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Supreme Court No. 94898-4

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

HEIDI JO HENDRICKSON,

Plaintiff/Respondent,

vs.

MOSES LAKE SCHOOL DISTRICT,

Defendant/Appellant.

MOSES LAKE SCHOOL DISTRICT'S RESPONSE TO
BRIEF OF AMICUS CURIAE WASHINGTON STATE
ASSOCIATION FOR JUSTICE FOUNDATION

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I. RESPONSE TO AMICI'S STATEMENT OF THE CASE

This action results from the injury of Plaintiff Heidi Jo Hendrickson (the Student) while using a table saw in the woodshop of Defendant Moses Lake School District (the District). The jury found that there was negligence on the part of the District but the District's negligence was not a proximate cause of the Student's injuries. The Court of Appeals overturned the jury's verdict in favor of the District because: "There is no serious dispute over whether the trial court should have issued an instruction explaining the district's heightened duty of care." *Hendrickson v Moses Lake Sch. Dist.*, 199 Wn.App. 244, 249, 398 P.3d 1199 (2017). The Court of Appeals made this pronouncement because: "School districts have a special relationship with the students in their custody." *Id.*

Contrary to what the Court of Appeals said, there is a serious dispute on whether the trial court was required to give a jury instruction on a *heightened duty of care*.

In a 2-1 opinion, the Court of Appeals concluded that the trial court erred in failing to give Plaintiff's Proposed Jury Instruction No. 12, which stated:

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. Harm is foreseeable if the risk from which it results was known, or in the exercise of reasonable care should have been known. The imposition of this duty is based on the placement of the student in the care of the school with the resulting loss of the student's ability to protect himself or herself. The relationship between a school district and a student is not a voluntary relationship, as children are required by law to attend school. The protective custody of teachers is thus mandatorily substituted for that of the parent.

(CP 00406.) (Emphasis added.)¹ This instruction was not a correct statement of law.

In response to the District's objection to this jury instruction, the Student advised the Court: "Plaintiff would agree to strike the last three sentences (although they correctly state the law, they admittedly contain explanations of why the law is in place rather than instructing the jury on how to deliberate)[.]" (CP 1503.)

Moreover, Plaintiff did not propose a jury instruction defining "heightened duty of care." Thus, the jury would have had no way of deciding whether the District violated this vague, undefined duty of care. Without defining heightened duty of care the Student's proposed instruction was confusing. A trial court is not required to submit to the

¹ The Student set forth these authorities for Proposed Jury Instruction No. 12: *Christensen v. Royal City Sch. Dist. No. 160*, 156 Wn.2d 62, 70 (2005); *Travis v. Bohannon*, 128 Wn.App. 231, 238-39 (2005) and *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 228 (1991). (CP 00406.)

jury something that is confusing. *Cf. MKB Constructors v. Am. Zurich Ins. Co.*, 2015 WL 1188533, *29 (W.D.Wash. 2015) (confusing special verdict form). “Words and phrases used in instructions where they have a technical meaning in law” must be defined. *Hanson PLC v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 58 Wn.App. 561, 569, 794 P2d 66 (1990). The “language used by this court in the course of an opinion is not ordinarily designed or intended as a model for jury instructions.” *Swope v. Sundgren*, 73 Wn.2d 747, 750, 440 P.2d 494 (1968). Without a further definition of “heightened duty of care” the Student’s proposed Instruction No. 7 was ambiguous. The trial court should not give an ambiguous jury instruction. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 876-77, 281 P.3d 289 (2012) (ambiguous jury instruction was misleading and required reversal).

In cases involving the duty of a common carrier to passengers, the pattern jury instruction states:

A common carrier has a duty to its passengers to exercise **the highest degree of care** consistent with the practical operation of its type of transportation and its business as a common carrier. Any failure of a common carrier to exercise such care is negligence.

However, a common carrier is not a guarantor of the safety of its passengers.

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 100.01 (Common Carrier – Duty to Passengers). (Emphasis added.) “The mere fact that an accident occurred during common carrier operation does not establish the carrier’s negligence.” *Carpenter v. Modeen*, 2013 WL 3089342, *2 (W.D.Wash. 2013). At minimum, the Student should have proposed an instruction similar to WPI 100.01 stating that a heightened duty of care is one consistent with the practical operation of the wood shop and that the District was not a guarantor of the safety of the wood shop students.

Fault of the Student for Abandoning the Push Stick

The Student received training on how to use the table saw and had used the table saw 60-100 times before the day she cut her thumb. (VRP 891-95; 290-92; 347-49; 607-08.) The Student was instructed to always use a “push stick” to push board through the table saw. (VRP 895-96; 911; 916; 347-49; 622-23; 262; 661.) Amici mentioned that the Student took a test and marked “false” to a question whether a “push stick is necessary when ripping narrow stock.” (Amici’s brief at 2.) During trial the Student answered affirmatively to the question: “You were trained and you admit that you were trained to always use the push stick on a narrow cut, correct?” (VRP 83.)

On the day of the occurrence, the Student was using a push stick to push a board through the blade of the table saw. (VRP 618-19.) Near the

end of a cut of a one-inch board the Student abandoned the push stick and tried to push the board with her bare hand. (VRP 683-84.) While moving the board she pushed her thumb over the saw's blade. (VRP 622-24.) Kevin Chestnut, the woodshop teacher, had more than 35 years' experience. (VRP 8.) His students had never sustained a serious injury while operating power tools in the wood shop. (VRP 45-46.)

Court's Instructions to the Jury

The trial court gave Jury Instruction No. 9, which stated:

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 ways 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 negligence of the defendant was a proximate cause of the injury to the plaintiff.

(CP 1525.) The trial court gave Jury Instruction No. 11:

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

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

(CP 1527.) The trial court gave Jury Instruction No. 12:

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably prudent 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 1528.) The trial court gave Jury Instruction No. 13:

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

(CP 1529.) The trial court gave Jury Instruction No. 14:

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.

(CP 1530.) The Student did not propose a separate foreseeability jury instruction such as:

[T]he duty of a school district to use reasonable care extends only to such risks of harm as are foreseeable. . . . To establish foreseeability, the harm sustained must be within a “general field of danger” that should have been anticipated. . . . Acts are foreseeable “only if the district knew or in the exercise or reasonable care should have known of the risk” that resulted in the harm.

Hopkins v. Seattle Public Sch. Dist. No. 1, 195 Wn.2d 96, 107, 380 P.3d 584 (2016), *rev. denied* 186 Wn.2d 1029, 385 P.3d 123 (2016), *citing* *McLeod v. Grant Cnty. Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 321, 255 P.2d 360 (1953) and *Peck v. Siau*, 65 Wn.App. 285, 293, 827 P.2d 1108 (1992), *rev. denied* 120 Wn.2d 1005, 838 P.2d 1142 (1992). The Student’s proposed Instruction No. 12 included wording that the District had a duty to protect the Student “from foreseeable harm” and stated: “Harm is

foreseeable if the risk from which it results was known, or in the exercise of reasonable care should have been known.”

The Student did not propose a jury instruction such as:

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 v. Grant Cnty. Sch. Dist. No. 128, 42 Wn.2d 316, 320, 255 P.2d 360 (1953).

The Student did not propose a jury instruction such as: “A school has a special relationship with the students in its custody and a duty to protect them from reasonably anticipated dangers.” *Christensen*, 156 Wn.2d 62, 71, 124 P.3d 283 (2005). The Student’s proposed Instruction No. 12 stated there was a “special relationship” and a school district has a “heightened duty of care to protect” the Student.

II. RESPONSE TO AMICI’S ARGUMENT

A. SPECIAL RELATIONSHIP

In discussing special relationship, the Student stated that such a relationship gives rise to “either a duty to protect or a duty to control.” (Amici’s brief at 6, *citing Peterson v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1983) (protection of plaintiff from dangerous propensities of a patient at a state mental hospital)). The District does not dispute that there is a

special relationship between a school and its pupils. In *Hopkins v. Seattle Public Sch. Dist.*, 195 Wn.App. 96, 108, 380 P.3d 584 (2016), *rev. denied* 186 Wn.2d 1029, 385 P.3d 123 (2016), it was stated: “We hold that 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.” *Hopkins* did not state that, due to the special relationship, a school district has a “heightened duty of care.”

This Court has stated 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 Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005). The “enhanced duty” is based on *McLeod v. Grant Cnty. Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953), which held that a school district may be liable for the criminal acts of a third person. *McLeod* was a departure from “the general rule at common law . . . that a private person does not have a duty to protect others from the criminal acts of third parties.” *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 223, 802 P.2d 1360 (1991).

B. THERE IS NOT A “HEIGHTENED DUTY” OF CARE

The Court of Appeals mistakenly, and without any substantive discussion, assumed that the District owed the Student a “heightened duty of care.” The Court of Appeals based its heightened duty decision on

Hopkins v. Seattle Public Sch. Dist. No. 1, 195 Wn.App. 96, 380 P.3d 584 (2016), *rev. denied* 186 Wn.2d 1029, 385 P.3d 123 (2016) (student punched in the head by another student) and *Quynn v. Bellevue Sch. Dist.*, 195 Wn.App. 627, 383 P.3d 1053 (2016) (student harassed and assaulted by other students on the school bus). ***Hopkins* and *Quynn* did not state there is a “heightened duty of care” on the part of a school district.** In *Quynn*, the court actually rejected the argument that there was a “heightened duty of care” for negligent supervision on a school bus under the heightened duty of care applicable to common carriers. 195 Wn.App. at 635-36.

Hopkins and *Quynn* simply hold that the Washington Civil Pattern Jury Instructions (WPI) on negligence and ordinary care are not sufficient because the WPIs do not mention that there is a school district – student “special relationship” and do not discuss foreseeability that is associated with the school district – student relationship.

In *Schwartz v. Elerding*, 166 Wn.App. 608, 270 P.3d 630 (2012), *rev. denied* 174 Wn.2d 1010, 281 P.3d 686 (2012), the court stated at 618 that “*McLeod* recognized that a heightened duty was owed” by a school district to a student. *McLeod* did not use the term “heightened duty.” *McLeod* held that “intervening criminal acts may be found to be foreseeable and if so found, actionable negligence may be predicated

thereon” and “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.” 42 Wn.2d at 321, 362.

In *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 18 P.3d 558 (2001), there was an issue whether a landlord owed a “heightened duty” of care to plaintiff to protect her from an attack by a neighboring tenant. This Court stated at 88:

Griffin’s claim to a heightened duty would only matter if the jury had rejected breach of the lesser included duty. But it didn’t. Rather the jury’s finding of negligence placed Trammell Crow in the same position regardless of the standard of care; the only remaining question being whether that breach of duty proximately caused Griffin’s injuries. And the jury answered no.

Here, because the jury found that the District was negligent – but not the proximate cause of the Student’s injuries -- it was immaterial as to whether the trial court instructed on heightened duty. If the jury found negligence under the ordinary care standard, it would include a finding of negligence under an “enhanced” duty of care. *See also* argument based on *Griffin* set forth at pp. 7-9 of the Supplemental Brief of Moses Lake School District.

In *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997), this Court discussed the “heightened duty of care” of a common

carrier. This Court held that defendant had “a non-delegable duty to provide protection and care so as to fall within the common carrier exception.” 131 Wn.2d at 53.

To the extent that the Court of Appeals in this case holds that the duty of care owed to the Student was a “heighted duty of care” that holding is contrary to the long-standing duty of care set forth in *McLeod* and reaffirmed in later cases. This Court should hold that there is no heightened duty of care for school districts – just the duty of care that has long been imposed on school districts under *McLeod*.

“[T]here are no ‘degrees’ of care or negligence, as a matter of law; there are only different amounts of care as a matter of fact” *Ulve v City of Raymond*, 51 Wn.2d 241, 245, 317 P.2d 908 (1957), quoting Prosser, Law of Torts 149 (2d ed.).

Of course, what would be reasonable or ordinary care under one set of facts might not be reasonable or ordinary care under another set of facts. The difference would not be the degree of care used, *but rather the amount of care*.

Ulve, 51 Wn.2d at 245. (Emphasis in original.) The *Ulve* court stated at 245:

This court has never repudiated the doctrine that the degree of care required is that degree which a reasonably prudent person would have exercised under the same or similar circumstances.

Quoted with approval Anderson v. Beagle, 71 Wn.2d 641, 643-44, 430 P.2d 539 (1967). Even under an enhanced duty of care the fact remains: “Negligence is the failure to exercise ordinary care.” WPI 10.01. “Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.” WPI 10.02.

C. COMPARATIVE FAULT PRINCIPLES APPLY

The Student’s cross-appeal alleges that the Court of Appeals erred in affirming the trial court’s giving of a jury instruction on comparative fault on the part of the Student. The Court of Appeals properly held: “Because there are no unique policy reasons for excluding application of contributory negligence in Ms. Hendrickson’s case, this aspect of the trial court’s instructions was appropriate.” 199 Wn.App. at 254.

The Student’s argument is based on *Christensen v. Royal Sch. Dist. No. 106*, 156 Wn.2d 62, 124 P.3d 283 (2005) (on public policy grounds, a student who has sexual relations with her teacher cannot be held to be contributorily negligent) and *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010) (suicide of an inmate while in jail). The Court of Appeals properly distinguished the two cases. 199 Wn.App. at 253-54. Amici stated “these opinions admittedly involved policy considerations . . .” (Brief of Amici at 16.)

The Student relies heavily on two Minnesota cases: *Sandborg v. Blue Earth Cnty.*, 615 N.W.2d 61 (Minn. 2000) (suicide of inmate while in jail) and *Wu v. Sorenson*, 440 F.Supp.2d 1054 (D.Minn. 2006) (student suffered a brain injury after being struck by a golf ball during golf class). (Brief of Amici at 17-19.) *Sandborg*, a jail suicide case, was cited by this Court's opinion in *Gregoire*, a jail suicide case, at 641 of the majority opinion. The rule in *Sandborg* should be limited to jail suicide cases. Moreover, in *Gregoire* there was a concurring/dissenting opinion written by Justice Madsen concurred in by Justices Johnson and Owens. Justice Madsen stated at 654:

Similarly, the lead opinion also cites language from *Sandborg v. Blue Earth County*, 615 N.W.2d 61, 65 (Minn. 2000) (quoting RESTATEMENT (SECOND) OF TORTS § 449 cmt. b), in which the Minnesota court concludes application of comparative fault “would be to deprive the [inmate] of all protection and to make the [jail’s] duty a nullity.” However, as the Respondent points out, Minnesota is a modified comparative fault jurisdiction “barring recovery to a plaintiff who’s [*sic*] fault is determined to be greater than the fault of the person from whom recovery is being sought.” . . . In contrast to Washington’s pure comparative fault statute, Minnesota’s comparative fault increases the likelihood that a plaintiff’s claim would be barred despite a jail’s violation of its duty, thus gutting the jail’s duty. Differences in the law . . . undercuts the lead opinion’s reliance on . . . *Sandborg*.

(Paragraphing omitted.) As to *Wu*, it has not been cited as authoritative by any other court in the United States. *Wu* has been negatively cited by a Minnesota trial court.

The Student cited at 19 a law review article: Ellen M. Bublick, *Comparative Fault to the Limits*, 56 Vand. L.Rev. 977 (2003). The article stated:

For example, mental and penal institutions may be required to structure their environments and care around foreseeable hazards to patients and prisoners. Thus, a mental institution that fails to protect a depressed patient from committing suicide might be barred from invoking the patient's negligence as a defense.

Id. at 1015, *citing Sandborg*, 615 N.W.2d at 62. The article stated at 986:

After establishing the parties' asymmetric obligations to exercise reasonable care for others and sometimes for self, **the Restatement entrusts the question of whether each party has exercised reasonable care to jury decision.**

(Emphasis added.) The article further stated at 988: "Comparative fault is ordinarily viewed as a jury question."

In *Briscoe v. Sch. Dist. No. 123, Grays Harbor Cnty.*, 32 Wn.2d 353, 201 P.2d 697 (1949), a student was injured playing an athletic game with fellow students on the school grounds. This Court held that whether the student was contributorily negligent was a question for the jury. "[T]he very least that can be said of a charge that the boy's actions

constituted contributory negligence is that it is a jury question, under proper instructions to be given by the court.” 32 Wn.2d at 366.

In *Hopkins v. Seattle Public Sch. Dist. No. 1*, 195 Wn.App. 96, 380 P.3d 584 (2016), *rev. denied* 186 Wn.2d 1029, 385 P.3d 124 (2016), the court discussed both *Gregoire* and *Briscoe* and stated at 109: “We leave it to the trial court on remand to reconcile whether the facts developed at trial, an instruction on comparative negligence should be given.”

The facts of this case are remarkably similar to those in *Fallin v. Maplewood-North St. Paul Dist. No. 622*, 362 N.W.2d 318 (Minn. 1985). A student lacerated his thumb when it was caught in the blade of a power saw during a wood shop class. The student did not use a “push stick” despite the teacher’s rule requiring such use. The teacher left the room for 1-1/2 minutes when the accident occurred. “The jury assessed [the student’s] damages at \$80,000 and returned a special verdict finding both plaintiff Fallin and defendant Nelson negligent, but found that only plaintiff’s negligence caused the injury.” 362 N.W. at 319. The court stated at 323:

The jury could have decided . . . that defendant’s negligence did not cause the injury. The basis of this decision was a question of fact to be resolved by the jury, and it did so.

A “special relationship” does not prevent a plaintiff from being charged with comparative fault. This was explained by Justice Madsen in her dissent in *Gregoire*, concurred in by Justice Johnson and Justice Owens, where it was stated at 648-49:.

For example, *Yurkovich v. Rose*, 68 Wash.App. 643, 847 P.2d 925 (1993), involved a negligence action against a bus driver and school district by the parents of a 13-year-old girl who was killed crossing a highway shortly after exiting a school bus. The Court of Appeals recognized a special relationship and found “school bus operators owe child passengers a duty of the highest degree of care consistent with the practical operation of the bus.” 68 Wn.App. at 648. Although the bus driver owed a duty, and through his negligence created the risk of harm, the court nevertheless approved instructions that included contributory negligence. *Id.* at 656. The court reasoned that the plaintiff still owed a duty of self-care that neither the school district nor the bus driver assumed.

Similarly, *Pearce v. Motel 6, Inc.*, 28 Wash.App. 474, 480, 624 P.2d 215 (1981), involved a negligence action against a motel owner brought by a guest who slipped on the shower floor. The Court of Appeals recognized that innkeeper-guest relationships create specific duties to guests regarding unsafe conditions on the premises. . . . However, reasoning that motel owners do not guarantee their guests’ safety, the Court of Appeals found that comparative negligence applies because it takes into account the two separate duties: of the motel owner to his guest and of the guest to himself or herself.

Every person, including a plaintiff, has “a duty to exercise reasonable care for her own safety” *Gorman v. Pierce Cnty.*, 176 Wn.2d 63, 87, 307 P.3d 795 (2013), *rev. denied* 179 Wn.2d 1010, 316

P.3d 495 (2014). “Contributory negligence is usually a factual question for the jury.” *Id.*

Courts throughout the country allow the jury to consider comparative negligence of a student when a student is injured at school. *See, e.g., Jimenez v. Roseville City Sch. Dist.*, 257 Cal.App. 4th 594, 202 Cal.Rptr.3d 536, 543 (Cal.App. 2016) (student hurt while performing flips; “The fact Jimenez chose to flip at behest of his fellow students does not preclude liability of the District, although it may trigger secondary assumption of the risk, requiring application of comparative negligence principles by the jury.”); *Safon v. Bellmore-Merrick Cent. High Sch. Dist.*, 22 N.Y.S.3d 233, 234 (N.Y.App. 2015) (student injured during lacrosse practice; plaintiff “failed to establish . . . that neither the doctrine of comparative negligence nor the doctrine of primary assumption of risk applied in this case”); *Oldham-Powers v. Longwood Cent. Sch. Dist.*, 997 N.Y.S.2d 687, 689 (N.Y.App. 2014) (student injured when stepping into a pole vault box; “even assuming that the pole vault area was open and obvious, the issue would only raise a triable issue of fact as to the injured plaintiff’s possible comparative negligence); *M.M. v. Fargo Public Sch. Dist. No. 1*, 815 N.W.2d 273, 276 (N.D. 2012) (student injured while practicing a bicycle stunt in the school auditorium; comparative negligence applied); *Wells v. Harrisburg Area Sch. Dist.*, 884 A.2d 946,

949 (Pa. 2005) (student cut her hand while using a table saw in woodshop class; the award in favor of the student was properly modified to reflect the student's comparative negligence).

The Court of Appeals did not err in submitting the issue of comparable fault to the jury.

III. CONCLUSION

This court should reverse the opinion of the Court of Appeals as to jury instruction issue and the court should affirm the Court of Appeals on the comparative negligence issue.

RESPECTFULLY SUBMITTED this 20th day of April, 2018.

JERRY MOBERG & ASSOCIATES, P.S.

A handwritten signature in black ink, appearing to read "Jerry J. Moberg", written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on this date I emailed a copy of this document and I mailed a copy of this document by first class United States mail to:

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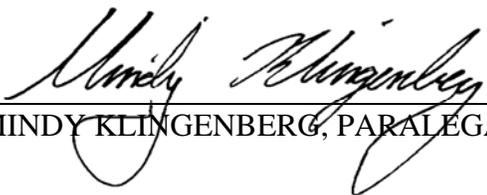
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