73147-5

No. 73147-5-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

JAMES HOPKINS, JR., an individual,

Appellant,

v.

SEATTLE PUBLIC SCHOOL DISTRICT NO. 1,

Respondent.

BRIEF OF APPELLANT HOPKINS

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A. INTRODUCTION

This is a case in which the Seattle Public School District No. 1 ("District"), in its zeal to "mainstream" a violent special needs student, breached its duty to protect James Hopkins, Jr. from that special needs student's assault while Hopkins was mandatorily in the District's care.

Washington case law has long recognized a special relationship between school districts and their students where school authorities act *in loco parentis* as to such students. A school district must take precautions to protect students in its custody from reasonably foreseeable dangers. Here, the special needs student's violence, given his history of acting out and violence in the school setting, was entirely foreseeable.

The trial court, however, failed to instruct the jury on the very important special protective relationship between a school district and a student like Hopkins. Moreover, the trial court permitted comparative fault to be an issue in the case when that special relationship barred comparative fault here as a matter of law. The trial court further stacked the deck against Hopkins by instructing the jury on mainstreaming special needs students. The trial court's instructional error was prejudicial, necessitating a new trial.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in giving Instruction 5 to the jury.

2. The trial court erred in giving Instruction 8 to the jury.

3. The trial court erred in giving Instruction 9 to the jury.

4. The trial court erred in giving Instruction 13 to the jury.

5. The trial court erred in giving Instruction 14 to the jury.

6. The trial court erred in giving Instruction 17 to the jury.

7. The trial court erred in failing to give Plaintiff's Proposed Instruction 8.

8. The trial court erred in failing to give Plaintiff's Proposed Instruction 9.

9. The trial court erred in failing to give Plaintiff's Proposed Instruction 10.

10. The trial court erred in entering the judgment on the jury's verdict on February 20, 2015.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in instructing the jury on the District's duty, ignoring that the District had a special relationship with a student like Hopkins in its custody that required it to protect him from reasonably foreseeable dangers? (Assignments of Error Numbers 1-10).

2. Given the special relationship between the District and Hopkins, did the trial court err in instructing the jury on Hopkins' alleged comparative fault where comparative fault was not available to the District

as a matter of law? (Assignments of Error Numbers 1-10).

3. Did the trial court err in giving an instruction to the jury on "mainstreaming" the violent special needs student who assaulted Hopkins where such an instruction was not relevant to the District's duty to Hopkins and was tantamount to an improper comment on the evidence? (Assignments of Error Numbers 1-10).

C. STATEMENT OF THE CASE

This case arises from an assault that occurred on June 7, 2006 at Aki Kurose Middle School, a school in the Seattle School District. CP 1470. E.E.,[1] who was 14 years old at the time of the incident, violently attacked Hopkins in the School's boys' locker room after a physical education class. *Id.* At the time of the incident, Hopkins was a 6th grader and 12 years old. CP 1469. E.E. was a much larger child than Hopkins. CP 1479.

The District knew of E.E.'s increasingly violent behavior. CP 197, 253. He was clinically evaluated as being at risk for aggression. CP 199. His history included threatening in class to kill another student with a gun, other verbally threatening behavior, multiple class disruptions resulting in referrals and suspension, suspension for fighting and "emergency expulsion" for assault in 2005. CP 204. The expulsion document stated

[1] The student who assaulted Hopkins is referred to as E.E., to maintain his confidentiality.

"This assault was serious." CP 204. In June 1, 2005, after the emergency expulsion, E.E.'s special education teacher noted that he was getting into angry physical exchanges with other students a few times per month. CP 226. In November 2005, he assaulted another student in the parking lot in front of eyewitnesses. CP 239. It was noted to be the second assault that school year. *Id.*

E.E.'s individual education plan ("IEP") specifically required placement into a "self contained classroom." CP 237. His behavior needed to be monitored and addressed in the hallway, cafeteria, gymnasium, anywhere "on and off school grounds." CP 257.

Despite this plan, in January 2006, E.E. was again suspended for assault. CP 264. Shortly after returning from suspension, he assaulted the appellant in this case, Hopkins. CP 269.

E.E. was not supervised by District staff at the time of the incident. CP 269. The only SSD employee nearby was not watching E.E. at the time of his assault on Hopkins. That teacher, physical education teacher Michael Kaiser, was not in the locker room when the assault occurred and failed to observe the incident. CP 269, 1243. Prior to the assault, Mr. Kaiser was never informed by the District that E.E. had a pattern of assaulting other students. CP 1257. The principal of the school at the time, BiHoa Caldwell, testified that it was a mistake to not have informed

Mr. Kaiser about E.E.'s past violent conduct against other students. RP 1/26/15 at 40. Student witnesses reported to staff that E.E. ran up to Hopkins and punched him in the back of the head, causing him to fall and fracture his jaw on the cement floor. RP 1/28/15 at 41-42.

Hopkins filed the present action against the District in the King County Superior Court on November 1, 2013. CP 1-4. The case was initially assigned to the Honorable Douglas North. The District answered, asserting a number of affirmative defenses. CP 5-10.

Thereafter, Hopkins moved for summary judgment on the District's affirmative defenses. CP 17-36. On December 5, 2014, the trial court granted motion in part striking the District's affirmative defenses for failure to state a claim upon which relief may be granted; Hopkins' damages and/or injury were proximately caused by the actions and/or omissions of third persons, including the alleged assailant; Hopkins' injuries and damages arose out of Hopkins' voluntary exposure to conditions of which he had knowledge; failure to join an indispensable party; and Hopkins' injuries/damages were caused by intentional conduct of another student. CP 372-74. The court did not strike the District's comparative fault or failure to mitigate defenses. CP 373.

The case was reassigned to the Honorable Judith H. Ramseyer for trial. In his motion in limine, Hopkins renewed concerns about the

mainstreaming issue, CP 875-76 and Hopkins' alleged comparative fault. CP 878-79. The trial court denied Hopkins' motions in limine on these issues. CP 1316.

The case was ultimately tried over a period of seven days. When the trial court instructed the jury on duty, those instructions omitted any reference to the special duty the District owed a student like Hopkins, and also refused Hopkins' proposed instructions detailing that special duty. CP 1665-1693. The court also gave an instruction to the jury that federal and state laws required public school districts to provide "appropriate education" to disabled students, and to educate disabled children in the "general education environment." CP 1681. The trial court also included instructions on Hopkins' comparative fault. CP 1669, 1672, 1677, 1678. Hopkins objected to these instructional errors pursuant to CR 51(f). RP 02/25/15 at 26-56. Hopkins filed a motion for judgment as a matter of law on pre-existing conditions, mitigation of damages, and special damages he had incurred. CP 1638-55. The trial court denied the motion. RP 02/25/15 at 23-26.

The jury returned a verdict for the District, CP 1694-95, and the trial court entered a judgment on the jury's verdict on February 20, 2015. CP 1696-98. Hopkins timely sought review by this Court. CP 1699-1704.

D. SUMMARY OF ARGUMENT

In using a standard WPI negligence instruction, the trial court erred in failing to properly instruct the jury on the District's special *in loco parentis* relationship with Hopkins while he was under that District's custody. That special relationship required it to protect him from reasonably anticipated dangers. Hopkins offered instructions detailing that duty, but the trial court rejected them. Hopkins was prejudiced by the trial court's misstatement of applicable law as he was prevented from arguing that special relationship duty.

Building on the trial court's failure to properly recognize that the District's duty to Hopkins arose out of its special relationship with him, the Court allowed comparative fault to be raised by the District here when the District's special relationship with Hopkins foreclosed the availability of that issue to the District as a matter of law.

The trial court's irrelevant instructions on the need to "mainstream" E.E. only compounded the trial court's instructional error on duty. The trial court unduly suggested that the District had a mandatory duty to mainstream E.E. that absolved it of any duty to protect Hopkins.

This Court should order a new trial.

E. ARGUMENT

(1) Overview of a School District's Duty to Its Students

Washington law has long recognized the existence of a special relationship between a school district and its students that obligates the district to protect students in its custody from reasonably anticipated dangers. This standard was articulated by our Supreme Court as early as *Briscoe v. School District No. 123, Grays Harbor County*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949),[2] a case involving injuries to a student at the hands of fellow students in a game on school grounds during the afternoon recess. In reversing a dismissal of the plaintiff's action, the Court stated:

> ... when a pupil attends a public school, he or she is subject to the rules and discipline of the school, and the protective custody of the teachers is substituted for that of the parent.
>
> As a correlative of this right on the part of a school district to enforce, as against the pupils, rules and regulations prescribed by the state board of education and the superintendent of public instruction, a duty is imposed by law on the school district to take certain precautions to protect the pupils in its custody from dangers reasonably to be anticipated among which dangers we think should fairly be included the danger incurred from playing games inherently dangerous for the age group involved, or likely to become dangerous if allowed to be engaged in without supervision. *See 2 Restatement, Torts* (1934) 867, § 320.
>
> The extent of the duty thus imposed upon the respondent school district, in relation to its supervision of the pupils within its custody, is that it is required to exercise such care as an ordinarily reasonable and prudent

[2] *See also, Gattavara v. Lundin*, 166 Wash. 548, 554, 7 P.2d 958 (1932) (district owed duty where it allowed cars to traverse school grounds during school hours); *Rice v. School Dist. 302*, 140 Wash. 189, 248 Pac. 388 (1926) (live electric wire).

> person would exercise under the same or similar circumstances.

Five years after *Briscoe,* our Supreme Court again discussed a school district's special duty in *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953). The Court noted that a District's custodial role imposes a duty of "special application" to prevent third persons from harming students. *McLeod,* 42 Wn.2d at 322. Citing the *Restatement (Second) of Torts*, § 320, the *McLeod* court explained:

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty of exercising reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.

McLeod, 42 Wn.2d at 322.

A district's special duty extends to off-campus activities, *Carabba v. Anacortes School Dist. No. 103,* 72 Wn.2d 939, 435 P.2d 936 (1967) (athletics) or even extracurricular activities. *Sherwood v. Moxee School Dist. No. 90*, 58 Wn.2d 351, 363 P.2d 138 (1961) (death during lettermen's initiation ceremony); *Travis v. Bohannon*, 128 Wn. App. 231,

238, 115 P.3d 342 (2005) (injuries occasioned from use of a hydraulic log splitter in the course of an off-campus extracurricular "work day.").

A school district owes a special duty to its students to anticipate dangers that may reasonably be anticipated and to take reasonable precautions to prevent harm to the students from occurring. *McLeod*, 42 Wn.2d at 320. Thus, a district is liable for a student's injuries arising from the foreseeable wrongful acts of third parties. *Travis*, 128 Wn. App. at 238. Harm is foreseeable if the risk from which it results was known or in the exercise of reasonable care should have been known. *Id.*[3]

Among the foreseeable risks to students are intentional torts. In *McLeod*, our Supreme Court found a school district potentially breached its duty to a student raped by other students in an unlocked, unsupervised room under the playing field bleachers. *Id.* at 318. The Court noted that the question was not whether the school should have anticipated forcible rape by 12-year-olds, but whether a "darkened room under the bleachers might be utilized during periods of unsupervised play for acts of indecency between schools boys and girls." *Id.* at 322. In other words, "the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual

[3] The occurrence is not foreseeable only when it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod,* 42 Wn.2d at 323.

harm fell within a general field of danger which should have been anticipated. *Id.* at 321. Safeguarding children from the general danger would have protected the rape victim from the particular harm. *Id.* In such a context, the intentional misconduct of third parties is considered foreseeable despite the fact that there was no allegation of prior misconduct of a similar nature by the offending student.

In *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1106, *review denied*, 120 Wn.2d 1005 (1992), a school librarian had sexual contact with a high school student. The student and his parents then sued the librarian, the school district, and its superintendent. The trial court granted summary judgment to the defendants because the district had no notice of the librarian's risk to his students. Division II affirmed the trial court's decision, dismissing claims of negligent hiring, retention, and supervision. *See also, Scott v. Blanchet High School*, 50 Wn. App. 37, 747 P.2d 1124 (1987), *review denied*, 110 Wn.2d 1016 (1988) (no liability of school or Catholic archdiocese for sexual relations between student and teacher where contact was too remote to school hours or activities).

But in *J.N. By & Through Hager v. Bellingham School Dist. No. 501,* 74 Wn. App. 49, 871 P.2d 1106 (1994), a case remarkably similar to the present case, a first grade student was repeatedly sexually assaulted by

a fourth grade student on school grounds in the boys' rest room. The trial court granted summary judgment to the school district.

This Court reversed the district's summary judgment victory in *J.N.*, stating: "[W]here the disturbed, aggressive nature of a child is known to school authorities, proper supervision requires the taking of specific, appropriate procedures for the protection of other children from the potential for harm caused by such behavior." *Id.* at 60. The district there had ample notice of the violent history of the student who committed the assaults, even though it did not have notice of the student's specific violent behavior, a fact important to the trial court. *Id.* at 56.

In *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2004), the most recent Supreme Court decision on school district liability, the Court described the duty owed by a district to a student in a case where a teacher engaged in sexual conduct with a student. In rejecting the notion that an underage student's "consent" to the sexual contact could constitute contributory fault, the Court explained the special relationship between the school and its students:

> ... a school has a "special relationship" with the students in its custody and a duty to protect them "from reasonably anticipated dangers." *Niece v. Elmview Group Home*, 131 Wn.2d 39, 44, 929 P.2d 420 (1997) (citing *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953)). The rationale for imposing this duty is on the placement of the student in the case of the school

> with the resulting loss of the student's ability to protect himself or herself. *Niece,* 131 Wn.2d at 44, 929 P.2d 420. The relationship between a school district and its administrators with a child is not a voluntary relationship, as children are required by law to attend school. *See McLeod*, 42 Wn.2d at 319, 255 P.2d 360. Consequently, "the protective custody of teachers is mandatorily substituted for that of the parent."

Id. at 70. Given the vulnerability of children under the care of school districts, the Court also ruled that contributory fault could not be asserted by a school district against a student. *Id.* at 70-71.

In the recent case of *N.L. v. Bethel School Dist.*, ___ Wn. App. ___, 348 P.3d 1237 (April 28, 2015),[4] Division II reversed a summary judgment in the district's favor, holding that the district had a duty to a student who was sexually assaulted off school grounds by a fellow student who was a registered sex offender. 348 P.3d at 1243. That court found that the sex offender/student's lengthy history of school discipline and interactions with the criminal justice system for illicit sexual conduct, known to the district, and the district's failure to have a policy in place for the monitoring/supervision of student sex offenders were relevant to the breach of the District's duty to the plaintiff. *Id.*

Division II reaffirmed the special duty principles set forth in *McLeod* and *Briscoe,* and further noted that the sex offender/student's

[4] Due to the recency of publication, only the Pacific Reporter citation was available at the time of filing of this brief.

dangerousness made the ultimate assault on the plaintiff conduct that was well within the general field of danger for which the district was responsible. *Id.* at 1242.

Thus, the District here had a clear-cut duty under Washington law arising out of its special relationship with Hopkins. That duty was not simply to do what an ordinary "reasonably careful person" would do under similar circumstances. It was specific to the District's special relationship to Hopkins. That duty mandated that the District take appropriate steps to protect students like Hopkins, who was involuntarily in the District's custody, from reasonably anticipated dangers.

(2) The Trial Court Erred in Its Instructions to the Jury on the District's Special Relationship and Duty to Hopkins

The trial court here erred in giving its Instructions 9, 17, and 21 to the jury on the District's duty to Hopkins and in failing to give Hopkins' proposed instructions 8, 9, and 10 that would have better instructed the jury on the District's special duty. *See* Appendix.

Instead of instructing the jury in the language of the case law arising from the District's special protective relationship with Hopkins, the trial court chose to instruct the jury in the general negligence language of WPI 10.01. In so instructing the jury, the trial court misstated the law and deprived Hopkins of the opportunity to argue his theory of the case.

A court commits prejudicial error if it erroneously instructs the jury on the law. As our Supreme Court noted in *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266-67, 96 P.3d 386 (2004):

> This court reviews de novo the alleged errors of law in a trial court's instruction to the jury. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d (1995). Instructions are inadequate if they prevent a party from arguing this theory of the case, mislead the jury, or misstate the applicable law. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (citing *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)). As with a trial court's instruction misstating the applicable law, a court's omission of a proposed statement of the governing law will be "reversible error where it prejudiced a party." *Hue*, 127 Wn.2d at 92, 896 P.2d 682.

See also, Fergen v. Sestro, 182 Wn.2d 794, 802-03, 346 P.3d 708 (2015).

Hopkins' proposed instructions 8-10 accurately reflect the law in Washington derived from cases like *Briscoe, McLeod, Christensen, and J.N.*, and those instructions should have been given to the jury here.

The trial court's duty instructions did not include any explanation of the District's duty to protect Hopkins. They did not explain the District's special involuntary custodial relationship with Hopkins giving rise to its duty to exercise reasonable care to protect Hopkins from the reasonably foreseeable acts of E.E. The instructions did not include the legal standard set forth in *J.N.* that a school must take "appropriate

procedures for the protection of other children from the potential for harm caused by" other students.

The District's duty here went beyond simply reasonable care. A person who does not have custodial control over others may not think it is "reasonable" to exercise constant monitoring and supervision over another person. Yet that is exactly the duty the District had here. The jury should have been informed of the applicable special duty the District owed Hopkins.

The omission of these established legal principles is an error, an error that prejudiced Hopkins, requiring a new trial here.

(3) The Trial Court Erred in Instructing the Jury on Hopkins' Alleged Comparative Fault Where Such an Instruction Ignores the District's Special Relationship/Duty to Hopkins and Is Unavailable as a Matter of Law

The trial court denied both Hopkins' motion for summary judgment and his motion *in limine*, which sought to bar the District's comparative fault defense. CP 31-32, 862, 879. The court instead instructed the jury on this issue, ignoring the fact that the District's duty to Hopkins, based on their special custodial relationship, barred the availability of this defense to the District *as a matter of law*. This was error.[5]

[5] Hopkins anticipates that the District may claim that the instructions on comparative fault, even if erroneous, may constitute harmless error. Such an argument is

The sole evidence relied upon by the District below to sustain its comparative fault argument was evidence that Hopkins, twelve years old at the time, may have mumbled "bitch" under his breath after bumping into E.E. in the boys' locker room. Based on this evidence, and contrary to the legal arguments against allowing the defense, the trial court allowed the District to argue to the jury that Hopkins was at fault for causing E.E. to assault him. CP 1316.

Because our Supreme Court has refused to allow this affirmative defense given the special custodial relationship of the District with Hopkins and the vulnerability of children in the custody of school officials, this issue should not have been in the case as a matter of law. The issue further detracted from the District's special duty to Hopkins, and prejudiced the result.

In *Christensen v. Royal Sch. Dist. No. 160*, Washington's Supreme Court considered the following question:

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mistaken. In *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010), a jail inmate committed suicide. Although the jury found the city negligent, it also found its negligence was not the proximate cause of the inmate's death. Our Supreme Court reversed the judgment on the verdict in the city's favor because the trial court gave erroneous instructions on assumption of the risk and comparative fault, even though the trial court properly instructed the jury on proximate cause. The Court held that the special relationship/duty owed by the city to the inmate could not be "nullified" by assumption of the risk, or comparative fault. The Court determined that the erroneous instructions on assumption of the risk and comparative fault effectively caused the jury to reach its decision on proximate cause, necessitating a reversal. *Id.* at 643-44. This case is no different.

> May a 13 year old victim of sexual abuse by her teacher on school premises, who brings a negligence action against the school district and her principle for failure to supervise or for negligent hiring of the teacher, have contributory fault assessed against her under the Washington Tort Reform Act for her participation in the relationship?

156 Wn.2d at 64. After considering the purpose of the Tort Reform Act, the Court refused to allow the affirmative defense of comparative fault under the facts of the case, reasoning that due to the special involuntary custodial relationship between a school district and its students, the student could not protect himself or herself. *Id.* at 70-71. *See also, Travis*, 128 Wn. App. at 238-39 ("The usual relationship between student and school is that the child must attend school and obey school rules. Students under the control and protection of the school are thus not able to protect themselves. The protective custody of teachers is substituted for that of the parents.").

Although *Christensen* involved sexual assault, the same special relationship and public policy at issue in *Christensen* is present in this case. Hopkins was a twelve-year old child that was supposed to be under the District's protection at the time he was assaulted by a violent special needs child. Even if he mumbled "bitch" under his breath before being brutally attacked, the District should not have been allowed to argue that

Hopkins was at fault for being attacked by a violent, unsupervised student that the District knew to be a danger to other students.

The District had a special relationship with Hopkins as a student in its care. This special duty arises because children do not always behave rationally or have the tools to recognize potential dangers. With this relationship came the attendant duty to protect Hopkins from the foreseeable violent conduct of a student also in its custody and control. The District's should not have been allowed to argue that 12-year-old children in its protective care have themselves to blame when they have the audacity to defend themselves verbally when physically attacked by another student.

(4) The Trial Court Erred in Giving an Instruction to the Jury on Mainstreaming E.E.

The trial court also erred in giving Instruction 17 to the jury on mainstreaming E.E. CP 1681. The instruction was requested by the District. CP 847. It was irrelevant to the legal issues on trial. Having failed to properly instruct the jury on the District's special protective duty to Hopkins, the trial court's Instruction 17 was an improper comment on the evidence, directing the jury to rule in the District's favor.

Article IV, § 16 prohibits courts from commenting on the evidence. Judges are to declare the law and this provision prevents a

judge from influencing the jury by conveying expressly or implicitly the judge's personal opinion regarding the credibility, weight, or sufficiency of evidence introduced at trial, *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970), or the merits of a case. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 616 (1988). Instructions may constitute a comment on the evidence where the court unduly emphasizes an aspect of the case instead of enunciating the essential elements of the legal rules necessary for the jury to reach a verdict is a comment on the evidence. *Harris v. Groth*, 31 Wn. App. 876, 881, 645 P.2d 1104 (1982), *aff'd,* 99 Wn.2d 438, 663 P.2d 113 (1983); *Laudermilk v. Carpenter*, 79 Wn.2d 92, 100, 457 P.2d 1004 (1969). Similarly, instructions deciding factual issues as a matter of law constitute an improper comment on the evidence. *State v. Becker*, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997); *State v. Jackman*, 156 Wn.2d 736, 744-46, 132 P.3d 136 (2006).

A jury instruction that emphasizes a particular fact or piece of evidence, even if legally correct, can constitute an improper comment on the evidence. *Laudermilk,* 78 Wn.2d at 100. Our Supreme Court has described this as avoiding "slanted instructions" that "point up, underline, or buttress" portions of one party's argument. *Id.*

While omitting the District's special duty to Hopkins, the trial court, through Instruction 17, unduly emphasized that the District had a

special duty to E.E. to educate and "mainstream" him, suggesting that somehow the District *only* had a greater and special legal obligation to E. E. In the jury's mind, reading the instructions as a whole, the District was under particular obligation to allow E.E. freedom and normalcy, even though he was a known and immediate risk to other students, but under no special obligation to Hopkins.

There is nothing mutually exclusive about protecting students from harm and accomplishing the District's educational goals for E.E. The District apparently believed that educating E.E. could be accomplished without sacrificing the safety of other students, although it did not do its duty in effectuating the latter goal.

Also, Instruction 17 was irrelevant. The issue of whether E.E. was entitled to mainstreaming under state or federal law was not a factor in the District's failure to protect Hopkins from reasonably foreseeable harm. Hopkins never argued that E.E. should not be educated or mainstreamed where appropriate, but argued that he should not have been left unsupervised in a locker room around other students given his history of violence. CP 914. E.E. was not in the locker room unsupervised because of mainstreaming; the District's own documents demonstrated that E.E. was unsuited to have unsupervised contact with other students, whether "mainstreamed" or not. It is absurd to suggest that the District was

somehow legally compelled to let E.E. roam school grounds looking for his next victim.

Any "mainstreaming" requirement was irrelevant to the issue of whether E.E.'s unsupervised presence in the boys' locker room constituted a foreseeable risk of harm to Hopkins. That argument was the only defense to the duty the District could raise, and it was unduly emphasized by the trial court. State or federal mainstreaming requirements could not constitute a legitimate justification for the District's failure to supervise E.E., particularly given his long history of violent conduct.

The District did not cite any authority compelling the trial court to advise the jury about E.E.'s mainstreaming as an implicit defense to its duty of care to Hopkins. CP 847. The authority cited by the District to justify Instruction 17 does not support the instruction. In *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 21-22, 317 P.3d 481 (2013), *review denied*, 180 Wn.2d 1016 (2014), the court concluded that merely because a student who shot and killed a fellow student was diagnosed as schizophrenic, such a diagnosis did not render his conduct foreseeable to the School District that had no indication from his school conduct or medical records that he was violent in any fashion, in direct contrast to the District's knowledge of E.E.'s long record of violence here. The Estate there argued that the student should not have been placed in the general

educational environment, *id.* at 22, making relevant the issue of his entitlement to be included in school activities and programs. No such argument was advanced by Hopkins here in contending that the District should have better monitored/supervised E.E. Simply stated, *Kok* does not make mainstreaming a defense to a school district's liability for failing to protect a student in its custodial care, as the District essentially persuaded the trial court here.

In light of the fact that the trial court refused to include an instruction explaining the District's special duty to protect Hopkins, the jury instructions tilted the jury's view of the case to the District's position, and constituted an impermissible comment on the evidence. *Harris*, 31 Wn. App. at 881; *Laudermilk*, 79 Wn.2d at 100.

By giving Instruction 17, the trial court implied to the jury that the District could legitimately claim that its special relationship with Hopkins was altered and its duty to him was truncated by the mere fact E.E. had to be included in District programs and activities such as physical education. That was misleading, and unduly emphasized the District's defense, constituting support for the District's position in violation of article IV, § 16.

F. CONCLUSION

Ignoring long-standing Washington law on a school district's duty to protect students with whom it stands *in loco parentis*, and over-emphasizing the necessity of mainstreaming a violent special needs student, the trial court here committed prejudicial error in instructing the jury. The jury responded by exonerating the District from any liability for the vicious assault on Hopkins by E.E., a special needs student with a long history of violence.

This Court should reverse the trial court's judgment, and award Hopkins a new trial. Costs on appeal should be awarded to Hopkins.

DATED this 20th day of July, 2015.

Respectfully submitted,

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APPENDIX

Court's Instruction 5:

> The following is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.
>
> (1) The plaintiff claims that the defendant Seattle Public School District was negligent in failing to prevent E.E. from assaulting plaintiff. The plaintiff claims that defendant's conduct was a proximate cause of injuries and damage to plaintiff. The defendant denies these claims.
>
> (2) In addition, the defendant claims as an affirmative defense that the plaintiff was contributorily negligent in one or more of the following respects: by provoking the assault; and by failing to mitigate his damage. The defendant claims that plaintiff's conduct was a proximate cause of plaintiff's own injuries and damage. The plaintiff denies these claims.
>
> (3) In addition, the defendant claims and plaintiff denies that the assailant, E.E.'s, intentional act was a proximate cause of plaintiff's injury.
>
> (4) The defendant further denies the nature and extent of the claimed injuries and damage.

CP 1669.

Court's Instruction 8:

> The plaintiff has the burden of proving each of the following propositions:
>
> First, that the defendant acted, or failed to act, in one of the way's claimed by plaintiff and that in so acting, or failing to act, the defendant was negligent;

Second, that the plaintiff was injured;

Third, that the defendant's negligence was a proximate cause of the plaintiff's injuries.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

The defendant has the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent.

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence.

CP 1672.

Court's Instruction 9:

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

CP 1673.

Court's Instruction 13:

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

CP 1677.

Court's Instruction 14:

> If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

CP 1678.

Court's Instruction 17:

> Both federal and state laws require public school districts to provide appropriate education to students with disabilities. Both federal and state laws also require that, to the maximum extent appropriate, public school districts must educate children with disabilities in the general education environment.

CP 1681.

Court's Instruction 21:

> In calculating a damage award, you must not include any damages that were caused by the acts of E.E. and not proximately caused by the negligence of defendant. Any damages caused solely by E.E. and not proximately caused by the negligence of Seattle Public School District must be segregated from and not made a part of any damage award against Seattle Public School District.
>
> If you find E.E. was the sole proximate cause of plaintiff's damages, your verdict should be for defendant.

CP 1686.

Plaintiff's Proposed Instruction 8:

> A school official stands in the place of a parent when the student is in the school's custody. The placement of children under a school's custody and control gives rise to a duty on the part of the school to exercise ordinary care to protect students in its custody from reasonably anticipated dangers, including from the intentional or criminal conduct of third parties.

CP 947.

Plaintiff's Proposed Instruction 9:

> Negligence is the failure to exercise ordinary care. Ordinary care is that degree on care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions. A school district fails to exercise ordinary care to protect students if it fails to anticipate dangers that may reasonably be anticipated or to take reasonable precautions to prevent the harm from occurring.

CP 948.

Plaintiff's Proposed Instruction 10:

> Whether a risk of harm is reasonably foreseeable under the same or similar circumstances depends upon the particular defendant's characteristics and experience. Where the disturbed, aggressive nature of a child is known to school authorities, proper supervision requires the taking of specific, appropriate procedures for the protection of other children from the potential for harm caused by such behavior.

CP 949.

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the Brief of Appellant Hopkins in Court of Appeals Cause No. 73147-5-I to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 20th, 2015, at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick/Tribe