No. 94898-4

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 34197-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

HEIDI JO HENDRICKSON, a single person,

Appellant,

vs.

MOSES LAKE SCHOOL DISTRICT, a municipal corporation,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Heidi Jo Hendrickson, hereafter Student, was injured when she attempted to complete a power saw cut of a one inch board by pushing the board through with her bare hand. She had been trained to never complete a one inch saw cut in this fashion but to always use a "push block" when finishing a cut. She was tested on this procedure, observed making the cut safely on a number of occasions under direct supervision of her shop teacher and she admits that she knew that she was required to use a push stick to complete this cut. The jury heard substantial evidence on the Respondent District's training procedures and care in making sure that the Student knew how to properly make a power saw cut.

The jury also heard evidence that the District had removed a "kick back" protection device from the saw because in the opinion of the shop teacher, the kick back device could result in student injuries. It is undisputed that the Student's injury in this case was not caused by the lack of a kick back device and that a kick back device would not have prevented this injury. The jury returned a verdict finding the District negligent, presumably for removing the kick back device, but the jury also found that the District's negligence was not the proximate cause of the

Student's injuries. In this appeal the Student attempts to conflate the negligence principles with proximate cause principles and asked the Court to reverse the jury verdict because of the trial court's negligence instruction. The jury verdict was clear and was not the result of any inadequate negligence instruction. In fact, the Student prevailed on the negligence issue. However, the jury determined that any negligence of the District was simply not the proximate cause of any District negligence. The verdict should be affirmed.

II. RESTATEMENT OF THE ISSUES

Does the jury's determination that any negligence on the part of the District **was not** the proximate cause of the Student's injuries render moot any argument that the trial court's negligence instruction was inadequate and set a higher standard to establish negligence than it should have set?

As a matter of law are school district prohibited from asserting contributory negligence against students?

III. STATEMENT OF THE CASE

Student's Statement of the Case fails to address these two critical issues and results in a one-sided slant of the jury's findings in a light most favorable to them, so the District responds by restating the case.

A. The Superior Court Declined the Student's Request For a "Special Relationship" Duty of Care; However, the Jury Found the School District Negligent, so any Error Associated with the Duty of Care Instruction was Harmless. The District's Negligence was not a Proximate Cause of This Injury.

The Student was properly trained on how to safely make one inch board cuts by using a push stick. She was shown how to safely make the cut; she was tested on how to safely make the cut and was not allowed to attempt a cut until she scored 100% on the test; she made 40 - 50 one inch cuts under the direct supervision of her instructor; and had made over 100 one inch cuts before her accident. She admitted that in the cut that resulted in her injury she did not use the push stick but tried to finish the cut by pushing the board through with her thumb.[1] According to Stanley Freeman, who developed and for years administered the Boeing safety training and procedures for a variety of crafts, the safety training utilized by the District's shop teacher was "extraordinary" and that the shop teacher should be "touring wood shop showing instructors exactly how to do it."[2]

The jury did make a finding of negligence. The Student argued several theories to establish District negligence. She argued that the District failed to instruct her how to use a table saw and the District failed

[1] RP, Vol 2, 347:9 – 349:23.
[2] RP, Vol 3, 534:8- 19; 537:21 – 539:25

to supervise her accordingly.[3] She then argued that the District knew or should have known she did not know how to use the table saw.[4] She made additional arguments on how the school district was negligent including the safety training she received and the school's decision not to call 911.[5]

The jury most likely determined that the removal by the District of the "splitter" was negligence on its part. The splitter was a device ahead of the saw blade that would align the board and prevent "kick back." Kick back is a phenomenon that occurs when the board is not perfectly aligned and the saw blade kicks the board back, away from the saw and potentially in the direction of the student. The District's shop teacher has not used the splitter guard in 37 years and in over 700,000 student cuts he had never experienced a single student injured from a kickback.[6] He believes that the anti-kickback guard increases the chance of kickback injuries.[7] No kick back occurred in this case.[8]

Appellant is quick to assign error to the trial court denying her proposed jury instruction for an "enhanced" duty of care but failed to analyze the impact of the jury's finding of negligence on her assignment of error. In a special verdict the jury found the school district was

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[3] RP 1014:1-17 & 1045:3-17.
[4] RP 1017:24-1018:17 & 1018:23-1019:7.
[5] RP 1031:1-10 & 1071:17-20
[6] RP, Vol. 3, 418:20 – 421:2; Vol 5, 923:12 – 927:24
[7] RP, Vol. 5, 958:23 – 959:2

negligent but was not the proximate cause of Appellant's injuries. CP 1539-40 (special verdict form) The finding of negligence with no proximate cause is fatal to Appellant's assignment of error.

B. Student Can Properly be Held Comparatively Negligent.

The Student was always instructed to us a push stick when making one inch cuts. She admitted that to her mom.[9] The Student knew how to use the push stick and used it in every supervised cut.[10] Her own expert agreed that if the Student had utilized the push stick as instructed she would not have been injured. The District expert agreed with that assessment.[11] The Student knew she needed to use the push stick on the one inch cut.[12] She had been taught to never put her hand in the area near the blade and to always use a push stick.[13] The jury was properly instructed on the issue of comparative negligence. The Student now claims that she cannot be held responsible for her clear negligence.

IV. ARGUMENT

A. The Jury Found that the District's Negligence was not the Proximate Cause of the Student's Injury Therefore Any Argument that the Negligence Instructions were in Error is Irrelevant and Need not be Considered by this Court.

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[8] RP, Vol. 3, 545:7-10; 557:8-15:
[9] RP Vol. 2, 221:23 – 223:11
[10] RP, Vol. 2, 348:14 – 349:12
[11] RP, Vol. 3, 513:12-23; 548:9-14
[12] RP, Vol. 4, 622:2-9;626:20- 627:7; 661:14 – 663:1
[13] RP Vol. 5, 911:7-17

In an appellate review, only the issues necessary to a proper result need be decided. Schmidt v. Cornerstone Investments, Inc., 115 Wash. 2d 148, 165, 795 P.2d 1143 (1990). Reaching a negligent party's duty of care is unnecessary when the party's negligence is not the proximate cause of the plaintiff's injury. Griffin v. W. RS, Inc., 143 Wash. 2d 81, 88–89, 18 P.3d 558, 562 (2001) (declined to reach the issue of applicable duty of care because the proximate cause determination is the same, and the jury's finding that defendant's negligence did not proximately cause damage resolves either alternative theory of the standard of care). There is no prejudice when a proximate cause determination is the same even under a heightened standard of care. *See* Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wash. App. 412, 439–40, 40 P.3d 1206, 1220 (2002) (citing to Griffin, 143 Wash. 2d at 88–89)

B. The Jury's Determination that the School District's Negligence was not the Proximate Cause of Student's Injuries is the Same Under a Heightened or Lesser Duty of Care.

Student's argument that she was prejudiced by the Court's negligence instruction glosses over the jury's finding by special verdict that the school district was negligent, but its negligence *was not the proximate cause of her injuries*. CP 1539-40 (special verdict form) The Student argues that the jury's finding of no causation did not "eliminate

the presumptively prejudicial effect of the erroneous instructions regarding the school's duty, and the school cannot meet its burden to show the error was harmless." (Appellant Brief at 14) The Student cites no precedent for this legal statement. She goes on, again with no legal support, to write that "[c]ausation refers to the degree of proximity required between the defendant's breach of duty and the plaintiff's injury and damage, in order to impose liability. (Appellant Brief at 14) In other words, the Student argues prejudice in the instruction on duty somehow overrides the jury's decision that the District's negligence did not cause her injuries. However, that banana spoiled when the Washington Supreme Court decidedly rejected this exact argument in Griffin, 143 Wash. 2d 81.

In *Griffin*, a female tenant sued her landlord for negligence after she was viscously attacked in her apartment by a man who gained access through a crawl space that the landlord failed to properly secure. Id. at 84. After trial, the jury reached a special verdict that the landlord was negligent in failing to secure the crawl space but his negligence was not the proximate cause of the tenant's damages. Id. at 86. The tenant appealed the verdict arguing that the trial court failed to instruct the jury on the landlord's heightened duty to protect her from foreseeable acts. Id. The Court of Appeals agreed the instruction on a lesser duty was

reversible error and remanded. Id. The landlord then petitioned to the Washington State Supreme Court for a ruling.

Griffin, 143 Wash. 2d at 88 (brackets added). The court stressed,

> "*[t]he proximate cause determination is the same under either arguable standard of care*; hence the jury's finding that the landlord's negligence did not proximately cause damage *resolves either alternative theory once negligence is established.*"

Id. (emphasis added). The tenant argued that the court's instruction on the lesser duty "skewed the jury's consideration of proximate cause by diminishing [the landlord's] duty to the point that its breach just did not matter." Id. (brackets removed, brackets added). However, the *Griffin* court rejected this argument ruling that, as a matter of law, duty and proximate cause are not intertwined:

> The jury's determination of cause in fact does not involve the assessment of policy considerations intertwining duty and legal causation and is not affected by a difference in underlying duties once negligence is established.

Relying on its previous decision in Schooley v. Pinch's Deli Mkt., Inc., 134 Wash. 2d 468, 951 P.2d 749 (1998), the Washington State Supreme Court in *Griffin* reminded us that proximate cause is divided into "two elements: cause in fact and legal causation." Griffin, 143 Wash. 2d at 89 (quoting Schooley, 951 P.2d 749). The *Griffin* court emphasized that "the issues regarding whether duty and *legal* causation exist are intertwined"

but not factual causation. Id. (Emphasis in original.) The court went on to explain,

> "...establishing cause in fact involves a determination of what actually occurred and is generally left to the jury. *Unlike factual causation,* which is based on a physical connection between an act and an injury, legal cause is grounded in policy determinations as to how far the consequences of a defendant's acts should extend."

Id. (Emphasis in original.)

This Court adopted the analysis in *Griffin* to determine there is "no prejudice in dismissing alternate theories when proximate cause determination is same even under heightened standard of care." Micro Enhancement Intern., Inc., 110 Wash. App. at 439–40 (citing to Griffin, 143 Wash. 2d at 88–89).

At bar the jury decided in a special verdict that the school district was negligent but was not the proximate cause of the Student's injuries. According to *Griffin*, the jury's finding ends the discussion on the applicable duty of care and it is unnecessary to determine if there was any error in the trial court's instruction on the school district's duty of care.

C. Student's Reliance on *Gregoire* is Misplaced as that Decision is not Constitutional Precedent and Does not Address the Impact When the Jury Determines There is no Proximate Cause.

In direct opposition of the analysis on proximate cause in *Griffin* and adopted by this Court in *Micro Enhancement Int'l*, the Student argues that duty and factual cause are intertwined and "the jury's finding of no

proximate cause was prejudicially affected by the erroneous definition of the school's duty." (Appellant Brief at 14) Student asks this Court to find support for her position within the decision of Gregoire v. City of Oak Harbor, 170 Wash. 2d 628, 244 P.3d 924 (2010). (Appellant Brief at 15)

Gregoire, however, simply does not support Student's position that proximate cause and duty are intertwined. In fact, *Gregoire* is not even constitutional precedent. *Gregoire* is a plurality opinion where four of nine justices on the Washington Supreme Court were joined by a fifth justice who wrote a separate concurring and dissenting opinion that ultimately concluded a suicidal inmate's fault could be compared with his negligent jailer's if on remand the jury did not find the jail assumed the inmate's duty of self-care during Gregoire, 244 P.3d at 937 (Madsen, C.J., concurring in part, dissenting in part) ("[A]bsent proof that the jail assumed Gregoire's duty of self-care, the trial court on remand should be free to consider whether to instruct the jury on comparative fault."); Id. at 938 (Alexander, J., dissenting) (same). "A plurality opinion has limited precedential value and is not binding on the courts." In re Isadore, 151 Wash. 2d 294, 302, 88 P.3d 390, 394 (2004) When dealing with a plurality opinion like the one in *Gregoire*, the limited precedential value is the position of the justice(s) concurring on the narrowest grounds. Davidson v. Hensen, 135 Wash. 2d 112, 128, 954 P.2d 1327 (1998); State

v. Zakel, 61 Wash. App. 805, 808, 812 P.2d 512 (1991), aff'd, 119 Wash. 2d 563, 834 P.2d 1046 (1992); *See* State v. Hickman, 157 Wash. App. 767, 774, 238 P.3d 1240 (2010)

The narrowest grounds in *Gregoire* must be taken from Chief Justice Madsen's opinion in which she makes no mention of an "interplay between duty and causation instructions" that the Student cites as precedent in her brief. (Appellant Brief at 15) Chief Justice Madsen had a singular focus on duty and agreed to remand the case to resolve a factual question on the issue of the jailer's duty:

> Both jail officials and Gregoire had duties—to provide for health and safety, and of self-care, respectively—and absent proof that the jail assumed Gregoire's duty of self-care, the trial court on remand should be free to consider whether to instruct the jury on comparative fault

Gregoire, 170 Wash. 2d at 654–55 (Madsen, C.J., concurring in part, dissenting in part) Thus, the narrowest grounds for the plurality decision in *Gregoire* is limited to the issue of the duty for self-care in the context of a custodial relationship. The language the Student cites regarding the interplay between duty and causation instructions in the lead opinion is merely *dicta*. Certainly, the plurality decision in *Gregoire* did not and does not overturn the constitutional precedent set forth in *Griffin* above.

Next, apart from its limited precedential value, *Gregoire* is also factually distinguishable because, as emphasized in C.J. Madsen's

opinion, the focus was on the special relationship between a jailer and an inmate who was suicidal and deprived of his liberty. Id. at 646. The lead opinion had the same narrow emphasis: "the duty owed is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty." Gregoire, 170 Wash. 2d at 635. Certainly, the Student was not in jail and was not intentionally trying to harm herself. In fact, she was not required to take shop class but elected to do so.[14]

D. The Ruling in *Griffin* Conforms to the Well-Settled Law that Error in Instructing the Jury on an Improper Negligent Standard is Harmless When the Issue of Negligence is Otherwise Resolved by the Jury's Special Verdict on Proximate Cause.

Washington statutes command that "[t]he court shall, in every action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." RCW 4.36.240 (2016). "The presumption of prejudice from a misstatement of law can be overcome only on a showing that the error was harmless." Paetsch v. Spokane Dermatology Clinic, P.S., 182 Wash. 2d 842, 849, 348 P.3d 389, 392 (2015) (citing Griffin, 143 Wash. 2d at 91–92).

[14] VP 228:23

Back in 1919, the Washington State Supreme Court concluded the error in instruction on contributory negligence was harmless if the jury's special verdict otherwise resolved the issue of negligence with a determination on proximate cause. Miller v. Great N. Ry. Co., 105 Wash. 349, 177 P. 799 (1919). In Miller, 105 Wash. 349, the trial court erroneously instructed the jury that the decedent's contributory negligence was a complete bar to his claim against the railroad company. Id. at 354. The claim, however, was made under a statute that applied comparative fault—not contributory negligence—which would not have barred decedent's claim due to his own negligent acts. Id. at 354. The *Miller* court concluded "the error in the instruction was harmless." Id. at 355. The court explained that the jury determined the railroad company was not negligent, and even "if it were possible to draw an inference of negligence...from the evidence, there [was] nothing to indicate that such negligence was the proximate cause of [the decedent's] death." Id. In fact, in reviewing a jury's verdict, Washington courts:

> ...will not willing assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. The inferences to be drawn from the evidence are for the jury and not for [the] court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.

Burnside v. Simpson Paper Co., 123 Wash. 2d 93, 108, 864 P.2d 937 (1994).

In 1986, this division published the opinion in Chhuth v. George, 43 Wash. App. 640, 719 P.2d 562 (1986), which also underscored the importance of the jury's decision on proximate causation with a similar analysis as conducted in *Griffin* and Miller, 105 Wash. 349 In *Chhuth*, a child was killed on his way home from school while crossing a four lane street. Id. at 642. The parents sued the motorist and the school district. Id. By special verdict, the jury found the school district was negligent but determined that the district's negligence was not the proximate cause of the child's death; the jury determined child's own negligence was the sole proximate cause of his death and apportioned 100 percent of the liability to the child. Id. The parents motioned for a new trial or judgment NOV in response to which the trial judge disregarded the jury's verdict and ruled that the district's negligence was, as a matter of law, the proximate cause of the death. Id. at 642–643. The school district appealed taking issue with the trial court's ruling on proximate cause. Id. at 648.

The *Chhuth* court reversed the trial court's ruling on proximate cause. Id. at 650. The *Chhuth* court understood "if the event would have occurred regardless of the defendant's conduct, the conduct is not the

proximate cause of the injury." Id. at 649 (citing Davis v. Globe Mach. Mfg. Co., 102 Wash. 2d 68, 74, 684 P.2d 692 (1984) With this understanding of proximate cause, the *Chhuth* court concluded "[i]t is not possible to determine from the special verdict the basis for the jury finding that the District was negligent." Id. at 650. (Brackets added.) The *Chhuth* court explained:

> It could be negligent implementation and supervision of bus procedures, or breach of duty by the principal, first grade teacher or the school bus supervisor. On the other hand, the basis of negligence could have been failure to supply crossing guards. But having found negligence, and that such negligence was not the proximate cause of [the child]'s death, the jury in substance concluded [the child]'s own intervening negligence was the sole proximate cause. Thus, [the jury] concluded that even though the District was negligent, that negligence was not a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which the injury would not have happened.

Id. at 650 (brackets added, internal citations removed). The decision in *Chhuth* made it clear that it is not the right of the trial judge (or any court) to substitute its reasoning for that of the jury when it comes to proximate cause. Id. at 649 ("The question of proximate cause is ordinarily for the jury unless the facts are undisputed and do not admit reasonable differences of opinion raising a question of law for the court.")

At bar, Student is asking this Court for the same relief rejected in *Chhuth*, i.e. to take away the jury's finding that the school district's

negligence was not the proximate cause of her injuries. Chhuth, 43 Wash. App. at 649. The *Chhuth* plaintiff's argument for negligence is identical to the argument the Student made against the District during her trial. She argued that the District failed to instruct her how to use a table saw and the District failed to supervise her accordingly.[15] She then argued that the District knew or should have known she did not know how to use the table saw.[16] She made additional arguments on how the school district was negligent including the safety training she received and the school's decision not to call 911.[17] She also argued that the District removed the anti-kickback guard. As expressed in *Chhuth*, the jury could have decided the school district was negligent in any of the areas, but because the jury also determined that the negligence was not the proximate cause of Appellant's injuries, the courts cannot lift the curtain on the jury's verdict to change the outcome of proximate cause.

The Court must give deference to the jury's proximate cause finding. It is the duty of the court to make every effort to harmonize the verdict to the extent possible." Herring v. Dep't of Soc. & Health Servs., 81 Wash. App. 1, 16, 914 P.2d 67 (1996) (citing State v. Peerson, 62 Wash. App. 755, 765, 816 P.2d 43 (1991)). See also, Alvarez v. Keyes,

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[15] RP 1014:1-17 & 1045:3-17.
[16] RP 1017:24-1018:17 & 1018:23-1019:7.

76 Wash. App. 741, 743, 887 P.2d 496 (1995); Estate of Stalkup v. Vancouver Clinic, Inc., P.S., 145 Wash. App. 572, 585–586, 187 P.3d 291, 298 (2008); Johnson v. Tradewell Stores, Inc., 24 Wash. App. 53, 600 P.2d 583 (1979), aff'd, 95 Wash. 2d 739, 630 P.2d 441 (1981) (citing Gilmartin v. Stevens Inv. Co., 43 Wash. 2d 289, 266 P.2d 800 (1954); Pepperall v. City Park Transit Co., 15 Wash. 176, 45 P. 743 (1896) Where there is a plausible scenario that supports the jury finding of no proximate cause this Court must accept that determination. Mears v. Bethel Sch. Dist. No. 403, 182 Wash. App. 919, 933, 332 P.3d 1077, 1084 (2014), review denied, 182 Wash. 2d 1021, 345 P.3d 785 (2015)(Where there was more than one scenario under which the jury's findings of negligence but lack of proximate cause can be reconciled the verdict must stand citing Estate of Stalkup, 145 Wash. App. at 591)

There certainly was more than enough evidence to support the jury's verdict that Student's negligence was the sole proximate cause of her injuries and that any negligence of the District did not contribute to her injury. For example, the jury could have concluded that the Student's injury was caused by her failure to use a push stick to push the wood through the table saw, which she admitted she was trained to do and was

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[17] RP 1031:1-10 & 1071:17-20

necessary for making the narrow cut.[18] Or the jury could have decided that the District's negligence was the removal of the "anti-kickback" guard but since the injury was not the result of any kickback there was no proximate cause. The Court cannot look behind the curtain but must accept the jury's determination in that regard.

E. The Lower Standard for Negligence Established in *Hopkins* and *Quynn* Would not Change the Result in this Case Since the Student has Established Negligence on an Ostensibly Higher Standard and Therefore Has not Been Prejudiced.

The Student argues that she was prejudiced by the trial judge's negligence instruction because it set a higher standard of proof then is required by Hopkins v. Seattle Pub. Sch. Dist. No. 1, 195 Wash. App. 96, 380 P.3d 584 (2016) and Quynn v. Bellevue Sch. Dist., 195 Wash. App. 627, 630 (2016). While it is true that both *Hopkins* and *Quynn* were remanded for new trials because the juries were instructed on a lesser duty of care, the Student downplays the single most critical fact in those decisions: **neither jury found the school districts to be negligent.** Since there was no finding of negligence in either case, the juries did address proximate cause. Because the juries did not determine proximate cause, neither decision can be applied to this appeal. The Student's argument that she has been prejudiced because she was required to establish

[18] RP 83: 13-21.

negligence on a higher standard is illogical where she has in fact met the higher burden and established negligence. The jury found the District negligent but it determined that the District's negligence did not cause her injuries. Under the facts of this case it is understandable how the jury reached this result.

Appellant argues for the application of the *stare decisis* doctrine (Appellant Brief at 13), and the Respondent agrees; however, it is the precedent from the Washington State Supreme Court decision of *Griffin* that is applicable to this appeal, not *Hopkins* and *Quynn*.

F. Contributory Negligence is a Proper Affirmative Defense Where a Student Injures Herself on a Table Saw and Admits she did not Follow Her Training.

The Student argues "[t]he superior court prejudicially erred in instructing the jury on contributory negligence, which is not applicable in the school context." (Appellant Brief at 15) She relies upon the decision is *Christensen*[19] and *Gregoire*, *supra*, as the only support for her argument that school districts can never argue comparative negligence; however, neither decision completely barred school districts from alleging comparative negligence as she argues. She is mistaken.

In fact, Chief Justice Madsen pointed out in *Gregoire* that the holding in *Christensen* ***was limited to sexual abuse of a minor***:

> Specifically, the *Christensen* holding was unique to sexual abuse. The court held that children, as a matter of public policy, have no duty to protect themselves from sexual abuse by teachers. Policy considerations involving sexual abuse of a child in the public school context do not apply in this case.

Gregoire, 170 Wash. 2d at 650 (Madsen, C.J., conferring and dissenting) C.J. Madsen's conclusion was obviously taken straight from the limitations expressed directly in the *Christensen* holding:

> In sum, we hold that contributory fault may not be assessed against a 13–year–old child when that child brings a civil action against a school district and school principal for sexual abuse by her teacher.

Christensen v. Royal Sch. Dist. No. 160, 156 Wash. 2d 62, 71–72, 124 P.3d 283, 288 (2005) The issue in *Christensen* was whether a minor child could be held comparatively negligent for her participation in a sexual relationship with an adult.[20] The Supreme Court adopted a unique rule regarding comparative fault for minors in sexual abuse cases where it held:

> In sum, because we recognize the vulnerability of children in the school setting, we hold, as a matter of public policy, that children do not have a duty to protect themselves from sexual abuse by their teachers. Moreover, we conclude that contributory fault may not be assessed against a 13–year–old child based on the failure to protect herself from being sexually abused when the defendant or defendants stand in a special relationship to the child and have a duty to protect the child. *See* Ellen M. Bublick, *Comparative Fault to the Limits,* 56 VAND. L. REV. 977, 1004 (2003).

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[19] The District's present counsel were also counsel in Christensen case

[20] In fact the District argued that it was not the minor's participation in the relationship that constituted comparative negligence but, moreover, it was her lying about it when confronted by the District and her parents.

Christensen, 156 Wash. 2d at 70–71

Christensen did not overrule the long established Washington jurisprudence that holds minors over the age of six responsible for their own comparative fault outside of sexual abuse cases. Graving v. Dorn, 63 Wash. 2d 236, 386 P.2d 621 (1963); Dingwall v. McKerricher, 75 Wash. 2d 352, 450 P.2d 947 (1969); Robinson v. Lindsay, 92 Wash. 2d 410, 412, 598 P.2d 392 (1979); *Roth v. Union Depot Co.,* 13 Wash. 525, 43 P. 641, 44 P. 253 (1896). *See also,* 3 Vand.L.Rev. 145 (1949); Kenneth Vinson, Torts-Negligence-Proximate Cause-Infants-Violation of Penal Statute by Seven Year Old Not Negligence Per Se-Standard Definition of Proximate Cause Applied As Measure of Child's Conduct.-Gottschalk v. Rudes, 315 S.W.2d 36, 37 Tex. L. Rev. 255 (1958); Keet, 77 A.L.R.2d 917 (Originally published in 1961), 12 Clev.-Mar.L.Rev. 395 (1963); Dorais v. Paquin, 113 N.H. 187, 304 A.2d 369 (1973); Annot., *Modern Trends as to Contributory Negligence of Children,* 77 A.L.R.2d 917 (1961).

Further as addressed above, the lead opinion in *Gregoire* is not constitutional precedent. However, even if the lead opinion in *Gregoire* had precedential value, the justices writing the lead opinion expressly limited its holding to "custodial" relationships of jail inmates, which the lead opinion expressed in Footnote 6:

> The concurrence/dissent claims *Hunt,* 4 Wn.App. 14, 481 P.2d 593, and *Christensen,* 156 Wn.2d 62, 124 P.3d 283, do not apply. Concurrence/dissent at 935. While there is no silver-bullet case in our jurisprudence that resolves this matter of first impression, *Hunt* and *Christensen* make the best analogy to the facts before us. In contrast the concurrence/dissent's reliance on *Yurkovich v. Rose,* 68 Wn.App. 643, 847 P.2d 925 (1993), and *Pearce v. Motel 6, Inc.,* 28 Wn.App. 474, 480, 624 P.2d 215 (1981), is misplaced because those cases—both from the Courts of Appeal—involve noncustodial relationships. Concurrence/dissent at 934–35. While we note the obvious differences between "custody" in schools, mental hospitals, and jails, *Christensen* and *Hunt* present much closer similarities to the instant matter than do *Yurkovich* and *Pearce.* We do not contest that contributory negligence has a time and place in our courts; however, <u>that time and place does not include suicides of jail inmates</u>.

<u>Gregoire</u>, 170 Wash. 2d at at (emphasis added). Furthermore, one of the "noncustodial" relationship cases mentioned in the footnote <u>*was*</u> school district cases, which allowed a contributory negligence defense as C.J. Madsen pointed out:

> *Yurkovich v. Rose,* 68 Wn.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." *Id.* at 648, 847 P.2d 925 (citing *Webb v. Seattle,* 22 Wn.2d 596, 602, 157 P.2d 312 (1945)). 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, 847 P.2d 925. The court reasoned that the plaintiff still owed a duty of self-care that neither the school district nor the bus driver assumed.

<u>Gregoire</u>, 170 Wash. 2d at 648–49.

The appellant in *Hopkins* made the identical argument that "...as a matter of law, the Washington Supreme Court decision in Christensen bars a school district from asserting contributory negligence." 195 Wn.App. at 109. The *Hopkins* court rejected this argument: "*Christensen* does not support the argument that as a matter of law, a school district may never assert contributory negligence." Id. In reaching this conclusion, *Hopkins* relied upon Briscoe v. Sch. Dist. No. 123, Grays Harbor Cty., 32 Wash. 2d 353, 201 P.2d 697 (1949), which approved of a jury instruction for contributory negligence where a young student participated in a "rough" game with other students. *Id.* at 366.

Certainly, there is a long history for allowing contributory fault in lawsuits claiming a school district was negligent. Neither *Christensen* nor *Gregoire* have overturned this historical precedent.

V. CONCLUSION

The jury verdict in this case was correct. The jury properly determined that the Student's injuries were not proximately caused by any negligence of the District. Whether the jurors decided this based on a belief that the Student should have used a push stick and therefore was 100% the cause of her own damages or it the District was negligent in removing the anti-kickback guard but that its negligence did not result in

any injury to the Student, the verdict must stand. It is not the prerogative of the Court to second guess the jury in that regard.

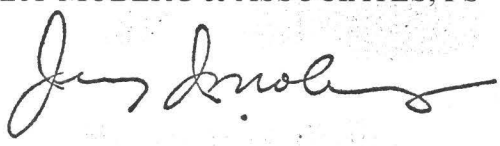
Furthermore, the negligence instruction is irrelevant to the jury's verdict. The Student won on negligence, even if she had to meet a higher burden than she thought the law required. Because she won by a touchdown and a field goal, she cannot claim prejudice because she only needed to win by a field goal. She proved negligence. Unfortunately for her, the District's negligence was not the proximate cause of her injury.

Finally, her argument that she cannot be held responsible for her comparative negligence in not using a push stick while cutting one inch boards is simply wrong.

This Court should affirm the jury verdict.

RESPECTFULLY SUBMITTED this 21st day of November, 2016.

JERRY MOBERG & ASSOCIATES, PS



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CERTIFICATE OF SERVICE

I certify that on this date I mailed a copy of the document to which this is affixed by electronic mail and U.S. mail to, postage prepaid, to:

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