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

WASHINGTON SUPREME COURT

HEIDI JO HENDRICKSON, a single person,
Plaintiff-Respondent and Cross-Petitioner,

vs.

MOSES LAKE SCHOOL DISTRICT, a municipal corporation,
Defendant-Petitioner.

SUPPLEMENTAL BRIEF OF AMICUS CURIAE WASHINGTON
SCHOOLS RISK MANAGEMENT POOL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington Schools Risk Management Pool (“WSRMP”) adopts and incorporates the statement of interest set forth in its motion for leave to file a supplemental *Amicus Curiae* brief.

II. ISSUES ADDRESSED BY AMICUS

- (1) Whether this Court should expand public school liability, overturning a century of Washington school law precedent;
- (2) Whether the Court of Appeals erred in adopting a new “heightened duty” of care for schools;
- (3) Whether the affirmative defense of comparative negligence should remain available to public schools; and
- (4) Whether jury instructions re the enhanced duty arising from a school’s special relationship with its students is now required in every case a student brings against a school.

III. STATEMENT OF THE CASE

Heidi Hendrickson cut her thumb while using a table saw in high school shop class. She sued Moses Lake School District, alleging her injury was the direct result of the District’s negligence in failing to provide proper guards/safety equipment, failing to provide reasonable instruction and/or failing to provide reasonable supervision. CP 1523. The District

acknowledged its duty to exercise reasonable care to protect Ms. Hendrickson from injury, but argued it fulfilled that duty. CP 506.

The jury returned a special verdict of negligence, but found the School District's negligence was not a proximate cause of Hendrickson's injury. CP 1539. The Court of Appeals reversed the judgment on the verdict, holding that the trial court erred in failing to instruct the jury that the "special relationship" between a school and minor student creates a "heightened duty of care" to protect the student from foreseeable harm.¹

IV. ARGUMENT

All parties claim to agree that ordinary negligence is the proper legal standard to apply in a student's lawsuit against a school district. Hendrickson argues she is not trying to heighten that legal standard of care, but that is exactly what she urges. In a traditional negligence case in which the plaintiff was injured during class due to the alleged direct negligence of her teacher, she claims the jury should have been instructed that the school district owed a "heightened duty" to Hendrickson due to its "special relationship" with its students. Plaintiff further argues that a school district's duty to its students is so high that a school should never be permitted to assert a student is partially at fault for her own injuries.

¹ *Hendrickson v. Moses Lake School District*, 199 Wn.App. 244, 249, 398 P.3d 1199 (2017), review granted 189 Wn. 2d 1031, 407 P.3d 1152 (2018).

Adopting a heightened duty of care for schools, and prohibiting schools from asserting comparative negligence as an affirmative defense, would require this Court to overturn a century of Washington precedent. No court in any jurisdiction has adopted the virtual strict liability for schools urged by Hendrickson, and this Court should not be the first to laden their public schools with limitless new liability for their students' own conduct.

A. Washington Has a Long History of Applying an Ordinary Negligence Standard to Schools and Recognizing A Student's Comparative Negligence for Self Injury

For more than 100 years, this Court has consistently applied an ordinary negligence liability standard to public schools, requiring schools to use "reasonable care" to protect students from harm while they are at school.² That ordinary negligence standard was not "heightened" by Washington's recognition of a "special relationship" between school and

² See, e.g., *Redfield v. School Dist. No. 3, in Kittitas County*, 48 Wash. 85, 92 P. 770, (1907) (negligence standard when student injured by tipped bucket of scalding water kept on top of school furnace); *Rice v. School Dist. No. 302 of Pierce County*, 140 Wash. 189, 248 P. 388, (1926) (school had duty "to exercise ordinary care" to prevent injury on playground); *Morris v. Union High School Dist. A, King County*, 160 Wash. 121, 294 P. 998, (1931) ("reasonable care" standard applied when student sued school for injury during football game); *Yarnell v. Marshall School Dist. No. 343*, 17 Wn.2d 284, 135 P.2d 317, (1943) (negligence claim for injury on playground swing); *Briscoe v. School Dist. No. 123, Grays Harbor County*, 32 Wn.2d 353, 201 P.2d 697 (1949) (school is required to exercise "such care as an ordinarily reasonable and prudent person would exercise under the same or similar circumstances").

student in *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 320-22, 255 P.2d 360 (1953).³

Consistent with Washington’s tort law framework, Washington Courts have consistently recognized the affirmative defense of contributory negligence, and later comparative negligence, in student personal injury claims. Before the adoption of comparative negligence, a student’s contributory negligence would completely bar recovery. See *Juntila v. Everett School Dist. No. 24*, 183 Wash. 357, 48 P.2d 613 (1935) (contributory negligence as a matter of law when high school student was sitting on railing of bleacher seats when railing gave way). But whether a complete bar or later a comparative damage reducer, Washington courts have held for more than 100 years that a student’s contributory/comparative negligence should be submitted to the jury.⁴

³ Since this Court’s explicit recognition in 1953 of duty arising from the “special relationship” between school and student, this Court has continued to consistently apply an ordinary negligence standard of liability to schools. See, e.g., *Carabba v. Anacortes School Dist. No. 103*, 72 Wn.2d 939, 435 P.2d 936, (1967) (“duty to provide non-negligent supervision” at school wrestling match); *N.L. v. Bethel School District*, 186 Wn. 2d 422, 430, 378 P.3d 162 (2016) (“School districts have the duty ‘to exercise such care as an ordinarily responsible and prudent person would exercise under the same or similar circumstances.’”), quoting *Briscoe*, 32 Wn.2d at 362 (citing *Rice v. Sch. Dist.No. 302*, 140 Wash. 189, 248 P. 388 (1926)).

⁴ *Howard v. Tacoma School Dist. NO. 10, Pierce County*, 88 Wash. 167, 169, 152 P. 1004 (1915) (contributory negligence was jury question when 6-year-old was injured climbing ladder against instructions); *Hutchins v. School Dist. No. 81 of Spokane County*, 114 Wash. 548, 554-55, 195 P. 1020 (1921) (contributory negligence was jury question when 9-year-old was injured playing around open construction pit on school grounds);

B. The School-Student “Special Relationship” Does Not Create A Heightened Duty—Schools Are Still Held To A Negligence Standard

The nature of a school’s duty has not changed for more than a century—a school has a duty to use reasonable care to protect students while they are at school.⁵ Hendrickson admits an ordinary negligence standard applies to schools, and claims she is not advocating a change in that standard.⁶ But Hendrickson *is* trying to heighten the legal duty applied to public schools. She succeeded in persuading the Court of Appeals to err in

Rice v. School Dist. NO. 302 of Pierce County, 140 Wash. 189, 193, 248 P. 388 (1926) (contributory negligence was a jury question when 11-year-old was shocked and burned by wire on playground); *Gattavara v. Lundin*, 166 Wash. 548, 555, 7 P.2d 958 (1932) (contributory negligence was jury question when 10-year-old student was struck by teacher’s car during recess); *Briscoe v. School District No. 123*, 32 Wn.2d 353, 366, 201 P.2d 697 (1949) (contributory negligence was a jury question when 6th grader was injured playing keep-away during recess); *Eckerson v. Ford’s Prairie School Dist. No. 11 of Lewis County*, 3 Wn.2d 475 (1940) (contributory negligence was a jury question when 12-year-old student was injured playing tag at recess); *Swartley v. Seattle School Dist. No. 1*, 70 Wn.2d 17, 20, 421 P.2d 1009, (1966) (contributory negligence was a jury question when 12-year-old student entered storeroom against instructions and was killed); *Yurkovich v. Rose*, 68 Wn.App. 643, 847 P.2d 925 (1993) (four percent comparative fault assessed against 13-year-old killed crossing highway after school bus driver negligence).

⁵ This duty arises because children are required to attend school, and therefore “the protective custody of teachers is mandatorily substituted for that of the parent” in what is essentially an *in loco parentis* role—protecting the child in the parents’ stead. See *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 319, 255 P.2d 360 (1953); *Chapman v. State*, 6 Wash. App. 316, 320, 492 P.2d 607, 611 (1972). In contrast, Washington law immunizes parents from liability for their children’s injuries or death caused by parental negligence and extends that immunity to stepparents acting *in loco parentis*. See *Zellmer v. Zellmer*, 164 Wn.2d 147, 169, 188 P.3d 497 (2008); *Smelser v. Paul*, 188 Wn. 2d 648, 657, 398 P.3d 1086, 1090 (2017), *rec. denied* (Sept. 1, 2017).

⁶ Answer to Petition for Review and Cross Petition at 10, 12 (“This does not mean that a school owes a duty greater than reasonable care to its students.”).

holding a school’s special relationship with students creates a “heightened duty of care.”⁷ And Hendrickson continues to argue that a school should never be permitted to assert that a student is partially at fault for his/her own injury. This new standard of unilateral heightened school liability is contrary to a century of established Washington precedent, inconsistent with the framework of tort liability in this state and has no support anywhere in the country. Adoption of such an unprecedented school liability standard cannot be justified by the arguments Hendrickson proffers.

(1) A school’s special relationship with its students may mean a duty to protect attaches in factual settings where no duty would otherwise exist, but the nature of the duty remains unchanged

The special relationship between a school and its students does not heighten or otherwise change the nature of the duty owed—the duty remains one of reasonable care. The significance of the school’s special relationship is that it may broaden the reach of a school’s duty to factual settings where its duty to protect would not ordinarily extend. So, while a party does not ordinarily owe a duty to protect someone from harm inflicted by a third party, a school does owe a duty to protect if the harm is foreseeable. *N.L. v. Bethel Sch. Dist.*, 186 Wn. 2d 422, 430, 378 P.3d 162, 166 (2016). Courts

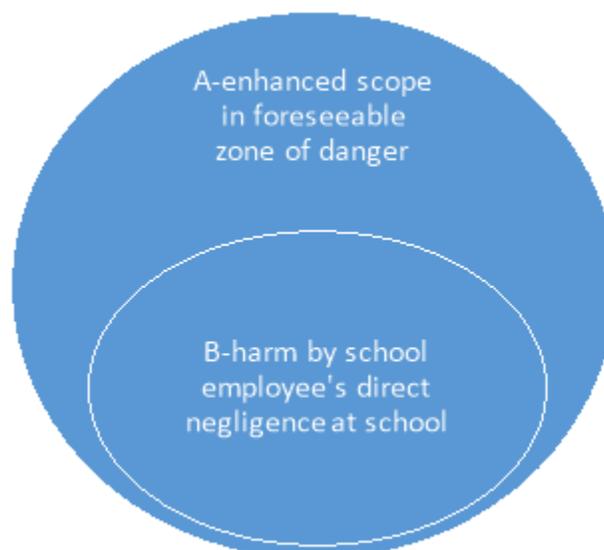
⁷ *Hendrickson v. Moses Lake School District*, 199 Wn.App. at 249, 252.

frequently refer to this as an “enhanced duty” arising from a “special relationship,” meaning a school’s duty to protect may extend to factual settings where no duty would otherwise exist. *Id.*

This enhanced duty is only relevant in those cases in which the existence of a duty is unclear and therefore turns on a factual finding of foreseeability; *e.g.*, when the harm is caused by a third party or occurs off school property. This analysis is wholly unnecessary where a student alleges she was harmed by the direct acts or omissions of her teacher during class on school property. In such straightforward negligence cases, where duty is clear, a simple negligence instruction will suffice.

Amicus would adjust the Venn diagram offered by Hendrickson in Petitioner’s Answer to Amicus Curiae Memorandum as follows:

Scope of School District’s Duty to Student



*Hopkins*⁸ and *Quynn*⁹ were both cases in which students were harmed by the intentional acts of another student, outside the classroom and with no teacher present. These cases fall within Category A in the above diagram, in that the school would have no duty to protect against the intentional acts of a third party but for the enhanced duty arising from the school-student special relationship. In such cases, it may make sense for a jury to be instructed on the foreseeability test the jury must apply to determine whether the injury is within the foreseeable zone of danger such that a duty to protect exists.

In contrast, the instant case is a simple negligence case that clearly falls within category B in the above diagram. Hendrickson offered three theories of liability at trial. She alleged the School District:

- Failed to use and maintain required safety equipment and guards,
- Failed to provide reasonable instruction to plaintiff,

⁸ In *Hopkins*, the plaintiff student was punched in the head by a special education student in the locker room after gym class. The *Hopkins* court held that because the school district would only have a duty to protect the plaintiff if he was in the “general field of danger” where injury was foreseeable, “*in this case*, it was essential to instruct the jury on foreseeability.” *Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wn.App.96, 108, 380 P.3d 584 (2016) (emphasis added).

⁹ In *Quynn*, the plaintiff student claimed she was harassed, intimidated and bullied on a school bus. The court explained that “[a]s a general rule, ‘there is...no duty to prevent a third party from causing physical injury to another, unless’ ‘a special relationship exists...’” Therefore, instruction was required on how the jury was to determine whether a duty arose from the special relationship. See *Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 633, 383 P.3d 1053 (2016) (citations omitted).

- Failed to reasonably supervise the plaintiff on the use of the table saw.

CP 1523. All three negligence theories were based on alleged acts and omissions of the wood shop teacher who Hendrickson claimed had removed a safety guard from the power saw, had inadequately instructed her, and was physically too far away from her at the time of her injury to satisfy the school's duty of reasonably prudent supervision. This was a simple negligence action, where the school's duty was clear and undisputed. The dispute at trial was not over whether the school had a duty to protect Hendrickson; nor whether harm was foreseeable—it was certainly foreseeable that a student learning to use a power saw could cut herself. The dispute centered on whether the shop teacher had satisfied the duty of reasonable care, and whether Hendrickson was comparatively negligent for having ignored the teacher's warnings and instructions.

In an ordinary negligence case such as this, where the negligence allegations fit clearly and admittedly within the scope of the school's acknowledged duty, a standard negligence instruction such as the one given by the trial court is appropriate. Instructing further concerning "special relationships" and "heightened duties" is not only unnecessary, it implies to jurors that they should erroneously apply a duty of care to schools that is higher than the ordinary negligence standard of "reasonably prudent" care.

(2) The sexual assault cases relied upon by Hendrickson do not justify adopting a higher general duty of care for schools

Hendrickson's reliance on sexual abuse case law that holds children under the age of consent cannot be comparatively negligent is misplaced. In support of her argument that schools should *never* be permitted to claim a student is comparatively negligent, Hendrickson cites to *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005). But *Christensen's* holding that children under the age of 16 who are sexually abused by their teacher cannot be apportioned fault for the harm they suffer is consistent with Washington tort law and does not justify overturning a century of school law precedent.

In *Christiansen*, this Court answered a certified question as follows:

May a 13 year old victim of sexual abuse by her teacher on school premises, who brings a negligence action against the school district and her principal for failure to supervise or for negligent hiring of the teacher, have contributory fault assessed against her under the Washington Tort Reform Act for her participation in the relationship? . . . We answer "no" to the question, concluding that, as a matter of law, a child under the age of 16 may not have contributory fault assessed against her for her participation in a relationship such as that posed in the question. *This is because she lacks the capacity to consent and is under no legal duty to protect herself from the sexual abuse.*

Christensen v. Royal School Dist. No. 160, 156 Wn.2d 62, 124 P.3d 283, (2005) (emphasis added).

It was key to this Court’s decision in *Christensen* that Washington criminal statutes set forth a public policy to protect children from sexual abuse, clearly stating that children under the age of 16 were incapable of consenting to sexual activity. While the Court recognized Washington’s “long history” of permitting children to be found contributorily negligent, it held these cases “are not germane to our inquiry, as none involve sexual abuse. The act of sexual abuse is key here. . .[O]ur public policy is directed to protecting children from such abuse.” *Id.* at 69.

Carving out sexual abuse as an exception to the general rule that school children may be found contributorily negligent for their own injuries is consistent with general tort law and with other jurisdictions that have similarly held contributory negligence is not an available defense against a claim of child sex abuse. *Id.* at 68 and citations therein (“Our conclusion is in accord with rulings in several other jurisdictions that have addressed an issue similar to the one before us now (citations omitted)”); see also, *C.C.H. v. Philadelphia Phillies, Inc.*, 596 Pa. 23, 940 A.2d 336, 347, (2008); *Bjerke v. Johnson*, 727 N.W.2d 183, 193–94 (Minn. Ct. App.), *aff’d*, 742 N.W.2d 660 (Minn. 2007); *Wilson v. Tobiassen*, 97 Or. App. 527, 534, 777 P.2d 1379, 1384 (1989); Restatement (Second) of Torts § 892C(2)(1979).¹⁰

¹⁰ “If conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action.” Restatement (Second) of Torts § 892C(2), Consent to Crime (1979).

(3) The suicide during confinement cases relied upon by Hendrickson do not justify adopting a higher general duty of care for schools

Not every “special relationship” creates the same duty, and Hendrickson’s reliance on the plurality opinion in *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010) is misplaced. Amicus will not repeat School District’s argument, but notes that a head count of Justices demonstrates that the majority in *Gregoire* opined that contributory negligence should go to the jury.¹¹ But even the “lead” plurality opinion, signed by four Justices, merely concluded that a jail, which has an express legal duty to perform suicide screening and suicide prevention programs to protect suicidal inmates from self-harm, cannot avoid that duty by placing fault on the suicidal inmate. Comparing this jail suicide case to cases of suicide inside a psychiatric hospital ward, the plurality opinion explained that both involved an express duty to take precautions to prevent suicide, and allowing the jail or hospital to blame the suicidal inmate or patient for

¹¹ Justice Madsen’s opinion, also signed by Justices James Johnson and Susan Owens, states “depending on the facts, a trial court commits no error when it instructs the jury to apply comparative negligence to instances of jail suicide.” Justice Alexander’s dissenting opinion, also signed by Justices Mary Fairhurst and James Johnson, states: “I, nevertheless, agree with Chief Justice Madsen’s discussion of comparative negligence and her opinion that on remand the trial court should ‘be free to consider whether to instruct the jury on comparative fault.’” *Gregoire*, 170 Wn.2d at 655, n.1. So the following five of nine Supreme Court Justices concurred that comparative negligence should be a jury question in a jail suicide case: Madsen, (James) Johnson, Owens, Alexander and Fairhurst.

the suicide would “gut the duty.” *Id.* at 639, quoting, *Hunt v. King County*, 4 Wn.App. 14, 22–23, 481 P.2d 593 (1971).

As Washington courts have explained, “each type of ‘special relationship’ has a certain nature and scope from which specific duties are derived.” *Yurkovich v. Rose*, 68 Wn.App. 643, 847 P.2d 925 (1993), citing *Caulfield v. Kitsap County*, 108 Wn.App. 242, 255, 29 P.3d 738 (2001) (nature of special relationships between county and profoundly disabled clients creates a different duty than the special relationship between a hotel and guest). The *Gregoire* plurality decision, like the *Hunt* psychiatric hospital case on which it relies, was not based merely on the existence of a “special relationship.” These decisions turned on the added fact that the particular special relationship included an express duty to protect their completely captive suicidal wards from the known risk of suicide.¹²

A quick look at the foreign law underlying the plurality opinion in *Gregoire* confirms that the reasoning of this decision does not support prohibiting schools from asserting comparative negligence in student injury

¹² See *Gregoire*, 170 Wn.2d at 636 (“Administrative regulations require Washington jails to perform suicide screening and suicide prevention programs.”); *Id.* at 635 (“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.’” quoting *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 (1978).

claims. In reaching its decision that a jail should not be permitted to place blame on its suicidal inmate, the *Gregoire* plurality said it found cases that had reached a similar result in Indiana, Oregon and Minnesota persuasive. *Gregoire*, 170 Wn.2d at 637-41. But while Indiana courts do not permit contributory negligence to be asserted in child sexual abuse or jail suicide cases, they do permit schools to assert contributory negligence in student injury cases. See *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 299–300 (Ind. 2009) (“Under Indiana law, “contributory negligence” has been considered an absolute defense available to governmental entities, including public schools.”). The same is true in Oregon and Minnesota. See *Grant v. Lake Oswego Sch. Dist. No. 7, Clackamas Cty.*, 15 Or. App. 325, 330, 515 P.2d 947, 950 (1973) (“a child's contributory negligence is ... normally, if not always, a question of fact for the jury”); *Scott v. Independent School District No. 709*, 256 N.W.2d 485 (Minn. 1977).

Gregoire does not support Hendrickson’s argument that schools should be prohibited from asserting comparative negligence. Five of the nine Justices deciding *Gregoire* agreed that comparative fault was a proper jury question, and the remaining four Justices relied on reasoning and foreign case law that those same jurisdictions have not applied to schools.

C. This Court Should Not Depart From Established Washington Precedent By Adopting A Heightened Standard of Liability For Schools And Eliminating Student Comparative Negligence

Hendrickson admits that the proper standard of care to apply to schools is reasonably prudent care—an ordinary negligence standard. This is inconsistent with the “heightened duty” standard urged by Hendrickson and adopted by the intermediate Court of Appeals. And Hendrickson has not cited a single court in any jurisdiction that has ever held the standard of care for schools is so high that schools should never be permitted to assert a student is partially at fault for her own injuries. The Minnesota court, found persuasive by the plurality in *Gregoire*, explains why creating a virtual strict liability standard would place an impossible burden on schools:

The legislative intent here does not appear to make liability absolute on the part of the school district. Such a construction would place a nearly impossible burden on a school supervisor. For example, even if the supervisor instructed a student every day in the use of safety glasses, but while the instructor left the room or was working with another student a student lifted off the glasses temporarily and was injured, liability would follow. We do not think the legislature intended that the school district be strictly liable in such a situation.

Scott v. Independent School Dist. 709, Duluth, 256 N.W.2d 485, (Minn. 1977).

In this case, it was undisputed that Hendrickson had been instructed by her teacher to use a push stick to push the wood through the power saw blade; not her fingers. Prohibiting a school from asserting comparative fault when a student does not follow the instructions of her teacher or coach would open schools up to unlimited new liability in a host of school settings where the possibility of injury is clearly foreseeable; *e.g.*, students misusing a Bunsen burner or removing safety goggles during a science lab, picking up a hot pan with their bare hands during Home Ec or failing to wear required safety equipment while playing contact sports.

Washington courts have always recognized that schools are not guarantors of student safety, and that students over the age of six typically have some responsibility to protect themselves. A student's failure to follow teacher instructions is a classic circumstance in which Washington courts have held juries should be instructed on contributory negligence. See *Swartley v. Seattle School Dist. No. 1*, 70 Wn.2d 17, 20, 421 P.2d 1009, (1966). *Swartley* involved a junior high student in a manual training class who, against the instructions of his teacher, entered a storeroom without permission where sheets of plywood for student projects were stored. The student was later found dead with several sheets of plywood, previously leaning against the wall, on top of him. This Court held the "negligence of appellant and the contributory negligence of the deceased were the primary

questions for the jury; they were questions of fact.” *Swartley v. Seattle Sch. Dist. No. 1*, 70 Wn. 2d 17, 23, 421 P.2d 1009, 1013 (1966). Hendrickson has provided no justification for abandoning a century of clear Washington school law precedent to adopt a new rule of virtual strict liability for schools that has no support by any court in the country.

D. This Court Should Clarify When A Special Duty Instruction Is Required

Recent appellate cases addressing the “special relationship” between schools and students have held it was reversible error not to instruct the jury on the foreseeability test used to determine whether a school owes a duty to protect a student from harm inflicted by another. See *Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wn. App. at 108; *Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. at 633. Unfortunately, this has confused some litigants and judges into believing that Washington has adopted a new requirement that a jury be instructed on “special relationship” and “foreseeability” in every case a student brings against a school. This Court should clarify that such instruction is not required in the straightforward negligence action in which a student asserts she was injured due to the direct acts or omissions of the school or its employees—cases in category “B” on the Venn diagram shown on page 7, *supra*.

The confusion Amicus asks this Court to dispel is amply demonstrated by the Court of Appeals in this case, which stated in conclusory fashion: “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 School District*, 199 Wn.App. at 249. The Court of Appeals explained that although the law had not changed, *Quynn* and *Hopkins*, decided after the trial in this case, had created a new jury instruction requirement in school cases:

Despite the long-standing rule regarding school districts’ enhanced duty of care, case law requiring this duty to be spelled out to the jury did not arise until after Ms. Hendrickson’s trial. *Quynn v. Bellevue Sch. Dist.*, 195 Wash.App. 627, 383 P.3d 1053 (2016); *Hopkins*, 195 Wash.App. 96, 380 P.3d 584. The trial court did not have the benefit of these decisions at the time it issued the instructions.

Hendrickson. 199 Wn.App. at 249, n. 1.

The Court of Appeals below erroneously concluded Washington had established a new jury instruction requirement for all student injury cases brought against a school when Division I decided *Hopkins* and *Quynn*. In both *Hopkins* and *Quynn*, the plaintiff student was physically harmed by another student. Because a defendant ordinarily is not liable for harm caused by a third party, a school could only be liable in this factual setting due to

the enhanced scope of duty arising from the school's special relationship with its student. But a school's liability for the actions of others is not limitless. In this setting—illustrated by “A” in the Venn diagram on page 7, *supra*—a jury determines whether a school had a duty to protect the student in the given factual setting by applying a foreseeability test.

While Amicus maintains it is error to ever instruct a jury that a school has a “heightened duty,” no special instruction is required at all in a straightforward negligence action like this case in which a student is injured during class by the alleged direct acts and omissions of her teacher. Special instruction on an enhanced duty is only appropriate, if at all¹³, when a jury is tasked with deciding whether the school owed any duty to the student in the factual circumstance presented. But special instructions on why and when a school may have a duty to protect a student from harm caused by a third party are unnecessary in direct negligence cases that do not involve a third party or derive from an enhanced scope of duty.

Where a jury is not charged with deciding whether a duty attached, but rather whether the admitted duty was met, special instructions are

¹³ Amicus maintains a jury should not need instruction on a school's “enhanced duty” arising from a “special relationship.” This is merely the legal theory upon which a school may be liable for harm caused by another. In those cases, in which the attachment of duty is a jury question, a jury could simply be instructed that a school has a duty to use reasonable care to protect a student from harm by another if the harm claimed was in the foreseeable zone of danger. Instruction on the legal rationale underlying this rule of law should not be required.

unnecessary and risk improperly implying that a school's duty to its student is something different and higher than ordinary reasonable care.

V. CONCLUSION

The legal standard for school liability for student injuries has remained the same for more than a century and should not be dramatically raised now. Amicus asks his Court to reverse the Court of Appeal's adoption of a new "heightened" duty of care for schools, to confirm that schools still have the right to assert comparative negligence as an affirmative defense, and to reinstate the trial court judgment in favor of Moses Lake School District.

Respectfully submitted this 12th day of February, 2018.

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