SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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N.D., on behalf of her minor child, R.B., and
S.H., on behalf of her minor child, K.W.,

Plaintiffs,

-against-

NEWBURGH ENLARGED CITY SCHOOL DISTRICT,

Defendant.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF008698-2016
Motion Date: December 4, 2018

The following papers numbered 1 to 7 were read on Defendant's motion for summary judgment and plaintiff RB's cross motion for the imposition of spoliation sanctions:

Notice of Motion - Affirmation / Exhibits - Memorandum ..... 1-3

Notice of Cross Motion - Affirmation in Opposition / Exhibits - Memorandum ..... 4-6

Reply Affirmation / Affirmation in Opposition ..... 7

Upon the foregoing papers, it is ORDERED that the motions are disposed of as follows:

This is an action to recover for personal injuries sustained by plaintiff RB and plaintiff KW, female cousins of high school age, in separate albeit not unrelated altercations that occurred during their school day on January 12, 2016, at the Newburgh Free Academy in Newburgh, New York. The Complaint asserts causes of action sounding in negligence against defendant Newburgh Enlarged City School District (the "School District"). The School District moves for

summary judgment on the ground, among others, that both RB and KW were voluntary participants in the altercations in which they were injured. Plaintiff RB cross moves for the imposition of sanctions, to wit, a negative inference against the School District at trial, on account of the District's failure to preserve a videotape of the incident in which she was involved. The Court has reviewed the extant videotape of the incident involving KW.

**Factual Background**

**A. The Neighborhood Brawl On January 8, 2016**

On Friday, January 8, 2016, RB's friends, the "W Sisters", had an argument with Tam F and Tal F, twin sisters. The W Sisters told RB that the F Twins wanted to fight her because of her association with them. Plaintiff ND, RB's mother, picked up RB and the W Sisters from school and took them to the F Twins' home to try to resolve the issue with their mother. The F Twins and their friends came outside, whereupon a violent brawl involving the girls and their mothers ensued and continued until the police arrived. The next day, the F Twins' mother called plaintiff SH, KW's mother, while she was at ND's home and told her that since KW was related to RB the F Twins and their friends were going to beat KW up. As a result of these incidents, both RB and KW were kept home from school on Monday, January 11, 2016. School District personnel were notified of the January 8th neighborhood altercation and of the threats against RB and KW.

**B. RB's Altercation On January 12, 2016**

On Tuesday morning, January 12, 2016, School District Security Officer Sharon Joyce walked RB to her Spanish class after the class period had already begun. Tal F was a student in this Spanish class. Her sister, Tam F, was in the hallway outside the classroom, as was RB's

friend JW, one of the W Sisters. RB went to her locker, which was also just outside the classroom. Officer Joyce testified:

> [Tam F] went to 212, started to knock. I then said what are you doing? She said I'm warning my sister that she's going to be jumped. I said you can not disrupt the classroom. I could see that she was going to do it again. I said you have to leave. RB had turned around with the locker, she's fiddling and was mumbling stuff. I went closer to her and I said what's going on? She made the comment of you know what, I'm just going to take this bitch out right now. I then knew with my experience that we had a situation. I then radioed a possible 1083, which means a physical altercation. At that moment [RB] turned around from the locker and said no Ms. Joyce, I'm just going to get this bitch, take her on out...

Officer Joyce further testified that she had to restrain RB to keep her away from Tam F, that in the ruckus Tal F emerged from the classroom, and that the altercation was quickly stopped when Security Officer Hobbs arrived in response to Officer Joyce's radio transmission.

In the wake of this incident RB made a signed written statement in the presence of her mother. It states:

> I have class with one of the sisters. They was already at the classroom. As we got to our locker the twins was saying they're not gonna do anything, they better not touch my sister, I'm talking about T[] or I'm going to F them up, we all just started fighting.

RB confirmed the truth of this statement at her deposition, and testified:

> Q And as you sit here today is anything different from your memory than what's written down there?
>
> A No.

RB sustained only minimal injury, and was suspended from school along with the F Twins for her role in this incident.

RB testified at her 50-h hearing that she was "at my locker minding my business" when Tam F said, "if you guys touch my sister which I'm going to beat you up." She then testified:

Q Did anyone say anything back to her ?

A No.

RB further testified that the fight started when Tal F ran out of the classroom and punched her in the face and that she was ultimately attacked by three girls.

**C. KW's Altercation On January 12, 2016**

After RB's altercation, KW's mother, SH, came to pick KW up and take her home. SH told KW that she knew the F Twins wanted to fight KW because of the altercation with RB and because KW was RB's cousin. SH tried to make KW come home, but KW insisted on staying at school because she did not want to miss a test that day. A second altercation ensued when KW, walking in a school hallway on her way to class, encountered the F Twins and two other girls as they were being escorted out of school on account of their involvement in the altercation with RB. The entire encounter is depicted on a school security videotape.

The videotape shows KW walking down the hallway, away from the camera, with a large bag hanging down at her right side. A door on the right side opens in to the hallway, and four girls including the F Twins, followed by a school security guard, emerge from behind the door. KW walks right into the midst of this group of girls and her bag contacts Tal F. KW, when nearly through and past the group, turns back. KW and Tal F confront each other. As KW takes a step forward Tal F strikes her and KW instantaneously strikes back, whereupon all four girls assault KW and force her to the ground. The security guard intervenes and shields KW by covering her with her body. Two other security personnel quickly arrive, and the altercation ends within ten (10) seconds.

**Legal Analysis**

**A. The School District's Liability For Negligent Supervision**

"Schools are under a duty to adequately supervise children in their charge, and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*see Mirand v. City of New York,* 84 NY2d 44, 49...). A school is obligated to exercise such care over students in its charge that a parent of ordinary prudence would exercise under comparable circumstances (*see id.*; *Ohman v. Board of Educ. of City of N.Y.,* 300 NY 306...). In determining that the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, the third-party acts could reasonably have been anticipated (*see Brandy B. v. Eden Cent. School Dist.,* 15 NY3d 297, 302...; *Mirand v. City of New York,* 84 NY2d at 49...). Actual or constructive notice to the school of prior similar conduct is generally required, because school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily. An injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act (*see Mirand v. City of New York,* 84 NY2d at 49...)." *Khosrova v. Hampton Bays Union Free School District,* 99 AD3d 669, 670-671 (2d Dept. 2012).

"'Even if a breach of the duty of supervision is established, the inquiry is not ended; the question arises whether such negligence was the proximate cause of the injuries sustained' (*Mirand v. City of New York,* 84 NY2d at 50...). 'The test to be applied is whether under all the

circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence' (*id.*). 'Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury' (*Convey v. City of Rye School Dist.*, 271 AD2d at 160...). 'Proper supervision depends largely on the circumstances surrounding the event' (*Mirand v. City of New York*, 84 NY2d at 51...). Moreover, "liability from injury caused by a fight cannot be predicated upon supervisory negligence if the plaintiff voluntarily entered into the fight' (*Janukajtis v. Fallon*, 284 AD2d 428, 430...; *see Keaveny v. Mahopac Cent. School Dist.*, 71 AD3d 955...; *Ambroise v. City of New York*, 44 AD3d 805, 806...; *Williams v. City of New York*, 41 AD3d 468, 468-469...; *McLeod v. City of New York*, 32 AD3d 907, 909...)." *Guerriero v. Sewanhaka Cent. High School Dist.*, 150 AD3d 831, 833 (2d Dept. 2017) (emphasis added)

**B. The Plaintiffs' Voluntary Participation In Fights Precludes Liability On The Part Of The School District For Negligent Supervision**

"Liability for injuries resulting from a fight between two students cannot be predicated on negligent supervision if the plaintiff was a voluntary participant in the fight." *Ambroise v. City of New York*, 44 AD3d 805, 806 (2d Dept. 2007); *McLeod v. City of New York, supra*, 32 AD3d 907, 909 (2d Dept. 2006). *See, Ruggerio v. Board of Education of the City of Jamestown*, 26 NY2d 849 (1970). A student fighting in self-defense, however, is not a "voluntary participant" and is not barred thereby from recovery for the school district's negligent supervision. *See, Ambroise v. City of New York, supra*; *McLeod v. City of New York, supra*; *S.K. v. City of New York*, 19 Misc.3d 493, 497 (Sup. Ct. Kings Co. 2008).

In *Ruggerio, supra,* the facts were these:

> Student, who was a senior, was in position to understand and evaluate consequences of his conduct. He voluntarily chose to expose himself to dangers of fist fight with fellow student by taking off his glasses and coat, and moving out to a more suitable location, and threatening defendant by squaring off with him. The student could have secured the intervention at any time of instructor, who was readily available in office off locker room but instead elected a physical confrontation without regard for risk of injury.

*Id.* The Court of Appeals affirmed the dismissal of a student's claim for negligent supervision because his own conduct demonstrated "a lack of reasonable regard for his safety, was a direct cause of the fight and defeated his right of recovery." *Id.*

Key to the Court of Appeals' holding in *Ruggerio* is that the plaintiff (1) affirmatively sought out the confrontation wherein he was injured, and (2) eschewed available opportunities to avoid physical conflict, in consequence whereof he was deemed a voluntary participant in the ensuing fight as a matter of law and barred from recovering for negligent supervision. *See, id. See also, Janukajtis v. Fallon, supra,* 284 AD2d 428, 430 (2d Dept. 2001) (infant plaintiff ran after fellow student and was struck with a stick). Here, likewise, the evidence indisputably shows that both RB and KW affirmatively sought out the confrontations at issue here and eschewed opportunities to avoid physical conflict by *inter alia* simply walking away and/or securing the intervention of security personnel who were, in each case, in the immediate vicinity of the situs of the altercation.

**1. RB**

The testimony of School Security Officer Joyce establishes that RB sought out a physical confrontation with Tam F and, far from availing herself of Officer Joyce's protection, tried to thwart Joyce's efforts to intervene. Contrary to Plaintiffs' counsel's suggestion, RB *nowhere*

controverts Officer Joyce's testimony that RB told *Joyce* "you know what, I'm just going to take this bitch out right now." The 50-h hearing testimony upon which counsel vainly relies is only to the effect that no one said anything *back to Tam F* when she said, "if you guys touch my sister which I'm going to beat you up." Furthermore, RB's contemporaneous signed written statement that "we all just started fighting," the truth of which she confirmed at her deposition, undermines her belated claim that Tal F began the fight and that RB was only defending herself.

In sum, uncontroverted evidence demonstrates that RB, like the infant plaintiff in *Ruggiero,* affirmatively sought out the confrontation wherein she was injured and elected to engage in physical conflict without regard for the risk of injury instead of securing the intervention of Officer Joyce, who was available in the immediate vicinity of this incident. As a matter of law, then, RB was a voluntary participant in the fight and is barred from recovering for alleged negligent supervision on the part of the School District.

**2. KW**

On January 12, 2016, when KW encountered the F Twins, (1) she knew about the neighborhood brawl that occurred on January 8th; (2) she knew that the F Twins were threatening to beat her up as a result of her connection to RB; (3) she knew that in consequence of that threat she was held out of school on January 11th; and (4) she knew that on the morning of January 12th the F Twins had been involved in yet another physical altercation, in school, with RB.

Nevertheless, as the videotape unequivocally shows, KW chose not just once but twice to confront the F Twins rather than to avoid an encounter with the girls who had threatened her. First, she walked right amidst these girls – neither pausing nor altering her path – with a large bag hanging at her side, virtually assuring that the physical contact that ensued would occur.

Second, having succeeded in bulling her way through and past the group, KW turned back, confronted Tal F, provoked a physical response from her and instantaneously struck back, evidencing her readiness to fight.

Here again, then, as in *Ruggiero,* the evidence demonstrates that KW affirmatively sought out the confrontation wherein she was injured and elected to engage in physical conflict without regard for the risk of injury instead of simply walking away or securing the intervention of the school security officer who was available in the immediate vicinity of this incident. As a matter of law, then, KW, like RB, was a voluntary participant in the fight and is barred from recovering for alleged negligent supervision on the part of the School District.

**C. Plaintiff RB's Cross Motion For Spoliation Sanctions**

Inasmuch as plaintiff RB's claim against the School District cannot survive summary judgment, her motion for an adverse inference charge at trial is moot. In any event, RB failed to demonstrate that spoliation sanctions were warranted in the circumstances of this case.

"A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *Pegasus Aviation I, Inc. v. Varig Logistica S.A.,* 26 NY3d 543, 547 (2015); *SM v. Plainedge Union Free School District,* 162 AD3d 814, 818 (2d Dept. 2018); *Tanner v. Bethpage Union Free School District,* 161 AD3d 1210, 1211 (2d Dept. 2018); *Golan v. North Shore - Long Island Jewish HealthSystem, Inc.,* 147 AD3d 1031, 1032 (2d Dept. 2017).

RB has failed to demonstrate that the School District was obligated to preserve the videotape of her altercation with the F Twins at the time of its destruction. "[I]n the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices" (*Aponte v. Clove Lakes Health Care & Rehabilitation Ctr., Inc.*, 153 AD3d [593] at 594...)." *Tanner v. Bethpage Union Free School District, supra,* 161 AD3d at 1211. In this case, the surveillance videotape footage of RB's incident was recorded over in the ordinary course of school affairs. RB has not shown that there was pending litigation or notice of a specific claim at the time this occurred, or that the School District's action or failure to act was other than in good faith. RB relies heavily on *SM v. Plainedge Union Free School District, supra,* wherein the Second Department held that "given the nature of the infant plaintiff's injuries and the immediate documentation and investigation into the cause of the accident by the defendant's employees, the defendant was clearly on notice of possible litigation and, thus, under an obligation to preserve any evidence that might be needed for future litigation." *Id.*, 162 AD3d at 818. That is simply not the case here. The evidence shows that RB sustained minimal injury for which no medical treatment was obtained or required as a result of the altercation in which she was involved on January 12, 2016, and that the School District conducted the usual investigation incident to a superintendent's hearing at which RB, along with the F Twins, was suspended for her role in the incident. These circumstances were not sufficient to place the School District on notice of possible litigation, or under any obligation to preserve the videotape for use in future litigation.

It is therefore

ORDERED, that the motion of defendant Newburgh Enlarged City School District for summary judgment is granted, Plaintiffs' cross-motion for spoliation sanctions is denied, and Plaintiffs' complaint is hereby dismissed.

The foregoing constitutes the decision and order of the court.

Dated: January 29, 2019
Goshen, New York

ENTER

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE