

FILED
SUPREME COURT
STATE OF WASHINGTON
12/14/2017 2:31 PM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 948984
C/A No. 341976-III

WASHINGTON SUPREME COURT

HEIDI JO HENDRICKSON, a single person,

Plaintiff-Petitioner,

vs.

MOSES LAKE SCHOOL DISTRICT, a municipal corporation,

Defendant-Respondent.

PETITIONER'S ANSWER TO AMICUS CURIAE MEMORANDUM
OF WASHINGTON SCHOOLS RISK MANAGEMENT POOL

George M. Ahrend
Ahrend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000

Matthew C. Albrecht
Albrecht Law PLLC
421 W. Riverside Ave., Ste. 614
Spokane, WA 99201
(509) 495-1246

Co-Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. WSRMP misapprehends a school's duty arising from the special relationship between the school and its students. 1

II. WSRMP misportrays the Court of Appeals decision below. .. 4

III. WSRMP does not contest Hendrickson's cross petition for review regarding whether, and under what circumstances, a defense of contributory negligence is compatible with a school's duty to its students..... 6

CERTIFICATE OF SERVICE 8

TABLE OF AUTHORITIES

Cases

<i>Christensen v. Royal Sch. Dist.</i> , 156 Wn. 2d 62, 124 P.3d 283 (2005)	5
<i>Hendrickson v. Moses Lake Sch. Dist.</i> , 199 Wn. App. 244, 398 P.3d 1199 (2017), <i>rev. pending</i>	5-6
<i>McLeod v. Grant Cty. Sch. Dist. No. 128</i> , 42 Wn. 2d 316, 255 P.2d 360 (1953).....	3, 5
<i>N.L. v. Bethel Sch. Dist.</i> , 186 Wn. 2d 422, 378 P.3d 162 (2016)	3, 5
<i>Quynn v. Bellevue Sch. Dist.</i> , 195 Wn. App. 627, 383 P.3d 1053 (2016)	5
<i>Schwartz v. Elerding</i> , 166 Wn. App. 608, 270 P.3d 630, <i>rev. denied</i> , 174 Wn. 2d 1010 (2012)	5

Statutes and Rules

WAC 296-125-030(13)	3
---------------------------	---

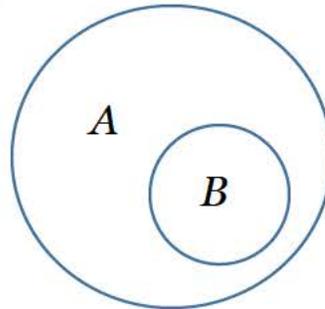
Plaintiff-Respondent Heidi Jo Hendrickson (Hendrickson) submits this answer to the Amicus Curiae Memorandum of Moses Lake School District's Petition for Review, filed on behalf of the Washington Schools Risk Management Pool (WSRMP):

I. WSRMP misapprehends a school's duty arising from the special relationship between the school and its students.

Initially, WSRMP contends that it is only necessary to instruct a jury regarding the duty arising from the special relationship when the existence of a duty or foreseeability of injury is disputed. *See* WSRMP Amicus Curiae Memorandum (ACM), at 3-4. WSRMP further contends that instructing the jury regarding the school's duty in the absence of dispute is unnecessary and potentially misleading. *See* WSRMP ACM, at 7-10. This approach to instructing the jury is unprecedented and incoherent, and wrongly implies that there was no dispute in this case regarding the nature of MLSD's duty in this case.

MLSD sought to limit its duty to risks of harm created by school personnel, whereas Hendrickson argued that a school's duty extends to all risks of harm within the scope of the school-student relationship, including, but not necessarily limited to, risks of harm

created by school personnel. The difference can be represented by the following diagram:



Circle A represents all foreseeable risks of harm within the scope of the school-student relationship, and *Circle B* represents a subset of *Circle A*, comprised solely of the risks of harm created by school personnel. If the jury is instructed only regarding the duty of reasonable care with respect to risks of harm created by school personnel (represented by *Circle B*), then the instructions improperly limit the potential breaches of duty that may be considered by the jury as well as the causal relationship between those breaches of duty and the plaintiff's damages. It is necessary to instruct the jury regarding the duty of reasonable care with respect to all risks of harm within the school-student relationship (represented by *Circle A*) in order to avoid artificially limiting what the jury may consider.

There can be no serious dispute that the duty of a school arising from the special relationship with its students includes all

foreseeable risks of harm within the school-student relationship. From before this Court's decision in *McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360, 362 (1953), which held that a school had a duty to protect its student from sexual assault by other students, "the duty of a school district ... is to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers." (Ellipses added); accord *N.L. v. Bethel Sch. Dist.*, 186 Wn. 2d 422, 430, 378 P.3d 162, 166 (2016) (relying on *McLeod*). Where there is a legitimate dispute regarding whether the risk in question is foreseeable, the question of foreseeability can be submitted to the jury, but that does not change the nature of the duty. See *N.L.*, 186 Wn. 2d at 436 (noting foreseeability is normally an issue for the jury).

The nature of the duty is important in this case because, when she was injured, Hendrickson was learning how to use a power saw, a dangerous piece of equipment that she would normally be prohibited from using outside of school. See WAC 296-125-030(13). MLSD had a duty of reasonable care to anticipate dangers arising from her use of the saw and take precautions to protect her from those dangers, regardless of whether the risk of harm was created by school district personnel. The jury should not have been instructed

as if the school could avoid liability by placing her in a room with dangerous equipment as long as its personnel did not affirmatively injure her.

Given the long-standing and well-settled nature of a school's duty to its students, there is no reason to grant review on this issue and simply re-state what has already been said many times.

II. WSRMP misportrays the Court of Appeals decision below.

WSRMP repeatedly characterizes the Court of Appeals decision below as creating "a new heightened standard of virtual strict liability." WSRMP ACM, at 2; *accord id.* at 1-2, 4-6 & 9-10 (referring to allegedly "heightened" standard of care); *id.* at 6-7 (referring to allegedly "strict liability"); *id.* at 3, 6 & 9 (referring to allegedly "higher" standard of care). Nothing could be further from the truth.

The Court of Appeals simply used the terms "heightened" and "enhanced"—as this Court and the Court of Appeals have on previous occasions—to refer to the fact that MLSD's duty to its students extends to all foreseeable risks of harm:

There is no serious dispute over whether the trial court should have issued an instruction explaining the district's **heightened** duty of care. School districts have a special relationship with the students in their custody. *Id.* Based on this relationship, school districts have a duty "to anticipate

dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in [their] custody from such dangers." *McLeod v. Grant County Sch. Dist.*, 42 Wash.2d 316, 320, 255 P.2d 360 (1953). Jurors are entitled to receive instructions on the unique nature of a school district's duty of care. *Hopkins*, 195 Wash.App. at 108, 380 P.3d 584. The failure to provide such instruction is error. *Id.* Given this legal landscape, the trial court should have provided an instruction explaining the district's **enhanced** duty of care.

Hendrickson v. Moses Lake Sch. Dist., 199 Wn. App. 244, 249, 398 P.3d 1199, 1202 (2017), *rev. pending*; *see also N.L.*, 186 Wn. 2d at 430 (stating "Washington courts have long recognized that school districts have '**an enhanced and solemn duty**' of reasonable care to protect their students"; quoting *Christensen v. Royal Sch. Dist.*, 156 Wn. 2d 62, 67, 124 P.3d 283 (2005); emphasis added); *Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 634, 383 P.3d 1053, 1057 (2016) (quoting "**enhanced and solemn duty**" language from *Christensen*; emphasis added); *Schwartz v. Elerding*, 166 Wn. App. 608, 618, 270 P.3d 630, 636, *rev. denied*, 174 Wn. 2d 1010 (2012) (stating "[g]iven the special relationship between the school district and the plaintiff, *McLeod* recognized that a **heightened** duty was owed"; brackets & emphasis added).

The Court of Appeals did not hold that MLSD was subject to strict liability or suggest that its liability is based on a lower standard than reasonable care, nor has Hendrickson ever contended that

MLSD is subject to liability based on a lower standard than reasonable care. *See Hendrickson*, 199 Wn. App. at 247-48 (quoting instruction on school's duty proposed as a supplement to standard negligence instructions). *Hendrickson* is still obligated to show that the school was negligent and that its negligence proximately caused her injuries. WSRMP's concerns about the prospect of strict liability are unfounded.¹

III. WSRMP does not contest *Hendrickson's* cross petition for review regarding whether, and under what circumstances, a defense of contributory negligence is compatible with a school's duty to its students.

WSRMP does not explicitly urge the Court to grant *Hendrickson's* cross petition for review, and it appears to believe that the Court of Appeals decision on the issue of contributory negligence was correct. Nonetheless, its discussion of the issue of contributory negligence suggests that the issue is worthy of review. *See WSRMP ACM*, at 5-6. At a minimum, WSRMP does not explicitly urge the Court to deny review of *Hendrickson's* cross petition.

¹ WSRMP also makes an argument that "[i]f this new liability standard is adopted, school shop classes, science labs and physical education classes would become unmanageable liability risks." *WSRMP ACM*, at 6. This is not a legally cognizable argument, and it is completely unsupported. The Court of Appeals standard of liability is the same that has prevailed in Washington for almost a century without apparent unmanageable risks, and WSRMP does not disclose the effect, if any, of the nature of the duty on its underwriting.

Respectfully submitted this 14th day of December, 2017.

s/George M. Ahrend

George M. Ahrend, WSBA #25160

Ahrend Law Firm PLLC

100 E. Broadway Ave.

Moses Lake, WA 98837

Phone (509) 764-9000

Facsimile (509) 464-6290

Email gahrend@ahrendlaw.com

Co-Attorneys for Petitioner

CERTIFICATE OF SERVICE

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

On the date set forth below, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

Jerry Moberg, Patrick Moberg & James Baker
Jerry Moberg & Associates, PS
P.O. Box 130
Ephrata, WA 98823

Email jmoberg@jmlawps.com
pmoberg@jmlawps.com
jbaker@jmlawps.com

Tyna Ek
3704 SW Lander St.
Seattle, WA 98126

Email TynaEkLaw@comcast.com

and upon co-counsel for Plaintiff/Petitioner, via email pursuant to prior agreement for electronic service, as follows:

Matthew C. Albrecht
malbrecht@trialappeallaw.com

Bryce P. McPartland
mcpartland.bryce@mcpartlandlaw.com

Signed at Moses Lake, Washington on December 14, 2017.



Shari M. Canet, Paralegal

AHREND LAW FIRM PLLC

December 14, 2017 - 2:31 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94898-4
Appellate Court Case Title: Heidi Jo Hendrickson v. Moses Lake School District
Superior Court Case Number: 10-2-01037-4

The following documents have been uploaded:

- 948984_Briefs_20171214142942SC241993_7030.pdf
This File Contains:
Briefs - Answer to Amicus Curiae
The Original File Name was 2017-12-14 Ans to AC.pdf

A copy of the uploaded files will be sent to:

- TynaEkLaw@comcast.net
- assistant1@mcpartlandlaw.com
- j baker@jmlawps.com
- jmoberg@jmlawps.com
- malbrecht@trialappeallaw.com
- mcpartland.bryce@mcpartlandlaw.com
- mevans@trialappeallaw.com
- mklingenberg@jmlawps.com
- pmoberg@jmlawps.com

Comments:

Sender Name: George Ahrend - Email: gahrend@ahrendlaw.com
Address:
100 E BROADWAY AVE
MOSES LAKE, WA, 98837-1740
Phone: 509-764-9000

Note: The Filing Id is 20171214142942SC241993