NO. 90971-7

SUPREME COURT OF THE STATE OF WASHINGTON

JEANETTE MEARS, individually and as personal representative for the Estate of Mercedes Mears and as Limited Guardian for JADA MEARS; and MICHAEL MEARS,

Petitioners,

v.

BETHEL SCHOOL DISTRICT NO. 403, a municipal corporation; RHONDA K. GIBSON; and HEIDI A. CHRISTENSEN,

Respondents.

ANSWER TO PETITION FOR REVIEW

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II. COURT OF APPEALS DECISION

The Court of Appeals issued its partially published opinion on August 12, 2014, and denied the Mears' motion to publish the unpublished part on September 22, 2014. In the published part, *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn. App. 919, 332 P.3d 1077 (2014), the court affirmed the trial court's denial of the Mears' motions for new trial based on alleged inconsistency in the jury's verdict, and for judgment as a matter of law on proximate cause. The court concluded that (1) the verdict was a special verdict; (2) the jury's finding that defendants were negligent did not require the court to assume that the jury agreed that each and every allegedly wrongful act or omission asserted by the Mears constituted negligence; and (3) the jury's findings of negligence but no proximate cause were not inconsistent and were supported by substantial evidence.

In the unpublished part of its decision, *Slip Op. at 14-29*, the Court of Appeals affirmed the trial court's denial of the Mears' motion for new trial based on alleged attorney misconduct.[1] The Court recognized the

[1] In the unpublished part, the court also affirmed the trial court's denial of a new trial based on allegedly improper admission of evidence of Mercedes' use of Flovent, concluding that the evidence was relevant to the level of control of Mercedes' asthma and

deference that should be given to the trial court's ruling on such a motion,[2] carefully analyzed the claims of misconduct, and concluded that "[a]lthough the record discloses several instances of improper conduct by the District over the course of the trial, in the context of the entire eight-week proceeding, these improprieties do not appear so prejudicial that they denied the Mears a fair trial." *Slip Op. at 29.*[3]

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly affirm the trial court's denial of the Mears' motion for new trial based on alleged inconsistency of the verdict and for judgment as a matter of law on the issue of proximate cause, where the jury's findings of negligence did not require a conclusion that the jury agreed with all of the multiple theories of negligence the Mears claimed, and where the jury's findings of negligence but no proximate cause were reconcilable and supported by the evidence?

2. Did the Court of Appeals properly affirm the trial court's denial of the Mears' motion for new trial based on alleged misconduct of defense counsel, where much of the conduct the Mears cited was not

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supported the defense theory that Mercedes' sudden death was caused by her poorly controlled asthma. *Slip Op. at 18-21.*

[2] *See Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539-40, 998 P.2d 856 (2000).

[3] Because the Court of Appeals affirmed the judgment in favor of the District, it did not address the two issues raised in the District's cross-appeal – the issues of whether the trial court erred in refusing to dismiss on summary judgment (1) the Mears' claims on grounds of immunity under RCW 28A.210.270, and (2) Jada Mears' bystander emotional distress claim. *Mears*, 182 Wn. App. at 923; *Slip Op. at 2, 29.*

misconduct, and where the instances of improper conduct that appear in the record when considered in the context of the entire eight-week trial were not so prejudicial as to have deprived the Mears of a fair trial?

3. Did the Court of Appeals properly affirm the trial court's denial of the Mears' motion for new trial based upon allegedly improper admission of evidence concerning Mercedes' use of Flovent, where such evidence was relevant to show the level of control of Mercedes' asthma and supported the defense theory that Mercedes' sudden death was due to her poorly controlled asthma, rather than to an allergic reaction, and where the trial court gave an appropriate limiting instruction?

IV. COUNTERSTATEMENT OF THE CASE

This case arises out of the death of Mercedes Mears, a student at Clover Creek Elementary School, who began having difficulty breathing shortly after arriving at school on October 7, 2008. When Mercedes' sister, Jada Mears, informed the school's health clerk, Rhonda Gibson, of Mercedes' difficulty, Gibson escorted Mercedes to the school's health room and called 911. While Mercedes was being attended to in the health room before the paramedics arrived, Mercedes was breathing and had a pulse. Unfortunately, after the paramedics moved her to the medic unit, they lost her pulse, and resuscitation attempts failed.

Mercedes' parents, Jeannette and Michael Mears, sued the Bethel

School District, Gibson, and Heidi Christensen, the school nurse, (collectively, the "District"), alleging that various acts or omissions by them were negligent and proximately caused Mercedes' death. They also asserted a bystander emotional distress claim on behalf of Jada.

After an eight-week trial, aptly described by the Court of Appeals as "strenuously litigated," *Mears*, 182 Wn. App. at 922, the jury returned a verdict in favor of the District, finding negligence, but no proximate cause as to each defendant. CP 3196-99. The trial court entered judgment for the District based on the jury's verdict, and denied the Mears' post-trial motions for judgment as a matter of law and/or for new trial. CP 4303-34.

A. Factual Background.

Mercedes Mears had a history of poorly controlled asthma, 10/20 RP (Dr. Larson) 123-26, 129, 131-36; 11/16 RP (Dr. Montanaro) 9-17, and of severe allergies, 10/20 RP (Dr. Larson) 169. Shortly after she and her sister Jada, and friend Henry Dotson, arrived at school on October 7, 2008, Mercedes began having difficulty breathing and thought she was having an asthma attack. 10/25 RP (H. Dotson) 8-9, 19-20. Jada ran to the office and told Peggy Walker, the principal's secretary and former health clerk, and Robin Gibson, the health clerk, that Mercedes was outside and needed help. 10/17 RP (Walker) 47-49; 10/31 RP (Gibson) 31, 106; 11/1 RP (Gibson) 142. Gibson went to help Mercedes, saw that she

was having trouble breathing, thought she was having a severe asthma attack and that the situation was serious, escorted her to the health room, and called 911. 11/1 RP (Gibson) 142-145; 10/31 RP (Gibson) 35-36, 61, 82; 10/17 RP (Walker) 55-56, 63-64; 10/18 RP (Walker) 129, 131. After calling 911, Gibson called Mercedes' parents. 11/1 RP (Gibson) 145.

While Gibson called 911, Ms. Walker attended to Mercedes. 10/17 RP (Walker) 67; 10/18 RP (Walker) 131. Mercedes had her Albuterol inhaler in her hand when she came into the health room, and showed it to Walker and told her that she had tried to use it. 10/17 RP (Walker) 59-60; 10/18 RP (Walker) 133, 138, 149, 157-59, 170-72. Walker checked the inhaler, found it was functioning, and gave Mercedes two doses of Albuterol, which seemed to calm her down. 10/17 RP (Walker) 59-60, 67-68, 85-86; 10/18 RP (Walker) 134-35. Ms. Wolfe, the dean of students, 10/19 RP (Wolfe) 2, and Ms. Blaimayer, a para educator, 10/19 RP (Blaimayer) 2, joined Walker and Gibson in the health room. 10/18 RP (Walker) 135. Each of them thought that Mercedes was having a severe asthma attack. 10/18 RP (Walker) 117, 131-33; 10/19 RP (Wolfe) 53-54; 10/19 RP (Blaimayer) 58; 10/31 RP (Gibson) 21, 87, 112-13.

They continued to monitor and keep Mercedes calm while waiting for the medics to arrive. 10/31 RP (Gibson) 71-73; 11/1 RP (Gibson) 145; 10/19 RP (Blaimayer) 56-57, 60-61; 10/19 RP (Wolfe) 48-49, 57; 10/17

RP (Walker) 92. Mercedes continued to worsen and Gibson called 911 a second time. 11/1 RP (Gibson) 147-48; Ex. 253. When asked if Mercedes had a discernible pulse, Gibson asked Wolfe or Walker to check, which they did. 11/1 RP (Gibson) 148. After the second 911 call, Gibson also checked Mercedes' pulse. 10/31 RP (Gibson) 93-94; 11/1 RP (Gibson) 149-50. Near the time of the second 911 call, Mercedes, who had been up moving, went limp and was guided to the floor. 10/18 RP (Walker) 137.

The medics arrived while the second 911 call was made, 11/1 RP (Gibson) 148-50; 10/18 RP (Walker) 164, roughly five minutes after the first call. *See* 10/25/11 RP (T. Boyle) 8-9, 11-12, 35; Ex. 253. When they arrived, Mercedes was lying supine on the floor and unresponsive. 10/25 RP (Boyle) 14-15, 36; Ex. 254. They detected a faint pulse and observed agonal respirations. 10/25 RP (Boyle) 14-15, 37, 39, 62-63, 67; Ex. 234. They used a bag valve mask to assist her breathing, and then moved her to the medic unit. 1025 RP (Boyle) 17-18; Ex. 254. Mercedes vomited while being moved, so they suctioned her. 10/25 RP (Boyle) 18; Ex. 254. They intubated her, placed her on a cardiac monitor, found that they had lost a pulse, and began CPR. 10/25 RP (Boyle) 18-19, 24; Ex. 254. The medics were not able to revive her and she was pronounced dead at the hospital. 10/25 RP (Boyle) 33; Ex. 253. The Death Certificate listed the cause of death as "Status Asthmaticus" and "Bronchial Asthma." Ex. 260.

Gibson had seen Mercedes having an asthma attack, and also had seen her having an allergic reaction, in the past. 10/31 RP (Gibson) 81-82, 87-88. A few weeks earlier, Mercedes had come to the health room complaining of a bee sting and Gibson noted that she had hives and swelling around her mouth and lips, and complained of itchiness and tingling in her throat. *Id.*; 11/1 RP (Gibson) 139-41. Mercedes did not exhibit any of those symptoms on October 7, 2008. 10/31 RP (Gibson) 81; 11/1 RP (Gibson) 143-44. Her symptoms on October 7, while more severe, were consistent with what Gibson had observed when Mercedes was having an asthma attack. 10/31 RP (Gibson) 68-69; 11/1 RP (Gibson) 151-52. Gibson, as well as Walker and Wolfe, were 100% certain that Mercedes was having an asthma attack. 11/1 RP (Gibson) 151-52; 10/19 RP (Walker) 117; 10/19 RP (Wolfe) 53-55.

Although the Mears claimed, among other things, that the school employees should have used an EpiPen, the doctors' orders for Mercedes on file at the school prescribed Albuterol for an asthma attack and EpiPen for an allergic reaction. Ex 299, 300. Regulations and District policy prohibited school employees from using an EpiPen to treat an asthma attack. 10/18 (Walker) 142, 172-73; 10/31 RP (Gibson) 21, 41, 112-115. And, although the Mears also claimed that the school employees should have attempted CPR, Gibson and Walker, who were trained in CPR, did not

attempt it because Mercedes was breathing and had a pulse. 10/31 RP (Gibson) 67, 72; 11/1 RP (Gibson) 182-83; 10/17 RP (Walker) 4-5, 96-99, 116-17; 10/19 RP (Wolfe) 60-61; 10/19 RP (Blaimayer) 35, 59; *see also* 10/25 RP (Boyle) 15, 24, 36, 37-39, 62-63, 65.

B. The Parties' Theories of the Case.

At trial, both negligence and proximate causation were hotly contested. The Mears' causation theory was that an allergic reaction caused Mercedes' sudden death, while defendants' theory was that Mercedes' sudden death was caused by her poorly controlled asthma.

Although there was evidence that Mercedes would not have died had the District's employees administered an EpiPen or CPR, the Mears' theories of negligence were not limited to failure to use an EpiPen or initiate CPR. The Mears asserted that numerous acts or omissions were negligent, most of which had they not occurred would not have inexorably led to use of an EpiPen or CPR. Indeed, the Mears' counsel told the jury in rebuttal closing "I'll tell you 50 things that they did wrong, and I'll also tell you that I'm just getting warmed up," 11/22 RP (Closings) 99, and then proceeded to tick off a litany of things the Mears claimed constituted negligence, *see id.* at 99-117. Among that litany, they claimed, *id.* at 99-102, as the Court of Appeals noted, *Mears*, 182 Wn. App at 933-34, that (1) Gibson was negligent in failing to consult Mercedes' emergency health

care plan or failing to contact a school nurse during Mercedes' emergency, 11/22 RP (Closings) 103-04; and (2) that Heidi Christensen, the school nurse, was negligent in failing to complete students', including Mercedes', emergency health care plans, and other tasks.

In response, the District presented evidence to support its theories, among others, that (1) Mercedes' medical emergency was a severe asthma attack to which the school's employees properly responded; (2) regulations and District Policy precluded them from administering an EpiPen for an asthma attack; and (3) prior to the arrival of the paramedics and their moving Mercedes to the medic unit, initiation of CPR was not indicated because Mercedes was breathing and had a pulse.[4]

After an eight-week trial, the jury returned a verdict, answering "yes" as to each defendant to the first question "Were any of the defendants negligent?", but "no" as to each defendant to the second question "Was such negligence a proximate cause of injury or damage to the plaintiffs?" CP 3196-99. From the verdict, it is not possible to tell upon which of the Mears' multiple theories of negligence the jury based its finding of negligence against each defendant. *See id.* The Mears did not request a verdict form that would have allowed the jury to identify which

[4] *E.g.*, 10/17 RP (Walker) 4-5, 96-99; 10/18 RP (Walker) 116-17, 131-32, 142, 172-73; 10/19 RP (Wolfe) 53-55, 60-61; 10/19 (Blaimayer) 35, 58-59; 10/31 (Gibson) 21, 41, 67, 72, 87, 112-13; 11/1 RP (Gibson) 151-52, 182-83; Ex. 299, 300.

of the Mears' theories of negligence it agreed with as to any defendant.

C. The Mears' Claims of Misconduct.

Although the Mears' counsel employed a trial tactic of repeatedly accusing defense counsel of misconduct, the trial court made no findings of misconduct, much less of misconduct prejudicially affecting the verdict or warranting a new trial. The Court of Appeals, reviewing the Mears' misconduct claims, found that four questions the District asked, without first making an offer of proof outside the jury's presence, violated certain orders in limine and constituted misconduct, *Slip Op. at 22-24*, but could not say that the questions "posed sufficient risk of prejudice to merit reversal," *id.* at 27. The Court of Appeals concluded that the instances of improper conduct appearing in the record, considered in the context of the entire eight-week trial, "do not appear so prejudicial that they denied the Mears a fair trial." *Id.* at 29.

The four questions[5] were asked during the cross of Kimberly Barrett, a family therapist the Mears called as a forensic expert. 10/25 RP (Barrett) 2-3, 54-56. Barrett had testified that all of Jada's symptoms, including anger and emotional distress, were attributable to what Jada witnessed in the health room the morning Mercedes died. *Id.* at 1-2, 14, 36-37, 39. When the District sought to inquire about Jada's pre-existing

[5] The four questions are set forth at *Slip Op. at 22*. *See also* 10/25 RP (Barrett) 54-56.

anger problems, the Mears objected, claiming that such inquiry violated their motion in limine concerning evidence of failure to bond between Jeannette and Jada, which the trial court pointed out it had denied.[6] *Id.* at 39-42. After colloquy and an offer of proof, the court reiterated that the defense could inquire concerning the failure to bond issue. *Id.* at 42-47.

When cross of Ms. Barrett resumed, the District elicited that she had testified in deposition that the lack of attachment between a parent and child is predictive of long-term consequences in the mental health of a child and that she was aware of attachment issues between Jeannette and Jada. *Id.* at 49-52. After Barrett denied awareness of the severity of the attachment issues, *id.* at 51-54, the District asked the four questions at issue that were based on statements contained in Jeannette's counseling records or Jada's counseling and school records, *id.* at 54-56.[7]

Two of the questions asked whether Barrett had been told that one of Jeannette's treatment goals was "to be able to tolerate the presence of Jada without feeling like her flesh was crawling or without coming loose in [her] stomach contents" or was "so that she could end up being in the same room with her daughter Jada and not feeling like her skin was

[6] The order on motion in limine (4.15.9) contained a reference to "outside the presence of the jury only," which the trial court expressed no concern about in dealing with the Mears' objection. CP 2784.

[7] The Court of Appeals acknowledged that the statements and allegations contained in the counseling records had some relevance to Jada's damages. *Slip Op. at 26.*

crawling." *Id.* at 54-55. The third question asked whether Barrett had read in Jada's medical records Jada's claim that "her mom had told her that she was stupid, she was ugly, that why couldn't she be more like Mercedes." *Id.* at 55. The fourth, and the only question referencing "abuse," asked Barrett whether she knew that Jada had reported "an instance of what was described by the counselors as severe emotional abuse that she suffered from her mom."[8] *Id.* at 56.

The Mears immediately objected to the first three questions; they objected only after the one "emotional abuse" question. *Id.* More colloquy ensued; the Mears asked for a mistrial, which the trial court denied; and the District made another offer of proof and the Court ruled that the District's remaining questions were permissible. *Id.* at 56-62.

As the Court of Appeals correctly noted, *Slip Op. at 26-27*, (1) Barrett "never admitted any knowledge of the statements that the District's counsel paraphrased from the counseling and school records, and did not answer the question concerning Jada's emotional abuse," *see* 10/25 RP (Barrett) at 54-56, and (2) "the trial court never actually admitted the prejudicial statements into evidence" and "properly instructed the jury that the lawyers' remarks, statements, or arguments are not evidence," and admonished the jury to "disregard any remark, statement, or argument that

[8] The trial court had granted plaintiff's motion in limine (4.15.21) to preclude allegations of abuse related to Jeannette and Jada. CP 2781.

is not supported by the evidence or the law...."

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Contrary to the Mears' assertions, the Court of Appeals decision is not in conflict with any decision of this Court or of the Court of Appeals so as to warrant review under RAP 13.4(b)(1) or (2). Nor does it involve an issue of substantial public interest that should be determined by this Court so as to warrant review under RAP 13.4(b)(4).

A. The Court of Appeals Decision as to Alleged Inconsistency in the Jury's Verdict Finding of No Proximate Cause Is Not in Conflict with Any Washington Appellate Decision, Nor Does It Involve an Issue of Substantial Public Interest.

The Mears claim, *Pet. at 15-16*, that the Court of Appeals' characterization of the jury's verdict as a "special verdict" and its failure to provide the Mears "the benefit of a presumption that all potential theories of negligence were found in their favor" is somehow inconsistent with CR 49(-); *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 918, 32 P.3d 250 (2001); *Hawley v. Mellem*, 66 Wn.2d 765, 405 P.2d 243 (1965), and *Rowe v. Safeway Stores*, 14 Wn.2d 363, 373, 128 P.2d 293 (1942). That is simply not true. Neither CR 49(-), nor any of those cases stands for the proposition that the verdict form in this case – which asked first whether any defendant was negligent, and, if so, asked second whether such negligence was a proximate cause of injury to any plaintiff – constitutes a general verdict, much less a general verdict that requires a presumption

that a jury's "yes" answer to the negligence question means the jury found defendants negligent in every respect argued by plaintiffs.

CR 49(-) merely describes a "general verdict" as one "by which the jury pronounces generally upon all or any of the issues in favor of either the plaintiff or defendant." CR 49(a) describes a "special verdict" as one a jury returns "in the form of a special written finding upon each issue of fact." Here, the jury returned a verdict with special written findings on two factual issues: (1) that each defendant was negligent, but (2) that such negligence was not a proximate cause of injury to plaintiffs. It thus was a special verdict.

The verdict form in this case was not like the general verdict at issue in *Guijosa*. As this Court explained in *Guijosa*, 144 Wn.2d at 918, the verdict in that case asked the jury:

> whether the defendants are liable under each claim, i.e., whether the defendants falsely imprisoned the plaintiffs, whether the defendants committed battery or malicious prosecution, whether the defendants discriminated against the plaintiffs, and whether the defendants violated the CPA.

Because the jury's answers actually resolved the ultimate questions on each of plaintiff's claims, the jury's answers constituted general verdicts under CR 49. *Id.* The jury's answer in this case to the question whether any of the defendants were negligent did not resolve the ultimate issue of whether defendants were or were not liable to plaintiffs for any such

negligence; it was merely a factual finding of negligence, which standing alone and without a factual finding of proximate cause did not resolve the issue of liability in either side's favor. The jury's answer to the questions whether any of the defendants were negligent and, if so, whether such negligence was a proximate cause was a special verdict.[9]

Ultimately, whether characterized as a special or a general verdict, the fact remains that the jury's combined "yes" answers to the negligence questions and "no" answers to the proximate cause questions means that the jury found in favor of defendants on plaintiffs' liability claims. As long as the jury's answers to those questions can be reconciled and there is substantial evidence to support the jury's answers, neither a new trial nor a judgment as a matter of law in plaintiffs' favor can be granted. *E.g.*, *Herring v. DSHS*, 81 Wn. App. 1, 15-16, 914 P.2d 67 (1996).

Without citing any supporting authority, and ignoring the many things – the "50 things" – the Mears argued defendants did wrong, the Mears assert, *Pet. at 17*, that "it must be presumed that the jury found in [their] favor on the theory that the school district was negligent in failing to provide Mercedes with CPR and/or her EpiPen." Had the Mears

[9] Apparently trying to craft an argument for seeking review under RAP 13.4(b)(4), the Mears assert, *Pet. at 18*, that review should be granted "because the public would have a substantial interest in preserving the sanctity of general verdicts." But, as noted above, this is not a general verdict, and it is the Mears who seek to undermine the sanctity of the jury's special verdict finding of no proximate cause.

limited their negligence theories to failure to provide Mercedes with CPR or her EpiPen, that assertion might have some plausibility. But, the Mears did not so limit their negligence theories. Under the evidence adduced at trial (which included evidence that the District's employees reasonably believed Mercedes was having an asthma attack and the doctor's orders on file did not say use an EpiPen for an asthma attack, as well as evidence that CPR was not called for prior to the paramedics' arrival as Mercedes had a pulse and was breathing), the jury did not have to find that District employees' failure to administer an EpiPen or CPR was negligent.

As the Court of Appeals correctly observed, *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 209, 667 P.2d 78 (1983), and *Estate of Stalkup v. Vancouver Clinic, Inc., PS*, 145 Wn. App. 572, 187 P.3d 291 (2008)

> leave no room for the Mearses' contention that the jury's finding as to negligence requires us to assume that the jurors agreed that every act or omission alleged by the Mears had breached the due care standard. The trial court therefore did not err in denying the Mearses' motion for judgment as a matter of law on the issue of proximate cause. Further, as long as the Mearses alleged that each defendant committed some act or omission that the jury could properly have found to be negligent, but not a proximate cause of Mercedes's death, no inconsistency would lie in the verdict, and it would have been within the trial court's discretion to deny the alternative motion for a new trial as to all issues.

Mears, 182 Wn. App. at 933. As the court explained in *Stalkup*, 145 Wn.

App. at 586 (citing *Brashear*, 100 Wn.2d at 209):

> A jury verdict finding that a defendant is negligent but that the negligence was not a proximate cause of the plaintiff's injuries is not inconsistent if there is evidence in the record to support a finding of negligence but also evidence to support a finding that the resulting injury would have occurred regardless of the defendant's actions.

Here, the Mears alleged a multitude of acts or omissions by defendants that the jury reasonably could have found constituted negligence, but did not proximately cause Mercedes' death. Indeed, the ones the Court of Appeals identified, *Mears*, 182 Wn. App. at 933-34, more than sufficed to deny the Mears' post-trial motions based on alleged inconsistency in the jury's "negligence, but no proximate cause" findings or alleged insufficiency of the evidence to support them.

B. The Court of Appeals Decision Concerning Alleged Attorney Misconduct Also Does Not Conflict with Any Washington Appellate Decision, Nor Does It Raise an Issue of Substantial Public Interest.

The Mears assert, *Pet. at 8*, that the Court of Appeals decision as to alleged attorney misconduct is inconsistent with well-established legal principles. Yet, none of the cases they cite require reversal of the trial court's denial of plaintiff's motion for new trial based on the attorney misconduct the Court of Appeals found in this case.

First, *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010), was not even an attorney misconduct case. The issue in *Salas* was

whether the trial court abused its discretion in admitting evidence of plaintiff's undocumented immigrant status. The *Salas* court held that:

> [W]ith regard to lost future earnings, the probative value of a plaintiff's undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice. Therefore, the trial court's decision to admit evidence of Salas' immigration status was an abuse of discretion.

Salas, 168 Wn.2d at 673-74.

Second, in *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 750 P.2d 1275 (1988), the issue was whether at the second trial an improper "golden rule" argument the defense made at the very end of its closing argument just before a recess, and as to which the trial court overruled plaintiff's objection and refused to give a curative instruction, required reversal. Given that the jury in the liability phase of the second trial returned a defense verdict, while the jury in the liability phase of the first trial had found the defendant 80% negligent, the *Adkins* court concluded:

> Because the inconsistency in the verdicts may well have been due to the improper argument in this case, and because the trial court failed to sustain Adkins' objection and give a prompt curative instruction, we conclude that the improper argument presumptively affected the outcome of the trial and requires reversal.

Adkins, 110 Wn. App. at 143.[10]

Third, in *Carabba v. Anacortes Sch. Dist.*, 72 Wn.2d 939, 954, 435

[10] Here, contrary to the Mears' assertion, *Pet. at 10-11*, there was no inconsistency in the jury's findings of negligence but no proximate cause from which to presume that the four questions at issue prejudicially affected the jury's verdict. *See* pp. 13-17, *supra*.

P.2d 936 (1967), the trial court found that counsel had engaged in four specific acts of prejudicial and incurable misconduct, but denied plaintiff's new trial motion, because plaintiff, who objected and requested a curative instruction, did not request a mistrial. The *Carabba* court held:

> We agree with the trial court's characterization of the four specific acts of misconduct as prejudicial and incurable. But we hold that the trial court was in error in balancing against these acts and their effect what the court referred to as "gambling on the verdict." This latter concept has no place in the court's consideration of a motion for new trial where the acts upon which such motion is based are acts of prejudicial misconduct, which were incurable, especially where such acts occurred at or near the end of the trial. To hold otherwise would be to place appellant on the horns of an impossible dilemma. Appellant has been denied a fair trial, and the judgment of the trial court must, therefore, be reversed.

Carabba, 72 Wn.2d at 954. Here, the trial court made no findings of misconduct, much less prejudicial and incurable misconduct, nor did it deny a new trial based on some notion of "gambling on the verdict."[11]

Fourth, in *Osborn v. Lake Wash. Sch. Dist. No. 414*, 1 Wn. App. 534, 539, 462 P.2d 966 (1969), the Court of Appeals affirmed a trial court's grant of a new trial, where the trial court "was shocked by an obvious violation of a pretrial order designed to prevent the very problem caused by defense counsel" – the eliciting of irrelevant evidence

[11] Nor did the questions at issue occur at or near the end of trial. *See* CP 3299-3302. Here, the Court of Appeals correctly concluded that "in the context of the entire eight-week proceeding," the improprieties it found in the record, "do not appear so prejudicial that they denied the Mears a fair trial." *Slip Op. at 29.*

concerning the plaintiff's commitment to a home for boys as an incorrigible child. That the trial and appellate courts in that case concluded that counsel's misconduct in that regard was prejudicial and incurable does not mean that the trial or appellate court in this case had to conclude that the four questions at issue here were prejudicial and incurable. Contrary to the Mears' suggestion, *Osborn* does not stand for the proposition that any violation of a motion in limine is so prejudicial as to require a new trial.

Fifth, that this Court in *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012), affirmed the trial court's grant of a new trial, finding that the record in that case supported the trial court's findings of misconduct and prejudice warranting a new trial, does not mean that the trial court or the Court of Appeals in this case, on different facts, was required to find prejudicial, incurable misconduct necessitating a new trial.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

RESPECTFULLY SUBMITTED December 29, 2014.

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By _____
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 29, 2014, I caused a true and correct copy of the foregoing "Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 29th day of December, 2014, at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer, Legal Assistant

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Dear Clerk of Court,

Attached for filing in .pdf format is the Answer to Petition for Review in *Mears v. Bethel School District, et al.*, Supreme Court Cause No. 90971-7. The attorney filing this answer is Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: mspillane@williamskastner.com.

Respectfully submitted,

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