCLA swim team member's injury during *mandatory* weight training; her "presence in the weight room was required." (*Id.* at p. 465-466.) The Court of Appeal rejected plaintiff's argument that "primary assumption of the risk does not apply because she did not impliedly consent to having a weight dropped on her head." (*Id.* at p. 471.) It recognized that under *Knight* and its progeny, "'[p]rimary assumption of risk focuses 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." (*Ibid.*)

- *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 (cited at AOB 52-53) applied the doctrine to injuries that a corrections officer sustained in a *mandatory* training course, recognizing that "[a] court's determination of the risk inherent in an activity does not depend on a particular plaintiff's 'subjective knowledge or appreciation of the potential risk' inherent in the activity, or consent to or voluntary acceptance of that risk." (*Id.* at p. 1024, italics omitted.)

- California courts have applied the doctrine to certain occupational injuries by firefighters and veterinarians, even though firefighters and veterinarians cannot be said to have voluntarily accepted the risk; instead, those cases are "example[s] of the proper application of the doctrine of assumption of risk, that is, an illustration of when it is appropriate to find that the defendant owes no duty of care." (*Neighbarger*, *supra*, 8 Cal.4th at pp. 538, 541 (cited at AOB 53)).

N.B. pays lip service to *Knight*'s duty approach by correctly noting that "'[p]rimary assumption of risk is merely another way of saying no duty of care is owed as to risks inherent in a given sport or activity'" and that "[u]nder *Knight* and its progeny, the principal consideration in the application of the doctrine of primary assumption of the risk is to avoid imposing a duty that might chill vigorous participation in the sport or activity and thereby alter its fundamental nature." (RB 45-46.)

But N.B. then wholly abrogates *Knight*'s duty approach by seizing on passing references to the word "voluntary" in certain post-*Knight* cases to erroneously claim that "after *Knight*, the fact

that a participant voluntarily engages in the activity at issue has *become an important component* of the application of the doctrine" and "the voluntary nature of participation . . . *is critical* to application of the doctrine." (RB 46, 48, italics added; see also RB 47-49.) The exact opposite is true: After *Knight*, application of the doctrine "*cannot* properly be said to rest on the [plaintiff's] voluntary acceptance of a known risk of injury . . . ." (*Neighbarger*, *supra*, 8 Cal.4th at p. 541, italics added.) *Knight eliminated* the "voluntary" requirement that existed under the traditional assumption of risk doctrine.

Every one of the "voluntary" snippets cited in the Respondent's Brief comes from a case where a plaintiff voluntarily engaged in an inherently-risky activity and the court held that the primary assumption of risk doctrine *applied*; the court made passing references to voluntary participation but ultimately applied *Knight*'s duty approach. (See RB 47-49.) *None* of these cases involved a court applying the doctrine to conduct that might be considered mandatory and then holding the doctrine doesn't apply. *None* construes the "voluntary" nature of the conduct as "critical" to whether the doctrine applied; instead, each applied *Knight*'s duty approach. *None* rejects *Knight*'s duty approach or states that the primary assumption of risk doctrine only applies to voluntary conduct. That the doctrine often applies to voluntary conduct does not mean it cannot apply to compulsory activities.

The Respondent's Brief cites to *Kahn*, *supra*, 31 Cal.4th 990 (RB 46), but ignores that the case *expressly rejects* N.B.'s argument, and in the context of addressing school sports. In

Kahn, which involved a plaintiff's participation in a high school swimming program, the Court of Appeal majority had held that the primary assumption of risk doctrine applied "in part because of the voluntary nature of plaintiff's conduct" and had emphasized that "'plaintiff was injured because she *voluntarily* participated in a dangerous activity, she *chose* to remain in the competition even though she could have refused to swim, and she *took it upon herself* to practice an unfamiliar dive without her coach's knowledge.'" (31 Cal.4th at p. 1016, italics added by Supreme Court). Although the Supreme Court ultimately held that the doctrine applied, it *rejected* the Court of Appeal's voluntary-participation "line of reasoning" as "flaw[ed]":

> "[W]ith respect to the issue of the asserted breach of duty, in referring to plaintiff's *voluntary* participation in the sport of competitive swimming and her *choice* to compete at the meet and practice diving on the day she was injured, the Court of Appeal majority *failed to recognize* that the doctrine of primary assumption of risk, including the issue of the scope of defendants' duty of care, *does not turn on plaintiff's subjective awareness of the risk or her decision to encounter it voluntarily, but on the question whether defendants owed her a duty of care*."

(*Ibid*., italics added, citing *Knight*, *supra*, 3 Cal.4th at pp. 313-315.)

The cases that the Respondent's Brief emphasizes confirm the same, when properly read in toto rather than simply relying on passing references to "voluntary":

- N.B. highlights a snippet in *Lilley*, *supra*, 68 Cal.App.4th at p. 946, that the plaintiff "cho[se] to participate in a sport" (RB 49), ignoring *Lilley*'s explanation that application of the primary assumption of risk doctrine under *Knight* and its progeny 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" (*Lilley*, *supra*, 68 Cal.App.4th at p. 943, italics added).

- N.B. quotes a reference to "voluntary participants" in *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1167 (*Nalwa*) (RB 47), ignoring that *Nalwa* merely held that *Knight*'s "duty approach" extends beyond sports to non-sports recreation, such as riding bumper cars: "The primary assumption of risk doctrine *rests on a straightforward policy foundation*: the need to avoid chilling vigorous participation in or sponsorship of recreational activities by imposing a tort duty to eliminate or reduce the risks of harm inherent in those activities. It operates on the premise that imposing such a legal duty 'would work a basic alteration—or cause abandonment' of the activity." (*Id.* at p. 1156, italics added.) Justice Kennard's dissent in *Nalwa* proves the point, as she explains that *Knight* "transform[ed] . . . California tort law"—a "radical transformation" in Justice Kennard's view—by "abandon[ing]" the traditional "voluntary acceptance" requirement. (See *id.* at p. 1164 (dis. opn. of Kennard, J.); *id.* at p. 1167 [under the "common law assumption of risk doctrine" that

Knight replaced, "'the pertinent inquiry [wa]s not what risk is inherent in a particular sport [or recreational activity]; rather, it [wa]s what risk the plaintiff consciously and voluntarily assumed'"]; *id.* at p. 1166 [pre-*Knight* law required voluntary consent].)

- N.B. emphasizes a reference in *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1115 (*Aaris*) that extracurricular activities, such as a high school cheerleading class, are "voluntary" (RB 49), ignoring that *Aaris* solely addressed whether the "doctrine of primary assumption of risk does not apply where the negligence action is brought against the instructor or coach, as opposed to the sports coparticipant" (*Aaris*, at p. 1117). In holding it applies, *Aaris* did not rely on any analysis of whether the conduct was voluntary versus mandatory. It applied *Knight*'s "duty approach": "Were we to hold that respondent has liability for appellant's injury, it would fundamentally alter the nature of high school cheerleading . . . . This would either chill, or perhaps even kill, high school cheerleading." (*Id.* at p. 1120.)

In sum, *Knight* and its progeny make clear that the doctrine's application does not rest on whether a plaintiff's involvement was voluntary. Rather, it is a duty of care analysis presenting a question of law regarding a sport's inherent risks.

B. There is no principled reason why duties in a P.E. touch-football class should differ from an extracurricular school touch-football program.

1. The same policy concerns apply.

N.B. argues that "Defendants cannot point to a single decision issued since [*Knight*] that has applied the [primary assumption of risk] doctrine in the context of a compulsory P.E. class." (RB 50). But it is equally true that N.B. cannot point to a single decision since *Knight* that has held the mandatory nature of a P.E. class bars the doctrine from applying. In terms of published decisions, the issue before this Court is one of first impression.

N.B. does not and cannot deny that if the incident at issue had occurred during a high school or collegiate extracurricular sports class or program, the primary assumption of risk doctrine would apply. (See *Kahn*, *supra*, 31 Cal.4th at p. 995 [high schooler's participation on junior varsity swim team]; *Fortier*, *supra*, 45 Cal.App.4th at pp. 432-433 [college student's participation in touch football drill that mirrors the touch-football class at issue here]; *Aaris*, *supra*, 64 Cal.App.4th at pp. 1115-1116 [high schooler's participation on cheerleading team].)

Nor could N.B. deny that the doctrine would apply had the incident occurred during a middle-school extracurricular sports class. (See *Lilley*, *supra*, 68 Cal.App.4th at pp. 942-944 [doctrine applies to middle-school student's participation in school's after-school wrestling program].)

So, the issue comes down to whether the mandatory nature of a P.E. class compels a different result. It doesn't. As the opening brief demonstrated and this brief further shows, the doctrine's application rests on an objective public-policy-based duty analysis, not on whether someone voluntarily assumed the risk. The same policy considerations that motivated the Supreme Court to adopt the primary assumption of risk doctrine, under which a person's general duty of care does *not* include a duty to protect student athletes from risks inherent in a sport, apply equally whether that sport is performed in a compulsory P.E. class or performed in an extracurricular school class or program. "[S]ome activities—and, specifically, many sports—are inherently dangerous. Imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation." (*Kahn*, *supra*, 31 Cal.4th at p. 1003.) "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, citing *Kahn* and *Knight*.)

These concerns apply equally to teacher or school district liability, not just to claims against participants. School teachers and schools are only liable if they "increase[] the risk of harm to the student over and above that inherent in the sport." (*Aaris*, *supra*, 64 Cal.App.4th at p. 1117 [school cheerleading program]; *Fortier*, *supra*, 45 Cal.App.4th at pp. 435-437 [same; school touch football drill]). That's because imposing a duty on coaches or schools to protect "student athletes from any risk inherent in a sport . . . would fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether

because the threat of liability would make schools reluctant to offer sports" and "would have a significant social ramification." (*Lilley*, *supra*, 68 Cal.App.4th at p. 946; see *Kahn*, *supra*, 31 Cal.4th at p. 996 ["[a] sports instructor may be found to have breached a duty of care to a student or athlete only 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' [citation] involved in teaching or coaching the sport"].)

N.B. argues that refusing to apply the primary assumption of risk doctrine to P.E. sports poses no threat to California schools because "P.E has remained a staple of the California public-school curriculum" even though no post-*Knight* published decision has applied the doctrine to a P.E. class. (RB 54.) N.B again ignores that no post-*Knight* published decision has *refused* to apply the doctrine to an inherently-risky P.E. sport. If concerns about chilling vigorous competition, altering a sport's nature, and chilling a school from offering sport classes or programs justify the doctrine's application in the middle school, high school, and collegiate context for extracurricular school sports, those concerns are *magnified* in the P.E. context because their mandatory nature substantially increases the number of participants. Exposing schools to multi-million-dollar liability for an injury sustained by aggressive play during an inherently-risky sport in P.E class could cause schools to shut down such programs, denying younger students the training and practice needed to prepare them for future participation at a higher level.

P.E. classes are compulsory for a reason. Physical exercise and playing sports benefits students. (AOB 46-48.)

N.B. also sweepingly claims that refusing to apply the doctrine to P.E. classes "will lead to safer P.E. classes." (RB 54.) But that same argument could be made as to extracurricular school sports too, yet the doctrine irrefutably applies. The reason the doctrine limits the duty of care to increasing a sport's *inherent risks*—which applies equally to P.E. sports—is that schools cannot prevent all injurious conduct in such sports without altering their nature and transforming the school into an insurer of student safety. (See *Hemady v. Long Beach Unified School Dist.* (2006) 143 Cal.App.4th 566, 573-574, 576 (*Hemady*) [concluding golf is not inherently risky and "being hit in the head by a golf club swung by another golfer is not an inherent risk in the game of golf," but contrasting golf with "touch football," a sport where "[i]f tort liability depended on whether players conducted themselves under the usual concepts of negligence law, this could chill the vigorous activity of the participants"]; *Lilley*, *supra*, 68 Cal.App.4th at p. 945 [teachers have no duty "to insure students against the risks of injury inherent in the participation in extracurricular school sports"].)

The primary assumption of risk doctrine still fosters safe playing in inherently-risky sports because co-participants and coaches/teachers remain liable if they "increase[] the risk of harm to the student over and above that inherent in the sport." (*Aaris*, *supra*, 64 Cal.App.4th at pp. 1117.) The doctrine merely creates a triable issue in cases such as this one, where a plaintiff claims a teacher increased the risk of harm. (See AOB 48-49.) But the

jury must be properly instructed about the duty of care, which never happened here.

2. Player collisions are an inherent risk of touch football.

N.B. tries to confuse matters by arguing that applying the primary assumption of risk doctrine to this touch football program "will not result in the alteration of the 'fundamental nature'" of the sport. (RB 55.) He criticizes statements in the opening brief that football "'involves tackling, blocking, pushing and shoving' and 'aggressive play is integral to the game,'" arguing "that is not the way the game was played by the boys and girls" at this school because they "were not allowed to tackle, block, push or shove." (*Ibid.*) That misses the mark for several reasons.

The opening brief's language that N.B. criticizes did not come from *tackle* football cases. It came from a case applying the primary assumption of risk doctrine to a seven-on-seven *touch* football class structured the *same* way as the P.E. game at issue here (see AOB 15-16 & fn. 2, 44; *Fortier*, *supr*a, 45 Cal.App.4th at pp. 433, 436-437) and a case that involved a low-speed, no-pads, no-helmet, non-contact football drill (see AOB 45, quoting *Dorley v. South Fayette Township School Dist.* (W.D.Pa. 2015) 129 F.Supp.3d 220, 245).

More importantly, the standard is not "the way the game was played" (RB 55) or "is played" if rules are perfectly followed. The doctrine focuses on when they are *not* perfectly followed. *Knight* and its progeny recognize that "in the heat of an active

sporting event" such as football (whether touch or tackle), "a participant's normal energetic conduct" often includes careless conduct that can cause injury and thus "vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct." (*Knight*, *supra*, 3 Cal.4th at p. 318.)

Although participants in touch football games are never "allowed to tackle, block, push or shove" (RB 55), California courts have repeatedly and uniformly held that the primary assumption of risk doctrine applies to touch football because collisions are an inherent risk (see *Fortier*, *supra*, 45 Cal.App.4th at p. 440 [collision in school's seven-on-seven touch football class]; *Knight*, *supra*, 3 Cal.4th at pp. 300-301 [collision caused by overzealous player knocking plaintiff down during recreational co-ed game of touch football]; *Hemady*, *supra*, 143 Cal.App.4th at pp. 573-574 [recognizing "touch football" as a sport where "[i]f tort liability depended on whether players conducted themselves under the usual concepts of negligence law, this could chill the vigorous activity of the participants"].) As the Supreme Court has put it, "[i]n a game *of touch football*, . . . there is *an inherent risk that players will collide*; to impose a general duty on coparticipants to avoid the risk of harm arising from a collision would work a basic alteration—or cause abandonment—of the sport." (*Kahn*, *supra*, 31 Cal.4th at p. 1003, italics added.)

N.B. also ignores that *Fortier* involved a seven-on-seven school non-contact football class that mirrors the touch football game played at John Muir. (See AOB 15-16 & fn. 2, 44; *Fortier*, *supr*a, 45 Cal.App.4th at pp. 433, 436-437.) As in the John Muir

class, the participants wore gym clothes and gym shoes only; there was no blocking or tackling; the ball could only be passed; and the play ended when a pass was incomplete or intercepted or a receiver caught a pass and was touched by a defender. (*Ibid.*)

Fortier held, after the plaintiff sued the school district for injuries he sustained as a receiver during a violent collision with a defender, that the primary assumption of risk doctrine applied, recognizing that the football game was "akin to one-hand or two-hand touch" and cannot be "authentically performed if the participants are not carrying out their respective roles aggressively." (45 Cal.App.4th at pp. 432, 436-437, 439.) Even though the rules are designed to minimize contact, "deliberate contact, e.g., the touching of an offensive player by a defensive player to end a play," remains an unavoidable part of the game. (*Id.* at p. 438.) "It is not and in the nature of the sport cannot be a guarantee of absolutely no contact"; "[n]o matter the level of play," the inherent risks of play in touch football "always include" collisions between offensive and defensive players. (*Id.* at pp. 437-438.) "To encourage aggressive play in [touch] football is simply to encourage the participants to play the game as it should be played." (*Id.* at p. 436.) In fact, "[a]ll so-called 'non-contact' team sports which require the rapid and sudden movement of the players in the playing arena involve an inherent risk of contact and resulting injury." (*Id.* at p. 440, fn. 2.)

The same is equally true here. If the doctrine applies to the touch football class at issue in *Fortier*, it also applies here.

3. The doctrine covers conduct that violates a sport's internal rules.

Even conduct that could subject the violator to "internal sanctions prescribed by the sport itself" are 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." (*Knight*, *supra*, 3 Cal.4th at pp. 318-319, original italics; see *Shin v. Ahn* (2007) 42 Cal.4th 482, 497 [noting that "generally" the sanction for violating the rules of a game is "social disapproval, not legal liability"].)

This even includes prohibited intentional conduct, such as intentionally throwing at a batter in baseball, where making such conduct a basis for tort liability would deter vigorous participation and chill schools from offering the sport. (See *Avila*, *supra*, 38 Cal.4th at p. 165 ["It is one thing for an umpire to punish a pitcher who hits a batter by ejecting him from the game, or for a league to suspend the pitcher; it is quite another for tort law to chill any pitcher from throwing inside, i.e., close to the batter's body—a permissible and essential part of the sport—for fear of a suit over an errant pitch"].)

Here, Gianni's conduct in running at full speed to stop N.B. from advancing after he caught the ball, and then touch tackling him in too aggressive a fashion, would—in football terms—warrant a penalty or chastisement for "unnecessary roughness." But making a violation of the playing rules a basis for *tort*

liability against the participant or a coach/instructor would inhibit players from playing touch football vigorously, chill teachers/coaches from teaching or encouraging competitive conduct, and chill schools from offering touch football in P.E. or any other sport where energetic, heat-of-the-moment actions can lead to excessive contact and injury.

N.B. misses the point in noting that the jury found Gianni's conduct was "intentional." (RB 55.) That finding is meaningless because the jury made the finding without being told that the primary assumption of risk doctrine applies. Even intentional conduct can fall within a sport's inherent risks, such as throwing a baseball at or close to a batter, a hard foul in basketball to prevent an easy basket, a hard slide in baseball to break-up a double-play or dislodge the ball, an aggressive slide tackle in soccer to prevent a shot on goal, or tackling someone too aggressively in football to prevent a touchdown. (See, e.g., *Avila*, *supra*, 38 Cal.4th at pp. 163-166.) Because such conduct is a risk of the game and often indistinguishable from merely careless conduct, allowing such conduct to trigger tort liability would chill vigorous participation and chill schools from offering sports programs. (*Ibid.*)

It is very easy to label any heat-of-the-moment aggressive contact as intentional. Gianni certainly intended to touch tackle N.B., and did so aggressively, but that's not contact outside the game's ordinary risks, such as punching someone in the head out of anger. When courts reference "intentional" conduct as beyond the scope of the primary assumption of risk doctrine, they are referring at most to *criminal* conduct where the defendant

intended to injure the plaintiff (e.g., a punch to the head that has nothing to do with playing the sport), rather than simply playing the game too aggressively. (See, e.g., *Avila*, *supra*, 38 Cal.4th at p. 166 [noting, in holding that the doctrine applies to intentionally hitting a batter in baseball, that the dissent suggests the doctrine "should not extend to an intentional tort such as battery and that [plaintiff] should have been granted leave to amend to allege a proper battery claim"].) And for the doctrine not to apply to a coach or instructor's conduct, "it must be alleged and proved that *the instructor* acted with intent to cause a student's injury." (*Kahn*, *supra*, 31 Cal.4th at p. 1011, italics added.)

Here, no one claimed that Washausen or Gianni engaged in criminal conduct or intended to injure plaintiff. (See, e.g., 9RT 2759 [trial court stating "there's no criminal activity here"]). The jury was never even asked to determine whether Gianni committed a battery. (See 9RT 3004-3018.) Gianni may have pushed N.B. too forcefully in touch tackling him, but his conduct was not a crime, nor was it unrelated to playing the game. As N.B. himself recognizes, Catherine Celaya, the assistant principal in charge of school discipline, "ultimately concluded that 'Gianni intentionally *played* too aggressively'" (RB 27, italics added), which does not mean he intended to cause injury. And Washausen, irrefutably, was at most negligent.

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Collisions in touch football cannot be prevented or minimized without fundamentally changing the game's nature.

Thus, a refusal to apply the primary assumption of risk doctrine to limit the duty of care here could "fundamentally alter the nature of the sport and could result in schools deciding to eliminate the beneficial educational activity of school sports." (*Lilley*, *supra*, 68 Cal.App.4th at p. 941.) And it would likely curtail the most competitive P.E. classes in inherently-risky sports, the ones that best prepare students for future participation. (AOB 15.) That includes N.B.'s advanced P.E. class for eighth graders at John Muir, which was more competitive and, in N.B.'s words, for the "more physically gifted." (3RT/990; 4RT/1206-1208; compare *Hemady*, *supra*, 143 Cal.App.4th at p. 579 [emphasizing "there is no evidence that the seventh-grade physical education golf class was competitive"].)

C. A school's "supervision" duty does not trump the primary assumption of risk doctrine.

Relying on *Hemady, supra*, 143 Cal.App.4th 566 and *Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594 (*Jimenez*), N.B. argues that "California decisions have consistently held" that the duty of school personnel to supervise children on school grounds "is not displaced by the doctrine of primary assumption of the risk." (RB 51.) It is equally true, however, that a school's duty to supervise students does not displace the primary assumption of risk doctrine. (*Aaris*, *supra*, 64 Cal.App.4th at pp. 1118-1119; *Lilley*, *supra*, 68 Cal.App.4th at pp. 941, 945; AOB 42-43.)

Aaris rejected an argument that the school district "breached a statutory duty to supervise the [school's

cheerleading] stunt team" because Education Code section 44807 "provides in pertinent part: 'Every teacher in the public schools shall hold pupils to a strict account for their conduct on the . . . playgrounds, or during recess.'" (64 Cal.App.4th at p. 1118.) Even though "the sports injury occurred on school grounds, during school hours, while [the school's coach] was supervising and training the cheerleaders," *Aaris* held that section 44807 did "not 'trump' the doctrine of primary assumption of risk." (*Id.* at p. 1119.)

Lilley similarly rejected an injured student's argument "that Education Code section 44807 eliminates primary assumption of the risk as a defense to a negligence action brought by an elementary or secondary school student who is injured" during school sports programs, recognizing that applying the statute "to foreclose application of the primary assumption of risk doctrine to risks inherent in any school sports" would lead to the alteration or elimination of beneficial school sports. (*Lilley*, *supra*, 68 Cal.App.4th at pp. 941-942; see *id.* at p. 945 ["[t]he statute 'does not make school districts insurers of the safety of pupils at play or elsewhere' [citation], and, by its terms, section 44807 does not purport to impose a duty on teachers to insure students against the risks of injury inherent in the participation in extracurricular school sports"].)

The primary assumption of risk doctrine and a school's duty to supervise students can, and must, co-exist where, as here, a school sport entails inherent risks. A school is liable only if the coach's conduct *increased* those inherent risks. And where, as here, the doctrine applies and triable facts exist as to the coach's

conduct, a properly-instructed jury must resolve the claim. (See, e.g., *Kahn*, *supra*, 31 Cal.4th at pp. 995-997 [applying doctrine to student's injury on junior varsity swim team but finding triable issue as to whether coach's inadequate supervision and training increased sport's risks]; *Aaris*, *supra*, 64 Cal.App.4th at p. 1119 [finding there "are no triable facts that respondent increased the risk of harm beyond that which was inherent in the gymnastic activity"].)

Tellingly, in emphasizing a school's duty to supervise students, the Respondent's Brief doesn't even mention the holdings of *Aaris* or *Lilley*. Instead, it relies solely on *Hemady* and *Jimenez*. (RB 51-53.) Both are inapposite. Neither disagrees with, or employs reasoning contrary to, *Aaris* or *Lilley*.

N.B. argues that *Hemady* "declined to apply the *Knight/Kahn* limited duty of care in a case brought by a 12-year-old student struck in the face with a golf club during a middle-school P.E. class" who alleged that the class was not "adequately supervised." (RB 51.) But N.B. ignores why *Hemady* reached that conclusion. The trial court had determined "that the *Knight/Khan* limited duty of care applied," recognizing that the class's mandatory nature did not preclude the primary assumption of risk doctrine from applying. (*Hemady*, *supra*, 143 Cal.App.4th at p. 570.) Although *Hemady* reversed, it did *not* do so on the ground that the class was mandatory. It correctly recognized that the mandatory nature of a P.E. class would *not* be a valid to refuse to apply the doctrine. (*Id.* at p. 583 ["[I]n this case, whether plaintiff believed the physical education golf class *was voluntary or mandatory* and whether plaintiff was

reasonable or unreasonable in participating in the golf class, *are irrelevant* under *Knight* and *Kahn*," italics added].)

Instead, *Hemady* held that the doctrine didn't apply to the plaintiff getting struck in the face by a golf swing as she was waiting to play, because it applied *Knight/Kahn*'s "objective analysis" and concluded that (a) golf is not an inherently-risky sport; (b) "being hit in the head by a golf club swung by another golfer is not an inherent risk in the game of golf"; and (c) applying the ordinary duty of care would not fundamentally alter the golf class or chill participation of the sport being offered. (143 Cal.App.4th at p. 576.) The exact opposite is true as to touch football. (See AOB 44-46; § II.B.2 *ante*.) Even *Hemady* recognizes this is true: It specifically describes "touch football" as an "example" of a sport where, in contrast to golf, "[i]f tort liability depended on whether players conducted themselves under the usual concepts of negligence law, this could chill the vigorous activity of the participants." (143 Cal.App.4th at pp. 573-574.).

Jimenez (RB 52-53) is even more far afield than *Hemady*. *Jimenez* did not even involve a sports class. A teacher allowed children to break-dance in his classroom; after he left the room, the unsupervised children performed flips, resulting in a serious injury. (247 Cal.App.4th at p. 598.) *Jimenez*, unlike this case, did not involve "the possible liability of coparticipants in a recreational activity" or the "possible liability of an instructor of a recreational activity towards a student." (*Id.* at p. 601.) Instead, it solely involved a school's liability where "a teacher broke school rules and allowed middle-school students to engage in a

potentially risky activity, break dancing, in his classroom without supervision." (*Ibid.*) There also was evidence that "flips are *not* an integral part of ordinary break dancing" (*id.* at p. 602, original italics), unlike the running, falling, and collisions that are inherent risks in school sports such as touch football.

The allegations that Washausen inadequately supervised and instructed students in a touch-football P.E. class are worlds apart from the *Jimenez* context of a teacher leaving students unattended during a break between classes. No risk exists in the *Jimenez* context of chilling vigorous participation in a sports class/program or chilling schools from offering programs and instruction in sports involving inherent risks.

N.B. errs for the same reason in noting that *Hemady* referenced pre-*Knight* case involving student injuries during recess or breaks between classes. (RB 51; see *Hemady, supra*, 143 Cal.App.4th at pp. 579-582.)[2] Concerns about a school

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[2] The only pre-*Knight* case referenced in *Hemady* that did not involve recess or unsanctioned activities by wholly unsupervised students was *Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, a case where a student was injured during a tumbling P.E. class. (See *Hemady*, 143 Cal.App.4th at pp. 579-580.) But *Bellman* is a 1938 decision rendered during the contributory negligence era, six decades before the Supreme Court adopted the primary assumption of risk doctrine for comparative fault cases. *Bellman* solely regarded whether the record supported the jury's findings that the school was negligent and that the student was not contributorily negligent (and even then, it sparked a dissent concerned about chilling school sports). (See *id.* at pp. 580, 589.) *Bellman* did not address the assumption of risk doctrine. "[C]ases are not authority for propositions not

supervising children and preventing risky horseplay during recess or class breaks fundamentally differ from the public-policy concerns when a school provides a sports class/program. The goals of encouraging schools to provide such classes/programs and encouraging vigorous participation apply to the latter but not the former. That's why a school's general duty to supervise students doesn't trump the primary assumption of risk doctrine when schools offer classes/programs involving sports with inherent risks. (*Aaris*, *supra*, 64 Cal.App.4th at pp. 1118-1119; *Lilley*, *supra*, 68 Cal.App.4th at pp. 941, 945.)

D. The trial court's failure to apply the doctrine was prejudicial.

The prejudice from not instructing the jury that the primary assumption of risk doctrine applies is obvious. It means that the jury was not properly instructed on the governing duty of care. "It is incumbent upon the trial court to instruct on all vital issues involved." (*Estate of Mann* (1986) 184 Cal.App.3d 593, 612, internal quotation marks omitted.) The court erroneously gave standard instructions for ordinary negligence (9RT/3010-3011) and that "the failure to prevent injuries caused by the intentional or reckless conduct of the victim or fellow student may constitute negligence" (9RT/3013). It also instructed the jury with Education Code 44807 (9RT/3011 ["'Every teacher in the public school shall hold pupils to a strict account for their conduct on the playgrounds and during recess'"]), which smacks

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considered." (*B.B.*, *supra*, 10 Cal.5th at p. 11, internal quotation marks omitted.)

of strict liability without the tempering effect of the primary assumption of risk doctrine (see *Aaris*, *supra*, 64 Cal.App.4th at p. 1120).

Our opening brief demonstrated that the failure to provide primary assumption of risk instructions was prejudicial because ample evidence at trial, if believed by the jury, supports a finding that Washausen did not unreasonably increase the inherent risks of touch football or that the injury incurred from inherent risks. (AOB 54-55.) N.B. doesn't claim otherwise. Instead, he accuses the District of misconstruing the applicable standard, claiming (without any citation) that this Court must merely "consider the entire record, without the presumptions included in substantial-evidence review." (RB 56.) That's misleading. Yes, this Court must consider the entire record. And if the entire record *compelled* a finding of liability even under the primary assumption of risk doctrine, the lack of such instructions would not be prejudicial.

But the standard for determining prejudicial instructional error requires courts to do more than simply avoid the substantial-evidence standard of construing the record in the prevailing party's favor. Rather, as the opening brief correctly explained (AOB 53), it *also* requires the Court to "assume that the jury, had it been given proper instructions, might have drawn different inferences *more favorable to the losing [party]* and rendered a verdict in [that party's] favor on those issues as to which it was misdirected" and to "recite *the facts in the light most favorable to the claim of instructional error*" and "assume the jury *might have believed [the party claiming instructional error's]*

version of the facts." (*Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 5, internal quotation marks omitted, italics added; accord, *Mayes v. Brown* (2006) 139 Cal.App.4th 1075, 1087 ["to assess the instruction's prejudicial impact, we assume the jury might have believed appellant's evidence" and must "'state the facts most favorably to the party appealing the instructional error'"].)

The record here does not even remotely compel a finding of liability under primary assumption of risk instructions. Despite students falling down in every game (6RT/1921), as is common in touch football, there were no prior injuries during this particular class nor any history of Gianni acting physically aggressive in P.E. class toward plaintiff or others (AOB 54; see 3RT/1028-1029, 1039-1040; 4RT/1327-1328; 5RT/1621-1622; 6RT/1976; 8RT/2426, 2449). N.B.'s inadequate "supervision" arguments ignore that the record provides ample room for a jury to conclude that nothing would have changed even if Washausen had been on the sidelines of N.B.'s game watching Gianni's every move like a hawk. (See cases at AOB 55.) This was not a case of unsupervised students goofing around on the sidelines while waiting to play. The injury resulted from a heat-of-the-moment *sports* play where Gianni was supposed to chase after N.B. and touch tackle him as part of the game but ended up touching him too hard. Whether Washausen did something to increase the inherent collision risks is a question for the jury.

N.B. also tries to muddy the waters by accusing the District of "seek[ing] to displace the jury's finding on causation." (RB 57.) He claims the jury's "causation finding" rejected the District's

argument that his injury would have happened "in the absence of Washausen's negligence." (RB 58.) But the primary assumption of risk doctrine modifies the negligence standard that was provided to the jury. The correct question for the jury, which the jury was never asked to reach, was whether Washausen breached his duty of care by engaging in conduct that increased the touch football game's inherent risks and whether the injury resulted from that conduct. If the answer is "no," N.B.'s causation argument fails too because no breach of duty caused the injury.

III. The District Is Entitled To JNOV On The Mandatory Duty Claim.

A. The claim is that school administrators failed to report information to Washausen.

It is important to understand what N.B.'s "mandatory duty" claim against the District is *not* about. It is not based on Washausen failing to report something to administrators. It is about administrators failing to report information *to him*.

The Respondent's Brief obfuscates the issue by repeatedly referring to Washausen or other teachers not reporting something to school administration. (RB 25 ["Washausen did not discipline Gianni after he injured [N.B.], nor did he report the incident to the school administration"],[3] 29-30 ["Washausen[] fail[ed] to document Nick's bullying of [N.B.]"], 36 ["Washausen should have reported the incidents he saw when [N.B.] was

[3] Although Washausen did not report the incident himself, he immediately told two students they could report the incident to school administration, and he knew they did. (4RT/1230-1231.)

knocked to the ground by Nick and later by Gianni"], 33 [school employees learning about conduct covered by section 49079 must report it], 35 ["teachers failed to report student misconduct to the administration"].)

N.B.'s "mandatory duty" argument against the District was that assistant principal Celaya violated a mandatory duty under section 49079 to report student conduct *to Washausen*, not that Washausen breached a reporting duty. (9RT/2767-2768, 3012.) As plaintiff's counsel stated in closing argument: "Education Code section 49079 . . . is about communication. This is about if the school knows that there's something going on with a student, *they have an obligation to let the coach know, the teachers know*." (9RT/3034, italics added.) The sole claim against the District at trial was that "the District's failure to comply with its mandatory duty to report prior bullying by Gianni *to Washausen* contributed to Washausen's faulty supervision." (RB 12, italics added; see also RB 38 ["the District failed to fulfill its duty under section 49079, subdivision (a), to inform teachers of students' misconduct"].)

B. Plaintiff improperly conflates reporting "misconduct" to administrators with a school's section 49079 duty to apprise all teachers of misconduct warranting *suspension or expulsion*.

Because public entities are immune from liability absent a statutory violation, N.B. needed a statutory basis for holding the District directly liable for his injury, rather than merely

vicariously liable for Washausen's conduct. (Gov. Code, § 815.) N.B. seized on section 49079. But section 49079's mandate that a school must "inform the teacher of each pupil" doesn't apply to everything that might constitute misconduct. It only applies, as the Respondent's Brief admits (RB 33) but the jury was never told (9RT/3012), to conduct that merits *suspension or expulsion*. (Educ. Code, §§ 49079, 48900.)[4]

Schools do not have to bombard a student's teachers with notices each time a student gets sent to the principal's office or might engage in conduct that the school decides warrants discipline or an entry in the student's file. Nor does it have to send out notices to all teachers any time a student violates school policies. Instead, it must only notify a student's teachers of the most serious misconduct—misconduct warranting suspension or expulsion. N.B. blurs the standard by claiming there was a "breakdown . . . of the reporting system mandated by section 49079" but then generically referring to failures to report "student misconduct." (RB 35.)

Here, it is undisputed that Gianni was never suspended or expelled. Nor can it be said that the school lacked the discretion to conclude that the incidents reported to the school warranted

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[4] Apparently because the only case analyzing Education Code section 49079, *Skinner*, *supra*, 37 Cal.App.4th 31, applied an older version of the statute, N.B. accuses the District of "rel[ying] on an obsolete version." (RB 33, bold omitted.) But the District relies on the *current* version, which only applies to conduct meriting suspension or expulsion. (AOB 35.) And *Skinner*'s lack-of-causation causation analysis equally applies to the current version. (AOB 35-36.)

discipline short of suspension or expulsion. (*Skinner*, *supra*, 37 Cal.App.4th at p. 39.)

Instead, the Respondent's Brief re-writes the record by claiming that "Principal Miller specifically testified that *under section 49079*, Washausen should have reported the incidents he saw when Nigel was knocked to the ground by Nick and later by Gianni." (RB 36, italics added, citing 6RT/1873:11-26, 1878:8-1879:7.) Miller said no such thing. He merely confirmed that under section 49079, schools "have a duty to advise teachers of students that have engaged in certain types of physical misconduct" that are "suspend[a]ble offenses," such as "fighting, possession of a weapon, sexual battery or harassment" or "assault." (6RT/1873:11-20.) Miller never said that Gianni's or Nick's conduct met that standard. (See *ibid.*)

Instead, Miller later answered "Yes" to plaintiff's counsel's generic question, not related to conduct during a sports class and not even tied to section 49079, that if a teacher saw "one student push another down from behind, laugh, and walk away," would you "expect the teacher to report that to the school administration." (6RT/1872.) Miller later explained, discussing the specific context of P.E. class, that he would expect Washausen to talk to kids in P.E. class that were "playing too rough" and that if Washausen felt Gianni was "playing like a jackass when he knocked [N.B.] down" in the touch football game, and called him a baby, faker and drama queen, Miller would expect Washausen to report Gianni's conduct to the administration. (6RT/1878-1879.) Again, the expectation that a teacher/coach would notify the administration of *misconduct* is

not the same thing as saying that the conduct merits suspension or expulsion and that the school therefore must notify all teachers of the conduct.

C. There was insufficient evidence that the school's failure to report information to Washausen about Gianni (or anyone else) proximately caused plaintiff's injury.

Regardless whether any conduct fell inside or outside section 49079's scope, there was insufficient evidence that the school's failure to apprise Washausen of anything was a proximate cause of N.B.'s injury.

As our opening brief explained, N.B.'s counsel argued to the jury that the District's breach of a mandatory duty was a substantial factor in causing N.B.'s injury because the District never reported to Waushausen and other teachers its disciplining of Gianni *after* the football injury and that this failure indicated the school likely failed to document or report other incidents involving Gianni. (AOB 30, citing 9RT/3034-3036, 3084-3085.)

In response to the opening brief's incontrovertible explanation that these arguments cannot establish proximate causation of N.B.'s injury (AOB 36-38), N.B. now states that he "does not contend otherwise" and accuses "the District [of] mischaracteriz[ing] the evidence and [N.B.'s] position." (RB 39.)

But this *was* N.B's position. The opening brief relied on what his lawyers actually argued to the jury.[5]

N.B. now argues that the "[t]he evidence was not limited to the District's failures *after* [N.B.] was injured" (RB 38, bold omitted, italics added) and that the evidence "clearly shows" the District "breached" its duties under section 49079 (RB 39). But, again, there was no evidence of "breach" involving Gianni's conduct *before* N.B.'s injury. No pre-injury incident involving Gianni warranted suspension or expulsion. (See pp. 57-58, *post*.)

In any event, even assuming "breach," there still was insufficient evidence that the District's failure to report something to Washausen about Gianni or anyone else proximately caused N.B.'s injury. (See *Skinner*, *supra*, 37 Cal.App.4th at pp. 36, 40-43 [even where school failed to report student's history of multiple suspensions for fighting to P.E. teacher, evidence was insufficient to show that the school's failure to apprise the P.E. teacher of the disciplinary history was

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[5] See 9RT/3035 ("So here's Education Code 49079. Now, where this comes up is that Celaya, *after* she gets this report that Nigel's hurt . . . Celaya says that she is going to ban Gianni from lunch football due to his previous aggressive play," italics added); 9RT/3037 ("So back to this 49079. When Celaya finally did determine that Gianni acted intentionally . . . she does not tell Washausen"); 9RT/3039 (even after Celaya concluded Gianni acted intentionally "unbelievable as it is, she still didn't tell Washausen"); 9RT/3085 ("It's not that [Celaya's] failure to write it down after the fact caused the incident. . . . [B]ecause [Celaya] doesn't write things down and she doesn't document things, we don't know what happened before. We don't know if Gianni had a lot of other incidents before").

a proximate cause of plaintiff's injury during P.E. class].) As a matter of law, the Respondent's Brief's sweeping assertions that N.B. was bullied or harassed "by Gianni in choir and in P.E. by Gianni, Nick and Richard" (RB 36) cannot suffice to establish that any non-reporting of such conduct to Washausen proximately caused N.B.'s injury:

Gianni's conduct. Contrary to the Respondent's Brief's hyperbole that Gianni "often bullied" N.B. (RB 12), N.B. testified that he had prior issues with Nick Franco and Richard Egoyan but that he could not remember Gianni ever saying anything derogatory to him, ever being too rough toward him in P.E. class, or ever getting physical with him other than the contact leading to his knee injury (3RT/1028-1029, 1039-1040.) There was *no* evidence of Gianni physically abusing N.B. in P.E. class or even outside of class, or that he had physically attacked *anyone* in school. (See *ibid.*; 4RT/1327-1328; 5RT/1621-1622; 6RT/1843, 1976; 7RT/2141; 8RT/2417-2418, 2426, 2449; AOB 37.) The most the Respondent's Brief claims is that "[d]uring kickball, Gianni would repeatedly throw the ball at [N.B.] 'unnecessarily hard'" (RB 19, citing 6RT/1917)—which would not even remotely trigger section 49079.

The Respondent's Brief instead bases its claim of "prior bullying" by Gianni of N.B. on Gianni's obnoxious *remarks*. (RB 12, 17.) It emphasizes that one witness claimed that during P.E. class Gianni made fun of N.B. (about his lack of athleticism and sports knowledge) and other participants. (6RT/1915-1916.) Not only is it unclear whether Gianni made these remarks within N.B.'s earshot (N.B cannot remember any, 3RT/1029), that same

witness admitted that Washausen heard Gianni make the remarks but did nothing (6RT/1916-1917). A failure by the District to report something about Gianni's nature to Washausen *that Washausen already knew about* before N.B.'s injury cannot be a proximate cause of N.B.'s injury. (*Skinner*, *supra*, 37 Cal.App.4th at p. 42 [reversing jury verdict because school's failure to report student's disciplinary record to P.E. teacher could not have been a proximate cause of injury because the P.E. teacher "*independently* learned" about the student's "nature" through "observ[ing] the student," making the unreported "information superfluous," original italics].)

Nor does it make any difference for section 49079 purposes that two witnesses said Gianni made fun of N.B. during choir class for having a high voice and singing soprano, including saying he and another student were gay lovers and should kiss. (See 6RT/1913-1914, 1956; 8RT/2447-2449.) Again, while N.B. recalled Gianni being disruptive in choir class, he did not remember Gianni saying anything derogatory *to him*. (3RT/1028-1029; 8RT/2449.) Nor did any witness testify that Gianni made his choir-class remarks within N.B.'s or any teacher's earshot. There also was no evidence that any teacher heard the comments or that any student reported Gianni's choir-class conduct to a teacher or to administrators. (E.g., 8RT/2447-2449.) It cannot be said that school administrators had a duty to report to Washausen and other teachers conduct that the administrators never knew about. And even if administrators had known about Gianni's choir-class remarks, such conduct would not warrant

suspension or expulsion, so there would have been no mandatory duty to report it to all teachers.

Also, N.B.'s theory was that "Washausen tolerated and created a class atmosphere that allowed bullying." (RB 29.) While that may be grounds for a claim *against Washausen*, it invalidates any suggestion that a reporting of Gianni's choir-class comments to Washausen would have made Washausen change course and take action that would have prevented N.B.'s injury. (Cf. *Skinner*, *supra*, 37 Cal.App.4th at pp. 42-43 [even assuming P.E. teacher's learning about student's prior disciplinary record might have "intensified her vigilance, it is quite another thing to conclude that the absence of this information was a substantial factor in bringing about the injury"].)

Nick's conduct. Nick's conduct during P.E. class likewise cannot support a section 49079 claim because *Washausen saw some of Nick's conduct and thus knew Nick's nature.* (See AOB 19; RB 19-20; 3RT/1001-1002, 1029-1030; 4RT/1239-1240.) Indeed, the reason Washausen never reported Nick's conduct to the administration is because N.B. asked him not to. (RB 20; 3RT/1002, 1030; 4RT/1240; 6RT/1823-1824.) There was no evidence that N.B. or anyone else reported Nick's conduct to administrators. (3RT/1000-1001; 5RT 1668-1669.) Again, school administrators have no duty to report information they don't know about, nor could a failure to report something to Washausen that he already knew about be a proximate cause of N.B.'s injury. Nor could the failure to report something about Nick proximately cause *Gianni's* injuring of N.B..

Richard's conduct. Although N.B. never told Washausen that Richard mistreated him in P.E. class and Celaya never told Washausen after N.B. reported the mistreatment to her (AOB 18-19; RB 18-19; 3RT/997-998, 1030; 4RT/1243), Gianni was not involved in those incidents. Thus, even if the school had reported Richard's conduct to Washausen, at most that might have impacted Washausen's treatment *of Richard*. There's no legitimate, non-speculative basis to conclude that it would have prevented *Gianni's* aggressive touch tackle of N.B.

In sum, this is a case about Washausen's conduct during P.E. class, not the District's section 49079 reporting duties. There was no evidence of any pre-injury conduct warranting suspension or expulsion of Gianni and, regardless, no legitimate basis to conclude that the school's non-reporting of any information to Washausen was a proximate cause of Gianni injuring N.B.. The only issue here is whether a teacher, Washausen, breached his duty of care to the students in his P.E. class—a duty circumscribed by the primary assumption of risk doctrine.

IV. The Remedy: Absent Full JNOV, The Court Must Remand For A Plenary New Trial On Plaintiff's Claim Against Washausen And Comparative Fault.

A trial court's failure to let a jury apportion fault requires a remand for a new trial because courts cannot make comparative-fault findings by remittitur. (*Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452-454 (*Schelbauer*).) N.B. admits as much, arguing instead that "[a]ny new trial should be limited to

the issue of apportionment." (RB 74, bold omitted.) But that's not a sufficient remedy here. The cases he cites involve contexts where the jury actually made an apportionment finding, and there were no other issues with the verdict. (See RB 74, citing *Schelbauer*, *supra*, 35 Cal.3d at p. 457; *Shanks v. Department of Transportation* (2017) 9 Cal.App.5th 543, 558.)

Here, in contrast, the jury made no apportionment finding, so the verdict failed to "resolve the issue of liability in plaintiff's favor" (AOB 67, citing *Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 855), and, regardless, the verdict has additional flaws. As demonstrated, the failure to instruct the jury on the primary assumption of risk doctrine invalidates the jury's findings on N.B.'s claim against Washausen and at a minimum, requires a do-over on that claim with proper instructions. And N.B.'s sole claim against the District fails as a matter of law because there was insufficient evidence that the District breached any reporting duty to Washausen under section 49079 or that any such breach caused N.B.'s injury.

And, as our opening brief explained, any flaws in either of those claims creates a deficiency in the special verdict because the verdict's causation question was in the disjunctive, so the jury's "yes" answer cannot be construed as a finding on the other claim. (See AOB 38-41.) N.B.'s efforts to sidestep this deficiency by arguing "waiver" or "harmless error" (RB 40-43) are misplaced. For starters, the verdict deficiency relates to whether this Court should grant JNOV on the entire case on the ground that it was N.B.'s duty to ensure a verdict that answered all required elements. (See AOB 39.) Even if this Court declines to

issue JNOV on the entire case, the case still must be remanded for a plenary trial on N.B.'s claim against Washausen because the primary assumption of risk doctrine circumscribes Washausen's duty of care, and there was insufficient evidence on N.B.'s section 49079 claim against the District.

The verdict ambiguity simply provides an *additional* reason as to why the claim against Washausen must be remanded for a new trial even if this Court rejects JNOV being granted on the entire case. A court cannot rely on implied findings or the substantial evidence standard to plug gaps or ambiguities in a special verdict. (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092; AOB 40.)

N.B. emphasizes that *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228 (RB 43-44) applied a harmless error analysis to a special verdict. But *Taylor* did so in a different context. It did not hold that, where facts are disputed, courts can use implied findings to cure verdict ambiguities. In *Taylor*, an inadvertent typo—a drafting error—led the jury to skip two verdict questions. (*Id.* at pp. 1240-1241.) *Taylor* concluded that the jury's other verdict findings and undisputed facts "compel[led]" "yes" answers. (*Id.* at p. 1246.) Here, in contrast, the other verdict answers do not indicate how the jury would have ruled had the causation question not been in the disjunctive, nor does the record compel only one answer on each claim. Thus, even if the Court rejects JNOV on the entire case, a new trial on the claim against Washausen is required even if the primary assumption of risk doctrine did not already mandate that result.

CONCLUSION

The judgment must be reversed. California public policy, as embraced in Proposition 51 and the primary assumption of risk doctrine, invalidates this verdict.

Date: January 13, 2023

LIEBMAN, QUIGLEY & SHEPPARD
A PROFESSIONAL LAW CORPORATION
Jack L. Sheppard

GREINES, MARTIN, STEIN & RICHLAND LLP
Edward L. Xanders

/s/ Edward L. Xanders
Edward L. Xanders

Attorneys for Defendants and Appellants BURBANK UNIFIED SCHOOL DISTRICT, A Public Entity, and DYLAN WASHAUSEN

CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this **APPELLANTS' REPLY BRIEF** contains 13,758 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: January 13, 2023 */s/ Edward L. Xanders*

Edward L. Xanders

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On January 13, 2023, I served the foregoing document(s) described as: **APPELLANTS' REPLY BRIEF** on the interested party(ies) in this action, addressed as follows:

Janine K. Jeffery #112639
jjeffery@reilyjeffery.com
REILY & JEFFERY, INC.
5850 Canoga Avenue, Ste. 400
Woodland Hills, CA 91367
Telephone: (818) 350-6282

Jeffrey I. Ehrlich #117931
jehrlich@ehrlichfirm.com
THE EHRLICH LAW FIRM
237 W. Fourth Street, 2nd Fl.
Claremont, CA 91711
Telephone: (909) 625-5565

Attorneys for Plaintiff and Respondent N. B., a minor, by and through his guardian ad litem, Robin Brigstocke

Hon. William D. Stewart
Los Angeles County Superior Court
Department: A
Burbank Courthouse
c/o Court Counsel, Frederick Bennett III
300 East Olive
Burbank, CA 91502
fbennett@lacourt.org
pnguyen1@lacourt.org
Telephone: (818) 260-8412
Case No. 18STCV06782

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/s/ Gwendolyn West
Gwendolyn West

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The Ehrlich Law Firm			c178a36a-aaaf-4bab-9d06-072c1ab17bce
Jack L. Sheppard	jsheppard@lqss.com	e-Serve	01-13-2023 8:35:36 PM
Liebman, Quigley & Sheppard			ade4f07c-a4bf-4896-837a-bf747f26e857
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Reily & Jeffery			e4e9f090-e6ec-4f0c-911e-aa6fb319efba
Gwendolyn West	Gwest@gmsr.com	e-Serve	01-13-2023 8:35:36 PM
Greines, Martin, Stein & Richland LLP			9fe74e78-0f9c-4430-afe4-c2e9891c019e
Isabel Drake	idrake@ehrlichfirm.com	e-Serve	01-13-2023 8:35:36 PM
The Ehrlich Law Firm			577260a8-ce54-4137-a3ee-eb53279a7201
Edward L. Xanders	exanders@gmsr.com	e-Serve	01-13-2023 8:35:36 PM
Greines, Martin, Stein & Richland, LLP			a9684d05-4e60-4eb6-b29b-0f8b5e799ee6
Chris Hsu	chsu@gmsr.com	e-Serve	01-13-2023 8:35:36 PM
Greines Martin Stein & Richland LLP			8c49b60c-90f5-4c55-9fcd-2f1b7eb8f57c
F. Bennett	fbennett@lacourt.org	e-Serve	01-13-2023 8:35:36 PM
			7fb8e9b3-5ff8-4c59-974d-d3d767319dfa
P. Nguyen	pnguyen1@lacourt.org	e-Serve	01-13-2023 8:35:36 PM
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/s/Gwendolyn West
Signature

Xanders, Edward (145779)
Last Name, First Name (Attorney Number)

Greines Martin Stein & Richland LLP
Firm Name