No. 93492-4

SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES HOPKINS, JR., an individual,

Respondent,

v.

SEATTLE PUBLIC SCHOOL DISTRICT NO. 1,

Petitioner.

HOPKINS' ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

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

The Court of Appeals correctly recognized that this Court has long recognized a special relationship between school districts and their students where school authorities act *in loco parentis* as to such students; a school district has a duty to anticipate reasonably foreseeable dangers and to take precautions to protect students in its custody from such dangers.

The Court of Appeals correctly noted that the trial court erred when it failed to instruct the jury on the District's important special protective relationship as to Hopkins and on the District's anticipatory duty of care to Hopkins. The trial court's instructional errors on duty were compounded by its instruction on comparative fault when its special relationship with Hopkins barred such an instruction as a matter of law. The trial court further stacked the deck against Hopkins by instructing the jury on mainstreaming special needs students. The trial court's instructional errors were prejudicial, necessitating a new trial, as the Court of Appeals properly discerned. Review is not merited. RAP 13.4(b).

B. STATEMENT OF THE CASE

The Court of Appeals correctly set forth the facts and procedure in this case. Op. at 1-7. Hopkins only supplements the facts to emphasize certain key features of the facts relevant to review by this Court.

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

While it is mentioned in passing in the Court of Appeals' opinion and the District's petition, it is important to note that E.E.'s past violence in school was not minor in nature and the District was well aware of his exceedingly violent behavior. CP 197, 253.[2] Moreover, E.E. was not

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

[2] E.E. was clinically evaluated as being at risk for aggression. CP 199. His history included threatening in class to kill another student with a gun, other verbally threatening behavior, multiple class disruptions resulting in referrals and suspension, suspension for fighting and "emergency expulsion" for assault in 2005. CP 204. The expulsion document stated "This assault was serious." CP 204. In June 1, 2005, after the emergency expulsion, E.E.'s special education teacher noted that he was getting into angry physical exchanges with other students a few times per month. CP 226. In November 2005, he assaulted another student in the parking lot in front of eyewitnesses. CP 239. It was noted to be the second assault that school year. *Id.* E.E.'s individual

supervised by District staff at the time of the incident. CP 269. The only District employee nearby was not watching E.E. at the time of his assault on Hopkins. That teacher, physical education teacher Michael Kaiser, was not in the locker room when the assault occurred and failed to observe the incident. CP 269, 1243.[3] Former Superintendent of Public Instruction Judith Billings concluded that the District breached its general supervisory duty over E.E., as well as its specific duty under E.E.'s IEP. RP 1/22/15 at 130-31.

Hopkins was severely injured by E.E.'s assault. Student witnesses reported to staff that E.E. ran up to Hopkins and punched him in the back of the head, causing him to fall and fracture his jaw on the cement floor. RP 1/28/15 at 41-42.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

(1) The Court of Appeals Correctly Determined that the Trial Court Erred in Failing to Instruct the Jury on the District's Special Relationship with Hopkins and Foreseeability

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education plan ("IEP") specifically required placement into a "self contained classroom." CP 237. His behavior needed to be monitored and addressed in the hallway, cafeteria, gymnasium, anywhere "on and off school grounds." CP 257. Despite this plan, in January 2006, E.E. was again suspended for assault. CP 264. Shortly after returning from suspension, he assaulted Hopkins. CP 269.

[3] Prior to the assault, Kaiser was never informed by the District that E.E. had a pattern of assaulting other students. CP 1257. Kaiser received E.E.'s file, but he had "60 kids that I'm responsible for" and did not remember learning that E.E. had a violent history. RP 1/26/15 at 27. Kaiser also noted that there are many behaviorally disturbed students of widely varying behaviors and issues. *Id.* The principal of the school at the time, BiHoa Caldwell, testified that it was a mistake to not have informed Kaiser about E.E.'s past violent conduct against other students. RP 1/26/15 at 40.

As a preliminary matter, the District argued below that Hopkins failed to preserve instructional error as to the failure to give his proposed instructions 8, 9, 10 for appellate review because those proposed instructions contained more language than was appropriate. Br. of Resp't at 20-23. The Court of Appeals rejected that contention. Op. at 7-8. The District does complain about the wording of Hopkins' proposed instructions, but its complaints are raised largely in n.3 to its petition at 16.[4] The Court of Appeals correctly rejected the District's procedural complaint particularly where the District specifically stated below that Hopkins' proposed instructions correctly stated the law, but contained unnecessarily "detailed elaborations." Br. of Resp't at 21. The Court of Appeals' decision was consistent with this Court's decision in *Washburn v. City of Federal Way*, 178 Wn.2d 732, 748, 310 P.3d 1275 (2013). Review on this mere procedural point is unwarranted. RAP 13.4(b).

(a) School Districts Owe a Special Protective Duty to Students under Their Care Arising Out of the Students' Mandatory Attendance

The District deliberately understates the duty it owed to students like Hopkins under its care as a result of compulsory attendance laws. The

[4] The Court should disregard such an argument. *Public Util. Dist. No. 2 of Pacific Cty. v. Comcast of Wash. IV, Inc.*, 184 Wn. App. 24, 84 n.49, 336 P.3d 65 (2014), *review denied*, 183 Wn.2d 1015 (2015) (court disregards argument in footnote because placement of issue in footnote makes it ambiguous as to whether it is part of party's argument).

District would have this Court ignore its prior precedents on the special relationship between districts and students and focus solely on a duty of ordinary care. Pet. at 11-14. The District fails to document any error in the Court of Appeals' treatment of the District's special relationship with Hopkins. Op. at 9-10.

As the Court of Appeals noted, this Court has long recognized the existence of a special relationship between a school district and its students that obligates the district to anticipate reasonably foreseeable dangers and protect students in its custody from such dangers. In *Briscoe v. School District No. 123, Grays Harbor County*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949),[5] a case involving injuries to a student at the hands of fellow students in a game on school grounds during the afternoon recess, the Court stated that a school stands *in loco parentis* to a student where the student must by law be at school. This Court again discussed a school district's special duty in *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953), where it noted that a District's custodial role imposes a duty of "special application" to prevent third

[5] This broad duty was articulated by this Court even earlier than *Briscoe*. *See, e.g., Gattavara v. Lundin*, 166 Wash. 548, 554, 7 P.2d 958 (1932) (district owed duty where it allowed cars to traverse school grounds during school hours); *Rice v. School Dist. 302*, 140 Wash. 189, 248 Pac. 388 (1926) (live electric wire).

persons from harming students, citing the *Restatement (Second) of Torts*, § 320. *Id.* at 322.

This Court has reaffirmed this heightened duty of school districts to students in recent cases as well. In *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2004), the Court reaffirmed the special relationship between the school and its students arising out of the student's mandatory attendance at school, describing a school district's duty to the students in its custody as "an enhanced and solemn duty" to protect them.

Very recently, in *N.L. v. Bethel School Dist.*, ___ Wn.2d ___, ___ P.3d ___, 2016 WL 4573928 (2016), this Court upheld the Court of Appeals' reversal of a summary judgment in the district's favor, holding that the district had a duty to a student who was sexually assaulted off school grounds by a fellow student who was a registered sex offender. The Court noted that the sex offender/student's lengthy history of school discipline and interactions with the criminal justice system for illicit sexual conduct, known to the district, and the district's failure to have a policy in place for the monitoring/supervision of student sex offenders were relevant to the breach of the District's duty to the plaintiff. The Court reaffirmed the special duty principles set forth in *McLeod* and *Briscoe,* ruling that the sex offender/student's dangerousness made the

ultimate assault on the plaintiff conduct that was well within the general field of danger for which the district was responsible, even though the plaintiff was assaulted off-campus.

The Court of Appeals decision here is also consistent with *J.N. By & Through Hager v. Bellingham School Dist. No. 501,* 74 Wn. App. 49, 871 P.2d 1106 (1994), a case remarkably similar to the present case,[6] a first grade student was repeatedly sexually assaulted by a fourth grade student on school grounds in the boys' rest room. The Court of Appeals reversed summary judgment for the school district, stating: "[W]here the disturbed, aggressive nature of a child is known to school authorities, proper supervision requires the taking of specific, appropriate procedures for the protection of other children from the potential for harm caused by such behavior." *Id.* at 60. The district there had ample notice of the violent history of the student who committed the assaults, even though it did not have notice of the student's specific violent behavior, a fact important to the trial court. *Id.* at 56.

Thus, the District here had a clear-cut duty under Washington law arising out of its special relationship with Hopkins. That duty was not simply to do what an ordinary "reasonably careful person" would do under similar circumstances, as it has argued throughout its petition. Rather, it

[6] J.N. was cited with approval in N.L.

was specific to the District's special relationship with Hopkins. That duty mandated that the District anticipate reasonable foreseeable dangers and to take appropriate steps to protect students like Hopkins, who was involuntarily in the District's custody from such dangers.

The Court of Appeals correctly determined that the trial court erred in giving its "ordinary care" instruction to the jury[7] and in failing to give Hopkins' proposed instructions 8 and 9 that would have properly instructed the jury on the District's special duty to students like Hopkins. Hopkins' proposed instructions 8 and 9 accurately reflect the law in Washington derived from cases like *Briscoe, McLeod, Christensen, N.L., and J.N.*, and those instructions should have been given to the jury here, as the Court of Appeals held. Op. at 9-10. *See* Appendix.

The trial court's duty instructions did not include any explanation of the District's duty to protect Hopkins. They did not explain the District's special involuntary custodial relationship with Hopkins giving rise to its duty to anticipate reasonably foreseeable danger to him such as that posed by E.E. The District had a duty, as articulated in Hopkins

[7] Instead of instructing the jury in the language of the case law arising from the District's special protective relationship with Hopkins, the trial court chose to instruct the jury only in the general negligence language of WPI 10.01.

proposed instructions 8 and 9, to anticipate harm to him and to address it.[8] The trial court's ordinary care instruction nowhere speaks to this anticipatory duty.

Also, the District's duty here went beyond ordinary care. Uninformed of the District's heightened duty, a juror may not think it is "reasonable" to exercise constant monitoring and supervision over another person. Yet that is exactly the duty the District had here. The jury should have been informed of the applicable special duty the District owed Hopkins, as the Court of Appeals determined. In instructing the jury merely on the District's ordinary care, the trial court misstated the law and deprived Hopkins of the opportunity to argue his theory of the case.[9]

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[8] In *Quynn v. Bellevue School District*, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 4507470 (2016) at *6, Division I made this point even clearer:

> The school district had a duty to "reasonably anticipate" and "take precautions" to prevent harms falling "within a general field of danger which should have been anticipated." *McLeod*, 42 Wn.2d at 321. Instruction 15 did not tell the jury this. Instead, Instruction 15 told the jury that the district was required to react after the fact to preclude recurrences of tortious behavior.

The trial court's Instructions 8 and 9 on ordinary care here made no mention at all of any anticipatory duty on the District's part.

[9] A court commits prejudicial error if it erroneously instructs the jury on the law. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266-67, 96 P.3d 386 (2004); *Fergen v. Sestro*, 182 Wn.2d 794, 802-03, 346 P.3d 708 (2015). Contrary to the District's assertion in its petition at 18-19, Hopkins was deprived of the opportunity to argue his theory of the case by the absence of that instruction, contrary to the District's contention. Pet. at 2-6. *Nowhere* in any of the record passages cited there was there any indication that Hopkins could advise the jury of the District's special relationship with Hopkins or its duty to anticipate harm to him.

The District seeks to justify its contention that this Court should grant review in two ways. First, it argues that the simple WPI ordinary care instruction – Instruction 9 – accurately reflects its duty here. Pet. at 11-14.[10] In that assertion it is mistaken. As noted *supra,* it is oblivious to the many decisions of this Court and the Court of Appeals noting the special relationship between districts and their students.

Moreover, despite its assertion that only a simple instruction on ordinary care was necessary, the District *nowhere* discusses Instruction 17 on mainstreaming E.E. The District's entire argument (articulated in its petition at 11-12) that an ordinary care instruction should not be accompanied by any other duty instruction, is undercut by the very fact that it had the benefit of an instruction that elaborated upon its duty that it could readily argue to the jury. The District was allowed to argue *its theory of the case* – its ordinary care duty was tempered by a legal duty to keep E.E. in school. *See, e.g.*, RP 2/2/15 at 115. On the other hand, Hopkins' counsel's hands were tied. They could not tell the jury of the District's special relationship to Hopkins.

[10] The District implies that a WPI instruction is invariably a correct statement of the law. *E.g.*, pet. at 1, 11. That contention is belied by the numerous appellate decisions finding pattern instructions erroneous. As the court in *State v. Hayward*, 152 Wn. App. 632, 645, 217 P.3d 354 (2009) noted: "...WPICs are not the law; they are merely persuasive authority." Pattern instructions must give way to controlling law. *Id.* at 646.

Further, contrary to its contention that the Court of Appeals' reiteration of the well-established special relationship law will somehow be of concern for all school districts, pet. at 16-17, such a requirement is fully supported in Washington law. Indeed, in other settings where the duty of care arises out of a special relationship, such a relationship is discussed with the jury. For example, the relationship of common carrier to passenger, much akin to the relationship of districts to students, is but one. *See, e.g.*, WPI 110.01; *Yurkovich v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993).

In sum, the Court of Appeals correctly determined that the trial court erred in failing to instruct the jury on the District's special relationship to Hopkins, well-established by *numerous* decisions of this Court and the Court of Appeals. Review is not merited. RAP 13.4(b).

(b) The Trial Court Erred in Failing to Instruct the Jury That the District Had a Duty to Anticipate Reasonably Foreseeable Dangers and Safeguard Hopkins From Them While He Was in Its Care

As a specific feature of the District's special relationship with students under its care by mandatory attendance laws, the District had a duty to safeguard students like Hopkins from foreseeable risks of harm. The *McLeod* court made foreseeability an element of a school district's

duty to a student for harm occasioned by third persons.[11] Among the foreseeable risks to students are intentional torts.[12]

The trial court refused to give Hopkins proposed instruction number 10 on the District's duty to protect Hopkins from foreseeable risks. *See* Appendix. The Court of Appeals properly held that this was prejudicial error. Op. at 9-11. That court correctly discerned that this Court's decisions in *Briscoe* and *McLeod mandated* that a school district anticipate dangers to students under its care and take appropriate precautions to protect students from those risks of harm. *McLeod*, 42 Wn.2d at 320. The appellate courts have consistently reaffirmed this principle as recently as this Court did in *N.L.* when it held "that districts have a duty of reasonable care toward the students in their care to protect

[11] Harm is foreseeable if the risk from which it results was known or in the exercise of reasonable care should have been known. *Travis v. Bohannon*, 128 Wn. App. 231, 238, 115 P.3d 342 (2005). The occurrence is not foreseeable only when it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod*, 42 Wn.2d at 323.

[12] In *McLeod*, this Court found a school district potentially breached its duty to a student raped by other students in an unlocked, unsupervised room under the playing field bleachers. *Id.* at 318. The Court noted that the question was not whether the school should have anticipated forcible rape by 12-year-olds, but whether a "darkened room under the bleachers might be utilized during periods of unsupervised play for acts of indecency between schools boys and girls." *Id.* at 322. In other words, "the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated. *Id.* at 321. Safeguarding children from the general danger would have protected the rape victim from the particular harm. *Id.* In such a context, the intentional misconduct of third parties is considered foreseeable despite the fact that there was no allegation of prior misconduct of a similar nature by the offending student.

them from foreseeable dangers that could result from a breach of the district's duty." *N.L.*, *supra*.

The District contends that a foreseeability instruction here was not necessary at all. Pet. at 14-16. The District misunderstands the law. As noted *supra*, foreseeability is an element of a District's duty *and* a duty-limiting factor under this Court's formulation of a district's duty to student with regard to harm by third persons. This analysis was most recently undertaken by this Court in *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 762-64, 344 P.3d 661 (2015). Foreseeability as an element of the duty owed by an actor to others must be explained to the trier of fact who then must determine if that duty of care is breached. Op. at 11.

An ordinary care instruction failed to sufficiently convey to the jury the District's obligation to Hopkins to anticipate the reasonable danger of harm to him that E.E. presented and to take reasonable risks to forestall that danger. An ordinary care instruction without such an explanation of the duty owed was an erroneous statement of the law, as the Court of Appeals properly discerned.

In sum, the Court of Appeals properly resolved the foreseeability of harm instructional error. Review is not merited. RAP 13.4(b).

(2) The Trial Court's Instructional Error on Duty Was Compounded by Instructions that Unduly Emphasized the District's Position[13]

(a) Comparative Fault

The trial court denied both Hopkins' motion for summary judgment and his motion *in limine*, which sought to bar the District's comparative fault defense. CP 31-32, 862, 879. The court instead instructed the jury on this issue, ignoring the fact that the District's duty to Hopkins, based on their special custodial relationship, barred the availability of this defense to the District *as a matter of law*. This was error, although the Court of Appeals decided to remand the issue in its opinion. Op. at 12-13.

The sole evidence relied upon by the District below to sustain its comparative fault argument was evidence that Hopkins, twelve years old at the time, may have mumbled "bitch" under his breath after bumping into E.E. in the boys' locker room. CP 1316. This issue should not have been in the case as a matter of law. The issue further detracted from the District's special duty to Hopkins, and prejudiced the jury.

In *Christensen*, this Court refused to allow the affirmative defense of comparative fault under the facts of the case, reasoning that due to the

[13] Hopkins is raising these issues only as conditional issues, should this Court grant review on the duty instructional issue. *Lewis River Golf Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 725, 845 P.2d 987 (1993).

special involuntary custodial relationship between a school district and its students, the student could not protect himself or herself. 152 Wn.2d at 70-71. *See also, Travis*, 128 Wn. App. at 238-39 ("The usual relationship between student and school is that the child must attend school and obey school rules. Students under the control and protection of the school are thus not able to protect themselves. The protective custody of teachers is substituted for that of the parents.").

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

That error was not harmless. In *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010), a jail inmate committed suicide. Although the jury found the city negligent, it also found its negligence was not the proximate cause of the inmate's death. This Court reversed the judgment on the verdict in the city's favor because the trial court gave

erroneous instructions on assumption of the risk and comparative fault, even though the trial court properly instructed the jury on proximate cause. The Court held that the special relationship/duty owed by the city to the inmate could not be "nullified" by assumption of the risk, or comparative fault. The Court determined that the erroneous instructions on assumption of the risk and comparative fault effectively caused the jury to reach its decision on proximate cause, necessitating a reversal. *Id.* at 643-44. This case is no different.

(b) Mainstreaming E.E.

The trial court also erred in giving Instruction 17 to the jury on mainstreaming E.E., particularly without a concurrent instruction regarding the District's special duty to Hopkins. CP 1681. Instruction 17 was not an erroneous statement of the law, but because the trial court failed to properly instruct the jury on the District's special protective relationship with Hopkins and the attendant duty to safeguard him from foreseeable risks, Instruction 17 unduly emphasized the District's position. The trial court, in effect, put its thumb on the scale.

As noted *supra,* throughout its petition, the District asserted no other instruction but the WPI on ordinary care should have been given. Yet, as noted *supra*, the District makes no mention of Instruction 17 that favored it.

While omitting the District's special relationship to Hopkins or its duty to safeguard him from risks of harm while he was in its custody, the trial court, through Instruction 17, unduly emphasized that the District had a special duty to E.E. to educate and "mainstream" him, a greater and special legal obligation to E.E. than Hopkins. In the jury's mind, reading the instructions as a whole, the District was under a special obligation to allow E.E. freedom and normalcy, even though he was a known and immediate risk to other students, but under no special obligation to Hopkins.[14]

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

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

"mainstreamed" or not. The District was not legally compelled to let E.E. roam school grounds looking for his next victim.

E.E.'s mainstreaming is not an implicit defense to its duty of care to Hopkins. CP 847. In *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 21-22, 317 P.3d 481 (2013), *review denied*, 180 Wn.2d 1016 (2014), the court concluded that merely because a student who shot and killed a fellow student was diagnosed as schizophrenic, such a diagnosis did not render his conduct foreseeable to the school district that had no indication from his school conduct or medical records that he was violent in any fashion, in direct contrast to the District's knowledge of E.E.'s long record of violence here. The plaintiff in *Kok* argued that the student should not have been placed in the general educational environment, *id.* at 22, making relevant the issue of his entitlement to be included in school activities and programs. No such argument was advanced by Hopkins here in contending that the District should have better monitored/supervised E.E. Simply stated, *Kok* does not make mainstreaming a defense to a school district's liability for failing to protect a student in its custodial care, as the District essentially persuaded the trial court here.

By giving Instruction 17, the trial court implied to the jury that the District could legitimately claim that its special relationship with Hopkins was altered and its duty to him was truncated by the mere fact E.E. had to

be included in District programs and activities such as physical education. That was misleading, and unduly emphasized the District's position on duty.

D. CONCLUSION

The trial court ignored this Court's long-standing law on a school district's special relationship with students like Hopkins while mandatorily in attendance at school and the associated duty to protect such students from reasonably foreseeable dangers during that custodial period while the District was *in loco parentis*. The Court of Appeals correctly found the trial court committed prejudicial error in instructing the jury. That decision is further supported by the fact that the trial court's instructions on comparative fault and mainstreaming over-emphasized the District's position on duty, to Hopkin's detriment. The jury responded by exonerating the District from any liability for the vicious assault on Hopkins by E.E., a special needs student with a long history of violence.

This Court should deny review under RAP 13.4(b) and let the Court of Appeals decision to award Hopkins a new trial stand. Costs on appeal should be awarded to Hopkins.

DATED this 22 day of September, 2016.

Respectfully submitted,

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APPENDIX

Court's Instruction 5:

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

CP 1669.

Court's Instruction 8:

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

Second, that the plaintiff was injured;

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

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

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

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

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

CP 1672.

Court's Instruction 9:

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

CP 1673.

Court's Instruction 13:

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

CP 1677.

Court's Instruction 14:

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

CP 1678.

Court's Instruction 17:

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

CP 1681.

Court's Instruction 21:

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

CP 1686.

Plaintiff's Proposed Instruction 8:

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

CP 947.

Plaintiff's Proposed Instruction 9:

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

CP 948.

Plaintiff's Proposed Instruction 10:

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

CP 949.

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

JAMES HOPKINS, JR., Appellant, v. SEATTLE PUBLIC SCHOOL DISTRICT NO. 1, Respondent.	)	No. 73147-5-I ORDER TO PUBLISH

At the direction of a majority of the panel in accord with RAP 12.3(d), the opinion issued on July 18, 2016 in the above case shall be published in the Washington Appellate Reports.

Now, therefore, it is hereby

ORDERED that at the direction of a majority of the panel, the opinion issued on July 18, 2016 in the above case shall be published in the Washington Appellate Reports.

DATED this 21st day of July, 2016.

FOR THE COURT:

Judge

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

JAMES HOPKINS, JR., Appellant, v. SEATTLE PUBLIC SCHOOL DISTRICT NO. 1, Respondent.	)	No. 73147-5-I UNPUBLISHED OPINION FILED: July 18, 2016

SCHINDLER, J. — 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. James Hopkins Jr. appeals the verdict in favor of Seattle Public School District No. 1 (School District). Hopkins contends the trial court erred in refusing to instruct the jury on the special relationship and duty of the School District. Because the court's instructions allowed the jury to apply an ordinary negligence standard without regard to the special relationship and duty of the School District, we reverse the judgment on the verdict, and remand for a new trial.

FACTS

In 2006, James Hopkins Jr. and E.E. were students at Aki Kurose Middle School. E.E. attended special education classes except for physical education (PE). On June 7,

2006, E.E. and Hopkins were in the boys' locker room after PE class. E.E. punched Hopkins in the back of his head. Hopkins fell to the ground and broke his jaw.

On November 1, 2013, Hopkins filed a lawsuit against Seattle School District No. 1 (School District). Hopkins asserted claims for negligence and negligent supervision. The complaint alleged the School District knew E.E. "was a danger to himself and/or others." The complaint alleged the School District "owed a duty to Hopkins to supervise its employees to ensure Hopkins would be free from physical harm while under the custody and control" of the School District. The School District denied the allegations and asserted a number of affirmative defenses.

In his motion for summary judgment on liability, Hopkins cited the leading case on the special relationship and the duty the School District owed to protect him from foreseeable harm, McLeod v. Grant County School District No. 128, 42 Wn.2d 316, 255 P.2d 360 (1953). Hopkins argued the undisputed facts showed the School District breached the duty to protect him from foreseeable harm.

The School District conceded that "[w]ith respect to the duty element, there is no dispute" that a school district has the duty to exercise reasonable care when supervising students in its custody. The School District argued there were material questions of fact regarding foreseeability. The court denied summary judgment on liability.

At the beginning of trial, the court described the claims to the jury:

> The plaintiff, Mr. James Hopkins, whom you were introduced to, claims that the Seattle Public School is at fault for injuries he sustained as a result of a June 2006 assault by a fellow middle school student whose initials are E.E. The plaintiff alleges Seattle Public School District owed a duty of reasonable care to protect him and breached this duty by failing to prevent E.E. from assaulting him in June 2006. He claims this breach of duty was a cause of the June 2006 assault and his injury.

> Defendant public school district denies it breached a duty to use reasonable care to prevent students — student-to-student assaults. Seattle Public School District further denies that its alleged actions or failures to act caused the assault or plaintiff's injury. Seattle Public School District also denies the nature and extent of damages plaintiff claims were caused by the assault.
>
> In addition, Seattle Public School District claims that the plaintiff was contributorially negligent in provoking the assault and by failing to mitigate or reduce his damages, and that the assailant, known by the initials E.E., was the proximate cause of plaintiff's injury. The plaintiff denies these claims.

In opening statement, Hopkins' attorney told the jury: "The school district has an obligation to protect all students from foreseeable harm." The attorney asserted the School District "was negligent by failing to supervise a special ed kid" they knew was likely to assault other students and in failing to protect Hopkins from the attack.

The School District told the jury that it exercised reasonable care in supervising E.E. and could not have prevented the spontaneous and impulsive assault that was provoked by Hopkins.

Near the end of trial, the parties addressed the proposed jury instructions.

Hopkins' attorney objected to the instructions proposed by the School District because the instructions did not include an instruction on the special relationship and duty the School District owed to students or foreseeability. Hopkins argued the court should give the instructions he proposed on the duty of the School District to exercise reasonable care to prevent foreseeable harm. Hopkins proposed giving the following instructions:

Instruction 8:

> A school official stands in the place of a parent when the student is in the school's custody. The placement of children under a school's custody and control gives rise to a duty on the part of the school to exercise ordinary care to protect students in its custody from reasonably

anticipated dangers, including from the intentional or criminal conduct of third parties.

Instruction 9:

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

Instruction 10:

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

The School District attorney objected to Hopkins' proposed instructions as incorrect, misleading, and argumentative.

The School District asserted the pattern instructions based on 6 Washington Practice: Washington Pattern Jury Instructions: Civil (6th ed. 2012) (WPI) accurately stated the "duty is to exercise ordinary care, to reasonably supervise students within its custody. That's the duty at issue."[1] The School District argued the court should give its proposed instructions including the WPI on negligence and ordinary care:

Instruction 8:

> 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.

See WPI 10.01, at 124. Instruction 9: "Ordinary care means the care a reasonably

[1] Internal quotation marks omitted.

careful person would exercise under the same or similar circumstances." See WPI 10.02, at 126.

Hopkins did not object to giving the WPI on ordinary care but argued it was "critical" to give his proposed jury instructions on the special relationship and duty of the School District.

> This language is taken from the cases that are cited. This is about the special relationship. And that's what this case is all about — I mean, that's a critical piece to Plaintiff's case is that when Mr. Hopkins stepped out of — off the bus or stepped onto the bus out of his family home and then was in the school, he had a relationship with the school in — that's akin under the law as between him and his parents. Uh, that's absolutely supported in the law. And that relationship, gives ri[s]e to the — to a special obligation to — from the school to protect him.
>
> . . . .
>
> . . . And I think it's very important for the Court to instruct the jury on this special relationship that Mr. Hopkins had and the obligations that arise on the school because of that.
>
> . . . .
>
> The jury needs to understand the special relationship between the school and its students. And I think it's appropriate to explain what negligence and ordinary care means in the context of that school. I think that's another very important part of it.

The next day, the court provided the parties with a copy of the court's proposed jury instructions. The court's proposed instructions included the WPI on negligence and ordinary care.[2] The court's proposed instructions did not include an instruction on the special relationship and duty of the School District to protect students in its custody or on foreseeability.

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[2] In addition to WPI 10.01 and 10.02, the court also included an instruction based on WPI 12.07.

> Every person has the right to assume that others will exercise ordinary care and comply with the law 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.

See WPI 12.07, at 159.

Hopkins filed a memorandum objecting to the failure of the court to include a jury instruction on the duty the School District owed to a student and on foreseeability. Hopkins argued it was error for the court to refuse to instruct the jury on the duty of the School District to protect a student from foreseeable harm.

When trial reconvened, the parties addressed the court's proposed instructions.

The School District argued a school has the duty of ordinary care and a separate instruction on the special relationship was unnecessary.

> [W]hat the cases say is that school districts have a duty of ordinary care to their students. The reason why they have that duty of ordinary care is because of this special relationship. Therefore, it's not necessary to instruct the jury that, yeah, they have a special relationship. That's just the [basis] for whether it's the duty of ordinary care.

Hopkins objected to the court's instructions. Hopkins argued the court had to instruct the jury on the duty of the School District and foreseeability.

> This is not a cookie cutter case. This involved misconduct of an intentional actor, and it involves a school district that has a special relationship and obligation to Mr. Hopkins. I believe it would be error for the Court not to instruct the jury on the specific duty owed by the school district and provide some instruction on what the duty means when it pertains to intentional acts or misconduct of third parties.

The court stated it refused to give Hopkins' proposed instructions on the duty of the School District and foreseeability because the instructions contained language that was argumentative and "inflammatory."

Hopkins reiterated the failure of the court to give an instruction on the duty of the School District and foreseeability would constitute legal error and prevent him from arguing his theory of the case.

> I believe it would be error for this Court to not instruct on the specific duty that's owed by [a] school district. At a minimum, there has to be some kind of instruction that follows the . . . McLeod court . . . .

> We cannot argue our case without some kind of instruction about that. I don't see how this is included in the plain negligence standard. Again, this is not a cookie cutter case.

The court noted Hopkins' objection but refused to give an additional instruction on duty or foreseeability. The court ruled Hopkins' theory "can be argued under the instructions that have been given."

By special verdict, the jury found the School District was not negligent. The court entered judgment on the verdict and dismissed the lawsuit.

ANALYSIS

Hopkins contends the court erred in failing to instruct the jury on the special relationship and duty of the School District to use reasonable care to protect a student in its custody from foreseeable harm. The School District asserts the trial court did not err in refusing to give the jury instructions proposed by Hopkins. The School District argues the jury instructions proposed by Hopkins were argumentative, misleading, and incorrect.

We review the decision not to give a jury instruction for abuse of discretion. Fergen v. Sestero, 182 Wn.2d 794, 802, 346 P.3d 708 (2015). A trial court need not " 'give a requested instruction that is erroneous in any respect.' " Crossen v. Skagit County, 100 Wn.2d 355, 360, 669 P.2d 1244.(1983) (quoting Vogel v. Alaska S.S. Co., 69 Wn.2d 497, 503, 419 P.2d 141 (1966)).

However, even if Hopkins' proposed instructions contained more language than was appropriate, we conclude Hopkins preserved his right to challenge the instructions given as legally erroneous. The undisputed record establishes Hopkins objected not only to the refusal to give his proposed instructions, but also to the failure of the court to

give a jury instruction on the duty of the School District to protect a student from foreseeable harm. See Washburn v. City of Federal Way, 178 Wn.2d 732, 748, 310 P.3d 1275 (2013) (Because the City objected not only to the refusal to give its public duty doctrine instruction but also objected to giving proposed instructions, the objection was preserved.); Joyce v. Dep't of Corr., 155 Wn.2d 306, 325, 119 P.3d 825 (2005) (The Department properly objected to legally erroneous jury instructions that prevented the Department from arguing its theory of the case.).

The purpose of CR 51(f) is to apprise the trial judge of the nature and substance of the objection. Crossen, 100 Wn.2d at 358. The record shows Hopkins repeatedly cited the leading Washington Supreme Court case on the special relationship and duty of the School District to argue that the court must give an instruction on the duty of the School District and foreseeability.

> School districts owe a duty to protect the pupils in its custody from dangers reasonably to be anticipated—including the foreseeable misconduct of third-parties, like E.E. Under well-established principles, when a pupil attends a school, he or she is subject to the rules and discipline of the school, and the protective custody of the teachers is substituted for that of the parent["to protect the pupils in its custody from dangers reasonably to be anticipated."] . . . McLeod, 42 Wn.2d at 319.

Hopkins repeatedly objected to the failure to give a jury instruction on "the specific duty owed by a public [school] to its student, or the school's duty to protect Mr. Hopkins from the foreseeable misconduct of third parties" as legal error.

We conclude the record establishes Hopkins clearly and unequivocally stated the failure to instruct the jury on the duty of the School District and foreseeability was an error of law.

We review legal errors in jury instructions de novo. Fergen, 182 Wn.2d at 803. Jury instructions are sufficient if the instructions are supported by the evidence; allow each party to argue its theory of the case; are not misleading; and when read as a whole, properly inform the trier of fact of the applicable law. Fergen, 182 Wn.2d at 803; Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012). If any of these elements is absent, the instruction is erroneous. Anfinson, 174 Wn.2d at 860. If the instruction misstates the law, prejudice is presumed and is grounds for reversal unless the error was harmless. Fergen, 182 Wn.2d at 803.

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 Wn.2d at 320; Christensen v. Royal Sch. Dist. No. 160, 156 Wn.2d 62, 70, 124 P.3d 283 (2005).

McLeod identifies two factors that determine the scope of the legal duty of a school district. First, there is the special relationship where the "protective custody of teachers is mandatorily substituted for that of the parent." McLeod, 42 Wn.2d at 319.

> The relationship here in question is that of school district and school child. It is not a voluntary relationship. The child is compelled to attend school. He must yield obedience to school rules and discipline formulated and enforced pursuant to statute. . . . The result is that the protective custody of teachers is mandatorily substituted for that of the parent.
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> The duty which this relationship places upon the school district has been stated in the Briscoe case . . . as follows:
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> "As a correlative of this right on the part of a school district to enforce, as against the pupils, rules and regulations prescribed by the state board of education and the superintendent of public instruction, a duty is imposed by law on the school district to take certain precautions to

> protect the pupils in its custody from dangers reasonably to be anticipated."

McLeod, 42 Wn.2d at 319-20 (quoting Briscoe v. Sch. Dist. No. 123, 32 Wn.2d 353, 362, 201 P.2d 697 (1949)). Second, there is "the duty of a school district . . . to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers." McLeod, 42 Wn.2d at 320. A school district must "exercise such care as an ordinarily reasonable and prudent person would exercise under the same or similar circumstances." Briscoe, 32 Wn.2d at 362.

Below and on appeal, the School District relies on Kok v. Tacoma School District No. 10, 179 Wn. App. 10, 317 P.3d 481 (2013), to argue the trial court properly instructed the jury on the duty of ordinary care to protect students from harm. The School District claims an instruction on the obligation to exercise reasonable care to protect students from harm is an unnecessary elaboration of the duty of ordinary care.

We reject the argument that an instruction on the well established legal scope of the duty of a school district to exercise reasonable care to protect students from foreseeable harm is unnecessary. Nor does Kok support the argument that the court properly instructed the jury using the pattern WPI on negligence and the duty of ordinary care.

McLeod, not Kok, is the leading authority on the duty of a school district. The court in Kok addressed whether there was a genuine issue of material fact on foreseeability. Although foreseeability is "generally a question for the jury," the court concluded reasonable minds could only conclude the student's acts were "not foreseeable by the District," and affirmed summary judgment dismissal of the lawsuit. Kok, 179 Wn. App. at 17-18.

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 15.01, at 191. It is not true with respect to duty. McLeod makes clear that the duty of a school district to use reasonable care extends only to such risks of harm as are foreseeable. McLeod, 42 Wn.2d at 320; see also J.N. v. Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 57, 871 P.2d 1106 (1994). To establish foreseeability, the harm sustained must be within a "general field of danger" that should have been anticipated. McLeod, 42 Wn.2d at 321. Acts are foreseeable "only if the district knew or in the exercise of reasonable care should have known of the risk" that resulted in the harm. Peck v. Siau, 65 Wn. App. 285, 293, 827 P.2d 1108 (1992). Thus, in this case, it was essential to instruct the jury on foreseeability.

We hold the court erred in failing to give jury instructions on the special relationship and duty of the School District to exercise reasonable care to protect students from foreseeable harm. Because the instructions given allowed the jury to apply an ordinary negligence standard without regard to the special relationship and duty of the School District, the error was not harmless and prevented Hopkins from arguing his theory of the case. We reverse and remand for a new trial.

Because the dispute over giving a jury instruction on the obligation of the School District to educate a student with disabilities and on contributory negligence will likely arise on remand, we briefly address those instructions.

The propriety of giving a jury instruction is governed by the facts of the case. Fergen, 182 Wn.2d at 803.

The court instructed the jury on the federal and state law requirements to educate special needs students. Jury instruction 17 states:

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

Hopkins argues the instruction is an improper comment on the evidence and is irrelevant. We disagree. The instruction was not an unconstitutional comment on the evidence. See State v. Brush, 183 Wn.2d 550, 565, 353 P.3d 213 (2015); State v. Becker, 132 Wnh.2d 54, 64, 935 P.2d 1321 (1997). The instruction correctly states the obligation of a school district under state and federal law and is relevant to whether the School District exercised reasonable care.

Hopkins contends that as a matter of law, the Washington Supreme Court decision in Christensen bars a school district from asserting contributory negligence.[3] Below, the parties debated the applicability of Christensen. In Christensen, the court held that as a matter of public policy, "a defense of contributory fault should not be available to the perpetrator of sexual abuse or to a third party that is in a position to control the perpetrator." Christensen, 156 Wn.2d at 70. The opinion makes clear the court is addressing only "a civil action against a school district . . . for sexual abuse" by a teacher; "[t]he act of sexual abuse is key here." Christensen, 156 Wn.2d at 71-72, 69.

Christensen does not support the argument that as a matter of law, a school district may never assert contributory negligence. See Briscoe, 32 Wn.2d at 366. On the other hand, on appeal Hopkins cites a case, Gregoire v. City of Oak Harbor, 170

[3] Jury instruction 13 states: "Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed."

Wn.2d 628, 244 P.3d 924 (2010), which may arguably cut in the opposite direction in this case. We leave it to the trial court on remand to reconcile whether on the facts developed at trial, an instruction on contributory negligence should be given.

We reverse the judgment on the verdict and remand for a new trial.

Schindler, J.

WE CONCUR:

Cox, J.

Becker, J.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of Hopkins' Answer to Petition for Review in Supreme Court Cause No. 93492-4 to the following:

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Original E-filed with:
Washington Supreme Court
Clerk's Office

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

DATED: September 2, 2016, at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

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Hopkins' Answer to Petition for Review

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