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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY

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LORIE HUNIU, individually and as Guardians for M.L.F.;
W.R.H., individually; and RICHARD HIGGINS and
KAREN HIGGINS, individually and as Guardians for W.R.H.,

Appellants,

vs.

PUYALLUP SCHOOL DISTRICT,
a political subdivision of the State of Washington,

Respondents.

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

High school students (collectively, “Bates”) whose sexual histories were publicized by their fellow students in the school-sponsored newspaper, filed claims against the Puyallup School District (“District”) for negligence. The District misled the trial court and jury, incorrectly suggesting that the school-sponsored newspaper was a totally unsupervised “open forum” in which the students had the last word as to what was published in the paper. The District repeatedly and incorrectly suggested to the jury that such an arrangement was protected by the First Amendment, and that Bates’ greed had forced the District to revoke the First Amendment rights of other students.

The District now suggests that its conduct was entirely appropriate, and that the trial court made no errors of law regarding the open forum issue. The District argues that Bates received a fair trial on the issue of whether the District properly supervised its students.

The trial court’s critical errors of law and the misconduct of the District’s counsel deprived Bates of a fair trial. In order to ensure a fair trial to the children who were the victims of the District’s lackadaisical supervision of their fellow students, and who were further victimized by the District’s trial counsel’s strident, insistent misconduct at trial, this Court should order a new trial.

B. REPLY ON STATEMENT OF THE CASE

The District's statement of the case is replete with argument in violation of RAP 10.3(a)(5). For example, the District argues that a lack of administrative review is "the essence of open forum instruction and practice." Br. of Resp'ts at 3. The District avers that the newspaper "gave the students the opportunity to act truly as journalists and editors." *Id.* at 5. The entire third section of the District's statement of the case is entitled "Suspect Credibility of Plaintiffs" and is *entirely* argumentative. Br. of Resp'ts at 11-14.

It is difficult to respond to the District's argumentative fact presentation without also violating RAP 10.3(a)(5). However, most of the District's statement is simply a sanitized version of the harassment of the student victims in this case, and a questioning of whether the article in question could have harmed them. These statements are irrelevant to the legal issues before this Court.

However, the central theme of the District's statement of the case *is* at issue here: the concept of "open forum" that the District presented at trial. *Id.* at 2-7, 14-17. The District's statements on this issue require clarification because they are argumentative and misleading.

First, the District claims that it introduced "no discussion of the legal significance of the term ["open forum"] at trial. Br. of Resp'ts at 16.

It claims that to the extent “open forum” was discussed, it was merely described as an “educational philosophy” imbued with no legal meaning. *Id.* at 27.

The District *repeatedly* imbued the term “open forum” with legal and constitutional significance, hammering the issue before the jury. A few examples suffice:

Q. What is the philosophy behind open forum as far as you know?

A. It’s free speech, it’s First Amendment....

RP 497.

A. ...The ability for them to operate and to make decisions about content is important and so –

Q. Does the First Amendment have anything to do with that?

A. Free speech has something to do with it, so yes.

RP 499.

Q. What is the expression called in there from your understanding of open forum?

A. Free speech; it’s protected speech.

RP 528.

Q. And teaching about the First Amendment, where did open forum fall into that lesson?

A. It came at the end....

Q. Was the open forum something connected with the First Amendment?

A. Yes, absolutely.

Q. Tell me about the connection that you were teaching.

A. The connection is that students have the same First Amendment rights as everybody else....

RP 849 (emphasis added).

Q. How is the First Amendment doing these days at Emerald Ridge?

A. It's not pretty.

Q. How so?

A. Because of the implementation of Regulation 3220-R, all issues of the *JagWire* must be reviewed by the principle....

RP 854.

Next, the District claims that under Policy 3220, *JagWire* was officially an “open forum” newspaper “without any prior review of prior restraint by school administration.” *Id.* at 2-3. The District describes this as a common method of journalism instruction in which the school has absolutely no say in what the students print in the school-sponsored newspaper, short of what the District calls “unprotected expression.” The District states that “unprotected expression” is defined in Policy 3220. Again, this is argument. The District does not explain how “unprotected”

material is to be identified and stopped if there is *no* prior review and restraint.

The District's description of Policy 3220 is inaccurate. First, Policy 3220 does not say that there will be no prior administrative review or restraint of student publications. CP 79. The policy informs students that the school newspaper is financed by the school and mandates what information may or may not appear in it. Also, the phrase "unprotected expression" does not appear in the policy. The policy does describe what expression is absolutely forbidden, including expression that will "cause a substantial disruption of the school." *Id.* The "Model Guidelines for Student Publications" that the District cites (Br. of Resp'ts at 3) were not adopted by the District as official policy or regulation. RP 1715. Policy 3220 was the *only* binding policy in effect for the District and the *JagWire*.

In addition to Policy 3220, the District ignores the fact that the journalism students were also subject to prior review and restraint in practice. Advisor Kevin Smyth had the power to review and stop publication of content. CP 160-61. Principal Lowney had the same power to stop publication of any content that violated District policy. CP 148-52. Superintendent Apostle testified that if the students tried to public obscene, harassing, defamatory, or controversial material, the principal or

the journalism advisor were supposed to step in and stop the publication. RP 436-37.

The District continues claim on appeal that *JagWire* was an “open forum,” *in direct conflict* with the trial court’s belated forum ruling, which the District has not appealed. Br. of Resp’ts at 2-3. The trial court ruled that *JagWire* was not an open or public forum under the test in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270, 108 S. Ct. 562, 569, 98 L. Ed. 2d 592 (1988). RP 2427-28.¹

C. SUMMARY OF ARGUMENT

The District *concedes* Bates’ forum analysis, that *JagWire* was a non-public forum. Therefore, the District also *concedes* that trial court’s ruling that the paper was a “limited public forum” is erroneous.

The trial court not only erred in the forum analysis, it erred in delaying that analysis until after the trial. Although the trial court ruled that the District could not present a defense that it was unable to control its students as a matter of law, the District permeated the trial with argumentative questions and testimony suggesting just that. Thus, the trial court allowed the District to present an improper defense. The jury

¹ The District mischaracterizes the trial court’s forum ruling, br. of resp’ts at 17, although this is understandable because the ruling was highly confused. The trial court used the term “limited public forum” in its oral ruling, but the court’s subsequent definition of the forum offered in jury instructions is squarely in line with the *Hazelwood* definition of a nonpublic forum. RP 2427-28.

instructions confused the jury further by suggesting that the First Amendment was at issue, and by failing to cure the District's improper open forum evidence.

Thus, armed with the trial court's errors of law, the District deprived Bates of a fair trial through its misconduct. The District presented its improper "open forum" defense and combined it with deceptive use of the statutorily-mandated statements of damages to suggest that Bates was a greedy First Amendment foe who had deprived fellow students of their freedoms of speech and press. The trial was not about whether the District met the standard of care, but about whether the District acted to protect the First Amendment.

D. ARGUMENT

(1) Standard of Review

The District concedes that this Court's standard of review of the trial court's decision to deny a new trial on the basis of a legal error is *de novo*. Br. of Resp'ts at 24.

The District argues that a party should object to misconduct of counsel but cites no authority to refute *Osborn v. Lake Washington Sch. Dist. No. 414*, 1 Wn. App. 534, 462 P.2d 966 (1969). Under *Osborn*, evidence introduced in violation of a motion in limine warrants a new trial *even if no objection is made during trial*. *Id.* at 538-39. Also, the District

concedes that a party need not object when the error is so flagrant and prejudicial that no instruction could have cured it. *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993); *Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873 (1967); *Carabba v. Anacortes School District No. 103*, 72 Wn.2d 939, 954, 435 P.2d 936 (1967); *State v. Case*, 49 Wn.2d 66, 76, 298 P.2d 500 (1956).

(2) The Trial Court's Errors of Law Regarding Forum Analysis, Motions in Limine, and Jury Instructions Affected the Outcome of the Trial

(a) The Trial Court Erred in Its Forum Analysis By Refusing to Rule Pretrial, and By Ruling Incorrectly Post-Trial

In her opening brief, Bates lays out the legal analysis a court must undertake when evaluating whether, under the Constitution, a forum is public, limited public, or non-public. Br. of Appellants at 22-31. Bates describes the legal underpinnings of forum analysis, and explains why, as a matter of law, *JagWire* was a nonpublic forum. *Id.*

In response, the District says the constitutional forum analysis is “of little if any import to this appeal.” Br. of Resp’ts at 30. In essence, the District concedes Bates’ analysis.

Thus, there is no question in this appeal that the trial court erred in conducting its forum analysis. *JagWire* was a nonpublic forum, subject to

prior review and prior restraint by the District, its administrators, and teachers. Nevertheless, the trial court ruled that *JagWire* was a “limited public forum.” RP 2427-28. This was error.

Bates also argues in her opening brief that it was error for the trial court to delay ruling on the forum issue until after the trial. Br. of Appellants at 32. Bates notes that had the trial court properly ruled on the forum issue pretrial, the District would not have been able to introduce its improper “open forum” evidence at trial.

The District responds that the trial court appropriately delayed its forum ruling in order to hear the evidence at trial. Br. of Resp’ts at 29, 32. It argues that questions of fact existed pretrial regarding this issue. *Id.* at 32. However, the District cannot point to *a single fact* adduced at trial that the court did not know beforehand relating to the forum analysis.

Prior to trial, the trial court had all of the facts it needed to conduct a forum analysis under *Hazelwood*. Br. of Appellants at 30-31. The trial court knew that the *JagWire* was (1) designated by school policy as part of the curriculum; (2) taught by a regular faculty member during school hours; (3) awarded grades and credit to participating students; (4) controlled and overseen by a faculty member who was the final arbiter of content; (5) was not opened up for public use, and; (6) bore no indicia of

“clear intent” by the school to relinquish control and create a public forum. *Hazelwood*, 484 U.S. at 269-70.

Moreover, such a forum analysis, based on constitutional analysis, is classically a question of law for the trial court. *Planned Parenthood of Southern Nevada, Inc. v. Clark Co. Sch. Dist.*, 887 F.2d 935, 939 (9th Cir 1989). If the trial court needed additional evidence to make such a ruling, it should have done so outside the jury’s presence, to avoid tainting the jury.

Nothing presented at trial changed the analysis, nor was the trial court lacking information to rule on the forum issue pretrial. The trial court committed error in its post-trial forum ruling, and in reserving the ruling until after the trial.

(b) The Trial Court Did Not and Could Not Cure the Prejudice Caused by the District’s Improper Open Forum Evidence with Jury Instructions

Bates argues in her opening brief that once the trial court made its erroneous forum rulings, it compounded the errors by giving inadequate jury instructions. Br. of Appellants at 32. Given the District’s extensive evidence and argument regarding “open forum” and the Constitution at trial, it is difficult to imagine a set of jury instructions that would have cured the massive prejudice that resulted from the trial court’s flawed decisionmaking process or the District’s misconduct.

The District responds that the jury instructions adequately stated the law, and allowed Bates to argue her theory of the case. Br. of Resp'ts at 41.

The District misses the point. It is not enough for jury instructions to adequately state the law. They also must not mislead the jury and must properly inform the jury of "the law to be applied." *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 1271 (2000), *opinion corrected*, 22 P.3d 791 (2001); *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). The First Amendment was not applicable law in this case. And the lack of any clarification on the forum issue misled the jury in to thinking that the District's "open forum" evidence and defense were valid.

The problem with the jury instructions here is that they failed to cure the serious prejudice that resulted from the District's extensive evidence and argument regarding "open forum" at trial, evidence the jury should not have heard had the trial court properly ruled pretrial on the forum issue. The jury was led to believe that the First Amendment was somehow at issue with respect to Bates' negligence claims. The trial court should have refrained from suggesting that the First Amendment had any relevance in the case. Jury Instruction 20 conveyed just the opposite: it makes a pronouncement about students' First Amendment rights, which were totally irrelevant and bolstered the District's improper "open forum"

defense. Also, the trial court erred in failing to explain to the jury that it should ignore the District's misleading evidence regarding "open forum." The trial court's instruction and actions *compounded* the errors.

(3) The District Committed Misconduct

(a) Despite the Trial Court's Ruling and Contrary Facts, the District Presented Its Improper Open Forum Defense at Trial

The trial court did not commit its errors of law in a vacuum, it was led to them by the District. Bates argues in her opening brief that the District retroactively invented a non-existent "open forum practice" at *JagWire* and then claimed it was an issue of fact and not law. Br. of Appellants at 13-14. Bates then points out that the District did, in fact, have prior review and restraint authority over *JagWire*, and that evidence and argument to the contrary violated the trial court's order in limine and misled the jury. *Id.* at 30-32, 36-38.

The District makes the astonishing response that it did not argue or present evidence regarding the "constitutional" concepts of forum analysis. Br. of Resp'ts at 25-33. The District avers that it merely presented evidence of the "educational philosophy" of "open forum" and invited the jury to decide whether "the supervision was consistent with the standard of care for high school journalism." *Id.* at 27. The District claims that the jury never heard legal argument or evidence as to the law

regarding the constitution and open forum. *Id.* For the District to so state blatantly distorts its own actions below, belied by the record. The Court should not tolerate such a distortion of the record.

The District misstates its actions at trial, and proves Bates' point: the constitutional forum analysis was conflated with a fictional "educational philosophy" hopelessly confused the trial court and the jury. Not only did the jury hear evidence and argument regarding the constitution and open forum, but the District defined open forum in a way that contradicted the law and the facts.

First, according to the District's own definition of "open forum," which is a school newspaper lacking *any* prior review or restraint, (Br. of Resp'ts at 3) *JagWire* was not an open forum. Superintendent Apostle conceded that prior review and restraint of material that would "cause a substantial disruption of the school" was a part of his job under Policy 3220. RP 385. He confirmed that Policy 3220 allowed for prior restraint:

Q. ...[T]here are a number of documents that talk about the fact that the School District can and should promptly review information that will either cause harassment, invasion of privacy, or substantially disrupt the educational environment, correct?

A. *If the publication met any of those conditions, the principal could intervene.*

RP 428-29. This testimony was confirmed by both Principal Lowney and by the newspaper's advisor, Kevin Smyth. RP 439, 460, 501. District counsel made the same claim in cross-examination questions, for example, asking an expert witness, "[T]he key ingredient to open forum is no prior administrative review, no prior administrative restraint, is that correct?" RP 1537. An expert witness for the District claimed that in open forum, the students, not the principal or the newspaper advisor "ultimately decide[]" whether something is published. RP 2042. Another expert witness stated that in an "open forum situation" the principal and the journalism advisor could not "put their foot down" and stop publication of material prohibited by school policy. RP 2184-85. In fact, two witnesses actually contrasted "open forum" with prior review and restraint, suggesting the two concepts were mutually exclusive:

Q. Exhibit 142 has already been admitted but it says here under JagWire, "an open forum for student expression; ...Is that language currently in the JagWire?"

A. No.

Q. Why is that?

...

A. It's a limited open forum.

Q. What does limited open forum mean?

A. It means the District can have prior review to the publication being printed.

RP 419-20.

Q. Is [JagWire] open forum anymore?

A. No.

Q. What is it now?

A. It's prior review, prior restraint.

RP 854. Principal Lowney stated that he “knew” *JagWire* was an open forum “because I didn’t prior review the paper ever and the students made the decisions about what was going to show up in that newspaper.” RP 2315.

Therefore, by the District’s own definition, open forum did not exist at Emerald Ridge as a matter of fact. Every time a District witness or District counsel stated that *JagWire* was an “open forum” (*see, e.g.*, RP 417, 420, 433, 435, 1537), *that statement was false*. The District should not have been allowed to present evidence and argument to the jury that suggested otherwise. It certainly cannot now do so.

The District is also not accurate when it tells this Court that “neither defense counsel nor District witnesses ever used the term ‘open forum’ before the jury to denote a constitutional category in which the District was barred by the First Amendment from exercising editorial

control over the *JagWire*.” Br. of Resp’ts at 30. One of the most egregious violations occurred when District counsel attempted to “educate” a plaintiff expert during cross-examination:

Q: Do you know whether or not open forum is constitutionally protected?

A: I know there is a Supreme Court case and I don’t remember exactly its [sic] Hazelwood –

Q. No, it’s Tinker v. Des Moines.

A. Tinker – yeah. I’m familiar with it, but I don’t know the letter of the case but, you know, it has been brought up in journalism classes in the past.

Q. And you’re aware that under the Constitution, open forum is constitutionally protected?

MR. ROBERTS: Objection. Excuse me, objection your honor. This is a motion in limine and we’re getting into the law now.

RP 1554-55. Almost immediately thereafter, the connection was drawn again:

Q. Journalism is the only profession that’s specifically protected by the First Amendment, right?

A. Yeah, although it’s not First Amendment at all costs you can’t just print whatever you want.

Q. And you’re testifying that you disagree with pure open forum instruction; is that correct?

A. I am, yeah.

Q. Even though it’s constitutionally protected?

MR. ROBERTS: Objection, Your Honor.

BY MR. AUSTIN: Even though you understand it to be constitutionally protected?

MR. ROBERTS: Same objection, Your Honor.

THE COURT: Overruled. You may answer the question.

RP 1557. District counsel posed this question to another expert: “And what bothers you [about open forum] is that the students are given the absolute right to use their First Amendment rights under the U.S. Constitution, isn’t that correct?” RP 1218. The trial court overruled Bates’ objections to this line of questioning. RP 1219-20.

By claiming that “open forum” is constitutionally protected, and by repeatedly linking it to the First Amendment, the District misled the jury into believing that exercising prior review and restraint would have violated the First Amendment.

The District also incorrectly claims that its improper open forum evidence was not objected to at trial. Br. of Resp’ts at 39-40. As demonstrated above, Bates objected *repeatedly* to this evidence, particularly when it related to witness statements about the law. RP 1299, 1555, 1557. These objections were largely overruled.

The District is also not accurate when it states that open forum testimony was limited to the facts of the “educational philosophy” and did not constitute improper statements as to the law. Br. of Resp’ts at 26-27. In fact, the District admitted at trial that it introduced testimony on the law. When the trial court asked District’s counsel post-trial on what legal authority she should rely to determine what forum existed, District’s counsel responded, “I think the best that you’re going to get is what experts testified on the stand they considered to be an open forum.” RP 2401. The District asked the trial court to look to its witnesses’ testimony for the *legal standard* for forum analysis.

Thus, even the District could not keep separate its own theories regarding the factual and legal definitions of “open forum.” This is likely because there is no separation: the District’s definition of “open forum” high school journalism precisely matches the Supreme Court’s definition of “public forum:” that only unprotected speech may be regulated. However, as the trial court ruled, *JagWire* was not a public forum.

Even if the “educational philosophy” of open forum could be decoupled from any constitutional analysis, the record is replete with examples of how the District asked argumentative questions and elicited testimony to draw a connection in the jury’s mind between open forum and the Constitution. RP 479, 499, 528, 849, 1218-25, 1250, 1515, 1537,

1554-55, 1560, 1567, 2075, 2093, 2150, 2162, 2185. In short, the District *flagrantly and repeatedly* violated the trial court's ruling in limine that the constitutional forum analysis was a question of law for the court.

The District also offers no explanation about how its theory that *JagWire* had an open forum "educational philosophy" was not negated by the trial court's post-trial ruling that *JagWire* was not an open forum as a matter of law, and that prior restraint and prior review existed at the time the oral sex article was published. The District wants this Court to believe that *JagWire* simultaneously *had and did not have* prior review or restraint. This is a factual and legal impossibility.

Reading the record as a whole, the District's deceptive plan for this trial becomes clear. The District was stuck with Policy 3220, which made quite clear that responsibility for any problematic content in the newspaper was the District's. Smyth admitted as much at trial, when he said that the language of Policy 3220 was "not the language of open forum." RP 2251. Realizing that Policy 3220 placed legal responsibility with the District, and not the students, the District concocted a legal and factual fiction that by ignoring Policy 3220 and failing to properly supervise the paper's content, the District was actually defending the First Amendment and engaging in a high-minded pedagogical method.

The District's "open forum" fiction has no basis in fact or law. The District's claim that an "open forum" with no prior review or restraint existed "in practice" is contradicted by the District's own evidence. The District's arguments and evidence to the contrary was misconduct.

Bates argues in her opening brief that the District's "open forum" deception so infected the trial that it was impossible for the trial to be fair. Br. of Appellants at 42. The District lightly dismisses the dozens of examples of its deceptive conflation at trial, claiming that they were "scrape[d] together" and presented out of context. Br. of Resp'ts at 34. The District seems to suggest that the 40 examples in Bates' brief are the only examples of its "open forum" strategy to conflate its negligence with Constitutional vigilance. *Id.*

The pervasive nature of the District's improper argument and evidence is almost impossible to catalogue instance-by-instance. Bates' brief attempts to list a number of the most egregious examples, but it is by no means exhaustive. For example, this exchange is not listed in Bates' catalogue:

Q. From a First Amendment point of view, does First Amendment still exist as Emerald Ridge High School?

A. Not to –

MR. ROBERTS: Objection, your honor. That's a legal conclusion.

BY MR. AUSTIN:

Q. From your point of view?

THE COURT: I'm going to allow it. Overruled.

A. Clearly, not to the extent that it did when we operated as an open forum.

RP 501.

Nor is this exchange:

Q. What is the expression called in [the oral sex article] then from your understanding of open forum?

A. Free speech, it's protected speech.

RP 528.

Nor is this one:

Q. What was your understanding as to the authority you had if it was unprotected speech?

A. As far as I know, we had every First Amendment right as any other journalist despite being students....

RP 605.

The examples listed in Bates' brief are selections. If this Court wishes Bates to provide a praecipe that lists every single instance of this kind of violation in the transcript, Bates will happily comply.

The District also responds to Bates' argument regarding the use of the terms "unprotected speech" and "unprotected expression" which are legal terms of art. Br. of Resp'ts at 36-37. The District claims that it

made clear to the jury that “protected” and “unprotected” were defined solely by Policy 3220 and not by any legal definition of those terms.

Again, the District’s assertion is inaccurate. District counsel asked Smyth, “In an open forum situation if the principal vetoes unprotected expression, is it still an open forum?” Smyth responded, “I’m not sure if it is, *but unprotected expression is against the law....*” RP 2206. At another point, Smyth stated that profanity and tobacco advertising were “protected speech,” even though they were prohibited by Policy 3220. RP 742. Thus, “protected speech” in the District’s case was not bound by the dictates of Policy 3220.

Even if Bates’ 40 examples of improper legal argument and evidence represent the entirety of the District’s misconduct, this Court has granted new trials based on far fewer instances of wrongdoing. *Storey v. Storey*, 21 Wn. App. 370, 585 P.2d 183 (1978);² *State v. Simmons*, 59 Wn.2d 381, 384-77, 368 P.2d 378 (1962).

The District suggests that Bates should not have a new trial because the jury might simply have not believed the plaintiffs, and that the

² The District’s attempt to distinguish *Storey* by ignoring the instances of “open forum” testimony and by instead counting the number of objections, is puzzling. Br. of Resp’ts at 39. First, the trial court here refused to issue a forum ruling and improperly denied Bates’ motion in limine to prevent the inaccurate “open forum” theory from tainting the trial. Second, Bates did object on numerous occasions. *See, e.g.*, RP 1219-20, 1554-55, 1557. Most of those objections were overruled.

open forum confusion might have had nothing to do with the verdict. Br. of Resp'ts at 38.

The District misstates the standard that this Court applies in reviewing the issue. The question is not whether there is another possible explanation for the verdict, but whether, considering the entire record, it is reasonably probable that the trial court's error affected the outcome of the trial. *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 433, 814 P.2d 687 (1991), *review denied*, 118 Wn.2d 1011 (1992).

The District also provides no response to the many examples of juror questions that establish the jury's confusion on this subject. Br. of Appellants at 40-41. Those questions indicate that the jury believed, incorrectly, that *JagWire* had no prior restraint or review. In another example, not included in Bates' opening brief, one juror asks Lowney why he reprimanded Smyth for allowing the article, "considering he could not control the content." RP 2336.

The trial here was supposed to be about whether the District was negligent in its supervision of student journalists, allowed the invasion of privacy of its students, and if so, whether those students were harmed. Instead, the District turned the trial into a referendum on whether (1) Policy 3220 violated the First Amendment, (2) the District correctly ignored Policy 3220 when it allowed publication of student sexual

histories, and (3) protected its student journalists' First Amendment rights by refusing to supervise them. Bates did not get a fair trial.

(b) The District Misused the Statements of Damages to Inflamm the Passion and Prejudice of the Jury

As Bates argued in her opening brief, the District pushed its “open forum defense” to inflame the passions of the jury with irrelevant First Amendment rhetoric, and simultaneously misused the statutorily-mandated statements of damages to further prejudice the jury against the student victims. Br. of Appellants at 42. The District waved the statements in front of the student victims and asked them why they were demanding \$2-4 million dollars each from the District, even though the documents said nothing of the sort. These arguments were an attempt to paint the student victims as avaricious, which has been held to be misconduct. Br. of Appellants at 50-52.

The District offers several responses. It claims that Bates did not move to exclude the statements of damages, and therefore Bates cannot raise the issue on appeal because she failed to object at trial. Br. of Resp'ts at 47-48, 51. It also claims that in response to the District's use of the statements, Bates should not have tried to analyze and explain the statements of damages to the jury. *Id.* at 50. In attempting to distinguish *Day v. Goodwin*, 3 Wn. App. 940, 478 P.2d 774 (1970), the District avers

that although the *Day* court found the argument that the plaintiff was going to be on “Easy Street” improper, this Court “did not grant a new trial based on this basis [sic].”

The District is wrong when it says that Bates did not move in limine to exclude the statements of damages. As the District points out, it made no suggestion that it planned to use the statements *until just before it made its opening statement*. Br. of Resp’ts at 53; RP 245. The District brought up the issue as “clarification” of the trial court’s order in limine. *Id.* As soon as Bates’ counsel were on notice of District’s intention, they strenuously objected and moved to exclude the statements at that time under ER 403 and 408. RP 245-51.

After Bates asked the trial court to exclude the statements, and once the trial court ruled, Bates had a “standing objection” at trial. “The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation.” *State v. Weber*, 159 Wn.2d 252, 271, 149 P.3d 646, 656 (2006); *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564, 568 (1984), *citing State v. Evans*, 96 Wn.2d 119, 123, 634 P.2d 845 (1981) *amended*, 649 P.2d 633 (1982). Unless the trial court indicates further objections are required when making its ruling, its decision is final, and the party losing the motion in limine has a standing objection. *Kelly*, 102

Wn.2d at 193, citing *State v. Koloske*, 100 Wn.2d 889, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

Bates moved to exclude the statements of damages and lost the motion. The trial court did not instruct Bates to continue objecting. Bates had a standing objection to the evidence at trial, and can raise the issue on appeal.

The District also cannot fault Bates for trying to explain the statements of damages to the jury after the trial court ruled that the District could use them. This Court's precedents do not require a party to forego a defense to improper evidence in order to appeal the evidentiary ruling. Once a trial court has made an adverse evidentiary ruling, the party who lost on the issue is entitled to explain the evidence in the hope of mitigating its impact. *State v. Thang*, 145 Wn.2d 630, 649, 41 P.3d 1159, 1168 (2002). This Court has also held that when a litigant against whom evidence of other crimes is ruled admissible seeks to minimize its effect by introducing it himself, he is not precluded from appealing the admissibility. *Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 806 P.2d 766 (1991). In *Garcia*, the plaintiff in a medical malpractice action arising from the death of her newborn child sought unsuccessfully to exclude evidence of her prior abortions, and thereafter preemptively

testified about the abortions. The Court of Appeals held that she had not waived review: “A party is entitled to try to minimize the adverse effect of a decision by raising the damaging testimony first. Thus, we hold that Garcia has not waived review of the issue by her conduct.” *Garcia*, 60 Wn. App. at 641, 806 P.2d 766. Later, in a criminal case, the Court of Appeals held that a defendant could not invoke the protections given by *Garcia* because the challenged evidentiary holding did not alter the planned trial strategy. *State v. Makela*, 66 Wn. App. 164, 171, 831 P.2d 1109 (1992).

Bates was entitled to mitigate the prejudice created by the District’s misconduct. Once the trial court permitted the District to improperly introduce the statements of damages, and the District painted them as greedy demands, Bates was entitled to explain the context under the rule of completeness, ER 106. ER 106 states that ‘{w}hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.’ This rule is intended ‘to protect against the misleading impression which might otherwise result from hearing or reading matters out of context.’ 5 Karl B. Tegland, *Washington Practice: Evidence* sec. 106.1 at 115 (4th ed.1999).

After repeatedly attacking Bates for not objecting at trial, the District offers an anemic argument that it did not commit misconduct by painting the student victims as greedy First Amendment foes, distinguishing *Day*. Br. of Resp'ts at 52-53. However, the District does not argue that its conduct was not as bad as the misconduct in *Day*, it argues that the misconduct in *Day* was not the basis for the Supreme Court's grant of a new trial. Br. of Resp'ts at 52.

The District offers no support for its plainly faulty analysis of *Day*. The *Day* court called the "Easy Street" greed argument "improper," noted several other trial court errors, and reversed a judgment in the defendant's favor. The entire holding of *Day* states, "The judgment is reversed, and the cause is remanded for a new trial." This Court did, in fact, consider appeals to the jury that the plaintiff is greedy to be misconduct.

The District combined the false image of itself as a First Amendment defender with a false image of the student victims as greedy First Amendment foes. No instruction from the trial court could have cured this insidious thread that the District wove throughout the trial. This conduct prejudiced and inflamed the jury and deprived Bates of a fair trial.

E. CONCLUSION

The District's response is not persuasive. The trial court erred in failing to rule as a matter of law that the *JagWire* was a nonpublic forum

at the outset, and in allowing evidence that an “open forum” is a First Amendment concept. The court compounded this error by permitting the District’s trial counsel to repeatedly ask argumentative questions and solicit testimony as to the law that the student newspaper was an “open forum” that the District did not control. The court further permitted the District’s counsel to misuse the statement of damages in argument. The student victims were deprived of a fair trial.

This Court should reverse the trial court’s judgment and remand the case for a new trial. Costs on appeal should be awarded to appellants.

DATED this 10th day of June, 2011.

Respectfully submitted,



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DECLARATION OF MAILING

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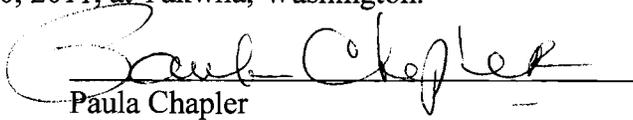
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 10, 2011, at Tukwila, Washington.


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