101869-0

No. 56067-4-II

THE SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM TISDALE, an individual,

Respondent,

vs.

APRO LLC, a Delaware Limited Liability Corporation,

Appellant

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER AND INTRODUCTION

William Tisdale, a customer of APRO, LLC's store, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II that reversed the jury's determination of $91,000,000 million in damages after Mr. Tisdale was left permanently brain injured and disabled from a savage assault on the store premises, exposing Mr. Tisdale to $1,665,136.03 in appellate costs. **APPENDIX A, B**.

The questions of law and public policy raised by this petition have, for decades, bedeviled courts in lawsuits involving a negligent defendant who owes a duty to prevent or protect against a third party's criminal acts. Division Two now says this Court in *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003) intended to undermine the common law duty to prevent criminal acts and allow negligent defendants with such

duties to offload responsibility for damages they have caused to ***nonparty*** criminal assailants by mandating that the jury "segregate" damages.

Tegman's first paragraph stated the legal limitation of its damages segregation holding: "We hold that ***under*** RCW 4.22.070 the damages resulting from negligence must be segregated from those resulting from intentional acts." 150 Wn.2d at 105 (emphasis added). "The first sentence of RCW 4.22.070 restricts application of the statute" to "actions involving fault of more than one entity." *Id.* at 111; RCW 4.22.070(1)[1]. Intentional tortfeasors are not "at-fault" entities under the statute. *Tegman*, 150 Wn.2d at 110; *Welch v. Southland Corp.*, 134 Wn.2d 629, 634, 952 P.2d 162 (2003). By its plain language, RCW 4.22.070's comparative fault scheme is inapplicable to intentional tortfeasors unless they are named as a

[1] **Appendix C.**

defendant, triggering its requirement that "[t]he liability of ***each defendant*** shall be several only." RCW 4.22.070. Emphasis added.

Consistent with this, Division One has held that "there is no need to instruct the jury to segregate damages caused by intentional conduct" in cases involving a defendant's negligent failure to prevent third party criminal conduct. *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 372, 199 P.3d 499 (2009). Division Two's published opinion directly conflicts with RCW 4.22.070 's legislative intent as established through decisions of this Court and other appellate divisions interpreting the statute. RAP 13.4(b)(1), (2), (4).

The facts of this case—identical to those in *Welch*, 134 Wn.2d at 631, 634 (2003), in which this Court held that RCW 4.22.070 was inapplicable to a negligent convenience store's failure to protect its customer from being shot by a nonparty robber—provide a fair and

straightforward opportunity for this Court to provide much needed clarity on the interplay of its decisions in *Tegman* and *Welch* with chapter 4.22 RCW, as well as conflicting interpretations by the Court of Appeals in this case, *Rollins*, federal courts, and trial courts across the state.

APRO owed a duty to protect customers like Mr. Tisdale from foreseeable criminal assault on the premises because of its special relationship with him. In cases such as this where a negligent defendant and a criminal assailant outside RCW 4.22.070 ‘s comparative fault scheme combine to cause a plaintiff’s injuries, the defendant bears the burden to “apportion the damages” if possible but owes full liability for any indivisible injuries. *Cox v. Spangler*, 141 Wn.2d 431, 444, 5 P.3d 1265 (2000) (negligent defendant liable for indivisible damages caused by them and plaintiff’s nonparty co-employee immune from suit under chapter 51.04 RCW); RCW 4.22.070 (excluding “entities immune from liability to the claimant under Title 51

RCW" from comparative fault scheme).

Division Two's holding that in all such protective duty cases juries must be instructed to segregate damages for an indivisible injury to the nonparty criminal effectively allows APRO to ignore or abrogate its duty. Under this holding, defendants can escape responsibility by pointing to the assailant and arguing the jury must segregate indivisible damages—despite the absence of any conceivable supporting evidence. This result renders the duty to protect meaningless. *See also* RESTATEMENT (THIRD) OF TORTS § 14 cmt. b (1999) (recognizing that placing little liability on the negligent defendant in duty-to-protect cases "significantly diminishes the purpose for requiring a person to take precautions against the risk."); Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform,* 16 U. PUGET SOUND L. REV. 1, 33 (1992) (stating the duty to protect "would effectively be nullified if

we were to allow a negligent guardian to escape responsibility by shifting the lion's share of fault to an intentional wrongdoer who was not deterred because the guardian afforded inadequate protection").

The confusion is great, the need for clarity is important, and the right time to resolve this is now. RAP 13.4(b)(1), (b)(2), (b)(4).

II. COURT OF APPEALS DECISION

In the unpublished part of its decision, Division Two upheld a verdict finding APRO liable for its negligence in failing to protect Mr. Tisdale from a third-party robber, Terrance Sablan, on its premises. In the published part of its decision, however, it reversed the jury's damages award because the trial court gave Washington Pattern Instructions ("WPI") on negligence, proximate cause, and damages but declined to give a damages segregation

instruction based on language from *Rollins*.[2]

Despite conceding that the trial court's pattern jury instructions and verdict form were "true and correct as far as [they] went," Division Two held that *Tegman* ***requires*** trial courts to instruct juries to "segregate" damages in "***all*** cases involving both negligent defendants and nonparty intentional tortfeasors." Opinion ("Op.") 13, 16 (emphasis added). It reasoned that the evidence "entitled" APRO to such an instruction because it showed that "Sablan's intentional tort and APRO's negligence were both causes of Mr. Tisdale's injury." Op. at 15.

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[2] Though not required by *Rollins*' holding, an instruction given there stated: "In calculating a damage award, you must not include any damages that were caused by acts of the unknown assailants and not proximately caused by negligence of the defendant. Any damages caused solely by the unknown assailants and not proximately caused by negligence of defendant King County must be segregated from and not made a part of any damage award against King County." *Rollins*, 148 Wn. App. at 379.

Division Two also held that the pattern instructions were prejudicially misleading because the jury "may have believed" that it could award damages solely caused by Sablan's intentional conduct, not APRO's negligence, and because, in Division Two's view, APRO was prohibited from arguing that the jury should "segregate" such damages. Op. 17.

III. ISSUES PRESENTED FOR REVIEW

1. In cases where a plaintiff seeks recovery only from a negligent defendant for damages caused by that defendant's failure to protect customers and prevent criminal conduct, does *Tegman* require a damages segregation instruction?

2. In a case where a plaintiff's only liability theory was the defendant's negligent failure to protect customers and prevent criminal conduct and the pattern instructions and verdict form limited damages to those caused by that

negligence, do trial courts prejudicially mislead juries by giving the pattern instructions?

IV. STATEMENT OF THE CASE

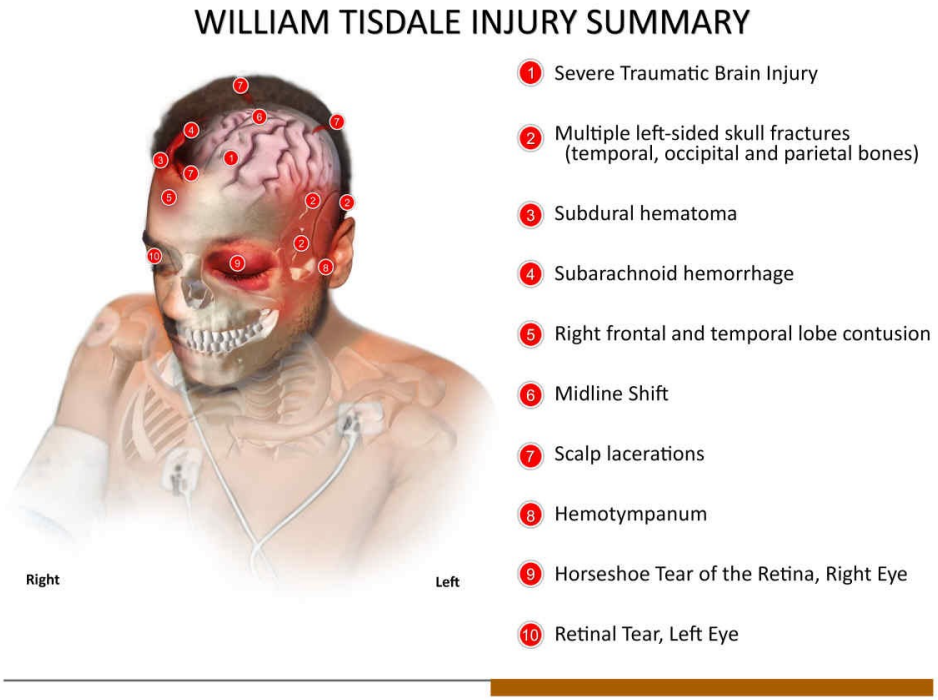
In November 2015, Mr. Tisdale entered APRO's convenience store. CP 1094-96; RP 509, 511-12. Unknown to Mr. Tisdale, Sablan was robbing the store. RP 511-12, 706, 1891.

APRO created the conditions for Sablan to assault Mr. Tisdale by failing to provide robbery de-escalation and violence prevention training to its employees. RP 509-10, 601. Its store clerk escalated the robbery by using Mr. Tisdale to "scare" Sablan by asking Mr. Tisdale to call 911, causing Sablan to leave the store; failed to warn Mr. Tisdale about the robbery and that Sablan had just threatened to kill him with a baseball bat; and failed to lock the store's doors and warn Mr. Tisdale to remain inside the store. RP 511-12, 522, 557-58, 572-74, 706, 1673, 1891.

Mr. Tisdale, still speaking with 911 as directed by the store clerk, stepped outside. Ex. 2 6:04-6:10; RP 558-59. Mr. Tisdale saw Sablan breaking into his car and approached. CP 1097, 1105; Ex. 3 6:46-6:52. The robber began beating Mr. Tisdale in the head with the bat.[3] Ex. 3 6:46-8:00.

[3] The record contains a full video of the robbery and assault. Ex. 2; Ex. 3 at 6:46-8:00.

The force was equivalent to “somebody putting a refrigerator on your head” and fractured Mr. Tisdale’s skull from its base to its cheekbone, traveled completely through his brain, and caused multiple hemorrhages and swelling in the opposite side of his brain:



Ex. 38; RP 847, 849, 883, 1519, 1549, 1551, 1560, 1570.

Mr. Tisdale suffered permanent destruction of portions of his brain, leaving him with devastating consequences including severe, recurrent epileptic

seizures. RP 758, 762, 849, 864, 1542, 1547-48, 1604, 1625. Mr. Tisdale's brain injuries included permanent damage to his right temporal and frontal lobes that resulted in substantial cognitive impairments and executive dysfunction. RP 860-61, 868-869, 939-40, 1946, 556. Because of his limitations, he will never be a "normal-functioning individual in society"; never be able to "work in a job where you have to do more than one thing at a time"; and needs twenty-four seven live-in home care for his safety costing $12,314,368. RP 869, 946, 1013, 1585.

The trial court gave pattern instructions on proximate cause and damages. CP 1344, 1352, 1360; *cf.* WPI 15.04; WPI 21.03; WPI 30.02.01. Instruction 7 required Mr. Tisdale to prove "the negligence of the defendant was a proximate cause of the injury to the plaintiff." CP 1344; **APPENDIX D**.

Instruction 15 informed the jury that there may be more than one proximate cause of the same injury; that if

it found APRO's negligence was a proximate cause of injury or damage that it was not a defense that Sablan's acts may also have been a proximate cause; and that if Sablan's acts were the sole proximate cause of injury or damage to Mr. Tisdale, the jury should return a defense verdict. CP 1352; **APPENDIX E**.

Instruction 23 required the jury, if it found APRO negligent and that its negligence proximately caused his injuries, to determine the "total amount of such damages as you find were proximately caused by the negligence of the defendant APRO, LLC." CP 1360; **APPENDIX F**. The verdict form required the jury to find that APRO's negligence was "a proximate cause of injury" to Mr. Tisdale and to determine the "amount of total damages" referred to in Instruction 23. CP 1333; **APPENDIX F**.

During closing argument, the trial court sustained Mr. Tisdale's objection to APRO's argument that "in Washington, the law states that the jury must segregate

damages caused by intentional tortfeasors" as a misstatement of the law.[4] RP 2013.

The jury found that APRO was negligent, that its negligence proximately caused Mr. Tisdale's injuries, and determined damages of $91 million, less 10 percent comparative fault allocated to Mr. Tisdale. CP 133-1334; **APPENDIX F**.

After trial, APRO argued that *Tegman* required giving its proposed instruction 17 and special verdict form.[5] *Id.* at

[4] The Court of Appeals conceded APRO's closing argument was not a "truly correct statement of the law." Op. 17. Nevertheless, the Court of Appeals mischaracterized the record when stating the trial court "refus[ed] to allow APRO to argue about segregation of damages arising ***solely*** from Sablan's intentional tort." Op. 17. The trial court made no such ruling. Instead, APRO pivoted to arguing without objection that "[t]he evidence shows that the sole proximate cause of the injury to Mr. Tisdale is Mr. Sablan swinging the bat and striking him." RP 2013-2014. *Id.*

[5] This proposed instruction stated "[a]ny damages proximately caused by the intentional act[s] of a non-party and ***not*** proximately caused by negligence of the defendant must be segregated . . . ." CP 629

5, 9, 10. Yet APRO conceded:

> This is not an issue of joint and several liability. No one is asking that Mr. Sablan appear as an empty chair on the verdict form.

VRP (Aug. 20, 2021) at 27.

In denying APRO's new trial motion, the trial court observed that Instructions 7 and 15 sufficiently informed the jury that Mr. Tisdale had to prove APRO's negligence was a proximate cause of his injuries and that there may be more than one proximate cause of an injury. VRP (Aug. 20, 2021) at 32-33.

It further observed that "according to *Rollins*, *Tegman* was about joint and several liability. And there's no question that this case was not about joint and several liability." *Id.* at 35.

Finally, it reasoned:

> So in my 22 years on the bench, I've never given an instruction that says the same thing, one in the affirmative and one in the negative, and that's what *Rollins* did. It certainly is a correct statement of the law to say that, to say the same thing in the negative that you already said in the affirmative, but there's nothing in Instruction 23 that precluded the defense from arguing if the damages are not proximately caused by the defendant, you don't include them. I don't see that prohibition anywhere in these instructions. There had to be a causal relationship between the damages and the negligence of APRO in order for the jury to award damages pursuant to those instructions. They have to be read as a whole. When you read them as a whole, I believe they accurately state the law. They accurately allow both parties to argue their theory of the case. They are not misleading.

Id. at 33-35.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. APRO's Duty to Mr. Tisdale

This Court has long recognized that "a business owes a duty to its invitees to protect them from imminent

criminal harm and reasonably foreseeable criminal conduct by third persons" and to "take reasonable steps to prevent such harm." *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 205, 943 P.2d 286, 292 (1997). Indeed, this Court has continued to recognize the duty to protect against and prevent intentional third-party conduct in a wide variety of "special relationship" contexts. *Nivens*, 133 Wn.2d at 201 (listing cases in which Washington has recognized special relationships between common carriers and passengers, hospitals and patients, employers and employees, psychotherapists and patients, innkeepers and guests, and schools and students); *see also Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 46-47, 929 P.2d 420 (1997) (group home and disabled residents).

Washington courts also have continuously recognized the principle that there can be more than one proximate cause of harm, and independent actors can breach separate duties which in concurrence cause an

injury. *Meyers v. Ferndale Sch. Dist.*, 12 Wn. App. 2d 254, 264, 457 P.3d 483 (2020), *aff'd*, 197 Wn.2d 281, 481 P.3d 1084 (2021); *cf.* WPI 15.04.

It is a verity in this case based on the jury's findings that APRO breached its duty to protect Mr. Tisdale from or prevent foreseeable criminal conduct on its premises, leading to the assailant's brutal assault.

B. Division Two's Interpretation of *Tegman* Conflicts with RCW 4.22.070's Express Language and Decisions of This Court and the Court of Appeals

As this Court recently reiterated, rather than extrapolating a "broad proposition" from a case's holding, all opinions "must be read in the context of the particular facts, procedure, and legal arguments presented." *Norg v. City of Seattle*, 200 Wn.2d 749, 760-61, 522 P.3d 580 (2023).

Tegman did not create a legal doctrine or rule requiring "damages segregation" in ***all*** cases involving both

negligent and intentional tortfeasors. *Tegman* expressly stated the limitation of its damages segregation holding: "We hold that ***under RCW 4.22.070*** the damages resulting from negligence must be segregated from those resulting from intentional acts." 150 Wn.2d at 105 (emphasis added); *see also id.* at 115 (damages must be segregated "***because*** RCW 4.22.070(1)(b) only addresses liability for *at-fault* entities") (emphases added) (italics in original); 117 (damages must be segregated "[u]nder RCW 4.22.070(1)").

Factually and procedurally, *Tegman*'s damages segregation requirement arose from attempting to apply RCW 4.22.070's plain language to multiple defendants for negligent and intentional conduct. 150 Wn.2d at 106-07. The trial court entered a judgment holding the defendants jointly and severally liable for all damages. *Id.* at 107.

Tegman reaffirmed that RCW 4.22.070's fault allocation procedures are inapplicable to intentional

tortfeasors. *Id.* at 110; *see also Welch*, 134 Wn.2d at 635 (internal quotation omitted) ("[I]ntentional torts are part of a wholly different legal realm and are inapposite to the determination of fault pursuant to RCW 4.22.070(1).")

Tegman reasoned that, because "each defendant" could only be jointly and severally liable for their "proportionate share" of damages—the same term used in RCW 4.22.070(1)'s fault allocation provisions—intentional tortfeasors are "not included and will not be part of the joint and several liability calculation." *Id.* at 114. Accordingly, in the absence of joint and several liability, RCW 4.22.070(1)'s default rule that "'[t]he liability of ***each defendant*** shall be several only and shall not be joint'" controlled liability for damages caused by the intentional defendant's conduct. *Id.* at 112 (quoting RCW 4.22.070(1) (emphasis added); 115. Because the jury was unable to allocate a percentage of fault to the intentional tortfeasor to determine "each defendant['s]" "proportionate share" of

damages, the jury was required to segregate the plaintiff's damages between those caused by the defendants' negligent and intentional conduct. *Id.* at 111; 115.

Accordingly, *Tegman* never found a requirement to "segregate damages" in cases involving nonparty intentional tortfeasors to whom RCW 4.22.070 cannot apply. "*Tegman* is about joint and several liability" under RCW 4.22.070—namely, how to effectuate RCW 4.22.070's mandate of several liability when its joint and several liability and allocation of fault procedures are inapplicable to an intentional tortfeasor ***defendant***. *Rollins*, 148 Wn. App. at 379.

Unlike *Tegman*, here it was undisputed there was no issue of RCW 4.22.070 joint and several liability. "Joint and several liability under our statutory scheme is a term of art which requires an actual judgment against both tortfeasors." *Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 449, 986 P.2d 823 (1999) (quoting *Kottler v. State,* 136

Wn.2d 437, 449, 963 P.2d 834 (1998)) (footnote omitted) (emphasis in original); *see also Kottler,* 136 Wn.2d at 447 n. 9 (internal quotation omitted) ("[A] person is not liable to the plaintiff at all, much less jointly and severally, if he or she has not been named by the plaintiff."). "[T]here is no issue of joint and several liability" in cases with the same material facts as this one: a case where "Metro was the only defendant and negligence is the plaintiffs' only theory." *Rollins*, 148 Wn. App. at 379.

Absent a plaintiff suing an intentional tortfeasor as in *Tegman*—thereby requiring a damages segregation procedure to effectuate several liability under RCW 4.22.070—"***there is no need to instruct the jury to segregate damages caused by intentional conduct***." *Rollins*, 148 Wn. App. at 372 (emphasis added). *Tegman* does not have "any bearing" on such cases. *Id.* at 381.

Instead, cases based solely on a defendant's negligent failure to protect against and prevent third-party

criminal conduct are "akin to *Welch*." 148 Wn. App. at 379 (emphasis in original). In such cases, intentional tortfeasors are not "at-fault" entities under the statute. *Tegman*, 150 Wn.2d at 110; *Id.* at 110; *Welch*, 134 Wn.2d at 635. Because "[t]he first sentence of RCW 4.22.070 restricts application of the statute" to "actions involving fault of more than one entity," RCW 4.22.070 is inapplicable. *Tegman*, 150 Wn.2d at 111; RCW 4.22.070(1).

RCW 4.22.070 did not apply to this case. By extending *Tegman*'s holding to nonparty intentional tortfeasors beyond RCW 4.22.070's plain language, Division Two contravened the legislature's intent, an intent established through multiple appellate decisions. Review is warranted. RAP 13.4(b)(1), (b)(2), (b)(4).

C. Division Two's Holding that the Trial Court's Pattern Jury Instructions and Verdict Form Were Prejudicially Misleading Conflicts with Decisions of this Court and the Court of Appeals

Division Two's holding that the pattern instructions

and verdict form were misleading because the verdict form asked the jury to determine Mr. Tisdale's "total damages" apportioned between "APRO and Tisdale alone" conflicts with decisions of this Court and the Court of Appeals requiring appellate courts to read the actual language of the verdict form and the instructions as a whole. *Canfield v. Clark*, 196 Wn. App. 191, 200, 385 P.3d 156 (2016); *see also Hue v. Farmboy Spray Co, Inc.*, 127 Wn.2d 67, 91-93, 896 P.2d 682 (1995) (verdict form term not misleading when read with relevant instructions).

Here, the verdict form asked the jury to find "plaintiff's ***amount*** of ***total*** damages." CP at 1333 (emphasis added). Instruction 23 defined the "amount of total damages" the jury was asked to determine: ""the ***total amount of such damages*** as you find were ***proximately caused by the negligence of [APRO]***." CP 1360 (emphasis added).

The pattern instructions and verdict form "focus[ed] the jury upon the damages caused by the negligent

defendant." *Rollins*, 148 Wn. App. at 381-82. As the trial court correctly reasoned, they were functionally identical to APRO's proposed instruction. They positively state the same proposition—award damages caused by APRO's negligence—that APRO's proposed instruction stated in the negative: do not award damages not caused by APRO's negligence. By limiting the jury's determination of the "total amount" of damages to those caused by APRO's negligence, they ***inherently*** required the jury to "segregate" damages solely caused by Sablan and neither asked nor permitted the jury to award such damages.

Washington law prefers giving the trial court's pattern, positively phrased instructions over APRO's individually drafted, negatively phrased instruction. *Stevens v. Gordon*, 118 Wn. App. 43, 53, 74 P.3d 653 (2003); *Terrell v. Hamilton*, 190 Wn. App. 489, 505, 358 P.3d 453 (2015) ("jury instructions framed in the negative . . . are disfavored because they can be misleading").

Additional, express verdict form or instructional language such as APRO's proposed instruction "is not required" when the instructions contain the required legal elements of a claim. *State v. Willis*, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005); *City of Seattle v. Pearson*, 192 Wn. App. 802, 821, 369 P.3d 194 (2016) (where jury instructions are otherwise sufficient, courts are not required to give a party's additional proposed instructions, even those accurately stating the law).[6]

Where the trial court's pattern instructions accurately

[6] The same is true of APRO's proposed instruction which restated the positive, pattern damages instruction from the defendant's perspective. For example, because an "error of judgment" instruction in medical malpractice cases "simply restate[s] the standard of care instruction, but from the defendant's perspective," it is "at most a supplementary instruction," is "unnecessary for a defendant to argue a defense theory," and trial courts do not err in refusing to give one. *Fergen v. Sestero*, 182 Wn.2d 794, 818, 346 P.3d 708 (2015) (Stephens, J., dissenting); *Seattle W. Indus., Inc. v. David A. Mowat Co.,* 110 Wn.2d 1, 9, 750 P.2d 245 (1988).

stated the law, Division Two's holding invaded the trial court's "considerable discretion" in "deciding how the instructions will be worded . . . and whether more specific or clarifying instructions are necessary to guard against misleading the jury." *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985); *see also Fergen v. Sestero*, 182 Wn.2d 794, 811, 346 P.3d 708 (2015) ("[e]laborating instructions . . . will not be applied on every case but should remain a tool for a judge to use when he or she decides it is appropriate").[7] Division Two's contrary holding that trial courts commit reversible error by giving the pattern instructions in cases solely alleging a defendant's negligent failure to protect against and prevent

[7] ***Giving*** APRO's ***additional*** segregation instruction potentially would have been misleading where the instructions had ***already*** inherently required "segregation." *See HBH v. State*, 197 Wn. App. 77, 95, 387 P.3d 1093 (2016) (jury instructions and verdict form were "misleading as to the segregation of damages" by creating a "risk that the jury would segregate damages twice").

third party criminal conduct warrants review. RAP 13.4(b)(1), (2), (4).

Likewise, Division Two's holding that the pattern instructions and verdict form were prejudicial and required retrial of the amount of Mr. Tisdale's damages invaded the jury's province. Our state constitution grants juries "the ultimate power" to determine "the amount of damages in a particular case." *Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 810, 490 P.3d 200 (2021) (internal quotations omitted). In order to show "appropriate deference to the jury's constitutional role as the ultimate finder of fact," courts "strongly presume the jury's verdict" that Mr. Tisdale's permanent injuries were severe enough to require $91,000,000 in compensatory damages "is correct." *Coogan*, 197 Wn.2d at 810.

As a necessary corollary, "[j]urors are presumed to follow the court's instructions" even where an appellate court feels an instruction "could have been worded better."

Id. at 807 (internal quotation omitted).[8] Here, the jury instructions neither asked nor allowed the jury to award damages solely caused by Sablan. Division Two's conclusion that it "cannot be certain" whether the jury nonetheless awarded such damages impermissibly speculates that the jury misunderstood its instructions and provides no basis for reversal. Op. 18; *Ayers By & Through Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d 747, 769, 818 P.2d 1337 (1991) (internal quotation omitted) (because the "mental processes by which individual jurors reached their conclusions . . . inhere in the verdict itself," "a verdict may not be affected by the circumstances that some jurors misunderstood the judge's

[8] Nothing rebuts that presumption. Although Division Two referenced a jury question about instruction 15, the question "does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached." *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988); Op. 8.

instructions").

Likewise, neither the trial court[9] nor the instructions prohibited APRO from arguing that Sablan, rather than its negligence, was the sole cause of some distinct portion of Mr. Tisdale's damages. As in any negligence case, instruction 23—instructing the jury to determine damages "proximately caused by [APRO's] negligence"—***allowed*** APRO to point to any evidence of damages solely caused by Sablan, not APRO's negligence. Counsel "[is] free, and, indeed, has the responsibility, to argue to the jury, the refinements of [pattern jury instructions] within the factual framework of his case." *Laudermilk v. Carpenter,* 78 Wn.2d 92, 100-01, 457 P.2d 1004 (1969).

[9] The trial court granted Mr. Tisdale's motion *in limine* precluding APRO's argument that it was "entitled to have ***any*** damages attributable to intentional conduct . . . segregated." CP 199 (emphasis added); CP 506-07, 581, 589; RP 112-13. The Court of Appeals acknowledged such arguments misstate the law because they omit the word "solely." Op. 17.

Division Two's speculatory, unsupported usurpation of the jury's determination that Mr. Tisdale's severe, permanent injuries required $91 million in compensation requires review. RAP 13.4(b)(1), (b)(2), (b)(4).

D. Division Two's Holding that Trials Courts Must Give a Damages Segregation Instruction in All Special Relationship Cases Involving Third Party Conduct Furthers Significant Trial Court Confusion and Undermines Special Relationship Duties

Finally, Division Two's opinion furthers existing confusion among courts and severely undermines special relationship protective duties.

First, a pre-*Rollins* Division One opinion and three federal court decisions concluded that *Tegman* requires juries to be instructed to segregate damages caused by nonparty intentional tortfeasors. *Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 167 P.3d 1193 (2007); *Ammons v. Washington Dept. of Soc. And Health Servs.*, No. C08-

5548 RBL, 2013 WL 139541, at *5 (W.D. Wash. Jan. 10, 2013); *R.K. v. Corp. of President of Church of Jesus Christ of Latter Day Saints*, C04-2338RSM, 2006 WL 8445959, at *2 (W.D. Wash. Aug. 28, 2006); *Fleming v. Church of Latter Day Saints*, 275 Fed. Appx. 626, 627 (9th Cir. 2008) (affirming *R.K.*).

In contrast, *Rollins* held that *Doe*'s damages segregation discussion was improper dicta and neither *Tegman* nor damages segregation have "any bearing" on a case where a defendant was sued for damages caused by its negligent failure to protect against intentional nonparty conduct. *Rollins*, 148 Wn. App. at 381-82.[10] One Eastern District of Washington, two Western District, five Superior Court, and Division Two and Division Three

[10] *Rollins* did not hold that trial courts are ***required*** to give the additional, sole proximate cause "segregation" instruction given there. *Id.* at 382. Just because an "instruction was given in a case does not compel its use in a different case." *Terrell*, 190 Wn. App. at 506.

Commissioner decisions have similarly ruled. *Christensen v. Royal School Dist. No. 160,* 2006 WL 2237671 (8/3/06, E.D. Wash.); **APPENDIX H-T**. Uniformity of Washington law on the issue of whether a damages segregation instruction is mandatory in such cases requires review. RAP 13.4(b)(4).

Likewise, Division Two's holding that a defendant is ***entitled*** to a damages segregation instruction in ***all*** such cases undermines defendants' special relationship duties. Jury instructions and closing argument "must be restricted to the facts in evidence . . . lest the jury be confused or misled." *State v. Perez-Cervantes*, 141 Wn.2d 468, 474-75, 6 P.3d 1160 (2000) (trial court properly prohibited unsupported argument regarding "alternative cause" of death); *Jaeger v. Cleaver Constr., Inc*., 148 Wn. App. 698, 716, 201 P.3d 1028 (2009).

Although APRO and Sablan concurrently caused Mr. Tisdale's damages, no evidence demonstrated Sablan was

the ***sole*** cause of ***some portion*** of his damages.[11] By baselessly injecting into the jury's deliberations the issues of another "sole proximate cause" and damages that ***must*** be segregated, a segregation instruction confusingly misleads the jury to offload some or all liability for damages from a negligent defendant to nonparty tortfeasors. The detrimental effect of such a requirement on special relationship duties warrants review. RAP 13.4(b)(4).

[11] The Court of Appeals referenced *Tegman*'s language regarding segregation of "indivisible" damages as its basis for concluding that evidence that both APRO's negligence and Sablan caused Mr. Tisdale's damages required a segregation instruction. Op. 11-12, 15-17. But neither RCW 4.22.070 nor *Tegman* apply to this case. Where they are inapplicable, APRO is liable for indivisible damages and bears the burden of proving they are capable of segregation. *Cox,* 141 Wn. 2d at 444.

RESPECTFULLY SUBMITTED this 6th day of April 2023.

The undersigned certifies that this petition consists of 4,997 words in compliance with RAP 18.17.

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CERTIFICATE OF SERVICE

I, Kathryn Purdue, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on April 6, 2023, I delivered via the Court's filing portal a true and correct copy of the above document, directed to:

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DATED this 6th day of January 2023.

/s/ Kathryn Purdue
Kathryn Purdue
Legal Assistant

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

December 28, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WILLIAM TISDALE, Respondent, v. APRO LLC, a Delaware Limited Liability Corporation and JOHN DOES 1-10, Appellants.	No. 56067-4-II PART PUBLISHED OPINION

GLASGOW, C.J.—Terrence Sablan entered a convenience store owned by APRO LLC and attempted to rob the store. William Tisdale entered the store in the midst of the robbery, and the clerk asked Tisdale to call 911. When Sablan left the store, he began rummaging through Tisdale's unlocked car in the parking lot. Tisdale confronted Sablan in the parking lot, and Sablan repeatedly struck Tisdale with an aluminum baseball bat, fracturing his skull and requiring hospitalization. After the assault, Tisdale began having seizures and he experienced cognitive and other related symptoms of brain injury.

Tisdale sued APRO for negligence based on its failure to ensure customer safety in compliance with industry standards. Sablan was not named as a defendant.

The trial court refused to instruct the jury to segregate damages caused solely by Sablan's intentional conduct and not proximately caused by APRO's negligence, even though both parties sought such an instruction. When APRO told the jury in closing argument that Washington law required it to segregate damages caused by intentional tortfeasors, the trial court sustained an

objection to the argument as a misstatement of law. Furthermore, the special verdict form did not allow the jury to segregate damages attributable to Sablan.

The jury found that APRO was negligent and that Tisdale was contributorily negligent and responsible for 10 percent of his own damages. After deducting Tisdale's contributory portion, the jury awarded Tisdale $81.9 million in damages. The trial court then denied APRO's motion for remittitur or a new trial.

APRO appeals. It argues the trial court erred by refusing to issue the proposed jury instruction on segregation of damages. APRO asks this court to reverse the damage award and remand for a new trial.

In the published portion of this opinion, we hold that the trial court erred when it failed to instruct the jury to segregate damages proximately caused by APRO's negligence from damages caused solely by Sablan's intentional conduct. When combined with the special verdict form and the sustained objection at closing argument, this lack of instruction was a misstatement of law, misleading, and prejudicial.

We remand for retrial on damages only. The fact finder must first determine the total amount of damages and then segregate the portion of the total damages, if any, caused solely by Sablan's intentional conduct. The jury's determination that Tisdale is 10 percent contributorily negligent need not be relitigated, so the trial court must then apportion to Tisdale 10 percent of the remainder after segregation, and APRO will be responsible for 90 percent of the remainder after segregation.

We resolve the remaining issues APRO has raised on appeal in the unpublished portion of this opinion.

FACTS

I. BACKGROUND

One night in November 2015, Sablan entered a convenience store that APRO owned and asked the clerk to call the police because he was being followed. After a few moments he changed his mind and left the store. Several minutes later, Sablan returned to the store and removed cigarettes from a rack near the cash register, indicating that he intended to leave without paying for them. The clerk took the cigarettes out of Sablan's hand and pointed to the store's security cameras. Sablan then threatened the clerk with a baseball bat and ordered the clerk to open the store's safe. Tisdale entered the store, and the clerk asked Tisdale to call the police. Sablan then left the store. The clerk called 911.

Tisdale's unlocked car was in the parking lot near the store's door. Sablan began to rifle through Tisdale's car. While the clerk was on the phone with emergency services, Tisdale left the store and confronted Sablan in the parking lot. Sablan struck Tisdale multiple times in the head with the baseball bat. Sablan then took Tisdale's keys and drove away in Tisdale's car.

When he was taken to a hospital, imaging showed that Tisdale had multiple skull fractures, bleeding inside his brain, and damage to his brain's frontal and temporal lobes. After the incident, Tisdale began having seizures, vision problems, and tinnitus. He reported depression, anxiety, and post-traumatic stress disorder. A MRI in 2019 showed that part of Tisdale's brain had atrophied and would not recover. Cognitive problems limited his ability to live alone or retain jobs requiring complex tasks.

II. PRETRIAL

In 2019, Tisdale sued APRO, alleging that APRO "negligently failed to adopt, implement[,] and enforce industry standards or policies and procedures to ensure customer safety and security," causing his injuries. Clerk's Papers (CP) at 11. He also alleged that the clerk, as APRO's employee, negligently failed to comply with industry standards and APRO's polices to ensure Tisdale's safety as a business invitee. Tisdale sought damages for his physical injuries, past and future medical expenses, pain and suffering, mental and emotional distress, loss of enjoyment of life, and loss of earning potential. Tisdale later expressly abandoned his claims for lost wages and past medical expenses.

APRO alleged in its answer that Tisdale was partially responsible for his own injuries and that Sablan's and Tisdale's actions were the proximate cause of Tisdale's injuries. Relying on *Tegman v. Accident & Medical Investigations, Inc.*,[1] APRO asserted that damages from Sablan's intentional acts "must be segregated from" any damages assigned to APRO. CP at 23.

During motions in limine, Tisdale moved to exclude any testimony or argument that would allow the jury "to apportion fault to a non-party intentional tortfeasor" such as Sablan. CP at 145. Tisdale argued that under *Welch v. Southland Corp.*,[2] a case that predated *Tegman,* a negligent defendant "was not allowed to segregate damages to [an intentional tortfeasor]." CP at 146. In return, APRO moved to exclude testimony and argument that sought damages from APRO that were solely attributable to Sablan's intentional conduct or Tisdale's own conduct, relying on

[1] 150 Wn.2d 102, 75 P.3d 497 (2003).

[2] 134 Wn.2d 629, 952 P.2d 162 (1998).

Tegman and Division One's more recent decision in *Rollins v. King County Metro Transit*.[3] APRO argued that a negligent defendant cannot be forced to pay damages stemming *solely* from the intentional tort of a nonparty, here Sablan.

The trial court disagreed. Citing *Welch*, the trial court reasoned that "a defendant is not entitled to apportion liability to an intentional tortfeasor." CP at 589. The trial court denied APRO's motion and granted Tisdale's motion.

III. JURY INSTRUCTIONS AND VERDICT

A. Instruction on Segregating Damages

APRO proposed a jury instruction that would have told the jury to segregate damages caused by APRO's negligence from damages caused solely by Sablan's intentional torts, consistent with the instruction given in *Rollins*:

> In calculating a damage award, you must not include any damages that were caused by intentional act[s] of a non-party and not proximately caused by negligence of the defendant. Any damages proximately caused by the intentional act[s] of a non-party and not proximately caused by negligence of the defendant must be segregated from and not made a part of any damage award against the defendant.

CP at 629 (alterations in original). Tisdale proposed a similar instruction. The first sentence was functionally identical, while Tisdale's second sentence read, "Any damages caused solely by Terrence Sablan and not proximately caused by the negligence of APRO, LLC, must be segregated from and not made a part of any damages award against APRO." CP at 993. The trial court's instructions to the jury did not include either party's proposed language on segregation.

[3] 148 Wn. App. 370, 199 P.3d 499 (2009).

Instead, the trial court's instruction 15 closely tracked Washington Pattern Instruction 15.04 to explain that injuries can have multiple proximate causes and that the jury should find for APRO "if you find that the sole proximate cause of injury or damage to the plaintiff was the act of some other person who is not a party to this lawsuit." CP at 1352; *see* 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CIVIL 15.04, at 203 (7th ed.) (WPI). APRO did not contend instruction 15 was incorrect, only that the trial court should also have given an instruction on segregation of damages.

Instruction 23 addressed contributory negligence, but not segregation of damages caused solely by intentional torts. It instructed that if the jury ruled for Tisdale, "then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of [APRO], apart from any consideration of contributory negligence." CP at 1360.

APRO objected to instruction 23, seeking "a separate *Rollins* instruction that tracks the actual language from the case. It should be a standalone . . . or independent instruction." 10 Verbatim Report of Proceedings (VRP) at 1944-45. A *Rollins* instruction would have told the jury that the damage award against APRO must not include any damages caused by Sablan's intentional acts that were not proximately caused by APRO's negligence. 148 Wn. App. at 379.

APRO also proposed a special verdict form that asked if Sablan acted intentionally, and if that intentional conduct was a proximate cause of Tisdale's injury. It then asked, "Was Terrence Sablan's intentional conduct the sole proximate cause of a portion of injury to Plaintiff?" and, "What percentage of injury to Plaintiff was proximately caused by Terrence Sablan's intentional conduct?" CP at 983. It included a direction: "You must segregate the damages attributable to

Terrence Sablan's intentional conduct that proximately caused injury to Plaintiff and not include them as part of any damage award [for negligence]." CP at 983 (emphasis omitted).

The trial court declined to give the jury APRO's special verdict form. The special verdict form that the trial court instead adopted asked the jury to determine if APRO was negligent and whether that negligence was a proximate cause of Tisdale's injury. The form then asked, "What do you find to be the plaintiff's amount of total damages? Do not consider the issue of contributory negligence, if any, in your answer." CP at 1333 (boldface omitted). The verdict form also asked the jury to determine if Tisdale was negligent and if his negligence was a proximate cause of his own injury. The verdict form then read, "Assume that 100% represents the total combined fault that proximately caused the plaintiff's injuries. What percentage of this 100% is attributable to the negligence of APRO LLC [and] what percentage of this 100% is attributable to the plaintiff's negligence? Your total must equal 100%." CP at 1334. The verdict form allowed the jury to divide the 100 percent of fault only between APRO and Tisdale. Nothing in the instructions or special verdict form explained any difference between apportioning fault or liability on one hand and segregating damages on the other hand.

APRO objected to the special verdict form because it "does not provide the jury the opportunity to segregate what portion of plaintiff's damages were caused by Sablan's intentional conduct . . . . It's only reasonable for the jury to show that the jury actually did that in the verdict form." 10 VRP at 1945. The trial court did not modify any of the instructions or the verdict form as a result of APRO's objections.

B. Closing Argument and Verdict

APRO returned to the issue of segregating damages during its closing argument: "[I]n Washington, the law states that the jury must segregate damages caused by intentional tortfeasors. That would be Mr. Sablan." 11 VRP at 2013. Tisdale objected, arguing that the comment was a misstatement of the law, and the trial court sustained the objection.

The jury asked a question during deliberations, seeking "'clarification'" on instruction 15, which explained proximate cause and told the jury it should return a verdict for APRO if it found that a nonparty was the sole proximate cause of Tisdale's injuries. 12 VRP at 2033. The trial court instructed the jury to "'reread the instructions as a whole.'" *Id.* at 2034.

The jury found APRO negligent and that APRO's negligence proximately caused Tisdale's injuries, and the jury concluded Tisdale was entitled to $91 million in damages. The jury found that Tisdale was contributorily negligent and responsible for 10 percent of his damages, leaving APRO responsible for 90 percent of the damages, or an award of $81.9 million.

Reiterating many of the arguments recited above, APRO moved for a new trial, and the trial court denied the motion. APRO timely appealed.

ANALYSIS

I. SEGREGATION OF DAMAGES INSTRUCTION

APRO argues that the trial court erred by refusing to instruct the jury to segregate the damages caused by APRO's negligence from the damages caused solely by Sablan's intentional conduct. APRO contends that the verdict form compounded the instructional error by not allowing the jury to segregate damages between those arising from Sablan's intentional conduct from APRO's negligence. And APRO argues that it was prejudiced when the trial court refused its

proposed instruction and when the trial court sustained an objection to APRO's closing argument about segregating damages. We agree and remand for a new trial solely on the issue of damages.

We review the language and wording of jury instructions for abuse of discretion. *In re Det. of Taylor-Rose*, 199 Wn. App. 866, 880, 401 P.3d 357 (2017). We also review a decision to not issue a jury instruction for abuse of discretion. *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 120, 323 P.3d 1036 (2014). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *Taylor-Rose*, 199 Wn. App. at 880. But claims of legal error in jury instructions are reviewed de novo. *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 849, 348 P.3d 389 (2015).

"'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'" *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). "If any of these elements are absent, the instruction is erroneous." *Id.* An erroneous instruction that prejudices a party is reversible error. *Id.* "Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading." *Id.* Misleading closing argument can contribute to prejudice. *Id.* at 876.

A. Segregation of Damages

RCW 4.22.070(1) provides, "In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages." The entities whose percentage of fault the trier of fact should determine include the plaintiff, "defendants, third-party defendants, entities released by the

claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant." RCW 4.22.070(1). The definition of "fault" in chapter 4.22 RCW does *not* include intentional torts. RCW 4.22.015.

In *Welch*, a convenience store patron was robbed and shot by another patron who was never found. 134 Wn.2d at 631. Welch sued the store for failing to maintain a safe premises for business invitees, and the store argued as an affirmative defense that any *fault* should be apportioned with the intentional acts of the robber and Welch's own negligence. *Id*. Welch moved for partial summary judgment to strike the apportionment defense, which the trial court denied. *Id*. The Supreme Court then reversed, holding, "Intentional acts are not included in the statutory definition of 'fault,' and a defendant is not entitled to apportion *liability* to an intentional tort-feasor." 134 Wn.2d at 630 (emphasis added) (citing RCW 4.22.015).

Several years later, in *Tegman*, the Supreme Court addressed joint and several liability for negligent tortfeasors, but also discussed segregation of *damages* where there are both intentional and negligent tortfeasors. 150 Wn.2d at 115. Tegman sued a law firm and several of the firm's staff and attorneys for negligence and an array of intentional torts. *Id.* at 106-07. A nonlawyer in the firm had forged Tegman's signature on a settlement agreement without telling Tegman about it and retained the resulting settlement money in a nontrust account. *Id.* at 106. A jury found two attorneys and a paralegal liable for negligence and legal malpractice and held them jointly and severally liable for all of the damages awarded. *Id*. at 107. One of the attorneys who was solely negligent appealed, arguing that she should not be jointly and severally liable with intentional tortfeasors. *Id*. She asserted the "damages due to intentional torts must be segregated, and that

under RCW 4.22.070(1)(b) she [was] jointly and severally liable only for . . . that portion of the damages resulting from negligent acts." *Id.* at 107-08.

The Supreme Court agreed and held that "the damages resulting from negligence must be segregated from those resulting from intentional acts" and that once the intentional damages had been segregated, the defendants who were negligently at fault within the meaning of RCW 4.22.070(1) were jointly and severally liable "as to all remaining damages." *Id*. at 105, 115. Thus, the attorney who was only negligent was not liable for any of Tegman's damages that resulted from intentional torts. *Id*. at 119. The Supreme Court remanded for segregation of damages. *Id*. at 119-20.

The Supreme Court also explained that this segregation should occur even in cases where the harm is indivisible, like in *Tegman* where negligent parties failed to protect the plaintiff from others who intentionally inflicted harm. *See id.* at 116-18. The court reasoned, "'It does not follow that simply because the harm is indivisible that there is no basis for apportionment. It is the responsibility for causing the harm that should be the focus of the inquiry.'" *Id.* at 117 (internal quotation marks omitted) (quoting Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 41 (1992)).

The *Tegman* dissent explained that the majority opinion significantly changed the law. First, the majority disrupted the prior common law rule that "negligent actors could not reduce their liability by comparing fault to intentional actors, though they could [under *Welch*] reduce their liability by the fault of negligent parties." *Id.* at 123 (Chambers, J., dissenting). Similarly, the majority's holding did away with the prior rule that, when one actor's negligence allowed another

actor to commit an intentional tort, "the negligent tortfeasor could not expect any reduction of liability." *Id*. at 127 (Chambers, J., dissenting). Nevertheless, the majority maintained that damages arising from intentional torts had to be segregated and that segregation of negligent and intentional damages was feasible even in cases involving indivisible harm. *Id*. at 117.

Then in *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, plaintiffs who were sexually abused by their stepfather sued both their stepfather and the church for intentional infliction of emotional distress, and they included a claim of negligence against the church for failure to protect. 141 Wn. App. 407, 414, 167 P.3d 1193 (2007). Division One interpreted *Tegman* to hold that it was appropriate for the trial court to instruct the jury "to segregate damages resulting from negligence from those resulting from intentional acts." *Id.* at 438. The *Doe* court emphasized the Supreme Court's reasoning that an indivisible harm does not prevent the segregation of damages between negligent and intentional tortfeasors. *Id*. at 440.

Division One reaffirmed that interpretation two years later in *Rollins*. Rollins and others were attacked by a group of unknown teenagers on a King County Metro bus. 148 Wn. App. at 373-75. The plaintiffs sued only King County Metro for negligence and not any of the assailants. *Id*. at 372-73. The trial court specifically instructed the jury to segregate damages:

> "In calculating a damage award, you must not include any damages that were caused by acts of the unknown assailants and not proximately caused by negligence of the defendant. Any damages caused solely by the unknown assailants and not proximately caused by negligence of defendant King County must be segregated from and not made a part of any damage award against King County."

Id. at 379 (quoting record). King County Metro argued that the trial court should have been required to issue additional instructions placing the burden on the plaintiffs to establish the percentage of damages resulting from negligent versus intentional conduct. *Id*. at 380. Division

One disagreed, explaining, "How to instruct on damages will often depend upon the circumstances of the case, which is one reason for the discretion invested in the trial judge. Here, the practical question was how to focus the jury upon the damages caused by the negligent defendant." *Id*. at 382 (footnote omitted). "The instructions accomplished that and properly stated the law." *Id*. Thus, the *Rollins* court relied in part on the jury instruction to affirm in that case, where the intentional tortfeasors were not defendants and where the harm was arguably indivisible because the claim against King County Metro involved a failure to protect against violence from other riders. *Id.* at 373, 382.

In sum, the *Tegman* court held that damages must be segregated among named defendants between intentional and negligent tortfeasors, even when the harm is indivisible. 150 Wn.2d at 117. And Division One has applied *Tegman* to uphold the initial segregation of damages between *nonparty* intentional tortfeasors and negligent defendants. *Rollins,* 148 Wn. App. at 382.

We agree with Division One and further conclude that where an intentional tortfeasor is not a party, the trial court must give a *Rollins* instruction to the jury. In cases with both allegedly negligent defendants and nonparty intentional tortfeasors, the trial court must include an instruction ensuring the jury understands that any damages caused solely by the intentional tortfeasor and not proximately caused by negligence of the defendant must be segregated from and not made a part of any damage award against the negligent defendant. *See id.*

B. Instructions in the Present Case

Both Tisdale and APRO proposed instructions that were similar to the one that Division One found to be sufficient in *Rollins*, but the trial court did not give either instruction to the jury. *See Crittenden v. Fibreboard Corp.*, 58 Wn. App. 649, 655, 794 P.2d 554 (1990). Instead, the trial

court gave instruction 15, modeled on WPI 15.04, explaining that injuries can have multiple proximate causes and that the jury should find for APRO "if you find that the sole proximate cause of injury or damage to the plaintiff was the act of some other person who is not a party to this lawsuit." CP at 1352. The trial court also gave instruction 23, which APRO objected to, telling the jury that if it found for Tisdale, it had to "first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of [APRO], apart from any consideration of contributory negligence." CP at 1360.

APRO also objected to the special verdict form, which allowed the jury to apportion 100 percent of the "total combined fault" between APRO and Tisdale alone, and the form required the responsibility of these two parties to add up to 100 percent. CP at 1334. Nothing in the special verdict form or in the jury instructions distinguished between apportioning fault and segregating damages. The special verdict form did not allow the jury to find Sablan responsible for any portion of Tisdale's damages.

The trial court was correct that *Tegman* addressed the joint and several liability of at-fault defendants when the plaintiff is not at fault. 150 Wn.2d at 118-19. But the *Tegman* court also held that at-fault defendants "are not jointly and severally liable for the intentionally caused damages" that their conduct did not proximately cause. *Id*. at 119.

Here, the trial court's instructions and the verdict form required the jury to "*first* determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you *find were proximately caused by the negligence of* [*APRO*]," but the instructions identified only contributory negligence as a possible limiting factor. CP at 1360.

Unlike in *Rollins*, the instructions did not expressly tell the jury that it should segregate damages caused solely by Sablan from damages caused by APRO and Tisdale. The jury should have been instructed to segregate the damages that were solely caused by Sablan's intentional acts from those that were proximately caused by APRO's and Tisdale's negligence, because damages caused solely by Sablan's intentional acts do not fall within the "total fault" contemplated by RCW 4.22.070(1). And even in cases involving a failure to protect, it is "appropriate to segregate damages resulting from negligence from those resulting from intentional acts." *Doe*, 141 Wn. App. at 438. Once the amount of damages attributable solely to negligent at-fault entities has been determined, that amount can be divided between a contributorily negligent plaintiff and the negligent defendant or defendants. *See Tegman*, 150 Wn.2d at 115. Only Tisdale's contributory negligence would be subtracted from APRO's liability at that stage. *See* RCW 4.22.070(1) (including plaintiff's negligence within the definition of "fault").

Given that there was substantial evidence that Sablan's intentional tort and APRO's negligence were both causes of Tisdale's injury, APRO was entitled to a *Rollins* instruction that explained the jury should segregate the damages that were caused solely by Sablan's intentional conduct and not proximately caused by APRO's negligence. *See Cooper v. Dep't of Lab. & Indus.*, 188 Wn. App. 641, 647-48, 532 P.3d 189 (2015). Without a *Rollins* instruction, the jury instructions did not correctly state the applicable law. Both the Supreme Court and Division One have emphasized that even where causes are concurrent or a harm is indivisible, a jury can segregate damages between intentional and negligent tortfeasors. *Tegman*, 150 Wn.2d at 117; *Rollins*, 148 Wn. App. at 382. And even though both parties in this case requested instructions similar to the one given in *Rollins*, the trial court gave neither. *Crittenden*, 58 Wn. App. at 655.

The jury instructions addressed only contributory negligence as a limiting factor on APRO's damages, not the segregation of intentional damages from fault-based damages resulting from negligence. It would have been proper to tell the jury to differentiate between damages proximately caused by APRO's negligence and those caused solely by Sablan's intentional conduct, but the instructions do not discuss segregation at all. Without the required segregation of damages instruction, the jury may have believed that it could hold APRO liable for *all* of Tisdale's damages, even those that it may have found were caused solely by Sablan.

Tisdale contends that an explicit *Rollins* segregation instruction was not necessary because instruction 23 told the jury that it had to start with damages proximately caused by APRO, so all of the jury's consideration of liability and damages would have naturally excluded any damages caused solely by Sablan. Although instruction 23 was true and correct as far as it went, the lack of an explicit *Rollins* instruction explaining the jury had to segregate damages caused solely by Sablan, when combined with the language in the special verdict form, did not give the jury an accurate statement of the law overall.

Moreover, the absence of a *Rollins* instruction combined with the special verdict form was misleading. Despite the presence of an intentional tortfeasor, the pattern verdict form that the trial court gave the jury considered liability and damages for only negligent conduct. But even indivisible harms may have concurrent causes with overlapping responsibility for the plaintiff's damages. *Tegman*, 150 Wn.2d at 117; *Rollins*, 148 Wn. App. at 382. The special verdict form here required the jury to determine Tisdale's "total damages" and then it used language that required apportionment between APRO and Tisdale alone, requiring their percentages to equal 100 percent. CP at 1333. Even if the jury thought that Sablan was solely responsible for a portion of Tisdale's

"total damages," there was no ability to reflect that determination in the verdict form. *Id.* Although the trial court reasoned that it did not need to affirmatively mention segregation of damages caused solely by Sablan so long as it otherwise correctly stated the law, this reasoning fails to account for the impact of the reference to "total damages" and segregation between only APRO and Tisdale in the verdict form.

As a result, the trial court's instructions, without a *Rollins* instruction, and the special verdict form did not adequately inform the jury of the applicable law. *Anfinson*, 174 Wn.2d at 860. This error was also misleading because the jury was not specifically instructed to take care to avoid penalizing APRO for damages stemming solely from Sablan's conduct that were not proximately caused by APRO's negligence. *Id*.

And even if we assume prejudice is required, APRO suffered prejudice from the misleading instructions and verdict form. During closing argument, when APRO attempted to inform the jury that it "must segregate damages caused by intentional tortfeasors," Tisdale objected to the argument as a misstatement of the law, and the trial court sustained the objection. 11 VRP at 2013. On one hand, a truly correct statement of the law would be that the jury must segregate damages caused *solely* by intentional tortfeasors and *not* proximately caused by the defendant's negligence. Nevertheless, the trial court's refusal to allow APRO to argue about segregation of damages arising solely from Sablan's intentional tort undermines Tisdale's argument on appeal that the trial court's instructions as given allowed APRO to fully argue just that.

The verdict form gave the jury no indication that it could segregate damages caused solely by Sablan's intentional conduct. Even if this case presents concurrent causes of indivisible harm, the Supreme Court and Division One have held that an indivisible harm can still lead to damages

that are segregable between intentional and negligent tortfeasors. *Tegman*, 150 Wn.2d at 117; *Doe*, 141 Wn. App. at 438. Thus, the lack of a *Rollins* instruction and the language of the verdict form prejudiced APRO.

CONCLUSION

It was legal error for the trial court to decline to give a *Rollins* instruction on segregating damages when the case involved a negligent defendant and a nonparty intentional tortfeasor. And collectively, the lack of a *Rollins* instruction, the sustained objection regarding segregation during closing, and the special verdict form were both misleading and prejudicial.[4]

Because of the way the instructions and special verdict form were presented to the jury, we cannot be certain whether the $91 million verdict represented the total amount of damages caused by intentional tortfeasors and negligent parties or only the amount caused by negligent parties. Therefore, we must remand for retrial on damages. After calculating Tisdale's total damages, the fact finder must segregate the portion of the total damages, if any, solely caused by Sablan's intentional conduct. The jury's determination that Tisdale is 10 percent contributorily negligent need not be relitigated, so the trial court must then apportion to Tisdale 10 percent of the remainder after segregation, and APRO will be responsible for 90 percent of the remainder after segregation.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

[4] For the same reasons, the trial court erred in not recognizing this error posttrial when APRO brought a motion for a new trial under CR 59. In light of the error of law in the jury instructions and verdict form, the trial court should have granted a partial new trial on damages. CR 59(a)(8).

UNPUBLISHED TEXT

After trial began, APRO moved to compel Tisdale to attend trial. The trial court denied APRO's motion because of APRO's failure to provide timely notice requiring Tisdale's attendance under CR 43. The trial court allowed the jury to watch a recording of Tisdale's deposition but denied APRO's motion to admit a recent surveillance video of Tisdale as an alternative to compelling his appearance. The trial court also declined to instruct the jury on the definition of a "business licensee" in contrast to a "business invitee."

APRO argues the trial court erred when it denied its request that the trial court instruct the jury on the definition of a "business licensee," denied its motion to compel Tisdale to attend trial, and excluded the surveillance video. APRO also contends that the trial court erred by denying its posttrial motion for remittitur.

We hold the trial court did not abuse its discretion when it declined to instruct the jury on the definition of a "business licensee," denied the motion to compel Tisdale to appear at trial, and excluded the surveillance video. We need not address the motion for remittitur.

ADDITIONAL FACTS

I. TRIAL

A week before trial, both APRO and Tisdale submitted witness lists naming Tisdale as a potential witness. Tisdale, along with over 100 others, was also listed as a possible witness in the joint statement of evidence. APRO did not send Tisdale's counsel a CR 43 notice before trial to compel Tisdale's attendance and testimony as an adverse party witness.

Trial began on June 2, 2021. Before opening statements, Tisdale's counsel stated that Tisdale would not be attending the trial. The next day, APRO moved to require Tisdale to attend

the trial, arguing that Tisdale was "listed as a witness in both parties' cases, and he hasn't been here the entire time." 4 VRP at 632. Tisdale responded that APRO had not followed the procedure for compelling attendance of an adverse party under CR 43(f)(1), which required 10 days notice before trial. When the trial court asked whether Tisdale would be testifying, Tisdale's counsel said, "I don't know. I can't answer that question, I really can't." *Id*. at 633. APRO continued to protest: "We're happy to bring a motion of a notice to attend trial and on a motion to shorten time if we need to do that, but it's our position that they're just keeping him away from the jury at this point in time." *Id*. The trial court reasoned that "in the absence of a motion or a notice," there is no "requirement that a party actually attend their trial." *Id*. The trial court denied the motion.

Tisdale's doctor testified that watching videos of the assault or attending the trial would likely aggravate Tisdale's post-traumatic stress disorder. Watching a video of the assault during his deposition had triggered a panic attack.

The following day, APRO filed a written motion to compel Tisdale to attend the trial under CR 43 and to shorten the time for serving a notice to appear at trial under CR 6. In response, Tisdale again pointed out that APRO had not timely served Tisdale with a notice to testify in compliance with CR 43(f). APRO's counsel orally raised the motion again a few days later, explaining that he believed Tisdale's counsel was "concealing" Tisdale from the jury. 5 VRP at 812. The trial court disagreed, explaining, "First, there's no requirement that a party attend trial. Second, the fact that somebody puts anybody on their witness list, including their own client, doesn't require them to produce them at trial." *Id.* at 1033. Because APRO had failed to follow the CR 43(f) procedures for compelling Tisdale's attendance, the trial court denied the motion.

In light of the ruling, APRO moved to admit Tisdale's videotaped deposition under CR 32, which allows the use of a witness's deposition when the witness is unable to testify. Tisdale opposed the use of the deposition, again arguing that there had not been sufficient notice. The trial court allowed APRO to play Tisdale's deposition on the basis that APRO had relied on Tisdale testifying at trial, explaining, "[I]f you're not going to produce Mr. Tisdale live, I think that the defense is well within the rules to play the deposition." 7 VRP at 1406.

APRO also moved to admit a surveillance video of Tisdale recorded by private investigators during the trial, which showed Tisdale driving. It also showed him walking with another person who was carrying alcohol. Tisdale's counsel stated that Tisdale's reason for not attending the trial was because he suffered post-traumatic stress disorder, not because he was incapable of running errands or driving. The trial court denied the motion, reasoning that APRO could have compelled Tisdale's appearance if they had followed CR 43 procedures and that the surveillance video was not a substitute for appearance.

APRO then argued that the video was admissible as impeachment evidence to undercut Tisdale's claim for damages and to raise questions in the jury's mind about Tisdale's failure to attend the trial. "They are claiming that he has complete disability and . . . can't manage his own daily affairs. He no longer consumes alcohol and he cannot drive. The surveillance video clearly contradicts that testimony." 9 VRP at 1643. The trial court declined to change its ruling.

Throughout the trial several witnesses testified about the extent of Tisdale's injuries, their effect on his daily living, and the services he would need going forward. For example, Tisdale, who was a former professional dancer, briefly worked at a cannabis dispensary after the assault. His supervisor from the dispensary testified that, while Tisdale could perform his duties as a

cashier, when he was promoted to assistant manager, he could not perform necessary tasks such as tracking cash deposits and scheduling, and he was fired.

A neurosurgeon testified that a 2019 MRI of Tisdale's brain showed that part of Tisdale's brain tissue had died, leaving scar tissue that "often serve[s] as a focus for seizures." 5 VRP at 864. The neurosurgeon stated that because of the damage to his brain, Tisdale was at high risk for depression, memory problems, and loss of executive function. He also had an increased risk of dementia from the brain damage and a reduced life expectancy because of his seizures.

Tisdale's primary doctor testified that Tisdale "had several episodes of multiple seizures" in the years since the assault. 4 VRP at 763. Tisdale's doctor also testified that Tisdale suffered from memory and concentration issues that caused him to frequently forget to take the medication for his seizures. Tisdale would benefit from a home care companion to help him remember to take his medications and attend appointments. A life planner testified that the annual cost of a home care companion was approximately $215,000 per year, with a total cost of roughly $7,670,000 to $9,250,000 over Tisdale's projected lifespan.

After Tisdale rested, APRO moved for a directed verdict under CR 50 that Tisdale lost his status as a business invitee and became a business licensee, when he left the store to confront Sablan. If Tisdale were a licensee instead of an invitee, then APRO would have had a lesser duty to protect him from dangerous conditions on APRO's property. *See* RESTATEMENT (SECOND) OF TORTS §§ 342, 344 (AM. L. INST. 1965). The trial court denied the motion, explaining that Tisdale had not left APRO's property when he pursued Sablan into the store's parking lot, so he had retained his business invitee status throughout the incident.

APRO played Tisdale's deposition during the presentation of its case. The deposition had been taken approximately seven months before the trial. In the deposition, Tisdale acknowledged that he had continued to consume alcohol after the assault despite his health care providers' recommendations not to. He denied currently consuming alcohol. He also stated that he had instructions to not operate vehicles for six months after a seizure, although he had continued to do so. Tisdale admitted that his driver's license was currently suspended, although he was not sure why.

II. Additional Jury Instructions and Closing Argument

Instruction 11 defined a "business invitee" as "a person who is either expressly or impliedly invited onto the premises of another for some purpose connected with a business interest or business benefit." CP at 1348. APRO proposed additional jury instructions defining a "business licensee," the duty of care owed to a business licensee, and how a business invitee becomes a licensee by exceeding the scope of their invitation. When the trial court declined to give APRO's proposed instructions to the jury, APRO objected, arguing that Tisdale "strayed from the store and went from a passive bystander to a proactive party by charging Sablan. His status [had] changed from a business invitee to a licensee, so . . . we think it would have been appropriate to provide the definition of a [']licensee.[']" 10 VRP at 1944.

Instead, the trial court's instruction 10 explained to the jury that an owner of a business owed a duty of care "to a person who has an express or implied invitation to come upon the premises," and the duty was "to exercise ordinary care to protect the person from criminal harm that the operator knows or has reason to know is occurring or about to occur and reasonably foreseeable criminal conduct by third persons." CP at 1347.

Instruction 23 informed the jury, "The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions." CP at 1361.

During closing argument, Tisdale reminded the jury that he had lost the use of brain tissue, which affected his memory, attention, and moods. He referenced the expert testimony from multiple doctors agreeing that Tisdale's seizure disorder was permanent. Tisdale drew a comparison to the salaries of professional athletes and corporate executives to argue that if other corporations "are valuing their assets at hundreds of millions of dollars, then APRO should be valuing their assets and their customers who are coming in and buying their products." 11 VRP at 1979. He contended that the value of his damages was $91 million. APRO did not object to Tisdale's closing argument.

III. MOTION FOR NEW TRIAL OR REMITTITUR

After the jury's verdict, APRO moved for a new trial or in the alternative, remittitur of the verdict to $15 million, reiterating many of the arguments recited above.

The trial court rejected APRO's reiterated legal arguments and found that substantial evidence supported the jury verdict and damage award. It reasoned that there was conflicting testimony from multiple experts at trial regarding the extent and lifetime consequences of Tisdale's injuries. The trial court reasoned that the jury had found some expert testimony more compelling than others and denied the motion for new trial or remittitur. APRO then appealed the denial of the motion.

ANALYSIS

I. BUSINESS LICENSEE INSTRUCTION

APRO argues that the trial court erred by declining to instruct the jury on the definition of a "business licensee," and had the jury found Tisdale was merely a licensee at the time of the assault, that would have reduced APRO's duty of care. APRO contends the jury should have been asked to determine as a factual matter whether Tisdale became a licensee when he left APRO's store to confront Sablan in the parking lot. APRO claims the instructions instead told "the jury that Tisdale was an invitee as a matter of law." Am. Br. of Appellant at 41. We disagree.

When the possessor of land allows public entry for business purposes, they may be liable "to members of the public . . . for physical harm caused by . . . intentionally harmful acts of third persons" and for the failure of the possessor to discover the danger and warn visitors or otherwise protect against it. RESTATEMENT, *supra*, § 344. The fact that a danger is generally known to the person injured does not necessarily insulate the possessor of the land from liability. *Ford v. Red Lion Inns*, 67 Wn. App. 766, 770, 840 P.2d 198 (1992).

In contrast, a possessor of land is liable for harm to licensees caused by conditions on their land if the possessor "knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger," "fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk," and "the licensees do not know or have reason to know of the condition and the risk involved." RESTATEMENT, *supra*, § 342.

We note that the denial of a CR 50 motion for a directed verdict does not constitute a ruling as a matter of law. *See Morton v. Lee*, 75 Wn.2d 393, 397-98, 450 P.2d 957 (1969) (affirming

the denial of a motion for a directed verdict because reasonable minds could differ on the factual issue, which was a question for the jury).[5] When there is conflicting evidence about a plaintiff's status as a licensee or invitee, it is proper to submit the question to the jury. *Adkins v. Alum. Co. of Am.*, 110 Wn.2d 128, 149-50, 750 P.2d 1257 (1988). However, when the facts regarding a plaintiff's entry onto a property are uncontested, "the legal status of the entrant as invitee, licensee, or trespasser is a question of law." *Ford*, 67 Wn. App. at 769.

Here, it was undisputed that the convenience store was open to the public, that the parking lot was a part of APRO's property, and that Tisdale entered the property for a business purpose as a customer of the convenience store. Accordingly, Tisdale was a business invitee.

In *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 205, 943 P.2d 286 (1997), the Supreme Court expressly adopted *Restatement* § 344 to hold that "a business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons. The business owner must take reasonable steps to prevent such harm in order to satisfy the duty." There is no duty "unless the harm to the invitee by third persons is foreseeable," which "is ordinarily a fact question" for the jury. *Id.*; *see also McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 768, 344 P.3d 661 (2015) (explaining that with regard to *Restatement* § 344, "foreseeability is not merely used to determine the scope of a duty already owed, it is a factor in determining whether the duty is owed in the first place"). While foreseeability is generally

[5] "A trial court may grant a motion for a directed verdict only if there is no evidence or reasonable inference which would support a jury verdict in favor of the nonmoving party." *Bays v. St. Lukes Hosp.*, 63 Wn. App. 876, 880, 825 P.2d 319 (1992). "Likewise, the denial of a motion for a directed verdict should be reversed only if no evidence or reasonable inference exists which would be sufficient to sustain a verdict for the nonmoving party." *Id.*

determined by a trier of fact, it "'will be decided as a matter of law only where reasonable minds cannot differ.'" *Mortensen v. Moravec,* 1 Wn. App. 2d 608, 616, 406 P.3d 1178 (2017) (quoting *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998)).

The jury instructions in this case explained that a business owed a duty of care "to a person who has an express or implied invitation to come upon the premises." CP at 1347. That duty entailed exercising "ordinary care to protect the person from criminal harm that the operator knows or has reason to know is occurring or about to occur and reasonably foreseeable criminal conduct by third persons." *Id.* 1347. And the instructions defined a "business invitee" as "a person who is either expressly or impliedly invited onto the premises of another for some purpose connected with a business interest or business benefit." CP at 1348. These instructions were consistent with *Restatement* § 344, which the Supreme Court has adopted.

APRO relies on *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621 (1994), to argue that Tisdale forfeited his status as a business invitee by leaving the store to protect his own personal property and confronting Sablan in the parking lot. In *Tincani*, a zoo visitor was injured when he fell off a rock after wandering off of the marked trails. 124 Wn.2d at 125-26. *Tincani* is distinguishable because Tisdale stayed on the public portions of the APRO property, the store and the parking lot.

APRO argues that another way to exceed the scope of a business invitation is to engage in conduct unconnected to the purpose of the invitation. APRO relies on *Adkins* and *Beebe v. Moses*, 113 Wn. App. 464, 54 P.3d 188 (2002), to argue that Tisdale lost his business invitee status when he left the store to confront Sablan because confronting Sablan was not a business purpose that had economic benefit for APRO or Tisdale. In *Adkins*, a roofer was injured when he reached into

an exhaust vent to retrieve a fallen tube of caulk. 110 Wn.2d at 131. But there, the scope of the business invitation was governed by a roofing contract that stated what Adkins was invited to do on the property. *Id.* at 150. No such written limitations existed here. And in *Beebe*, the plaintiff was injured at a family member's home, and there were facts supporting a conclusion that the plaintiff was making a social visit when he was injured, rather than visiting the property for a business purpose. 113 Wn. App. at 468.

Here, APRO's property was open to the public, and while some conduct or activity could exceed the scope of an implied invitation to the public for business purposes, it seems clear that customers were invited to park their cars in APRO's parking lot. And it is eminently foreseeable that invitees would interact with others in the parking lot, especially if they thought their cars were being broken into. The cases APRO cites do not suggest that these facts supported a licensee instruction. Moreover, the instructions provided the jury with the definition of a "business invitee," but they left it for the jury to determine whether Tisdale met that definition. The trial court did not commit legal error, nor did it abuse its discretion when it declined to give a business licensee instruction in this case.

II. EVIDENTIARY ISSUES

APRO argues that the trial court erred by denying APRO's motion to compel Tisdale's attendance at trial. APRO contends that it "reasonably relied on Tisdale's representation in his witness list and the Joint Statement of Evidence that he would testify at trial, and thus a notice to attend trial under CR 43 was unnecessary." Am. Br. of Appellant at 58. And APRO asserts that declining to require Tisdale to testify at trial prejudiced APRO.

APRO also argues that the trial court erred by excluding a video of Tisdale filmed by private investigators during the trial without addressing the *Burnet v. Spokane Ambulance*[6] factors. APRO insists that the video was admissible under the evidence rules related to relevance, including ER 403, and that the trial court erred by finding the video irrelevant and cumulative. APRO contends, "The exclusion of the video, combined with the failure to direct Tisdale to appear at trial, deprived the jury of the opportunity to fully assess Tisdale's damages." Am. Br. of Appellant at 62. We disagree.

Burnet addressed a trial court order limiting discovery and precluding expert testimony as a sanction for a violation of a discovery order under CR 37. 131 Wn.2d at 492. Trial courts must consider the factors from *Burnet* "before excluding untimely disclosed evidence" because excluding such evidence "amounts to a severe sanction." *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015); *see also Petters v. Williamson & Assocs., Inc.*, 151 Wn. App. 154, 171, 210 P.3d 1048 (2009) (stating that *Burnet* applies only to CR 37(b)(2) sanctions).

This case does not involve a discovery violation under CR 37, and APRO does not show that *Burnet* has been extended to apply to evidentiary rulings related to relevance or failure to comply with CR 43. Thus, *Burnet* is not the correct lens to analyze APRO's claim of error. Here, the trial court ruled that APRO had not followed the proper procedures for securing Tisdale's appearance at trial under CR 43(f). And the trial court allowed APRO to play Tisdale's video deposition as a substitute for live testimony so that the jury could assess his credibility.

[6] 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Before excluding evidence as a sanction for a discovery violation, a court must consider whether the "refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial" and whether a lesser sanction would be an adequate remedy. *Id.*

Further, we review a trial court's evidentiary decisions, including those based on relevance, for abuse of discretion. *State v. Orn*, 197 Wn.2d 343, 353, 482 P.3d 913 (2021). APRO's purpose of presenting the surveillance video was for impeachment, but the video was not admissible for impeachment purposes. "Evidence offered to impeach is relevant only if (1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action." *State v. Allen S.*, 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). APRO offered the video to impeach Tisdale's assertions about the scope of his injuries and damages. But Tisdale's claims for damages were based on expert testimony from doctors who explained that Tisdale would endure seizures and an array of cognitive and mental health problems for the remainder of his life. Tisdale did not argue that he was unable to drive or walk around town, so the video was not properly offered for impeachment purposes.

Finally, even if relevant for impeachment purposes, the video was cumulative under ER 403, which allows for exclusion of relevant evidence "if its probative value is substantially outweighed" by considerations such as "needless presentation of cumulative evidence." At least one of Tisdale's own witnesses had referred to his continued alcohol consumption as evidence of lasting brain damage that interfered with his ability to follow recommendations from doctors. And Tisdale admitted to driving and drinking alcohol even when his doctors recommended against these things. Thus, the video was cumulative.

In sum, the trial court's decisions were evidentiary rulings, not discovery sanctions. The trial court did not exclude all testimony on Tisdale's alcohol consumption or continued driving, and it allowed APRO to play Tisdale's two-hour-long deposition for the jury. Although it would not have been unreasonable for the trial court to compel Tisdale's appearance, it was also not an

abuse of discretion under these circumstances to decline to do so but allow the jury to see his deposition testimony. And APRO has not shown what information the surveillance video would have provided that was not duplicative of Tisdale's deposition or other testimony. We hold that the trial court did not abuse its discretion by refusing to compel Tisdale to attend trial or by excluding the surveillance video.

For the same reasons, the trial court properly denied APRO's motion for a new trial based on the same arguments. And because we remand for a new trial on damages, we need not address the challenge to the trial court's denial of remittitur.

CONCLUSION

We remand for a new trial solely on the issue of damages. After calculating Tisdale's total damages, the fact finder must segregate the portion of the total damages, if any, solely caused by Sablan's intentional conduct. The jury's determination that Tisdale is 10 percent contributorily negligent need not be relitigated, so the trial court must then apportion to Tisdale 10 percent of the

remainder after segregation, and APRO will be responsible for 90 percent of the remainder after segregation. We otherwise affirm.

Glasgow, C.J.

We concur:

Lee, J.

Veljacic, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WILLIAM TISDALE, Respondent, v. APRO LLC, a Delaware Limited Liability Corporation and JOHN DOES 1-10, Appellants.	No. 56067-4-II RULING ON COST BILL

William Tisdale walked into a convenience store owned by APRO LLC (APRO) while a robbery was in progress. The suspect left the store and rummaged through Tisdale's car in the parking lot. When Tisdale confronted the suspect, the man repeatedly struck Tisdale with an aluminum baseball bat causing severe injuries.

Tisdale sued APRO for negligence based on a failure to ensure customer safety. The trial court did not allow APRO to argue the segregate damages theory to the jury, and the special verdict form did not allow the jury to segregate damages.

The jury found that APRO was negligent and that Tisdale was contributorily negligent. After deducting Tisdale's portion, the jury awarded Tisdale $81.9 million in damages. The trial court denied APRO's motion for remittitur or a new trial.

Tisdale declined to forgo collection of the damages award pending appeal, and APRO obtained three supersedeas bonds to cover the verdict. On appeal, APRO argued that it was entitled to a new trial on both liability and damages. This court affirmed the jury verdict as to liability but reversed on the segregate damages issue, remanding for a new trial on damages only.

Having obtained a retrial on damages, APRO filed a cost bill. Because of the large total amount of the supersedeas bonds, the cost bill for this appeal includes $1.646 million in costs for the supersedeas bond fees. Tisdale objects, and APRO has filed a response.

ANALYSIS

"The appellate court determines costs in all cases after the filing of a decision terminating review[.]" RAP 14.1(a). Where, as here, the Court did not determine costs in its opinion, "a commissioner . . . determines and awards costs by ruling as provided in rule 14.6(a)." RAP 14.1(c). The party who substantially prevails on

appeal is generally entitled to be reimbursed by the losing party for certain costs incurred in the review proceedings. RAP 14.1. The extent to which costs may be determined and reimbursed are governed by the rules in Title 14. Costs include statutory attorney fees and the reasonable expenses that are specifically enumerated in RAP 14.3.

The majority of the cost bill here is typical, but the costs of obtaining a large supersedeas bond to secure the appeal are extraordinary. And it would arguably be unjust to require either party to pay $1.6 million in order to obtain an appeal from any judgment. But such policy determinations are beyond the role of a commissioner. A commissioner "will award costs" to the prevailing party. RAP 14.2. The plain language is mandatory and provides no discretion to mitigate the costs of an appeal based on unusually high costs nor disparate abilities to bear the expense.

Substantially Prevailing Party

Here, as Tisdale argues, neither party fully prevailed. But this does not end the inquiry. The commissioner will award costs to the "*substantially* prevailing party on review." RAP 14.2 (emphasis added). And "[i]f there is no substantially prevailing party on review, the commissioner . . . will not award costs to any party." *Id*.

Here, one could argue that neither party substantially prevailed because the Court of Appeals decision affirmed on liability and reversed only on damages. But the nature of the segregate damages jury instruction calls much if not all of the large jury

award into question. And the reversal of the large jury award was complete. In these circumstances, APRO substantially prevailed when it successfully obtained a reversal of an $81 million verdict. Accordingly, the court commissioner "will" award APRO the costs of appeal under RAP 14.2.

Calculation of Costs

RAP 14.3 includes the cost of obtaining a supersedeas bond as an awardable cost on appeal. And there is no argument that the fees charged for obtaining these bonds were abnormal as compared to fees for similar bonds. The remaining cost bill amounts are reasonable and received no discrete objection. Accordingly, APRO is entitled to an award of $1,665,136.03 in costs on appeal.

These costs are obviously high. But they are not unprecedented. In a similar matter, Division Three Commissioner Hailey Landrus awarded the prevailing party almost $140,000 in costs following the appeal of a $8.1 million jury verdict that resulted in a supersedeas bond. COA No. 35872-1-III, *Atwood v. Mission Support Alliance, LLC*, Commissioner's Ruling (Apr. 14, 2021) (awarding costs). Although the timing of that cost bill award was modified by a panel of judges, as noted below, in general the cost bill award remained intact over objections based on financial disparities. Supreme Court No. 100373-1, *Atwood v. Mission Support Alliance, LLC*, Ruling (Jan. 13, 2022) (denying discretionary review). It is unfortunate but clear that

obtaining a supersedeas bond to appeal a large verdict creates a risk of exceedingly large costs on appeal.

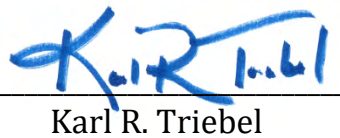
Timing for Payment of Costs

RAP 14.2 does not state when the commissioner must require the costs to be paid. As noted, the upcoming trial verdict is unpredictable when a jury is properly instructed, but it could result in a verdict that would easily cover the costs of this appeal. Moreover, imposing such high costs on Tisdale before the verdict could alter the status quo by impoverishing Tisdale and removing the ability to afford the costs to see this retrial to its conclusion. And in the *Atwood* matter discussed above, the Court of Appeals modified the cost bill award in part by ordering that the prevailing party would not enforce the award until the completion of the trial court proceedings. COA No. 35872-1-III, Order Denying in Part and Granting in Part Motion to Modify Commissioner's Ruling, (Oct. 11, 2021).[1] While not binding, this unpublished order is persuasive and this court will follow its example. APRO is not entitled to enforce this cost bill award until the completion of the trial court proceedings. Accordingly, it is hereby

ORDERED that Tisdale shall reimburse APRO an award of $1,665,136.03 in costs on appeal, and it is further

[1] For the convenience of the parties, the cited *Atwood* orders are attached to this ruling.

ORDERED that APRO shall not enforce this award until completion of the trial court proceedings on remand.



Karl R. Triebel
Court Commissioner

cc: Mark H. Goodfriend
Catherine Wright Smith
Mick A. Jaeger
Heather M. Jensen
Geoffrey M. Hersch
Eric M. Fong
Darrell L. Cochran
Christopher E. Love
Emma L. Aubrey

APPENDIX C

PDF **RCW 4.22.070**

Percentage of fault—Determination—Exception—Limitations.

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

[1993 c 496 § 1; 1986 c 305 § 401.]

NOTES:

Effective date—1993 c 496: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 496 § 3.]

Application—1993 c 496: "This act applies to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1993." [1993 c 496 § 4.]

Preamble—Report to legislature—Applicability—Severability—1986 c 305: See notes following RCW 4.16.160.

APPENDIX D

INSTRUCTION NO. 7

The plaintiff has the burden of proving each of the following propositions:

- First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting or failing to act, the defendant was negligent;
- Second, that the plaintiff was injured;
- Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendant has the burden of proving both of the following propositions:

- First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent;
- Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence.

APPENDIX E

INSTRUCTION NO. 15

There may be more than one proximate cause of the same injury. If you find that the defendant was negligent and that such negligence was a proximate cause of injury or damage to the plaintiff, it is not a defense that the act of some other person who is not a party to this lawsuit may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to the plaintiff was the act of some other person who is not a party to this lawsuit then your verdict should be for the defendant.

APPENDIX F

JURY INSTRUCTION NO. 23

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of the defendant APRO, LLC, apart from any consideration of contributory negligence.

If you find for the plaintiff, you should consider the following future economic damages elements;

- The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future.
- The reasonable value of necessary substitute domestic services, non-medical expenses and future life care needs that will be required with reasonable probability in the future.

In addition, you should consider the following noneconomic damages elements:

- The nature and extent of injuries
- The disability, disfigurement and loss of enjoyment of life experienced and with reasonable probability to be experienced in the future.
- The pain, suffering, both mental and physical experienced in the past and with reasonable probability to be experienced in the future.
- The mental anguish and emotional distress experienced and with reasonable probability to be experienced in the future.

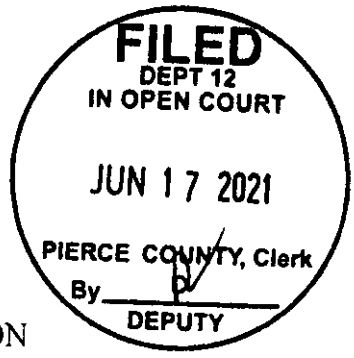
- Inconvenience experienced and with reasonable probability to be experienced in the future.
- Injury to reputation and humiliation experienced and with reasonable probability to be experienced in the future.
- Loss of society and companionship.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

APPENDIX G



)URT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

WILLIAM TISDALE, an individual, Plaintiff, vs. APRO LLC, a Delaware limited Liability corporation Defendants.	CASE NO. 18-2-12279-7 SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Were any of the following negligent?
(Answer "yes" or "no" after the name of the defendant APRO LLC)

Defendant APRO LLC (Yes) No

(DIRECTION: If you answered "no" to Question 1 as to the defendant APRO LLC, sign this verdict form. If you answered "yes" to Question 1 as to the defendant, APRO LLC, answer Question 2.)

QUESTION 2: Was such negligence a proximate cause of injury to the plaintiff?
(Answer "yes" or "no" after the name of the defendant APRO LLC, if found negligent by you in Question 1.)

(Yes) No

Defendant APRO LLC:

DIRECTION: If you answered "no" to Question 2 as to the defendant, APRO LLC sign this verdict form. If you answered "yes" to Question 2 as to the defendant, APRO LLC answer Question 3.)

QUESTION 3: What do you find to be the plaintiff's amount of total damages? Do not consider the issue of contributory negligence, if any, in your answer.

ANSWER: $ 91 Million

(DIRECTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form.)

QUESTION 4: Was the plaintiff also negligent? Yes

ANSWER:	(Write "yes" or "no")

(DIRECTION: If you answered "no" to Question 4, sign this verdict form. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5:	**Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?** AJT
ANSWER:	(Write "yes" or "no") ~~AG~~ Yes

(DIRECTION: If you answered "no" to Question 5, sign this verdict form. If you answered "yes" to Question 5, answer Question 6.)

QUESTION 6:	**Assume that 100% represents the total combined fault that proximately caused the plaintiff's injuries. What percentage of this 100% is attributable to the negligence of APRO LLC what percentage of this 100% is attributable to the plaintiff's negligence? Your total must equal 100%.**

ANSWER:	
To defendant APRO LLC:	% 90
To plaintiff William Tisdale:	% 10
TOTAL:	100%

(DIRECTION: Sign this verdict form and notify the bailiff.)

Date: 6-17-21

Presiding Juror

APPENDIX H

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

M.M., AN INDIVIDUAL; AND K.M., INDIVIDUALLY AND AS THE MOTHER OF M.M., Plaintiff,	)	
vs.	)	SPOKANE COUNTY SUPERIOR COURT NO. 20-2-00374-32
MEAD SCHOOL DISTRICT NO. 354, OPERATING AS MEAD HIGH SCHOOL, A GOVERNMENTAL ENTITY UNDER THE LAW OF THE STATE OF WASHINGTON, Defendant.	)	

VERBATIM REPORT OF PROCEEDINGS
HONORABLE ANNETTE S. PLESE
FEBRUARY 26, 2021 & JULY 16, 2021

APPEARANCES:

FOR THE PLAINTIFF: MICHAEL T. PFAU
Attorney at Law
403 Columbia Street #500
Seattle, Washington 98104

FOR THE DEFENDANT: JERRY J. MOBERG
Attorney at Law
238 W. Division Avenue
Ephrata, Washington 98823

Heather M. Gipson, RPR CCR No. 3371
Official Court Reporter
1116 W. Broadway Avenue, Department 1
Spokane, Washington 99260
(509) 477-4414

GENERAL INDEX

sex with them, but not at 15. I don't think public policy. I think the public policy would say no. If you're a minor under 18 and you're going to school, a teacher cannot have sex with their student.

So to say this 16-year-old was at fault or somehow contributed to her getting groomed and she agreed with it, I think it would totally go against public policy. Maybe the Supreme Court will disagree with me, but no kid should be able to say I'm going to have sex with my teacher and allow it.

So at this point, I think the Court is going to go with that. There is no comparative negligence or fault on behalf of the victim in this case. It's illegal under 9A.44.093 for a minor who is under 18 to have sex with her teacher.

Even though the Supreme Court said it, I mean, I know you went with the dissent, I'm going with the majority, and the majority said that teachers can't have sex with their students.

So as far as those affirmative defenses of fault, comparative negligence on behalf of the victim in this case or the issue of her sophistication, all that, I don't think that's a good affirmative defense. So the Court is going to dismiss the affirmative defenses.

As far as the issue on the *Tegman* instruction, I don't

think it applies, either. I mean, we don't have an intentional tort feasor in this case. So I think at this point, the Court is going to stick with that. I don't think it applies, and so I am going to go ahead and dismiss that, also.

You already agreed to the public duty doctrine and the parents being out of it. So the only issue is the failure to mitigate damages.

As you said, you pretty much agree at this point she's done what she had to mitigate her damages. I'll dismiss it without prejudice. If you think there's something that comes up, I can't believe you've gotten this far into it and there hasn't been anything, but if it comes up, I'll let you re-raise that issue with new evidence from this point forward, but at this point, the Court is going to grant that dismissal of the failure to mitigate.

So I guess that solves the issue at this point.

MR. PFAU: May I be heard, Your Honor?

THE COURT: Yes.

MR. PFAU: A couple things just points of clarification.

I believe Mr. Moberg conceded in the failure to mitigate that that affirmative defense was not appropriate for the arguments about not reporting and not stopping, and that when he talks about finishing discovery, he's

3rd?

THE COURT: I am going to write it in the order. How's that?

MR. PFAU: Thank you, Your Honor.

MR. MOBERG: Thank you, Your Honor.

THE COURT: Do you want a copy of the order, counsel?

MR. PFAU: Yeah, that would be great. You want me to send you one, Jerry?

THE COURT: I just put phone conference 9/3 at 8:00 A.M. regarding trial date. How's that? He's going to make you a copy.

MR. PFAU: Thank you, Your Honor.

THE COURT: We're in recess.

THE CLERK: Please rise. Court's in recess.

(END OF 7/16/2021 PROCEEDINGS.)

C E R T I F I C A T E

I, HEATHER M. GIPSON, do hereby certify:

That I am an Official Court Reporter for the Spokane County Superior Court, sitting in Department No. 1, at Spokane, Washington;

That the foregoing proceedings were taken on the date and place as shown on the cover page hereto;

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 24th day of August, 2021.

Heather Gipson

HEATHER M. GIPSON, RPR, CCR No. 3371
Official Court Reporter
Spokane County, Washington

APPENDIX I

HON. ANNETTE S. PLESE
HEARING DATE: JULY 16, 2021
WITH ORAL ARGUMENT

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SPOKANE COUNTY

M.M., AN INDIVIDUAL; AND K.M., INDIVIDUALLY AND AS THE MOTHER OF M.M. Plaintiff, v. MEAD SCHOOL DISTRICT NO. 354, OPERATING AS MEAD HIGH SCHOOL, A GOVERNMENTAL ENTITIY UNDER THE LAWS OF THE STATE OF WASHINGTON Defendant.	Case No. 20-2-00374-32 **[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE AFFIRMATIVE DEFENSES OF COMPARATIVE NEGLIGENCE, FAULT OF OTHERS, FAILURE TO STATE A CLAIM, FAILURE TO MITIGATE DAMAGES, PUBLIC DUTY DOCTRINE, AND INTENTIONAL ACTS OF OTHERS**

THIS MATTER came before the Court on Plaintiffs' Motion for Summary Judgment. After hearing oral argument by the parties, and after reviewing the following materials including:

(1) Plaintiffs' Motion for Summary Judgment, and the Declaration of Michael T. Pfau submitted in support thereof;

(2) Defendant's opposition to Plaintiffs' Motion for Summary Judgment, and all evidence submitted in support thereof, if any; and,

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Seattle, Washington 98104
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(3) The Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment, if any, and all evidence submitted in support thereof, if any;

(4) _____.

For the reasons set forth in Plaintiffs' briefing, the Court hereby finds and **ORDERS** that

(1) Plaintiffs' Motion for Summary Judgment regarding Defendant's affirmative defense of comparative negligence is **GRANTED**

_____.

(2) Plaintiffs' Motion for Summary Judgment regarding Defendant's affirmative defense of fault of others is **GRANTED**

_____.

(3) Plaintiffs' Motion for Summary Judgment regarding Defendant's affirmative defense of failure to state a claim is **GRANTED**

Subject to Defendants motion for reconsideration.

(4) Plaintiffs' Motion for Summary Judgment regarding Defendant's affirmative defense of public duty doctrine is **GRANTED**

_____.

(5) Plaintiffs' Motion for Summary Judgment regarding Defendant's affirmative defense of failure to mitigate damages is **GRANTED**

WITHOUT Prejudice,

and

(6) Plaintiffs' Motion for Summary Judgment regarding Defendant's affirmative defense of intentional acts of others is **GRANTED**

(7) Defendant is granted leave to file a motion for reconsideration on the issue of Extent of damages allowed under the WLAD claim. Defendants Brief Due on August 13; Plaint. Hs Brief due September 3; Court will decide issue without oral argument.

DONE IN OPEN COURT this ___ day of July 2021.

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APPENDIX J

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

A.L., an individual,

Plaintiff,

v.

SEATTLE PUBLIC SCHOOLS, operating at BALLARD HIGH SCHOOL, a governmental entity under the laws of the State of Washington,

Defendant.

Case No. 20-2-18531-1 SEA

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RE AFFIRMATIVE DEFENSES

THIS MATTER came before the Court on Plaintiff's Motion for Summary Judgment. After hearing oral argument by the parties, and after reviewing the following materials including:

(1) Plaintiff's Motion for Summary Judgment and the Declaration of Michael T. Pfau submitted in support thereof;

(2) Defendant's opposition to Plaintiff's Motion for Summary Judgment, and all evidence submitted in support thereof, if any; and,

(3) The Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment, if any, and all evidence submitted in support thereof, if any;

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ATTORNEYS AT LAW
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Seattle, WA 98104
(206) 462-4334 | Fax: (206) 623-3624

It is hereby ORDERED that Summary Judgment is **GRANTED** as to Defendant's affirmative defenses of fault of others and intentional acts of others. No intentional tortfeaser is named in this case. *See* Rollins v. King Cty. Metro Transit, 148 Wn.App. 370, 199 P.3d 499, 502 (2009).

Defendant's affirmative defenses of failure to state a claim, failure to mitigate damages, comparative negligence have been withdrawn. They are dismissed.

DONE IN OPEN COURT this 10th day of February 2022.

K Richardson
THE HONORABLE KRISTIN RICHARDSON

PRESENTED BY:

PFAU COCHRAN VERTETIS AMALA PLLC

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APPENDIX K

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT TACOMA

L.K.M., et al.,	)	3:18-cv-05345-BHS
Plaintiffs,	)	Tacoma, Washington
v.	)	September 16, 2021
BETHEL SCHOOL DISTRICT, et al.,	)	Pretrial Conference
Defendants.	)	1:30 p.m.

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE BENJAMIN H. SETTLE
UNITED STATES DISTRICT JUDGE

Proceedings stenographically reported and transcript produced with computer-aided technology

APPEARANCES

For the Plaintiffs:

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THOMAS B. VERTETIS
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For the Defendants:

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Moberg Rathbone Kearns
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Ephrata, Washington

COLIN K. KEARNS
Floyd Pflueger & Ringer PS
200 West Thomas Street
Suite 500
Seattle, Washington

MR. COCHRAN: Other than what was specifically said on there, which was "lewd and vulgar conduct," no, and neither did I.

THE COURT: Mr. Moberg.

MR. MOBERG: Yes, Your Honor. As I recall from Leanne, the mother's testimony, she testified that in the conversation with the attorney, she learned for the first time that there had been claims that Cheyenne had been sexually abused by D.M., was not aware of that before. There is nothing in the record to support that that information was ever conveyed to the family before because, frankly, the evidence will show that nobody suspected there was anything inappropriate that occurred in this two-minute encounter, 90-second encounter in the portable toilet.

THE COURT: You have said enough. If it is in the record, if you are accurately representing what was in the deposition, then it is relevant. I don't think it is unfairly prejudicial. I am going to deny that motion in limine.

No. 4, exclude reference to plaintiff's attorneys -- sorry. That is the one I just covered.

No. 5, exclude reference to the fault of others, no apportionment. The Court is going to follow the law as stated in the Washington State Supreme Court *Tegman* decision and followed by Division I Washington State Court of Appeals

in *Rollins*. There will not be an apportionment between the intentional tortfeasor and the District. The Court will provide an instruction that is consistent with the Washington Pattern Jury Instruction No. 15.04. This is not carved in stone. It will be part of our discussions about final jury instructions, but that jury instruction that I referenced, 15.04 would read something like: There may be more than one proximate cause of the same injury. If you find that the district was negligent and that subject negligence was a proximate cause of injury or damage to C.K.M., it is not a defense that the act of David M., who is not a party to this lawsuit, may have also been a proximate cause. However, if you find that the sole proximate cause of injury or damage to C.K.M. was the act of David M., who is not a party to this lawsuit, then your verdict should be for the District.

Again, I am certainly not wedded to that without modification. The general understanding I want you to have is that I believe that the law in the state of Washington is that there is no apportionment unless there is a sole third-party cause in the case.

No. 4 -- 6 is to --

MR. MOBERG: Could I inquire for clarification, Your Honor? You indicated you were going to follow the *Rollins* case. Is the Court saying that -- because in *Rollins* the instruction was that as to damages, not to liability, but as

MR. MOBERG: Thank you, Your Honor.

MR. VERTETIS: Thank you, Judge.

(Recessed.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Angela Nicolavo

ANGELA NICOLAVO
COURT REPORTER

APPENDIX L

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHERYL ROBBINS BERG, as Litigation Guardian ad Litem for C.K.M.,

Plaintiff,

v.

BETHEL SCHOOL DISTRICT,

Defendant.

CASE NO. C18-5345 BHS

COURT'S FINAL INSTRUCTIONS TO THE JURY

Dated this 18th day of October, 2021.

BENJAMIN H. SETTLE
United States District Judge

INSTRUCTION NO. 24

The plaintiff alleges the defendant was negligent. To prevail, the plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent;

Second, that the plaintiff was injured;

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. 26

In negligence, the term "proximate cause" means a cause which in a direct sequence produces the event complained of and without which such event would not have happened.

There may be more than one proximate cause of an event. If you find that a defendant's acts were a proximate cause of injury or injury or damage to a plaintiff, it is not a defense that some other cause may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to the plaintiff was some other cause then your verdict should be for the defendant

.

INSTRUCTION NO. 27

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff, you must determine the plaintiff's damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for any injury you find was proximately caused by the defendant. You should consider the following:

The nature and extent of plaintiff's injuries;

The disability and loss of enjoyment of life experienced and with reasonable probability will be experienced in the future;

The mental, physical, and emotional pain and suffering experienced by the plaintiff and that with reasonable probability will be experienced in the future;

The reasonable value of necessary household help, services other than medical, and expenses that with reasonable probability will be required in the future;

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

APPENDIX M

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR BENTON COUNTY

GAGE WEBB, MATHEW HALL, SEAN SLOPPY, GEOFF HAYES, JOSEPH SPARKS, BRANDON ARKLE, AARON FITZIMMONS, JEREMY CRONENWETT, MILTON HARADON, KALVIN BUNDRANT, RICHARD ROBINSON, and CALEB SUTTLE, Plaintiffs, vs. KENNEWICK SCHOL DISTRICT, Defendant.	NO. 14-2-02526-0 **PLAINTIFF SEAN SLOPPY'S MOTION IN LIMINE TO PROHIBIT *TEGMAN* ARGUMENT, INSTRUCTION, AND/OR VERDICT FORM**

I. RELIEF REQUESTED

Plaintiff Sean Sloppy brings this motion to exclude Defendant Kennewick School District ("the District") from making any argument and proposing any instruction or jury verdict form based upon the Washington Supreme Court case of *Tegman v. Accident & Medical Investigations*, Inc., 150 Wn.2d 102,75 P.3d 497 (2003) and the Washington Court of Appeals case of *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P.3d 499, *review denied*, 166 Wn.2d 1025 (2009).

Significantly, this case squarely presents the issue—not reached by the *Tegman* court but pointed out in footnote 6 of Justice Chamber's dissent—regarding cases in which the

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which the jury could segregate damages. Moreover, later precedent such as *Christensen* confirms that applying *Tegman* to these claims would be contrary to Washington public policy and the commentary relied on by the *Tegman* court. And, finally, at a minimum *Rollins* confirms that *Tegman*'s damages segregation principles do not apply to a case, such as the one at bar, where a plaintiff sues only a negligent tortfeasor and no issues of joint and severable liability or damages segregation are present in the case for the jury's determination.

RESPECTUFLLY Submitted this 14th day of February, 2018.

PFAU COCHRAN VERTETIS AMALA PLLC

By: _____

Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316
Christopher E. Love, WSBA No. 42832
Attorneys for Plaintiff Sean Sloppy

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APPENDIX N

JOSIE DELVIN
BENTON COUNTY CLERK

FEB 26 2018

FILED

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON AND FRANKLIN COUNTIES

WEBB, et al. Plaintiffs

vs.

KENNEWICK SCHOOL DISTRICT Defendant

Case No. 14-2-02526-0

ORDER

On this 26th day of February, 2018, this cause came regularly on for hearing by the Court on Plaintiff's MOTION TO PROHIBIT TEGMAN ARGUMENT, INSTRUCTION AND/OR VERDICT FORM

and after hearing said matter and the argument of counsel and the Court being fully advised in the premises, it is by the Court

ORDERED, That said MOTION TO PROHIBIT TEGMAN ~~ARGUMENTS~~ instruction and verdict form be and the same is hereby GRANTED.

Done in open Court this 26 day of Feb. 2018

Carrie Runge
Judge.

Attorney [signature] ESQ
WSBA 22857

APPENDIX O

☐ EXPEDITE
X No hearing set
Hearing is set
Date: February 2, 2018
Time: 9:00 a.m.
Judge/Calendar: Hon. Christopher Lanese

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

B.W., an individual,

Plaintiff,

vs.

BLACK HILLS FOOTBALL CLUB, a Washington nonprofit corporation; DAVID E. CROSS and KIMBERLY S. CROSS, individually, and as a marital community;

Defendant.

NO. 15-2-01746-0

PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE *TEGMAN* ARGUMENT, INSTRUCTION, AND/OR VERDICT FORM

I. RELIEF REQUESTED

Plaintiff B.W. brings this motion to exclude the Defendants from making any argument and proposing any instruction or jury verdict form based upon the Washington Supreme Court case of *Tegman v. Accident & Medical Investigations*, Inc., 150 Wn.2d 102,75 P.3d 497 (2003).

Significantly, this case squarely presents the issue—not reached by the *Tegman* court but pointed out in footnote 6 of Justice Chamber's dissent—regarding cases in which the negligent conduct was the failure to prevent the intentional conduct from occurring. The Washington Supreme Court did not reach the issue of whether *Tegman* applies in such

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context, and the *Tegman* majority opinion expressly indicated its inapplicability where the negligent actor's conduct was the *cause* of the intentionally based tort. In a case based upon a crime which occurred as a direct result of the negligent failure to protect a plaintiff or prevent the actions of an employee with whom it had special relationships. The rationale of *Tegman* should not apply. It makes no sense, legally or factually, to permit segregation of damages in such a case and Defendants have no evidence, testimony or witnesses to present evidence from which the jury could segregate damages.

RESPECTUFLLY Submitted this 25th day of January, 2018.

PFAU COCHRAN VERTETIS AMALA PLLC

By: 

Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316
Attorneys for Plaintiff

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APPENDIX P

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2018 FEB -2 AM 11:46

Linda Myhre Enlow
Thurston County Clerk

15-2-01746-0
ORGMT 330
Order Granting Motion Petition
2524195

☐ **EXPEDITE** (if filing within 5 court days of hearing)
☐ Hearing is set:
Date: _____
Time: _____
Judge/Calendar: _____

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

B.W.
Plaintiff/Petitioner,
vs.
Black Hills Football Club et al
Defendant/Respondent.

15-2-01746-0

NO. ~~15-2-0746-0~~

ORDER
(OR) GRANTING PLAINTIFF'S MOTION TO EXCLUDE TEGMAN

I. BASIS

II. FINDINGS

After reviewing the case record to date, and the basis for the motion, the court finds that:

III. ORDER

IT IS ORDERED that:

PLAINTIFF's MOTION TO EXCLUDE TEGMAN IS GRANTED.

DATED this 2nd day of February, 2018.

JUDGE / COURT COMMISSIONER
Chris Lanese

Presented by:

DARRELL C. COCHRAN WSBA NO. 22851

Approved as to form Meredith Smith WSBA 48361

ORDER

F:\FORMS\MC\ORDER.DOC, 11/3/09

APPENDIX Q

☐ EXPEDITE
☐ No hearing set
X Hearing is set
Date: February 14, 2020
Time: 9:00 a.m.
Judge/Calendar: Hon. Christopher Lanese

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

C.B., an individual,

Plaintiff,

vs.

BLACK HILLS FOOTBALL CLUB, a Washington nonprofit corporation; DAVID E. CROSS, individually; JAMES CHARRETTE,

Defendants.

NO. 18-2-02416-34

PLAINTIFF'S MOTION TO SUMMARILY DISMISS DEFENDANTS' AFFIRMATIVE DEFENSES

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I. RELIEF REQUESTED

Plaintiff C.B. respectfully asks the Court to summarily dismiss the following affirmative defenses raised in Defendant Black Hill Football Club's ("BHFC") Answer:

1. Allocation of fault to C.B., C.B.'s parents, and David Davis[1] under RCW 4.22.070, Answer Paragraph 6; Answer Paragraph 7.
2. Allocation of fault to other third-parties and unknown or unnamed persons or entities under RCW 4.22.070, Answer Paragraph 7.
3. Attributing Plaintiff's damages to intentional tortfeasors, Answer Paragraph 8.
4. Segregation of damages resulting from intentional acts and damages resulting from negligence [sic] acts pursuant to *Tegman v. Accident & Medical Investigations, Inc.* 150 Wn.2d 102, 75 P.3d 497 (2001), Answer Paragraph 9.
5. Damages resulting from Plaintiff's own failure to exercise ordinary care, negligence, and recklessness, Answer Paragraph 4.
6. Estoppel or waiver, Answer Paragraph 1.
7. Laches, Answer Paragraph 1.
8. Superseding Cause, Answer Paragraph 10.
9. Failure to join a party, Answer Paragraph 11.

Plaintiff also asks the Court to summarily dismiss the following affirmative defenses raised in Defendant Cross and Charette's Answer:

[1] Defendants have identified only C.B., C.B.'s parents, and Davis as individuals or entities who are at fault. This motion also requests the defense be dismissed to the extent that BHFC and Cross and Charette seek to allocate fault to any other individual or entity that they have not properly identified.

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these affirmative defenses because Defendants have had ample opportunities to set forth their position on these subjects.

V. CONCLUSION

For the foregoing reasons, the Court should summarily dismiss Defendants' affirmative defense for apportionment of fault under RCW 4.22.070, segregation of damages, and other meritless affirmative defenses identified herein.

RESPECTUFLLY SUBMITTED this 9th day of January, 2020.

PFAU COCHRAN VERTETIS AMALA PLLC

By ___s/ Darrell L. Cochran_____
Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316
Bridget T. Grotz, WSBA No. 54520
Attorneys for Plaintiffs

STATE OF WASHINGTON)
: ss
COUNTY OF PIERCE)

I, KEVIN M. HASTINGS, hereby declare under penalty and perjury under the laws of the State of Washington that the following is true and correct:

I am over the age of 18, competent to testify as to the matters stated herein and make this declaration based on my personal knowledge. I am attorney of record for the Plaintiffs in this matter and make this affidavit in support of Plaintiffs' Motion to Summarily Dismiss Defendants' Affirmative Defenses.

Appended hereto as **Exhibit A** is a true and correct copy of Defendant Black Hills Football Club's Answer to Plaintiff's First Amended Complaint.

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APPENDIX R

18-2-02416-34
ORGSJ 495
Order Granting Summary Judgment
7691179

3

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2020 FEB 14 AM 9:44

Linda Myhre Enlow
Thurston County Clerk

☐ EXPEDITE
☐ No hearing set
X Hearing is set
Date: February 14, 2020
Time: 9:00 a.m.
Judge/Calendar: Hon. Christopher Lanese

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

C.B., an individual,

Plaintiff,

vs.

BLACK HILLS FOOTBALL CLUB, a Washington nonprofit corporation; DAVID E. CROSS, individually; JAMES CHARRETTE,

Defendants.

NO. 18-2-02416-34

ORDER GRANTING PLAINTIFF'S MOTION TO SUMMARILY DISMISS DEFENDANTS' AFFIRMATIVE DEFENSES

THIS MATTER came before the Court on Plaintiff's Motion to Summarily Dismiss Defendants' Affirmative Defenses. The Court having considered the following papers submitted:

1. Plaintiff's Motion to Summarily Dismiss Defendants' Affirmative Defenses;
2. Defendants David Cross and James Charette's Response;
3. Defendant Black Hills Football Club's Response;
4. Declaration of Mark Scheer;
5. Plaintiff's Reply;

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6. Supplemental Declaration of Darrell L. Cochran;

7. _____; and

8. The existing record and file in this case.

Finding itself fully appraised of the matters raised, and the Court having reviewed the Court file, as well as hearing argument of counsel, it is hereby:

ORDERED ADJUDGED AND DECREED that Plaintiff's Motion to Summarily Dismiss Defendants' Affirmative Defenses is **GRANTED**.

_____

_____

_____

_____

_____

DONE IN OPEN COURT this 14th day of February, 2020.

_____
THE HONORABLE CHRISTOPHER LANESE

Presented by:

PFAU COCHRAN VERTETIS AMALA, PLLC

_____
Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316
Andrew S. Ulmer, WSBA No. 51227
Attorneys for Plaintiff

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APPENDIX S

Filed
Washington State
Court of Appeals
Division Two

January 19, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

C.B., an individual, Respondent, v. BLACK HILLS FOOTBALL CLUB, a Washington nonprofit corporation, Petitioner, DAVID E. CROSS, individually; JAMES CHARETTE, Defendants.	No. 54680-9-II RULING DENYING REVIEW

Black Hills Football Club (BHFC) seeks discretionary review of the Thurston County Superior Court's February 14, 2020 order granting C.B.'s motion for summary judgment dismissing BHFC's affirmative defenses. Concluding that it does not demonstrate that review is appropriate under RAP 2.3(b), this court denies review.

FACTS

C.B. alleges that in 2005, while she was a youth soccer player with BHFC, her coach, David Davis, during a soccer tournament in Medford, Oregon, asked her to come

Summary judgment is only appropriate if "'there is no genuine issue as to any material fact' and 'the moving party is entitled to a judgment as a matter of law.'" *Walston v. Boeing Co*., 181 Wn.2d 391, 395, 334 P.3d 519 (2014) (quoting CR 56(c)). "The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party." *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). This court reviews summary judgment decisions de novo. *Nichols v. Peterson NW, Inc.*, 197 Wn. App. 491, 498, 389 P.3d 617 (2016).

Segregation of Damages

BHFC argues that the trial court committed obvious error by dismissing its affirmative defense of segregation of damages under RCW 4.22.070 and *Tegman*, 150 Wn.2d 102.[2] It claims that damages caused by Davis' intentional conduct must be segregated from damages caused by its negligence, if any. It contends that this requirement applies even though Davis is not a party to the proceeding.

RCW 4.22.070 provides that "[i]n all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages . . . ." RCW 4.22.070(1). "Fault," under chapter 4.22, includes negligent or reckless acts or omissions, but not intentional acts or omissions. RCW 4.22.015. In *Tegman*, our Supreme Court considered allocation of liability where multiple defendants caused damage either negligently, intentionally, or

[2] BHFC assigns error to the trial court's decision as to each of its affirmative defenses, but only argues as to the segregation of damages affirmative defense.

both. Plaintiff hired Richard McClellan and Accident and Medical Investigations, Inc. (AMI) to handle her personal injury claims. McClellan falsely claimed to be an attorney. He settled plaintiff's claims without her consent, forged her signature on the settlement check, and deposited the funds in his personal account. Plaintiff sued McClellan, AMI, a paralegal, and two attorneys employed by McClellan for various negligent and intentional torts. The trial court held all defendants jointly and severally liable. Lorinda Noble, one of the attorneys, appealed, arguing that she should not be liable for McClellan and AMI's intentional conduct. The Supreme Court agreed and remanded because under RCW 4.22.070, "damages resulting from negligence must be segregated from those resulting from intentional acts, and the negligent defendants are jointly and severally liable only for the damages resulting from their negligence." *Tegman*, 150 Wn.2d at 105.

In *Rollins v. King Cnty. Metro Transit*, 148 Wn. App. 370, 199 P.3d 499, *review denied*, 166 Wn.2d 1025 (2009), non-party assailants attacked plaintiffs on a King County Metro bus. Plaintiffs sued Metro for negligence. The trial court declined to use Metro's proposed jury instructions which stated the plaintiffs must prove "the percentage of damages caused by negligent conduct and the percentage of damages caused by the assailants' intentional conduct." *Rollins*, 148 Wn. App. at 376 (internal quotation omitted). Metro appealed and this court affirmed, holding that "[w]here there is no issue of joint and several liability and plaintiffs seek damages only for injuries caused by a single defendant's negligence, there is no need to instruct the jury to segregate damages caused by intentional conduct." *Rollins*, 148 Wn. App. at 372. Thus, because Metro was the only defendant and plaintiffs' only theory was negligence, they only needed to prove

their injuries were proximately caused by Metro's negligence. *Rollins*, 148 Wn. App. at 379.

It does not appear that the segregation of damages under *Tegman* is truly an affirmative defense to C.B.'s claims. Here, unlike *Tegman*, there is no issue of impermissible joint and several liability. And like the non-party assailants in *Rollins*, Davis is not a party to this case and C.B. seeks damages from BHFC only for its allegedly negligent failure to prevent his intentional conduct. Thus, the factfinder is not being asked to determine damages between negligent and intentional tortfeasors. Further, it does not appear that in summarily dismissing all of BHFC's affirmative defenses, the trial court was ruling on what jury instructions, if any, should be given regarding segregation of damages. Thus, discretionary review of the application of *Tegman* to C.B.'s damage claims is not appropriate. If in the future, the trial court indicates otherwise and asserts that it has addressed the issue, BHFC may renew its motion for discretionary review on this issue outside the time limit of RAP 5.2(b).

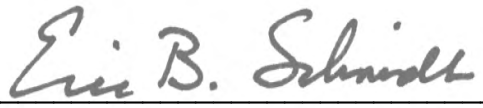
Rendering Further Proceedings Useless

This court concludes the trial court did not commit obvious error in granting C.B.'s motion for summary judgment regarding BHFC's affirmative defenses. Thus, it needs not address whether BHFC has met the effect prong of RAP 2.3(b)(1) by showing that further proceedings would be useless.

CONCLUSION

BHFC fails to demonstrate that discretionary review is appropriate under RAP 2.3(b)(1). Accordingly, it is hereby

ORDERED that BHFC's motion for discretionary review is denied.



Eric B. Schmidt
Court Commissioner

cc: Mark P. Scheer
Jennifer L. Crow
J.P. Dowdle
Darrell L. Cochran
Kevin M. Hastings
Andrew S. Ulmer
Bridget T. Grotz
E. Pennock Gheen, III
Evelyn E. Winters
R. Daniel Lindahl

APPENDIX T

The Court of Appeals
of the
State of Washingt
Division III

M.M., et al.,

Respondent,

v.

MEAD SCHOOL DISTRICT NO. 354,

Petitioner.

No. 38377-6-III
(Consol. w/No. 38431-4-III)

COMMISSIONER'S RULING

This is a civil lawsuit against the Mead School District No. 354, which arises from acts of grooming and sex abuse by a Mead High School teacher against a teenage student that occurred on and off school grounds. The District asks this Court to grant discretionary review pursuant to RAP 2.3(b)(1), (2), and (3) of three Spokane County Superior Court orders: (1) a February 26, 2021, *Order Granting Plaintiff's Motion for Summary Judgment Re: WLAD*[1], which concluded that the teacher's sexual grooming and abuse of the student constituted gender-based discrimination for which the school district was strictly liable under WLAD's public accommodation provision; (2) a July 16, 2021, *Order Granting Plaintiff's Motion for Summary Judgment Re: Affirmative Defenses*, dismissing affirmative defenses, including contributory

[1] WLAD is an abbreviation for the Washington's Law Against Discrimination, chapter 49.60 RCW.

Response, App. at 17. Its "intentional acts of others" defense alleged it could not be held liable for damages resulting from the offending teacher's intentional acts and misconduct:

> The Plaintiffs' injuries or damages were the result of the intentional acts and misconduct of Wesley Perez for which the Defendant is not and cannot be held liable.

Id. at 18. The parties treated these two defenses as a single defense denying liability for the offending teacher's intentional acts. Plaintiffs contended that the District could not allocate fault for WLAD damages to the offending teacher because the trial court concluded the District is strictly liable for all such damages; they further contended that the District could not allocate fault for the District's negligence damages to the offending teacher because *Welch v. Southland Corp.*, 134 Wn.2d 629, 952 P.2d 162 (1998), precludes the District from allocating fault for the offending teacher's intentional acts, which are not included in RCW 4.22.015's definition of "fault".

Again, the trial court agreed with plaintiffs and dismissed the District's affirmative defenses described above on summary judgment.

Analysis:

Affirmative Defenses: Fault of Others – Intentional Acts of Others

The District argues that Washington law precludes a negligent defendant from being liable for damages proximately caused by an intentional tortfeasor. *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003). By striking its "intentional acts of others" defense, the District maintains that the trial court obviously erred under *Tegman* and its progeny and that the trial court's error has made the District jointly and severally liable

for damages caused by the offending teacher's intentional acts. This error, the District maintains, renders further proceedings useless because any damages verdict will be defective. Alternatively, the District argues that the trial court's decision amounts to probable error and alters the status quo, which, until the decision, required the jury to segregate damages caused by the intentional tortfeasor from damages caused by a negligent defendant. Finally, the District maintains the trial court substantially departed from the accepted and usual course of judicial proceedings by departing from the *Tegman* rule.

Tegman was a case involving multiple defendants, some of whom negligently caused the plaintiff's damages and some of whom intentionally damaged the plaintiff. 150 Wn.2d at 105-07. The issue on review was "whether negligent defendants are jointly and severally liable for damages resulting from both negligent *and intentional acts*." *Id.* at 105 (emphasis original). The Supreme Court held "that under RCW 4.22.070 the damages resulting from negligence must be segregated from those resulting from intentional acts, and the negligent defendants are jointly and severally liable only for the damages resulting from their negligence. They are not jointly and severally liable for damages caused by intentional acts of others." *Id.* However, in analyzing RCW 4.22.070, the *Tegman* Court also acknowledged its previous holding "that in light of the statutory definition of 'fault,' a defendant who was not an intentional actor could not apportion liability to a third party intentional tortfeasor under RCW 4.22.070." *Id.* at 110 (citing *Welch v. Southland Corp.*, 134 Wn.2d 629, 634, 636-37, 952 P.2d 162(1998)).

In effect, the District's "intentional acts" affirmative defense sought to reallocate any damages for the District's alleged negligence to the offending teacher under RCW 4.22.070;

however, RCW 4.22.070, which concerns the allocation of fault among at-fault entities, does not apply to intentional torts because that statute's definition of "fault" excludes intentional acts and omissions. *Tegman*, 150 Wn.2d at 110. Because a defendant who is not an intentional actor cannot allocate fault for negligence to an intentional actor, the District has failed to establish that the trial court departed from or obviously or probably erred under *Tegman* by dismissing the District's "intentional acts" affirmative defense.

Further, the District has not shown that a jury instruction directing the jury how to properly calculate a damage award for negligence could ensure that further proceedings are not rendered useless. *See, e.g., Rollins v. King County Metro Transit*, 379-380 (approving jury instruction that instructed jury to not include any damages that were caused by the intentional acts of unknown assailants and not proximately caused by defendant's negligence in calculating a damage award). Finally, the District's claimed alteration of the status quo has not occurred here where there has been no trial and a jury has yet to be instructed on how to calculate damages. Regardless, this type of alteration in the status quo, even if it did occur, is not the type of alteration that justifies discretionary review. RAP 2.3(b)(2) is not satisfied where, like here, a decision merely alters the status of the litigation or limits a party's freedom to act in the conduct of litigation. Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1545-46 (1986).

The discretionary review standards under RAP 2.3(b)(1), (2), and (3) have not been satisfied here.

discriminatory acts. "A finding of proximate cause is premised upon proof of cause in fact as well as a legal determination that liability should exist." *Bernethy*, 97 Wn.2d at 935. The determination of proximate cause in fact is a question for the jury. *Martini*, 137 Wn.2d at 368.

Here, the trial court decided that the District was strictly liable as a matter of law for all actual damages resulting directly from the offending teacher's discriminatory acts, which, according to the trial court, could include damage that occurred off campus. It expressly reserved the issues of proximate cause in fact and damages for the jury. By doing so, it did not obviously or probably relieve the plaintiffs of their burden to prove proximate cause or damages. And it does not appear, from the record provided, to have departed from the usual course of judicial proceedings by entering summary judgment on a legal issue and reserving fact issues for trial.

Even if the trial court's decision makes the District liable for off-campus discrimination, the fact question of what off-campus discrimination occurred should be decided by the jury, not this Court, in the first instance before appellate review.

To conclude, RAP 2.3(b)(1), (2), and (3)'s discretionary review standards are not satisfied here and discretionary review of this issue is not appropriate in any event.

Accordingly, IT IS ORDERED, the District's motions for discretionary review are denied.

Hailey L. Landrus
COMMISSIONER

PCVA LAW

April 06, 2023 - 4:38 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56067-4
Appellate Court Case Title:	William Tisdale, Respondent v. Apro LLC., Appellant
Superior Court Case Number:	18-2-12279-7

The following documents have been uploaded:

- 560674_Other_20230406163603D2641807_8503.pdf
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  The Original File Name was 2023-04-06 -- Tisdale -- Appendix for Pet for Review.pdf
- 560674_Petition_for_Review_20230406163603D2641807_2362.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 2023-04-06 -- Tisdale -- Petition for Review.pdf

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PCVA LAW

April 06, 2023 - 4:38 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56067-4
Appellate Court Case Title:	William Tisdale, Respondent v. Apro LLC., Appellant
Superior Court Case Number:	18-2-12279-7

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Comments:

Sender Name: Sarah Awes - Email: sawes@pcvalaw.com
Filing on Behalf of: Darrell L. Cochran - Email: darrell@pcvalaw.com (Alternate Email: sawes@pcvalaw.com)

Address:
911 Pacific Ave
Suite 200
Tacoma, WA, 98402
Phone: (253) 617-1642

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