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.

REPLY BRIEF OF APPELLANT HOPKINS

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A. INTRODUCTION

Both parties in this case agree that jury instructions must not only accurately state the law, but they must be balanced and refrain from slanting the jury's perspective in favor of one party's theory of the case. However, they disagree on whether the trial court adhered to these principles.

The District had a particularized duty to protect its students from other violent students, based on the District's special custodial relationship to James Hopkins, Jr., the student in its care. The trial court improperly rejected jury instructions describing the scope of the District's duty. Instead, the jury was told that the District had only a generalized "ordinary" duty of care to Hopkins, but had a special, heightened duty to "mainstream" the violent aggressor in this case, E.E.

No person, including a middle school student, can legally consent or "contribute" to being suddenly, intentionally, and violently assaulted. The jury was instructed that Hopkins, the victim of a sudden attack, contributed to his injuries by speaking to E.E. Consent is not a defense to intentional assault and battery in the criminal context, and contributory negligence is not available as a defense to the same act in the civil context.

B. REPLY ON STATEMENT OF THE CASE

The District largely does not contest that it had ample advance knowledge of E.E.'s violent history, although it describes that violence using soft language like "disruptive" or "minor assaultive behavior." Br. of Resp't at 3-10. However, some of the District's factual assertions merit a reply.

The District mischaracterizes the testimony of Judith Billings, the former state Superintendent of Public Instruction, Hopkins' standard of care expert. Br. of Resp't at 10. Billings said that E.E. need not have one-on-one supervision *during class,* but should during "passing times." RP 1/22/15 at 140. E.E. did not assault Hopkins during class, but in a locker room. CP 269. Also, contrary to the District's assertion, Billings did NOT say monitoring E.E. from halfway across the gym would have been appropriate:

> A: I believe he should have been close enough to keep close supervision of E.E.
>
> Q: And how close would that be in terms of distance, ma'am?
>
> A: Close enough to have him in his line of sight and be aware of what was happening with his behavior.
>
> ...
>
> Q. Okay, if he's halfway across the gym, and he can see him, is that close enough?
>
> A. It's possible. *And it might not be close enough.*

RP 1/22/15 at 144-45 (emphasis added).

The District says it made the P.E. teacher, Michael Kaiser, aware of E.E.'s history of assaults. Br. of Resp't at 10. However, Kaiser testified that he received E.E.'s file, but he had "60 kids that I'm responsible for" and did not remember learning that E.E. had a violent history. RP 1/26/15 at 27. Kaiser also noted that there are many EBD students of widely varying behaviors and issues. *Id.* The District admitted it should have specifically informed Kaiser about E.E.'s very recent history of violent assaults *against other students*. RP 1/26/15 at 40.

The District claims that Instruction 8 is the "standard WPI 10.01 on the duty of ordinary care," and that Hopkins did not object to it below. Br. of Resp't at 15. The District therefore suggests that Hopkins should not be able to assign error to Instruction 8 on appeal. *Id.*

The Court's Instruction 8 does not recite the duty of ordinary care, it explains what each party has the general "burden of proving" at trial. CP 1672. Hopkins does not assign error to Instruction 8 on the grounds that it misstates the duty of care, because it does not state the duty. *Id.* Hopkins assigns error to that instruction because it states that Hopkins could be contributorily negligent. *Id.* As Hopkins moved for a ruling as a matter of law that he could not be contributorily negligent, and was

denied, it would have been futile to object to Instruction 8. The issue is preserved by his motion to strike the contributory negligence defense.[1]

Finally, the District concedes the trial court included a jury instruction pronouncing that the District owed E.E. a special duty under the law because it "was a significant part of the District's theory of the case...." Br. of Resp't at 16. The District also concedes that Hopkins' proposed special duty instructions were a correct statement of the law, but argues that they were unnecessarily "detailed elaborations." *Id.* at 21.

C. SUMMARY OF ARGUMENT

Jury instructions must properly state the applicable law and be balanced so that *each* party may argue its theory of the case. Here, each party had a theory of the case that the District had a special duty to two of its students, the victim and the perpetrator.[2] The District requested and received a special duty instruction, but Hopkins' instructions on duty, while legally correct, were rejected as being "overly elaborate" and too "detailed." Instead, the trial court instructed the jury that the District owed a special duty of care to E.E., the violent aggressor, but only an "ordinary"

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[1] The District points out that Hopkins did not object to the inclusion of a "negligence of a child instruction" but objected to the Court's contributory negligence instructions. Br. of Resp't at 15. Thus, the District apparently concedes that the contributory negligence issue is preserved.

[2] While E.E. was not a defendant in this case, he too was a "victim" insofar as the District's failure to protect Hopkins from E.E. was also a failure to channel E.E. away from circumstances in which E.E.'s known propensity for violence against other students would manifest itself.

duty of care to Hopkins, the injured victim. In so doing, the trial court credited the District's theory of the case and deprived Hopkins of equal opportunity to advance his theory of the case.

The trial court also erred in concluding that the victim of a sudden, intentional assault can be somehow culpable in the attack. Just as a 13-year-old student cannot "consent" to sexual abuse, no person can "consent" to a sudden, violent attack. On remand, this Court should instruct the trial court that a comparative negligence instruction was inappropriate here.

This Court should order a new trial.

D. ARGUMENT

(1) This Court Should Reverse and Remand for a New Trial Because the Jury Instructions Were Legally Deficient and Slanted in Favor of the District

(a) The Trial Court Erred in Rejecting Jury Instructions that the District Concedes Were a Correct Statement of the Special Duty of Care to Hopkins, and In So Doing Impermissibly Slanted the Verdict

In his opening brief, Hopkins argued that describing the District's duty to Hopkins only "ordinary care" was legal error. Hopkins cited numerous cases enunciating this special duty of care, including *Briscoe v. School District No. 123, Grays Harbor County*, 32 Wn.2d 353, 362, 201

P.2d 697 (1949) and *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953).

In defense of instructions that tipped the scales in its favor, the District claims it owes only a duty of ordinary care that any stranger might owe to another. Br. of Resp't at 20. However, the District does not state that Hopkins' proposed instructions incorrectly stated the law, only that they included "detailed elaborations" of the duty that the District believed were unnecessary. *Id.* at 21.

Remarkably, the District does not even cite to *McLeod,* the watershed Supreme Court decision that describes the special *in loco parentis* relationship between a school district and a student. Also, the District only cites *Briscoe*, another major Supreme Court decision on the special relationship duty, with respect to the comparative fault issue. *See* Br. of Resp't at iii-iv, 27. The District claims that cases such as *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 18, 317 P.3d 481 (2013), *review denied*, 180 Wn.2d 1016, 327 P.3d 55 (2014), support its view.

Although *Kok* does not analyze the duty issue, it does acknowledge and describe the special relationship. *Kok* does *not* simply state that a school district "owes a duty of ordinary care" to its students. The full passage from *Kok* proclaims:

> A school district is required to exercise reasonable care—that of a reasonably prudent person under similar circumstances—when supervising students within its custody. *J.N. v. Bellingham Sch. Dist. No. 501,* 74 Wn. App. 49, 57, 871 P.2d 1106 (1994). "[A] school district has the power to control the conduct of its students while they are in school or engaged in school activities, and with that power goes the responsibility of reasonable supervision." *Peck v. Siau,* 65 Wn. App. 285, 292, 827 P.2d 1108 (1992).

The District dismisses all of the holdings of these many cases establishing the special relationship, arguing that these cases merely explain "why" the District owes a duty of ordinary care. Br. of Resp't at 20. The District avers that an "ordinary care" jury instruction that omits language about the special relationship does not misstate the law on a school district's duty. *Id.*

The District is wrong in stating that decisions defining the special relationship are merely explaining "why" there is a duty of care. The District would have been wise to read the duty analyses in *J.N.* and *Peck* – the cases upon which the *Kok* court relied – rather than simply glossing over them with the parenthetical "summarizing cases." Br. of Resp't at 20.[3] If it had, the District would have discovered that those cases very specifically describe "*the scope of a school district's duty*" exactly as Hopkins' rejected instruction recited:

[3] As with *McLeod* and *Briscoe*, the District does not even cite to *Peck*, and cites *J.N.* only to the extent that case discusses foreseeability. Br. of Resp't at iv, 22.

> A school district's duty requires that it exercise reasonable care to protect students from physical hazards in the school building or on school grounds. [I]t also requires that the district exercise reasonable care to protect students from the harmful actions of fellow students, a teacher, or other third persons.

J.N., 74 Wn. App. at 58, *quoting Peck,* 65 Wn. App. at 292.

The District claims that the trial court could ignore the language of these decisions because they are merely "unnecessary elaborations" regarding the duty of care, citing *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). Br. of Resp't at 21.

The District is correct about *Bodin's* general proposition, but the facts of that case do not assist the District in its argument. In *Bodin,* the duty instruction that the jury received – on the agreement of the parties – was highly specific:

> The defendant has a duty to exercise ordinary care in connection with the construction, design, maintenance and repair of its sewer lagoon and tide gate and pump station and to keep, construct, and maintain them in a manner and condition that is reasonably safe for adjacent property owners.

Id. at 732. The *Bodin* court held that this very specific duty instruction did not need to be "augmented" by "detailed elaborations" that the plaintiff offered in addition. *Bodin,* 130 Wn.2d at 732. Also, there was no issue in *Bodin* about any competing duty to the third party tortfeasor, thus no

danger of slanted instructions weighing one duty more heavily than another.

Even assuming that the trial court had discretion to reject Hopkins' instructions in favor of the District's "ordinary care" language, the trial court abused its discretion in refusing a more specifically worded instruction when there was an issue of competing duties. This tipped the scale in favor of the District's defense by suggesting to the jury that the District had a highly specific and elevated duty to E.E., but only an ordinary duty to Hopkins.

The District argues that Hopkins proposed instruction 8 misstated the law, but that argument is without merit. The District claims that Hopkins' instruction was incorrect because it failed to define foreseeability, and failed to state that "unruly" behavior is not necessarily a predictor of violent behavior. Br. of Resp't at 22. Neither of these legal principles is supported by the facts here. The final jury instructions offered did not include a foreseeability instruction, because it was not at issue in the case. CP 1662-93. And the District does not deny that E.E.'s history of behavior was not merely "unruly," but was violent. Br. of Resp't at 8 ("the most serious injury E.E. had inflicted was giving two individuals a black eye"). Also, the District ignores that Hopkins did

propose a separate foreseeability instruction, which was also rejected. CP 949; Br. of Resp't at 24.

The District's exception to Hopkins' proposed instruction 9 is likewise not well taken. Br. of Resp't at 23. The District claims that describing the District's particular duty of care based on the facts of the case would "arguably be a comment on the evidence." *Id.* This proposition is flatly contradicted by *Bodin,* upon which the District relies. Just like the instructions Hopkins requested here, the *Bodin* instruction defined the duty in terms of the *specific facts of the case*: "to exercise ordinary care in connection with the construction, design, maintenance and repair of its sewer lagoon and tide gate and pump station and to keep, construct, and maintain them in a manner and condition that is reasonably safe for adjacent property owners." There is nothing legally flawed about so describing a duty for the jury.[4]

Finally, the District takes issue with Hopkins' proposed foreseeability instruction, Number 10. Br. of Resp't at 24. The District claims that focusing on the District and the facts of the case, rather than the generic "person" without reference to the circumstances, was

[4] The case upon which the District relies, *Baughn v. Malone*, 33 Wn. App. 592, 597, 656 P.2d 1118 (1983), is inapposite. There, the jury instruction described the duty of a "reasonably careful establishment operator," rather than a "reasonably careful person." Here, instruction 9 correctly stated that the duty of care is that of a "careful and prudent person." CP 948.

improper. Again, *Bodin* contradicts this proposition. Also, the District claims that the instruction should not have made reference to the foreseeability of harm when the "disturbed, aggressive nature of a child" is known to school authorities" because it improperly commented on the evidence. This language is taken directly from *J.N.,* and does not misstate the law. *J.N.*, 74 Wn. App. at 60. Also, the District did not and certainly cannot dispute that E.E. was disturbed and aggressive.

Instructing the jury that the District had only an ordinary duty to Hopkins, a description which contradicts the case law imposing a special duty on school district, was legal error. Even if the instruction could be considered legally correct, it was an abuse of discretion to refuse to offer balanced instructions that also correctly stated the law.

(b) The Trial Court Slanted and Prejudiced the Instructions With a Statement that the District Had a Special Duty to Mainstream E.E., But Rejecting Any Instruction on a Special Duty to Hopkins

In his opening brief, Hopkins explained when the trial court refused to instruct the jury on the District's special duty to protect Hopkins, but agreed to include an instruction that the District had a special duty to mainstream E.E., the court slanted and prejudiced the verdict. Br. of Appellant at 7-14, 19-23.

The District concedes that the trial court must avoid "slanted" instructions and decline to give any instruction "other than those which enunciate the basic and essential elements of the legal rules necessary for the jury to reach a verdict." Br. of Resp't at 17. The District responds that an instruction explaining the special relationship duty the District had to Hopkins would have been "slanted," but claims that its own special relationship duty instruction was vital, citing *Kok*. Br. of Resp't at 2, 19-24. In fact, the District emphasizes that its own special relationship instruction was important to its ability to argue its theory of the case. *Id.* at 16.

In arguing that an instruction explaining mainstreaming was necessary for the District to advance its theory of the case, the District reveals the slanted nature of the trial court's decision. Br. of Resp't at 16, 34. *Kok,* upon which the District relies, says that mainstreaming is "relevant" to the discussion on duty because a school district has the duty of "a reasonably prudent person *in similar circumstances*." *Kok,* 179 Wn. App. at 10 (emphasis in original). The District insists that the mainstreaming instruction was important because it explained those *circumstances* to the jury, so that the District could argue its theory of the case. Br. of Resp't at 34.

However, the District ignores that Hopkins' proposed duty instructions sought to achieve the *exact same goal* the District claimed to achieve with its mainstreaming instruction: describing the "circumstances" surrounding the District's duty to the jury, particularly the District's special custodial relationship to all students and the particular duty to protect them from violence. If describing the "circumstances" to the jury was appropriate to support the District's theory of the case, it was equally appropriate to do so in support of Hopkins' theory.

Even the District cannot avoid using Hopkins' instructional language in its own argument on appeal. It admits that it had to balance its "duty to prevent E.E. from *assaulting others* with its competing duty to educate E.E. in the least restrictive environment appropriate." *Id.* at 34 (emphasis added). However, the jury instructions did not say that the District had a "duty to prevent E.E. from assaulting others." The instructions regarding this special duty were *rejected* by the trial court.

Instead, the jury was told that the District had only an ordinary duty to Hopkins, despite standing *in loco parentis* to him, with *no* reference to the District's special duty to prevent students it knew to be violent from attacking other students. The instructions were imbalanced, unfair, and prejudicial to Hopkins. In effect, the trial court instructed the

jury to pay special attention to the District's relationship with E.E., while instructing it that the District's relationship with Hopkins was that of a stranger on the street witnessing an assault.

The obligation to give the specific "special relationship" duty instruction as to Hopkins was heightened when the trial court chose to include the District's unnecessary instruction about its "duty" to mainstream EBD students. That extra duty instruction created an imbalance by overemphasizing the District's duty to E.E., the violent aggressor, and ignored the District's duty to Hopkins, the victim, depriving Hopkins of the opportunity to advance his theory of the case to the jury in the context of the instructions, as the District was allowed to do.

(2) The District Should Have Been Prohibited as a Matter of Law from Arguing that Hopkins Negligently Caused E.E.'s Sudden, Violent Attack by Speaking to E.E.[5]

In his opening brief, Hopkins argued that the trial court erred in permitting the District to raise the defense that Hopkins contributed to

[5] The District does not challenge Hopkins' prejudice analysis under *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010), thus conceding the issue. The District instead argues, citing *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 249 P.3d 607 (2011) that Hopkins was not prejudiced by the contributory negligence instruction, because the jury found the District not negligent and so never reached the issue. Br. of Resp't at 25-26. The District misses the point. Hopkins has appealed from the jury's verdict on negligence. The jury was given an instruction to consider Hopkins' alleged "negligence" as well. This is further evidence that the trial court's instructions slanted the jury's consideration of the evidence. Furthermore, if this Court reverses and remands for a new trial, then the contributory negligence issue is relevant and appropriately challenged on appeal.

being intentionally assaulted by "negligently" speaking to E.E. Br. of Appellant at 16-19. Hopkins noted that in the recent case of *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 71, 124 P.3d 283 (2005), our Supreme Court held that the special relationship between a school and a student, combined with the fact that the child could not "consent" to sexual abuse, meant that the school could not raise the defense. *Id.*

The District responds by citing a series of cases in which Washington courts have concluded that sufficient evidence existed to take the issue of contributory negligence to a jury. Br. of Resp't at 27-28. However, these cases do not analyze the contributory negligence issue, or any public policy concerns behind allowing a school to raise the defense. For example, in one of the cases the District cites, the entire discussion of contributory negligence is as follows:

> Appellant finally contends that respondent was guilty of contributory negligence. The rule is that contributory negligence is ordinarily a question of fact for the jury to determine. Under the evidence as heretofore detailed, we think that, upon that issue, a question was presented for the jury's determination.

Eckerson v. Ford's Prairie Sch. Dist. No. 11 of Lewis Cty., 3 Wn.2d 475, 487, 101 P.2d 345 (1940). The other cases the District cites also lack any analysis of the contributory negligence issue. *Briscoe,* 32 Wn.2d at 366; *Osborn v. Lake Washington Sch. Dist. No. 414*, 1 Wn. App. 534, 537, 462

P.2d 966 (1969); *Yurkovich v. Rose*, 68 Wn. App. 643, 656, 847 P.2d 925 (1993).

In addition to providing no insight into the issue of contributory negligence by students, the cases the District cites are distinguishable because they involve children who voluntarily undertake hazardous activities that lead to their injuries, such as playing dangerous sports or crossing busy streets. *Briscoe,* 32 Wn.2d at 358 (playing a physical game); *Osborn,* 1 Wn. App. at 537 (being "disorderly" by running around inside locked dark room); *Yurkovich,* 68 Wn. App. at 656 (crossing busy highway when vehicle was approaching).

Unlike in the cases the District cites, the touchstone of the Supreme Court's decision in *Christensen* was the public policy implication of allowing a District to claim a child could contribute to being sexually abused. *Christensen,* 156 Wn.2d at 286. The *Christensen* court also pointed out that a consent/contributory negligence defense would not be available in the criminal context.

Here, as in *Christensen,* allowing the District to argue that Hopkins consented to or caused an intentional assault by speaking to E.E. is bad public policy, and would not be permitted in other contexts, including the criminal context. *State v. Weber*, 137 Wn. App. 852, 859, 155 P.3d 947 (2007). *In Weber,* Division III of this Court prohibited, on public policy

grounds, the claim that one inmate could agree to be assaulted by agreeing to fight another, citing the "nondelegable duty on those operating correctional facilities to maintain the health and safety of the prisoners incarcerated there." *Id.* at 860. The *Weber* court noted, "courts are now more hesitant to permit a defense of consent for some forms of assault because society has an interest in punishing assaults as breaches of the public peace and order, so that an individual cannot consent to a wrong that is committed against the public peace." *Id.*

Likewise, the District should not be able to delegate to its own students its duty to keep those students safe from violent attacks, particularly where the student did not participate in or initiate the violence. Hopkins did not physically initiate or otherwise participate in the assault on him. According to the District, Hopkins spoke to E.E. after E.E. bumped into him. Br. of Resp't at 12; CP 5-10. Allowing the District to claim that Hopkins "contributed" to E.E.'s sudden, violent assault by speaking to E.E. endorses the notion that victims of violence are to blame for merely interacting with assaulters they have no choice about encountering.

Our courts have rejected such victim-blaming when intentional, violent assaults are at issue. *Langness v. Ketonen,* 42 Wn.2d 394, 402, 255 P.2d 551, 556 (1953) ("if the only basis of recovery...was assault and

battery, contributory negligence would not be a defense."); *Honegger v. Yoke's Wash. Foods, Inc.*, 83 Wn. App. 293, 297, 921 P.2d 1080 (1996), *review denied*, 131 Wn.2d 1016, 936 P.2d 416 (1997) (a defendant cannot use a plaintiff's contributory fault to reduce its own liability for assault and battery).

The entire purpose of imposing a duty upon school districts to protect their students from other violent students is that the violence is unpredictable, and innocent students have no choice about being in the presence of the violent actors. *McLeod*, 42 Wn.2d at 320. Allowing the District to defend its negligence by arguing that Hopkins should not have spoken to E.E. in a manner that displeased E.E. contradicts the policy behind imposing that duty.

E. CONCLUSION

Rejecting long-standing Washington law on a school district's special duty to protect students, while 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 15th day of October, 2015.

Respectfully submitted,

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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 Reply 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: October 15th, 2015, at Seattle, Washington.

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