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No. 34197-6-III
Grant Co. Superior Court Case No. 10-2-01037-4

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

HEIDI JO HENDRICKSON, a single person,

Appellant,

vs.

MOSES LAKE SCHOOL DISTRICT, a municipal corporation,

Respondent.

RESPONDENT'S PETITION FOR REVIEW BY THE SUPREME COURT OF WASHINGTON

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I. IDENTITY OF PETITIONERS

The Petitioner is the Moses Lake School District (District). The Petitioner was the Defendant in the trial court and obtained a jury verdict in its favor. Petitioner was the Respondent in the Court of Appeals (Div III).

II. CITATION TO COURT OF APPEALS DECISION

The District is seeking a review by this court of the opinion by the Court of Appeals Division III filed on June 8, 2017 (Appendix Ex. A) and the Court of Appeals Order filed on July 27, 2017 denying District's Motion for Reconsideration. (Appendix Ex. B)

III. ISSUES PRESENTED FOR REVIEW

This case involves a lawsuit by a former Moses Lake High School student who injured her thumb when she was attempting to push a two inch wide board through an operating table saw with her hand instead of using a "push stick" as she was trained to do. In her lawsuit, the Student claims the District and the shop teacher were negligent and breached the duty of care owed to the Student. (CP 1-7) The District denied it was negligent and claimed the Student's injury was entirely her own fault. The trial judge instructed the jury that the Student was claiming that District

was negligent because it:

- Failed to use and maintain required safety equipment and guards,
- Failed to provide reasonable instruction to plaintiff,
- Failed to reasonably supervise the plaintiff on the use of the table saw, and
- Failed to exercise reasonable precautions to protect plaintiff from harm. (CP 1523)

The jury returned a verdict finding the District negligent. The jury also found that the District's negligence **was not the proximate cause of the Student's injuries**. (CP 1539) In its opinion, two members of the Court of Appeals determined the jury must have based its negligence solely on a finding that a guard was removed from the table saw. The majority opinion implied that the jury must have rejected the negligence arguments regarding reasonable instructions, reasonable supervision and failing to take reasonable precautions. The majority then decided that since the jury probably **did not find negligence** on the basis of lack of reasonable instructions, lack of reasonable supervision and failure to take reasonable precautions, the verdict must be reversed because the trial judge failed to instruct the jury fully on the standard of care.

Throughout its opinion the majority mistakenly referred a "heightened" duty of care. No Washington case has ever held a school district owes a heightened duty of care to students under its supervision. The issues that are now squarely before this Court are:

(1) Did the Court err in referring to an "heightened" duty of care where no such duty of care has been adopted in Washington?

(2) Does the jury's verdict determining that the District's negligence was not the proximate cause of the Student's injury foreclose any argument that the proximate cause finding may have been different if the jury had been instructed differently on negligence?

IV. STATEMENT OF THE CASE

The Student, Heidi Hendrickson, at the time of trial was a college graduate and working as an athletic trainer. VRP 582-83 She was injured in her high school shop class while operating a table saw. She recalls the class had one day of training on the table saw. (VRP 607) She thought she had used the table saw about 50 or 60 days between her first instruction and her injury. (608-10) She did not recall the board binding in the saw at any time, had not seen that happen to any other student and had not been trained on what to do if the board bound up in the saw. (*Id.*)

On the day she was injured, she was finishing up her project. Her shop teacher, Kevin Chestnut, told her to make a ½ inch rip cut on the table saw. (VRP 618-19) She had her cut ready and grabbed the push stick because she knew she would need it. As she was pushing the cut through with the push stick, she felt the saw blade come to a stop. She was scared and did not know what to do. She became worried about a kickback and set the push stick down. She then tried to wriggle the board with her bare hand. She reached down to the board and moved the board

side to side. She then felt the blade cut her thumb. She recalls that Mr. Chestnut told her she could safely have her hand within 3 or 4 inches of the saw. (VRP 622 -625) She testified that when this was happening she looked around for Mr. Chestnut to help her, but he was not in her view. (VRP 631 – 632) At the time she cut herself, Kevin Chestnut, her shop teacher, could see the table saw area but was standing in a fenced area outside the back of the room.

Mr. Chestnut testified about how he trains students to use the table saw. After demonstrating two different types of cuts, the students would make those cuts one at a time until they performed the cut correctly. The students then took a written test. Once they passed the test, Mr. Chestnut would supervise the students over the next six weeks as they made 40-50 cuts. If the students earned his trust, Mr. Chestnut allowed them to use the table saw on their own. Specifically regarding the safe use of the table saw, Mr. Chestnut testified he told the students to always use a push stick when making their cuts and to turn off the table saw if anything unusual happens. Mr. Chestnut also stated he removed the anti-kickback device and the splitter from the table saw because, if those components became misaligned, operating the table saw could be "extremely dangerous." (VRP 891 – 895) At the time of the injury Mr. Chestnut was about thirty feet away but could see the saw. (VRP 931- 932, 925 27)

In final argument, the Student argued the District was negligent for removing the anti-kickback guard, for not providing the Student with adequate instruction on what to do when the saw bound up and for not providing adequate on site supervision because the shop teacher was approximately thirty feet away. The jury found the District negligent but also decided that its negligence did not proximately cause the Student's injury.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should accept review of this case because the Court of Appeals decision (1) is in conflict with decisions of this Court and the decisions of the Court of Appeals, and (2) involves an issue of substantial public interest that should be determined by this Court. RAP 13.4.

A. THE COURT OF APPEALS ERRED IN DECIDING THE DISTRICT OWED A "HEIGHTENED" DUTY OF CARE TO THE STUDENT. THIS RULING IS CONTRARY TO CASE LAW AND WILL HAVE SUBSTANTIAL IMPACT ON THE PUBLIC AND SCHOOL DISTRICTS.

The Court of Appeals majority mistakenly, and without any substantive discussion, assumed the District owed the Student a "heightened" duty of care. This Court has long held a school district does not have any heightened duty of care but must exercise ordinary care when supervising students. *McLeod v. Grant County Sch. Dist.,* 42 Wn.2d 316,320,255 P.2d 360 (1953). The majority based its decision on two

recent cases, *Hopkins v. Seattle Pub. Sch. Dist. No. 1,* 195 Wn. App. 96,106,380 P.3d 584, *review denied,* 186 Wn.2d 1029, 385 P.3d 123 (2016) and *Quynn v. Bellevue Sch. Dist.,* 195 Wn. App. 627,631,643,383 P.3d 1053 (2016). While both of these cases discussed the traditional duty of care owed by school districts to their students as defined in *McLeod,* neither case referred to any "heightened" duty.[1] *Hopkins* and *Quynn* simply hold that the Washington Civil Pattern Jury Instructions (WPI) on negligence and ordinary care are not sufficient to fully describe the duty that a school district owes to its students because it does not define the "special relationship" and requisite foreseeability that is associated with the district-student relationship. *Hopkins* and *Quynn* simply capture the duty set forth in *McLeod* in more detail than does the WPI on ordinary care. As *Hopkins* noted in its opening sentence, "It is well established that a school district has a special relationship and a duty to use reasonable care to protect students in its custody from foreseeable harm." *Hopkins* at 98. In *Quynn*, the court actually rejected the argument that there was a "heightened" standard of care for student harassment on a school bus under the applicable heightened care standard applicable to common carriers . *Quynn* at 635-36. *Quynn* went on to conclude:

---

[1] In this case, the Student proffered an instruction that included language regarding the special relationship and foreseeability but also, incorrectly, included a reference to a "heightened" duty of care. (CP 406)

> The Quynns requested that the trial court instruct the jury as follows:
>
> > Defendant, as a school district, owes to its students a duty to anticipate reasonably foreseeable dangers and take precautions to protect its students from such dangers, including the harmful actions of other students.
>
> We recently discussed the relationship between an ordinary care instruction, such as the one given herein, and the special relationship owed to a student by a school district. Well established case law imposes a duty on a school district to exercise reasonable care to protect students in its custody from foreseeable harm. *McLeod*, 42 Wash.2d at 320, 255 P.2d 360; *Christensen v. Royal Sch. Dist. No. 160*, 156 Wash.2d 62, 70, 124 P.3d 283 (2005).

Id. at 638–39.

McLeod v. Grant Cty. Sch. Dist. No. 128, 42 Wn.2d 316, 320, 255 P.2d 360, 362 (1953) was a negligence case. It held that:

> The harm which came to appellant was not caused by the direct act or omission of the school district, but by the intervening act of third persons. The fact that the danger stems from such an intervening act, however, does not of itself exonerate a defendant from negligence. If, under the assumed facts, such intervening force is reasonably foreseeable, a finding of negligence may be predicated thereon.

McLeod and its progeny make no reference to a standard higher than mere negligence. To the extent that the Court of Appeals majority holds that the duty of care owed to the Student in this case was a "heightened" standard of care that holding is contrary to the long standing

duty of care set forth in *McLeod* and reaffirmed in the recent Division 1 cases of *Hopkins* and *Quynn.* This court should accept review to clarify there is no heightened duty for school districts; just the duty that has long be imposed on them in *McLeod.*

B. THE COURT OF APPEALS ERRED IN DETERMINING THE JURY'S DETERMINATION THAT THE STUDENT'S INJURIES WERE NOT PROXIMATELY CAUSED BY THE DISTRICT'S NEGLIGENCE WAS INFLUENCED BY THE INSTRUCTIONS ON NEGLIGENCE

The Court of Appeals majority determined the jury only found negligence based upon one of the Student's arguments (removal of the kick-back guard) and that it may have found proximate cause on the remaining theories of negligence if it had been properly instructed on foreseeability.[2] The Court's ruling improperly substitutes the majority's conclusions on liability for that of the jury. The majority lacks the authority to "look behind the curtain" and determine on what basis a jury made a finding of negligence. It is plausible that the jury found the District negligent on all of the theories of negligence, but determined that the real proximate cause of this injury was the Student's act of pushing the board through the table saw without using a push stick. It would be a dangerous precedent, contrary to existing case law, to permit an appellate

[2] Judge Korsmo in his dissenting opinion noted quite succinctly that the jury determination that Ms. Hendrickson was the cause of her own injury should be dispositive here.

court to determine on what basis the jury decided any particular claim of negligence. It would require the appellate court to review the evidence, make determinations on the weight of the evidence and to "second guess" the jury's determination.

This issue was partially addressed in *Hopkins* . The District had argued the jury did not need to be instructed on the foreseeability issue. The *Hopkins* court noted:

> Without citation to authority, the School District argues a jury should not be instructed on foreseeability. **That may be true with respect to proximate cause.** See WPI *108 15.01, at 191. It is not true with respect to duty. (Emphasis added)

Id. at 107-08. Washington case law has made it clear there is no linkage between duty instructions and a determination of proximate cause.

This Court addressed the issue in *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 88–89, 18 P.3d 558, 562 (2001). In that case, Griffin, a tenant in an apartment complex, was attacked by a neighboring tenant who obtained access to her apartment though an attic crawlspace. Griffin noticed dirt and debris below the entry to the crawlspace and contacted the manager. A maintenance crew inspected the crawl space and a single two-by-four across the attic entry. Two weeks later the neighboring tenant entered Griffin's apartment though the attic crawlspace and assaulted her. Similar to the case at bar, the jury found the landlord negligent but determined that

the landlord's negligence was not the proximate cause of Griffin's injuries. The Court of Appeals reversed and remanded for a new trial concluding that the failure to give a duty instruction that imposed a "greater duty" on the landlord influenced the jury's determination on proximate cause. On review, this Court specifically declined to reach the issue of the landlord's duty of care because of the jury's proximate cause determination. This Court wrote:

> Griffin's claim to a heightened duty would only matter if the jury had rejected breach of the lesser included duty. But it didn't. Rather the jury's finding of negligence placed Trammell Crow in the same position regardless of the standard of care; the only remaining question being whether that breach of duty proximately caused Griffin's injuries. And the jury answered no.
>
> Griffin argues the lack of a jury instruction based on the heightened duty of care between business owners and business invitees under *Nivens v. 7–11 Hoagy's Corner,* 133 Wash.2d 192, 943 P.2d 286 (1997) "[s]kewed [t]he [j]ury's [c]onsideration [o]f [p]roximate [c]ause" by diminishing Trammell Crow's duty to the point that "its breach just did not matter." Br. of Appellant Christie Griffin at 19, 22 (Wash.Ct.App. No. 41904–8–I). The Court of Appeals agreed, claiming "duty and proximate cause are intertwined," holding "we cannot be certain that the jury properly determined proximate cause when it was improperly instructed on the applicable duty." *Griffin,* 97 Wash.App. at 572, 984 P.2d 1070 (citing *Schooley v. Pinch's Deli Market, Inc.,* 134 Wash.2d 468, 479, 951 P.2d 749 (1998)).
>
> However we did not hold "duty and proximate cause are intertwined" in *Schooley. Id.* We said "the issues regarding whether duty and *legal* causation exist are intertwined."

> *Schooley,* 134 Wash.2d at 479, 951 P.2d 749 (emphasis added). We specifically distinguished between legal and factual causation, opining:
>
> > Proximate causation is divided into two elements: cause in fact and legal causation. "Cause in fact" refers to the actual, "but for," cause of the injury, i.e., "but for" the defendant's actions the plaintiff would not be injured. Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury. *Unlike factual causation,* which is based on a physical connection between an act and an injury, legal cause is grounded in policy determinations as to how far the consequences of a defendant's acts should extend.
>
> *Id.* at 478, 951 P.2d 749 (emphasis added) (citations omitted). The jury's determination of cause in fact does not involve the assessment of policy considerations intertwining duty and legal causation and is not affected by a difference in underlying duties once negligence is established.

Griffin at 88–89. The Court of Appeals majority erred when it determined that the jury's determination on proximate cause was somehow influenced by the failure of the trial court to give a "heightened" duty instruction on the duty of care.

The Court of Appeals majority noted the Student alleged at least three theories of negligence. The Court of Appeals then went on to determine the jury found negligence on one but not all theories of negligence. The Court of Appeals lacks authority as an appellate body to

make that specific factual determination. The Court of Appeals then went on to incorrectly determine:

> Had the jury actually found breach under less than all three of Ms. Hendrickson's theories, then the failure to advise the jury as to the district's enhanced duty of care could have made a difference. See *Id.*[*Griffin*] at 89, 18 P.3d 558 (recognizing the causation analysis would be different if the plaintiff identifies additional duties). Taking the above example, it is possible the jury found the district was negligent in failing to maintain equipment while also finding no breach of an ordinary duty to provide instruction or supervision. However, had the jury been instructed correctly, it would have understood the district had not just an ordinary duty of care, but a heightened obligation that also encompassed protecting Ms. Hendrickson against reasonably foreseeable self-inflicted harm. See *McLeod*, 42 Wash.2d at 321, 255 P.2d 360 (enhanced duty of care includes duty to protect against foreseeable student misconduct). This more thorough understanding of the district's duties could have led the jury to believe Mr. Chestnut should have done more to prevent Ms. Hendrickson's injuries. Accordingly, the jury's assessment of proximate cause and the final verdict could have been different.

Hendrickson, 199 Wn. App. 244 (2017). This ruling by the majority is inconsistent with existing decisions of this Court and the Court of Appeals. *Burnside v. Simpson Paper Co.*, 123 Wash. 2d 93, 108, 864 P.2d 937 (1994)(The court will not willing assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it).

Ironically, the majority's ruling is directly contrary to the holding in its case of *Chhuth v. George*, 43 Wash. App. 640, 719 P.2d 562 (1986). In *Chhuth*, a student was killed when struck by a car while crossing the street on his way home from school. The jury found the school district and the car driver negligent. but determined that their negligence was not the proximate cause of the injury. The trial court then ruled, as a matter of law, the driver and the district proximately caused the students death, effectively the same ruling that the majority made at bar. The Court of Appeals reversed the trial judge's ruling and cogently noted:

> We reverse the trial court's ruling that the District's negligence was a proximate cause of Saintyro's death. **It is not possible to determine from the special verdict the basis for the jury finding that the District was negligent.** It could be negligent implementation and supervision of bus procedures, or breach of duty by the principal, first grade teacher or the school bus supervisor. On the other hand, the basis of negligence could have been failure to supply crossing guards. **But having found negligence, and that such negligence was not the proximate cause of Saintyro's death, the jury in substance concluded Saintyro's own intervening negligence was the sole proximate cause.** Thus, they concluded that even though the District was negligent, that negligence was not a "cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which the injury would not have happened." *Petersen*, at 435–36, 671 P.2d 230. Viewing the evidence in the light most favorable to the nonmoving party (the District), as the trial court must do in ruling on this motion, there is evidence to support the jury's conclusion the District's negligence was not a proximate cause of Saintyro's death. The issue of proximate cause falls within

> the scope of the jury's duties and since the court properly instructed the jury, there is no basis for disregarding the verdict. **It was error for the court to disregard the jury's verdict.** (Emphasis added)

Id. at 650–51.

The Court of Appeals should have given deference to the jury's proximate cause finding. It is the duty of the court to make every effort to harmonize the verdict to the extent possible." *State v. Peerson*, 62 Wash. App. 755, 765, 816 P.2d 43 (1991). See also, *Alvarez v. Keyes*, 76 Wash. App. 741, 743, 887 P.2d 496 (1995); *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wash. App. 572, 585–586, 187 P.3d 291, 298 (2008); *Johnson v. Tradewell Stores, Inc.*, 24 Wash. App. 53, 600 P.2d 583 (1979), aff'd, 95 Wash. 2d 739, 630 P.2d 441 (1981) (citing *Gilmartin v. Stevens Inv. Co.*, 43 Wash. 2d 289, 266 P.2d 800 (1954)); *Pepperall v. City Park Transit Co.*, 15 Wash. 176, 45 P. 743 (1896). Where there is a plausible scenario that supports the jury finding of no proximate cause this Court must accept that determination. *Mears v. Bethel Sch. Dist. No. 403*, 182 Wash. App. 919, 933, 332 P.3d 1077, 1084 (2014), review denied, 182 Wash. 2d 1021, 345 P.3d 785 (2015)(Where there was more than one scenario under which the jury's findings of negligence but lack of proximate cause can be reconciled the verdict must stand citing *Estate of Stalkup*, 145 Wash. App. at 591).

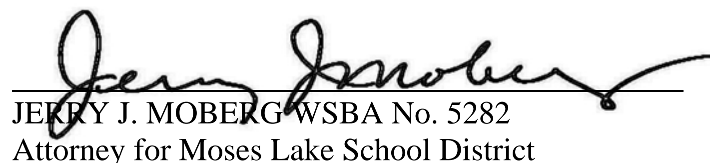
The majority opinion sets a dangerous precedent that has not existed prior to this case. It allows the appellate court to factually determine the basis upon which a jury rendered its verdict. This rule in contrary to existing case law and is inconsistent with our case law that makes the jury's verdict inviolate.

VI. CONCLUSION

The majority opinion of the Court of Appeals erroneously creates a "heightened" duty of care for school districts in Washington. This ruling is contrary to existing case law and would impose a substantial burden on school districts throughout the state. Furthermore, the majority opinion invades the province of the jury to make determinations regarding proximate cause. The jury determined quite simply that the District's negligence was not the proximate cause of the Student's injuries. That determination ends the inquiry. This Court should grant review in this case to correct these errors.

RESPECTFULLY SUBMITTED this 24th day of August, 2017.

JERRY MOBERG & ASSOCIATES, P.S.



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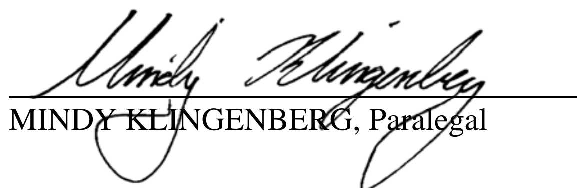

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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

HEIDI JO HENDRICKSON, a single person, Appellant, v. MOSES LAKE SCHOOL DISTRICT, a municipal corporation, Respondent.	)	No. 34197-6-III PUBLISHED OPINION

PENNELL, J. — School districts have a special duty to protect students in their custody and care. Heidi Jo Hendrickson claims the Moses Lake School District (the district) violated this duty when she severed her thumb during shop class. At trial, the court declined to issue a jury instruction on the district's enhanced duty of care. Instead, the instructions were limited to ordinary principles of duty and contributory negligence. We agree with Ms. Hendrickson that the trial court should have instructed the jury about the district's heightened duty of care. However, contributory negligence remained applicable. Because the inadequate instruction about the district's duty could have impacted the jury's verdict, this matter is remanded for retrial.

FACTS

Fifteen-year-old freshman Heidi Hendrickson injured herself while working on a project for shop class. Using a push stick, Ms. Hendrickson guided a board through a table saw to make a small cut. When she felt the board come to a stop, she became scared. She set the push stick down, tried to wiggle the board free, and cut her right thumb. At the time Ms. Hendrickson cut herself, Kevin Chestnut, her shop teacher, could see the table saw area but was standing in a fenced area outside the back of the room. As a result of that cut, doctors amputated Ms. Hendrickson's thumb to her first joint. Ms. Hendrickson sued the district, alleging negligence in that the district (1) failed to use and maintain required safety equipment and guards, (2) failed to provide her with reasonable instruction, and/or (3) failed to reasonably supervise her on the use of the table saw.

At trial, Mr. Chestnut testified about how he trains students to use the table saw. After demonstrating two different types of cuts, the students would make those cuts one at a time until they performed the cut correctly. The students then took a written test. Once they passed the test, Mr. Chestnut would supervise the students over the next six weeks as they made 40-50 cuts. If the students earned his trust, Mr. Chestnut allowed them to use the table saw on their own. Specifically regarding the safe use of the table saw, Mr. Chestnut testified he told the students to always use a push stick when making

their cuts and to turn off the table saw if anything unusual happens. Mr. Chestnut also stated he removed the anti-kickback device and the splitter from the table saw because, if those components became misaligned, operating the table saw could be "extremely dangerous." 5 Verbatim Report of Proceedings (Feb. 1, 2016) at 925. According to Mr. Chestnut, Ms. Hendrickson made 40-50 cuts correctly before he allowed her to use the saw on her own. At the time of her injury, Ms. Hendrickson had made approximately 100 cuts.

Before submitting the case to the jury, the trial court heard extensive argument on jury instructions. Ms. Hendrickson proposed the following instruction:

> A school district has a "special relationship" with a student in its custody and a heightened duty of care to protect him or her from foreseeable harm. Harm is foreseeable if the risk from which it results was known, or in the exercise of reasonable care should have been known. The imposition of this duty is based on the placement of the student in the care of the school with the resulting loss of the student's ability to protect himself or herself. The relationship between a school district and a student is not a voluntary relationship, as children are required by law to attend school. The protective custody of teachers is thus mandatorily substituted for that of the parent.

Clerk's Papers (CP) at 1308. The court declined to give that instruction, instead instructing the jury as follows:

> INSTRUCTION NO. 12
>
> 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.
>
> INSTRUCTION NO. 13
>
> Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.
>
> INSTRUCTION NO. 14
>
> When referring to a child, ordinary care means the same care that a reasonably careful child of the same age, intelligence, maturity, training, and experience would exercise under the same or similar circumstances.
>
> . . . .
>
> INSTRUCTION NO. 18
>
> Every person has the right to assume that others will exercise ordinary care, and a person has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

CP at 1528-30, 1534. Ms. Hendrickson filed a written exception to the court's refusal to give the special relationship instruction.

Additionally over Ms. Hendrickson's objection, the trial court instructed the jury on the district's affirmative defense of Ms. Hendrickson's contributory negligence. The district claimed Ms. Hendrickson's injuries were proximately caused by her (1) failure to use a push stick while operating the table saw and (2) failure to turn off the table saw after the board became stuck in the saw. The district emphasized Ms. Hendrickson's

alleged contributory negligence in its closing argument to the jury.

The jury found the district was negligent. However, the jury also found the district's negligence was not a proximate cause of Ms. Hendrickson's injury. The court entered judgment on the verdict. Ms. Hendrickson appeals.

ANALYSIS

This court reviews legal errors in jury instructions de novo. *Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wn. App. 96, 106, 380 P.3d 584, *review denied*, 186 Wn.2d 1029, 385 P.3d 123 (2016). Jury instructions are sufficient if they are supported by the evidence, allow each party to argue its theory of the case, are not misleading, and properly inform the trier of fact of the applicable law when read as a whole. *Id.* An instruction is erroneous if any of these elements is absent. *Id.* If an instruction misstates the law, prejudice is presumed and is grounds for reversal unless the error was harmless. *Id.*

Jury instructions and the district's duty

There is no serious dispute over whether the trial court should have issued an instruction explaining the district's heightened duty of care. School districts have a special relationship with the students in their custody. *Id.* Based on this relationship, school districts have a duty "to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in [their] custody from such dangers."

McLeod v. Grant County Sch. Dist., 42 Wn.2d 316, 320, 255 P.2d 360 (1953). Jurors are entitled to receive instructions on the unique nature of a school district's duty of care. *Hopkins*, 195 Wn. App. at 108. The failure to provide such instruction is error. *Id.* Given this legal landscape, the trial court should have provided an instruction explaining the district's enhanced duty of care.[1] The only real argument is whether the absence of such an instruction prejudiced the jury's verdict.

The disagreement over prejudice stems from the unique nature of the jury's verdict. Had the jury found the district was not negligent, it would not have reached the question of proximate cause and prejudice would easily have been presumed. *Id.* at 104, 108; *Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 631, 643, 383 P.3d 1053 (2016). But the jury did find the district negligent. It only denied relief to Ms. Hendrickson through its determination of proximate cause. Based on this unique context, the district argues the jury's verdict would have been the same regardless of an instruction on an enhanced duty of care. Because there was no causal link between the district's conduct and Ms. Hendrickson's injuries, the district claims the rejection of Ms. Hendrickson's

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[1] Despite the long-standing rule regarding school districts' enhanced duty of care, case law requiring this duty to be spelled out to the jury did not arise until after Ms. Hendrickson's trial. *Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 383 P.3d 1053 (2016); *Hopkins*, 195 Wn. App. 96. The trial court did not have the benefit of these decisions at the time it issued the instructions.

proffered instruction could not have impacted the jury's verdict. *See Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 88, 18 P.3d 558 (2001).

The district's analysis of prejudice would have force if Ms. Hendrickson had only alleged one theory of negligence. Breach of a lesser duty necessarily implies breach of a corresponding greater duty. If there is no causal connection between the breach of a lesser duty and the plaintiff's injuries, then there is necessarily no causal connection between the breach of a greater duty and the plaintiff's injuries. *See id.* (instructing on a heightened duty "would matter only if the jury had rejected breach of the lesser included duty").

But Ms. Hendrickson alleged three distinct types of duties and breach. The jury made no findings as to whether negligence pertained to one theory, two, or all three. If the jury had found negligence as to all three theories, but no proximate cause, the analysis would be the same as if there had only been one theory of negligence. Yet as the district recognizes, it is possible, if not probable, that the jury found the district negligent as to only one of Ms. Hendrickson's theories. Specifically, given Mr. Chestnut's testimony that he removed the table saw's anti-kickback device and splitter, the jury could have found the district negligent based on Ms. Hendrickson's theory that the district breached its duty to reasonably maintain safety equipment. There were facts at trial suggesting that

the removed equipment would not have prevented Ms. Hendrickson's injuries. This is a likely explanation of the jury's verdict.

Had the jury actually found breach under less than all three of Ms. Hendrickson's theories, then the failure to advise the jury as to the district's enhanced duty of care could have made a difference. *See id.* at 89 (recognizing the causation analysis would be different if the plaintiff identifies additional duties). Taking the above example, it is possible the jury found the district was negligent in failing to maintain equipment while also finding no breach of an ordinary duty to provide instruction or supervision. However, had the jury been instructed correctly, it would have understood the district had not just an ordinary duty of care, but a heightened obligation that also encompassed protecting Ms. Hendrickson against reasonably foreseeable self-inflicted harm. *See McLeod*, 42 Wn.2d at 321 (enhanced duty of care includes duty to protect against foreseeable student misconduct). This more thorough understanding of the district's duties could have led the jury to believe Mr. Chestnut should have done more to prevent Ms. Hendrickson's injuries. Accordingly, the jury's assessment of proximate cause and the final verdict could have been different.

Despite this analytical possibility, the district appears to claim there was no realistic chance for Mr. Chestnut to provide additional supervision or instruction. We

disagree. Mr. Chestnut was stationed 25-30 feet away from Ms. Hendrickson at the time of her injury and was focused on other students. It is possible the jury could have found this inattention to be a breach of the enhanced duty of care and supervision. Had Mr. Chestnut worked more closely with Ms. Hendrickson, he might have been able to see when she ran into problems and provide appropriate instruction on injury avoidance. The question of whether this was reasonably possible is something a jury must consider, after receiving accurate instructions. It is not something this court will resolve on appeal.

Jury instructions and contributory negligence

Not only does Ms. Hendrickson claim she was entitled to an instruction on the district's enhanced duty of care and protection, she also argues this enhanced duty prohibits the district from asserting contributory negligence. This latter position goes too far.

The default rule in Washington is one of contributory negligence. RCW 4.22.005. Our case law has long held students responsible for negligent conduct on school grounds. *Briscoe v. Sch. Dist. No. 123*, 32 Wn.2d 353, 366, 201 P.2d 697 (1949). We have even applied contributory negligence against students in circumstances where a school district owes its highest duty of care as a common school bus carrier. *Yurkovich v. Rose*, 68 Wn. App. 643, 655-56, 847 P.2d 925 (1993). Although school districts owe students a

heightened duty of care, our case law makes clear they are not guarantors of student safety. *Id.* at 654-55. We have recognized a jury can consider a student's own misconduct or negligence in assessing issues such as proximate cause or damages. *Id.*

Ms. Hendrickson claims the Washington Supreme Court altered the legal landscape on school-based contributory negligence through its decisions in *Christensen v. Royal School District No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005), and *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010). *Christensen* held contributory negligence could not be assessed against a 13-year-old student who brought a claim against a school district for sexual abuse by a teacher. *Gregoire* involved the custodial relationship between an inmate and a jail. A plurality of our Supreme Court determined contributory negligence may not always be raised when a claim is made against a correctional institution for injuries resulting from an inmate's intentional self-harm.

Christensen and *Gregoire* carved out exceptions to the general rule of comparative fault based on unique policy concerns. *Christensen*, 156 Wn.2d at 68-69; *Gregoire*, 170 Wn.2d at 637-38. Because children under 16 years of age are not competent to consent to sex under our state's criminal code, *Christensen* held they also cannot be held responsible for failing to protect themselves from entering into a sexual relationship. *Christensen*, 156 Wn.2d at 67-68. In *Gregoire*, the justices in the plurality were concerned with

ensuring correctional institutions retained an incentive to follow through with the duty of protecting inmates against self-harm. Because defenses such as assumption of risk and contributory negligence threatened to "immunize" institutions from breaching this duty, the justices declined to allow such defenses as contrary to public policy. *Gregoire*, 170 Wn.2d at 637.[2]

Neither *Christensen* nor *Gregoire* abrogated the general rule[3] that a defendant's special relationship to a plaintiff does not make the defendant the guarantor of the plaintiff's safety, thus eliminating comparative fault. Indeed, if all that were necessary to deny comparative fault was the existence of a special relationship, much of the analysis in *Christensen* would be rendered dicta. Never mind *Christensen*'s lengthy discussion of public policy and explicit statement that the decision was specific to the context of child sexual assault, the decision could have been rendered simply based on the well-established rule that the school district had a heightened duty to protect its student from

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[2] Former Chief Justice Madsen, whose concurrence was pivotal in reversing the Court of Appeals decision, agreed with the majority's analysis with respect to the defense of assumption of risk but favored limits on restricting the defense of contributory negligence to circumstances where a correctional institution has assumed an inmate's duty of self-care. *Gregoire*, 170 Wn.2d at 645 (Madsen, C.J., concurring/dissenting).

[3] *See, e.g.*, *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 203-04, 943 P.2d 286 (1997). Contrary to Ms. Hendrickson's position, the Restatement of Torts does not create a new general rule, eliminating contributory negligence in the context of special relationships.

foreseeable harms. As recognized by then Chief Justice Madsen in *Gregoire*, this was not the case: *Christensen*'s "holding was unique to sexual abuse." *Gregoire*, 170 Wn.2d at 650 (Madsen, C.J., concurring/dissenting). Our reading of *Christensen* and *Gregoire* is that both decisions are context specific and do not fully alter a plaintiff's duty of self-care in the custodial settings of a school or penal institution.

Ms. Hendrickson's arguments against application of contributory negligence can only succeed if, like the plaintiffs in *Christensen* and *Gregoire*, she can articulate a context-specific reason for eliminating contributory negligence. None has been proffered, and we cannot discern any on our own. There is no legal bar to Ms. Hendrickson's capacity to consent to using a table saw. Thus, this case is unlike *Christensen*.[4] Unlike *Gregoire*, this case does not pose the public policy problem of how to incentivize a legal custodian to prevent self-harm. Ms. Hendrickson was not engaged in intentional self-harm, and application of contributory fault to her conduct would not effectively immunize the district from liability. Because there are no unique policy reasons for excluding application of contributory negligence in Ms. Hendrickson's case, this aspect of the trial court's instructions was appropriate. On remand, the trial court shall continue to instruct

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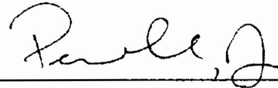
[4] Even legal incapacity is not necessarily a bar to contributory negligence. *See Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 481, 951 P.2d 749 (1998).

the jury on contributory fault.

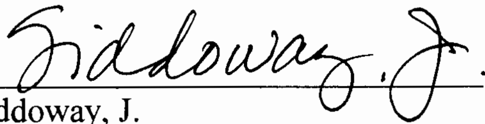
CONCLUSION

The failure to instruct the jury on the special relationship between a school district and its students was prejudicial error. We reverse the trial court's judgment and remand for a new trial.



Pennell, J.

I CONCUR:



Siddoway, J.

KORSMO, J. (dissenting) — The jury determination that Ms. Hendrickson was the cause of her own injury should be dispositive here. The error in instructing the jury on the school district's heightened duty of care was harmless in this circumstance.

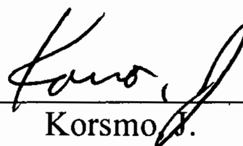
I agree with the majority and the recent authority indicating that the plaintiff was entitled to an instruction indicating that the school district had a special relationship to the children in its care. *Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 383 P.3d 1053 (2016); *Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wn. App. 96, 380 P.3d 584, *review denied*, 186 Wn.2d 1029 (2016). It was error to refuse the requested instruction. That error was meaningless here, though.

In both *Quynn* and *Hopkins*, the jury declined to find the district negligent under the general negligence standard. The error in incorrectly defining the district's obligations was therefore prejudicial. That is not the case here since the jury concluded that the district's negligence was not the cause of the injury. Appellant speculates that maybe one of her theories of negligence was not accepted by the jury, but would have been accepted if the jury had been properly instructed. The problem with the argument is that she was able to argue all of her theories to the jury and they concluded that whatever

negligence the district committed was not the cause of the plaintiff's injury. The jury heard every theory of liability Ms. Hendrickson had and determined none of them were the cause of the accident. That should be the end of the case.

It would be a different story if Ms. Hendrickson had been unable to assert one of her theories due to the lack of the instruction. But that is not the case here. Schools are not insurers of students' safety. The district here did everything it could to train this young lady to handle the table saw safely. She was no novice, but was quite experienced in the correct methods of operating the saw. It simply is not practical to monitor every student from a few feet away unless you reduce the class size to one or two students. The jury understandably considered, but rejected, any claim that the teacher was not close enough to oversee Ms. Hendrickson's work. That would not change if the jury had been instructed on the special relationship because it is not possible to monitor every child all of the time. Ms. Hendrickson caused this accident by not operating the saw in accordance with her training.

I think we should affirm the jury's verdict.



Korsmo, J.

APPENDIX B

FILED
JULY 27, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

HEIDI JO HENDRICKSON, a single person, Appellant, v. MOSES LAKE SCHOOL DISTRICT, a municipal corporation, Respondent.	)	No. 34197-6-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent Moses Lake School District's motion for reconsideration of our June 8, 2017, opinion, and the record and file herein;

IT IS ORDERED that the respondent's motion for reconsideration is denied.

PANEL: Judges Korsmo, Siddoway and Pennell

FOR THE COURT:

ROBERT LAWRENCE-BERREY
Acting Chief Judge

JERRY MOBERG & ASSOCIATES, P.S.

August 24, 2017 - 11:41 AM

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