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Court of Appeal, Sixth District, California.

JONNIE ROE, a Minor, etc., et al., Plaintiffs and Appellants,
v.
HOLLISTER SCHOOL DISTRICT et al., Defendants and Appellants.

H043658
Filed 09/26/2019

Opinion

Mihara, J.

***1** Plaintiffs Jonnie Roe and Jane Roe (Jonnie's mother) appeal from the judgment entered after a jury returned a special verdict finding that defendant Hollister School District (the District) had not been negligent in connection with a restroom incident during which five-year-old Jonnie's genitals were grabbed by a six-year-old kindergarten classmate. The District appeals from the trial court's order denying its request for expert witness fees under Code of Civil Procedure section 998 and granting plaintiffs' motion to tax costs as to those fees.

Plaintiffs contend that the trial court erred in (1) ruling that the restroom incident could not be characterized as a "sexual assault" and did not trigger a mandatory reporting obligation, (2) excluding admissible hearsay evidence and instructing the jury that hearsay evidence could not be considered for its truth, (3) dismissing Jane's causes of action, (4) precluding plaintiffs from consulting with their jury selection expert, (5) refusing to allow plaintiffs to present videotaped deposition testimony of the District's person most qualified in lieu of live testimony, (6) permitting the District to introduce evidence that Jonnie's parents had declined to submit to a "collateral interview" by the District's medical expert, (7) allowing the District to introduce testimony by an undisclosed expert witness, and (8) taking various actions that plaintiffs view as demonstrating that the trial judge had a defense bias. The District contends that the trial court erred in finding that their Code of Civil Procedure section 998 offer was not a valid offer under that section because the offer did not allocate the proposed settlement amount between Jonnie and Jane. We affirm.

I. Evidence Presented At Trial

During the 2012/2013 school year, Jonnie and G.P. were classmates in a kindergarten class at Sunnyslope Elementary School in the District. Their teacher was Katherine Hudson, who had over 30 years of experience teaching kindergarten at Sunnyslope. Hudson used a graduated method of discipline. Initially, she would try to correct misbehavior verbally. If that did not work, she would preclude the child from playing during recess. Only if that was unsuccessful would she send the child to the principal's office. The most severe form of discipline was to send the child home.

Sunnyslope had three classes of kindergarten with a total of 90 to 100 kindergartners. These kindergarten classes had two recesses each day and a lunch period, and the children were permitted to play on the playground at these times. The morning recess was supervised by teachers and yard duty supervisors, while the lunch period was supervised by yard duty supervisors only. There were always at least two yard duty supervisors and sometimes also an instructional aide on the playground during lunch.

Kindergartners "have a very hard time keeping their hands to themselves." It is common for kindergarten boys to engage in "rough" or "aggressive play." Kindergartners are often "benched" for rough play. It is also common for kindergartners to play in the restroom, usually playing with toilet paper and paper towels. The teachers and yard duty supervisors did not go inside the restrooms, and they could not see into the restrooms from the outside.

***2** Jonnie was a five-year-old, very quiet, shy, nervous, well-behaved child when he began kindergarten. G.P., on the other hand, was a six-year-old who "had a lot of issues with self-control." Hudson saw G.P. hitting other boys on the playground on numerous occasions, and she heard from other teachers and yard duty supervisors that he was doing so. In late September or October 2012, a parent complained about G.P.'s "[a]ggressive behavior" on the playground. Hudson did not document the complaint, but she encouraged the children to play with others. Another parent also complained about G.P.'s "aggressive, rough play." Several children complained repeatedly to Hudson about G.P.'s aggressive behavior on the playground, with one of them complaining 10 to 20 times. Hudson was also aware that on one occasion G.P. had tried to "jab" another little boy in the buttock with a pencil. She thought that G.P. was "engaging in bullying behavior."

Hudson never saw G.P. punch or scratch Jonnie nor did Jonnie ever complain to Hudson about G.P. Two or three times prior to April 22, 2013, Jane complained to Hudson about G.P. engaging in "rough play at recess" with Jonnie. Jane's first complaint was in November 2012. Hudson responded by sending notes home to G.P.'s parents. Hudson also talked to G.P. and told him to keep his hands and feet to himself and not to play with Jonnie. She told Jonnie to play with other people, and she told the other teachers about this problem. After that, she saw G.P. playing with Jonnie again, and she reminded them not to play together. She noticed that they did not stop. According to Jonnie's deposition testimony, G.P. had never shoved him but had punched and shoved other little boys. G.P. did "bully" Jonnie by calling him names, and G.P. once "pushed" Jonnie.

Hudson used her progressive discipline method in her attempts to modify G.P.'s behavior. Verbal warnings were followed by "benching" and then being taken to the principal's office instead of being allowed to play at recess. Hudson brought G.P.'s conduct to the attention of Sunnyslope's principal, Bill Sachau, at least three times prior to April 22, 2013, with the first time being in November 2012. And she took G.P. to Sachau's office a couple of times prior to April 22.

Sachau considered G.P.'s rough play to be typical of kindergartners. Sachau's first documented contact with G.P. was on September 13, 2012, after G.P. and another student were reported to be playing in the restroom. Sachau spoke to them about the appropriate use of the restroom. On December 5, 2012, Hudson took G.P. to Sachau's office after several girls reported that G.P. had exposed himself to them in the girls' restroom by running into the girl's restroom and pulling his pants down.[1] G.P. admitted the misconduct, and Hudson informed his mother. G.P.'s parents were contacted by telephone, and his mother was called in to discuss his behavior with Sachau the following day.

1 G.P.'s school discipline record coded the December 2012 incident as "Sex/Harasss-Aslt [*sic*]."

At the December 2012 meeting between Sachau, G.P., and G.P.'s mother, G.P. entered into a "behavior contract" as a result of his "repeated disruptive conduct." A behavior contract was a written agreement that provided consequences and involved the parents, which could help lead to a child changing his or her behavior. Sachau and Hudson decided that this contract was necessary because "benching" G.P. had not changed his behavior. This contract required G.P. to "KEEP HANDS AND FEET TO YOURSELF." G.P. also suffered other consequences for his misbehavior, including not being permitted to use the computer in the computer lab. In addition, Hudson told G.P. that he was not supposed to go to the restroom during playground time when there were other children in the restroom. She did not document this requirement.

Prior to April 22, 2013, Hudson had never heard of G.P. touching another child's genitals. On April 23, 2013, Jane came to the school and told Hudson that Jonnie had told her the previous night about an incident between Jonnie and G.P. in the restroom. This was the first Hudson had heard of the event; Jonnie had not told her of the incident. Jane said that G.P. had come up behind Jonnie at the urinal, reached in between his legs, and grabbed Jonnie's genitals. Hudson immediately talked to G.P., who admitted doing so, and she immediately took G.P. to the principal's office. Hudson did not report the incident to anyone other than Sachau. She asked

Jonnie if the incident had occurred, and Jonnie affirmed that it had, but provided no description of it.

***3** At his deposition, Jonnie described how G.P. had touched Jonnie while Jonnie was using the urinal. While Jonnie was peeing, G.P. came up behind him and poked him in the butt with his finger and possibly grabbed Jonnie's penis. Jonnie testified at his deposition that he immediately reported the incident to the "yard duty" supervisor.

Nubia Zamora was a yard duty supervisor at Sunnyslope. She had never been trained as to what to do if a student hit another student or touched another student inappropriately. Zamora testified at her deposition that, on one occasion, two years prior to her deposition, G.P. and another boy came up to her and one of them told her "something happened in the restroom." She took the two boys to the principal's office. Before she took them to the office, she told Hudson that she was doing so. She could not recall if the other boy was Jonnie. Zamora recalled that the boy who was not G.P. said " 'He touched my buttocks.' " Zamora told Sachau's secretary what the boys had said. Zamora testified that this incident happened before G.P. was barred from the playground.

Sachau's written incident report regarding the April 2013 incident was consistent with Jonnie's deposition testimony. It stated that a student was standing at the urinal when G.P. "proceeded to reach under from behind and grab the student in the private area." Sachau did not report this incident to anyone even though he believed that it could be characterized as a sexual battery because "they are kindergarten students" and "it's not uncommon" for them to touch somebody "in their private area." Although Hudson told Sachau that another kindergartner was in the restroom during the incident between Jonnie and G.P., Sachau did not talk to the other boy. He also did not talk to Jonnie about the incident. The District did not report the April restroom incident to law enforcement or child protective services.

After April 23, 2013, G.P. was not allowed to be on the playground with the other children during recess or lunch. He was required to go to Sachau's office during those times. However, he was allowed on the playground before school.

On May 1, 2013, a parent and a kindergarten teacher reported to Sachau that, after school when the children were lining up to be picked up by their parents, G.P. was "witnessed by parents and children grabbing students in the private area." Sachau noted that G.P. had "had multiple incidents of sexual behavior," and he suspended G.P. for two days as a result of the May 1 incident. [2] After the suspension, G.P. did not return to Sunnyslope but instead remained on "independent study" for the rest of the school year. G.P. transferred to another school after the 2012/2013 school year.

[2] The May 1, 2013 notice of suspension cited as the basis for the suspension that G.P. "[c]ommitted or attempted to commit a sexual assault or sexual battery as defined by the Penal Code ...."

II. Procedural Background

In February 2014, Jonnie and Jane filed an action against the District for negligence, concealment, negligent infliction of emotional distress (NIED), and intentional infliction of emotional distress (IIED). [3] The complaint alleged that "[o]n or around April 15, 2013" Jonnie "was the victim of an unlawful sexual assault and battery and other misconduct by G.P. during recess, when [Jonnie] was left unsupervised in a bathroom with G.P., and G.P. grabbed [Jonnie's] penis and put his hand in [Jonnie's] buttocks." The complaint further alleged, on information and belief, that this incident was witnessed by another child and reported to school authorities, to whom G.P. admitted his conduct.

[3] The action also named several individual defendants, but they were dismissed by stipulation at the commencement of trial.

***4** The complaint alleged that school authorities did not immediately report the incident to anyone, including Jonnie's parents. Two days after the incident, Jonnie's teacher told Jane that Jonnie's schoolwork was " 'slipping.' " A week after the incident, Jonnie told Jane about the incident. The complaint alleged that when Jane told Hudson about the incident, Hudson mentioned an incident in which G.P. had done something similar to another student. "Several days later, [Jonnie] told [Jane] that G.P. touched him in the area between his penis and buttocks that day." Jane kept Jonnie out of school after that.

The complaint alleged that the District knew or should have known of G.P.'s "inappropriate behavior" and taken

"preventative measures" because there had been numerous prior incidents involving other students, and G.P. had previously "slapped, kicked, punched, and pushed" Jonnie "on various occasions." Jane was not named as a party to the negligence cause of action but only to causes of action for concealment, NIED, and IIED. Jane alleged that the District was liable because it had failed to notify her "following the first sexual assault and battery."

Plaintiffs' trial brief asserted that there had been *two* restroom incidents during which G.P. had grabbed Jonnie's penis. The first incident, said to have happened on April 15, 2013, was described as: "G.P. grabbed Jonnie's penis and put his hand in Jonnie's buttocks while Jonnie called for help." The brief stated that Jonnie did not tell Jane about that incident until April 21. Jane reported that incident to the District on April 22 or April 23. The brief also stated that another student had seen an incident in a stall where G.P. had climbed under the stall into the stall where Jonnie was using the toilet and "put his hand up Jonnie's butt." No time period was described for the stall incident. The brief further stated that "G.P. was allowed to continue his sexually inappropriate conduct, such as grabbing Jonnie's penis on at least one other occasion." The description of this "other occasion" did not involve the restroom. Instead, the brief described an incident on May 1 where G.P. "touched" Jonnie's "penis again while playing a 'game' of tag that involved grabbing the other little boys' penises."

Plaintiffs' opening statement identified only a single restroom incident. During plaintiffs' case-in-chief, plaintiffs' trial counsel told the court that there was "a subsequent episode," after the incident at the urinal, but plaintiffs' "supervision and school safety" expert, Richard Swanson, subsequently testified that he was not aware of any incidents after the incident at the urinal nor did he believe that G.P. had "bothered" Jonnie after that incident. John, Jonnie's father, subsequently testified that he was not aware of any incident of touching "after the restroom incident."

Swanson testified that Sunnyslope had "a systemic problem with supervision." In his view, since playgrounds and restrooms are the places where most bullying occurs, teachers and yard duty supervisors needed to be trained to stop bullying. Swanson blamed Sachau for not ensuring that teachers and yard duty supervisors at Sunnyslope were properly trained and evaluated. [4]

[4] His position was that, whenever there was a bullying report, there should be "a full investigation" in which every child who was involved in or witnessed the incident was individually questioned. After that, a team consisting of the teacher, the principal, the parents, and the school psychologist should come up with a plan to address the issue. He criticized the December 2012 behavioral contract due to the absence of a counseling component.

***5** Eight-year-old Jonnie testified at trial that G.P. was a "bully" who hit and pushed him, and kicked him in the ribs while they were on the playground. G.P. also "bullied" him "[t]wice" in the restroom. Jonnie testified that he told the yard duty supervisor and Sachau about one or both of these events. When asked what had happened in the bathroom, Jonnie described an incident "at the urinal" during which G.P. "touched my privates" "[o]n both sides." After that incident, Jonnie told Jane. Asked about the "other time," Jonnie testified that he was "in the stall" when G.P. "touched my privates again" also on "both sides." Jonnie testified that he again told Jane. When Jonnie was asked about talking to Sachau about the incidents, he testified "I'm sure I did. I don't remember." He then testified that he was "confused" and did not remember going to Sachau's office with G.P. or talking to Sachau about anything. On cross, Jonnie testified that the urinal event occurred "first." When he was asked if he reported that incident to the yard duty supervisor, he said he was "confused." Jonnie testified that he had not reported the second incident to the yard duty supervisor but only to Jane. He also testified that he had not reported the first incident to Jane on the same day it happened and could not recall how soon he reported the second incident to Jane.

Excerpts from Jonnie's deposition testimony were admitted at trial. At his deposition, Jonnie had testified that G.P. had pushed him once and called him names. Jonnie testified at his deposition that he reported the restroom incident at the urinal, during which G.P. had touched his "butt" and his penis, to Jane on the same day that it happened. Jonnie also testified at his deposition that he told the yard duty supervisor about this event immediately after it happened. "I told on him, and then he probably got benched or took him to the office. I

can't remember." He did not describe any additional restroom incident.

Jane testified that the week of April 15, 2013, Jonnie seemed "really sad." Jane asked him what was happening, but he did not want to talk. That week, Hudson mentioned to Jane that Jonnie's "work was slipping." On the following Sunday night, Jonnie told her about the restroom incident. The next day, April 22, 2013, Jane informed Hudson of the incident. Jane understood from Hudson that the school was aware of the incident and had taken care of it. After that, Jane saw G.P. at the school running around and interacting with other children. On May 1, she observed the incident where G.P. grabbed the privates of several children who were in line to be picked up from school. Jane testified that she later learned that there had been another incident of Jonnie being touched by G.P. No admissible evidence disclosed how she had learned of such an incident. However, at her deposition, Jane had testified that she was not aware of any inappropriate touching of Jonnie by G.P. after her April 22 report except for a "tag game" during which G.P. had touched Jonnie. Jonnie told her about the "tag game" incident on May 1. She kept Jonnie out of school for a couple of days after the May 1 line-up incident, but she then allowed him to return after she learned that G.P. was no longer at the school. After the restroom incident, Jonnie went from being a happy boy to a boy who was constantly fearful.

Dr. Lenore Terr, a child psychiatrist, met with Jonnie at ages six, seven, and eight and concluded that Jonnie was suffering from posttraumatic stress disorder (PTSD) as a result of the incident in the bathroom during which G.P. touched Jonnie's penis. Terr believed that Jonnie needed five years of psychotherapy now to deal with this trauma and additional psychotherapy at key times in his life. Leslie Packer, a child psychologist, testified that her testing indicated that Jonnie suffered from PTSD, though some of his symptoms were also consistent with ADHD, and he had a learning disability.

Defense experts Anlee Kuo, a child psychiatrist, and Sarah Hall, a clinical neuropsychologist, testified for the defense that Jonnie's symptoms were consistent with ADHD and a learning disability, not PTSD.

Plaintiffs' attorney argued to the jury that the District had been negligent in five different ways. First, the District "chose to minimize serious problems" regarding G.P. She argued that the prior incidents, the September 2012 "playing in the bathroom" incident, and the December 2012 girl's restroom incident, showed that G.P. had "a serious behavioral problem" with "a sexual component ...." Plaintiffs' attorney argued that the next event was the urinal incident. After that, there was the line-up incident, during which G.P. grabbed the privates of several students. Plaintiffs' attorney argued that Jane then went to the police because she learned that G.P. had "touched Jonnie again." She argued that Jonnie had "testified that he was touched twice, as well." "Because Hollister School District chose to minimize the serious problems to which they were alerted, they allowed G.P. to continue to bully Jonnie and to engage in sexual misconduct with him in the bathroom." "All they had to do was keep G.P. from going to the bathroom with other kids."

***6** Second, yard supervision during recess was inadequate because the supervisors should have been checking the restrooms on a random basis rather than every five minutes. The District knew G.P. had problems in the playground, but it failed to provide additional supervision of him even after Jane complained about G.P. injuring Jonnie. Third, yard duty supervisors were not properly trained. This was a problem because when Zamora took G.P. to Sachau's office there was no documentation. Fourth, the District failed to inform Jonnie's parents of the incident between G.P. and Jonnie in the restroom. She argued that the District "must have learned about it from yard duty on the day it happened" because there was no other way that Sachau could have learned the details of the event. This caused Jonnie harm because he had to be the one to tell Jane, and he did not have her comfort until then. The fifth and final reason was that the District "refused to meet their responsibility." "Reasonable care ... would have stopped this." Plaintiffs' attorney also told the jury that there were "several versions of these events or what happened in the restroom," and she argued that Jonnie could not be expected "to be able to articulate it well."

The District's attorney argued to the jury that plaintiffs had failed to prove foreseeability because G.P.'s grabbing of Jonnie was not a predictable event in light of G.P.'s prior misconduct.

After two hours of deliberation, the jury returned a unanimous special verdict finding that the District was not negligent. The court entered judgment on the verdict. Plaintiffs timely filed a notice of appeal.

The District sought to recover its expert witness fees as costs under Code of Civil Procedure section 998. Plaintiffs contended that the District's settlement offer was not a valid offer under Code of Civil Procedure section 998 because it was not allocated between Jonnie and Jane. The court granted plaintiffs' motion to tax the District's costs as to the expert witness fees and denied the District's request for its expert witness fees. The District appealed from that order.

III. Plaintiffs' Appeal

A. Mandatory Duty

Plaintiffs challenge the trial court's finding that, as a matter of law, the District did not have a mandatory duty to report the restroom incident under the Child Abuse and Neglect Reporting Act (CANRA).

CANRA requires that "[r]eports of suspected child abuse or neglect shall be made by mandated reporters ... to any police department or sheriff's department, ... county probation department, if designated by the county to receive mandated reports, or the county welfare department." (Pen. Code, §§ 11164, subd. (a), 11165.9.) Teachers, instructional aides, public school teacher's aides, public school teacher's assistants, and public school classified employees are statutorily designated mandatory reporters of child abuse. (Pen. Code, § 11165.7, subd. (a).)

"[A] mandated reporter shall make a report to an agency specified in Section 11165.9 whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect.... [¶] (1) For purposes of this article, 'reasonable suspicion' means that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect. 'Reasonable suspicion' does not require certainty that child abuse or neglect has occurred nor does it require a specific medical indication of child abuse or neglect; any 'reasonable suspicion' is sufficient." (Pen. Code, former § 11166, subd. (a).)

Child abuse includes "sexual abuse," which "means sexual assault or sexual exploitation" as those terms are defined in Penal Code section 11165.1. " '[S]exual assault' includes, but is not limited to, all of the following: [¶] ... [¶] (3) Intrusion by one person into the genitals or anal opening of another person .... [¶] (4) The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification ...." (Pen. Code, § 11165.1, subd. (b).)

1. Background

***7** The District filed a motion in limine seeking to exclude "all documentary and testimonial evidence, and comment and argument ... offered to prove or demonstrate that [the District's] failure to report to CPS and/or the Police regarding GP's alleged sexual battery upon [Jonnie] violated [the District's] mandatory reporting obligations under Penal Code section 11164 et seq. [(CANRA)]." The District asserted that "[a]s a matter of law no mandatory obligation was violated." It asked the court to exclude this evidence under Evidence Code sections 350 and 352 or to hold an Evidence Code section 403 hearing to determine whether plaintiffs could make a preliminary showing "that G.P. appreciated the wrongfulness of the conduct Plaintiff describes as sexual battery." Plaintiffs opposed this motion.

The court granted the District's motion. It characterized G.P.'s alleged conduct as "assaultive in nature" but "not a sexual assault, because a five or six year old is not capable of forming the requisite criminal intent to commit an act that qualifies as a sexual assault." "The Court is not considering that to be a sexual assault but does consider it to be an act of bullying ...." The court ruled in limine that G.P.'s alleged conduct was "not ... a sexual assault" and therefore was "not an episode that the school district was required as a mandatory reporter of child sexual abuse to report." "[A] six-year-old is statutorily and presumptively incapable of forming the requisite intent to commit a mandatory reportable offense." "The mandatory reporting laws are aimed at the commission of sexual offenses upon children. By definition, the perpetrator has to be a person who is capable of forming the requisite criminal intent to commit a sexual assault or sexual crime upon someone else.

[¶] That is not to say that a child in the broad definition of children cannot be such a person. What I am saying is that a five-year-old or a six-year-old cannot be such a person." "So the Court finds and rules that the school was not mandated to report the episode in the bathroom. It is not a sexual crime. It's not a sexual offense."

The court told the jury during plaintiffs' opening statement: "Since it's not a sexual assault, the rules regarding mandating reporting of sexual assaults do not come into play in this case. In other words, you will be instructed that whatever happened here was not of a nature that triggered the mandatory reporting rules concerning sexual assault, because it's not a sexual assault."

2. Analysis

Plaintiffs contend that the court erroneously concluded that the District did not have a mandatory reporting obligation. They contend that "GP's 'intrusion' into Jonnie's genitals was an assault within the meaning of the mandatory-reporting laws." They also argue that G.P.'s conduct "was most certainly a battery" and that Sachau and Hudson understood G.P.'s conduct to be a sexual assault because Sachau suspended G.P. for this misconduct.

Plaintiffs misconstrue the District's mandatory reporting obligations. Sachau and Hudson were mandatory reporters, but their obligation to report depended on whether, given what they knew of the restroom incident, it was "objectively reasonable" for them to "suspect" that Jonnie had "been the victim of child abuse ...." (Pen. Code, former § 11166, subd. (a).) Plaintiffs do not assert that Sachau or Hudson had any reason to suspect some type of reportable "child abuse" other than "sexual assault."

" 'Sexual assault' includes, but is not limited to, all of the following: [¶] ... [¶] (3) *Intrusion by one person into the genitals* or anal opening of another person .... [¶] (4) The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of a child, or of the perpetrator by a child, *for purposes of sexual arousal or gratification* ...." (Pen. Code, § 11165.1, subd. (b), italics added.) The mandatory reporting obligation applicable to "sexual assault" does not extend to a simple "battery."

***8** Hudson's understanding of the restroom incident was that G.P. had come up behind Jonnie at the urinal, reached in between his legs, and grabbed Jonnie's genitals. Sachau's understanding of the restroom incident was that Jonnie was standing at the urinal when G.P. "proceeded to reach under from behind and grab [Jonnie] in the private area."

While both Hudson and Sachau were told that G.P. had grabbed Jonnie's genitals, this information did not provide any basis for either of them to suspect that there had been an "[i]ntrusion ... into" Jonnie's "genitals" or that G.P.'s touching of Jonnie's genitals had been undertaken "for purposes of sexual arousal or gratification." An "[i]ntrusion ... into the genitals" is not simply a touching or grabbing but requires some sort of penetration. Otherwise, it would be not be "into" the genitals. This is confirmed by the presence of Penal Code section 11165.1, subdivision (b)(4), which applies to a "touching" of the genitals. G.P.'s conduct did not fall within subdivision (b)(4) because neither Sachau nor Hudson was aware of any basis for a suspicion that G.P. engaged in this conduct "for purposes of sexual arousal or gratification." No reasonable person would have suspected that the objective conduct of six-year-old G.P. was sexual in nature rather than simply an act of aggression.

Plaintiffs argue that a mandatory reporter is not required to "assess the mental state of the assailant and report only those incidents believed to have been motivated by the assailant's intent to self-gratify." A mandatory reporter is obligated to report an event if a reasonable person would have suspected that the conduct was reportable. This rule does not require a mandatory reporter to "assess the mental state of the assailant," but only to consider whether the objective facts raise a suspicion. Here, Hudson and Sachau were not obligated to report this event because the objective facts did not support a suspicion that G.P.'s conduct was sexual.

Plaintiffs argue that Sachau must have understood G.P.'s conduct to be a "sexual assault" because the discipline report he prepared for the May 1, 2013 incident characterized G.P.'s prior conduct as "sexual behavior" and suspended G.P., which plaintiffs claim would have been permitted under Education Code section 48900 only for a sexual assault. Sachau's vague post-hoc reference in the discipline report to G.P.'s prior

conduct as "multiple instances of sexual behavior" did not transform the restroom incident ex post facto into a "sexual assault." Nor did the fact of the suspension for the later incident establish that the earlier incident was a sexual assault since Sachau was permitted to suspend G.P. for "[w]illfully us[ing] force" on another student, which the May 1 incident clearly involved. (Ed. Code, § 48900, subd. (a)(2).)

Because there was no evidence that Hudson or Sachau had failed to comply with the mandatory reporting statutes, the trial court did not err in ruling as a matter of law that plaintiffs had no claim against the District for a violation of the District's mandatory reporting obligations.

B. Characterization of Restroom Incident

Plaintiffs argue that the trial court prejudicially erred in instructing the jury, commenting to the jury, and telling plaintiffs' trial counsel that the restroom incident could not be characterized as a sexual assault, sexual harassment, or sexual misconduct. They claim that the court's actions were "partisan" and that its rulings unfairly prevented them from presenting their case.

1. Background

***9** The District moved in limine to exclude any evidence that the District had "coded" the restroom incident "in the computerized discipline record as 'sex/harasss-aslt,' 'sexual harassment' or 'sexual assault'...." Plaintiffs opposed this motion. The court denied this motion, but it told counsel during in limine motions that it intended to instruct the jury that "the six-year-old can't commit a sex crime."

The court told the jury prior to opening statements: "[S]exual assault has a very particular meaning in the law." "[I]n order to constitute a sexual assault, there has to be a certain state of mind on the part of the perpetrator of the assault that has to do with sexual gratification." "[T]his case does not involve sexual assault for the simple reason that children of the age that we're dealing with in this trial, 5 and 6, are simply incapable by virtue of their age and their developmental level of forming the requisite intent to commit a sexual assault." "And it doesn't matter what anybody describes a matter as between kids of the age of 5 and 6, it doesn't matter what anybody else calls it or what category they select on a form. None of that can make something that happens between two kindergartners on a playground into a sexual assault within the meaning of the law. [¶] So we're not dealing with sexual assault here, no matter who may have described it that way or what form may have had a box that got checked.... [¶] But whatever you decide, you wind up deciding the evidence demonstrates happened here, it wasn't a sexual assault."

In their opening statement, plaintiffs asserted that "it makes no difference whether G.P. had sexual intent" because Sachau characterized G.P.'s conduct as "sexual harassment/assault" and "no matter how it's characterized" G.P.'s conduct toward Jonnie was "just another in a series of bullying behavior by G.P."

During the trial, the court commented in the jury's presence: "[S]ix-year-olds are incapable of sexual assault, and they are incapable of, for the same reason, of sexual harassment." After the defense objected to evidence that Sachau had referred to G.P.'s "sexual misconduct," the court told the jury: "The ruling is that that's the same thing as sexual offenses for our purposes in the sense that in the Court's view kindergartners are not capable of that sort of thing." Plaintiffs subsequently requested "a 403 hearing" so that they could present testimony by a psychologist about children and sexual matters. The court expressed its openness to having an Evidence Code section 403 hearing and asked the parties to confer about it, but the court again told the jury that "kindergartners are not capable of" "sexual misconduct."

In his closing argument, the District's attorney harkened back to the court's instructions to the jury "that this is not a case about sexual molestation," "not a case about a sex crime," and "isn't about a sexual attack."

2. Analysis

Plaintiffs contend: "The court's rulings were incorrect as a matter of law, were inconsistent with the school officials' interpretation of the events and greatly prejudiced the plaintiffs' case by minimizing what had happened to Jonnie."[5] They claim that "[t]he court's repeated comments sent the jury the message the court did not believe the

matter belonged in court." Plaintiffs characterize the court's comments as "partisan judicial commentary" and argue that the court's rulings prevented them from offering evidence to prove their case.

5 Some of the comments that plaintiffs complain about were made by the court while the jury was absent.

***10** The record reflects that the trial court consistently ruled and told the jury that G.P.'s conduct was not sexual assault, sexual harassment, or sexual misconduct because there was no evidence that G.P. had a sexual motivation for his touching of Jonnie. While the trial court should have refrained from making these types of comments and rulings or giving such instructions about the *facts* of the case, we cannot find that these rulings, instructions, and comments prejudiced plaintiffs since there was no admissible *evidence* presented at trial that G.P.'s conduct was "sexual." The trial court accurately observed that a third party's characterization of a touching as "sexual" where the third party did not witness the touching and had no personal knowledge of the touching is irrelevant. Jonnie was the only witness to the event who testified at trial, and he did not characterize the touching as "sexual." G.P. did not testify.

And despite the trial court's antipathy to characterization of the restroom incident as sexual, the court expressly remained open during trial to holding an Evidence Code section 403 hearing at which plaintiffs would have had the opportunity to present evidence about children and sexual matters. Had plaintiffs pursued such a hearing, they might have been able to persuade the court to retract its comments and instructions and rescind its rulings in this regard, but the record contains no indication that plaintiffs made any effort to do so. Under these circumstances, the trial court's ill-advised comments, instructions, and rulings could not have prejudiced plaintiffs.

C. Hearsay Rulings and Comments

Plaintiffs maintain that the trial court prejudicially erred in excluding evidence of "statements Jonnie made to others" and telling the jury that such statements could not be considered for their truth. They contend that Jonnie's statements were admissible as prior consistent or inconsistent statements, statements of mental or physical state, or statements of a child abuse victim. (Evid. Code, §§ 1235, 1236, 1250, 1253.)

1. Background

The District moved in limine to exclude all hearsay statements of plaintiffs' witnesses on the grounds that they did not fall within any exception and were speculative. Plaintiffs opposed the District's motion concerning the admission of hearsay. The court responded: "Since Jonnie is available as a witness and since unavailability is a necessary criteria for an admission of hearsay evidence to show his state of mind under 1250, or as to former testimony under 1291, or as to prior consistent statements under 791, it would appear that hearsay statements of the mother as to what Jonnie said to her or hearsay statements of Jonnie, out-of-court statements, not under oath, offered to prove the truth of the matters asserted, if there are any, would be excluded. [¶] As I said, prior consistent statements under 791 would not be appropriate unless there is an allegation of recent fabrication or there is impeachment with prior inconsistent statements. Those foundations would have to be laid before hearsay statements of Jonnie would be admissible."

Plaintiffs' trial counsel sought clarification, and the trial court tried to explain its position. "[I]f you call your witness, Jonnie, and he testifies, and you have his mother in the wings and you want to call her to impeach the testimony of Jonnie, who Jane would testify told him (sic) something different, keeping in mind that in his deposition testimony I believe Jonnie said that he told his mother the same thing that he said at deposition. I think that question came up, and he said that's what he told her. [¶] So he could be impeached if she were to testify that, no, he told me something different. But that would be the purpose for it would be to attack his credibility through impeachment." "[Y]ou can't use hearsay statements from people other than Jonnie or an eye witness ... to establish the facts of what occurred in the restroom." The court noted that there were "352 problems" with the admission of statements about the restroom incident for "nonhearsay" purposes, such as to show Jane's state of mind. The court subsequently rejected plaintiffs' claim that Jonnie's hearsay statements about the restroom incident could be admitted to show his state of mind. It also reaffirmed its prior ruling that "you can't establish what happened in the restroom with hearsay statements when you have the participant eye witness who is here to testify as to what happened."

***11** Plaintiffs' expert Terr testified before Jonnie. During Terr's testimony, plaintiffs' counsel asked Terr what Jonnie had told her. The defense objected on hearsay grounds. The court instructed the jury that it could not consider Terr's testimony about what Jonnie had told her for its truth but only in evaluating her opinions. Terr proceeded to give extensive testimony about Jonnie's statements to her.[6] The court instructed the jury that Jonnie's statements to Terr were hearsay and could not be considered for their truth.

6 She testified that, when he was six years old, Jonnie had told her a story about the April 2013 restroom incident. He said he was in a stall and was beginning "to poop" when G.P. "crawled under something to get into the stall." Jonnie told Terr that G.P. "stuck his hand into his butt" and "took his penis twice separately and squeezed it" causing Jonnie "a lot of pain." Jonnie said that he told G.P. "to stop," and that "a boy named A.B." was "around there" during the incident. Jonnie told Terr that A.B. had come into the stall somehow and seen what G.P. had done to Jonnie. "And then over lunch [G.P.] punched Jonnie." After this, Jonnie and G.P. were sent to see Sachau by their teacher. G.P. stopped "doing what he was doing" after that. Jonnie told Terr that this was so embarrassing that he did not want to tell anyone about it.
Terr also testified that, when he was seven, Jonnie told her that "it was very hard for him to remember exactly what had happened." He said he was "confused" about " '[w]here it happened and if my pants were up or down.' " Jonnie said he was " 'trying to forget it.' " When Jonnie was eight, he told Terr a story similar to the one he had told when he was six. Terr testified that Jane had told Terr that a week before Jonnie told her about the incident he had told Hudson and Sachau about it.

Jonnie testified before Jane testified. Jane testified that one day she picked Jonnie up from school and he had "gouges on the side of his face" that he told her G.P. had inflicted. Jane reported these scratches to Hudson the next morning. In February 2013, Jane noticed bruises and scratches on Jonnie and reported these to Hudson. A little later, she reported to Hudson that the side of Jonnie's face was "very, very red." The court barred Jane from testifying that Jonnie had told her that G.P. inflicted these injuries. It noted that Jonnie had not been asked about these injuries.

During the testimony of plaintiffs' expert Packer, the defense objected on hearsay grounds to Packer repeating Jonnie's statements to her about the restroom incident, and the court sustained the objection on hearsay and Evidence Code section 352 grounds. "[T]hat seems to be unduly prejudicial," and "you can't recite his factual statements to you ...." During the testimony of Jonnie's counselor, Jadille Minkoff, the District objected to Minkoff reciting from her notes statements to her about the restroom incident. Plaintiffs' counsel claimed that Minkoff's notes were admissible as statements to a treating health care professional or as a business record. The court sustained the objection. It ruled that even if the notes came within a hearsay objection it would exclude them under Evidence Code section 352 because they were based not on Jonnie's statements but on Jane's statements.

2. Analysis

Plaintiffs claim that the trial court's hearsay rulings were erroneous because Jonnie's statements to others were admissible for their truth and to show their effect on Jane. They claim that Jonnie's statements to his parents, counselors, and plaintiffs' experts were admissible as prior consistent or inconsistent statements. The only statements they actually identify are Jonnie's statements to Jane, Terr, Packer, and Minkoff, although they suggest that they also could have cross-examined defense expert Kuo about Jonnie's statements to her.

a. Prior Inconsistent Statements

***12** "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." (Evid. Code, § 1235.) "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action." (Evid. Code, § 770.)

Terr testified before Jonnie, so his statements to her could not have been inconsistent with his testimony. Plaintiffs contend that this is irrelevant because the court ruled on this issue in limine. We disagree. The trial court's in limine ruling did not unequivocally preclude all testimony about prior inconsistent statements. The court made it clear that, for instance, Jane could testify to a prior inconsistent statement if Jonnie denied having made such a statement. It was therefore incumbent upon plaintiffs to demonstrate in the trial court that the proffered hearsay statements of Jonnie satisfied the statutory requirements to qualify as prior inconsistent statements. As to Terr, plaintiffs could not have made any such showing.

Nor did plaintiffs make the requisite showing as to Jonnie's statements to Jane, Packer, or Minkoff. Jonnie was excused immediately after his testimony. Thus, his prior inconsistent statements to Jane, Packer, or Minkoff could be admissible under Evidence Code sections 1235 and 770 only if he was given an opportunity to explain or deny those statements during his testimony. Jonnie's trial testimony was very brief, and plaintiffs make no attempt to demonstrate that he was given the opportunity to explain or deny any prior inconsistent statements to Jane, Packer, or Minkoff. Hence, they have failed to establish that these statements were admissible as prior inconsistent statements.

b. Prior Consistent Statements

Plaintiffs have also failed to demonstrate that Jonnie's prior consistent statements to Jane, Terr, Packer, and Minkoff were admissible as prior consistent statements.

"Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." (Evid. Code, § 1236.) "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791.)

Like prior inconsistent statements, it is not possible to offer prior consistent statements *before* the witness has testified at the hearing as it cannot be demonstrated the prior statements are consistent with the witness's trial testimony. This disposes of any prior consistent statements that Jonnie made to Terr.

Plaintiffs have failed to demonstrate on appeal that any prior consistent statements that Jonnie made to Jane, Packer, or Minkoff qualified for admission as prior consistent statements. To establish the admissibility of such statements, plaintiffs were obligated to show one of two things. The first possible avenue for admission was that a prior inconsistent statement had been utilized to attack Jonnie's credibility and the prior consistent statement had been made before the prior inconsistent statement.

***13** During the District's very brief cross-examination of Jonnie at trial, the District did not introduce any inconsistent statements to attack Jonnie's credibility. During the playing of excerpts from Jonnie's deposition testimony, the District introduced at most three statements Jonnie had made at his deposition that were different from his trial testimony. First, Jonnie testified at his deposition that he had told Jane about the restroom incident on the day that it happened. At trial, he testified that he did not tell Jane about the restroom incident immediately but could not remember when he had told her. Second, at his deposition, Jonnie described a single restroom incident, and his description was the same as his description of the urinal incident at trial. At trial, Jonnie testified that there was a second incident that "happened in a stall" but was otherwise identical to the urinal incident. Third, at his deposition, Jonnie testified that G.P. had never "shoved" him, but had once "pushed" him, and, inconsistently, that he could not remember whether G.P. had shoved or punched him.[7] At trial, Jonnie testified that G.P. was a bully who "hit" and "push[ed]" him and "kick[ed]" him in the ribs.

7 Although Jonnie testified at his deposition that he had reported these incidents to "the yard duty," he was not asked whether he told Jane. He testified at trial that he had told Jane about these incidents. Since he did not testify at his deposition regarding whether he told Jane about these

> incidents, his deposition testimony was not inconsistent with his trial testimony on this point.

Only the first of these three statements of Jonnie at his deposition was actually inconsistent with his trial testimony. Jonnie was not asked at his deposition whether there had been a second incident. And his deposition testimony that he had been pushed, but not shoved or punched, was not inconsistent with his testimony at trial that he had been hit, pushed, and kicked. In any case, plaintiffs were not seeking to introduce carefully delineated prior statements of Jonnie that addressed these minor discrepancies between his deposition and trial testimonies. The one inconsistency—when Jonnie told Jane of the restroom incident—was not the subject of a substantial dispute at trial. It was essentially undisputed that he told her of the incident on a weekend, so it could not have been true (as Jonnie testified at his deposition) that he told her on the day of the incident.

The only other avenue for admission of Jonnie's prior consistent statements would have been if the District was claiming that Jonnie's trial testimony was "recently fabricated or is influenced by bias or other improper motive, and the [prior consistent] statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." The District did not make any implied or express claim that Jonnie was fabricating his testimony or that he was "influenced by bias" or any other "improper motive." The District did attack Jonnie's credibility, but its attack was based on Jonnie's inability to remember the events and the possibility that Jonnie had been influenced by the statements of others to him. The District did not attack Jonnie's testimony based on his "improper motives" or bias.

Plaintiffs make no effort on appeal to establish that any of the hearsay statements that they sought to introduce qualified for admission as prior consistent statements. It follows that plaintiffs have failed to demonstrate on appeal that the trial court should have admitted these statements as prior consistent statements.

c. Statements of Child Victim Witness

Plaintiffs claim on appeal that Jonnie's hearsay statements were admissible under Evidence Code section 1253. Evidence Code section 1253 applies only to statements "describing any act, or attempted act, of child abuse or neglect" within the meaning of Evidence Code section 1360 or Penal Code sections 281 through 289.6 (sex crimes). Evidence Code section 1360 provides: " '[C]hild abuse' means an act proscribed by Section 273a, 273d, or 288.5 of the Penal Code, or any of the acts described in Section 11165.1 of the Penal Code, and 'child neglect' means any of the acts described in Section 11165.2 of the Penal Code." As we have already discussed in section III(A) of this opinion, G.P.'s conduct did not fall within the meaning of Penal Code sections 11165.1 or 11165.2. Nor did it qualify as child endangerment (Penal Code section 273a), corporal punishment (Penal Code section 273d), or continuous sexual abuse of a child (Penal Code section 288.5). Hence, Evidence Code section 1253 was inapplicable.

d. Statements of Mental or Physical Condition

***14** Plaintiffs argue that Jonnie's hearsay statements to Jane, Terr, Packer, and Minkoff were admissible under Evidence Code section 1250 as statements of his mental or physical condition.

Evidence Code section 1250 provides: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. [¶] (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

The bulk of the hearsay statements of Jonnie that plaintiffs sought to introduce had nothing to do with Jonnie's "then existing state of mind" at the specific times that he made those statements to Jane, Terr, Packer, and Minkoff. Instead, plaintiffs sought to introduce Jonnie's hearsay statements to prove facts about G.P.'s conduct. Evidence Code section 1250 did not make admissible Jonnie's recollections of the facts of G.P.'s conduct. While it was possible that a specific hearsay statement of Jonnie about his then-existing state of mind

could have been relevant to damages if the jury had found the District negligent, the jury never reached any damages issues as it found no negligence. Plaintiffs have not established any prejudicial error with regard to Jonnie's hearsay statements regarding his state of mind.

D. Jane's Causes of Action

Jane asserts that the trial court prejudicially erred in refusing to allow her claims to go to the jury.

Jane's causes of action were for concealment, NIED, and IIED. The District sought in limine to exclude evidence of Jane's emotional distress damages on the ground that she was not a direct victim as she was not present and was not a bystander. The court did not grant the in limine motion because it concluded that it would depend on what the evidence showed.

Jane testified that the incident and the District's handling of it had caused her emotional distress. During the defense case, the court heard arguments, outside the jury's presence, regarding Jane's causes of action. Jane premised her NIED claim on her contention that the District had negligently failed to inform her of the restroom incident. Her counsel argued that "the school was on notice on the day that it occurred" and failed to tell Jane. The District argued that there was no evidence that Jonnie had been inappropriately touched a second time after the District learned of the first incident, so there was no basis for Jane's claim.

The court characterized the issue as whether there was a duty to inform Jane and whether there was a duty to control G.P. It found that there was no duty to inform or control prior to the April 2013 restroom incident. The court's position was that there was no evidence that "the responsibles at the school" had "learned" of the April 2013 restroom incident prior to Jane telling Hudson about it. The court also ruled that plaintiffs had not pleaded that there was "a second restroom groping episode" and had not produced any "credible evidence" of a second incident, "let alone that it occurred" between the reported incident and Jane learning of that incident. "[T]here is no proof of knowledge on the part of the school concerning the first episode until Mrs. Hudson is informed by the mother ...." Based on its finding that there was no basis for a duty, the court dismissed Jane's claims. It included the IIED claim [8] and the concealment claim because there was no evidence that the District had knowledge of the incident before Jane knew of it.

[8] Plaintiffs conceded that they were not contending that Jonnie had an IIED claim.

***15** On appeal, Jane contends that her NIED claim should have been permitted to go to the jury because there was evidence that Jonnie was touched by G.P. a second time *after* the District knew of the first restroom incident. The evidence she cites does not support her thesis.

The critical problem is with Jane's post hoc attempt to create a timeline that supports her theory in an evidentiary void. Jonnie testified at trial that there were two restroom incidents. He testified that he had told the yard duty supervisor of one of those incidents. He also testified that he had told Sachau about one of the incidents. However, at the same time, he expressed uncertainty about whether he had ever spoken to Sachau about any restroom incident. Zamora, the yard duty supervisor, testified that she had taken G.P. and another boy to Sachau's office after an incident in the restroom, but she did not recall that the other boy was Jonnie. Neither Jonnie nor Zamora testified about when any restroom incident had occurred, and there was no evidence that Zamora spoke with Sachau about any restroom incident.

Jane's thesis required evidence that the District was aware of one restroom incident before a second restroom incident occurred and failed to take action after learning of the first incident. It was undisputed that the District took action immediately after Jane told Hudson about the urinal incident. While Jonnie's testimony suggested that the stall incident occurred after the urinal incident, that alone was not sufficient evidence to support Jane's thesis. For her theory to work, there had to be evidence that the stall incident occurred after the District learned of the urinal incident but before Jonnie told Jane about the urinal incident.

Two evidentiary voids afflicted Jane's theory. One, there was no evidence that the District learned of the urinal incident before Jane learned of it. Two, there was no evidence that the stall incident occurred before Jane learned of the urinal incident. Not only that, but Jane's theory was inconsistent with the allegations in the complaint, plaintiffs' opening statement,

and Jane's own testimony. In the complaint, plaintiffs alleged that Jonnie told Jane about the urinal incident a week after it occurred, and she then told Hudson. "Several days *later*, [Jonnie] told [Jane] that G.P. had touched him in the area between his penis and buttocks *that day.*" (Italics added.) Thus, the timeline in plaintiffs' complaint had the second incident occurring *after* Jane learned of the urinal incident and informed the District, and *after* the District took action against G.P. Plaintiffs' opening statement did not even mention a second restroom incident. Jane testified that she learned of the second incident *after May 1, 2013*, which was plainly inconsistent with the allegation in the complaint that she learned of it on the day that it occurred (since G.P. was no longer at the school after May 1). No evidence established when (if ever) the stall incident occurred. Because there was no evidence to support Jane's theory, the trial court did not err in refusing to allow Jane's claims to go to the jury.

E. Fair Trial

Plaintiffs complain that the trial court made a host of errors that they claim deprived them of a fair trial.

1. Jury Consultant

***16** Plaintiffs challenge the trial court's order barring them from utilizing a jury consultant.

Prior to voir dire, plaintiffs told the court that they planned to use a "jury consultant ...." "[W]e're working with a jury consultant and you said you didn't want her here. I would like to propose, your Honor, I understand she won't be at counsel table, but it is a public courtroom and she can sit in the back. [¶] THE COURT: If she is going to be providing advice as to the selection of jurors based upon anything other than the proper criteria she is going to get you in trouble. She's going to get everybody in trouble. [¶] Far better -- because I don't permit that. I'm telling you right now, I am not permitting a demographical jury selection expert who by the nature of their business hire out to help people select juries that are going to render verdicts in their favor. That's exactly what I don't want in a voir dire process to be and I don't permit that. So I would caution you very delicately here about it. It's an open courtroom." "I don't want Counsel being advised by demographic experts who have sat here and watched the proceedings. If that happens, we're going to have trouble."

Plaintiffs' trial counsel subsequently engaged in this colloquy with the court: "I wanted to make sure it was on [the record] that your Honor has instructed me I cannot utilize my jury consultant as part of this process. I just want to put that on the record. [¶] THE COURT: Correct. [¶] MS. McKENNA: That was it. [¶] THE COURT: And the reason for that is I just don't believe that the so-called scientific jury selection expert practice, which is clearly and advertisedly designed to help one side or the other select juries that will be predisposed to vote in their favor is a practice that I want to engage in. That's not what jury selection should be about, in my view. [¶] Some courts have attempted to remedy the imbalance if one side has that service hired on by appointing an expert to even it out, and I think the much better practice is just not to go down that road at all. To pick a jury and to have a process designed to pick a jury that is fair and impartial and not biased is what we have been about here all day." Jury selection proceeded, and plaintiffs did not exercise all of their peremptory challenges.

While we do not approve of the trial court's blanket order barring plaintiffs from receiving advice from their jury consultant, we also do not see how plaintiffs can establish that their right to a fair trial was impacted by this order. Plaintiffs did not exercise all of their peremptory challenges, and there is no indication in the record that they were unable to select a fair jury without the assistance of their jury consultant. The trial court's order barring them from utilizing their jury consultant was not prejudicial.

2. Use of Kurtz's Deposition Testimony

Plaintiffs challenge the trial court's refusal to allow them to use video excerpts in lieu of testimony for the District's designated person most qualified (PMQ), Dennis Kurtz, the District's assistant superintendent of schools.

***17** Code of Civil Procedure section 2025.620 provides: "At the trial ..., any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection under Section 2025.410, so far as admissible under the rules of evidence applied as

though the deponent were then present and testifying as a witness, in accordance with the following provisions: [¶] ... [¶] (b) An adverse party may use for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under Section 2025.230 [(PMQ)] of a party. It is not ground for objection to *the use of a deposition* ***of a party*** *under this subdivision* by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing." (Code Civ. Proc., § 2025.620, italics and boldface added.)

Plaintiffs designated in advance of trial deposition excerpts from Kurtz's and other District employees' depositions pursuant to Code of Civil Procedure sections 2025.340, subdivision (m) and 2025.620. During trial, the District objected to plaintiffs using excerpts from Kurtz's deposition in advance of his testimony. It claimed that this objection was permitted because Kurtz was a "nonparty." Plaintiffs contended that Code of Civil Procedure section 2025.620, subdivision (b) barred the District's objection. The court found the statute to be "a bit ambiguous" in this situation. It concluded that the statute did not preclude objection where the deposition was of a "nonparty," and it directed plaintiffs to "start out with the live testimony" and use video only if needed to "impeach or correct or augment" the live testimony. Plaintiffs called Kurtz to testify at trial and used excerpts from his deposition to augment his testimony. At trial, Kurtz disclaimed any present memory and said that whatever he said in his deposition would be his answers to questions. Plaintiffs' trial counsel repeatedly read Kurtz's deposition testimony into the record. Kurtz's deposition testimony was ambiguous and consisted largely of him saying that he did not remember specifics.

Plaintiffs contend that the District was statutorily precluded from objecting to the use of Kurtz's deposition on the ground that Kurtz was available to testify at trial. The trial court reasoned that the statute barred an objection on that ground where the deposition was of "a party" but not where the deposition was of an "employee" or a PMQ. Plaintiffs claim that the statute is unambiguous and clearly bars an objection on that ground whether the deponent is "a party" or an employee or a PMQ. We disagree.

The plain language of the statute bars such an objection only where the deponent was "a party" and does not apply the bar on objection where the deposition is of an employee or a PMQ. Plaintiffs' construction would assign no meaning to the Legislature's use of the words "of a party" in the last sentence of the statute. " 'If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.' [Citation.] ... '[A] construction making some words surplusage is to be avoided.' [Citation.]" (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) We reject plaintiffs' contention.

3. Reference to Absence of Collateral Interviews

Plaintiffs contend that the trial court erred in permitting the District to adduce evidence that Jane and John had "refused" to participate in "collateral interviews" with the District's expert.

Plaintiffs moved in limine to exclude testimony by a defense expert that she had not been permitted to do collateral interviews of Jonnie's parents. The District opposed plaintiffs' motion concerning the collateral interviews. The court denied this motion. "It seems to me fair for Dr. Kuo to explain why she didn't interview the parents, when it would be reasonable to do so collaterally to her interview of the child." "She can say what I think is the truth, and that is that she attempted to interview the parents and they were not compliant. They didn't participate. Didn't agree to participate. That much she could say. No more."

***18** Plaintiffs' expert, Terr, testified that she met with Jonnie's parents and his paternal grandmother. Kuo testified that she understood her assignment to be to "do an independent psychiatric medical evaluation" of Jonnie. Kuo testified that she had made "a request" to interview Jonnie's parents because this was "part of the standard of assessing a child." She was "told due to the legal -- the legalities of the situation, it was not allowed." Although this limited the information available to her, she believed that her findings were valid. The District's expert Hall testified that she did not have any information from the parents because "the plaintiffs' side did not agree to those conditions that I would be able to ask the parents" for information. Plaintiffs' counsel did not object but instead delved into the issue on cross in an apparent

attempt to establish that defense experts generally did not have access to such information from plaintiffs.

Plaintiffs claim that the trial court erred in failing to bar the defense from adducing testimony from Kuo and Hall that they were "not allowed" to interview the parents because the parents "did not agree" to collateral interviews. They argue that the absence of statutory authority for mandating a collateral interview meant that the parents' refusal to participate in a collateral interview was "the exercise of a privilege." Since they do not develop this argument, we do not address it. The mere fact that Jane and John were not statutorily required to submit to collateral interviews did not make their refusal automatically privileged, nor did it render irrelevant the fact that the defense experts were not able to interview them due to their decision not to submit to such interviews. Plaintiffs have not established that the trial court erred in permitting the defense experts to explain why they lacked this information.

4. Undisclosed Expert

Plaintiffs contend that the trial court erred in permitting the defense to present evidence from an undisclosed expert.

Code of Civil Procedure section 2034.300 provides that, "on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has *unreasonably* failed to do any of the following: [¶] (a) List that witness as an expert under Section 2034.260." (Italics added.) We review the trial court's ruling under Code of Civil Procedure section 2034.300 for abuse of discretion. (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950.)

Marie Lamb was a school psychologist for the District. Lamb had tested Jonnie in May 2015, when he was in second grade, and written a report regarding his learning disabilities in the course of her duties as the District's school psychologist. Her testing showed that Jonnie had trouble paying attention, and difficulties with organization and executive functioning.

Plaintiffs moved in limine to exclude testimony of any experts who had not been disclosed by the District during discovery. Lamb had not been disclosed by the District as an expert witness during discovery. The District argued that Lamb should be permitted to testify because it had identified Lamb as a witness on March 16, 2016 in response to plaintiffs' form interrogatories and had provided Lamb's May 2015 report to plaintiffs' trial counsel on February 26, 2016, which was promptly after the defense discovered the report. The evaluation that led to the report had occurred after the close of discovery. The court ruled that Lamb could testify.

During a break in Lamb's testimony, plaintiffs renewed their objection to Lamb's testimony, particularly to what they viewed as her "testifying as an undisclosed expert." Plaintiffs moved for a mistrial, which was denied. When Lamb returned to the stand the next day, plaintiffs again objected. "[S]he's not been qualified as an expert nor disclosed, and she's giving expert opinion." The court responded that plaintiffs were aware of the services that Lamb was providing to Jonnie. The court seemed to conclude that Lamb was not testifying as an expert because she did not make a diagnosis. Lamb thereafter testified that her testing of Jonnie did not show that he suffered from significant anxiety. During cross, plaintiffs' attorney mentioned that she had not been "given the opportunity" to depose Lamb.

***19** We find no abuse of discretion. The defense could not have identified Lamb as an expert witness during discovery because her evaluation of Jonnie, which was in the course of her employment as a school psychologist rather than as defense expert, did not occur until after the close of discovery. Plaintiffs were plainly aware of her interaction with Jonnie and of her report well in advance of trial, so they could not have been surprised by her testimony. The trial court did not abuse its discretion in concluding that the defense had not *unreasonably* failed to disclose Lamb as an expert witness during discovery. In any case, Lamb's testimony, which concerned Jonnie's status in 2015, was not probative on the only issue reached by the jury, whether the District was negligent with regard to G.P.'s conduct. Any error was harmless. [9]

9 Plaintiffs contend that the trial court's alleged errors with respect to the jury consultant, the Kurtz deposition excerpts, the collateral interviews, and Lamb's testimony were cumulatively prejudicial. Since plaintiffs have failed to show any prejudice from the court's ruling in

regard to the jury consultant, and any error in connection with Lamb's testimony was harmless, there was no cumulative prejudice.

F. Court's Alleged Bias

Plaintiffs claim that the trial court's conduct of the trial displayed bias against plaintiffs that prejudiced them before the jury.

Plaintiffs rely on *People v. Sturm* (2006) 37 Cal.4th 1218 (*Sturm*). *Sturm* was a death penalty case in which the trial judge persistently assisted the prosecutor, belittled defense witnesses and interfered with their testimony, and disparaged defense counsel. (*Sturm*, at p. 1233.) The California Supreme Court vacated the death verdict (but not the convictions) due to the trial judge's overwhelming misconduct. " '[A] judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant.' [Citation.] [¶] Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.' [Citation.] A trial court commits misconduct if it ' "persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge." ' " (*Sturm*, at pp. 1237-1238.)

We have reviewed the entire record, and we can find no indication that the trial court exhibited bias against plaintiffs or their trial counsel. While the trial court may have been zealous at times in guarding against the jury's consideration of hearsay evidence, its interventions never disparaged plaintiffs, their witnesses, or their trial counsel. The specific instances that plaintiffs rely upon do not reflect bias. The trial court was demanding of counsel during voir dire, but it did not exceed its proper role in guiding the selection of a fair jury. Although the trial court interrupted plaintiffs' trial counsel's opening statement to instruct the jury regarding the meaning of "sexual assault," its instructions were accurate. The court's efforts to guard against improper consideration of hearsay were zealous, but they did not exhibit bias. Unlike plaintiffs, we do not see any pattern in the court's hearsay rulings that favored the defense over plaintiffs rather than simply favoring a strict approach to hearsay. While the court may have made arguably inconsistent rulings regarding Minkoff's notes, we do not view these rulings as indicia of bias, and plaintiffs did not preserve this issue for review. The trial court's discretionary rulings regarding procedural issues were not reflective of bias, and we do not see in the record a pervasive pro-defense leaning in these rulings.[10] None of the trial court's actions prejudiced plaintiffs before the jury.

[10] The court allowed the District to conduct its direct examination after its cross-examination of witnesses that plaintiffs had called in their case but would necessarily also need to be called in the District's case. We can see no abuse of discretion in this reasonable decision to favor efficiency.

IV. The District's Cross-appeal

***20** The District challenges the trial court's denial of its request for expert witness fees under Code of Civil Procedure section 998.

A. Background

On March 18, 2015, the District and its codefendants served a settlement offer on plaintiffs that "jointly offer[ed] to allow judgment to be taken against them in accordance with the following terms: [¶] 1. Defendants through a single check will pay to Plaintiffs and to Plaintiff's attorney, as settlement for all of Plaintiffs' claims against the Defendants, as well as for all of Plaintiffs' costs and attorney's fees incurred to date of the acceptance of this offer, the total sum of Two Hundred Thousand Dollars ($200,000.00)." The offer did not allocate the $200,000 offer between Jonnie and Jane. Plaintiffs did not accept the offer.

After trial, the District sought to recover $26,950.50 in expert witness fees under Code of Civil Procedure section 998 because plaintiffs had not accepted the $200,000 offer and had not obtained a more favorable result at trial. Plaintiffs moved to tax the District's costs as to the expert witness fees on the ground that the offer had not been a "legally valid" offer under Code of Civil Procedure section 998 because it had not been allocated between Jonnie and Jane. The District claimed that allocation was unnecessary "where the 998 offer is made jointly to plaintiffs who are spouses ...." The District

argued that "[f]or all practical purposes John Roe is the second plaintiff in this case" because Jonnie is a minor and John is his guardian ad litem. In the District's view, John's status as guardian ad litem meant that, due to community property laws, a joint settlement offer did not need to be allocated between Jonnie and Jane. The court granted plaintiffs' motion to tax and denied the District's request for expert witness fees under Code of Civil Procedure section 998.

B. Analysis

The District contends that the trial court erred because there was no need for allocation or separate offers to Jonnie and Jane. It argues: "Any money which might have been awarded to Jonnie Roe would also become, for control purposes, an asset of the community which can be managed by either spouse. John Roe thus had the individual power to accept or reject the joint offer, as the separate acceptance by both spouses was not necessary." The District claims that separate offers "need not be made separately under community property rules because any financial recovery by Jonnie lessens the burden upon his parents to support him, AND lessens the burden upon his parents' community property."

Since the issue is whether the District's offer was legally valid, we exercise de novo review on appeal. (*Litt v. Eisenhower Medical Center* (2015) 237 Cal.App.4th 1217, 1221; *MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1049.)

Code of Civil Procedure section 998 speaks in the singular. "[A]ny party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." (Code Civ. Proc., § 998, subd. (b).)

***21** "It has long been held that a section 998 offer is effective to shift liability for costs only where the offer was properly allocated as to multiple offerees and was made in a manner allowing individual offerees to accept or reject it. [Citation.] This rule has been applied to both plaintiff and defendant offerors, and both where the offer is explicitly and impliedly conditioned on joint acceptance by the offerees. [Citations.] [¶] Where an offer is not apportioned between individual offerees, the inference that the offer must be accepted jointly is inherent." (*Menees v. Andrews* (2004) 122 Cal.App.4th 1540, 1544.)

The District relies on a line of cases that recognize an exception to this rule where the plaintiffs are spouses and any recovery would be community property. In *Barnett v. First National Ins. Co. of America* (2010) 184 Cal.App.4th 1454 (*Barnett*), the Second District Court of Appeal held that a joint offer to spouses is not invalid under Code of Civil Procedure section 998 due to a failure to allocate the offer between the plaintiffs because a cause of action is community property as is any recovery. (*Barnett*, at p. 1460.) The Second District reached the same conclusion in *Farag v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 372 (*Farag*) and *Vick v. DaCorsi* (2003) 110 Cal.App.4th 206 (*Vick*).

The District claims that Jane and Jonnie are akin to the spouses in *Vick*, *Barnett*, and *Farag* because Jane's spouse, John, is Jonnie's guardian ad litem. We see no analogy here. Jane and Jonnie are mother and son and do not share property rights. John's role as Jonnie's guardian ad litem did not grant him a personal property interest in any recovery that Jonnie might obtain. Try as it might, the District cannot force Jane and Jonnie into the exception that applies where two plaintiffs are husband and wife. Accordingly, we find no flaw in the trial court's reasoning underlying its decision that the District was not entitled to recover its expert witness fees under Code of Civil Procedure section 998.

V. Disposition

The judgment and the order denying the District's request for expert witness fees and granting plaintiffs' motion to tax costs are affirmed. The parties shall bear their own costs on appeal.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.

All Citations

Not Reported in Cal.Rptr., 2019 WL 4686986