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C/A No. 341976-III

WASHINGTON SUPREME COURT

HEIDI JO HENDRICKSON, a single person,
Plaintiff-Respondent-Cross Petitioner,

vs.

MOSES LAKE SCHOOL DISTRICT, a municipal corporation,
Defendant-Petitioner-Cross Respondent.

RESPONDENT-CROSS PETITIONER'S SUPPLEMENTAL BRIEF

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I. SUPPLEMENTAL STATEMENT OF THE CASE

Heidi Jo Hendrickson (Hendrickson), a former student at Moses Lake High School, had a significant portion of the thumb on her dominant hand cut off while learning to use a power table saw in shop class that she would normally be prohibited from using. She brought suit against Moses Lake School District No. 1 (MLSD), alleging that the school and her shop teacher had failed to train and supervisor her properly, and that the saw was unsafe because safety equipment had been removed.

Table saws such as the one that injured Hendrickson are the "most dangerous" power tools in the MLSD shop class. RP 291:18-19 & 893:1-3. There is a serious risk of injury because boards can become jammed and kick back toward the user or others in the area. RP 277:21-278:16 & 282:20-24. The Washington State Department of Labor and Industries prohibits minors from using such saws in any workplace. *See* WAC 296-125-030(13).

The table saw came with and was supposed to have installed a splitter device to prevent binding and an anti-kickback device to prevent boards from kicking out backwards. Ex. P-34 (instruction manual); Ex. P-36 (blow up of splitter and anti-kickback device); RP

318-22. However, the splitter and anti-kickback device had been removed. RP 335.

Before allowing a student to use a table saw, the shop teacher would typically give some verbal instructions, then perform a demonstration cut, and then give the students a written safety quiz to confirm that they understood how to use it. RP 293:6-24. According to the shop teacher, the students were required to get all the quiz answers correct, or he would make them write down any safety rules they had misunderstood ten times in order to make sure that their misunderstanding was corrected. RP 294:9-22. However, Hendrickson's written safety quiz contained an incorrect answer that was not corrected. Question 8 on the exam asked whether "A push stick is necessary when ripping narrow stock." Ex. 9. She answered "false," which is incorrect. RP 296:17-297:1. Nonetheless, the answer was not marked as being incorrect. *Id.*

At the time of her injury, Hendrickson was making a rip cut on a narrow board, using a push stick. RP 622:2-624:23. She did not know that the shop teacher had left the room, as he did not give the students any warning that he was leaving. RP 632:7-12. While she was making the cut, the wood got jammed in the saw. She looked around for the shop teacher, but did not see him. RP 631:17-632:6.

She got scared, set the push stick down, and tried to wiggle the board free with her thumb. RP 622:17-623:1. She thought her thumb was a safe distance from the blade, but she could not see her thumb's exact location in relation to the blade because her vision was obscured by a plastic guard. RP 623:23-624:6. When the saw was new, the guard was clear, see-through plastic, but it had become opaque over time. RP 614:8-15. Her thumb slipped and hit the blade.

At trial, the superior court declined to instruct the jury regarding the school's duty to use reasonable care to protect Hendrickson from risks of harm within the school-student relationship. CP 1308. Instead, the court instructed the jury regarding the duty of care that applies outside the school context, including instructions regarding alleged contributory negligence on the part of Hendrickson. CP 1523, 1525, 1528-32 & 1534. In closing argument, counsel for MLSD argued that Hendrickson's alleged contributory negligence precluded a finding of proximate cause. RP 1038:15-24 & 1039:6-10. Based on these instructions and argument, the jury returned a special verdict finding that the school was negligent in one or more of the ways alleged by Hendrickson, but that its negligence was not a proximate cause of her injury and damage. CP 1539-40.

The Court of Appeals reversed in part, holding that the superior court's failure to instruct the jury regarding the school's duty to protect is prejudicial error requiring retrial. However, the Court of Appeals affirmed the superior court decision to instruct the jury regarding the alleged contributory negligence of Hendrickson. From this decision, MLSD and Hendrickson both sought review, which was granted. *See Hendrickson v. Moses Lake Sch. Dist.*, 199 Wn. App. 244, 398 P.3d 1199 (2017), *rev. granted*, 189 Wn. 2d 1031 (2018).

II. SUPPLEMENTAL ARGUMENT

A. **A school has a duty to exercise reasonable care to protect students from foreseeable risks of harm within the scope of the student-school relationship.**

Under most circumstances, an actor owes no duty to protect another from risks of harm the actor has not created. *See C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn. 2d 699, 738, 985 P.2d 262 (1999) (quoting Restatement (Second) of Torts § 314 (1965) with approval). However, a duty to protect does arise from certain types of special relationships. *See, e.g., Shea v. City of Spokane*, 17 Wn. App. 236, 241-42, 562 P.2d 264 (1977) (adopting Restatement (Second) of Torts § 314A), *aff'd*, 90 Wn. 2d 43, 578 P.2d 42 (1978) (adopting Court of Appeals opinion per curiam).

One of the archetypal special relationships giving rise to a duty to protect is the relationship that exists between a school and its students. *See Christensen v. Royal Sch. Dist. No. 160*, 156 Wn. 2d 62, 67, 124 P.3d 283 (2005) (referring to "the well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care"); *accord N.L. v. Bethel Sch. Dist.*, 186 Wn. 2d 422, 430, 378 P.3d 162 (2016) (citing *Christensen* for this proposition).

The school's duty to protect arises because "the protective custody of teachers is mandatorily substituted for that of the parent." *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn. 2d 316, 319, 255 P.2d 360 (1953). "[T]he essential rationale for imposing a duty 'is that the victim is placed under the control and protection of the other party, the school, with resulting loss of control to protect himself or herself.'" *N.L.*, 186 Wn. 2d at 433 & 440-41 (brackets added; quotation omitted).

The school's duty to protect requires the school "to anticipate dangers which may reasonably be anticipated, and then to take precautions to protect the pupils in its custody from such dangers." *McLeod*, 42 Wn. 2d at 320; *accord N.L.*, 186 Wn. 2d at 440 (quoting *McLeod*); *Hopkins v. Seattle Public Sch. Dist. No. 1*, 195 Wn. App.

96, 99, 380 P.3d 584, *rev. denied*, 186 Wn. 2d 1029 (2016), (describing *McLeod* as "the leading case" on the special relationship and the duty owed by schools). The duty is often described as an "enhanced" or "heightened" duty. *See N.L.*, 186 Wn. 2d at 430 (describing the duty as "enhanced"; quoting *Christensen*, 156 Wn. 2d at 67); *Schwartz v. Elerding*, 166 Wn. App. 608, 618, 270 P.3d 630, 636 (2012) (stating "*McLeod* recognized that a heightened duty was owed"). However, this does not mean that a school owes more than reasonable care to its students. *See N.L.*, 186 Wn. 2d at 430 (stating "[s]chool districts have the duty 'to exercise such care as an ordinarily responsible and prudent person would exercise under the same or similar circumstances'"; brackets added & quotation omitted).

A school's duty is "enhanced" and "heightened" in the sense that it extends to all foreseeable risks of harm that occur within the scope of the school-student relationship, not just those created by the conduct of the school or its agents. It includes risks of harm that students may inflict upon each other. *See, e.g., N.L.*, 186 Wn. 2d at 431 (rape of one student by another). It includes risks of harm arising from the use of dangerous machinery. *See, e.g., Banks v. Seattle Sch. Dist. No. 1*, 195 Wash. 321, 322-24, 80 P.2d 835 (1938) (involving student injured while using unguarded printing press at school);

Travis v. Bohannon, 128 Wn. App. 231, 115 P.3d 342 (2005) (involving student injured while using wood splitter during school-sponsored work day). As argued below, it also includes risk of harm from students' negligence.

The Court of Appeals below properly held that failure to instruct the jury on a school's enhanced and heightened duty to protect students was reversible error.¹

B. Foreseeable risks of harm within the scope of the student-school relationship include harm from students' own negligence, which should preclude a school from raising an affirmative defense based on the alleged contributory negligence of its students.

This Court has not squarely addressed whether the nature of a school's duty toward its students is compatible with an affirmative defense based on the alleged contributory negligence of the student outside the context of sexual abuse of the student by a teacher. *See Christensen, supra*. Nonetheless, the Court's decision in *Christensen* and the subsequent lead opinion by a 4-Justice plurality of the Court in *Gregoire v. City of Oak Harbor*, 170 Wn. 2d 648, 244 P.3d 924 (2010), reveal a basic conceptual incompatibility between a school's

¹ Prejudice is presumed from instructions that misstate the applicable law. *See Anfinson v. FedEx Ground Package Sys.*, 174 Wn. 2d 851, 860, 281 P.3d 289 (2012). The issue of prejudice is addressed elsewhere in the briefing. *See Hendrickson App. Br.*, at 12; *Hendrickson Reply Br.*, at 4-6; *Hendrickson Ans. To Pet. For Rev. & Cross Pet.*, at 13.

duty to protect its students and a defense of contributory negligence, even outside the sexual abuse context. Holding that a school's duty to protect its students includes protection from the students' own foreseeable negligence is consistent with provisions of the Restatement of Torts regarding a school's duty. Conceiving a school's duty in this way reflects the nature of the relationship between a school and its students, with the school assuming a parental role toward students that are in its custody. It also recognizes the relative immaturity of students, which immaturity educators are equipped to recognize and education is designed to address.

1. No precedent squarely addresses whether a school is entitled to raise a defense of contributory negligence.

The Court of Appeals stated that “[o]ur case law has long held students responsible for negligent conduct on school grounds.” *Hendrickson*, 199 Wn. App. at 252 (brackets added). In support of this statement, the court cited *Briscoe v. School Dist. No. 123*, 32 Wn. 2d 353, 366, 201 P.2d 697 (1949), and *Yurkovich v. Rose*, 68 Wn. App. 643, 655-56, 847 P.2d 925 (1993)). However, contrary to the Court of Appeals, neither *Briscoe* nor *Yurkovich* held that a school can raise a defense of contributory negligence against its students.

a. The discussion of contributory negligence in *Briscoe* is dicta.

In *Briscoe*, a student sued the school for injuries sustained in an unsupervised game of “keep away” during recess under former Rem. Rev. Stat. §§ 950 & 951, statutes that authorized certain suits against school districts before the general waiver of sovereign immunity. *See* 32 Wn. 2d at 360-61. The Court reversed a directed verdict in favor of the school district on grounds that evidence regarding the lack of supervision of recess coupled with knowledge of the rough-and-tumble manner of play was sufficient to create a jury question regarding the district’s negligence. *See id.* at 362.

Although the school in *Briscoe* raised a defense of contributory negligence on the part of the injured student, contributory negligence was not one of the issues before the Court.

The Court described the issues as follows:

The paramount legal question, therefore, on this phase of the appeal, is whether the trial court was correct in withdrawing the case from the jury’s consideration, necessarily on the assumption that reasonable minds could not differ on the questions: (1) whether the respondent school district had been negligent as to the appellant, and (2) if it had been so negligent, whether its negligence was of such a nature as to constitute a proximate cause of his injury.

32 Wn. 2d at 360. “The defense of contributory negligence was pleaded by [the school district], but was not argued to the trial court

as one of the grounds for taking the case from the jury.” *Id.* at 366 (brackets added). Nonetheless, the Court stated:

In view of the age of the appellant at the time of the injury, and in view of the further fact that he was merely participating in a game which the other boys of his age were playing, however rough it may have been, the very least that can be said of a charge that the boy's actions constituted contributory negligence is that it is a jury question, under proper instructions to be given by the court. *Davis v. Wenatchee*, 86 Wash. 13, 149 P. 337; *Hutchins v. School District No. 81*, 114 Wash. 548, 195 P. 1020; *Rice v. School District No. 302*, supra; *Gattavara v. Lundin*, supra; *Eckerson v. Ford's Prairie School District No. 11*, supra.

Id. at 366 (citations in original; brackets added). This portion of *Briscoe* is dicta because the student's alleged contributory negligence was not an issue before the Court and it was unnecessary to address contributory negligence in order to resolve the issues of the school's negligence and proximate cause.

b. The cases cited in *Briscoe* are not precedential on the issue of contributory negligence.

The cases cited in *Briscoe* are likewise not precedential on the issue of whether schools can raise a defense based on the contributory negligence of their students. *Davis v. City of Wenatchee*, 86 Wash. 13, 149 P. 337 (1915), involved an 11-year-old who was injured by a dynamite cap left on a municipal worksite. It did not involve a claim against a school or any other type of special

relationship. It is therefore distinguishable and unhelpful in resolving the issue before the Court in this case.

The availability of a defense of contributory negligence was not contested by the parties or addressed by the Court in the remaining cases cited in *Briscoe*, although they do involve schools. All of these cases affirmed jury verdicts in favor of injured students and rejected the schools' requests to reverse the verdicts on grounds that the students were contributorily negligent as a matter of law.² Decisions such as these, involving an issue that was not disputed by the parties, are not precedential on that issue.

² See *Hutchins v. School Dist. No. 81*, 114 Wash. 548, 552-53, 195 P. 1020 (1921) ("It is argued by the appellant that its motion for a nonsuit was improperly denied, and also that its motion for a judgment n. o. v. should have been granted. The argument is based upon the assertions that there was no proof of negligence on the part of the school district and that the boy was guilty of contributory negligence there can be no room for an opinion other than that it was one for the jury"; ellipses added); *Rice v. School Dist. No. 302*, 140 Wash. 189, 194, 248 P. 388 (1926) ("Nor can we agree with another argument presented on behalf of the appellant that it should be held as a matter of law that the contributory negligence of the injured boy bars his right to recover damages Contributory negligence, set up in the answer, was under the evidence in this case a matter for the jury under proper instructions"; ellipses added); *Gattavara v. Lundin*, 166 Wash. 548, 555, 7 P.2d 958 (1932) ("it is claimed that the boy was guilty of contributory negligence to the extent that it should be so declared as a matter of law. On the contrary, a fair consideration of the evidence, as the jury had a right to view it, pictured this boy's conduct as nothing more than nor different from that of the average school boy of his age under the same or similar circumstances"); *Eckerson v. Ford's Prairie Sch. Dist. No. 11*, 3 Wn. 2d 475, 487, 101 P.2d 345 (1940) ("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").

c. *Yurkovich* did not address the issue of contributory negligence.

In *Yurkovich*, a student was killed in a vehicle-pedestrian accident after being dropped off by a school bus. Following a jury verdict in favor of the student's estate, the defendant-school appealed the superior court's refusal to give an assumption of risk instruction to the jury in addition to a contributory negligence instruction. *See* 68 Wn. App. at 656-57. The court held that declining to give the instruction was not error because the assumption of risk defense was substantively the same as the contributory negligence defense. *See id.* at 657 (stating "the defendants had the benefit of the defense"). The representatives of the deceased student did not appeal the submission of a contributory negligence defense to the jury, and the court did not address the issue whether a defense of contributory negligence is compatible with a school's duty to protect. *See id.* As a result, *Yurkovich* is not helpful because it did not address the issue before the Court in this case.³

³ Even if it had addressed the issue before the Court, *Yurkovich* is distinguishable because the case involved a school's duty as a common carrier rather than the duty to protect arising from the special relationship with its students. *See Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 634-35, 383 P.3d 1053 (2016), (distinguishing *Yurkovich* on this basis, and stating "[i]t is also true ... that a school district may owe its students duties that arise separate and apart from the special relationship that begets the protective duty"; brackets & ellipses added).

2. *Christensen* and *Gregoire* suggest that a school’s duty to protect is incompatible with a defense of contributory negligence.

Christensen involved a negligence claim against a school arising from a sexual relationship between a teacher and a student, and the Court held that the school could not raise an affirmative defense based on alleged contributory negligence of the student. The decision was grounded both in the public policy against sexual abuse and the nature of a school’s duty to protect its students:

Our conclusion is compelled by two principal reasons. 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 for 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 care.

Another case that is similarly distinguishable is *Juntila v. Everett Sch. Dist. No. 24*, 183 Wash. 357, 48 P.2d 613 (1995), where a minor was injured when he fell off of a railing on which he was sitting while watching a football game. In a subsequent lawsuit by his parents against the school, the Court affirmed judgment as a matter of law in favor of the school in part because “he assumed the attendant risk” of sitting on the railing, although the language of the Court’s opinion equates this assumption of the risk with contributory negligence. *Id.*, 183 Wash. at 364. While it is not clear whether the minor was a student at the defendant-school, it is apparent that his attendance at the football game was deemed to be **outside** the scope of the school-student relationship. *See id.* at 360-61 (stating “Young Juntila was at the game in response to the invitation extended by respondent to the public”). As a result, *Juntila* does not support a defense of contributory negligence **within** the scope of the school-student relationship.

156 Wn. 2d at 67. With respect to the second reason, the school's duty to protect, the Court elaborated:

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 has a "special relationship" with the students in its custody and a duty to protect them "from reasonably anticipated dangers." *Niece v. Elmview Group Home*, 131 Wash.2d 39, 44, 929 P.2d 420 (1997) (citing *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wash.2d 316, 320, 255 P.2d 360 (1953)). 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. *Niece*, 131 Wash.2d at 44, 929 P.2d 420. The relationship between a school district and its administrators with a child is not a voluntary relationship, as children are required by law to attend school. *See McLeod*, 42 Wash.2d at 319, 255 P.2d 360. Consequently, "the protective custody of teachers is mandatorily substituted for that of the parent." *Id.*

Id. at 70-71.

Following *Christensen*, the lead opinion in *Gregoire* stated that it was error to instruct the jury on affirmative defenses of contributory negligence and assumption of risk in a negligence claim against a jail arising from the suicide of an inmate. *See* 170 Wn. 2d at 631, 634 & 641. The opinion reasoned that such defenses vitiate the duty to protect that arises from the special relationship between a jail and its inmates, and concluded:

The trial court erred by instructing the jury on contributory negligence because the injury-producing act—here, the suicide—is the very condition for which the duty is imposed.

The jail's duty to protect inmates includes protection from self-inflicted harm and, in that light, contributory negligence has no place in such a scheme.

Id. at 640. The lead opinion in *Gregoire* relied on *Christensen* in reaching this result, stating “a similar principle” to the one enunciated in *Christensen* “applies to the jailor-inmate relationship,” *id.* at 639; and that *Christensen* is “the best analogy to the facts before us,” *id.* at 640 n.6.

The Court of Appeals below characterized *Christensen* and *Gregoire* as involving “unique policy concerns” and distinguished them on that basis. *Hendrickson*, 199 Wn. App. at 253. While policy concerns are undoubtedly implicated in both decisions, both decisions are also independently grounded in the special relationship between a school and its students (in *Christensen*), and the analogous relationship between a jail and its inmates (in *Gregoire*). The fact that *Gregoire* relied on *Christensen* by analogy indicates that the rationale of *Christensen* is not limited to cases of sexual abuse. Otherwise, it would not be analogous. Limiting *Christensen* and *Gregoire* to their particular facts, as the appellate court tried to do, ignores the independent rationale underlying both decisions based on the duty to protect arising from a special relationship, and

the danger that a defense of contributory negligence vitiates this duty.⁴

3. The Restatement confirms that a school’s duty to protect is incompatible with a defense of contributory negligence.

The Restatement (Second) of Torts § 314A mirrors a school’s duty to protect its students as reflected in Washington law, although Washington’s formulation of the duty preceded the promulgation of this Restatement provision. This Court has adopted § 314A in the jailor-inmate context in *Shea*, 90 Wn. 2d 43, which is analogous to the student-school relationship, as recognized by the lead opinion in *Gregoire*, 170 Wn. 2d 640 n.6.⁵ It would be incongruous for the protection afforded by this provision to be given to inmates but not schoolchildren.⁶

Section 314A(4) provides in pertinent part:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a

⁴ The Court of Appeals also ignores the dangerous nature of the saw that injured Hendrickson, which minors are normally prohibited from using. *See infra* pt. D.

⁵ *See also* Restatement (Second) of Torts § 314A Illustration 7 (involving kindergarten’s duty to provide medical assistance to student); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40 cmt. 1 (2012) (noting “substantial acceptance” of § 314A and related provisions as applied to schools).

⁶ Washington has applied related Restatement provisions in the school context. *See Briscoe v. School Dist. No. 123*, 32 Wn. 2d 353, 362, 201 P.2d 697 (1949) (following the first Restatement of Torts § 320 (1934)); *McLeod*, 42 Wn. 2d at 320 (same). There was no counterpart to Restatement (Second) of Torts § 314A in the first Restatement.

similar duty [i.e., a duty to take reasonable action to protect them against unreasonable risk of harm] to the other.

(Brackets added.) The duty stated in this provision includes protection of the person who is in custody from their own negligence:

d. The duty to protect the other against unreasonable risk of harm extends to risks arising out of the actor's own conduct, or the condition of his land or chattels. It extends also to risks arising from forces of nature or animals, or from the acts of third persons, whether they be innocent, negligent, intentional, or even criminal. (See § 302B.) ***It extends also to risks arising from pure accident, or from the negligence of the plaintiff himself***, as where a passenger is about to fall off a train, or has fallen. The duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door.

Id. § 314A cmt. *d* (emphasis added).

Section 314A has been updated by the Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 40 (2012), which makes a school's duty to protect students more explicit:

(a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include ...

(5) a school with its students[.]

(Ellipses & brackets added; formatting in original.) As with the Restatement (Second) § 314A, the duty stated in this provision

includes protection of the person who is in custody from their own negligence:

g. Risks within the scope of the duty of care. The duty described in this Section applies regardless of the source of the risk. **Thus, it applies to risks created by the individual at risk** as well as those created by a third party's conduct, whether innocent, negligent, or intentional.

Id. § 40 cmt. *g* (emphasis added).⁷

These Restatement provisions confirm that a school's duty to protect its students should include protection of its students from their own negligence. A defense of contributory negligence should not, therefore, be available because the school has a duty to protect its students from the very harm that forms the basis for the defense.

4. A school's in loco parentis status is incompatible with a defense of contributory negligence.

A school's duty to protect its students is "based upon the concept the school stands in loco parentis to the child during the time the child is in its custody." *Chapman v. State*, 6 Wn. App. 316, 320-21, 492 P.2d 607 (1972). Parents who are compelled by law to surrender their child to the authority of a school should be able to

⁷ Although Washington courts have not adopted the Restatement (Third) of Torts § 40, the provision does not appear to differ from the substance of the Restatement (Second) of Torts § 314A, which has been adopted in Washington. The Court has cited other provisions of the Restatement (Third) of Torts with approval. *See, e.g., Mohr v. Grantham*, 172 Wn. 2d 844, 854, 262 P.3d 490 (2011).

expect that the school will take responsibility for the safety of that child, including the exercise of reasonable care to protect the child from the consequences of the child's own negligence. Permitting assertion of contributory negligence as a defense to breach of the school's duty in effect denies parents the assurance that the school has indeed accepted responsibility for the safety of their children.

5. Students' lack of maturity, which education is designed to address, militates against a defense of contributory negligence.

This Court has previously determined that contributory negligence is unavailable in the case of injury to a child below the age of 6, because a child that young is incapable of exercising reasonable care for their own safety. *See Price v. Kitsap Transit*, 125 Wn. 2d 456, 461, 886 P.2d 556 (1994). Even with children over the age of 6, a scientific consensus has recently emerged regarding the relative immaturity of the adolescent brain in the areas of risk and consequence assessment, impulse control, and susceptibility to peer pressure, among other things. *State v. O'Dell*, 183 Wn. 2d 680, 692 & nn.6-7 & 9, 358 P.3d 359 (2015). In light of this scientific information, the Court has recognized that there is "a clear connection between youth and moral culpability for criminal conduct," *id.*, 183 Wn. 2d at 695; and that "youth can significantly

mitigate culpability” for such conduct, *id.* at 694. This recognition has prompted the Court and the Legislature to alter the approach to sentencing juveniles, and even adults for crimes committed as juveniles, to ensure that they had the capacity to appreciate the wrongfulness of their conduct and conform their conduct to the requirements of the law. *See O’Dell, supra*; Laws of 2005, ch. 437, § 1 (explaining amendment to RCW 9.94A.540 is based on research regarding adolescent brain development and intellectual and emotional capabilities).

Scientific research regarding adolescent brain development should likewise influence the assessment of contributory negligence in the school context. Professional educators are equipped to recognize immaturity corresponding to adolescent brain development and the process of public education is designed to address such immaturity, perhaps better than most parents.⁸ Given the special role of schools, it is not enough that juries are permitted

⁸ *See, e.g.*, RCW 28A.150.240 (requiring teachers to “[m]aintain good order and discipline in their classrooms at all times,” “[h]old students to a strict accountability while in school for any disorderly conduct,” “[g]ive careful attention to the maintenance of a healthful atmosphere in the classroom,” and “[g]ive careful attention to the safety of the student in the classroom”; brackets added); RCW 28A.150.211 (providing education should address values of “[r]esponsibility for personal actions,” “[s]elf-discipline and moderation,” and “[h]ealthy and positive behavior”; brackets added); RCW 28A.150.210 (stating goal of education includes becoming responsible citizens).

to consider the immaturity of children. *See Bauman by Chapman v. Crawford*, 104 Wn. 2d 241, 244, 704 P.2d 1181, (1985) (permitting jury to consider “age, intelligence, maturity, training and experience” of a child between 6 and 16); 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 10.05 (6th ed.) (defining “ordinary care” for a child between 6 and 16). Schools should not be able to minimize or avoid responsibility for failing to exercise reasonable care to protect the student from his or her own immaturity by blaming the student for being immature or failing to recognize his or her own immaturity.

C. Precluding schools from raising a defense of contributory negligence does not turn schools into “guarantors of student safety.”

The Court of Appeals below was reluctant to hold that a school’s duty to protect its students includes protection from the students’ own foreseeable negligence, based on a fear that doing so would turn schools into “guarantors of student safety.” *Hendrickson*, 199 Wn. App. at 252. This fear is unfounded, and does not justify allowing a school to raise a defense of contributory negligence.

First, an affirmative defense based on the alleged contributory negligence of a student does not expand the nature of the school’s duty. It merely serves as a damage-reducing factor if the school is otherwise found liable. *See RCW 4.22.070*.

Second, as a damage-reducing factor, the availability of contributory negligence as a defense is already limited by the age of the child. A child under six years of age cannot be found contributorily negligent, *see Price, supra*; and the jury can consider the immaturity of a child between ages 6 and 16 when assessing contributory negligence, *see Bauman, supra*.

Third, liability can only be imposed for an injury that arises out of the school-student relationship. *See N.L.*, 186 Wn. 2d at 432 (indicating “the district’s *duty* to exercise reasonable care might end when the student leaves its custody”; emphasis in original). The school is not liable for harm that does not arise out of the relationship.

Fourth, the student still must prove that the school failed to exercise reasonable care and was therefore negligent. The school is not strictly liable for injuries that occur within the scope of the school-student relationship.

Fifth, the student must also prove that the school’s negligence proximately caused his or her injuries. The school is not liable for harm that it did not cause.

Sixth, the harm to the student must be foreseeable. *See N.L.*, 186 Wn. 2d at 435-36. The school is not liable for unforeseeable

harm, and where appropriate, the issue of foreseeability can be submitted to the jury. *See id.*

In light of the foregoing, fears of turning schools into guarantors of student safety are overblown and insufficient to justify allowing a school to raise a defense of contributory negligence.⁹

D. Even if a school were permitted to raise a defense of contributory negligence in some circumstances, it should not be allowed to do so in a case such as this one, involving a student who is being trained to use dangerous equipment that is otherwise reserved for use only by adults.

The Court of Appeals below held that MLSD was entitled to raise the alleged contributory negligence of Hendrickson as a defense in the absence of “a context-specific reason for eliminating contributory negligence.” *Hendrickson*, 199 Wn. App. at 254. As argued above, the relevant context is the school-student relationship and no further reason should be required for eliminating contributory negligence. Nonetheless, to the extent that a context-specific reason for eliminating contributory negligence is necessary, the fact that Hendrickson was learning to use a dangerous piece of

⁹ This case does not require the Court to address the effect of intentional misconduct on the part of the student. Nor does it require the Court to address express or implied primary assumption of risk, which involve consent to negation of a defendant’s duty. *See Kirk v. Wash. State Univ.*, 109 Wn. 2d 448, 453, 746 P.2d 285 (1987).

power equipment that she would otherwise normally be prohibited from using should provide a sufficient reason.

Although it is obviously difficult to compare being trained to use dangerous equipment with the sexual abuse at issue in *Christensen*, there is a principle that can be derived from *Christensen* that militates a defense of contributory negligence in the particular factual context present in this case. In addition to the rationale grounded in the school-student relationship, the Court in *Christensen* concluded that a defense of contributory negligence was unavailable to the school because the student was deemed by law to be incapable of consenting to a sexual relationship with her teacher. *See* 156 Wn. 2d at 67-68 (citing criminal statutes). In an analogous way, Department of Labor & Industries regulations deem minors as being incapable of safely using power saws such as the one that injured Hendrickson. *See* WAC 296-125-030(13). Hendrickson should not therefore be blamed for her alleged negligence in using this saw, any more than the student in *Christensen* could be blamed for participating in a sexual relationship with a teacher. Applying the principle that underlies this aspect of *Christensen*, MLSD should not be allowed to minimize or avoid responsibility for its negligence by

raising a defense based on Hendrickson's alleged contributory negligence.¹⁰

III. CONCLUSION

Based on the foregoing, Hendrickson respectfully asks the Court to affirm the well-established duty of a school to protect its student from risks of harm within the student-school relationship, hold that this duty is incompatible with a defense of contributory negligence, either in general or in the particular factual context of this case, and remand the case for a new trial with proper instructions.

Respectfully submitted this 12th day of February, 2018.

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¹⁰ *Cf. Bauman by Chapman v. Crawford*, 104 Wn.2d 241, 244, 704 P.2d 1181, 1184 (1985) (noting “the child's standard [of care] was created because public policy dictates that it would be unfair to predicate legal fault upon a standard most children are incapable of meeting”; brackets added).

CERTIFICATE OF SERVICE

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

On the date set forth below, I served the document to which this is annexed by email and U.S. Postal delivery, postage prepaid, as follows:

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