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

WASHINGTON SUPREME COURT

HEIDI JO HENDRICKSON, a single person,

Plaintiff-Respondent-Cross Petitioner,

vs.

MOSES LAKE SCHOOL DISTRICT, a municipal corporation,

Defendant-Petitioner-Cross Respondent.

HENDRICKSON'S RESPONSE TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION

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Respondent and Cross-Petitioner Heidi Jo Hendrickson (Hendrickson) submits this response to the amicus curiae brief filed on behalf of the Washington State Association for Justice Foundation (WSAJF).

I. WSAJF correctly describes a school’s duty to protect its students.

WSAJF notes that “Washington law has adhered to the view that ‘school districts have an “enhanced and solemn duty of reasonable care to protect their students.”” WSAJF Am. Br., at 9 (quoting *N.L. v. Bethel Sch. Dist.*, 186 Wn. 2d 422, 430, 378 P.3d 162 (2016), in turn quoting *Christensen v. Royal Sch. Dist.*, 156 Wn. 2d 62, 67, 124 P.3d 283 (2005)). WSAJF explicates this Court’s decisions as holding that “[t]he ‘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.” WSAJF Am. Br., at 9 (brackets added; emphasis in original).

WSAJF’s formulation of the school’s duty conforms to the language used by this Court in multiple cases. *See, e.g., McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn. 2d 316, 320, 255 P.2d 360, 362 (1953) (stating “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); *N.L.*, 186 Wn. 2d at 431 (quoting *McLeod* for the foregoing proposition); *see also Lauritzen v. Lauritzen*, 74 Wn. App. 432, 439, 874 P.2d 861, 865, *rev. denied*, 125 Wn. 2d 1006 (1994) (describing *McLeod* as imposing “an affirmative duty”); *Shepard v. Mielke*, 75 Wn. App. 201, 206 n.3, 877 P.2d 220, 223 n.3 (1994) (same).

WSAJF’s description of a school’s duty to protect its students is essentially synonymous with Hendrickson’s description of the duty based on this Court’s precedent. Hendrickson agrees that the enhanced nature of the duty does not require schools to use more than ordinary care. *See* Hendrickson Supp. Br., at 6. Hendrickson also agrees that the school has an affirmative duty to protect students from all dangers that may reasonably be anticipated, not just those created by the conduct of the school or its agents. *See id.* Hendrickson simply uses different terminology to describe the same duty. *See id.*

WSAJF’s description of a school’s duty to protect contrasts with the description of the school’s duty offered by the Moses Lake School District (MLSD) and its aligned amicus, the Washington Schools Risk Management Pool (WSRMP), neither of which

recognize a school's duty to protect outside of limited circumstances involving criminal assault by a third party. *See* MLSD Supp. Br., at 14-19; WSRMP Supp. Am. Br., at 6-9. The Court should confirm that WSAJF and Hendrickson have correctly summarized the school's duty.

II. WSAJF correctly observes that failure to instruct the jury properly regarding the school's duty is presumptively prejudicial error.

WSAJF observes that failure to instruct the jury properly regarding the defendant's duty constitutes presumptively prejudicial error. *See* WSAJF Am. Br., at 9-15. Hendrickson has consistently made the same point throughout her briefing. *See* Hendrickson Supp. Br., at 7 n.1; Hendrickson Ans. to Pet for Rev., at 13; Hendrickson Reply Br., at 4-6; Hendrickson App. Br., at 12. The trial court's narrow definition of MLSD's duty to Hendrickson necessarily limited what the jury could find to be negligent conduct on the part of the school, and thereby limited the conduct that the jury could find to be a proximate cause of Hendrickson's damages. MLSD and WSRMP have never addressed the presumptively prejudicial effect of the jury instructions regarding its duty.

III. WSAJF’s recognition of the “fundamental tension” between a school’s duty to protect and a defense of contributory negligence is correct and compatible with Hendrickson’s analysis.

The lead opinion in *Gregoire v. City of Oak Harbor*, 170 Wn. 2d 628, 640-41, 244 P.3d 924 (2010), cited a number of cases for the proposition that “other jurisdictions agree the existence of a duty to protect should forgive the injured party’s contributory negligence” and stated that it found the reasoning in these cases to be persuasive. WSAJF highlights the plurality’s quotation of a Minnesota case, *Sandborg v. Blue Earth County*, 615 N.W.2d 61, 65 (Minn. 2000), which in turn quoted from the Restatement (Second) of Torts § 449 comment *b* and § 452 comments *d* and *f* (1965), to illustrate how a defense of contributory negligence eviscerates a school’s duty to protect its students. *See* WSAJF Am. Br., at 17-19.

In *Sandborg*, the Minnesota Supreme Court held that a jail could not apportion fault to an inmate who committed suicide, in part because the inmate is relieved of his duty under the circumstances, and in part because the inmate’s “fault is encompassed in the foreseeability determination that establishes the jail’s duty.” 615 N.W.2d at 64. The Court found support for this reasoning in Restatement provisions that address the topic of superseding cause. Under Restatement § 449 and comment *b*, an

injured person's negligence cannot be considered a superseding cause of their own damages when the tortfeasor has a duty to protect them from such negligence:

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 to make the duty a nullity.*

Sandborg, 615 N.W.2d at 65 (quoting § 449 & cmt. b; ellipses & emphasis in original).

Under § 452 and comments *d* and *f*, failure to protect the injured person can be considered a superseding cause of the injured person's damages based on the tortfeasor's "character and position" and "relation to the plaintiff," among other things. *See Sandborg*, at 64 (quoting § 452 & cmt. *f*). As WSAJF points out there is a "fundamental tension" between these principles and a defense of contributory negligence in the duty to protect context. *See WSAJF Am. Br.*, at 17-18.

WSAJF's analysis of *Sandborg* and the Restatement is entirely compatible with Hendrickson's approach. As noted by Hendrickson, *Christensen* rejected a contributory negligence defense in the sexual abuse context as "conflict[ing] with the well-

established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care.” 156 Wn. 2d at 67 (brackets added); *see also* Hendrickson Supp. Br., at 13-14 (quoting *Christensen*). The lead opinion in *Gregoire* followed *Christensen* by analogy in the jailor-inmate context, indicating that the principle enunciated in *Christensen* is not confined to sexual abuse in schools. *See Gregoire*, 170 Wn. 2d at 639 & 640 n.6. In both cases, the Court noted that a defense of contributory negligence would undermine the duty to protect. *See Christensen*, at 70-71; *Gregoire*, at 640.

Also as noted by Hendrickson, this Court has previously adopted Restatement (Second) of Torts § 314A in the jailor-inmate context. *See Shea v. City of Spokane*, 17 Wn. App. 236, 562 P.2d 264 (1977), *aff'd*, 90 Wn. 2d 43, 578 P.2d 42 (1978) (adopting Court of Appeals opinion per curiam); *see also* Hendrickson Supp. Br., at 16. Under this Restatement provision, the duty to protect includes protection “from the negligence of the plaintiff himself[.]” Restatement (Second) of Torts § 314A cmt. *d* (brackets added); *accord* Restatement (Third) of Torts § 40(b)(5) & cmt. *g* (2012); *see also* Hendrickson Supp. Br., at 16-18. WSAJF’s analysis of *Sandborg* and the Restatement supports the duty described in Restatement

§ 314A, which has been adopted in *Shea*, although it has yet to be applied in the school context. (It would be remarkable if this protection extended to inmates but not school children.)

Lastly, as noted by Hendrickson, schools' involuntary in loco parentis status and students' relative lack of maturity militate against a defense of contributory negligence in this context. *See* Hendrickson Supp. Br., at 18-21. In this way the school-student relationship presents the type of "character," "position," and "relation" that should preclude a defense of contributory negligence per *Sandborg* and the Restatement.

While the main thrust of WSAJF's analysis would appear to preclude a school from raising a defense of contributory negligence in all cases, as an alternative WSAJF suggests that the factors enumerated in Restatement (Second) of Torts § 452 cmt. *f* may guide application of contributory negligence on a case-by-case basis. *See* WSAJF Am. Br., at 18-19. This nonexclusive list of factors, which includes the risk, magnitude and knowledge of harm along with character, position and relation between the parties, appears to be similar to the factors that determine whether a duty exists in the first place. *Compare* Restatement (Second) of Torts § 452 cmt. *f* with *Centurion Properties III, LLC v. Chicago Title Ins. Co.*, 186 Wn. 2d

58, 65, 375 P.3d 651, 654 (2016) (noting the existence of a duty is determined by logic, common sense, justice, policy and precedent). In any event, WSAJF's application of these factors to this case, *see* WSAJF Am. Br., at 19 n.5, is consistent with Hendrickson's alternative argument that, at a minimum, a defense of contributory negligence should not be allowed where a student is being trained to use dangerous equipment, which is otherwise reserved for use only by adults, *see* Hendrickson Supp. Br., at 23-25 (discussing WAC 296-125-030(13)).

IV. WSAJF's qualification that contributory negligence is only "generally" incompatible with a school's duty is unsupported.

While WSAJF recognizes "the fundamental tension between the duty to protect and the contributory negligence defense," WSAJF Am. Br., at 17, it qualifies its position by stating that such a defense is only "generally" improper, *id.* at 18. WSAJF does not explain any reason for the qualification other than acknowledging the possibility that the Court may be "disinclined to generally preclude the contributory negligence defense in the duty to protect context[.]" *Id.* at 19.

WSAJF's qualification is unsupported because no Washington authority has squarely addressed whether a defense of

contributory negligence is available in the context of a school's duty to protect its students, except *Christensen*. While the defense has been raised in a number of cases, it does not appear to have been challenged in any of them, except *Christensen*. See *Hendrickson Supp. Br.*, at 8-12. And, while MLSD and WSRMP attempt to limit *Christensen* to sexual abuse in the school setting, it cannot be denied that *Christensen* rejected the defense of contributory negligence in part based on a school's special relationship with its students and the corresponding duty to protect them.

This case presents the Court with the opportunity and necessity to determine whether a defense of contributory negligence is compatible with a school's duty to protect, either in general or under the particular circumstances presented here. Allowing such a defense in all cases is incompatible with the special relationship between a school and its students and the school's corresponding duty "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. The defense of contributory negligence is unnecessary to protect schools from expansive liability because an injured student still must prove that the school was negligent, that its negligence proximately caused the

student's damages, and that the harm was foreseeable. *See* Hendrickson Supp. Br., at 21-23. While MLSD and WSRMP attempt to play on these fears, they are entirely speculative and unsupported by the record as well as being contrary to the very nature of a school's duty to protect.

Respectfully submitted this 16th day of May, 2018.

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