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Supreme Court No. 94898-4

WASHINGTON SUPREME COURT

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HEIDI JO HENDRICKSON, a single person,

Plaintiff – Respondent,

vs.

MOSES LAKE SCHOOL DISTRICT, a municipal corporation,

Defendant – Petitioner.

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SUPPLEMENTAL BRIEF OF MOSES LAKE SCHOOL DISTRICT

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## I. INTRODUCTION

After a jury verdict in favor of Defendant Moses Lake School District,<sup>1</sup> the Court of Appeals – in a 2-1 decision -- overturned the jury verdict because “the trial court should have instructed the jury about the district’s heightened standard of care.” *Hendrickson v. Moses Lake Sch. Dist.*, 199 Wn.App. 244, 246, 398 P.3d 1199 (2017). The Court of Appeals speculated that “the inadequate instruction about the district’s duty could have impacted the jury’s verdict . . . .” (*Id.*) The dissent squarely defined the issue when it wrote:

In both *Quynn* and *Hopkins*, the jury declined to find the district negligent under the general negligence standard. The error in incorrectly defining the district's obligations was therefore prejudicial. That is not the case here since the jury concluded that the district's negligence was not the cause of the injury. Appellant speculates that maybe one of her theories of negligence was not accepted by the jury, but would have been accepted if the jury had been properly instructed. The problem with the argument is that she was able to argue all of her theories to the jury and they concluded that whatever negligence the district committed was not the cause of the plaintiff's injury. The jury heard every theory of liability Ms. Hendrickson had and determined none of them were the cause of the accident. That should be the end of the case.

199 Wn.App. at 255 (Korsmo, J., dissenting). This action results from a Student’s injury while using a table saw in the woodshop of Moses Lake

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<sup>1</sup> Question 1 asked: “Was the defendant negligent?” The jury answered “Yes.” Question 2 asked: “Was the defendant’s negligence a proximate cause of injury to the plaintiff?” The jury answered “No.”

High School. The Student received training on how to use the table saw and had used the table saw for 60 to 100 times before the day that she cut her thumb. The Student was instructed to always use a push stick to push boards through the blade of the table saw. The Student was also instructed to turn off the table saw if anything unusual happened such as the blade coming to a stop. On the day of the occurrence, the Student was using a push stick to push a board through the blade of the table saw. 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. While moving the board she pushed her thumb over the saw's blade and cut her thumb. Kevin Chestnut, the woodshop teacher, had more than 35 years of experience. His students had never sustained a serious injury while operating power tools in his wood shop.

The jury found that there was negligence on the part of the school district but the district's negligence was not a proximate cause of the Student's injuries. The majority of the Court of Appeals overturned the jury verdict based on their own factual determination of the basis of the jury verdict.

## **II. ASSIGNMENTS OF ERROR**

- A. The Court of Appeals erred in overturning the verdict of the jury, which found that negligence on the part of school district was not a proximate cause of the Student's injuries, because

the Court of Appeals lacks any authority to determine what the jury actually considered in arriving at its verdict. The deliberation of the jury inheres to the verdict and cannot be subject to reconsideration by the appellate court.<sup>2</sup>

- B. The Court of Appeals erred in referring to a “heightened duty of care” for public school districts when no such duty of care has been adopted in Washington.
- C. The Court of Appeals correctly determined that comparative fault could be assigned to the Student.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A. Did the Court of Appeals err in overturning the verdict of the jury, which found that negligence on the part of the school district was not a proximate cause of the Student’s injuries, because the Court of Appeals made a factual determination of what the jury may have considered in arriving at its verdict and in so doing considered matters that inhere to the jury verdict and are not subject to review by the Court of Appeals?
- B. Did the Court of Appeals err in deciding that a public school district owes a “heightened duty of care” to the students of the school district?
- C. Did the Court of Appeals err in concluding that comparative fault could be assigned to the Student?

### **IV. STATEMENT OF THE CASE**

On June 1, 2006 near the end of the school year, Plaintiff Heidi Jo Hendrickson (Student) was injured in her high school woodshop class

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<sup>2</sup> If the Court agrees with the District on this Assignment of Error it is not necessary for the Court to resolve Assignment of Error “B”.

while operating a table saw. (CP 4.) (VRP 180, 194.)<sup>3</sup> The Student had used the table saw 60 to 100 times from her first instruction on how to use the saw until the day of her injury. (VRP 891-95; 290-92, 347-49; 607-08.) She had been trained on the procedures to follow in making a cut on a one inch board, including that she must always use a push stick to move the board through the saw. (VRP 895- 96; 911; 916; 347-49; 622-23; 626; 661.)

On the day of the Student's injury, she was finishing up a project and was making a one inch rip cut on the table saw. (VRP 618-19.) As she was pushing the cut through with a push stick she noticed that the board was binding. She became worried about a kickback and set the push stick down. (VRP 683-84.) She then tried to push the board with her bare hand. (VRP 622-24.) She then felt the blade cut her thumb. (*Id.*) She testified that as she was trying to push the board she looked around for Mr. Chestnut to help her but he was not in her view. (VRP 631-32.)

Mr. Chestnut testified about how he trains students to safely use the table saw. (VRP 891-98.) After demonstrating two different types of cuts, the students would make those cuts one at a time until they correctly performed the cut. (*Id.*) The students took a written test. (*Id.*) Once a

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<sup>3</sup> The Complaint alleges that the accident happened on June 1, 2005 but that is likely an error as the testimony established that the accident happened in 2006.

student passed the test Mr. Chestnut would supervise the student over the next six weeks as the student a minimum of 40 to 80 cuts. (VRP 892-95.) After a student earned Mr. Chestnut's trust he allowed the student to use the table saw on her or his own. (VRP 895-96.)

Mr. Chestnut taught the students to always use a push stick when cutting boards and to turn off the table saw if anything unusual happened – such as the blade binding up. (VRP 945-46; 895–96; 911; 916; 347-49; 622-23; 626; 661.)

The trial court's Instruction No. 7 made it clear that the District could be held negligent under four theories: (1) it failed to use and maintain required safety equipment and guards, (2) it failed to provide reasonable instruction to Plaintiff, (3) it failed to reasonably supervise Plaintiff in the use of the table saw and (4) it failed to exercise reasonable precautions to protect Plaintiff from harm. (CP 1523.) The record is devoid of any evidence that the jury failed to consider all four theories when arriving at its verdict. The jury found the District negligent but also found that the District's negligence was not a proximate cause of the Student's injury. (CP 1539-40.)

The trial court did not give Plaintiff's Proposed Jury Instruction No. 7, 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. 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 406.) (Emphasis added.) This instruction as written is not a correct statement of the law.

The proposed jury instruction went beyond what is ostensibly required by two recent Court of Appeals cases.<sup>4</sup> The proposed jury instruction incorrectly included a reference to a “heightened duty of care.” Plaintiff’s proposed Instruction No. 7 also included excess verbiage. It defined “foreseeable.” It also set forth a history lesson about why a school district is held to a “heightened duty of care” by explaining (a) the loss of the student’s ability to protect himself or herself, (b) the involuntary nature of the school district – student relationship, (c) the legal requirement for

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<sup>4</sup> In *Hopkins v. Seattle Public Sch. Dist. No. 1*, 195 Wn.App. 96, 108, 380 P.3d 584 (2016), *rev. denied* 186 Wn.2d 1029, 385 P.3d 123 (2016) and *Quynn v. Bellevue Sch. Dist.*, 195 Wn.2d 627, 640, 383 P.3d 1053 (2016), the Courts of Appeal held that the trial 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* and *Quynn* did not state that a school district has a heightened duty of care.** Both cases were decided after the trial court instructed the jury in this case.

children to attend school and (d) the mandatory substitution of teachers for parents.

## V. ARGUMENT

### A. THE COURT OF APPEALS ERRED IN OVERTURNING THE VERDICT OF THE JURY ON THE COURT'S ASSUMPTION THAT THE JURY CONSIDERED ONLY ONE OF THE THEORIES OF NEGLIGENCE. THE COURT LACKED AUTHORITY TO MAKE THAT DETERMINATION.

The jury's finding that the District was negligent foreclosed Student's argument that the jury's decision might have been different if a "heightened duty of care" instruction had been given to the jury on the issue of negligence. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 87-88, 18 P.3d 558 (2001). If the jury found negligence under the ordinary care standard, it would include a finding of negligence under an "enhanced" duty of care.<sup>5</sup>

The Court of Appeals' majority opinion speculated that the jury only found negligence based upon one of the Student's arguments (removal of the kick-back guard) and that it may have found proximate cause on the remaining theories of negligence if it had been properly instructed on foreseeability. The Court's ruling is not correct on two grounds. Firstly, the determination of duty of care and proximate cause are not intertwined. Secondly, the Court lacked the authority to "look

behind the curtain” to determine on what basis a jury made a finding of negligence or proximate cause.

This Court addressed the first issue in *Griffin, supra*, where the jury found defendant landlord was negligent but determined that the landlord’s negligence was not a proximate cause of plaintiff’s injuries. The Court of Appeals reversed and remanded for a new trial after concluding that the failure to give a duty instruction that imposed a “greater duty” on the landlord influenced the jury’s determination on proximate cause. On review, this Court specifically declined to reach the issue of the landlord’s duty of care because of the jury’s proximate cause determination. This Court stated:

We therefore decline to reach the issue of Trammell Crow's duty of care because the jury, as instructed, determined that while Trammell Crow negligently discharged its duty to protect Griffin from harm its dereliction nevertheless did not proximately cause her injuries in any event. **The 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.**

143 Wn.2d at 88. (Emphasis added.) The same rule applies at bar.

At bar the Court of Appeals assumed that the issues of duty and proximate cause are intertwined and that the lack of a jury instruction on heightened care skewed the consideration of proximate cause. This Court

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<sup>5</sup> The District denies that there is any “enhanced” duty in this case. *See* argument *infra*.

expressly rejected that same argument in *Griffin* where the Court wrote at 88:

However we did not hold “duty and proximate cause are intertwined” in *Schooley. Id.* We said “the issues regarding whether duty and *legal* causation exist are intertwined.” *Schooley*, 134 Wash.2d at 479, 951 P.2d 749 (emphasis added.)

The *Griffin* Court further stated at 89:

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.

*Griffin* does not identify any additional duty that would be placed on the landlord under her proposed instruction, nor does she offer a persuasive logical argument that the jury's considerations were necessarily “skewed” by application of what appear to be identical standards of care once the landlord took action upon which the tenant relied. Furthermore, **Griffin does nothing to demonstrate the jury’s proximate cause determination would have been any different** in light of the supervening cause instruction which she herself proposed.

(Emphasis added.) Duty and proximate cause are not “intertwined.” A factual determination of breach of duty is not dependent on whether that breach proximately caused the injury.

Secondly, the Court of Appeals lacked any authority to factually determine the basis on which the jury found negligence or proximate cause. Negligence and cause in fact are normally jury questions. *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 436-47, 378 P.3d 162 (2016). It would be a dangerous precedent, contrary to existing case law, to permit an

appellate court to determine on what basis the jury decided any particular claim of negligence or proximate cause. It would require the appellate court to review the evidence, make determinations on the weight of the evidence and to “second guess” the jury’s determination on matters that clearly inhere to the jury’s verdict.

*Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn.App. 412, 426-27, 40 P.3d 1206 (2002) is on point. There, in a complicated accounting negligence case, the jury found against defendant on negligence but also found no proximate cause. *Id.* at 431 Plaintiff (MEI) argued that the jury had to accept MEI’s theory that defendant’s negligence was a proximate cause of MEI’s damages. *Id.* at 433. The Court of Appeals rejected that argument and stated at 432-33:

This assumption is not warranted. The jury could just as easily have determined that any or all earlier (or subsequent) negligence of the defendants did not proximately cause the IPO to fail.

**It was the jury’s province to sort out the evidence and decide the final proximate cause** of MEI’s failure. The superseding intervening cause instruction gave them an opportunity to do just that. And the court properly gave that instruction.

(Emphasis added.) In the case at bar, the Court of Appeal’s majority opinion noted the Student alleged at least three theories of negligence. The majority then went on to make a factual determination that the jury found negligence on one but not all theories of negligence. It speculated

that the jury's verdict might have been different if the trial court had given a "heightened duty of care" instruction. It noted that the inadequate instruction about the District's duty "**could have impacted the jury's verdict**" (*Id.* at 246) or that a more thorough understanding of the district's duties "**could have led the jury**" to believe that Mr. Chestnut should have done more (*Id.* at 251) or it was "**possible the jury could have found**" Mr. Chestnut's inattention to be a breach of the "enhanced duty of care and supervision." (*Id.*) The majority's entire opinion on this point relies solely on its speculation that the jury did not consider all three theories of negligence, despite the fact that the trial court instructed the jury on all three theories. The majority concluded at 251 that "it is possible, if not probable, that the jury found the district negligent as to only one of Mrs. Hendrickson's theories." The majority does not cite any case law to support its novel view that it has the authority to determine what the jury did or did not consider in arriving at this verdict. The majority lacked authority as an appellate body to make that specific determination.

The majority's ruling is directly contrary to Division III's own holding in *Chhuth v George*, 43 Wn.App. 640, 719 P.2d 562 (1986), *rev. denied* 106 Wn.2d 1007 (1986). In *Chhuth*, a student was killed when struck by a car while crossing the street on his way home from school.

The jury found the school district and the car driver were negligent but determined that the negligence was not a proximate cause of the occurrence. The trial court then ruled, as a matter of law, the driver and the school district proximately caused the student's death.<sup>6</sup> The Court of Appeals reversed the trial court's ruling and stated:

We reverse the trial court's ruling that the District's negligence was a proximate cause of Saintyro's death. **It is not possible to determine from the special verdict the basis for the jury finding that the District was negligent.** 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 Saintyro's death, the jury in substance concluded Saintyro's own intervening negligence was the sole proximate cause. . . . The issue of proximate cause falls within the scope of the jury's duties and since the court properly instructed the jury, there is no basis for disregarding the verdict. It was error for the court to disregard the jury's verdict.

43 Wn.App. At 650–51. (Emphasis added.) Here, the Court of Appeals should have given deference to the jury's finding on proximate cause. Where there is a plausible scenario that supports the jury's finding of no proximate cause the appellate court must accept that determination. *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn.App. 919, 927, 332 P.3d 1077 (2014), *rev. denied* 182 Wn.2d 1021, 345 P.3d 785 (2015).

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<sup>6</sup> This is effectively the same ruling that the majority made in the case at bar.

Appellate courts will generally not inquire into the internal process by which the jury reaches its verdict. *Gardner v. Malone*, 60 Wn.2d 836, 840, 376 P.2d 651 (1962); *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), *rev. denied* 116 Wn.2d 1014, 807 P.2d 883 (1991). “The individual or collective thought processes leading to a verdict ‘inhere in the verdict’ and cannot be used to impeach a jury verdict.” *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). If the verdict cannot be impeached by a juror’s affidavit stating the basis of the jury’s verdict, it certainly cannot be impeached by the Court of Appeals mere supposition about the basis of the jury’s verdict. Proximate cause is ordinarily determined by the trier of fact. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Here, there was nothing inconsistent about the jury finding negligence but no proximate cause.

The Court’s ruling is in error. The determination of duty of care and proximate cause are not intertwined and the finding of no proximate cause renders moot any finding of negligence. Furthermore, an appellate court lacks the authority to “look behind the curtain” to determine on what basis a jury made a finding of negligence or proximate cause. This Court should reverse the decision of the Court of Appeals on this point and it need not reach the issues argued in section B.

B. THE COURT OF APPEALS ERRED IN DECIDING THAT A PUBLIC SCHOOL DISTRICT OWES A “HEIGHTENED DUTY OF CARE” TO A STUDENT.

The Court of Appeal’s majority held that the District owed a “heightened” duty of care to the Student. This holding is inconsistent with existing case law. It erroneously interpreted the seminal case of *McLeod v. Grant Cnty. Sch. Dist. No. 182*, 42 Wn.2d 316, 316, 255 P.2d 360 (1953) as creating a “heightened duty” of care in a negligent supervision case. In *McLeod* a 12-year-old girl was raped by fellow students during a noon recess in the school gymnasium. 42 Wn.2d at 317. At the time of the occurrence, the teacher appointed to supervise students in the gym was absent. *Id.* at 318. The trial court sustained defendant’s demurrer. *Id.* at 317. The demurrer was apparently sustained due to the general rule that there is no duty to protect another from the criminal acts of a third person. W. PROSSER, TORTS § 33 (4<sup>th</sup> ed. 1971). This Court reversed the trial court and held that because of the “special relationship” between a school district and its students “the duty of a school district . . . is to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers.” 42 Wn.2d at 362. The *McLeod* Court stated that “intervening criminal acts may be found to be foreseeable, and if so found, actionable negligence may be predicated thereon.” *Id.* at 321.

*McLeod* established a duty of care based on the foreseeability of criminal acts when there is a special relationship. *McLeod* did not state that in a general negligence case against a school district (those not involving criminal acts of third persons) that foreseeability is different than in ordinary negligence cases.

In the case at bar, the majority of 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 stated that “school districts owe students a heightened duty of care” and there is a “well-established rule that the school district had a heightened duty to protect its students from foreseeable harms.” *Hendrickson v. Moses Lake Sch. Dist.*, 199 Wn.App. 244, 252, 254, 396 P.3d 1199 (2017).

In ordinary negligence cases not involving the criminal or intentional acts of third persons, “[t]he extent of the duty imposed upon the . . . school district, **in relation to its supervision of the pupils within its custody**, is that it is required to exercise such care as an ordinarily reasonable and prudent person would exercise under the same or similar circumstances.” *Briscoe v. Sch. Dist. No. 123, Grays Harbor Cnty*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949) (student injured while engaged in an athletic game with fellow students). (Emphasis added.) *See also Travis v. Bohannon*, 128 Wn.App. 231, 238, 115 P.3d 342 (2005) (student injured

by log splitter during off-campus activities sponsored by the school district; “schools have a duty to protect students in their custody from reasonably foreseeable harm”); *Carabba v. Anacortes Sch. Dist. No 103*, 72 Wn.2d 939, 955, 435 P.2d 936 (1967) (student injured in wrestling match; a school district owes a duty to its pupils to “anticipate reasonably foreseeable dangers and to take precautions protecting the children in its custody from such dangers”). The fact that a school district must protect a student from reasonably foreseeable dangers does not mean that the District owed the Student a heightened duty of care or that a jury instruction must be given on foreseeability. The fact that harm is foreseeable is the reason that a trial court will allow a jury to determine whether a defendant was negligent. It would not have been error for the trial court to give a foreseeability instruction. But the failure to give such an instruction should not be held to be error either.

Even if *McLeod* could be read to create an enhanced or increased duty of care, that duty should be limited to cases involving third party criminal conduct. In *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005) this Court stated at 67 that “a school district has an enhanced a solemn duty to protect minor students in its care.” *Christensen* involved a teacher’s sexual relationship with a student. The *Christensen* court made it clear that it addressed only “a civil action

against a school district and school principal for sexual abuse by her teacher.” 156 Wn.2d at 71. The Court stated: “The act of sexual abuse is key here.” *Id.* at 69. The *Christensen* Court did not state or imply that there was a “heightened duty” on the part of school districts in general negligence cases.

Here, the majority 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, intimidated and bullied by other students). In each case the Court of Appeals held that the trial 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*, 195 Wn.App. at 108 and *Quynn*, 195 Wn.App. at 640. ***Hopkins* and *Quynn* did not state that there is a “heightened duty of care” on the part of a school district.** Each case discussed the traditional duty of care owed by students. For example, the *Quynn* court stated at 640 that a school district “must exercise such care as an ordinarily reasonable and prudent person would exercise under the same or similar circumstances.” (*Quoting Briscoe v. Sch. Dist. No. 123, Grays Harbor Cnty.*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949).)

*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 did not discuss foreseeability that is associated with the school district – student relationship. *Hopkins* and *Quynn* simply capture the duty set forth in *McLeod* in more detail than the pattern jury instructions on ordinary care. *Hopkins* noted in its opening sentence: “It is well established that a school district has a special relationship and a duty to use reasonable care to protect students in its custody from foreseeable harm.” 195 Wn.App. at 98. In *Quynn*, the court actually rejected the argument that there was a “heighted 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. *Quynn* went on to conclude:

We recently discussed the relationship between an ordinary care instruction, such as the one given herein, and the special relationship owed to a student by a school district. **Well established case law imposed a duty on a school district to exercise reasonable care to protect its students in its custody from foreseeable harm.** *McLeod*, 42 Wash.2d at 320, 255 P.3d 360; *Christensen v. Royal Sch. Dist. No. 160*, 156 Wash.2d 62, 70, 124 P.3d 283 (2005).

*Quynn*, 195 Wn.App. at 638-39. (Emphasis added.)

*McLeod* and its progeny make no reference to a higher standard than ordinary negligence. To the extent that the Court of Appeals in this case

holds that the duty of care owed to the Student was a “heightened standard 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*.

C. THE COURT OF APPEALS CORRECTLY DETERMINED THAT COMPARATIVE FAULT COULD BE ASSIGNED TO THE STUDENT.

The Student contends that the trial court erred by the giving a jury instruction on comparative fault of the Student. The Student based her argument on *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005) and *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010). The Court of Appeals in this case properly stated:

*Christensen* held contributory negligence could not be assessed against a 13-year-old student who brought a claim against a school district for sexual abuse by a teacher. *Gregoire* involved the custodial relationship between an inmate and a jail. . . . *Christensen* and *Gregoire* carved out exceptions to the general rule of comparative fault based on unique policy concerns. . . . Neither *Christensen* nor *Gregoire* abrogated the general rule that a defendant’s special relationship to a plaintiff does not make the defendant the guarantor of the plaintiff’s safety, thus eliminating comparative fault. . . . Our reading of *Christensen* and *Gregoire* is that both decisions are context specific and do not fully alter a plaintiff’s duty of self-care in the custodial settings of a school or penal institution.

199 Wn.App. at 253-54. (Paragraphing omitted.) The court further stated: “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.” *Id.* at 254. RCW 4.22.005 provides that “any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensation damages for an injury attributable to the claimant’s contributory fault . . . .” Washington law holds that minors can be responsible for contributory negligence. *See, e.g., Graving v. Dorn*, 63 Wn.2d 236, 238-39 & n. 2, 286 P.2d 621 (1963) (concluding that children over the age of six may be contributorily negligent after reviewing 40 Washington Supreme Court cases). The trial court properly instructed the jury on comparative fault.

## VI. CONCLUSION

This Court should reverse the opinion of the Court of Appeals and reinstate the jury’s verdict.

RESPECTFULLY SUBMITTED this 12th day of February, 2018.

JERRY MOBERG & ASSOCIATES, P.S.



JERRY J. MOBERG, WSBA No. 5282  
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**CERTIFICATE OF SERVICE**

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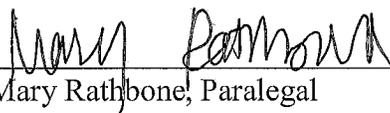
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\_\_\_\_\_  
Mary Rathbone, Paralegal

**JERRY MOBERG & ASSOCIATES, P.S.**

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