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WASHINGTON STATE
SUPREME COURT

NO. 93492-4

Court of Appeals, Division I, No. 73147-5-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES HOPKINS, JR.,

Respondent,

v.

SEATTLE PUBLIC SCHOOL DISTRICT NO. 1,

Petitioner,

SEATTLE PUBLIC SCHOOL DISTRICT'S PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF PETITIONER

Petitioner is Seattle Public School District No. 1 (the District), which was the defendant in the negligence action below.

II. COURT OF APPEALS DECISION

On July 18, 2016, the Court of Appeals reversed a jury verdict in the District's favor (Appendix 1). On July 21, 2016, the Court of Appeals *sua sponte* ordered publication of its opinion (Appendix 2).

III. ISSUES PRESENTED FOR REVIEW

A. The Washington Pattern Jury Instructions (WPIs) are the product of decades of Washington appellate court decisions. *See* 6 *Washington Practice: Washington Pattern Jury Instructions: Civil* (6th ed. 2012), at WPI 0.10. The jury was instructed using the standard WPI instructions on the duty of ordinary care. The Court of Appeals reversed the jury's verdict that the District met its duty of ordinary care because the jury did not receive additional instructions that (1) the District's duty of ordinary care arises from an *in loco parentis* relationship, and (2) the duty is limited to only risks of harm that are foreseeable. Does the Court of Appeals' decision conflict with decisions of the Supreme Court and the Court of Appeals limiting duty instructions to a short, basic statement of the duty owed, without elaboration, or focus on the named defendant?

B. Does the question of how to properly instruct a jury on the duty of ordinary care owed by school districts to students in their custody present an issue of substantial public interest that should be decided by the Supreme Court?

C. Does the Court of Appeals' failure to analyze whether a perceived instructional error was harmless conflict with decisions of the Supreme Court and the Court of Appeals?

IV. STATEMENT OF THE CASE

Plaintiff James Hopkins, Jr. (Hopkins) and E.E. were students at the District's Aki Kurose Middle School. E.E. was a disabled student in a self-contained special education classroom for all classes except Physical Education (PE). On June 7, 2006, Hopkins and E.E. were walking in the boys' locker room after PE class when they bumped into each other and Hopkins called E.E. a "bitch." E.E. spun around and punched Hopkins once to the back of his head. Hopkins fell to the ground and broke his jaw. Hopkins claims the District negligently caused his injury. *Hopkins v. Seattle Sch. Dist. No. 1,* Ct. App. No. 73147-5-I (Appendix 1), at pp. 1-2.

A. The Jury Was Told Hopkins' Theory of the Case

At the beginning of trial, the court used WPI 1.01.03 to instruct the jury on the parties' respective theories of the case:

> 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 ... 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.

Flygare RP (1/21/15) 119-20.[1]

In his opening statement to the jury, Hopkins' attorney summarized Hopkins' theory of the case:

> The school district has an obligation to protect all students from foreseeable harm. If they fail in their obligation to protect the student from foreseeable harm, the district is responsible for all the harm that is caused.
>
> A school district must inform general education teachers when they have a special education student in their class, that the student has a history of violent conduct against other students. If they fail to do so and the disabled student harms another student, the district is responsible for all the harms and losses. ...
>
> The district knew this kid was impulsive. They knew he erupted like this. And it was predictable. And if they had

[1] Due to the parties separately arranging for transcription of various portions of the trial, the Report of Proceedings (RP) was prepared by two different court reporters. Hopkins used Flygare & Associates (Flygare) to transcribe portions of the trial, and the District used Vernon & Associates (Vernon) to transcribe other portions. Both court reporters used a page numbering system that starts each day of the trial proceedings at page 1. Accordingly, the District cites to the RP by first identifying the court reporter - - *i.e.*, Flygare RP, or Vernon RP - - followed by the date of transcription, then the page number - - *e.g.*, Flygare RP (1/21/15) 119-20.

> the right people there, this didn't need to happen. ...
>
> And so at the end of this case, we're going to come back here and ... we're going to ask you to find that the district was negligent by failing to supervise a special ed kid.

Flygare RP (1/22/15) 27-28, 41, 53.

Hopkins' first witness was his liability expert, former Superintendent of Public Instruction Judith Billings. After going through several exhibits with Ms. Billings documenting the District's knowledge of E.E.'s history of assaultive behavior at school, Ms. Billings provided her opinion on whether the District breached the standard of care:

> Q: ... Did you form an opinion about whether the Seattle School District failed in its obligations under the standards of care required of special educators?
> A: Yes, because they failed to let the general education teacher know what was expected of him in terms of monitoring this student, that he needed to be closely monitored, what his history was, that he was to have a close eye kept on him. He was not given that information.
> Q: Are there any other things the district could have done to fulfill their obligations in educating E.E.?
> A: Because his IEP [Individualized Education Plan] indicates he was a child who acted out many times during passing periods, during lunch, before and after school, in basically unstructured situations, they could have had a para professional walk with him between passing periods. They could have had a security guard walk with him during passing periods. They could have made certain that he was always in the line of sight of some adult so that he was always under supervision. ...
> Q: Do you have an opinion about why this happened?
> A: It seems like this is just sort of a systemic breakdown. You know, the records for E.E. were not sent in a timely manner to Aki Kurose, so that he was in general education classes at Aki Kurose for the first two months of the year,

> rather than in special education classes when, during that time he committed two assaults. When you look at the IEP that was then developed after they did get the records, they did not include the general education [PE] teacher, Mr. Kaiser, in their IEP meeting. They did not send him the information that, according to their own policies, they are required to send any teacher who is dealing with a ... special education student, to let them know what their responsibilities are....
> Q: Would having more competent staff there, on a more probable than not basis, have prevented the assault on James Hopkins?
> A: I believe it would have. ...
> Q: Does it matter that he [E.E.] had never punched someone in a locker room before when you were forming your opinions about what happened in this case?
> A: No. It doesn't make any difference. Because what the history shows from the time E.E. was in kindergarten, his behavior from that time through the incident in the locker room was of being - - pushing, shoving, assaulting, slapping, headlocks, you know, you name it. It was physical aggression.

Flygare RP (1/22/15) 130-31, 134, 161.

Hopkins' attorney also adduced testimony supporting their theory of the case from two District employees who Hopkins called as witnesses, E.E.'s PE teacher and the school principal. *E.g., id.* at 173-77, 185-91; Flygare RP (1/26/15) 30-31, 39-40, 47. Hopkins' attorney adduced similar testimony during cross-examination of the District's standard of care expert, Maureen Davis. Vernon RP (B) (1/29/15) 42-47, 52-61.

In closing argument, Hopkins' attorney argued:

> In from this door ... comes a boy named E.E. He's 14 years old. The district has known this kid since he was in

kindergarten. ... The district knew and had determined that this was a disabled child who had trouble controlling his impulses, who had assaulted 26 other kids in the district. They had come together and they had crafted a plan. ...

The plan said, we recognize that this child's disability affects his ability to control himself, that he is at risk for assaulting other kids and has done it over and over and over again. ....

... Take a close look at Exhibit 229. That was the IEP that was in place during this school year when this event happened to this young man. It said, we know of this kid, E.E.'s, verbally and physically assaultive behavior to peers. We will put in place systematic observations. ... They had a plan. They didn't follow their plan. ...

What else do you find in Exhibit 229? The IEP ... says we need to accommodate this student and make sure the student is prepared for transitions between classes. The way we do that is proximity. We need to stay close to this kid. The kid could erupt at any time. He's a ticking time bomb. Keep him under watch. ... But nobody was watching. No adult was watching him. ...

... Somebody let E.E. come into this locker room unsupervised, and he hit James Hopkins. The district's plan was acceptable. They just didn't follow it.

... Judith Billings, the former Superintendent of Public Instruction says the district's system failure set up a situation in which a disabled child with a known history of assaulting other kids was left unattended in a boys' locker room. That was unreasonable, according to Ms. Billings.

... But look at Exhibit 229. You be the judge of whether or not they did everything they could reasonably do to prevent this assault in this case.

Was the defendant negligent in this case when they failed to follow their own plan to watch this child to make sure that he was being monitored? Was that negligence? On a more probable than not basis, the answer is yes ....

Flygare RP (2/2/15) 83-84, 88, 91-92, 94, 98.

The attorney for the District similarly focused a portion of closing

argument on question 1 of the verdict form, which asked "Was the defendant negligent?"

> They're claiming that the teachers at the Aki Kurose Middle School, where this assault happened, failed to prevent E.E. from assaulting the plaintiff. That's the negligent act that is being alleged. So you have to decide, did the teachers at Aki Kurose act negligently by failing to prevent this assault. That's what question 1 asks you.

Id. at 111. The District's attorney also acknowledged the assault was foreseeable: "E.E. has a bunch of assaults in his past. There's no dispute about that. Yeah, everybody knew that. It was in his IEP." *Id.* at 114. The District's defense was that E.E.'s IEP demonstrated a reasonable effort to prevent further assaults, and even if an adult had been supervising E.E. more closely, his sudden punch was not preventable. *Id.* at 113-19.

In his rebuttal closing argument, Hopkins' attorney reiterated, "But that fist doesn't fly if there is the appropriate and reasonable monitoring of this child. They've known he's a problem for a long time. ... [T]his history of his assaultive behavior suggested that leaving him unattended was not good enough." *Id.* at 129-30.

B. Jury Instructions and Objections to the Instructions

After hearing the court's introductory instruction on the parties' respective theories of the case, Hopkins' opening statement further describing his theory, and the testimony of several witnesses regarding

this theory, the court instructed the jury on what they had to decide. Question 1 on the verdict form required the jury to decide "Was the defendant negligent?" CP 1694. To aid the jury in answering this question, the court provided the standard WPI 21.03 elements of negligence instruction, which stated *inter alia* the plaintiff had the burden of proving "the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent." CP 1672. Using WPI 20.01 and 20.05, the jury was instructed Hopkins was claiming "the defendant Seattle Public School District was negligent in failing to prevent E.E. from assaulting plaintiff." CP 1669.[2]

To aid the jury in determining whether the District "was negligent in failing to prevent E.E. from assaulting plaintiff" the jury was instructed using the standard WPI 10.01 that 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. The jury also received the standard WPI 10.02 definition of "ordinary care." CP 1674. *See* Appendix 3.

Hopkins proposed three instructions that paraphrased portions of WPI 10.01 and 10.02 and blended that language into partial paraphrases of

[2] The court's instructions to the jury and verdict form are attached hereto as Appendix 3.

a few appellate decisions (*see* Hopkin's proposed instructions 8, 9, and 10, quoted in Appendix 1, pp. 3-4). CP 949-51. The court heard argument on the parties' proposed instructions on the District's duty, and objections to each other's proposals. Vernon RP (A) (1/29/2015) 110-133; Flygare RP (2/2/2015) 25-54. Hopkins' counsel told the court they had no objection to the court's instruction number 8, which is the standard WPI 10.01 on the duty of ordinary care. Flygare RP (2/2/2015) 33. Hopkins' counsel did object to the court's instruction numbers 5 (the claims instruction) and 9 (WPI 10.02 definition of ordinary care). Flygare RP (2/2/2015) at 27-36.

C. The Jury's Verdict

The jury returned a verdict for the District, answering "No" to question one, which asked "Was the defendant negligent?" CP 1694-95.

D. The Court of Appeals Decision

The Court of Appeals reversed the jury's verdict. The Court of Appeals noted the trial court did not abuse its discretion by refusing to give Hopkins' proposed instructions 8, 9 and 10. Appendix 1, p. 7 (suggesting these three instructions "contained more language than was appropriate"). However, the Court of Appeals ruled:

> We hold the court erred in failing to give jury instructions on the special relationship [*i.e.,* the "protective custody of teachers is mandatorily substituted for that of the parent"] 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.

Appendix 1, pp. 9, 11. Other than the above conclusory statement, the Court of Appeals provided no analysis explaining how Hopkins was prevented from arguing his theory of the case. *See id.*

V. ARGUMENT FOR ACCEPTING REVIEW

A. The Court of Appeals' Decision Conflicts with Decisions of the Supreme Court and Court of Appeals

"Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law." *Fergen v. Sestero,* 182 Wn.2d 794, 803, 346 P.3d 708 (2015). If the instructions satisfy these conditions, "[n]o more is required." *Douglas v. Freeman,* 117 Wn.2d 242, 257, 814 P.2d 1160 (1991). "When these conditions are met, it is not error to refuse to give detailed augmenting instructions, nor to refuse to give cumulative, collateral or repetitious instructions." *Bodin v. City of Stanwood,* 130 Wn.2d 726, 732, 927 P.2d 240 (1996).

Washington courts apply a less is more approach to instructing lay juries. "It has, for some years, been the policy of our Washington system of jurisprudence, in regard to the instruction of juries, to avoid ... slanted

instructions, formula instructions, or any instruction other than those which enunciate the basic and essential elements of the legal rules necessary for a jury to reach a verdict." *Laudermilk v. Carpenter,* 78 Wn.2d 92, 100, 457 P.2d 1004 (1969) (affirming use of standard ordinary care instructions).

The WPIs implement this less is more approach. "The *Washington Pattern Jury Instructions* are an immense aid to the bench and bar in selecting appropriate jury instructions.... They are to be used in preference to individually drafted instructions, but are not absolutely required." *Humes v. Fritz Cos.,* 125 Wn. App. 477, 498, 105 P.3d 1000 (2005).

1. The Court of Appeals' Decision that Reversible Error Occurs If Juries Are Instructed Only that School Districts' Owe a Duty of Ordinary Care Conflicts with Supreme Court and Court of Appeals Decisions, and with the WPIs

The Comments to WPI 10.01 (negligence definition) state: "Generally the jury should be instructed that the standard of care to be applied in a negligence action is the care that a reasonably careful person would take under the circumstances, rather than the care a particular defendant should have exercised in a given circumstance." The Comments to WPI 10.04 expressly discourage providing any additional instructions on the duty of ordinary care, stating the "subject is adequately covered by WPI 10.02 [ordinary care]... and WPI 21.02 [the elements instruction]."

The Comments to WPI 10.01 recommend using duty instructions different than WPI 10.01 and 10.02 only in cases in which defendants are held to a particularized standard of conduct, such as professionals owing a duty to use that degree of skill, care, diligence and knowledge used by reasonably careful professionals in that field. Special instructions for particularized duties of care are set forth in Part IX of the WPIs. There are no particularized instructions for the duty school districts owe to students in Part IX. The Comments to WPI 10.01 state: "It is error to give WPI 10.01 in combination with a standard of care of instruction involving a duty other than ordinary care without explaining the applicability of each instruction to the jury. Such instructions are inconsistent if given in combination and may mislead the jury as to the correct standard of care."

The Court of Appeals decision conflicts with this guidance by holding it was reversible error to give only ordinary care instructions 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 ...." Appendix 1, p. 11. Washington courts have long held that in supervising students, school districts owe students a duty of ordinary care. *E.g., Briscoe v. Sch. Dist. 123,* 32 Wn.2d 353, 362, 201 P.2d 697 (1949) (in the supervision of students, school districts are "required to exercise such care as an ordinarily reasonable and prudent

person would exercise under the same or similar circumstances"); *Kok v. Tacoma Sch. Dist. No. 10,* 179 Wn. App. 10, 18, 317 P.3d 481 (2013), *rev. denied,* 180 Wn.2d 1016 (2014) (same). WPIs 10.01 and 10.02 fully instruct a jury on this duty of ordinary care.

The Court of Appeals suggests a duty different than, or in addition to, ordinary care was imposed on school districts in *McLeod v. Grant County Sch. Dist. No. 128,* 42 Wn.2d 316, 255 P.2d 360 (1953). *See* Appendix 1, p. 10 (stating *McLeod,* not *Kok,* is the leading authority on school districts' duty). Yet, the *McLeod* court cited the *Briscoe* court's ordinary care analysis with approval. *McLeod,* 42 Wn.2d at 319-20. Several Court of Appeals decisions also cite *Briscoe* and *McLeod* for the proposition that school districts owe a duty of ordinary care to students in their custody. *E.g., Peck v. Siau,* 65 Wn. App. 285, 292-93, 827 P. 2d 1108, *rev. denied,* 120 Wn.2d 1005 (1992); *J.N. v. Bellingham Sch. Dist.,* 74 Wn. App. 49, 57, 871 P.2d 1106 (1994); *Kok,* 179 Wn. App. at 18.

The Court of Appeals decision conflicts with these authorities in holding prejudicial error occurred by not adding an instruction that school districts have a special relationship with students in their custody. Appendix 1, pp. 9-11. The special relationship forms the legal basis for imposing the duty of ordinary care; it does not modify the duty of ordinary care, or add other elements to the duty. Such an instruction would

unnecessarily explain to the jury the underlying legal analysis for why courts have determined, as a matter of law, that school districts owe a duty of ordinary care to students. *See id.* This type of augmenting instruction conflicts with the less is more approach espoused in *Bodin, Laudermilk,* and the WPIs, and could mislead juries. Supreme Court review is appropriate to resolve this conflict with existing law. *See* RAP 13.4(b)(1).

2. The Court of Appeals' Decision Requiring a Foreseeability Instruction Conflicts with Supreme Court and Court of Appeals Decisions, and with the WPIs

The Court of Appeals held reversible error occurred because "it was essential to instruct the jury on foreseeability." Appendix 1, p. 11. The WPIs do not recommend instructing on foreseeability. *See* Comments to WPI 15.01.

"The concept of foreseeability limits the scope of the duty owed." *Christen v. Lee,* 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). The duty to exercise ordinary care only extends to risks of harm that are foreseeable. *Kok,* 179 Wn. App. at 18. If the harm sustained was outside the general field of danger that should reasonably have been anticipated, no duty is owed to prevent that harm. *Id.* Thus, foreseeability essentially is a defense to whether a legal duty is owed under the circumstances. *See id.* (analyzing foreseeability as a defense to a student-to-student assault). Defendants, not plaintiffs, would request a foreseeability instruction

because such an instruction would narrow, rather than broaden the scope of the duty of ordinary care.

The District did not raise a foreseeability defense and conceded the assault was foreseeable. A foreseeability instruction was thus unnecessary.

The jury found no breach of the duty of ordinary care. In finding reversible error for failure to instruct on foreseeability, the Court of Appeals implicitly suggests foreseeability broadens the scope of the duty, rather than limits it, and a failure to instruct on foreseeability thus caused prejudicial harm to plaintiff Hopkins. *See* Appendix 1, p. 11. This suggestion conflicts with *Christen, Kok* and other Washington cases uniformly holding that foreseeability limits, rather than broadens, the duty of ordinary care. Supreme Court review is appropriate to resolve this conflict. *See* RAP 13.4(b)(1) and (2).

3. The Court of Appeals' Decision Conflicts with Supreme Court Decisions Holding that Trial Courts Are Not Required to Rewrite Incorrect Proposed Instructions

The Supreme Court has held trial courts are not obligated to rewrite proposed instructions that contain incorrect statements of law. *E.g., Harris v. Groth,* 99 Wn.2d 438, 447, 663 P.2d 113 (1983); *State v. Chambers,* 81 Wn.2d 929, 933, 506 P.2d 311 (1973). The Court of Appeals concluded Hopkins' proposed instructions on the District's special relationship and foreseeability incorrectly "contained more

language than was appropriate ...." Appendix 1, p. 7.[3] In finding reversible error due to the failure to instruct on the special relationship and foreseeability, the Court of Appeals necessarily was requiring the trial court to rewrite Hopkins' proposed instructions on the special relationship and foreseeability. Imposition of this editing obligation conflicts with Supreme Court precedent, justifying review. *See* RAP 13.4(b)(1).

B. The Proper Instruction of Juries on the Duty Owed by Public School Districts to Students Involves an Issue of Substantial Public Importance that Should Be Determined by the Supreme Court

Over one million students are enrolled in over 295 public school districts in Washington. *See* www.k12.wa.us/AboutUs/KeyFacts.aspx.

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[3] Hopkins' proposed instruction no. 8 (*see* Appendix 1, pp. 3-4) improperly suggests that intentional or criminal conduct is always foreseeable, and fails to correctly state the law that such conduct is not foreseeable when it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *See Kok,* 179 Wn. App. at 18. The proposed instruction also erroneously omits applicable Washington law holding that "evidence of a person's antisocial, unruly, or hostile behavior is generally insufficient to establish that a defendant with a supervisory duty should reasonably have anticipated a more serious misdeed." *J.N.,* 74 Wn. App. at 60.

Hopkins' proposed instruction no. 9 (*see* Appendix 1, p. 4) conflicts with the Comments to WPI 10.01, which state "the jury should be instructed that the standard of care to be applied in a negligence action is the care that a reasonably careful person would take under the circumstances, rather than the care a particular defendant should have exercised in a given circumstance." This proposed instruction also unduly emphasizes Hopkins' theory of the case by specifically pointing to the ways in which he was arguing the standard of care was breached in this particular case, which arguably would be a comment on the evidence adduced from Hopkins' liability expert. *See Laudermilk,* 78 Wn.2d at 100.

Hopkins' proposed instruction no. 10 (*see* Appendix 1, p. 4) is an argumentative comment on the evidence concerning E.E's "disturbed, aggressive nature." This proposed instruction on foreseeability also suffers from the same defects as Hopkins' proposed instruction no. 8 described above, and unduly emphasizes Hopkins' theory of the case by instructing that "proper supervision requires the taking of specific, appropriate procedures" in order to meet the duty of ordinary care.

Taken together, these three proposed instructions augmenting the instructions on the undisputed duty of ordinary care also suffer from the additional defects of being slanted and repetitious. *Contra Bodin,* 130 Wn.2d at 732; *Laudermilk,* 78 Wn.2d at 100.

Claims of school district negligence are frequent. *See, e.g., Briscoe; McLeod; Peck; J.N.; Kok, supra.* How juries are to be properly instructed on the duty school districts owe to students involves an issue of substantial public importance that should be determined by the Supreme Court. *See* RAP 13.4(b)(4).

The Court of Appeals' published decision holds that use of the standard WPIs for instructing on duty are insufficient in this context, but does not provide precise wording for jury instructions on public schools' duty to students that would be deemed sufficient by the Court of Appeals. This lack of guidance further compels Supreme Court review. *See id.*

C. The Court of Appeals' Failure to Analyze Whether a Perceived Instructional Error Was Harmless Conflicts with Decisions of the Supreme Court and Court of Appeals

Even if it were assumed the trial court's instructions to the jury on the District's duty of ordinary care erroneously omitted additional instructions on the District's special relationship with students and foreseeability, reversal is unwarranted unless a reviewing court is "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Furfaro v. City of Seattle,* 144 Wn.2d 363, 382, 27 P.3d 1160 (2001). "The question on appeal is not whether an instruction was faultless in every respect, but whether the jury, considering the instruction as a whole, was misled .... Thus, only in those cases where

the reviewing court has a substantial doubt whether the jury was fairly guided in its deliberations should the judgment be disturbed." *Id.* (quoting case). If instructions are deemed erroneous, prejudice is presumed, but this presumption may be rebutted following review of the entire record:

> When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless. *However, it becomes our duty, whenever such a question is raised, to scrutinize the entire record in each particular case, and determine whether or not the error was harmless or prejudicial.*

Blaney v. Int'l Ass'n of Machinists and Aerospace Workers, 151 Wn.2d 203, 211, 87 P.3d 757 (2004) (italics in original; quoting case).

The Court of Appeals' decision conflicts with this Supreme Court precedent requiring scrutiny of the entire record. After concluding the trial court erred in failing to give additional instructions on the special relationship and foreseeability, the Court of Appeals summarily concluded this "error was not harmless and prevented Hopkins from arguing his theory of the case." Appendix 1, p. 11. No analysis of the record to determine whether the jury was misled was provided by the Court. *See id.*

The record shows Hopkins was not prevented from arguing his theory of the case. As summarized above in section IV A, the jury was informed of Hopkins' theory that the District breached a duty to protect

Hopkins by negligently supervising E.E. The jury received this information from the court at the outset of the trial, in Hopkins' opening statement, in Hopkins' examinations of his liability expert and three other witnesses, and in Hopkins' closing argument. The District's attorney similarly made clear to the jury that question one on the verdict form required them to determine whether the District was negligent by failing to prevent E.E. from assaulting Hopkins. Flygare RP (2/2/15) 111. The outcome would not have been different had the jury received an additional instruction that the legal reason why the District owes a duty of ordinary care to protect students in its custody from assaults by other students is because "the protective custody of teachers is mandatorily substituted for that of the parent." *Contra* Appendix 1, pp. 9, 11.

The omission of a foreseeability instruction informing the jury the District's duty of ordinary care is limited to only harms that are reasonably foreseeable also did not prevent Hopkins from arguing his theory of the case or mislead the jury. Hopkins' attorney was permitted to adduce evidence of E.E.'s history of assaultive behavior and to argue E.E.'s assault on Hopkins was reasonably foreseeable: "The district has known this kid [E.E.] since he was in kindergarten. ... The district knew and had determined that this was a disabled child who had trouble controlling his impulses, who had assaulted 26 other kids in the district." Flygare RP

(2/2/15) 83-84. *See also id.* at 129-30 (rebuttal closing reiterating the assault was foreseeable). The District's attorney conceded in closing argument to the jury that E.E.'s assault was foreseeable. *Id.* at 114. The jury was not misled about the foreseeability of E.E.'s assault. The Court of Appeals' failure to scrutinize the entire record to determine whether a perceived instructional error was harmless, as Supreme Court precedent requires, justifies further review pursuant to RAP 13.4(b)(1).

VI. CONCLUSION

Supreme Court review should be accepted pursuant to RAP 13.4(b) because the Court of Appeals' decision reversing the jury's verdict conflicts with decisions of the Supreme Court and the Court of Appeals, and this petition involves issues of substantial public importance that should be decided by the Supreme Court. There was no instructional error, but even if there was, any error was harmless.

RESPECTFULLY SUBMITTED this 19th day of August, 2016.

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CERTIFICATE OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the Seattle Public School District's Petition for Review to the following parties:

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

DATED this 19th day of August, 2016, at Olympia, Washington.

Kath. Sisson

KATHRINE SISSON

APPENDIX 1

COURT OF APPEALS
STATE OF WASHINGTON
2016 JUL 18 AM 7:50

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

JAMES HOPKINS, JR., Appellant,	)	No. 73147-5-I
v.	)	UNPUBLISHED OPINION
SEATTLE PUBLIC SCHOOL DISTRICT NO. 1, Respondent.	)	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.
>
> The duty which this relationship places upon the school district has been stated in the Briscoe case . . . as follows:
>
> "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.

APPENDIX 2

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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July 21, 2016

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CASE #: 73147-5-I
James Hopkins, Jr., Appellant v. Seattle Public School District, Respondent

Counsel:

Enclosed please find a copy of the Order to Publish entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Hon. Judith Ramseyer
Reporter of Decisions

COURT OF APPEALS
STATE OF WASHINGTON
2016 JUL 21 AM 11:58

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

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

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

APPENDIX 3

FILED
KING COUNTY, WASHINGTON
FEB 02 2015
SUPERIOR COURT CLERK
BY Tonja Hutchinson
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

JAMES HOPKINS, JR., Plaintiff, v. SEATTLE PUBLIC SCHOOL DISTRICT, NO. 1, Defendant.	No. 13-2-37271-1 SEA

COURT'S INSTRUCTIONS TO THE JURY

Judith H. Ramseyer, Superior Court Judge

Dated this 2 day of February, 2015

ORIGINAL

INSTRUCTION No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of

the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In

the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION No. 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION No. 3

The law treats all parties equally whether they are individuals, corporations, or government entities. This means that individuals, corporations, and government entities are to be treated in the same fair and unprejudiced manner.

INSTRUCTION No. 4

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION No. 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.

INSTRUCTION NO. 6

An agent is a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services.

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

School employees were agents of Seattle Public School District No. 1, and, therefore, any acts or omissions of the agents were the acts or omissions of Seattle Public School District No. 1.

INSTRUCTION No. 7

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a prepondcrance of the evidence, or thc expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION No. 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 the 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.

INSTRUCTION No. 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.

INSTRUCTION No. 10

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

INSTRUCTION No. 11

When referring to a child, ordinary care means the same care that a reasonably careful child of the same age, intelligence, maturity, training, and experience would exercise under the same or similar circumstances.

INSTRUCTION No. 12

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.

INSTRUCTION No. 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.

INSTRUCTION No. 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.

INSTRUCTION No. 15

The term "proximate cause" means a cause which in a direct sequence produces the event complained of and without which such event would not have happened.

There may be more than one proximate cause of an event.

INSTRUCTION No. 16

There may be more than one proximate cause of the same event. If you find that the defendant was negligent and that such negligence was a proximate cause of injury or damage to the plaintiff, it is not a defense that the act of some other person who is not a party to this lawsuit may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to the plaintiff was the act of some other person who is not a party to this lawsuit, then your verdict should be for the defendant.

INSTRUCTION No. 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.

INSTRUCTION No. 18

It is the duty of this Court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of defendant, apart from any consideration of contributory negligence.

If you find for the plaintiff, you should consider the reasonable value of necessary medical care, treatment, and services received to the present time.

In addition you should consider the following future economic damages elements:

(a) The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future; and

(b) The reasonable value of earning capacity with reasonable probability to be lost in the future.

In addition, you should consider the following noneconomic damages elements:

(a) The nature and extent of the injuries; and

(b) The pain and suffering, both mental and physical, experienced and with reasonable probability to be experienced in the future.

(c) The inconvenience, mental anguish, emotional distress, injury to reputation, and humiliation experienced and with reasonable probability to be experienced in the future.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the

evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION No. 19

Any award for future economic damages must be for the present cash value of those damages. Noneconomic damages such as pain and suffering are not reduced to present cash value.

"Present cash value" means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the expenses must be paid or the earnings would have been received.

The rate of interest to be applied in determining present cash value should be the rate which in your judgment is reasonable under all the circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

In determining present cash value, you may also consider decreases in value of money that may be caused by future inflation.

INSTRUCTION NO. 20

According to mortality tables, the average expectancy of life of a male aged 21 years is 54.57 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

INSTRUCTION No. 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 School Public District.

If you find E.E. was the sole proximate cause of plaintiff's damages, your verdict should be for defendant.

INSTRUCTION No. 22

A person who is liable for an injury to another is not liable for any damages arising after the original injury that are proximately caused by failure of the injured person to exercise ordinary care to avoid or minimize such new or increased damage. In determining whether, in the exercise of ordinary care, a person should have secured or submitted to medical treatment, as contended by the defendant, you may consider the nature of the treatment, the probability of success of such treatment, the risk involved in such treatment, other factors in evidence, and all the surrounding circumstances.

Defendant has the burden to prove plaintiff's failure to exercise ordinary care and the amount of damages, if any, that would have been minimized or avoided.

INSTRUCTION No. 23

If your verdict is in favor of the plaintiff, and if you find that:

(1) before this occurrence the plaintiff had a pre-existing bodily or mental condition that was causing pain or disability, and

(2) because of this occurrence the condition or the pain or the disability was aggravated, then you should consider the degree to which the condition or the pain or disability was aggravated by this occurrence.

However, you should not consider any condition or disability that may have existed prior to this occurrence, or from which the plaintiff may now be suffering, that was not caused or contributed to by this occurrence.

INSTRUCTION No. 24

If your verdict is in favor of the plaintiff, and if you find that:

(1) before this occurrence the plaintiff had a bodily condition that was not causing pain or disability; and

(2) the condition made the plaintiff more susceptible to injury than a person in normal health,

then you should consider all the injuries and damages that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition.

INSTRUCTION No. 25

The parties agree the following medical expenses were reasonable and necessary to treat plaintiff's jaw injury on June 7, 2006. They do not agree as to who or what was a proximate cause of the injury and costs incurred.

American Medical Response	$769
Children's Hospital	$2,692.20
Harborview Medical Center	$12,486.20

INSTRUCTION NO. 26

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of exhibits 2, 4, 5, 6, 7, 11, 13, 18, 26, 32, 33, 45, 47, 49, 61, 62, 65, and 76. These exhibits may be considered by you only for the purpose of notice to the district and may not be considered by you as evidence of the truth of the matters asserted therein. For instance, if a certain exhibit gives reference to an event, you may use the exhibit as evidence that the district had notice of that event, but may not use the exhibit as evidence the event occurred or occurred in the manner in which the exhibit describes.

This evidence may not be considered by you for any other purpose. Any discussion of these exhibits during your deliberations must be consistent with this limitation.

INSTRUCTION No. 27

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

FILED
KING COUNTY, WASHINGTON
FEB 05 2015
SUPERIOR COURT CLERK
BY Tonja Hutchinson
DEPUTY

Honorable Judith H. Ramseyer
Dept. 46
Trial Date: January 20, 2015

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JAMES HOPKINS, JR., Plaintiff, v. SEATTLE PUBLIC SCHOOL DISTRICT NO. 1, Defendant.	NO. 13-2-37271-1SEA SPECIAL VERDICT FORM

QUESTION 1: **Was the defendant negligent?**

ANSWER: _____Yes ___X___ No

DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.

QUESTION 2: **Was the defendant's negligence a proximate cause of injury to the plaintiff?**

ANSWER: _____Yes _____ No

DIRECTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.

ORIGINAL

QUESTION 3: **What do you find to be the amount of plaintiff's damages proximately caused by the defendant's negligence? Do not consider the issue of contributory negligence, if any, in your answer.**

ANSWER: $_____

DIRECTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form.

QUESTION 4: **Was the plaintiff also negligent?**

ANSWER: _____Yes _____No

DIRECTION: If you answered "no" to Question 4, sign this verdict form. If you answered "yes" to question 4, answer Question 5.

QUESTION 5: **Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?**

ANSWER: _____Yes _____No

DIRECTION: If you answered "no" to Question 5, sign this verdict form. If you answered "yes" to Question 5, answer Question 6.

QUESTION 6: **Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to Seattle Public School District's negligence, and what percentage of this 100% is attributable to the negligence of the plaintiff? Your total must equal 100%.**

ANSWER:

Seattle Public School District _____%

Plaintiff, James Hopkins, Jr. _____%

TOTAL: 100%

DIRECTION: Sign this verdict form and notify the bailiff.

Date: 2/3/15 Yolanda Menjivar
Presiding Juror