

FILED
SUPREME COURT
STATE OF WASHINGTON
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No. 95342-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

K.H., as guardian for her minor daughter D.H.; K.H. and G.H.
individually,

Plaintiffs-Petitioners,

vs.

OLYMPIA SCHOOL DISTRICT,

Defendant-Respondent.

PETITIONERS' ANSWER TO WASHINGTON STATE
ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE
MEMORANDUM IN SUPPORT OF REVIEW

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ANSWER

Amicus Curiae Washington State Association for Justice Foundation (“WSAJ Foundation”) agrees with Petitioners’ analysis that the Court of Appeals’ opinion upholding the trial court’s decision to give a damages segregation jury instruction (court instruction 19) ignored the core holding of *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P.3d 499, *review denied*, 166 Wn.2d 1025 (2009), limiting the segregation requirement of *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003), to cases where the intentional tortfeasor is a party defendant, and instead relied on improper, inconsistent dicta in *Rollins* to uphold the instruction.¹ WSAJ Foundation Amicus Curiae Memorandum in Support of Review (“ACM”) at 8-10.

WSAJ Foundation’s agreement underscores the necessity of review of this segregation issue by this Court. Division Two’s application of *Rollins* squarely contradicts the express, central holding of *Rollins*, 148 Wn. App. at 378-79, requiring review under RAP 13.4(b)(2).

Amicus Curiae’s agreement also reinforces the critical need of both bench and bar for review of this issue under RAP 13.4(b)(4). Between the Washington Pattern Instruction 15.04’s comment, stating that *Rollins* “approved” a damages segregation instruction, and the fact that under GR 14.1 Washington courts and parties may cite Division Two’s unpublished

¹ Respondent Olympia School District has not challenged on appeal this reading of *Rollins* by Petitioners.

opinion as persuasive, it is unrealistic to argue that those interpretations of *Rollins* will have no impact on the Washington legal landscape. This Court must determine whether the Court of Appeals below and the WPI 15.04 comment have misread *Rollins*, as this is an issue of substantial public interest under RAP 13.4(b)(4).

Moreover, if Petitioners' and WSAJ Foundation's analysis of *Rollins* is correct, then the improper damages segregation instruction explains the jury's inconsistent verdict findings of gross negligence, negligence, and proximate cause but award of zero general damages, as the jury likely segregated damages under circumstances where no segregation was allowed. Indeed, the trial court itself partially rested its denial of Petitioners' motion for a new trial on its conclusion that the jury could have relied on the damages segregation instruction to award zero damages. Petition for Review at 10 (citing Report of Proceedings (Jan. 15, 2016) at 31-32).

This case clearly and precisely illustrates why this segregation issue is of substantial public interest warranting review under RAP 13.4(b)(4) because of its impact on the law of damages. It is an object lesson in the immense prejudice posed to litigants if a jury is improperly instructed on damages segregation. Despite well-settled Washington precedent holding that "a plaintiff who substantiates her pain or suffering with evidence is entitled to general damages," *Palmer v. Jensen*, 132 Wn.2d 193, 201, 937 P.2d 597 (1997), juries and courts may rely on an impermissible damages segregation instruction to improperly deny general damages, contrary to

law.

Finally, Amicus Curiae agrees with Petitioners that review is warranted under RAP 13.4(b)(1) because the Court of Appeals’ opinion acknowledges uncontroverted evidence of general damages but upholds the jury’s award of zero general damages, conflicting with this Court’s contrary precedent in *Palmer* and *Ide v. Stoltenow*, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955). ACM at 4-7. Again, WSAJ Foundation’s agreement demonstrates the existence of an issue of substantial public interest warranting review under RAP 13.4(b)(4), as to what constitutes “minimal” injury or injuries under *Palmer*, 132 Wn.2d at 202. ACM at 6-8. Indeed, the ACM observes the Court of Appeals’ attempts in other cases to reconcile the concept of “minimal” injuries not warranting a damages award with a plaintiff’s entitlement to damages for “substantiated” pain and suffering. ACM at 6-7. And the ACM highlights the problematic consequences of applying these concepts without further guidance from this Court, such as allowing the Court of Appeals to conclude that Petitioners’ uncontroverted sexual assault and resulting distress were so “minimal” as to justify an award of zero damages. ACM at 7-8. Review of this issue would provide Washington courts with much-needed clarification on the two broad, tensioned principles established by *Palmer* and its progeny.

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RESPECTFULLY SUBMITTED this 20th day of March, 2018.

PFAU COCHRAN VERTETIS AMALA, PLLC

By: /s/ Darrell L. Cochran
Darrell L. Cochran, WSBA No. 22851
Christopher E. Love, WSBA No. 42832

1 STATE OF WASHINGTON)
2)ss
3 COUNTY OF KING)

4 I, Sarah Awes, being first duly sworn upon oath, deposes and says:
5 I am a citizen of the United States of America and of the State of
6 Washington, over the age of twenty-one years, not a party to the
7 above-entitled matter and competent to be a witness therein.

8 That on March 20, 2018, I delivered via Email/ECF a true and
9 correct copy of the above, directed to:

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DATED this 20th day of March, 2018.

24 /s/ Sarah Awes
25 Sarah Awes
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PCVA LAW

March 20, 2018 - 3:41 PM

Transmittal Information

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