

No. 94898-4

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Court of Appeals
Division III
State of Washington

No. 341976

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

HEIDI JO HENDRICKSON, a single person,

Plaintiff-Appellant,

vs.

MOSES LAKE SCHOOL DISTRICT, a municipal corporation,

Defendant-Respondent.

REPLY BRIEF

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I. INTRODUCTION

The response brief submitted on behalf of Respondent Moses Lake School District (MLSD) fails to address directly the key point in the argument made on behalf of Appellant Heidi Jo Hendrickson (Hendrickson); namely, that the superior court's error in failing to instruct the jury as to the proper nature and scope of the school district's duty to its students in general and to Hendrickson resulted in the jury being unable to properly determine the issue of proximate cause.

MLSD does not seriously contest that the superior court's instructions to the jury were in error. Instead, it argues that any error was harmless. In so arguing, the respondent does not acknowledge that when instructions fail to properly inform the trier of fact of the applicable law, those instructions are presumed to be erroneous. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Prejudice is presumed if the instructions contain a clear misstatement of law, and in such a circumstance, the burden is on the opposing party to establish that error was harmless. *Id.*; *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 849, 348 P.3d 389 (2015).

The respondent's argument does not address the linkage between a proper statement of the nature and scope of the duty the school district had to the appellant and a proper evaluation of proximate cause by the jury. This is the heart of Hendrickson's argument: without a correct instruction on the nature of the school district's specific duty to the appellant under the special relationship doctrine, the jury could not properly decide the linked inquiry regarding proximate cause. The linkage between the proper understanding of duty and the determination of proximate cause, acknowledged by the plurality opinion in *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 637-44, 244 P.3d 924 (2010), is grounded in the common-sense recognition that causation flows from a defendant's breach of duty. See *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 131, 86 P.3d 1175 (2004); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998) ("[t]his court has recognized that the issues regarding whether duty and legal causation exist are intertwined"). Without a proper understanding of the correct nature and scope of the school district's duty to the appellant given the school district's special relationship with its students, the jury cannot make a proper determination of causation. In this case, the flawed instruction by

the trial court regarding the nature and scope of the school district's duty tainted the determination of proximate cause by the jury.

MLSD's efforts to rehabilitate the superior court's improper instruction regarding contributory negligence fails for similar reasons. The jury instruction was improperly given considering the school district's obligations as part of its special relationship to Hendrickson while she was a student, mandated to be present in shop class, while Hendrickson who was engaged in the use of dangerous equipment as part of her coursework in the class, with the knowledge and approval of the instructor. The superior court's provision of the erroneous instruction to the jury is also presumed to be prejudicial. *See Anfinson*, 174 Wn.2d at 860, 281 P.3d 289; *Paetsch*, 182 Wn.2d at 849, 348 P.3d 389. Considering the school district's special relationship with Hendrickson while she was a student, engaged in the use of dangerous equipment as part of her coursework, on site and during school hours, the superior court's improper contributory negligence instruction distorted the nature and scope of the parties' obligations. As such, the instruction directly prejudiced Hendrickson.

Considering these points, MLSD's argument fails to establish that the verdict in this case should be upheld. The verdict should be

reversed and the case remanded back to the superior court for a new trial, with specific instructions to the trial judge to properly instruct the jury on the nature and scope of the school district's special relationship obligations to its students in general and to Hendrickson specifically. Additionally, the trial court should be directed that the defense of comparative negligence is not appropriate in Hendrickson's case, where as a student she was injured while in school, attending class and participating in the use of dangerous equipment with the teacher's knowledge and approval as a part of her coursework for class.

II. ARGUMENT

A. The superior court's erroneous instruction regarding the Moses Lake School District's duty tainted the jury's finding of no causation and prejudiced Heidi Jo Hendrickson.

MLSD is incorrect in its assertion that the superior court's erroneous instructions to the jury regarding the School District's duty towards Hendrickson is irrelevant and unnecessary for this Court to address. Far from a harmless error, the failure of the trial court to correctly instruct the jury on the nature and scope of the MLSD's duty towards Hendrickson in light of their special

relationship necessarily tainted the determination of proximate cause and prejudiced Hendrickson as a result.

MLSD contends that this Court must accept the jury's determination regarding proximate cause to "harmonize the verdict to the extent possible." MLSD's Opposition Brief at 16. Such harmonization is not possible in the instant case because of the blatant (and uncontested) error in the trial court's instruction regarding the nature and scope of the School District's duty to Hendrickson. Causation flows from the duty owed by a defendant to a plaintiff. *Guarino*, 122 Wn. App. at 131, 86 P.3d 1175; *cf. Gregoire*, 170 Wn.2d at 637-44, 244 P.3d 924. MLSD does not address this point in its argument regarding the relevance of the trial court's failure to properly instruct the jury or elsewhere in its brief. Hendrickson was in the custody of the School District and carrying out assigned tasks at the time of injury, under the supposed supervision of a teacher. The trial court provided an erroneous instruction to the jury regarding the nature and scope of MLSD's duty towards Hendrickson. The jury then determined that the school district's negligence was not the proximate cause of the student's injuries. Given the uncontested rule from *Guarino v. Interactive Objects, Inc.*, that causation flows from the duty owed

by a defendant to a plaintiff, 122 Wn. App. at 131, 86 P.3d 1175, the trial court's erroneous instruction to the jury regarding duty is relevant to this Court's review of the instant case.

The evaluation of proximate cause is not the same under a heightened or lesser duty of care in a case like this, involving injury to party under the custodial care of a government actor. The higher the burden on a plaintiff in proving breach of duty, the harder it will be for the jury to find for the plaintiff on the issue of proximate cause; correspondingly, the lower the standard of breach of duty, the easier it will be for the plaintiff in such a case to establish proximate cause. The two inquiries are linked, as the determination of causation flows from the nature of the duty owed to the plaintiff. The superior court's improper instruction to the jury on the nature and scope of MLSD's duty to Hendrickson hinders the jury's task to properly determine proximate causation. The jury cannot properly determine the flow of causation from the defendant's duty when the jury is improperly instructed as to the nature and scope of that duty. The superior court's incorrect instruction prejudiced Hendrickson by not placing proper information before the jury to assist it in determining not only the breach of duty issue but the proximate causation issue as well.

B. The cases cited by the school district are distinguishable because they do not address instructional error regarding the duty to protect arising from a school district's special relationship with its students.

MLSD's argument contends that the appellant's position runs contrary to *Griffin v. West RS, Inc.*, 143 Wn. 2d 81, 18 P.3d 558 (2001); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998); and *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 40 P.3d 1206 (2002); *Chhuth v. George*, 43 Wn. App. 640, 719 P.2d 562 (1986); *Yurkovitch v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993); and *Briscoe v. School Dist. No. 123*, 32 Wn.2d 353, 201 P.2d 697 (1949). This is mistaken. Those cases do not deal with the kind of erroneous instruction that has prejudiced Hendrickson: an instruction that fails to explain a school district's special relationship with a student and the obligations upon the school district that flow from that special relationship. It is the precise nature and scope of MLSD's duty that impacts the determination of proximate cause. To improperly inform the jury about the nature and scope of MLSD's duty renders the jury incapable of properly determining proximate causation given the specific obligations that a school district has over a student who is on site, in class, and acting in accord with classroom

activities. A correct understanding of the nature and scope of MLSD's duty also makes a comparative negligence instruction to the jury improper.

This aspect of Hendrickson's case distinguishes her claims from cases cited by MLSD in support of its argument. *Griffin*, 143 Wn.2d at 83, 18 P.3d 558 (examining scope of a landlord's duty to protect tenants from the foreseeable criminal acts of third persons); *Schooley*, 134 Wn.2d at 472, 951 P.2d 749 (examining liability arising out of an injury suffered by plaintiff who sued a deli for the illegal sale of alcohol to a minor who in turn provided the alcohol to plaintiff); *Micro Enhancement Int'l, Inc.*, 110 Wn. App. 412, 417-18, 40 P.3d 1206 (examining negligence and proximate cause determinations where the plaintiff asserted accounting malpractice); *Chhuth*, 43 Wn. App. at 641-642, 719 P.2d 562 (student fatally injured due to accident while crossing the street outside of school); *Yurkovitch*, 68 Wn. App. at 645-46, 847 P.2d 925 (student fatally injured due to accident while crossing the street after exiting a school bus); *Briscoe*, 32 Wn.2d at 355-56, 201 P.2d 697 (student injured while playing a touch-football game with other students on school grounds during recess, not scheduled or directed by school authorities).

Griffin is distinguishable because the plaintiff did not propose a substantively different duty instruction. In a personal injury action by a tenant against her landlord, the jury returned a verdict finding negligence on the part of the landlord but no proximate cause. While the tenant objected to a jury instruction regarding the landlord's duty, she had proposed an alternate duty instruction that stated what the Court described as an "identical" duty. *Id.* at 89. She did "not identify any additional duty that would be placed on the landlord under her proposed instruction[.]" *Id.* She did not "offer a persuasive logical argument that the jury's considerations were necessarily 'skewed' by application of what appear to be identical standards of care[.]" *Id.* Under these circumstances, the Court also noted that it was unnecessary to address the duty issue further because "[t]he proximate cause determination is the same under either arguable standard of care[.]" *Id.* at 88.¹ In this case, by contrast, the duty to protect arising from the special relationship between a school and its students is unquestionably different from the duty of reasonable care that applies in other contexts.

¹ In addition, the instruction proposed by the tenant in *Griffin* was legally incorrect because it omitted what the Court described as a "critical element." *See id.* at 90.

The holding in *Schooley* is distinguishable because that case involved a situation of third party harm outside of a public school context, dealing with the liability of a defendant who sold alcohol to a minor who later re-sold that alcohol to a minor who was subsequently injured. 134 Wn.2d at 474, 951 P.2d 749. *Micro Enhancement Int'l, Inc.* is distinguishable from Hendrickson's case in that the trial court in *Micro Enhancement Int'l, Inc.* provided proper instruction to the jury in the face of deficient or absent objections by one of the parties. 110 Wn. App. at 429, 433, 437, 40 P.3d 1206.

Chhuth is distinguishable because the superior court "properly instructed the jury" regarding the defendants' duties. *Chhuth*, at 651. In a personal injury action arising from an automobile-pedestrian collision in a school cross walk, the parents and estate of a child killed in the collision brought suit against the driver of the automobile and the school district. The jury found negligence on the part of the school district but no proximate cause. The superior court entered judgment as a matter of law in favor of the parents and estate on grounds that the school district's negligence was a proximate cause of the child's death as a matter of law. This Court reversed on grounds that "[t]he 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." *Chhuth*, at 651 (emphasis added). In Hendrickson's case, there is no dispute that the superior court provided improper instruction to the jury, and, as a result, the verdict cannot stand.

Also clearly distinguishable from the instant case are *Yurkovitch v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993) and *Briscoe v. School Dist. No. 123*, 32 Wn.2d 353, 201 P.2d 697 (1949). *Yurkovitch* dealt with an accident occurring outside of school grounds, where the victim was a thirteen-year-old girl who was struck and killed crossing a street after leaving her school bus. 68 Wn. App. at 646, 847 P.2d 925. The trial court issued a directed verdict against the defendants regarding the issue of negligence. *Id.* at 646, 847 P.2d 925. The jury was left to deliberate on the remaining issues in the case. *Id.* No defective instruction on the nature and scope of duty was provided to the jury, distinguishing *Yurkovitch* from Hendrickson's case. The jury's deliberation in *Yurkovitch* was not tainted by a defective instruction regarding duty, as it was in Hendrickson's case.

Further, after stating that the school bus operator owed the victim the highest degree of care consistent with the operation of

the school bus, the Court of Appeals found that evidence showed that the victim had “voluntarily encountered a risk that had already been created by the negligence of the defendant.” *Id.* at 648, 656, 847 P.2d 925. This differs from the instant case, where Hendrickson was injured not because she voluntarily encountered a risk, but while she was working on a project as part of her coursework while in class, under the supervision of her teacher. A thirteen-year-old exiting a bus and crossing the street is simply not in the same position regarding a school district’s duty to protect her as a student in a shop class who is required to use dangerous machinery to carry out assigned tasks. The highest duty of care consistent with operating a school bus is not the same as the highest duty of care consistent with supervising a student engaged in the use of dangerous machinery for a project that is part of a student’s class work.

Briscoe v. School District. No. 123 is likewise distinguishable from Hendrickson’s case. In that case, a student was injured while “playing an athletic game with fellow-students on school grounds[.]” 32 Wn.2d at 354, 301 P.2d 697. The game, touch-football, “was part of the scheduled physical education program, and was supervised by an instructor.” *Id.* at 362, 301 P.2d 687. The

state Supreme Court indicated that given the facts in the case contributory negligence could be put before the jury, “under proper instructions to be given by the court.” *Id.* at 366, 301 P.2d 697. (citations omitted). Three key facts distinguish *Briscoe* from Hendrickson’s case. First, in *Briscoe*, the issue of taint through faulty instructions to the jury is simply not present; the case was never submitted to the jury for their decision due to the trial court issuing a directed verdict. *Id.* at 356, 301 P.2d 697. Second, the kind of activity involved in a game of touch-football during recess is inherently different from operating a table saw as part of a class. A table saw is dangerous equipment, requiring formal training and supervision in class for a student to operate. Third, the injury in *Briscoe* was the result of student group activity involved in playing a game, a factor expressly noted by the Court in its discussion of proximate cause in that case. *Id.* at 365, 301 P.2d 697. In Hendrickson’s case, there was no group student activity involved: Hendrickson was using the table saw as part of her coursework for the class.

The facts and the applicable principles of liability in Hendrickson’s case clearly auger against the application of *Griffin* and the other cases referenced by the respondent.

C. *Gregoire v. City of Oak Harbor* provides appropriate guidance to this Court regarding the linkage between duty and proximate cause, as well as the limitation of comparative fault in the context of a school district’s duty to protect students.

MLSD’s argument that *Gregoire v. City of Oak Harbor* may be disregarded by this Court because it is a plurality decision is mistaken. While the lead opinion in the case is a plurality opinion, the ultimate holding in *Gregoire* commanded majority support and returned the case to the trial court “for a new trial[.]” 170 Wn.2d at 634, 244 P.3d 924 (paragraph 10). Both Justice Chambers in his concurrence, *id.* at 644-45, 244 P.3d 924 (Chambers, J., concurring) and Justice Madsen in her separate opinion, *id.* at 645, 244 P.3d 924 (Madsen, J., concurring in part and dissenting in part) agreed with that holding. More importantly, the separate opinions by both Justice Chambers and Justice Madsen do not dispute the core reasoning involving the linkage between duty and causation that undergirds the plurality opinion’s holding. A reading of both the plurality and separate opinions in *Gregoire v. City of Oak Harbor* demonstrate that the fundamental reasoning and legal principles set out in the plurality opinion and applicable to Hendrickson’s case are vindicated by the separate opinions by

Justices Chambers and Madsen, and guide this Court in its application of the law.

Justice Chambers wrote his concurrence to clarify a point of law about express assumption of risk and implied primary assumption of risk. *Id.* at 644-645, 244 P.3d 924 (Chambers, J., concurring). Justice Madsen's separate opinion makes clear at its start that she agreed "with the lead opinion's assumption of risk analysis. *Id.* Justice Madsen wrote separately to clarify that a jail's duty to protect inmates consists of the provision of "health screenings and health care if necessary, and to protect an inmate from injury by their parties and jail employees, but it has no freestanding duty to prevent all inmate self-inflicted harm." *Id.* Justice Madsen's separate opinion specifically noted that comparative negligence becomes inappropriate when a jail assumes an inmate's duty of self-care. *Id.*

In the instant case, MLSD by the nature of its special relationship with Hendrickson had the duty to protect her from harm in the use of dangerous equipment in the shop class that she was taking as part of the curriculum. While MLSD ignores this duty to assert that contributory negligence and comparative fault are proper in the instant case, that argument overlooks the shared

thread of reasoning in the plurality and concurring opinions in *Gregoire v. City of Oak Harbor* and the application of that reasoning to Hendrickson's case. MLSD's had a duty to anticipate dangers and take reasonable steps to protect Hendrickson from injury. The failure to properly instruct the jury on the nature and scope of MLSD's duty tainted the jury's examination of proximate cause. Additionally, the instruction on comparative negligence should never have been provided to the jury in light of MLSD's heightened duty to protect Hendrickson.

D. *Christensen v. Royal School District No. 160* explains that the Washington rules regarding a school district's duty to protect students is one of the grounds of its prohibition on the application of comparative fault.

MLSD argues that the applicability of *Christensen v. Royal School District No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005) is limited to cases involving sexual abuse of students. MLSD's Opposition Brief at 19-20. There is no question that *Christensen* deals with sexual abuse of minors and the holding in that case was tailored to address that harm to students. At the same time, the legal principles regarding the duties of a school district towards its students and the inapplicability of comparative negligence to a student's claims have resonance beyond the narrow category of sexual abuse offenses.

In its decision, the state Supreme Court grounded its reasoning prohibiting contributory negligence on two grounds:

First, we are satisfied that the societal interests embodied in the criminal laws protecting children from sexual abuse should apply equally in the civil arena when a child seeks to obtain redress from harm caused to the child by an adult perpetrator of sexual abuse or a third party in a position to control the conduct of the perpetrator. Second, the idea that a student has a duty to protect herself from sexual abuse at school by her teacher conflicts with the well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its case.

Christensen, 156 Wn.2d at 67, 124 P.3d 283. The Court explained the second ground for its ruling later in the decision, stating:

Our conclusion that the defense of contributory negligence should not be available to the Royal School District and Principal Anderson is in accord with the established Washington rule that a school as a “special relationship” with the students in its custody and a duty to protect them “from reasonably anticipated dangers.” The rationale for imposing this duty is 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 its administrators with a child is not a voluntary relationship, as children are required by law to attend school. Consequently, “the protective custody of teacher is mandatorily substituted for that of the party.”

Id. at 70, 124 P.3d 283 (citations omitted). The Court’s reasoning demonstrates that the holding, while indeed focused on cases involving sexual abuse of minors, *id.* at 71, 124 p.3d 283, is based at

least in part on principles of liability that apply more generally to students who are injured due to the misdeeds of a school district and its personnel in violation of the school district's duty to protect students. That duty includes the duty to anticipate dangers and take reasonable precautions to prevent harm, including their own negligence. *Id.* at 67, 124 P.3d 283; Restatement (Second) of Torts § 314 cmt. d.; *Hopkins v. Seattle Public Sch. Dist. No. 1*, — Wn. App. —, — P.3d —, 2016 WL 2960844 (July 18, 2016) at 6; *Quynn v. Bellevue Sch. Dist.*, — Wn. App. —, — P.3d —, 2016 WL 4507470 (Aug. 29, 2016) at 5. *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn. 2d 316, 319, 255 P.2d 360 (1953); *N.L. v. Bethel Sch. Dist.*, — Wn. 2d —, 378 P.3d 162, 166-67 & 168 (2016); *Chapman v. State*, 6 Wn. App. 316, 320-21, 492 P.2d 607 (1972).

III. CONCLUSION

Considering these arguments and those contained in the appellant's Opening Brief, Ms. Hendrickson respectfully requests that this Court grant her relief by reversing the trial court's verdict and remanding her case back for a new trial. She respectfully requests that this Court provide the Superior Court in Grant County with specific directions as to the proper instruction to provide the jury regarding the school district's duty towards Ms. Hendrickson.

She also respectfully requests that this Court provide the Superior Court in Grant County with a specific direction regarding the impermissibility of an instruction to the jury regarding comparative fault/assumption of risk in her case.

Respectfully submitted this 26th day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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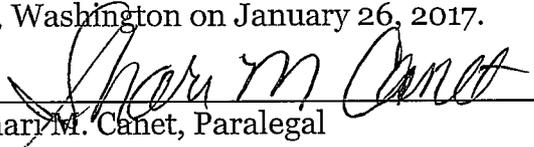
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Signed at Moses Lake, Washington on January 26, 2017.



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