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SUPREME COURT  
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4/17/2018 1:29 PM  
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4/25/2018  
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No. 94898-4

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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HEIDI JO HENDRICKSON,

Plaintiff/Respondent,

vs.

MOSES LAKE SCHOOL DISTRICT, a municipal corporation,

Defendant/Petitioner.

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AMENDED

BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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Valerie D. McOmie  
WSBA No. 33240  
4549 NW Aspen Street  
Camas, WA 98607  
(360) 852-3332

Daniel E. Huntington  
WSBA No. 8277  
422 W. Riverside, Ste. 1300  
Spokane, WA 99201  
(509) 455-4201

On Behalf of  
Washington State Association for Justice Foundation

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation has an interest in the rights of persons seeking redress under the civil justice system, including an interest in a school's enhanced duty of protection arising from the special relationship between a school and its students.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This is a negligence action arising out of injuries Heidi Hendrickson suffered as a student at Moses Lake High School (MLHS). The facts are drawn from the Court of Appeals' opinion and the briefing of the parties. *See Hendrickson v. Moses Lake Sch. Dist.*, 199 Wn. App. 244, 398 P.3d 1199 (2017), *review granted*, 189 Wn.2d 1031 (2018); District Pet. for Rev. at 3-5; Hendrickson Ans. to Pet. for Rev. at 5-7; District Supp. Br. at 1-2; Hendrickson Supp. Br. at 1-4.

Hendrickson was 15 years old when she enrolled in a shop class at MLHS. The shop housed a variety of industrial equipment, including a table saw. The saw came installed with an anti-kickback device and split-

ter to reduce the chance of injury, but these had been removed by Hendrickson's teacher, Mr. Chestnut, as he believed they could be dangerous.

Chestnut was responsible for training and supervising Hendrickson and her fellow students. He stated that prior to allowing Hendrickson to use the table saw, in keeping with his general policy, he gave verbal instructions, demonstrated multiple cuts and administered a written test. Following Chestnut's instructions, he supervised Hendrickson doing several individual cuts and eventually allowed her to use the table saw independently. Chestnut stated that he instructed the students, including Hendrickson, to use a push stick to guide their cuts and to turn off the saw if anything unusual occurred. However, on her written test, Hendrickson marked "false" to the question of whether a "push stick is necessary when ripping narrow stock." Hendrickson Supp. Br. at 2. Generally, missed test questions required that students write the correct answer multiple times to ensure they understood the safety rules. In this case, the question was not marked wrong and there was apparently no additional follow-up.

On the day of the accident, Hendrickson was guiding a board through the table saw with a push stick. The board became stuck. Hendrickson looked around for Chestnut, but he was standing approximately 30 feet away in a separate area. She put down the push stick and attempted

to dislodge the board with her hand. Hendrickson suffered a deep cut to her thumb, and doctors had to amputate her thumb to the first knuckle.

Hendrickson sued the District, alleging it 1) failed to reasonably maintain required safety equipment, 2) failed to provide reasonable instructions, and 3) failed to provide reasonable supervision. *Hendrickson*, 199 Wn. App. at 247. Hendrickson requested a jury instruction explaining the special relationship a school has with its students, and the related duty to protect. The court refused to give the requested instruction.

Additionally, the District requested a contributory negligence instruction, which the trial court gave, over Hendrickson's objection. The court also instructed the jury that every person has a right to assume others will exercise ordinary care. At trial, the District argued Hendrickson's injuries were proximately caused by Hendrickson using her hand to dislodge the board and by her failure to turn off the saw after the board became stuck. The jury found that the District had been negligent, but that its negligence was not the proximate cause of Hendrickson's injuries.

Hendrickson appealed to the Court of Appeals, Division III, on two grounds: 1) the court erred in refusing to instruct the jury regarding the enhanced duty a school owes to its students based on the special relationship doctrine; and 2) the court erred in instructing the jury regarding con-

tributory negligence, either because the defense is incompatible with a school's duty to protect, or in the alternative, because a student should not be subject to contributory negligence for injuries suffered while operating dangerous machinery that she would not generally be permitted to operate. *See* Hendrickson Supp. Br. at 24 (citing WAC 296-125-030(13)).

In a 2-1 opinion, the court of appeals reversed. It held the trial court erred in refusing the special relationship instruction. It also concluded the contributory negligence instruction was proper. The District petitioned for review as to the enhanced duty instruction, and Hendrickson cross-petitioned as to contributory negligence. This Court granted review.

### **III. ISSUES PRESENTED**

- (1) In a negligence action by a student against a school alleging breach of the duty to protect, should a jury be instructed on the enhanced duty of protection a school owes to its students under the special relationship doctrine?
- (2) Does the scope of a school's duty to protect encompass a duty to protect a student from her own negligence, and if so, whether and under what circumstances a defendant may reduce its liability for breach of this duty by asserting contributory negligence on the part of the student the school is charged with protecting?

### **IV. SUMMARY OF ARGUMENT**

While a party generally has no duty to protect another from harm, an exception exists where a responsible party is in a special relationship

with a vulnerable person. One such relationship recognized under Washington law is the relationship between a school and its students, imposing on schools an “enhanced” duty to anticipate dangers that may be anticipated and to take reasonable precautions to protect its students from harm.

A student alleging injury as a result of a breach of the duty of care owed by a school to its students is entitled to a jury instruction explaining a school’s enhanced duty. Here, the trial court erred in refusing Hendrickson’s proposed enhanced duty instruction. Because this error presumptively affected the outcome of the trial, reversal was proper.

The duty to protect imposes a duty to protect the plaintiff from a variety of harms, including from the plaintiff’s own negligence. As such, this duty is generally incompatible with a contributory negligence defense, as it would permit a defendant to shift liability to the plaintiff for harm the defendant has a duty to prevent. Courts should decline to permit a contributory negligence defense in such cases, or at a minimum, should carefully scrutinize whether the defense is proper on the facts before them.

## **V. ARGUMENT**

### **A. Brief Overview Of A School’s Affirmative Duty To Protect Arising From The Special Relationship Between A School And Its Students.**

A party generally has no duty to protect another from harm. *See Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997); *see also Restatement (Second) of Torts* § 314 (1965); *Restatement (Second) of Torts* § 315 (1965). Exceptions to this rule have been recognized where there is a “special relationship” between the parties, giving rise to either a duty to protect or duty to control. *See Petersen v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1983); *see also Restatement (Second) of Torts* §§ 314A, 315 and 320 (1965). A duty in either case reflects a determination that there is “some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act.” *See* W. Page Keeton et al., *Prosser and Keeton on Torts* § 56, at 374 (5th ed. 1984).

The duty to protect has been described as “protective in nature, historically involving an affirmative duty to render aid.” *Niece*, 131 Wn.2d at 44 (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 228, 802 P.2d 1360 (1991)). It has been found in a variety of relationships, including a nursing home to its residents (*see Niece*, 131 Wn.2d at 44), an innkeeper to its guests (*see Hutchins*, 116 Wn.2d at 228), and a prison to its inmates (*see Shea v. City of Spokane*, 17 Wn. App. 236, 242, 562 P.2d 264 (1977), *aff’d*, 90 Wn.2d 43, 578 P.2d 42). The rationale for imposing a duty to protect is that the responsible defendant has been entrusted with

protection for a vulnerable person. *See Niece*, 131 Wn.2d at 44; *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 201, 943 P.2d 286 (1997).

Three Restatement (Second) sections address the general duty to protect. *See Restatement (Second) of Torts* §§ 314A, 315(b) & 320 (1965).<sup>1</sup> Located in the section entitled “Duty to Control Conduct of Third Persons,” both §§ 315(b) & 320 describe a duty related to dangers posed by third parties. *See* § 315(b) (duty to control conduct of a third person when a special relationship is present); § 320 (duty to control conduct of a third person when relationship is custodial). In contrast, *Restatement (Second) of Torts* § 314A is not limited to risks from third parties, broadly contemplating a duty to “protect against unreasonable risk of physical harm,” and to render first aid when the defendant has notice of the plaintiff’s injury. *See* §§ 314A(1) (a) & (b). Section 314A cmt. d elaborates on the scope of the duty, clarifying it includes a duty to protect against “the acts of third persons,” but also extends to other dangers, including “the negligence of the plaintiff himself.” Custodial relationships are recognized as falling within the duty to protect. *See* § 314A(4).<sup>2</sup>

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<sup>1</sup> Restatement §§ 314A, 315 and 320 are reproduced in the Appendix.

<sup>2</sup> While § 314A does not expressly recognize the school/student relationship, *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 40 (Am. Law Inst. 2012) updates § 314A. Section 40 cmt. 1 recognizes the school/student relationship as a relationship triggering the duty to protect.

While the duty to protect frequently arises in the context of third party harm, in keeping with the broad duties contemplated by the Restatements, the source of the danger causing injury to the vulnerable person has not appeared to influence the legal analysis in this Court's decisions. *See, e.g., Niece*, 131 Wn.2d at 50 (noting that the defendant "was responsible for every aspect of [the plaintiff's] well being" and this gave rise to a duty to protect the plaintiff "from a universe of possible harms" (brackets added)). Instead, in ascertaining whether a duty may be found in any given case, the focus has been on the presence of a special relationship and the foreseeability of harm. *See id.*; *see also Caulfield v. Kitsap County*, 108 Wn. App. 242, 256, 29 P.3d 738 (2001).

This Court expressly recognized the special relationship between a school and its students giving rise to a duty of protection in *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 255 P.2d 360 (1953). There, a student was raped in a secluded, unsupervised area of the school's gymnasium, and the student sued the school for negligence. The school argued that it had no affirmative duty to prevent the rape. Recognizing the involuntary nature of the relationship and the school's role as a substitute for parents during the period of custody, the Court held that a special relationship exists between schools and their students. *McLeod*, 42 Wn.2d at 320

(citing *Briscoe v. Sch. Dist. No. 123*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949)). The Court described the duty as one "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.

Since *McLeod*, Washington law has adhered to the view that "school districts have 'an enhanced and solemn duty of reasonable care to protect their students.'" *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 430, 378 P.3d 162 (2016) (quoting *Christensen v. Royal School District No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005)). The "enhanced" duty owed by a school requires only that the school use ordinary care, but differs from an ordinary duty of care in that it is an *affirmative* duty to anticipate dangers that may reasonably be anticipated and to take precautions to protect its students from harm arising from those dangers.

**B. A Jury Must Be Instructed On The Enhanced Duty Of Protection Arising From The Special Relationship Between A School And Its Students.**

1. The jury instructions failed to accurately inform the jury of the District's legal duty and prevented Hendrickson from arguing her theory of the case.

Hendrickson requested a jury instruction explaining the enhanced duty owed by a school to its students. It provided, in pertinent part:

A school district has a “special relationship” with a student in its custody and a heightened duty of care to protect him or her from foreseeable harm. Harm is foreseeable if the risk from which it results was known, or in the exercise of reasonable care should have been known.

*Hendrickson*, 199 Wn. App. at 247-48. The trial court declined to give Hendrickson’s proposed instruction, instead instructing the jury that negligence is the failure to exercise ordinary care. *See id.*, 199 Wn. App. at 248.

Alleged errors of law in jury instructions are subject to de novo review. *See Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Instructions are considered inadequate if “they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law.” *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266, 96 P.3d 386 (2004) (citations omitted). Where there is evidence to support a legal theory, refusal to instruct on that theory constitutes reversible error. *See State v. Williams*, 132 Wn.2d 248, 259–60, 937 P.2d 1052 (1997).

The necessity for a special relationship instruction was examined in detail in two recent cases from Division I of the court of appeals: *Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wn. App. 96, 106, 380 P.3d 584, review denied, 186 Wn.2d 1029, 385 P.3d 123 (2016) and *Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 631, 643, 383 P.3d 1053 (2016). In *Hopkins*, the plaintiff was assaulted by another student and brought a neg-

ligence action against the school. The plaintiff requested a jury instruction describing a school's enhanced duty to protect its students, which the trial court rejected. On review, the court of appeals held the plaintiff was entitled to an instruction describing a school's duty to protect:

[T]he 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.

195 Wn. App. at 108 (brackets added).

In *Quynn*, the plaintiff was harassed on the school bus and sued the school for negligence. She requested an instruction describing a school's duty "to anticipate reasonably foreseeable dangers and take precautions to protect its students from such dangers[.]" *Quynn*, 195 Wn. App. at 639 (brackets added). The trial court declined, instead instructing the jury the school must use ordinary care to prevent bullying "if it knows or has reason to know that a student is the subject of harassment, intimidation or bullying[.]" *Id.*, 195 Wn. App. at 638 (brackets added). The jury found the school was not negligent. The plaintiff appealed, and the court of appeals held it was error for the trial court to deny the requested instruction:

The school district had a duty to reasonably anticipate and take precautions to prevent harms falling within the general field of danger which should have been anticipated. 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. . . . When foreseeable, the district must anticipate and prevent the first harm from happening.

*Id.* at 640-41.

In this case, as in *Quynn*, the jury was not instructed that the District had a distinct duty to “anticipate and prevent the first harm from happening.” *See id.* This duty is unique and not encompassed by the ordinary care instruction. As in *Hopkins*, the instructions here “allowed the jury to apply an ordinary negligence standard without regard to the special relationship and duty of the School District.” 195 Wn. App. at 108. A school’s duty to protect is a rule of law and the jury must be so instructed. *Cf. Clark County v. McManus*, 185 Wn.2d 466, 476-77, 372 P.3d 764 (2016) (jury instruction requiring special consideration be given to treating physicians in worker’s compensation cases reflects a rule of law and must be given).

2. The trial court’s error was prejudicial because it presumptively affected the outcome of the trial.

The Court of Appeals held the trial court’s failure to correctly instruct the jury regarding the District’s legal duty was reversible error. This was so because with multiple theories of negligence asserted, there was no

way to ascertain on which basis the jury found negligence, and thus no way to determine that another basis of negligence, properly instructed, would not have been found to proximately cause Hendrickson's injury.

An erroneous jury instruction constitutes reversible error if it is prejudicial. *See Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Prejudice exists when the alleged error "affects, or presumptively affects, the outcome of the trial." *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983); *see also Smith v. Ernst Hardware Co.*, 61 Wn.2d 75, 80, 377 P.2d 258 (1962) (noting that because it "would be sheer conjecture for this court to attempt to determine what value the jury placed [on improperly admitted evidence] . . . [a] new trial is . . . necessary" (brackets added)).

The District claims the jury's finding of negligence and no proximate cause renders any error in the duty instruction harmless. It cites several cases to support its claim that "[w]here there is a plausible scenario that supports the jury's finding of no proximate cause the appellate court must accept that determination." *See* District Supp. Br. at 12 (brackets added; citing *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn. App. 919, 927, 332 P.3d 1077 (2014), *review denied*, 182 Wn.2d 1021, 345 P.3d 785 (2015)); *see also* District Supp. Br. at 10-11 (citing *Micro Enhancement*

*Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 426-27, 40 P.3d 1206 (2002) & *Chhuth v. George*, 43 Wn. App. 640, 719 P.2d 562 (1986)). The District's reliance on these cases is misplaced, however, as they did not involve an erroneous duty instruction. These cases stand only for the proposition that issues of negligence and proximate cause are fact issues within the province the jury, and the jury's findings on these issues will generally be upheld absent legal error. That proposition is not at issue in this case.

Here, the Court of Appeals recognized the jury's finding of negligence could have been based on any one of three alternative theories of negligence — training, supervision or maintenance of safe equipment. Because the jury was not given an instruction correctly defining a school's enhanced duty to its students in undertaking these tasks, the jury was not able to properly assess whether the school breached its duty in each of these separate areas. Had it been properly instructed, the jury may very well have found breach of an additional duty, and found the additional breach proximately caused Hendrickson's injury. This is sufficient to establish that the court's error affected, or presumptively affected, the outcome of the trial. *See Thomas*, 99 Wn.2d at 105 (finding prejudice war-

ranting a new trial because “there is no way to know what value the jury placed upon the improperly admitted evidence”).<sup>3</sup>

**C. A School’s Duty Of Protection Is Generally Incompatible With A Defense Of Contributory Negligence.**

Washington law has adopted a system of comparative fault. *See generally* RCW 4.22.005-.070. A plaintiff’s fault is included in this calculus and serves as a damage-reducing factor. *See* RCW 4.22.005; RCW 4.22.015. The inquiry with regard to contributory negligence is whether the plaintiff exercised due care for her own safety. *See Seattle-First v. Shoreline Concrete*, 91 Wn.2d 230, 238, 588 P.2d 1308 (1978). Children’s capacity for fault is generally dependent on their age. *See Bauman by Chapman v. Crawford*, 104 Wn.2d 241, 244, 704 P.2d 1181 (1985). The standard of care applicable to children is that of a reasonably careful child of the “same age, intelligence, maturity, training and experience.” *Id.*, 104 Wn.2d at 244.

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<sup>3</sup> The District also relies on *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 18 P.3d 558 (2001), to argue that failure to give an instruction correctly describing an enhanced duty is harmless where the jury finds negligence but no proximate cause. To the extent *Griffin* may be read for that proposition, however, it is distinguishable. Unlike here, the plaintiff in *Griffin* identified no alternative theories of negligence, nor did she “identify any additional duty that would be placed on the [defendant]” under the requested instruction. 143 Wn.2d at 89 (brackets added).

The issue here is whether these general rules regarding contributory negligence are altered in the context of the duty to protect. Two opinions of this Court have addressed this question. *See Christensen v. Royal Sch. Dist., supra*, and *Gregoire v. City of Oak Harbor, supra*. In *Christensen*, the Court held that a school could not assert contributory negligence in the context of a student's negligence claim against the school based on sexual assault by her teacher. *See Christensen*, 156 Wn.2d at 70. In *Gregoire*, a plurality opinion, the lead opinion held contributory negligence inapplicable in a wrongful death action against a jail involving suicide of an inmate. *See Gregoire*, 170 Wn.2d at 641.

While these opinions admittedly involved policy considerations, *see Hendrickson*, 199 Wn. App. at 253, fundamental to both *Christensen* and *Gregoire* was the special relationship between the parties, giving rise to a duty to protect. *Christensen* rested in part on the issue of sexual abuse, but also emphasized the significance of the parties' relationship:

Our conclusion that the defense of contributory negligence should not be available to the Royal School District and Principal Anderson is in accord with the established Washington rule that a school has a "special relationship" with the students in its custody and a duty to protect them "from reasonably anticipated dangers."

156 Wn.2d at 70.

In *Gregoire*, contributory negligence was inapplicable, in part, because “the injury-producing act — here, the suicide — [was] the very condition for which the duty [was] imposed. The jail’s duty to protect inmates includes protection from self-inflicted harm and, in that light, contributory negligence has no place in such a scheme.” 170 Wn.2d at 641. The court also quoted with approval the Minnesota Supreme Court’s opinion in *Sandborg v. Blue Earth County*, 615 N.W.2d 61, 65 (Minn. 2000) and its reliance on *Restatement (Second) of Torts* § 449 cmt. b (1965):

The happening of the very event the likelihood of which makes the actor’s conduct negligent and so subjects the actor to liability cannot relieve him from liability. . . . *To deny recovery because the other’s exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and make the duty a nullity.*

*Gregoire*, 170 Wn.2d at 641 (italics in original).

These opinions recognize the fundamental tension between the duty to protect and the contributory negligence defense. A defendant’s duty to protect requires that it take precautions against unreasonable risks of harm stemming from a variety of sources, including “from the negligence of the plaintiff himself.” Section 314A cmt. d; *see also Hunt v. King County*, 4 Wn. App. 14, 20, 481 P.2d 593 (1971). To the extent contributory negligence permits a defendant to shift liability for its failure to protect

the plaintiff from her own negligence, permitting the defense would “make the duty a nullity.” *Gregoire*, 170 Wn.2d at 641. Where defendants have a special relationship with a plaintiff triggering a duty to protect, contributory negligence is generally improper.

In the alternative, at a minimum, courts should recognize this fundamental tension and carefully scrutinize whether, in particular cases, a contributory negligence defense should be precluded. In *Sandborg*, for instance, the court turned to the *Restatement (Second) of Torts* § 452(2) (1965), which provides:

Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause.

The court in *Sandborg* went on to note that § 452 cmt. f enumerates factors which may inform when the entire duty has shifted to another:

[T]he circumstances may be such that the court will find that all duty and responsibility for the prevention of the harm has passed to the third person. It is apparently impossible to state any comprehensive rule as to when such a decision will be made. Various factors will enter into it. Among them are the degree of danger and the magnitude of the risk of harm, the character and position of the third person who is to take the responsibility, his knowledge of the danger and the likelihood that he will or will not exercise proper care, his relation to the plaintiff or to the defendant, the lapse of time, and perhaps other considerations.

Section 452 comment f (brackets added).<sup>4</sup> Applying these factors to the circumstances before it, the court held the entire responsibility for prevention of an inmate's suicide had shifted to the prison that housed him. These factors have been employed by other courts to examine principles of contributory negligence and/or comparative fault. *See, e.g., Wu v. Sorenson*, 440 F.Supp.2d 1054 (D. Minn. 2006) (holding that under the factors enumerated in § 452 cmt. f, responsibility for injuries to a golf student caused by a fellow golf student had shifted entirely to the golf instructor).<sup>5</sup>

If the Court is disinclined to generally preclude the contributory negligence defense in the duty to protect context, trial courts should be instructed to carefully examine the facts before them to evaluate whether a contributory negligence defense is appropriate. Enumerated factors may guide their analysis.

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<sup>4</sup> Other organizing principles guiding courts' analysis in this context have also been identified. *See, e.g., Ellen M. Bublick, Comparative Fault to the Limits*, 56 Vand. L. Rev. 977, 999 (May 2003) (discussing factors used by courts to examine the appropriateness of a contributory negligence defense).

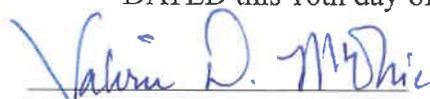
<sup>5</sup> Applied in this case, these factors appear to weigh against the District's assertion of the contributory negligence defense. First, the degree of danger and magnitude of risk of harm must be evaluated. Here, the degree of danger is significant and is recognized by WAC 296-125-030(13). Second, the character and position of a school and its faculty are far superior to students for evaluating the relative risks of particular activities, and to provide careful training and supervision. And, a school's legally-recognized duty to protect, including from harm arising from students' own negligence, is the kind of "relation" warranting responsibility for students' injuries.

In this case, the trial court appeared to operate under the general presumption that contributory negligence is an available defense and should be submitted to the jury. It did not inform the jury of the District's duty to protect Hendrickson from her own negligence. Instead, the jury was informed that "[e]very person has the right to assume that others will exercise ordinary care, and a person has a right to proceed on the assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary." *Hendrickson*, 199 Wn. App. at 248 (brackets added). Combined with the contributory negligence instruction, this suggested that the District could presume Hendrickson would not act negligently, and that any negligence by Hendrickson should be allocated solely to her as a percentage of the total fault. This is inconsistent with the special relationship between a school and its students giving rise to a duty of protection.

## VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving this appeal.

DATED this 16th day of April, 2018

  
Valerie D. McOmie

  
for Daniel E. Huntington

On Behalf of WSAJ Foundation

with authority

# Appendix

## Restatement (Second) of Torts § 314A (1965)

Restatement of the Law - Torts | March 2018 Update  
Restatement (Second) of Torts  
Division Two. Negligence  
Chapter 12. General Principles  
Topic 7. Duties of Affirmative Action

### § 314A Special Relations Giving Rise to Duty to Aid or Protect

[Comment:](#)

[Reporter's Notes](#)

[Case Citations - by Jurisdiction](#)

- (1) A common carrier is under a duty to its passengers to take reasonable action**
  - (a) to protect them against unreasonable risk of physical harm, and**
  - (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.**
- (2) An innkeeper is under a similar duty to his guests.**
- (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.**
- (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.**

See Reporter's Notes.

**Caveat:**

The Institute expresses no opinion as to whether there may not be other relations which impose a similar duty.

**Comment:**

*a.* An additional relation giving rise to a similar duty is that of an employer to his employee. (See § 314B.) As to the duty to protect the employee against the conduct of third persons, see Restatement of Agency, Second, Chapter 14.

*b.* This Section states exceptions to the general rule, stated in § 314, that the fact that the actor realizes or should realize that his action is necessary for the aid or protection of another does not in itself impose upon him any duty to act. The duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. There may be other such relations, as for example that of husband and wife, where the duty is recognized by the criminal law, but there have as yet been no decisions allowing recovery in tort in jurisdictions where negligence actions between husband and wife for personal injuries are permitted. The question is therefore left open by the Caveat, preceding Comment *a* above. The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.

*c.* The rules stated in this Section apply only where the relation exists between the parties, and the risk of harm, or of further harm, arises in the course of that relation. A carrier is under no duty to one who has left the vehicle and ceased

to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises. Nor is a possessor of land under any such duty to one who has ceased to be an invitee.

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

*e.* The duty in each case is only one to exercise reasonable care under the circumstances. The defendant is not liable where he neither knows nor should know of the unreasonable risk, or of the illness or injury. He is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate, or to give aid to one whom he has no reason to know to be ill. He is not required to take any action where the risk does not appear to be an unreasonable one, as where a passenger appears to be merely carsick, and likely to recover shortly without aid.

*f.* The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance.

**Illustrations:**

1. A, a passenger on the train of B Railroad, negligently falls off of the train, and is injured. The train crew discover that he has fallen off, but do nothing to send aid to him, or to notify others to do so. A lies unconscious by the side of the track in a cold rain for several hours, as a result of which his original injuries are seriously aggravated. B Railroad is subject to liability to A for the aggravation of his injuries.

2. A, a passenger riding on the train of B Railroad, suffers an apoplectic stroke, and becomes unconscious. The train crew unreasonably assume that A is drunk, and do nothing to obtain medical assistance for him, or to turn him over at a station to those who will do so. A continues to ride on the train in an unconscious condition for five hours, during which time his illness is aggravated in a manner which proper medical attention would have avoided. B Railroad is subject to liability to A for the aggravation of his illness.

3. A is a guest in B's hotel. Without any fault on the part of B, a fire breaks out in the hotel. Although they could easily do so, B's employees fail to call A's room and warn him to leave it. As a result A is overcome by smoke and carbon monoxide before he can escape, and is seriously injured. B is subject to liability to A.

4. A, a child six years old, accompanies his mother, who is shopping in B's department store. Without any fault on the part of B, A runs and falls, and gets his fingers caught in the mechanism of the store escalator. B's employees see what has occurred, but unreasonably delay in shutting off the escalator. As a result, A's injuries are aggravated in a manner which would have been avoided if the escalator had been shut off with reasonable promptness. B is subject to liability to A for the aggravation of his injuries.

5. A, a patron attending a play in B's theatre, suffers a heart attack during the performance, and is disabled and unable to move. He asks that a doctor be called. B's employees do nothing to obtain medical assistance, or to

remove A to a place where it can be obtained. As a result, A's illness is aggravated in a manner which reasonably prompt medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

6. A is imprisoned in a jail, of which B is the jailor. A suffers an attack of appendicitis, and cries for medical assistance. B does nothing to obtain it for three days, as a result of which A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

7. A is a small child sent by his parents for the day to B's kindergarten. In the course of the day A becomes ill with scarlet fever. Although recognizing that A is seriously ill, B does nothing to obtain medical assistance, or to take the child home or remove him to a place where help can be obtained. As a result, A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his injuries.

### Reporter's Notes

This Section has been added to the first Restatement.

Illustration 1 is based on *Yazoo & M.V.R. Co. v. Byrd*, 89 Miss. 308, 42 So. 286 (1906); *Layne v. Chicago & Alton R. Co.*, 175 Mo.App. 34, 157 S.W. 850 (1913); *Cincinnati, H. & D.R. Co. v. Kassen*, 49 Ohio St. 230, 31 N.E. 282, 16 L.R.A. 674 (1892); *Yu v. New York, N.H. & H.R. Co.*, 145 Conn. 451, 144 A.2d 56 (1958); *Continental Southern Lines, Inc. v. Robertson*, 241 Miss. 796, 133 So.2d 543, 92 A.L.R.2d 653 (1961), passenger injured through his own negligence.

Illustration 2 is taken from *Middleton v. Whitridge*, 213 N.Y. 499, 108 N.E. 192, Ann.Cas. 1916C, 856 (1915). Cf. *Kambour v. Boston & Maine R. Co.*, 77 N.H. 33, 86 A. 624, 45 L.R.A. N.S. 1188 (1913); *Jones v. New York Central R. Co.*, 4 App.Div.2d 967, 168 N.Y.S.2d 927 (1957), affirmed, 4 N.Y.2d 963, 177 N.Y.S.2d 492, 152 N.E.2d 519 (1958); *Yu v. New York, N.H. & H.R. Co.*, 145 Conn. 451, 144 A.2d 56 (1958).

Compare, as to the duty of a carrier to protect its passengers from dangers arising from the conduct of third persons: *Hillman v. Georgia Ry. & Banking Co.*, 126 Ga. 814, 56 S.E. 68, 8 Ann.Cas. 222 (1906); *Nute v. Boston & Maine R. Co.*, 214 Mass. 184, 100 N.E. 1099 (1913); *Kuhlen v. Boston & N. St. R. Co.*, 193 Mass. 341, 79 N.E. 815, 7 L.R.A. N.S. 729, 118 Am.St.Rep. 516 (1907); *Exton v. Central R. Co. of New Jersey*, 62 N.J.L. 7, 42 A. 486, 56 L.R.A. 508 (1898), affirmed, 63 N.J.L. 356, 46 A. 1099, 56 L.R.A. 512; *Kinsey v. Hudson & Manhattan R. Co.*, 130 N.J.L. 285, 32 A.2d 497, 14 N.C.C.A.N.S. 692 (Sup.Ct.1943), affirmed, 131 N.J.L. 161, 35 A.2d 888 (Ct. Err. & App.); *Harpell v. Public Service Coordinate Transport*, 20 N.J. 309, 120 A.2d 43 (1955); *Mulhause v. Monongahela St. R. Co.*, 201 Pa. 237, 50 A. 937 (1902); *St. Louis, I.M. & S.R. Co. v. Hatch*, 116 Tenn. 580, 94 S.W. 671 (1906); *Kline v. Milwaukee Elec. R. Co.*, 146 Wis. 134, 131 N.W. 427, Ann Cas. 1912C, 276 (1911).

Illustration 3 is based on *Dove v. Lowden*, 47 F.Supp. 546 (W.D.Mo.1942); *West v. Spratling*, 204 Ala. 478, 86 So. 32 (1920); *Stewart v. Weiner*, 108 Neb. 49, 187 N.W. 121 (1922); *Texas Hotel Co. of Longview v. Cosby*, 131 S.W.2d 261 (Tex.Civ.App.1939), error dismissed; cf. *Hercules Powder Co. v. Crawford*, 163 F.2d 968 (8 Cir.1947).

Compare, as to the duty of an innkeeper to protect his guests from dangers arising from the conduct of third persons: *Knott Corp. v. Furman*, 163 F.2d 199 (4 Cir.1947), certiorari denied, 332 U.S. 809, 68 S.Ct. 111, 92 L.Ed. 387, rehearing denied, 332 U.S. 826, 68 S.Ct. 164, 92 L.Ed. 401; *Fortney v. Hotel Rancroft*, 5 Ill.App.2d 327, 125 N.E.2d 544 (1955); *McFadden v. Bancroft Hotel Corp.*, 313 Mass. 56, 46 N.E.2d 573 (1943); *Gurren v. Casperson*, 147 Wash. 257, 265 P. 472 (1928); *Miller v. Derusa*, 77 So.2d 748 (La.App.1955).

## Restatement (Second) of Torts § 315 (1965)

Restatement of the Law - Torts | March 2018 Update  
Restatement (Second) of Torts  
Division Two. Negligence  
Chapter 12. General Principles  
Topic 7. Duties of Affirmative Action  
Title A. Duty to Control Conduct of Third Persons

### § 315 General Principle

#### Comment:

#### Case Citations - by Jurisdiction

**There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless**

**(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or**

**(b) a special relation exists between the actor and the other which gives to the other a right to protection.**

#### Comment:

a. The rule stated in this Section is a special application of the general rule stated in § 314.

b. *Distinction between duty to act for another's protection and duty to act for self-protection.* In the absence of either one of the kinds of special relations described in this Section, the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm. This is true although the actor realizes that he has the ability to control the conduct of a third person, and could do so with only the most trivial of efforts and without any inconvenience to himself. Thus if the actor is riding in a third person's car merely as a guest, he is not subject to liability to another run over by the car even though he knows of the other's danger and knows that the driver is not aware of it, and knows that by a mere word, recalling the driver's attention to the road, he would give the driver an opportunity to stop the car before the other is run over. On the other hand, under the rule stated in § 495, the actor is guilty of contributory negligence if he fails to exercise an ability which he in fact has to control the conduct of any third person, where a reasonable man would realize that the exercise of his control is necessary to his own safety. Thus if the actor, while riding merely as a guest, does not warn the driver of a danger of which he knows and of which he has every reason to believe that the driver is unaware, he becomes guilty of contributory negligence which precludes him from recovery against another driver whose negligent driving is also a cause of a collision in which the actor himself is injured.

#### Comment on Clauses (a) and (b):

c. The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316- 319. The relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§ 314A and 320.

#### Case Citations - by Jurisdiction

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## Restatement (Second) of Torts § 320 (1965)

Restatement of the Law - Torts | March 2018 Update  
Restatement (Second) of Torts  
Division Two. Negligence  
Chapter 12. General Principles  
Topic 7. Duties of Affirmative Action  
Title A. Duty to Control Conduct of Third Persons

### § 320 Duty of Person Having Custody of Another to Control Conduct of Third Persons

[Comment:](#)

[Reporter's Notes](#)

[Case Citations - by Jurisdiction](#)

**One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor**

**(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and**

**(b) knows or should know of the necessity and opportunity for exercising such control.**

**See Reporter's Notes.**

**Comment:**

*a.* The rule stated in this Section is applicable to a sheriff or peace officer, a jailer or warden of a penal institution, officials in charge of a state asylum or hospital for the criminally insane, or to teachers or other persons in charge of a public school. It is also applicable to persons conducting a private hospital or asylum, a private school, and to lessees of convict labor.

*b. Helplessness of other.* The circumstances under which the custody of another is taken and maintained may be such as to deprive him of his normal ability to defend himself, or to deprive him of the protection of someone who, if present, would be under a duty to protect him, or though under no such duty would be likely to do so. Thus the fact that a prisoner is handcuffed may make him incapable of defending himself against an attack, which he could otherwise have done. The very fact of imprisonment prevents a prisoner from avoiding attacks by flight. So too, a child while in school is deprived of the protection of his parents or guardian. Therefore, the actor who takes custody of a prisoner or of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.

*c. Peculiar risks to which other exposed.* The custody of another may be taken under such circumstances as to associate the other with persons who are peculiarly likely to do him harm from which he cannot be expected to protect himself. If so, the actor who has taken custody of the other is required to exercise reasonable care to furnish the necessary protection. This is particularly true where the custody not only involves intimate association with persons of notoriously dangerous character, but also deprives the person in custody of his normal ability to protect himself, as where a prisoner is put in a cell with a man of known violent temper, or is required to work or take exercise with a group of notoriously desperate characters. In such a case, the fact that the person in custody is a prisoner precludes the possession of any self-defensive weapons, and thus makes him incapable of adequately protecting himself.

*d. Duty to anticipate danger.* One who has taken custody of another may not only be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need of it, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it. Thus if a sheriff or peace officer knows that public opinion is so violently incensed against his prisoner that there is danger of mob violence, he may be required not only to himself to defend the prisoner, but also to exercise reasonable care to secure assistance which will enable him to do so effectively. So too, a schoolmaster who knows that a group of older boys are in the habit of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur. This is true whether the actor is or is not under a duty to take custody of the other.

### Reporter's Notes

As to the duty of one who has taken charge of another to protect him by controlling the conduct of third persons, see *People ex. rel. Coover v. Guthner*, 105 Colo. 37, 94 P.2d 699 (1939); *Ratliff v. Stanley*, 224 Ky. 819, 7 S.W.2d 230, 61 A.L.R. 566 (1928); *Lamb v. Clark*, 282 Ky. 167, 138 S.W.2d 350 (1940); *Honeycutt v. Bass*, 187 So. 848 (La.App.1939); *Dunn v. Swanson*, 217 N.C. 279, 7 S.E.2d 563 (1940); *Hixon v. Cupp*, 5 Okla. 545, 49 P. 927 (1897); *Taylor v. Slaughter*, 171 Okla. 152, 42 P.2d 235 (1935); *Browning v. Graves*, 152 S.W.2d 515 (Tex.Civ.App.1941), error refused; *Kusah v. McCorkle*, 100 Wash. 318, 170 P. 1023, L.R.A. 1918C, 1158 (1918); *Eberhart v. Murphy*, 110 Wash. 158, 188 P. 17 (1920), reversed on other grounds, 113 Wash. 449, 194 P. 415.

### Case Citations - by Jurisdiction

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**Comments:**

Attached please find WSAJ Foundation Motion to File Amended Amicus Brief and accompanying proposed Amended Amicus Brief.

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Sender Name: Valerie McOmie - Email: [valeriemcomie@gmail.com](mailto:valeriemcomie@gmail.com)

Address:

4549 NW ASPEN ST

CAMAS, WA, 98607-8302

Phone: 360-852-3332

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