No. 67711-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MADHURI PATEL,

Appellants and Cross-Respondents,

v.

KENT SCHOOL DISTRICT,

Respondent and Cross-Appellant.

APPEAL FROM THE
SUPERIOR COURT FOR KING COUNTY WASHINGTON
HONORABLE HOLLIS HILL

REPLY BRIEF OF APPELLANT / CROSS-RESPONDENT

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I. REPLY

In the opening brief, Appellants identified seven assignments of error. Below, Appellants present a reply for each.

A. Trial Court Error Nos. 1 and 2:

The authority cited in Defendant KSD's briefing supports ***Appellants'*** contention that the trial court erred by: (1) improperly denying parental immunity; and (2) allowing the jury to allocate the alleged fault of Amanda's mother, to the claims brought by Amanda.

Prior to trial, Appellants filed a motion requesting that Amanda's mother be granted parental immunity. CP 1349-1356. The purpose of Appellants' motion was also to prevent Defendant KSD from asking the jury to consider the alleged wrongdoing of Amanda's mother when it assessed the claims of Amanda:

> Plaintiffs request an order precluding Defendants from arguing or suggesting that alleged fault or negligence of Amanda's parent [Ms. Patel] should be imputed to Amanda. Plaintiffs further request an Order that Amanda's damages cannot be reduced due to the alleged acts of negligence on the part of her parent. CP 1350.

Appellants cited several Washington cases supporting their requested relief, as well as RCW 4.22.020 which states, in relevant part:

> The contributory fault of one spouse or one domestic partner shall not be imputed to the other spouse or other domestic partner or the minor child of the spouse or domestic partner to diminish recovery in an action by the other spouse or other domestic partner or the minor child of the spouse or other domestic partner, or his or her legal representative, to recover damages caused by fault resulting in death or in injury to the person or property .... CP 1355.

Appellants also pointed to the Washington Pattern Jury Instructions, which direct the trial court that a child's claims are not affected by the fault of a parent:

> Contributory negligence, if any, of the child affects the claims of both child and parent, whether the parent was negligent or not. Contributory negligence, if any, of the parent affects the claim of the parent only, ***but does not affect the claim of the child.***

See WPI 11.05 (emphasis supplied); *see also Poston v. Mathers*, 77 Wn.2d 329 (1969); *Griffin v. Gehret*, 17 Wn. App. 546 (1977).

Defendant KSD opposed Appellants' efforts and the trial court denied Appellants' motion. The basis for the trial court's denial was its belief that RCW 4.22.020 does ***not*** apply to claims brought by minor children. CP 1877. Consequently, Defendant KSD's attorneys argued throughout the trial that: (1) Amanda's mother was at fault; and (2) that the wrongdoing of Amanda's mother should diminish the damages sought by Amanda. *See e.g.* RP p. 4647, l. 25 – p. 4648, l. 16; p. 4648, l. 21-24.

The trial court's ruling is contrary to long standing precedent. Washington courts recognize that RCW 4.22.020 applies to claims brought by children, including decisions made by Washington courts ***after*** enactment of the Tort Reform Act of 1986: [1]

> The direction in RCW 4.22.020 that contributory fault shall not be imputed applies only when a spouse, child or their legal representative brings an independent cause of action for their injury or death, not when the action is for damages incurred under RCW 4.20.010 . . .

Ginochio v. Hesston Corp., 46 Wn. App. 843, 847 (1987).[2]

Realizing that the trial court's justification for denying parental immunity was flawed, Defendant KSD now concedes that Amanda's mother ***was*** entitled to immunity.[3] Defendant KSD also appears to concede that RCW 4.22.020 ***does*** apply to the claims brought by minor children – undercutting the trial court's rational for denying Appellants' motion.[4]

However, Defendant KSD now contends that RCW 4.22.020 does not apply because the legislature utilized the word "impute" rather than

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[1] RCW 4.22.020 uses the term "minor children" in the statute's heading. This provides additional guidance regarding the legislature's intention regarding the scope of the law's application. *See e.g. State v. Chhom*, 162 Wn.2d 451 (2007) (statute headings may be utilized to as source of legislative intent).

[2] The *Ginochio* decision was issued and published ***after*** the Tort Reform Act of 1986.

[3] Respondent's Brief, p. 23.

[4] *Id.* p. 26-27.

"allocate" when describing the statute's prohibition on offering a parent's conduct to "diminish" damages claimed by a minor child.[5] Specifically, Defendant KSD argues that:

> [the] case at hand does not involve imputation of fault between family members; it involves nothing more than the garden-variety method of allocating fault among at-fault parties . . . The concept of imputing fault to another family member is an entirely different concept than the tort reform method of allocating fault between entities.[6]

Defendant KSD understands that if RCW 4.22.020 applies, (which it does), the trial court committed reversible error by inviting the jury to factor in the alleged fault of Amanda's mother when considering Amanda's claims. Consequently, Defendant KSD argues that the concept of "imputing fault to another family member" is not implicated in this case.[7]

Defendant KSD's argument is contradicted by the facts, the law, and its own briefing. It cannot be disputed that Madhuri Patel is Amanda's mother.[8] And, it is clear that, during trial, Defendant KSD argued, over Appellants' objection, that Amanda's mother's actions

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[5] *Id.* p. 25.

[6] *Id.* p. 27.

[7] *Id.* p. 26-27.

[8] *Id.* p. 1.

should "diminish recovery in an action" brought by Amanda – the precise arguments explicitly prohibited by RCW 4.22.020.

Defendant KSD's argument, devoid of citation to any legal authority, appears to be that, within RCW 4.22.020, there is a distinction between "allocation" of fault, and "imputation" of fault. Yet, while the legislature inserted the word "imputed" into RCW 4.22.020, the word "allocate" or "allocation" is not utilized anywhere in RCW 4.22.070. There is no support for Defendant KSD's argument that the legislature intended a distinction between "allocation" and "imputation" when enacting RCW 4.22.070.

Regardless of whether there is a legal distinction between the terms "imputing" fault and "allocating" fault, the distinction has no bearing on the outcome of this appeal. As Defendant KSD's briefing recognizes, the Washington Pattern Jury Instructions state that any the claimed misconduct of a parent cannot "***affect***," in any way, the claims of a child:

> The Washington Pattern Jury Instructions clearly describe the allocation process to be used in every case in which released and immune entities share fault with a defendant. For example, instructions state that *the contributory negligence of a parent affects the claim of the parent only, but* ***does not affect the claim of a child****, which is in conformity with the statutory scheme; a parent's negligence affects only the parent's claim, and a child's comparative negligence affects the child's claim.*[9]

[9] *Id.*, p. 28. *See also* WPI 11.05.

Stated another way, the Washington Pattern Jury Instructions reflect that a defendant cannot seek to diminish or extinguish claims brought by a child, based upon an allegation of contributory negligence on the part of the child's parent. *See* WPI 11.05. However, the trial court allowed Defendant KSD to make this precise argument during trial and, in at least one instance, provided a jury instruction reflecting that the jury ***must*** diminish Amanda's claims to the extent it found Amanda's mother at fault. CP 6675. The trial court's adoption of Defendant KSD's theory was plain error requiring a new trial. *See Chuth v. George*, 43 Wn. App. 640, 642 (1986).

Defendant KSD argues that *Chuth* is no longer binding precedent following the passage of the Tort Reform Act of 1986. This argument overlooks that when there is a conflict between two statutes, courts give effect to the terms of the more specific statute.[10] *See Gorman v. Garlock, Inc.*, 155 Wn.2d 198 (2005). Here, the more specific statute is RCW 4.22.020.

RCW 4.22.070 *generally* requires the jury to determine the proportionate fault of each entity causing a claimant's harm, including the claimant's role in causing his or her own harm. *See* RCW 4.22.070(1). In contrast, RCW 4.22.020 is more specific, acting to prevent the imputation

[10] *Id.* p. 29.

of a parent's negligence to diminish the damages asserted in cases involving claims brought by minor children. *See* RCW 4.22.020.

The holding of *Chuth* remains binding precedent because the more specific statute – RCW 4.22.020 – prevents Defendant KSD from seeking to diminish the damages claimed by Amanda, based upon allegations that Amanda's mother was at fault.[11]

The trial court erred by ignoring RCW 4.22.020 and by allowing Defendant KSD to argue that the alleged negligence of Amanda's mother should be considered by the jury when assessing Amanda's claims. The trial court's error resulted in improper argument, incorrect jury instructions, and requires a new trial.

B. Trial Court Error No. 3:

The jury received inconsistent jury instructions and improper special verdict forms on this same issue. Specifically, the trial court provided two instructions (Jury Instructions 15 and 20) prohibiting the jury from considering the alleged negligence of Amanda's mother when assessing Amanda's claims. CP 6667; 6672. However, the court provided another instruction (Jury Instruction 23) ***directing*** the jury to attribute fault to each entity that proximately caused harm, including Amanda's mother, when considering ***both*** plaintiffs' claims. CP 6675. Instruction 23 also

[11] *Chuth v. George* remains binding precedent despite the passage of RCW 4.22.070.

indicated that "the court will provide you with a special verdict form for this purpose" of allocating fault.

The special verdict form reflecting Amanda's claims also instructs the jury to diminish her damages based upon the alleged contributory negligence of Amanda's mother – a statement of law that is irreconcilable with the directive given by Instructions 15 and 20. After hearing weeks of testimony regarding the role that Amanda's mother played in causing harm to Amanda, the jury found the mother at fault on the special verdict form reflecting Amanda's claims. CP 6694-6697; CP 6695.

Defendant KSD does not address the glaring inconsistency between Jury Instructions 15 and 20, compared with Instruction 23, compared with the special verdict form reflecting Amanda's claims. Instead, Defendant KSD suggests that the jury instructions are proper because ***some*** of them accurately reflected the law ("[i]n fact, the jury was specifically instructed that any contributory negligence of a parent does not affect the claim of the child").[12] However, this argument ignores that another instruction (Jury Instruction No. 23), as well as the special verdict forms, directed the jury to do just the opposite – apportion fault on the part of Amanda's mother to the claims of Amanda.

[12] *Id.* at 31.

The parties agree that, in order for jury instructions to be sufficient, they must: (1) allow counsel to argue their theory of the case; (2) not mislead the jury; and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732 (1996). Claimed errors in jury instructions are reviewed *de novo*. *Keller v. City of Spokane*, 104 Wn. App. 545, 551, (2001), *aff'd*, 146 Wn.2d 237 (2002).

Errors in special verdict forms are reviewed under the same standard as jury instructions – *de novo*. *Capers v. Bon Marche*, 91 Wn. App. 138, 142 (1998). When read as a whole, the special verdict form must adequately present the contested issues to the jury in an unclouded and fair manner. *See Lahmann v. Sisters of St. Francis*, 55 Wn. App. 716, 723 (1989). A special verdict form is prejudicially defective when it contradicts accompanying jury instructions.

As this Court held in *Capers*:

> Although a special verdict form need not recite each and every legal element necessary to a particular cause of action where there is an accurate accompanying instruction, it may not contain language that is inconsistent with or contradicts that instruction.

91 Wn. App at 144.

The jury instructions were misleading and, because of the contradictory requirements regarding the impact of the alleged fault of Amanda's mother on Amanda's claims, they do not accurately inform the trier of fact of the applicable law. For the same reason, the special verdict form submitted by the court regarding Amanda's claims was prejudicially defective.

Knowing that the trial court provided inconsistent jury instructions, as well as a special verdict form that contradicted some of the jury instructions, Defendant KSD argues that any resulting error was harmless and therefore reversal is unnecessary:

> [w]ere the jury instructions and verdict form so misleading as to be prejudicial – or was the error harmless? A review of the instructions shows that any error was harmless because, as they should, the instructions treated Amanda and her mother as separate parties, each with her own instructions.[13]

However, looking ***only*** at Amanda's claims, the court provided contradictory instructions that both prohibited ***and*** required that Amanda's damages be diminished to the extent the jury believed that Amanda's mother was at fault. Moreover, the special verdict form reflecting Amanda's claims demonstrates that the jury found Amanda's mother to be

[13] *Id.* at p. 31.

an at fault entity – a finding prohibited by Jury Instructions 15 and 20. CP 6695.

Consequently, Defendant KSD's suggestion that the instructions were appropriate because some of the instructions applied to Amanda's claims, and others to the claims of Amanda's mother, ignores that the instructions themselves do not reflect this distinction, and that the contradictions existed within the instructions for both claims.

Moreover, the special verdict form provided for Amanda's claims ***required*** the jury to assign fault to Amanda's mother. Therefore, even if this court were to agree that there is not an inconsistency between the jury instructions, the trial court was still required to provide a special verdict form for Amanda's claims that accurately reflected the law and was consistent with the jury instructions.

Defendant KSD's "lack of prejudice" argument also ignores binding precedent holding that prejudice is ***presumed*** when the trial court provides inconsistent jury instructions on a material issue:

> [W]e have held consistently that it is prejudicial error to give irreconcilable instructions upon a material issue in the case. Where instructions are inconsistent or contradictory on a given material point, their use is prejudicial, for the reason that it is impossible to know what effect they may have on the verdict.

Hall v. Corporation of Catholic Archbishop, 80 Wn.2d 797, 804 (1972).[14]

The alleged fault of Amanda's mother was a "material issue" in this litigation. In fact, Defendant KSD's briefing describes the jury's consideration as follows: "[t]he question of the mother's own negligence was an important, necessary, and proper part of the work the jury did in this case."[15] Considering the importance assigned to the issue of the mother's fault ***by Defendant KSD***, there can be no dispute that this issue was material.

Appellants have established that the jury instructions and special verdict forms were inconsistent, did not accurately reflect the law, and related to a material issue considered by the jury. The trial court's error was prejudicial. Consequently, as recognized by *Hall*, because "it is impossible to know the effect that these errors had on the jury's verdict," reversal is the only remedy.

C. Trial Court Error No. 4:

Pursuant to Evidence Rule 412, evidence of a victim's sexual history and/or sexual predisposition is presumed inadmissible.

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[14]Although *Hall* was prominently quoted in Appellants' opening brief, Defendant KSD does not attempt to distinguish it.

[15] *Id.* at p. 29.

ER 412(b).[16] The presumption regarding exclusion can only be overcome if the evidence's "probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." ER 412(c).

Appellants argued that questions of capacity turn on cognitive considerations, not a person's sexual history. RP 34, l. 10-16. Appellants pointed out that allowing a defendant to avoid the exclusionary presumption of Evidence Rule 412, by claiming that the evidence was offered to rebut damages, would eviscerate the rule's protections. RP 41, l. 19 – RP 42, l. 5.

The trial court disagreed. Evidence regarding Amanda's alleged sexual behaviors, occurring eight years before the events described in the Complaint, was permitted. RP p. 56, l. 1-7. The trial court allowed this evidence because ***Defendant KSD's expert*** determined that it was relevant:

> THE COURT: With respect to sex with her cousin, I --again, if -- if -- ***if the defense expert finds that that is relevant to her damages claim and if there is some competent proof of that having happened,*** then that would be -- then -- then that would be something where the probative value

[16] Defendant KSD argues that no presumption of exclusion exists under Evidence Rule 412. However, the plain language of the rule states that evidence of a victim's sexual behavior and sexual predisposition ***is not admissible in a civil proceeding***. *See* E.R. 412(b)(1) & (2). The rule, however, provides for ***exceptions*** to the general rule of exclusion. *See* E.R. 412(c). Whether these exceptions were properly weighed and applied by the trial court is the issue before the court.

> substantially outweighs the danger of harm and that would be admissible. And also with respect to capacity because she evidently testified in her deposition or told someone -- I guess she could be impeached on having told someone that she felt she would -- she stopped having sex with him because she thought she would have messed up children. So that shows a capacity to understand the consequences of sexual intercourse.[17]

The trial court also permitted evidence that Amanda allegedly used birth control. The trial court concluded that this evidence was also admissible to establish capacity.

Defendant KSD argues that the trial court properly weighed the evidence and did not abdicate its responsibility to weigh the evidence by deferring to Defendant KSD's expert:

> The trial court engaged in lengthy oral argument with the parties and considered multiple briefs regarding the issue of whether to admit evidence regarding birth control and Amanda's relationship with Sunil.[18]

Defendant KSD fails to offer any portion of the record supporting its argument. The trial court did, in fact, base its ruling regarding the admissibility of Amanda's sexual history and prior behaviors, on the belief ***by Defendant KSD's expert*** that Amanda's sexual history was relevant.

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[17] RP p. 56, l. 1-15.

[18] Respondent's Brief, p. 36.

The trial court's admission or exclusion of evidence pursuant to Rule 412 is reviewed for abuse of discretion. *United States v. White Buffalo*, 84 F.3d 1052 (8th Cir. S.D. 1996). However, Washington law makes clear that failure to exercise discretion is, in and of itself, an abuse of discretion. *Kucera v. DOT*, 140 Wn.2d 200 (2000). Here, the trial court failed to exercise authority and instead allowed Defendant KSD's expert opinion to establish the admissibility of evidence concerning Amanda's alleged sexual history.

The danger in allowing a defendant's legal team to make evidentiary decisions in a highly-charged sexual misconduct case is self-evident.

Even if the trial court had exercised discretion, its rulings reflect an abuse of that discretion. A trial court's exercise of discretion warrants reversal when based on an erroneous view of the law or an incorrect legal analysis. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833 (2007).

The trial court allowed evidence that Amanda was sexually-victimized by her cousin, and evidence regarding Amanda's efforts to obtain birth control, because it felt this evidence was relevant to whether Amanda was capable of consenting to sexual intercourse.[19] Due to her

[19] RP p. 56, l. 1-14

lifelong cognitive limitations, Amanda's mental capacity to consent to sex was a central issue at trial.

Mental incapacity is defined by RCW 9A.44.010:

> (4) "Mental incapacity" is that condition existing *at the time of the offense* which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

Applying RCW 9A.44.010(4), the Washington State Supreme Court has held that mental incapacity must be measured by analyzing a person's understanding of the nature and consequences ***at the time of the offense***:

> It is important to distinguish between a person's *general* ability to understand the nature and consequences of sexual intercourse and that person's ability to understand the nature and consequences at a given time and in a given situation. This treatment of the two as identical contradicts the express language of the statute. *RCW 9A.44.010(4)* specifically notes "'mental incapacity' is that condition existing *at the time of the offense* which prevents a person from understanding the nature or consequences of the act of sexual intercourse . . .." (Italics ours.)

State of Washington v. Ortega-Martinez, 124 Wn.2d 702, 716 (1994).

As recognized by *Ortega-Martinez*, evidence that Amanda was allegedly involved in a sexual relationship with her cousin

when she was 8 years old has no bearing on her capacity to consent to sex when she was 16 years old – her age when the incidents occurred at school. *Ortega-Martinez* makes it clear that a trial court must focus on a person's capacity to consent to sex at the time the offense occurs.

For the same reason, the trial court's decision to allow the jury to consider that Amanda may have sought birth control several months before the incidents at school, "contradicts the express language of the statute" as prohibited by *Ortega-Martinez Id.* at 716.

Defendant KSD does not offer a response to the holding of *Ortega-Martinez*. Defendant KSD makes no reference to its authority, and makes no effort to distinguish its holding.

Rather than argue the law, Defendant KSD parrots the salacious trial strategy employed throughout the trial:

> There was evidence that for several years Amanda had a sexual relationship with her cousin, Sunil, and that she chose to end the relationship because she feared having a genetically damaged baby because they were cousins.[20]

Despite the fact that this event was alleged to have occurred ***eight years before*** the sexual incidents at school, and despite scant evidence that

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[20] Respondent's Brief, p. 35.

these events even occurred, Defendant KSD made this inflammatory evidence a centerpiece of its defense.

There is no basis for departing from well-settled law that the mental capacity of an individual must be assessed by looking ***only*** at the person's capacity at the time of the offense. Amanda's prior sexual history with her cousin, as well as her request for birth control, are too remote in time to shed light on capacity during the incidents occurring in the school restrooms.

The trial court's ruling, that prior sexual conduct demonstrates capacity to consent to sex, also ignores the underlying causes of Amanda's incapacity – her life-long developmental disabilities. Evidence of prior sexual conduct is ***irrelevant*** where a victim, like Amanda, suffers from permanent, developmental impairments:

> Where the lack of capacity is based on a permanent, organic condition, it logically follows that prior acts of intercourse cannot demonstrate that the victim understands the nature and consequences because the prior acts may have occurred due to the same lack of capacity. The risk of undue prejudice from the admission of such evidence is high, while the benefit to the defense is insubstantial.

State of Washington v. Summers, 70 Wn. App. 424, 435 (Div. I. 1993).

Defendant KSD attempts to avoid the binding precedent of *Summers* by claiming it was not addressing "any of the unique characteristics of this case."[21] Defendant KSD does not explain why Amanda's sexual history is "unique" from any other sexual abuse case. Instead, Defendant KSD offers a single case from the State of New Hampshire in response: *State v. Frost*, 141 N.H. 493 (1996).

Frost does not support Defendant KSD's arguments. In fact, *Frost* makes clear that evidence of Amanda's sexual involvement with her cousin should have been excluded:

> The defendant argues that the complainant's prior relationship was relevant because her prior sexual activity tends to prove that she had the capacity to consent to sexual activity. ***We disagree. The fact that the complainant engaged in prior sexual activity is not probative of her legal capacity to consent***, any more than her sexual relationship with the defendant bears on that same issue. Her capacity to engage physically in sexual activity is not probative of her mental capacity to appraise the nature of her conduct.

Frost, 141 N.H. at 501 (emphasis added).

Moreover, *Frost* cites to the same language from this court's decision in *State v. Summers*. Far from distinguishing the binding

[21] Respondent's Brief, p. 37.

precedent of *Summers, Frost* underscores that this court's decision has been adopted in other jurisdictions.

The *Frost* court held that evidence that the alleged victim ***refused*** to engage in sexual conduct might be probative on the issue of the victim's capacity. However, that does not assist Defendant KSD in this appeal. *Frost* required that there be a "reasonable proximity in time" between the crime and the prior conduct:

> In contrast, the potential testimony by the prior boyfriend that he and the complainant refrained from certain sexual activities because she refused to consent is highly probative of the issue of her capacity to decide whether or not to consent. So is other evidence of the complainant's thought process in making such decisions, ***assuming a reasonable proximity in time to the charged crimes***.

Id. at 502.

Again, the sexual conduct, as well as Amanda's thought process regarding the conduct, occurred ***eight years before the incidents alleged*** in the complaint. It cannot seriously be argued that a very young developmentally disabled child's alleged sexual activity had a "reasonable proximity in time" to the events occurring at Amanda's high school.

Even assuming a reasonable proximity in time, Defendant KSD did far more that introduce evidence that Amanda ***refused*** to have sex with her

cousin. Defendant KSD repeatedly referenced that Amanda had sex with her cousin for "several years" (when she was 4 to 8 years old) and told the jury that this was "the penis in vagina kind of sex."[22] Defendant KSD offered this evidence for clear strategic purposes with the intention of prejudicing the jury against both Amanda and her mother. Tactics like this are why Evidence Rule 412 was enacted.

As recognized in *Summers*, it was an abuse of discretion for the trial court to allow Defendant KSD to offer this inflammatory sexual history evidence under the guise of capacity given Amanda's lifelong developmental disability. Because Amanda had a lifelong developmental disability, pointing to past sexual behavior as evidence of her understanding of sex was inappropriate in the extreme. Certainly, it violated ER 412.

Defendant KSD also argues that Amanda's sexual history and sexual predisposition should be admitted to rebut Amanda's claim of damages.[23] Specifically, Defendant KSD argues that, because Appellants' expert witnesses testified that the events in the school restrooms caused harm, her sexual history and predispositions became an issue for the jury to consider:

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[22] Respondent's Brief, pp. 17; 35.

[23] *Id.*, at p. 40-41.

> [I]t is not right to allow an expert witness to simply pick one (of several) events as the sole cause of plaintiff's injuries — while hiding the other possible sources and events from the jury.[24]

Defendant KSD's arguments are not supported by legal authority and ignore the purpose behind Evidence Rule 412. Specifically, the Rule was adopted to ***encourage*** victims of sexual misconduct to come forward with the knowledge that degrading and embarrassing details about their private lives would not be offered or admitted at trial.[25] *See United States v Cardinal*, 782 F.2d 34 (6th Cir. 1986), *cert denied at* 476 US 1161 (1986); *see also United States v Saunders*, 943 F.2d 388 (4th Cir. 1991); *cert denied,* 502 US 1105 (1992) (evidence that victim was prostitute that traded sex from drugs properly excluded pursuant to Rule 412).

Rule 412 applies to victims of sexual misconduct occurring at school. *See J.M. v. Hilldale Independent School District No. 1-29*, 397 Fed. Appx. 445 (2010) (student-victim's journal and evidence of other sexual behavior properly excluded pursuant to Rule 412). And, ***evidence regarding use of contraceptives is inadmissible under Rule 412*** since use

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[24] *Id.*, at p. 41.

[25] ER 412 is derived from Federal Rule of Evidence 412. Federal case law interpreting an identical federal rule may be used by this Court to construe ER 412. *In re Det. of Stout*, 159 Wn.2d 357, 386 (2007).

implies sexual activity. *See, e.g., United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S.Ct. 418 (1992).

Adopting Defendant KSD's argument would mean that the protections afforded by Evidence Rule 412 would cease to apply in a civil case whenever victim alleged damages as a result of sexual misconduct – a near universal request. The only realistic way for a victim of sexual misconduct to receive the protections of Evidence Rule 412 would be if the ***perpetrator*** of the wrongdoing to agreed that the evidence was inadmissible. Under Defendant KSD's logic, all manner of otherwise-inadmissible sexual innuendo and behaviors could be offered to "rebut" a claimant's damages. In short, Defendant KSD asks for an exception that swallows the rule without citing a single case to support its argument.

Where there is a risk of prejudice arising from improperly admitted evidence and "no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673 (2010) (*quoting Thomas v. French*, 99 Wn.2d 95, 105 (1983)). The trial court allowed Defendant KSD to introduce irrelevant and incendiary evidence regarding Amanda's sexual history (during her earliest years as a developmentally disabled child) and sexual predisposition. Consequently, a new trial is warranted.

D. Trial Court Error No. 5:

The trial court excluded evidence showing that Amanda was legally-incompetent. In support of the trial court's ruling, Defendant KSD offers an argument that is myopic, focusing exclusively on the question of whether Amanda had the "capacity to consent to sex." However, the basis for the determination that Amanda is legally incompetent is far more expansive than the narrow issue of her "capacity to consent to sex."

The GAL report, findings of fact, conclusions of law and order (all excluded by the trial court), demonstrate that Amanda is developmentally disabled, unable to protect herself, vulnerable to exploitation, and extraordinarily impressionable. These implicate developmental limitations that impact Amanda's well-being, safety, and need for close supervision. As noted by the court-appointed guardian ad litem, "[Amanda] is not able to distinguish when kindness ends and perhaps when harm will begin. She lacks skills and maturity . . . can be considered vulnerable." CP 1800-1801. The GAL also noted "[Amanda] is vulnerable to exploitation due to inability to problem solve and assess situations that could be risky or result in harm." CP 1801.

Evidence Rule 401 makes it clear that "'relevant evidence' means any evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be

without the evidence." ER 401. The rule requires only a showing of minimal logical relevance – *any* tendency to make the existence of a fact more or less probable. *State v. Bebb*, 44 Wn.App. 803, 723 P.2d 512 (1986).

It is difficult to imagine evidence that is more germane to the elements of causation and damages than findings that Amanda is, in fact, so vulnerable that she requires a full guardianship.[26] Defendant KSD agrees that "under the guardianship statute, a person may be deemed incapacitated due to an inability to adequately provide for . . . physical safety."[27] However, Defendant KSD writes "those standards do not have any application to the area of sexual contact." That is preposterous. The standards embodied in the guardianship statute have everything do to with one's decision-making abilities – whether the decision is to engage in a friendship, walk into a boys' bathroom where danger lurks, or comply with orders to give oral sex.[28]

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[26] The fact that the guardianship proceedings did not take place until Amanda turned eighteen years old is not a reason to exclude these findings. It certainly does not render these exhibits irrelevant. By definition, developmental disabilities occur at birth. Amanda was vulnerable, lacked awareness of risky situations, and was otherwise not equipped to make informed decisions about her safety from the time she was born.

[27] Respondent's Brief, p. 43.

[28] Defendant KSD argues that "plaintiffs attempted to use language they inserted into [the guardianship] order." This is an odd argument. Neither Amanda, her mother, nor their trial counsel, had any role in preparing the guardianship order or the GAL's report.

A court order, which declares Amanda to be legally incapacitated, is of extreme relevance on the issue of Amanda's ability to protect herself, and the need for close supervision. The GAL report demonstrates the potential for danger when Amanda is placed in situations that may result in harm. This evidence, excluded by the trial court, would have materially assisted Amanda in establishing the elements of causation and damages.

Defendant KSD offers decisional law from the Eastern District of Michigan (*Chavez v. Waterford School District*, 2011 U.S. Dist. LEXIS 25758 (E.D. Mich. 2011)) to support the trial court's decision to exclude Amanda's guardianship. However, the *Chavez* decision dealt with a federal claim, under a separate burden of proof, in the context the Americans with Disabilities Act. In *Chavez*, the claimant attempted to use a finding of disability benefits in one context to establish her right to disability benefits in a separate context. Here, Amanda does not seek to use the guardianship order to establish disability in another context. Rather, the guardianship order is relevant to demonstrate the profound nature of her disabilities, her susceptibility to danger, her inability to assess risky situations, and the clear need for supervision.

The trial court's error was compounded by its decision to allow Defendant KSD to argue that Amanda had the "capacity to consent to sex" by offering evidence that Amanda allegedly sought birth control and had

sexual contact with a cousin ***many years before*** the incidents in the high school bathroom.

Washington courts are clear that Evidence Rule 403 should be administered in an evenhanded manner. If evidence has already been admitted on behalf of one party, similar evidence offered by the opposing party should ***not*** be excluded under Rule 403. *Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994); *Martinez v. Grant County Public Utility District No. 2*, 70 Wn. App. 134, 851 P.2d 1248 (1993). The trial court committed error by not admitting evidence of Amanda's legal incapacity.

E. Trial Court Error No. 6:

Appellants have assigned error for giving criminal jury instructions in relation to their common law and statutory claims against Defendant KSD. Over counsel's objections,[29] the trial court insisted on giving criminal jury instructions relating to issues such as statutory rape and consensual sex. CP 6678; 6683; 6684; 6685; 6686.[30] On appeal, Defendant KSD does not challenge the established rule that giving jury instructions containing improper standards or imposing an incorrect burden of proof is reversible error. *See, e.g., State v. Savage*, 94 Wn.2d

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[29] RP p. 4344 -4354.

[30] In doing so, the trial court failed to explain the purpose of these instructions, and did not articulate the claim or defense to which these criminal standards applied.

569, 577 (1980). Nor does Defendant KSD dispute that inconsistent or confusing instructions require that a jury verdict be overturned. *See, e.g., Cox v. Spangler,* 141 Wn.2d 431, 442 (2000). In fact, Defendant KSD does not offer any authority on these issues. Rather, Defendant KSD tries to justify the trial court's use of criminal jury instructions by arguing that Appellants were required to prove that a crime (i.e. some form of criminal sexual abuse or rape) occurred as a threshold for Defendant KSD's civil liability. This argument has no basis in the law.

In essence, Defendant KSD asserts that Amanda and her mother cannot sustain their claims for negligence, or violations of RCW 26.44, without initially proving that a criminal act was committed against Amanda. Therefore, the argument goes, criminal standards must be added to the usual elements that must be proven, and these criminal instructions were appropriate for that purpose. Defendant KSD offers no authority to support this striking argument.

Instead, Defendant KSD cites to, and selectively quotes from, *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999) arguing that the "Washington Supreme Court has held that, for childhood sexual abuse to be actionable in tort, the alleged sexual abuse must amount to a violation of the criminal code." A closer look at the *C.J.C.* case makes clear that this was ***not*** the court's holding.

The primary issue presented in *C.J.C.* was whether the special statutes of limitations regarding childhood sexual abuse, RCW 4.16.340 and .350, sound in negligence and apply to the clergy sex abuse claims made against both the perpetrators and church defendants. *C.J.C.*, 138 Wn.2d at 708-709. The *C.J.C.* court held the plaintiffs' sex abuse claims were not time-barred against either the perpetrator or the institutional defendants. *Id.* at 713-714. The *C.J.C.* case ***did not*** relate to, or even mention, the issue of jury instructions, whether criminal jury instructions are ever appropriate in a civil action, or whether a plaintiff alleging negligence in a case relating to sexual abuse has a burden of proof that differs from those borne by other tort plaintiffs.

Instead of limiting a sex abuse victim's right of action, the *C.J.C.* court ***expanded*** those rights, confirming that claims against both perpetrators and institutional defendants are not time-barred under the relevant statute. To argue that the *C.J.C.* decision made an unprecedented change in the law by adding an element to tort claims based on sexual abuse — one that requires the plaintiff to prove that a crime occurred — is not correct.

Likewise, Defendant KSD's reliance on *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005) is misplaced. Defendant KSD argues that *Christensen* "reaffirmed" the purported holding in *C.J.C.* that a jury should use criminal law to determine whether a tort defendant is civilly liable.[31] In *Christensen*, the U.S. District Court for the Eastern District of Washington certified the following question to the Washington Supreme Court:

> May a 13 year old victim of sexual abuse by her teacher on school premises, who brings a negligence action against the school district and her principal for failure to supervise or for negligent hiring of the teacher, have contributory fault assessed against her under the Washington Tort Reform Act for her participation in the relationship? *Id. at 64.*

The court's answer to that question had nothing whatsoever to do with the propriety of using criminal jury instructions or whether a sex abuse victim, in a civil action, must demonstrate that a crime has occurred.

Rather than helping Defendant KSD's position, the *Christensen* decision highlights the principle that, under both civil and criminal law, "minors are incapable of meaningful consent" to sex and that "the obvious purpose of [the] criminal statute is to protect persons who, by virtue of their youth, are too immature to rationally or legally consent." *Id. at 68*

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[31] Despite Defendant's claim of *Christensen's* "reaffirmation" of the holding in *C.J.C.*, it is not cited a single time in the *Christensen* opinion.

(citing State v. Clemens, 78 Wn.App. 458, 467, 898 P.2d 324 (1995); *State v. Dodd,* 53 Wn.App. 178, 181, 765 P.2d 1337 (1989)). These statements do not support the trial court's decision to use criminal pattern jury instructions in this civil trial.

Another problem with Defendant KSD's argument is the line of authority in Washington, which Defendant KSD did not address, holding that it is not appropriate to graft criminal standards onto civil trials. *See, e.g., Young v. Seattle*, 25 Wn.2d 888, 894-895 (1946); *In re Estate of Kissinger*, 166 Wn.2d 120, 128 (2009); *Leavy v. Metro. Life Ins. Co.*, 20 Wn. App. 503, 507 (1978). The above-cited authority does not support Defendant KSD's assertion that proof of a crime is a prerequisite to a negligence claim in sex abuse cases.

Defendant KSD misunderstands the operation of Appellants' statutory claim under RCW 26.44. Under that statute, a mandatory reporter is required to make a report whenever she "has reasonable cause to believe that a child has suffered abuse or neglect." RCW 26.44.030(1)(a). Failure to support any suspicions based on "reasonable cause" is a violation of this requirement, whether or not any abuse (criminal or not) ever occurred. A civil claim under RCW 26.44 does not require a finding that sexual abuse actually occurred — it only requires a showing that a reporter has "reasonable cause" to suspect abuse or neglect,

that a report was not made, and that the child suffered harm as a result of that failure to report. Accordingly, a claim under RCW 26.44 for failure to make a mandated report does not require any showing that a crime occurred. In this context, providing criminal jury instructions suggesting that Appellants were required to prove the commission of a crime was highly prejudicial and resulted in confusing and inconsistent instructions.

Finally, Defendant KSD attempts to repair the trial court's erroneous use of criminal jury instructions by claiming that some the instructions proposed are "substantively identical" to Section 892A of the Restatement (Second) of Torts. Section 892A of the Restatement has never been adopted by Washington courts.

The fact is, the trial court improperly gave confusing and inconsistent criminal jury instructions in a civil case. This error cannot be cured by comparing the defective instructions to secondary sources. The only remedy is a reversal and new trial.

F. Trial Court Error No. 7:

The trial court denied Appellants' motion to amend the complaint to add a claim under RCW 74.34 based on the same set of operative facts. This was an erroneous decision.

There is no dispute that the claim pursuant to RCW 74.34, which Appellants sought to add, was based on the identical set of facts, but only added a new legal theory and remedies. *See* CP 2339.

Defendant KSD seems to concede — as it must — that the statute's definition facially applies to Amanda. Nonetheless, Defendant KSD argues that the trial court correctly denied the motion to amend because "[l]ogic and statutory interpretation" indicate that RCW 74.34 was not intended to protect those under the age of 18; and that there is an "implied" modification of this statutory definition to exclude minors. The trial court's ruling and Defendant KSD's argument ignore the liberal standard for amendment of pleadings and, more importantly, disregard the established law prohibiting courts from looking behind plain meaning when interpreting an unambiguous statute.

Amendment of pleadings should be liberally allowed to add causes of action. CR 15(b). Furthermore, amendments which only add a legal theory to a nucleus of already disputed facts may be permitted at any time, even after trial. *See, e.g., Herron v. Tribune Pub. Co.*, 108 Wn.2d at 166 (1987) ("appellate decisions permitting amendments have emphasized that the moving parties in those cases were merely seeking to assert a new legal theory based upon the same circumstances set forth in the original

pleading."). Only a finding that an amendment would be "meritless, futile, or unfairly prejudicial" can justify denial of a motion to amend. *Haselwood v. Bremerton Ice Arena*, 137 Wn. App. 872, 889 (2007).

Here, the trial court never found that Appellants' proposed amendment was meritless, futile or unfairly prejudicial to Defendant KSD. Rather, the trial court denied the motion to amend during pretrial proceedings based on a vaguely-stated ruling that Appellants could not allege a violation of RCW 74.34 because the Act did not apply to Amanda. The trial court's ruling is not supported by findings or conclusions, and the trial court made no effort to reconcile it with the law requiring liberal amendment. Because RCW 74.34 applies to Amanda, a developmentally disabled citizen, the trial court's denial was not correct.

There is no question that Amanda falls within the definition of a "vulnerable adult" as it is stated in RCW 74.34.020. The "definitions" section unambiguously declares that the protective measures of the statute apply to any person "[w]ho has a developmental disability as defined under RCW 71A.10.020[.]" RCW 74.34.020(17)(c). Because the parties do not dispute that Amanda is developmentally disabled, the Vulnerable Adults Act applies, and authorizes a cause of action arising from the abuse, neglect or exploitation of Amanda while a student at KHS.

Defendant KSD asks this Court to find that there is an additional "implied" term of this definition to exclude developmentally disabled minors. Doing so would be contrary to the established law of statutory interpretation.

The law is clear that when the meaning of statutory language is plain, the court's inquiry must stop there. The court must apply the language as-written. *See, e.g., Campbell v. DSHS*, 150 Wn.2d 881, 894 (2004). This approach is required regardless of whether other sources indicate a contrary reading, or even whether the court suspects the legislature intended a different result. *See State v. Hale*, 146 Wn. App. 299, 307 (2008) ("We will not add to or subtract from the clear language of a statute ***even if we believe the legislature intended something else but did not adequately express it.***") (emphasis added). A court cannot use titles, headings or marginal notes to change the plain meaning of statutory language. *See, e.g., State v. Lundell*, 7 Wn. App. 779, 782 (1972) ("Of course where the meaning of the act is clear and unambiguous, courts will not consider section headings and marginal notes.").

The law is clear that a court may not graft implied terms on plain language or look to external sources to create ambiguity, yet this is precisely what the trial court did, and what Defendant KSD asks that this

Court uphold. The trial court's denial of Appellants' motion to amend was legal error and must be reversed.

Applying the Vulnerable Adults Act to Amanda is not nonsensical, as Defendant KSD contends. RCW 74.34.020 contains a list of categories of individuals who are covered by the Act and, so long as a plaintiff meets any of these criteria, the Act applies. One of these categories is developmentally disabled citizens, and that category (unlike others) does not include any age restriction. Decisional law confirms that the goal of the Act is "**protecting elderly, mentally ill, *and* *disabled persons*** from abuse, neglect, financial exploitation, and abandonment[.]" *Calhoun v. State*, 146 Wn. App. 877, 889 (2008) (emphasis supplied).

Although Defendant KSD argues that claims relating to children must be made under RCW 26.44, that argument ignores the fact that Amanda was both a minor and developmentally disabled at the time of these events. It is certainly possible for both statutes to apply to someone who is both a minor and developmentally-disabled.

The definition provided by RCW 74.34.020(17)(c), indicates that the Act's protections apply to Amanda. The trial court's inquiry should have ended there, and Appellants' motion to amend should have been granted. The trial court's denial of this motion is legal error and justifies reversal.

II. RESPONSE TO CROSS-APPEAL

Appellant's opening brief addresses many material inconsistencies exhibited by the trial court. The depth and scope of the trial court's erroneous application of the law is further evidenced by Defendant KSD. It is exceedingly rare when an appeal includes multiple "issues on cross-appeal" from a party that received a defense verdict.

A. Response to Cross-Appeal No. 1:

Defendant KSD argues that the jury should not have been allowed to consider whether school personnel had a duty to report pursuant to RCW 26.44 ("Abuse of Children"). Defendant KSD focuses its argument on the definition of "sexual exploitation," but ignores the broad application of RCW 26.44, its explicit application to "professional school personnel," and the mandatory reporting requirement upon any suspicion of harm to a child's health, welfare, or safety.

Washington law provides that whenever certain professionals have "reasonable cause to believe that a child has suffered abuse or neglect[,]" they are legally required to report these suspicions to the appropriate governmental or law enforcement authorities. RCW 26.44.030(1)(a). The terms "abuse or neglect" are defined broadly to include "sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety . . ." RCW

26.44.020(1). The list of individuals who are required to report includes "professional school personnel." RCW 26.44.030(1)(a).

RCW 26.44 provides that these "mandatory reporters" must make a report to the authorities "at the first opportunity, but in no case longer than ***forty-eight hours*** after there is reasonable cause to believe that the child has suffered abuse or neglect." RCW 26.44.030(1)(f). Washington courts have recognized that the failure of a mandatory reporter to follow the requirements of RCW 26.44 will give rise to a private cause of action by the abused or neglected child against the mandated reporter. *Jane Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 423, 167 P.3d 1193 (2007).

In *Jane Doe*, the court confronted the question of whether RCW 26.44 provides a private right of action (on behalf of a minor) against a mandated reporter who violated the statutory requirement. *Id.* After analyzing the statutory provisions and authorities regarding private rights of action, the *Jane Doe* court held that Washington law allows a cause of action for violating RCW 26.44. *Id.*

Despite receiving a series of disturbing emails in 2006, and expressly acknowledging that Amanda had been "exploited," "victimized" and was being "groomed" for further abuse, Defendant KSD failed to report ***any*** of this information to Child Protective Services or law

enforcement. Even when Amanda's mother, during Amanda's freshman year, brought "allegations of sexual involvement" to the attention of the Principal and Assistant Principal, no report was made.[32]

Many months later, in Spring 2007, during Amanda's sophomore year, she was repeatedly sexually-victimized in the restrooms at Kentridge High School. The record shows that Defendant KSD reported its discovery of sexual activity involving Amanda and Mathew Mills to law enforcement as mandated by RCW 26.44. This demonstrates that Defendant KSD was aware of its reporting duties, but simply failed to comply with them during Amanda's freshman year.

Defendant KSD's personnel are "mandatory reporters" under RCW 26.44. Despite significant evidence of Amanda's victimization, exploitation and possible sexual abuse in 2006 and 2007, no school personnel made a report to Child Protective Services or law enforcement prior to May 2007. By failing to report, Defendant KSD prevented an investigation by the authorities from occurring, and allowed Amanda to be exposed to a risky situation — a situation that eventually led to Amanda suffering significant and repeated harm as she was sodomized and

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[32] These acknowledgments from Defendant KSD's staff regarding Amanda's vulnerabilities, "victimization" and "exploitation" came ***more than <u>eleven months before</u> Amanda was sexually-victimized in the school restrooms at Kentridge.***

otherwise sexually victimized in the boys' bathroom during class on multiple occasions.

The trial court properly allowed the jury to consider whether Defendant KSD violated RCW 26.44.

B. Response to Cross-Appeal No. 2:

Defendant KSD failed to obtain further information about Amanda being sexually exploited in the bathrooms at school, despite having a release that expressly permitted Defendant KSD to obtain further information. This evidence of negligence was properly submitted to the jury. Cross-Appeal #2 should be denied.

As part of its duty of supervision, it is well-established that "a school has a duty to protect students in its custody from reasonably anticipated dangers. *Niece v. Elmview Group Home*, 131 Wn.2d 29, 44, 929 P.2d 420 (1997). In a leading case on the subject of school tort duty, the Washington State Supreme Court made clear that a school's duty transcends a mere passive obligation not to cause harm, but also includes an affirmative duty to protect students from harm by others, "the duty of a school district, as thus defined, is to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such danger." *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 318, 255 P.2d 260 (1953).

At a meeting on September 13, 2006, Defendant KSD was specifically advised by Amanda's counselor, Ms. Crawford, that "there were reasons to be concerned with Amanda's safety if she was left in any unsupervised times. This included lunch, passing times, and especially bathroom time." Ex. 33. Defendant KSD presented Amanda's mother with an "Authorization for Exchange of Confidential Information," which expressly authorized Defendant KSD to obtain access to Amanda's counseling records. Ex. 15.

Defendant KSD never presented the release to Ms. Crawford or her agency. Defendant KSD took no steps to obtain copies of Amanda's counseling records. Had it done so, Defendant KSD would have seen repeated references to Amanda's "exploitation" and ongoing sexual victimization at school. Exs. 17, 20, 21, 22, 23, 24, 26 and 27.

Defendant KSD did not follow the mandate of *McLeod* when it failed to present the counselor with the release – a release that Amanda's mother provided for the very purpose of allowing Defendant KSD to "take precautions to protect" Amanda from the danger that she was experiencing at school. This evidence of negligence was properly submitted to the jury.

Defendant KSD argues that, even if it would have provided the release, the counselor would not have given up Amanda's records. Foremost, it is speculative to say what the counselor would have done in

September 2006 – five years before she testified at trial. More importantly, the counselor did not have a choice. If Amanda's guardian gave Defendant KSD an authorization to obtain Amanda's records (which she did), Defendant KSD was entitled to receive them. The counselor had no choice. Defendant KSD would have been negligent to take "no" for an answer when presenting a valid authorization for student records.

C. Response to Cross-Appeal No. 3:

Defendant KSD argues that the trial court should have entered judgment, as a matter of law, finding no evidence to support an award of damages to Amanda's mother.

An evaluation of whether a directed verdict was properly denied should be considered in the context that the "trial court, and this court on appeal, must interpret the evidence most strongly against Defendant and most favorably for Plaintiff, and draw every reasonable inference therefrom in favor of Plaintiff." *Osborn v. Lake Washington Sch. Dist. No. 414*, 1 Wash. App. 534, 535, 462 P.2d 966, 968 (1969) (citing *Leach v. Ellensburg Hospital Ass'n*, 65 Wash.2d 925, 400 P.2d 611, 9 A.L.R.3d 1303 (1965); *Benton v. Farwest Cab Co.*, 63 Wash.2d 859, 389 P.2d 418 (1964); *Wold v. Jones*, 60 Wash.2d 327, 373 P.2d 805 (1962); *Parrish v. Ash*, 32 Wash.2d 637, 203 P.2d 330 (1949)). Under this standard, directed

verdict is only reserved for the select situations where there are no facts presented that will support a favorable verdict. *Id.*; CR 50.

Here, Defendant KSD argues that a directed verdict should have been granted because: (1) Dr. Urquiza did not render a medical diagnosis but only recited hearsay from Amanda's mother; and (2) the only evidence relating to Amanda's mother's damages was the testimony of Dr. Urquiza. Both premises are factually incorrect.

Defendant KSD suggests that Amanda's mother can only recover damages under RCW 4.24.010 if an expert renders a medical diagnosis to support such damages. Defendant KSD cites no authority in support of this proposition, and there is no basis in law for requiring a specific medical diagnosis as a prerequisite to awarding damages to a parent for loss to, or damage of, the parent-child relationship under RCW 4.24.010. It is difficult to imagine what type of medical diagnoses would be appropriate or necessary for proving damage to the parent-child relationship. Lack of a medical diagnosis is clearly not fatal to Amanda's mother's claim for damages.

Defendant KSD also claims that Dr. Urquiza did not perform an evaluation of Amanda's mother or reach an expert opinion regarding her damages, but only related hearsay from her. This argument ignores the factual record. Dr. Urquiza testified that he performed an evaluation of

Amanda's mother and assessed the harm she suffered as a result of these traumatic events:

> **Q:** And did you perform a formal evaluation of Ms. Patel?
>
> **A:** I did, yes.[33]
>
> ****
>
> **Q:** One of your tasks which was disclosed in this case was to talk about damages, correct?
>
> **A:** Correct.
>
> **Q:** Both the damages to Amanda and her mother, Ms. Patel, correct?
>
> **A:** That's correct.[34]

Dr. Urquiza testified regarding the "desperation," "intense stress," the "enormous amount of distress" and feelings of betrayal experienced by Amanda's mother as a direct result of the conduct of Defendant KSD.[35]

Furthermore, Dr. Urquiza's testimony was not the sole evidentiary basis for the mother's damages claim. Several documentary exhibits admitted at trial include emails between Amanda's mother and school district officials regarding her strong concern for her daughter's safety and

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[33] RP p. 949, l. 9-11.

[34] RP p. 995, l. 7-13.

[35] RP 1022, l. 1-11; RP 1025 l. 4-7; and RP 1030 l. 12-24.

escalating distress regarding Defendant KSD's failure to take reasonable action. Some of these exhibits show that Amanda's mother was undergoing significant stress, fear and agitation as a result of these events. Exs. 30, 46, and 47. These contemporaneous statements by Amanda's mother — all of which were admitted into evidence at trial and submitted to the jury —provide a clear basis for awarding damages to Amanda's mother under RCW 4.24.010.

Defendant KSD has not demonstrated that the trial court should have entered directed verdict on the issue of the mother's damages. This assignment of error should be rejected.

D. Response to Cross-Appeal No. 4:

Defendant KSD asks this court to conclude that the trial court ***also*** committed reversible error regarding the jury instructions reflecting a school's duty to protect its students.[36] Specifically, Defendant KSD objects to the instructions to the extent they reflect that a school has a duty to protect students from reasonably anticipated "harm," rather than "danger."

Defendant KSD's argument underscores Appellants' belief that the trial court committed numerous errors requiring a new trial. Regarding Defendant KSD's argument that the jury instructions do not accurately

[36] Respondent's Brief, pp. 74-77.

reflect the law, Appellants leave it to this court to determine whether the argument has merit.

Jury instructions are sufficient when they: (1) allow counsel to argue their theory of the case; (2) do not mislead the jury; and (3) when read as a whole properly inform the trier of fact of the applicable law. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732 (1996).

Defendant KSD's argument that the terms "harm" and "danger" should have distinct meaning when applied to a school's duty of care ignores that the authority relied on for this argument – *McLeod v. Grant County*, 42 Wn. 2d 316 (1953) – does not make such a distinction. Defendant KSD's editing leaves out the following language from *McLeod*:

> If the school district should have reasonably anticipated that the room might be so used, then the fact that the particular ***harm*** turned out to be forcible rape rather than molestation, indecent exposure, seduction, or some other act of indecency, is immaterial. Had school children been safeguarded against any of these acts of indecency, through supervision or the locking of the door, they would have been protected against all such acts.[37]

Id. at 322.

[37] Moreover, the Supreme Court in *McLeod* announced an expansive view regarding the duty owed by a school to its pupils, not a limited one.

III. CONCLUSION

The trial court committed several reversible errors. The depth of the errors is demonstrated by the fact that Defendant KSD, which received a defense verdict, has identified four additional issues on cross-appeal. The Court of Appeals should address each assignment of error, providing clear direction to the trial court on remand.

RESPECTFULLY SUBMITTED this 31st day of January, 2013.

HAGENS BERMAN SOBOL SHAPIRO LLP

By _____
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No. 67711-0- I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MADHURI PATEL,

Appellant and Cross-Respondent,

v.

KENT SCHOOL DISTRICT,

Respondent and Cross-Appellant.

APPEAL FROM THE
SUPERIOR COURT FOR KING COUNTY WASHINGTON
HONORABLE HOLLIS HILL

CERTIFICATE OF SERVICE

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I, Rachel Corella, declare under penalty of perjury of the State of Washington that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within-entitled cause. I am an employee of Hagens Berman Sobol Shapiro LLP and my business address is 1918 8th Avenue, Suite 3300, Seattle, Washington 98101.

On January 31, 2013, I caused an original of the following documents to be filed with the Clerk of the Court:

1. REPLY BRIEF OF APPELLANT / CROSS-RESPONDENT
2. CERTIFICATE OF SERVICE.

I also caused a copy of the preceding documents to be served on the parties in the manner indicated:

VIA LEGAL MESSENGER

Mr. Mark S. Northcraft
Northcraft, Bigby & Biggs, P.C.
819 Virginia Street, Suite C-2
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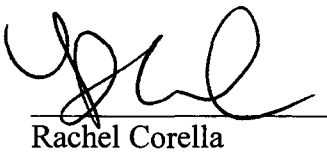
EXECUTED on January 31, 2013 in Seattle, Washington.



Rachel Corella