

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

NO. 40737-0-II

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION II

M.R.B., individually; K.B.W., individually; M.L.F., individually;  
CHARLES FREEDLE and 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,

v.

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

Respondent.

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BRIEF OF RESPONDENT

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## I. Introduction

Plaintiffs-Appellants (“Plaintiffs”) argue that Judge Susan Serko made two principal mistakes at trial. First, she supposedly allowed the District to make an improper constitutional argument to the jury about the law of “open forum.” Second, she allowed testimony and evidence about Plaintiffs’ Statements of Damages. Plaintiffs accuse defense counsel of “misconduct” in following Judge Serko’s rulings on these two matters. Their appeal is as baseless as their accusations of misconduct.

The open forum testimony was relevant to whether the Defendant-Appellee (the “District”) met standard of care for running a school newspaper. In this case, “open forum” referred to a legal theory as well as to a philosophy and method of running school newspapers. Under the legal theory, the District argued—out of the presence of the jury—that it could not be held liable for anything published in the *JagWire* because students made the editorial decisions. Judge Serko rejected this legal theory, ruling against the District’s summary judgment and directed verdict motions. The jury never heard the legal theory that is so central to Plaintiffs’ appeal.

Testimony about open forum practice was necessary, however, for the jury to understand how the *JagWire* class was advised and taught so that the jury could decide whether the District had been negligent, and for Judge Serko to make her later rulings regarding the District’s legal

arguments. Judge Serko therefore allowed the District to offer evidence on open forum practice as related to the *JagWire*'s operation and meeting the standard of care for operating a school newspaper program.

As for use of the Statements of Damages at trial, Plaintiffs failed to object to their introduction as exhibits or to testimony about them. Before his opening statement and out of the presence of the jury, defense counsel asked the trial court whether he could refer to Plaintiffs' tort claims and Statements of Damages. Judge Serko allowed reference to the Statements of Damages, although not to the tort claims. Not once during the District's opening, its closing, or examination of Plaintiffs did Plaintiffs object to mention of, testimony on, or admission of seven Statements of Damages.

Plaintiffs received a fair trial, but they lost. Their attacks on the court's trial process, the jury's result, and defense counsel are factually and legally unsustainable.

## **II. Statement of the Case**

The jury's verdict in favor of the District in this case came after a four-week-long trial and testimony by 24 witnesses.

### **A. Background of the JagWire**

Before October 2008, the District's Board Policy 3220 allowed high school newspapers to operate as open forum publications. RP 461. In an open forum, students make final publication decisions without any

prior review or prior restraint by school administration. *Id.* The student newspaper for Emerald Ridge High School, the *JagWire*, identified itself as an open forum publication in the editorial mission statement printed in each issue: “As an open forum, JagWire exercises student free expression rights to their fullest extent.” RP 429. The front page of the *JagWire* included the caption, “An Open Forum for Student Expression.” *Id.*

Open forum journalism is a widely-recognized approach to high school journalism instruction used in schools and school districts in Washington and nationwide. RP 2160, 2163-64. Open forum has been officially approved of since 1990 by the Office of Superintendent of Public Instruction (“OSPI”) in the *Washington State K-12 Journalism Curriculum Guide*, the only journalism curriculum guide published by OSPI. RP 1700-01. One of the Plaintiffs’ experts, Judith Billings, was the Superintendent of Public Instruction at the time the *Curriculum Guide* was approved and published. RP 1701. The purpose of the guide was to provide teachers with information on good journalism practices for grades K-12. *Id.* Included in the guide were the Student Press Law Center’s Model Guidelines for Student Publications, which read: “Prior restraint: No student publication whether non-school sponsored or official will be reviewed by school administrators prior to distribution.” RP 1700-01. This arrangement is the essence of open forum instruction and practice.

In addition to being OSPI-endorsed, open forum journalism was allowed by District policy and practice. RP 482. Under Board Policy 3220, and by District practice, high school newspapers were open forum publications in which the District did not interfere with student publication decisions unless they involved any of several narrow categories of “unprotected expression” as defined in the policy. RP 484, 498, 524-29, 739-42; CP 140.<sup>1</sup> At the *JagWire*, administration exercised no prior review and no prior restraint, except as to these specific types of “unprotected expression.” RP 484, 498, 524-29, 739-42.

During the 2007-08 school year, Emerald Ridge students produced the *JagWire* in their newspaper production course. Teacher Kevin Smyth acted as the advisor to the class. RP 477. About two-thirds of the *JagWire* students were in their second, if not third, year of journalism. RP 817. Students also were responsible for all publication decisions about letters to the editor from community members and advertising. RP 817.

Students received credit and grades for the course. RP 863. However, in other respects the *JagWire* operated more like an extracurricular activity than a typical class. During deadline week, students typically worked after school until as late as midnight. RP 669, 691. The *JagWire* was a student-centered learning environment. While

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<sup>1</sup> A copy of Board Policy 3220 is included in the Appendix.

Mr. Smyth did some limited stand-up instruction at the beginning of the year on topics like the First Amendment; open forum; the five deadly sins of journalism (libel, invasion of privacy, obscenity, plagiarism, and clear and present danger); the AP stylebook; attribution; and journalism ethics, the *JagWire* was a student-centered class in which the students learned by exercising the responsibilities of producing the newspaper. RP 807, 818-20. The classroom was often loud, and *JagWire* reporters were often out interviewing students. RP 827-29. The environment gave students the opportunity to act truly as journalists and editors.

At the time of his hiring in 2007, Mr. Smyth had over 25 years teaching experience and was credentialed to instruct high school journalism. RP 808-09. After being hired, Mr. Smyth attended a week-long Washington Journalism Education Association (WJEA) camp and later a national conference by the Journalism Education Association and the National Student Press Association at which open forum was discussed regularly. RP 809-11. He also met with the journalism advisors of the other District high schools, acquiring additional guidance on operating an open forum publication. RP 811-12. All three District high schools were known for their award-winning newspapers. *Id.* Mr. Smyth read a variety of resources to stay on top of the field and maintained a good relationship with the previous advisor. RP 812, 860. Additionally,

he met with Emerald Ridge Principal Brian Lowney throughout the year to discuss the newspaper and how to work with the students. RP 812-13.

The *JagWire* newspaper production class was led by an editorial board of five journalism students who were selected by the previous year's editorial board and made editorial decisions and shared concerns with the advisor. RP 815. The experienced editorial board was selected to present at the WJEA convention on how to operate an editorial board. RP 537, 798. When issues arose, Mr. Smyth would meet with the board to discuss them. *Id.* Mr. Smyth understood the *JagWire's* open forum status to mean that the "students are responsible for the content and the design of the paper and it's [his] job to advise them and ensure that that content does not cross the boundary into unprotected speech." RP 805.

As principal, Mr. Lowney understood that the District's high schools operated their student newspapers as open forum publications. RP 494-97. He supervised the advisor's work with the students, but he did not see a single article before publication. RP 461, 496. Rather, most of any conversation about *JagWire* content would take place after the fact, at which time he could "help[] students see their decisions through a different filter." RP 496. His understanding of open forum was that the advisor facilitated the students, provided instruction and structure for the students to make sound decisions, and advised students if issues arose

regarding the narrow categories of unprotected speech set forth in District policy. RP 738. But the students generally made the decisions about content and topics published in the newspaper. RP 497-98.

Mr. Lowney spoke at conferences on open forum journalism and wrote to the Washington Legislature in support of a bill that would have required open forum practice in all high schools, as is the law in seven states. RP 522-23, 2060. For his support of student journalism, he was recognized by the WJEA as Principal of the Year in 2006. RP 514.

#### **B. Publication of the 8-5 *JagWire* Issue**

The article at issue in this lawsuit was published in February 2008 and was included in the “8-5 Issue.” The decision to write an article on oral sex was first discussed during journalism camp in August 2007 between two members of the student editorial board, Ashley Vincent and Lauren Smith. RP 637, 810. They discussed the importance of tackling the topic because of the lack of curriculum on this subject, the casualness of oral sex among their peers, and the lack of knowledge of health risks associated with oral sex. RP 805. The student journalists decided to wait until the *JagWire* staff was more experienced before undertaking this project. RP 591. About a month before the article was published, the *JagWire* students held a focus meeting to discuss topics for the upcoming

issue. RP 640. All of the students had an opportunity to express their opinions and decided to publish the oral sex education article. RP 748.

The students decided to move forward because they believed the topic needed to be covered. RP 1965. They were not taught in health class about the risks of contracting sexually transmitted diseases (STDs) from oral sex and felt this and related topics needed addressing. RP 1965. The 8-5 Issue would address the lack of curriculum, the risk of STDs, whether oral sex “counted” as real sex, opposing viewpoints on whether oral sex was moral, personal opinions and experiences, and media treatment of oral sex. RP 1965-66. The student journalists used the names of those interviewed to add a sense of realism to the issue at their school and to enable their audience to identify with the reality of the situation. RP 2010. They received consent to use names and understood as journalists that you did not grant anonymity unless it is specifically requested. RP 2009. The 8-5 issue’s excellence was later recognized when it was designated “Best in Show” at the WJEA competition in 2008. RP 488.

Student journalists Ashley Vincent and Dallas Welker interviewed students for the article. RP 543, 582-83. They conducted themselves professionally by wearing *JagWire* badges, identifying themselves as *JagWire* reporters, stating the topic of the article, and allowing anyone to decline the interview. RP 592-93. Students, including the student

Plaintiffs, knew that Ms. Welker and Ms. Vincent served on the editorial board for the *JagWire* and were interviewing for an article on oral sex. *Id.*

Ms. Welker conducted all of the interviews of the student Plaintiffs. *Id.* She used a digital tape recorder during all of the interviews. RP 546. The recorder could record for about 20 minutes, and when it was full, Ms. Welker would transcribe her notes. *Id.*, Ex. 127. During her interviews with both the Plaintiffs and non-plaintiff students, she explained that the article was about oral sex and asked the students if she could quote them. *Id.* She told them that if they did not want to answer a question, they could just say “pass” or not answer. RP 550.

All students interviewed agreed to be interviewed and related their opinions and experiences. RP 595-98. One of the students interviewed by Ms. Welker subsequently came and requested that her name be removed from the article. RP 594. Both her name and her quote were removed because the editorial board felt the story lost credibility if quotes were anonymous. *Id.* Another student, who later could not remember the details of her interview or any discussion with Ms. Welker prior to publication, did not have her name and quotation used because the editorial board understood that she did not want her name in the article. RP 594, 628-30.

After the article was published and the student Plaintiffs’ parents learned of it, Mr. Lowney spoke with parents of two of them, assuring

them that no harassment or bullying would be tolerated and that they should contact him directly if the students experienced any. RP 485.

The District had a zero tolerance policy for harassment, intimidation, and bullying. RP 507. Mr. Lowney strove to ensure that Emerald Ridge's learning environment was free from bullying. *Id.* He attended trainings on the subject every year and provided training to his staff before the start of each school year. *Id.* Students received training on what to do if they were bullied. RP 350-51, 846-47, 962, 1357-59. Mr. Lowney and other administrators went over the student handbook and explained on closed circuit "Jag TV" to all students what to do if they ever were harassed or bullied. RP 846-47.

Not a single report of teasing or harassment was made to Mr. Lowney in connection with the article. RP 511. Plaintiffs acknowledged that they were trained about harassment, intimidation, and bullying and that they did not notify any administrators about any alleged harassment. RP 351, 962, 1106-06, 1363. Numerous District employees testified that no reports were made to them, and students testified that they did not witness any teasing or harassment of the student Plaintiffs after the article came out. RP 424, 522, 847, 1932-34, 2005, 2326. Discussion of the article died down quickly, as most things do in high school. RP 610.

In the wake of the article, Mr. Lowney issued a Letter of Reprimand to Mr. Smyth because he believed certain decisions had been made in poor judgment and “I also expect Mr. Smyth to facilitate that class in a way that they make great decisions about content; that they have a great decision-making process.” RP 481-82. Mr. Lowney indicated that Mr. Smyth was reprimanded not for what came out in the newspaper per se, but in connection with that facilitation and with a student survey unrelated to Plaintiffs’ claims. RP 502-03.

In response to this lawsuit, the District adopted Board Regulation 3220R in October 2008 to change the way student newspapers operate. RP 416-17. Under the policy in place when the 8-5 Issue was published the principal’s authority to stop a publication was limited to “unprotected speech” as defined by Board Policy 3220. Under the new regulation the principal is required to review the newspaper prior to its publication. RP 417-18. Both the principal and the superintendent have the authority to block the publication if they deem this necessary. *Id.* The *JagWire* changed its masthead so that it no longer indicates that the newspaper is an open forum publication. RP 419-20.

### **C. Proceedings: Suspect Credibility of Plaintiffs**

Evidence during trial, including testimony by the “student-victim” Plaintiffs themselves, cast ample doubt on their credibility so as to warrant skepticism in the minds of the jurors about the validity of their claims.

As a preliminary matter, all four student Plaintiffs conceded that they had volunteered to be interviewed and had known that Dallas Welker was a *JagWire* reporter. RP 953-54, 1000, 1002-03, 1088, 1090, 1332, 1395, 1448-49. They admitted their quotes were accurate and that they had known they were being interviewed for an article about oral sex. *Id.*

Other students who were present at the interviews or who were interviewed themselves testified that they had known the information would be included in the article and, as a result, had either consented to the use of their names, had declined to be interviewed at all, or had asked to have their names or quotations removed. RP 559, 584, 703, 706, 1916-18, 1927-32, 1999-2002, 2029-33. One student's quote was removed at her request, and another student who requested anonymity instead had her quotation removed. RP 583-85, 1891, 1928-31.

A teacher also testified that one student Plaintiff had told her she knew her name would be included in the article. RP 1942-43. This Plaintiff denied this and testified that she had thought the interview for the article was a mock interview. RP 1326, 1337. But she also gave contradictory testimony that after the interview she texted Dallas Welker and left her a voicemail asking to have her name removed from the article. RP 1281-83. She provided no phone record evidence to substantiate this claim. She testified that she did not hear back from Ms. Welker. She lived

right across the street from the school and knew Ms. Welker was there working on the article but testified that she “has a life” and was too busy to walk over to the school to make this urgent request in person. RP 1333-34. A friend of this same Plaintiff also testified that after watching the Plaintiff’s interview she declined to be interviewed herself because she did not want her name to appear in the article. RP 2029-33.

A second student Plaintiff testified that after the interview but before publication, she asked Ms. Welker to remove her quote, but Ms. Welker denied that any such conversation took place. RP 559, 1406, 1892. This Plaintiff also claimed she had a friend call *JagWire* member Lindsay Nolan requesting that her quote be removed, but Ms. Nolan denied any such conversation, and Plaintiffs produced no evidence of it. RP 1481-82. The same Plaintiff claimed another of the student Plaintiffs texted Ms. Nolan to ask that both of their names be removed from the article but again produced no evidence of the alleged text message. RP 1482. Ms. Nolan testified that this Plaintiff called her and asked only that a portion of her quote be removed, and that this wish was respected. RP 690-91. After the article came out, this particular “student-victim” did a standup comedy about the article before the assembled student body in which she admits she was blowing up phallus-shaped balloons. RP 1442-43.

Although the student Plaintiffs claim they were harassed on a daily basis, no reports of this were ever made to school administration, none of the Plaintiffs ever missed an hour of class, and none of the Plaintiffs saw their grades decline. RP 2716. No psychiatrists or therapists testified during trial to support Plaintiffs' emotional distress claims.

A third student Plaintiff claimed that the *JagWire* article precipitated her break-up with her boyfriend and her decision to attend a distant college. RP 1047, 1080, 1093-94, 1132. The boyfriend, the fourth student Plaintiff, attributed part of his own damages claim to this break-up. RP 949-51. Yet evidence in form of medical records of the third Plaintiff documented that she already had been planning to attend college out of the area and that she was emotionally devastated due to the break-up, which had occurred before the article ever came out. RP 2708-10.

One of this same Plaintiff's best friends, who was present at her *JagWire* interview, testified that the Plaintiff had known she was going to be quoted by name in the article but later confided to the friend that she intended to lie about this in the interest of her lawsuit. RP 698, 700-03.

#### **D. Proceedings: Open Forum**

During trial, the issue of open forum first arose during the argument for motions in limine. RP 49-55. Plaintiffs' counsel claimed the District was attempting to argue to the jury that it was legally not

responsible for monitoring the *JagWire* because it was an open forum publication. RP 43-44. The trial court made clear that it would not permit any expert or lay testimony before the jury on the law. RP 50-52. However, defense counsel argued that if Plaintiffs' experts testified that open forum is an invalid way of teaching journalism, then the defense should be permitted to offer rebuttal evidence that open forum journalism is a standard method of doing so. RP 50-51. The trial court granted an agreed-upon motion in limine prohibiting either side's experts from discussing what the law is or ought to be. RP 50-51.

Both sides stipulated that whether the *JagWire* was an open forum publication was an issue of law for the trial court. RP 51-52, 1179. The court reserved ruling on the issue until the end of the trial so that it could hear testimony regarding the *JagWire*'s practice and operation. RP 64-65.

During their opening statement, Plaintiffs' counsel zeroed in on the concept of "open forum" on numerous occasions and at some length claimed that the District had invented the concept after the fact and that it did not exist at the time the article was published. RP 220-21. Plaintiffs' counsel asked the jury, "[D]oes any of this open forum practice discussion comport with the District policies or the true evidence in this case?" *Id.*

In the District's opening statement, defense counsel was clear that the jury would be instructed on the law by the court at the end of trial. RP

254. In discussing the expected testimony, District counsel noted that the jury would hear from expert witnesses about the practice and operation of an open forum high school newspaper. RP 275-76. No discussion of the legal significance of the term was introduced by District counsel.

During the trial, both sides elicited testimony from lay and expert witnesses about the practice and operation of an open forum publication. RP 417, 497, 671, 805, 807, 1161, 1176, 1189, 1511. Evidence was offered through defense lay witnesses that the *JagWire* was by practice an open forum publication. RP 417, 497, 604, 805, 807. Student journalists explained from their point of view how open forum worked. RP 604, 660-61, 1995. They did not testify about any legal significance but offered explanations of how the *JagWire* was operated. Defense experts testified about the operation of an open forum newspaper, the prevalence of the practice, and the benefits associated with open forum, relating all of this to the operation of the *JagWire* and the procedures followed in publishing the article at issue and the standard of care. RP 2043-55, 2160-63.

Plaintiffs' counsel set a theme throughout the trial that the "open forum" concept was a "legal fiction." RP 1682. Plaintiffs' counsel elicited testimony from lay and expert witnesses regarding the practice of operating an open forum publication and whether they believed doing so ever could meet the appropriate standard of care. RP 1176, 1189, 1511.

Prior to trial, on the District's Motion for Summary Judgment, the trial court rejected the District's legal argument that because the newspaper operated as an open forum, the District could not be held liable for the students' publication decisions. CP 210-11. The trial court later went on to determine that for constitutional purposes the *JagWire* was a limited open forum. RP 2427-28. Although the District suggested that no jury instruction on the First Amendment was necessarily needed to resolve the tort claims, the trial court agreed to a First Amendment jury instruction based largely on that offered by the Plaintiffs. RP 2504-09.

**E. Proceedings: Responses to Statements of Damages**

In August 2009, the District requested Responses to Statements of Damages ("Statements of Damages") from the Plaintiffs individually. Each of the Plaintiffs responded to the request separately and individually on August 14, 2009. Nothing in the Plaintiffs' Statements of Damages identified them as settlement offers.<sup>2</sup> Before opening statements, the trial court instructed the jury that: "The lawyer's remarks, statements and arguments are intended to help you understand the evidence and apply the law. These remarks of the lawyers are not evidence, however, and you should disregard any remark, statement or argument which is not supported by the evidence or by the law as I give

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<sup>2</sup> Exs. 52, 53, 54, 56, 57, 58, 59, and 60. See Appendix.

it to you.” RP 167. The jury also was instructed that: “The lawyers may make objection to questions in evidence; they have the right and the duty to make any objections which they deem appropriate. Such objections should not influence you and you should make no presumptions because of their objections.” RP 168.

Prior to the District's opening statement, defense counsel inquired of the trial court “out of an abundance of caution” whether he could discuss the amount of money Plaintiffs had asked for in the course of litigation via their Notice of Claims and Statements of Damages. RP 245. He did not ask to discuss any settlement discussions or to talk about any information barred by ER 408. RP 245-51. He informed the court that the Plaintiffs had each asked for \$800,000-\$1.5 million in their Notice of Claims and \$2-4 million in their Statements of Damages. RP 245.

Defense counsel argued that the amounts requested in Plaintiffs’ Notice of Claims were admissible, given that the Notice of Claims were served on the District prior to an amendment to RCW 4.96.020 (the Notice of Claim statute), which made the amount listed in a notice of claim no longer admissible at trial. RP 246. The trial court determined that the recent amendment to RCW 4.96.020 could be applied retroactively, thus barring the parties from discussing the amount in Plaintiffs’ Notices of

Claims. *Id.* Defense counsel did not make any reference to the Notice of Claims during trial, abiding by the trial court's ruling.

However, the trial court agreed with defense counsel that the amounts in the Statements of Damages could be discussed during the District's opening. RP 245-51. The court reasoned that these were pleadings that provided the statements were a fact, were the claims being made at the time, and were not supplemented after that time. RP 249. The court ruled that the Statements of Damages were not settlement discussions and therefore fell outside of ER 408. *Id.* "[J]ust as a party's responses to interrogatories, a party's responses to request for production or request for admission are admissible, I think, and eligible for admission in court, I think that a statement of damages is also." RP 250.

During the District's opening statement, defense counsel reiterated what the trial court had instructed the jury: "This is the time when we do opening statements and probably the most important issue for you to remember in this opening statement is that nothing that I say, nothing that Mr. Connelly said yesterday is evidence. What we're trying to do is outline what we believe the evidence will show." RP 253. He mentioned that the District had received statements of damages from the Plaintiffs in which they collectively requested \$16-32 million. RP 261. Plaintiffs' counsel did not object at any point during this opening statement. *Id.*

During the trial, both defense and Plaintiffs' counsel questioned the seven<sup>3</sup> Plaintiffs who testified about their individual Statements of Damages. RP 286, 309-10, 312-13, 371-74, 965-66, 984, 1115-17, 1365-67, 1475-76, 1819-20, 1844-45. The first to testify was Layne Freedle. RP 286. Plaintiffs' counsel himself marked Exhibit 53, Mr. Freedle's Statement of Damages, and introduced it but did not offer it into evidence. *Id.* On cross examination, defense counsel questioned Mr. Freedle about his pleading and offered it as an exhibit. RP 310. The trial court specifically inquired whether there was any objection from Plaintiffs to admitting the exhibit. *Id.* Plaintiffs' counsel said there was no objection, and Mr. Freedle's Statement of Damages was admitted into evidence. *Id.*

In like fashion, each Plaintiff's Statement of Damages subsequently was entered into evidence. RP 309-10, 312-13, 371-74, 965-66, 984, 1115-17, 1365-67, 1475-76, 1819-20, 1844-45. *Id.* Plaintiffs made no objection to these admissions or on this issue at any time. *Id.* To the contrary, Plaintiffs' counsel questioned each Plaintiff about her or his individual Statement of Damages in direct and re-direct examination. *Id.*

For example, Plaintiffs' counsel asked Mr. Freedle if he had written his statement, was told the answer was no, and called it "a bunch of legal gobbledegook." RP 313. Each Plaintiff admitted that each

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<sup>3</sup> Because Plaintiff Lorie Huniu elected not to testify, her Statement of Damages was not entered into evidence.

individual Statement of Damages was his or her own and did not list the names of any other Plaintiffs. RP 309-10, 312-13, 371-74, 965-66, 984, 1115-17, 1365-67, 1475-76, 1819-20, 1844-45. Plaintiffs' counsel countered by eliciting testimony that the Plaintiffs trusted the jury to do the right thing and that certain Plaintiffs believed the amount was for the entire case, not for each individual. RP 372, 374.<sup>4</sup> As trial progressed, each Plaintiff's testimony echoed the previous, all to the effect that they trusted the jury to do the right thing, were unaware of how much money they were requesting, were allowing their lawyers to handle it, and were not asking for that particular amount but merely pointing out that other juries had awarded this amount in other cases. RP 312-13, 371-74, 965-66, 984, 1115-17, 1365-67, 1475-76, 1819-20, 1844-45.

At closing, Plaintiffs' counsel took the opportunity to address the Statements of Damages with the jury:

I hope that courage is not covered up with this overlay of sort of it's all about money, it's all about greed 16 to \$32,000,000.00. There never was a request for 16 to \$32,000,000. And I think you'll see that when you have an opportunity to look at the documents. Why is it said? To make you recoil, to make you think, oh, that's what it's about. I want to look at these people and say they're greedy, it's all about lawsuits.

RP 2646, 2679.

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<sup>4</sup> However, one of these Plaintiffs later admitted that there were eight plaintiffs in the case, yet only her name was listed on the Statements of Damages. RP 374.

The District's counsel also addressed the amounts requested by Plaintiffs in closing, reiterating that a key part of the jury's job was to weigh the credibility of witnesses. Recounting the inconsistencies in Plaintiffs' own testimony and the strong refutation evidence, he noted that part of the credibility inquiry relates to whether any witnesses had a personal interest in the lawsuit. In this connection, he noted that the Plaintiffs collectively had requested \$16-32 million prior to trial and during closing argument were requesting \$6.8 million. RP 2707, 2724.

### **III. Argument**

The errors that Plaintiffs now claim entitle them to a new trial under four different provisions of CR 59 all center on the same two complaints: the District's supposed improper constitutional argument to the jury, and the discussion of the Statements of Damages. Even if Plaintiffs had accurately recounted the trial proceedings, they would have confronted a high hurdle, as the standard of review for each assigned error ultimately comes down to whether the trial court abused its discretion. As it happens, notwithstanding the Plaintiffs' revisionist version of events<sup>5</sup> the trial court strictly managed this case with skill and care, and defense counsel scrupulously adhered to the court's rulings. The correctly instructed jury ruled in the District's favor on both the invasion of privacy

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<sup>5</sup> The District takes exception to the Plaintiffs' numerous misrepresentations of the record and insertion of argument in violation of RAP 10.3(a)(5).

and negligence claims.<sup>6</sup> This verdict should be upheld. Plaintiffs fail to set forth any basis for the extraordinary measure of granting a new trial.

#### **A. Standard of Review**

Denial of a motion for a new trial generally is not to be reversed on appeal except for abuse of discretion. *Aluminum Co. of America v. Aetna Casualty & Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (hereinafter “*ALCOA*”); *Levea v. G.A. Gray Corp.*, 17 Wn. App. 214, 226, 562 P.2d 1276, *review denied*, 89 Wn.2d 1010 (1977) (“Particularly where the claimed grounds for a new trial involve the assessment of occurrences during the trial and their potential effect on the jury, we will accord great deference to the considered judgment of the trial court in ruling on such a motion.”). In an appeal of a denial of a new trial, the test for abuse of discretion is whether “such a feeling of prejudice has been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial.” *ALCOA*, 140 Wn.2d at 537, 998 P.2d 856 (citations omitted).

An appeals court generally reviews a trial court’s evidentiary decisions for abuse of discretion. *Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, --- P.3d ----, 2011 WL 666283, \*4 (Wash., Feb. 24, 2011) (citing *Univ. of Wash. Med. Ctr. v. Wash. State Dep’t of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008); *State v. Luvane*, 127 Wn.2d 690,

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<sup>6</sup> Although the Plaintiffs cite claims for negligent supervision and hiring, they withdrew these claims before the case went to the jury, which was not instructed on either claim.

706-707, 903 P.2d 960 (1995) (“Trial court decisions to admit or exclude evidence are entitled to great deference and will be overturned only for manifest abuse of discretion.”). A trial court abuses its discretion only when its ruling is “manifestly unreasonable or based upon untenable grounds or reasons.” *Veit*, 2011 WL 666283 at \*4 (internal citations omitted).

Only where the denial of a new trial turns entirely on a question of law is that decision reviewed de novo. *Marvik v. Winkelman*, 126 Wn. App. 655, 661, 109 P.3d 47 (2005) (reviewing de novo denial of new trial that turned on legal question of whether jury's completion of verdict form inhered in the verdict); *see also Boley v. Larson*, 69 Wn.2d 621, 419 P.2d 579 (1966) (granting or denying new trial is largely within discretion of trial court except where “pure” question of law involved). This exception applies to an evidentiary decision only where admissibility of the evidence was a matter of law and not a matter for the trial court’s discretion. *Lyster v. Metzger*, 68 Wn.2d 216, 226, 412 P.2d 340 (1966); *Pacific Nat’l Bank of Wash. v. Morrissey*, 17 Wn. App. 525, 564 P.2d 337 (1977) (standard for reviewing order granting new trial “depends upon whether the order is predicated upon a rule of law or a matter within the court’s discretion.”); *Coleman v. Dennis*, 1 Wn. App. 299, 461 P.2d 552 (1970) (reversing grant of new trial where trial court determined that evidence should have been

admitted as matter of law but where admissibility actually was within court's discretion and court had not abused its discretion by excluding).

A new trial may be granted for misconduct of counsel only where the moving party establishes "that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record." *A.C. v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 521, 105 P.3d 400 (2005) (quoting *ALCOA*, 140 Wn.2d at 539); *see also City of Bellevue v. Kravik*, 69 Wn. App. 735, 743-44, 850 P.2d 559 (1993) ("A jury verdict must be reversed only if there is a substantial likelihood that the alleged misconduct affected the jury's verdict."). To preserve an error relating to misconduct of counsel for appeal, "a party should object to the statement, seek a curative instruction, and move for a mistrial or new trial," and "[a]bsent an objection to counsel's remarks, the issue of misconduct cannot be raised on appeal unless the misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." *City of Bellevue*, 69 Wn. App. at 743 (citations omitted).

**B. The District Did Not Argue Any Constitutional Open Forum Defense to the Jury.**

The trial court did not abuse its discretion in its careful management of the information the jury received about journalistic

practices at the *JagWire*. In their assignments of error, identification of issues, and lengthy explication of constitutional doctrine, Plaintiffs consistently conflate factual questions about the operation of the *JagWire* as an open forum publication—questions central to the tort claims at issue in this case—with constitutional questions that never were presented to the jury. This fundamental distinction is one the trial court enforced with zeal and one the District scrupulously respected. Plaintiffs’ counsel themselves seemed at times during the trial fully to appreciate the difference:

... I think that they can say this is what we did and I don’t know that we can stop that from a factual standpoint. But then to have someone say that the law provides or, you know, we did this because the law says or because—that, I think, is where you have to draw the line and they can’t do that.

RP 71.

**1. The Trial Court Committed No Error of Law in Its Rulings on Discussion of Open Forum.**

Plaintiffs mistakenly claim that the trial court committed an error of law warranting a new trial under CR 59(a)(8)<sup>7</sup> “because the district was allowed to present a defense that it was constitutionally prohibited from controlling the content of the school-sponsored newspaper.” Their Assignment of Error #3 claims that “[t]he trial court erred in permitting

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<sup>7</sup> “(8) Error in law occurring at the trial and objected to at the time by the party making the application; ...”

testimony, questioning, and argument as to the legal conclusions that the *JagWire* was an open forum, and that the District was prohibited by the First Amendment from stopping publication of the students' sexual status, histories, and details." Appellants' Br. at 3.

Despite the stridency and repetition with which they make these assertions, Plaintiffs' misconstruction of the case the District presented at trial is flatly belied by the record. The evidence and testimony presented to the jury during trial was offered to explain the educational philosophy behind open forum practice and demonstrate how open forum functioned at the *JagWire*, in order to educate the jury so that it could make the factual determination whether the supervision provided was consistent with the standard of care for high school journalism. It also was offered to provide the trial court with the necessary factual background to inform its legal decisions on questions that were not for the jury.

From the outset of the trial, it was clear Plaintiffs intended to suggest the District's practice of giving student journalists wide editorial license was reckless, if not negligent. As Plaintiffs' counsel explained:

I've got a negligence claim in here and the issue is: Is this a good method? That's one of the issues in this case. Were these kids properly instructed? Is what they did reasonable or unreasonable? RP 1181. ... We have the right to show that it's not meeting the standard of care. They're not learning what they're supposed to be learning through this.

RP 1184.

Plaintiffs also disputed that the student journalists at the *JagWire* in fact had the discretion the District claimed, and even suggested that open forum journalism in high school was a myth. Plaintiffs' counsel stated that the "newspaper advisor is the final arbiter of all the content in the *JagWire*," and "This newspaper was not up to the students. The evidence will show that this open forum practice that's being discussed is an invention after the fact." RP 221. Plaintiffs' experts testified that they didn't believe open forum journalism even was practiced in schools.<sup>8</sup>

There also was the potential for the trial to be tainted by juror discomfort with the sensitive subject matter of the *JagWire* article, with candid student discussions of such sensitive topics generally, and, by extension, with the entire educational approach of allowing student journalists a wide degree of editorial discretion. The trial court itself expressed concern about this danger when considering jury instructions.<sup>9</sup>

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<sup>8</sup> RP 1537 (witness Michael Wasserman testifying that, "I don't believe that's actually the way that things are done in Washington State or anywhere else for that matter."); RP 1722 (witness Judith Billings testifying that, "I'm saying there may be publications that use the term 'open forum.' I'm saying that in reality, they do not exist."). Under examination it was revealed that when Ms. Billings had served as the state Superintendent of Public Instruction, her office had released model guidelines for student journalism that dictated the open forum approach: "No student publication whether non-school sponsored or official will be reviewed by school administrators prior to distribution." RP 1752.

<sup>9</sup> RP 2508-09 ("I'm concerned by saying that you're telling that jury, you come up with the idea of what is vulgar or lewd. And many jurors are going to think that that article, in

To address these arguments it was critically important for the District to be able to present the educational equivalent of industry custom evidence to explain to the jury that open forum journalism was an accepted, responsible way of operating its program. To answer Plaintiffs' aggressive challenging of the notion that student journalists at the *JagWire* really had the editorial discretion they claimed, it was necessary to give the jury the proper background on how the newspaper operated. Had the District not been allowed to elicit factual standard of care testimony about the *JagWire*'s operations and how they comported with accepted practices, the jury would have been deprived of the most basic and important facts relating to the question it was tasked with answering: "Was the Puyallup School District negligent?" RP 2772.

The discussion of open forum practice also laid the factual groundwork necessary for the court to make its legal determination as to what kind of forum the *Jagwire* represented in order to consider the District's legal argument on Motion for Summary Judgment: that the District could not be held liable for the decisions of student journalists in a responsibly supervised open forum program. However, the trial court's forum determination was not needed by the jury to guide its factual decisions as to the tort claims. The District's legal argument never was

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and of itself, was vulgar and lewd and, therefore, I can find against the defendant for that reason. And I don't think that's a correct statement.").

made to the jury, was ultimately rejected by the trial court, is not appealed by the District, and thus is not before this Court. The considerable energy and ink the Plaintiffs expend arguing constitutional doctrine are of little if any import to this appeal. Appellants' Br. at 16-31.

The term "open forum" is hardly a fabrication of defense counsel as Plaintiffs allege. Appellants' Br. at 10; RP 221. To the contrary, it is a well-recognized educational term of art that describes the operation of a journalism program. RP 2162-64 (discussing seven states in which open forum practice is required of high school journalism programs by state law). "Open forum" denotes a widely understood—and widely practiced—journalism pedagogy in which student journalists have the responsibility to select topics, develop and write stories, design the layout of the paper, choose advertisers, and do so without censorship as long as they adhere to a limited set of restrictions. This understanding of what is meant by open forum was testified to by Plaintiffs' own experts, defense experts, and lay witnesses familiar with the practice of open forum journalism. RP 417, 497, 671, 805, 807, 1161, 1176, 1189, 1511.

Critically, 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*. The District's use of the term to

characterize the operation of the *JagWire* simply did not represent improper legal argumentation as to any of the constitutional doctrine upon which Plaintiffs expound at such length.<sup>10</sup> *See infra* at III.B.2.

Nor is this Court's ruling in *Magana v. Hyundai Motor Am.*, at all "particularly apt," as Plaintiffs maintain. *Id.* (citing 123 Wn. App. 306, 315, 94 P.3d 987 (2004)). There the court allowed evidence on a subject as to which the court already had sustained an objection to introduction of such evidence. Here, defense counsel introduced no evidence proscribed by the trial court. Discussion of open forum before the jury went to questions of journalistic practice and the applicable standard of care, not, as Plaintiffs claim, to a "pervasive" pattern of arguing that the "District's hands were legally tied by the First Amendment." Appellants' Br. at 40.

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<sup>10</sup> In decrying the "erroneous legal conclusion in testimony and argument to the jury," the Plaintiffs incorrectly "anticipate that the District may argue the trial court's actions were harmless error." Appellants' Br. at 38. Even where a trial court has abused its discretion in admitting evidence, this is not grounds for reversal or for granting a new trial where the evidence did not necessarily affect the outcome of the trial. *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 559-61, 815 P.2d 798 (1991) (finding no basis to reverse judgment or to grant new trial, despite concluding that trial court abused its discretion in allowing cross-examination of party about his substance abuse, where it could not be determined that there was strong likelihood that jury was prejudiced by this evidence and where evidence was relevant only to an issue the jury never reached, and where error did not necessarily affect trial). *Cf. Dickerson v. Chadwell*, 62 Wn. App. 426, 432-33, 814 P.2d 687 (1991) (noting great deference afforded to trial court's determination that its own error was prejudicial, based on its evaluation of occurrences during trial and their impact on jury, and upholding grant of new trial where it was "reasonably probable" that error affected outcome). Here, however, the trial court committed no error. The court admitted no legally inadmissible evidence, and the jury considered no critical evidence that the court had not admitted or had stricken.

Plaintiffs fail in assigning as error the trial court's "refusing to rule on the forum issue as a matter of law before the trial," including its reservation on the "student victims' " motions in limine. Appellants' Br. at 2 (Assignment of Error #1). Such a ruling at that stage of the proceedings was both unnecessary and impractical. An early ruling was unnecessary because the legal determination as to the type of forum at issue was irrelevant to the factual questions the jury was to consider, which concerned the tort claims that were the basis of the suit. More important, a ruling at that stage was impractical for the simple reason that the trial court had not yet heard the factual evidence about the *JagWire* to which it was later to apply the legal standard.

Curiously, the Plaintiffs even assign as error the trial court's "post-trial ruling that the school-sponsored newspaper was a limited public forum." Br. of Appellant at 3 (Assignment of Error #7). While Plaintiffs' counsel now claims that the *JagWire* was a non-public forum, that argument was not offered to the trial court during trial, nor did Plaintiffs' counsel object to the court's designating the *JagWire* a limited open forum. To the extent Plaintiffs include this among the trial court's supposed legal errors entitling them to a new trial, this argument is precluded under CR 59(a)(8)'s express requirement that the error complained of be "objected to at the time."

At any rate, regardless of which forum label the court applied to the *JagWire*, in its instructions to the jury the court applied the standard of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988). To the extent this was even relevant to the jury's factual determinations as to the tort claims,<sup>11</sup> this was the most difficult standard for the District. Indeed, it was the very standard Plaintiffs advocated, in that it provides that school officials may restrict newspaper expression where they have legitimate educational concerns. The court's ruling on this point and the instructions foreclosed the very legal argument the District had made to the court and on which Plaintiffs now base this appeal.

The trial court did not commit an error of law in its management of discussion of open forum and did not abuse its discretion in denying Plaintiffs' motion for new trial to correct an error of law.

**2. Defense Counsel Committed No Misconduct in the Discussion of Open Forum But Adhered Strictly to the Trial Court's Rulings.**

Just as their error of law argument fails under CR 59(a)(8), Plaintiffs' claim that the trial court abused its discretion by denying their motion for a new trial for misconduct of counsel under CR 59(a)(2) does not withstand scrutiny.<sup>12</sup> Plaintiffs' argue that, as to open forum, "counsel for the District misrepresented the law and the evidence" and "inflamed

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<sup>11</sup> See *infra* at III.B.4.

<sup>12</sup> Appellants' Br. at 42-53. Note: Plaintiffs erroneously cite CR 59(a)(7).

the passion and prejudice of the jury” by suggesting First Amendment values had been harmed by the lawsuit. Appellants’ Br. at 42, 47.

Perhaps cognizant of the abundant authority for the principle that a party’s failure to object at the time forecloses a post-verdict demand for a new trial on the ground of misconduct of counsel, Plaintiffs argue that a new trial is warranted here even where they failed to object, because defense counsel “introduced evidence prohibited by an order in limine.” Br. of Appellant at 42-43 (citing *Osborn v. Lake Washington Sch. Dist. No 414*, 1 Wn. App. 534, 462, P2d 966 (1969)).

In this argument, Plaintiffs again flatly misstate the record. The District scrupulously observed the trial court’s warning against legal testimony and argumentation to the jury. The best Plaintiffs can do to support their accusation is to scrape together from a 2777-page transcript references defense counsel or District witnesses made to the First Amendment or to District practices. Appellants’ Br. at 13, 36, 43 (citing same excerpts). Placed in their proper contexts, however, these excerpts do not add up to the argument Plaintiffs claim. They hew carefully to the factual/legal line of demarcation laid down by the trial court.

First, the limited allusions to the First Amendment went not to any proffered constitutional defense but to the philosophical underpinnings of open forum practice and the participants’ and other witnesses’

understanding of it.<sup>13</sup> This was not legal argument but necessary factual context as to what was ordinary care in the circumstances of the case for the jury to be able to discharge its function of evaluating the reasonableness of the District's actions for purposes of the negligence claim. The jury was properly instructed as to this function.

When Plaintiffs' counsel in closing argument referred to student Plaintiffs "exercising their civil rights," this did not amount to a legal argument that the District had violated their civil rights in addition to having committed negligence and invasion of privacy. RP 2679. In the same way, extolling the First Amendment philosophy that underlays the District's instructional practices and lamenting their loss<sup>14</sup> had nothing to do with any constitutional argument about what the District was precluded from doing, let alone with anything "deceptive." Appellants' Br. at 45.

Similarly, the mere mention of the Supreme Court's decisions in *Hazelwood* and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), cannot taint an entire trial. Appellants' Br.

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<sup>13</sup> See, e.g., RP 479 (principal's account of open forum practice at *JagWire*); RP 604, 660, 667-68, 671 (student journalists' understanding of open forum practice at *JagWire*); RP 738, 743, 2246 (advisor's account of open forum practice at *JagWire*); RP 818, 848-49 (advisor's account of First Amendment and open forum topics as part of class instruction); RP 1218-25 (questioning expert's disapproval of open forum practice in connection with freedom of expression and journalism ethics); RP 2162-63 (expert discussing seven states in which open forum journalism is mandated by state law); RP 2184-85, 2206 (expert's understanding of open forum practice).

<sup>14</sup> RP 499 (principal's view of connection between free speech values and instructional advantages of open forum); RP 501, 853 (principal's regret about change in District policy in response to lawsuit).

at 37-38. Trial exchanges mentioning these decisions related to disagreements over the philosophy and propriety of open forum journalism, all in connection with the standard of care. At no point did defense counsel or District witnesses ever invoke these decisions in connection with a supposed legal argument to the jury that Plaintiffs now assign as error and that they argue determined the jury's verdict: that these decisions legally precluded the District taking one action or another.<sup>15</sup>

Where District counsel or witnesses may have made references to Mr. Smyth or Mr. Lowney "having no authority" to review or restrict the *JagWire* article, these statements in context unambiguously referred to the District's and high school's open forum policy and practice at the time, and not, as Plaintiffs suggest, to any constitutional barriers.<sup>16</sup>

Plaintiffs even cite as damning evidence the mere references by District witnesses and counsel to "unprotected speech" and "protected speech," terms they claim inappropriately framed the discussion as one of

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<sup>15</sup> See, e.g., RP 1554-60 (questioning Plaintiffs' expert's opinions about propriety of open forum practice and understanding of constitutionality of school district's choice to use open forum practice, but asking no questions relating to constitutional limits on District's editorial discretion in open forum practice); RP 1559-60 (overruling *defense* counsel objection to question whether expert's "understanding of the Constitution require(s) high school teachers to abandon control of their classrooms and cede that control to students"); RP 1567 (defense counsel explaining why expert's opinion that open forum practice is constitutionally protected was relevant to credibility of expert's opinion that open forum practice is objectionable).

<sup>16</sup> See, e.g., RP 265 (opening statement about principal's and advisor's lack of authority leading directly into discussion of "long established rules ... [p]olicy, and the practice, guidelines ..."); RP 428 (discussing District policies); RP 528 (contrasting authority under policy at time of publication of article with authority after change of procedure).

First Amendment jurisprudence. Appellants' Br. at 36-37, 43, 46. But as used by the District counsel and witnesses, the term "unprotected speech," and by extension its opposite, were consistently and clearly that of the Puyallup School District under Board Policy 3220, not that of the United States Supreme Court.<sup>17</sup> Here again, the issue was not a constitutional argument but the District's practices and the applicable standard of care.

None of these examples violated the trial court's dictates or the motion in limine. None of them constitutes misconduct of counsel for purposes on CR 59(a)(2). None of them, alone or collectively, rises to the level of abuse of discretion entitling Plaintiffs to another bite at the apple.

### **3. Nothing About the Trial Proceedings Deprived Plaintiffs of a Fair Trial or Denied Them Substantial Justice.**

Finally, this Court should reject Plaintiffs' argument under CR 59(a)(1)<sup>18</sup> and CR 59(a)(9)<sup>19</sup> that they are entitled to a new trial "because pervasive misinformation, false testimony as to legal conclusions, and

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<sup>17</sup> See, e.g., RP 273-74 (discussing District journalism practices in opening argument); RP 523-29 (questioning of principal about five categories of unprotected speech under Board Policy 3220 and principal's opinion that the 8-5 Issue did not fall under any these categories); RP 803 (question to advisor about "protected expression" in line of questioning about District policies); RP 2732 ("3220. We're not going to talk about unprotected speech"). References to substantial interference with the educational process similarly were to the language of Policy 3220. See, e.g., 273-74.

<sup>18</sup> "(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;..."

<sup>19</sup> "(9) That substantial justice has not been done."

other errors were irregular and denied the student victims substantial justice.” Appellants’ Br. at 53-54.

To support this argument, Plaintiffs again baldly assert that the District argued “that the District’s act of publishing students’ personal histories and details was *compelled by the First Amendment*,” (*Id.* at 36) (emphasis original) and “the jury was repeatedly told, and apparently believed, that the District was *constitutionally prohibited* from doing what the [Plaintiffs] claimed it should have done.” *Id.* at 54 (emphasis original). Here Plaintiffs not only again flagrantly misstate the record, but they even suggest that *only* this supposed improper argument could account for the jury’s skeptical evaluation of their claims. Rather than the far simpler explanation that the jury was swayed by the numerous inconsistencies and implausibilities in Plaintiffs’ version of events (*see supra* at II.C), Plaintiffs’ counsel would have this Court believe that the lay jury must instead have deduced an unstated constitutional theory from references to the First Amendment and explanations of journalistic practices.

Plaintiffs’ reliance on *Storey v. Storey* to support their argument that a new trial is warranted pursuant to CR 59(a)(1) because of cumulative remarks is wildly misplaced. *See* Appellants’ Br. 53-54 (citing 21 Wn. App. 370, 585 P.2d 183 (1978), *review denied*, 91 Wn.2d 1017 (1979)). In *Storey*, witnesses testified regarding to matters completely

irrelevant to the lawsuit that were highly prejudicial to the plaintiff, like the fact that the plaintiff did not write checks in his own name because of over thirteen other lawsuits he was involved in. 21 Wn. App. at 373-374, 585 P.2d 183. The plaintiff in *Storey* not only objected at the time of trial but moved for a mistrial based on the testimony of one witness who stated she believed the note at issue was a hoax because the plaintiff had “pulled a couple other ones.” *Id.* at 374, 585 P.2d 183. The trial court in *Storey* reserved its ruling on the issue of a mistrial and during trial expressed doubt that an instruction to the jury could cure the prejudice of the testimony. *Id.* On appeal, the *Storey* court noted that the trial court had admonished the defendant or ordered her answer to be stricken *at least 27 times* for being unresponsive and that the cumulative effect of so many errors may be grounds to support a motion for a new trial under CR 59(a)(1). *Id.*

Nothing in this case begins to approach the proceedings at issue in *Storey*, and the suggestion that this trial had “even more pervasive” problems is wholly beyond credibility. Not even Plaintiffs, let alone the trial court, here raised or sustained remotely the objections and red flags that one would expect to see in the record of proceedings more pervasively tainted than those in *Storey*. “Unless inadequate to remedy the irregularity or misconduct complained of, the aggrieved party must request

appropriate court action to obviate the prejudice before the case is submitted to the jury.” See *Spratt v. Davidson*, 1 Wn. App. 523, 526, 463 P.2d 179 (1969). “[The aggrieved party] is not permitted to speculate upon the verdict by awaiting the result of the trial and then complain of the irregularity or misconduct in case the verdict is adverse.” *Id.*

As for CR 59(a)(9), the courts hold that “a new trial for lack of substantial justice, CR 59(a)(9), should be rare, given the other broad grounds available under CR 59.” *Lian v. Stalick*, 106 Wn. App. 811, 825, 25 P.3d 467 (2001) (citing *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997)). Plaintiffs fail to show the trial court abused its discretion in denying reconsideration based on CR 59(a)(1) and (9).

#### **4. The Trial Court Did Not Abuse Its Discretion In Instructing the Jury as to the First Amendment.**

Plaintiffs’ assignments of errors as to the jury instructions cannot surmount the appropriately high bar set for granting a new trial. Not only were the instructions legally correct, not only were they not prejudicial to Plaintiffs—they were *favorable* to Plaintiffs.

Jury instructions are initially reviewed de novo “to ensure they correctly state the law, do not mislead the jury, and allow parties to argue their theories of the case.” *Hough v. Stockbridge*, 152 Wn. App. 328, 342, 216 P.3d 1077 (2009). “[O]nce these threshold requirements have been

met, we then review the judge's wording, choice, or the number of instructions for abuse of discretion." *Id.* (quoting *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 491, 205 P.3d 145 (2009)). Even a misleading instruction will not be reversed unless prejudice is shown.<sup>20</sup> An error is prejudicial only if it affects the outcome of the trial.<sup>21</sup>

Plaintiffs assign as errors the trial court's giving of Instruction Number 20,<sup>22</sup> as well as its rejection of Plaintiffs' proposed Instructions 27<sup>23</sup> and 36.<sup>24</sup> The First Amendment instruction given by the court was:

Student journalists possess a First Amendment right to freedom of speech and press. Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored student newspapers so long as their actions are reasonably related to legitimate educational concerns.

CP 606.

The trial court instructed the jury as to the First Amendment at the insistence of Plaintiffs, who argued this was necessary to counteract constitutional arguments they claimed had been made to the jury or mere mention of the First Amendment philosophy behind open forum. RP 2505-06. The constitutional subject of the instruction related only in a limited

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<sup>20</sup> *Keller v. City of Spokane*, 146 Wn. 2d 237, 249-50, 44 P.3d 845 (2002) (citation omitted).

<sup>21</sup> *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 244 P.3d 32 (2010) (citing *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

<sup>22</sup> Appellants' Br. at 3 (Assignment of Error #4).

<sup>23</sup> *Id.* (Assignment of Error #5).

<sup>24</sup> *Id.* (Assignment of Error #6).

manner to the factual matters that were before the jury rather than to the legal determinations already made by the court. Once the court rejected the District's legal argument, the First Amendment was not central to the jury's resolution of the case, as the District argued at the time. RP 2505.

The trial court's rationale in issuing Instruction Number 20 was two-fold. First, by acknowledging that students have some First Amendment rights to freedom of expression in school, the instruction helped guard against jurors inappropriately allowing any personal feelings about the appropriateness of the subject matter of the *JagWire* article from influencing their views of whether it somehow was inherently negligent to grant students the kind of editorial discretion they exercise in many high school journalism programs. RP 2508-09. At the same time, the Plaintiffs insisted that the instruction clearly emphasize that a school district does not offend those student rights where it exercises editorial control over certain kinds of student expression. *Id.* District counsel also cautioned the court against issuing an instruction that would confuse a school district's legal *authority* to restrict newspaper content with a legal *duty* to do so. RP 2433, 2507 ("School districts do not have a duty to exercise the control that *Hazelwood* gives them. It's merely an opportunity.").

On all these counts, Instruction Number 20 correctly states the law. It acknowledges the general proposition under *Tinker* that students have

some freedom of expression in school, a proposition that philosophically undergirds the student editorial discretion exercised at the *JagWire*. At the same time it immediately places this freedom in context by reciting a school district's authority under *Hazelwood*. While this is not what the District had argued to the court was the applicable legal standard in this case, it undeniably is an accurate statement of the law and is in no way misleading. *See Hough*, 152 Wn. App. at 342, 216 P.3d 107 (instructions must be legally accurate and not misleading).

Plaintiffs' counsel was able to argue in closing—and did—about how the jury should apply this instruction. *See id.* (jury instructions must allow party to argue its theory of the case). Plaintiffs' counsel specifically highlighted Instruction Number 20, recited the *Hazelwood* language about editorial control verbatim, and recounted in detail all of Plaintiffs' evidence, witnesses, and arguments against the merest hint that the District did not have complete editorial authority over the *JagWire*. RP 2676-77.

Even if Instruction Number 20 had been erroneous, Plaintiffs cannot plausibly claim to have been prejudiced by it. The instruction was for the very legal standard Plaintiffs had urged on the court: that of a non-public forum. Appellants' Br. at 12. This was consistent with the trial court's rejection of the District's legal argument on summary judgment

and in its CR 50 motion, and it held the District to a higher standard than if the court had used an open forum instruction based upon *Tinker*.<sup>25</sup>

Nonetheless, Plaintiffs argue that the trial court abused its discretion in denying their proposed Instruction Numbers 27 and 36. Both would have reframed the reference to student rights in the negative, to wit:

Students in public schools are not entitled to engage in speech which school authorities have reason to believe will substantially interfere with the work of the school or impinge upon the rights of other students.

CP 542.

Proposed Instruction Number 27 also would have added:

School officials need not tolerate speech that is vulgar or lewd, that invades the privacy of others, that interferes with the rights of other students, or that is otherwise inconsistent with the school's basic educational mission.

CP 522.

In declining these proposals, the trial court did not abuse its discretion. *See Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 210 P.3d 337 (2009) (“[W]here a jury instruction correctly states the law ... decision to give the instruction will not be disturbed absent an abuse of discretion.”); *Burchfiel*, 149 Wn. App. at 491, 205 P.3d 145 (appeals court reviews wording, choice, or number of instructions for abuse of

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<sup>25</sup> *See Anfinson*, 159 Wn. App. 35, 244 P.3d 32 (an error is prejudicial only if it affects outcome of trial); *Lakoduk v. Cruger*, 48 Wn.2d 642, 296 P.2d 690 (1956) *superseded by statute as to unrelated point*, RCW 46.61.035 (error in instruction not prejudicial to party against which verdict rendered does not support order granting party new trial).

discretion). The question is “is not whether the trial judge could have given other instructions ...” but “whether the instructions the court gave were accurate statements of the law and whether [party demanding a new trial] could argue [its] theory of the case with those instructions.” *Hough*, 152 Wn. App. at 342, 216 P.3d 107. The trial court’s decision here was consistent with its overall approach to jury instruction: allowing the parties to “argue your case” without “adding too much to these instructions that are going to make it too complicated or make the jury believe that they've got to find something that really has not been presented as yet.” RP 2470.

The trial court’s refusal to grant Plaintiffs their exact wording was not prejudicial. Importantly, the Plaintiffs do not assign as errors those instructions by the trial court that were, in fact, the instructions most central to Plaintiffs’ claims: those relating to negligence.<sup>26</sup> Under the Plaintiffs’ theory, Instruction Number 20 relates to the negligence claims only in the sense that the District had the authority to censor the *JagWire* and, implicitly, its failure to do so in this case was negligent. RP 2647 (Plaintiffs’ counsel arguing in closing that, “When you have an opportunity to look at the law, it is that simple. This is a very straightforward case.”). Even if the Plaintiffs had been granted exactly the wording they requested in the First Amendment instruction, however, this

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<sup>26</sup> Instruction Number 20 was irrelevant to the invasion of privacy claims.

would not necessarily have changed the outcome of their negligence claims under the key instruction the court issued as to negligence. This is because that negligence instruction, Number 13,<sup>27</sup> correctly avoided the mistake of equating a school district's constitutional *authority* to exercise editorial control over its student newspapers with a legal *duty of care* to exercise this authority in a restrictive manner. RP 2433, 2507.

As detailed above, the District never argued to the jury that it was constitutionally prohibited from restricting the *JagWire*. Even had it done so, in the end the jury instructions reflected Plaintiffs' evaluation of the District's authority. Plaintiffs may have preferred different wording, but they were able to address the jury on the District's authority in detail during their closing argument.<sup>28</sup> The instructions were legally correct, and in issuing them the trial court in no way abused its considerable discretion. The jury is presumed to have followed the instructions, and even where a court finds misconduct, no new trial is granted where the misconduct is cured by the jury instructions.<sup>29</sup>

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<sup>27</sup> In pertinent part: "On the student plaintiffs' negligence claims, each student plaintiff has the burden of proving each of the following propositions: 1. That the Puyallup School District acted, or failed to act, and that in so acting, or failing to act, the District was negligent; ...."

<sup>28</sup> See *New York Life Ins. Co. v. Newport*, 1 Wn.2d 511, 96 P.2d 449 (1939) (refusal to give specific instructions requested on same matters fully and fairly covered in instructions issued is not error justifying new trial).

<sup>29</sup> *A.C.*, 125 Wn. App. at 521, 998 P.2d 856.

**C. Plaintiffs Failed to Object to Discussion of Their Statements of Damages, and the Trial Court Did Not Abuse Its Discretion in Allowing the Discussion.**

Plaintiffs' argument on appeal regarding their Statements of Damages is inaccurate, unsupported, and an attempt after the verdict to claim error when Plaintiffs' counsel failed to object at any point during opening statement, testimony, or closing argument. Plaintiffs cannot "speculate upon the verdict by awaiting the result of the trial and then complain of the irregularity or misconduct in case the verdict is adverse." *Spratt*, 1 Wn. App. at 526, 463 P.2d 179. As with the open forum discussion, Plaintiffs allege misconduct of counsel under CR 59(a)(2) and here claim that the trial court abused its discretion by allowing defense counsel to engage in misconduct as to the Statements of Damages. Like the open forum accusations, these arguments simply are unsupported by the record.

**1. The Trial Court Properly Allowed Discussion of the Statements of Damages.**

As an initial matter, Plaintiffs incorrectly claim that the trial court denied their motion in limine in regard to the Statements of Damages. Appellants' Br. at 51. Plaintiffs never submitted a motion in limine on this subject for the trial court to grant or to deny.

Significantly, despite their review of legislative history as to statements of damages, Plaintiffs do not argue on appeal that the trial court erred in admitting the Statements per se. Appellants' Br. at 3. Rather, they argue that the court abused its discretion by allowing defense counsel to "misuse" the Statements. *Id.* But the trial court did not abuse its discretion by allowing defense counsel to discuss the Statements of Damages during its opening, nor did it abuse its discretion by allowing the Statements to be entered as evidence absent any objection whatsoever from Plaintiffs.

Even if Plaintiffs had argued on appeal that admitting the Statements of Damages was an abuse of discretion, this argument would fail, as the trial court was correct in admitting them. A trial court has broad discretion regarding admissibility of evidence, and its determination will not be reversed absent a manifest abuse of discretion.<sup>30</sup> Here, Plaintiffs fail to show a manifest abuse of discretion by the trial court, and the court's ruling is consistent with RCW 4.28.360 and ER 402, 403, and 408.

Statements of damages are admissions by party opponents and are admissible evidence. *See* ER 801(d)(2); *Evans v. Daniel*, 289 F. 335, 337 (9th Cir. 1923) ("The pleading on which a party goes to trial is the one on which he places his defense or cause of action, and he is bound by its admissions."); McCormick on Evidence § 257 (2009); Tegland 5B Wash.

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<sup>30</sup> *Northington v. Sivo*, 102 Wn. App. 545, 8 P.3d 1067 (2000).

Prac., Evidence, Law and Procedure 434-36. The amounts listed in statements of damages are statements from Plaintiffs and are properly used by defendants in their case in chief as a pleading or can be used to impeach a plaintiff for a prior inconsistent statement in the event a plaintiff's testimony at trial contradicts his or her statement of damages.

There is no reason to suppose that statements of damages are inadmissible. Nowhere does RCW 4.28.360 indicate this. Had the Legislature intended for the amount in statements of damages to be inadmissible at trial, it would have stated so explicitly, as it has in the Notice of Claim statute. RCW 4.96.020(3)(f) ("The amount of damages stated on the claim form is not admissible at trial."). Absent such language, this cannot be assumed. In *McNeal v. Allen*, the Supreme Court addressed RCW 4.28.360 and noted that the parties in that case agreed "that the records of the legislature are silent as to the reasons for the enactment." 95 Wn.2d 265, 268, 621 P.2d 1285 (1980). Although the parties suggested explanations, the *McNeal* court stated, "We do not know which, if any, of these considerations the legislature had in mind." *Id.*<sup>31</sup>

A statement of damages is an admission by a party opponent of the extent of Plaintiff's injuries or the value he or she places upon his or her claim and is admissible evidence. *See* ER 801(d)(2). Here, Plaintiffs

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<sup>31</sup> The court went on to note that whatever the reason the legislature had, it made it applicable to all personal injury actions and not just medical malpractice actions. *Id.*

individually responded to the requests for Statements of Damages via counsel. An attorney's statement about litigation, when offered against the client of the attorney, qualifies as an admission by a party opponent.<sup>32</sup> There is no reason to believe Plaintiffs had any expectation that the Statements of Damages would not be discussed before the jury. To the contrary, given that they used their own witnesses to explain to the jury what the language meant and failed to object at all, there is every reason to believe they thought the information would help them more than it would hurt them, by signaling the range of potential damages. Plaintiffs want to be able to have it both ways, depending on how their strategy plays out. They are not entitled to a whole new trial because it didn't work.

The trial court correctly found that the responses to the Statements of Damages were relevant, were admissions by Plaintiffs akin to answers to interrogatories, and were admissible. The court did not abuse its discretion by permitting defense counsel to discuss them during opening and subsequently admitting them into evidence, without objection.

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<sup>32</sup> See *State v. Acosta*, 34 Wn. App. 387, 392, 661 P.2d 602 (1983) *reversed on other grounds* 101 Wash.2d. 612, 683 P.2d 1069 (1984); *State v. Dault*, 19 Wn. App. 709, 715-18, 578 P.2d 43 (1978); *Seattle v. Richard Bockman Land Corp.*, 8 Wn. App. 214, 216, 505 P.2d 168 (1973) (quoting *Brown v. Hebb*, 167 Md. 535, 175 A. 602 (1934)), review denied, 82 Wn.2d 1003 (1973).

## **2. Defense Counsel Committed No Misconduct in the Discussion of the Statement of Damages.**

Framing the trial court's supposed abuse of discretion not as a question of admissibility but as a failure to prevent "misuse" of the Statements of Damages by defense counsel is no more persuasive. Plaintiffs' attack on defense counsel's advocacy is not grounds for a new trial where Plaintiffs failed to object to any alleged misconduct during the trial and instead "speculate[d] upon the verdict." *Spratt*, 1 Wn. App. at 526, 463 P.2d 179. They are estopped from making this argument on appeal. If Plaintiffs' counsel felt that defense counsel was "misusing" the responses, they had ample opportunity to cure any prejudice by objecting at the time. Instead, Plaintiffs' counsel questioned Plaintiffs about the Statements and took advantage of the opportunity to address the Statements during closing, and had ample opportunity to cure any alleged misrepresentations. Plaintiffs' failure to object at any point during testimony or when the statements were offered into evidence precludes their argument now.

Plaintiffs' citation of *Day v. Goodwin* in support of their assertion that defense counsel committed misconduct is inapt. Appellants' Br. at 48-49 (citing 3 Wn. App. 940, 943, 478 P.2d 774 (1970)). *Day* does not stand for the proposition for which Plaintiffs invoke it. The *Day* court did not

hold that the “Easy Street” argument was misconduct; rather, the reason for granting a new trial concerned unrelated statements made by witnesses. *Id.* at 943-44. The court stated: “Although counsel is given wide latitude in arguing the evidence to the jury, he must stay within reasonable bounds of legitimate argument. We do not approve of the arguments made and agree with the observation of the Supreme Court in *Pederson v. Dumouchel*, 72 Wn.2d 73, 84, 431 P.2d 973 (1967) that ‘A case should be argued upon the facts without an appeal to prejudice.’ ” *Id.* But the court did not grant a new trial based on this basis.

If Plaintiffs suggest that the misconduct inhered in the mere suggestion that they really were seeking the amounts indicated in their Statements of Damages, then this makes for a strange brand of “misconduct.” Appellants’ Br. at 50-51. RCW 4.28.360 requires a plaintiff to provide to a requesting defendant not “a legal analysis based on case comparisons” (Appellants’ Br. at 50) but, straightforwardly, “the amounts of any special damages and general damages sought.” Plaintiffs now argue that their Statements of Damages *nowhere* declared what RCW 4.28.360 unambiguously provides they are to declare. Appellants’ Br. at 5-51 (emphasis original).

Plaintiffs’ argument regarding financial resources is also out of place. Appellants’ Br. at 48-49. At the start of trial, the trial court properly

granted a motion in limine brought by both parties to exclude testimony on their financial resources. Plaintiffs drew no connection between this motion and the Statements of Damages, and the issues are distinct. Again, Plaintiffs brought no motion in limine on the Statements, as they now claim. The issue was first addressed just prior to the District's opening.

Plaintiffs' failure to timely object is not excused here, because Plaintiffs do not make a persuasive case that any alleged misconduct was "flagrant." In regard to admissibility of evidence, "absent an objection to counsel's remarks, the issue of misconduct cannot be raised for the first time in a motion for a new trial unless the misconduct is so flagrant that no instruction could have cured the prejudicial effect." *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 94, 231 P.3d 1211 (quoting *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 171, 15 P.3d 664 (2001)). Plaintiffs claim that defense counsel "committed misconduct by abusive misuse of the student victims' statements," but do not address why they did not object at any point to such alleged abusive misuse. Neither do they explain how the alleged misconduct was "so flagrant that no instruction could have cured the prejudicial effect." *See id.* As in *Collins*, Plaintiffs "first raised the issue in their post-trial motions, after the jury had rendered its verdict for [the Defendant]." *Id.* at 95, 231 P.3d 1211; *see also* RAP 2.5(a). Even assuming any incidents of misconduct

had occurred here, “they were not so prejudicial that a timely instruction could not have cured any prejudicial effect.” *Id.*

The trial court did not abuse its discretion by denying Plaintiffs’ motion for a new trial for alleged misconduct of counsel related to the Statements of Damages. While the Statements were highly relevant to the issue of Plaintiffs’ credibility in light of the evidence contradicting their claims, that evidence was powerfully compelling even without the Statements. There is nothing here to suggest that the jury’s verdict was based on appeals to sympathy, passion, or prejudice.

#### **IV. Conclusion**

Plaintiffs received a fair trial. Fairness does not guarantee any one party’s success. Plaintiffs’ case had serious weaknesses, and these were not lost on the jury. Plaintiffs speculated on the verdict in their trial decisions and now grasp at a way to resurrect a loss by suggesting that this carefully managed trial was practically a circus. The record of the trial bears careful scrutiny by this Court with reference to assertions now being made by Plaintiffs versus what actually was or was not argued before the jury and what Plaintiffs did or did not assert at the time. Plaintiffs’ allegations and assignments of error are unsupported either in fact or in law. The trial court properly allowed defense counsel to discuss the Statements of Damages and proceeded in an abundance of caution

throughout the trial as to testimony on legal issues and the issue of open forum—issuing rulings that on balance were highly favorable to Plaintiffs. Defense counsel carefully conformed to the trial court’s guidance. The trial court did not abuse its discretion in denying Plaintiffs’ motion for a new trial. The District respectfully urges this Court to affirm.

DATED this 27<sup>th</sup> day of May, 2011.

PATTERSON BUCHANAN  
FOBES LEITCH & KALZER, INC., P.S.

By   
Michael A. Patterson, WSBA 7976  
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SCHOOL DISTRICT

DECLARATION OF MAILING

The undersigned declares that on the date indicated below, I caused true and accurate copies of the following documents to be emailed and deposited in the U.S. Mail: Brief of Respondent in Court of Appeals Cause No. 40737-0-II to the following:

Philip Talmadge  
Sidney C. Tribe  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630

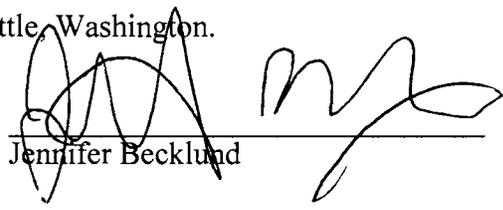
John R. Connelly, Jr.  
Nathan P. Roberts  
Connelly Law Offices  
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Tacoma, WA 98403

Original filed with:  
Court of Appeals, Division  
Clerk's Office  
950 Broadway, Suite 300  
Tacoma, WA 98402

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COURT OF APPEALS  
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TACOMA, WA 98402

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

Dated: May 27, 2011, at Seattle, Washington.

  
\_\_\_\_\_  
Jennifer Becklund

## APPENDIX

## FREEDOM OF EXPRESSION

The free expression of student opinion is an important part of education in a democratic society. Students' oral and written expression of their own private opinions on school premises is to be encouraged so long as it does not substantially disrupt the educational process or interfere with the right of others in the unique circumstances of the educational environment. Such speech activity by students is solely their own expression of views and the District does not intend to promote, endorse, or sponsor any expressive activity that may occur. However, distribution of written material, oral expression, or any other expressive activity (including the wearing of symbols, clothing, hairstyle, or other personal effects) may be restricted where a substantial disruption of the educational process is likely to result, or does result from such activity. Students are expressly prohibited from the use of vulgar, lewd and/or offensive terms in classroom, assembly, or other school settings. Substantial disruption includes:

- A. Inability to conduct classes or school activities, or inability to move students to/from class or other activities.
- B. A breakdown of student order, including riots or destruction of property.
- C. Widespread shouting or boisterous conduct.
- D. Substantial student participation in a school boycott, sit-in, walk-out, or similar activities.
- B. Physical violence, fighting or significant harassment among students.
- F. Intimidation, harassment, or other verbal conduct (including swearing, disrespectful insulting speech to students, teachers or administrators), creating a hostile educational environment.
- G. Defamation or untrue statements.
- H. Statements that attack ethnic, religious, gender or racial groups or that tend to provoke a physical response (including gang or hate group symbols or apparel, insults, or other fighting words that could reasonably be anticipated to provoke a physical or otherwise disruptive response).
- I. Speech likely to result in disobedience of school rules or health and safety standards (such as apparel, advertising alcohol, drugs, tobacco, etc.).

The Superintendent shall develop guidelines assuring that students are able to enjoy free expression of opinion while maintaining orderly conduct of the school.

### A. Student Publications

Student publications produced as part of the school's curriculum or with the support of the associated student body fund are intended to serve both as vehicles for instruction and student communication. They are operated and substantively financed by the district. Material appearing in such publications should reflect all areas of student interest, including topics about which there may be controversy and dissent. Controversial issues may be presented provided that they are treated in depth and represent a variety of viewpoints. Such materials may not: be libelous, obscene or profane; cause a substantial disruption of the school, invade the privacy of others; demean any race, religion, sex, or ethnic group; or, advocate the violation of the law or advertise tobacco products, liquor, illicit drugs, or drug paraphernalia.

Freedom of Expression

Policy No. 3220  
Students

The Superintendent shall develop guidelines to implement these standards and shall establish procedures for the prompt review of any materials which appear not to comply with the standards.

B. Distribution of Materials

Except as otherwise prohibited in this policy, publications or other material written by students may be distributed on school premises in accordance with regulations developed by the Superintendent. Such regulations may impose limits on the time, place, and manner of distribution including prior authorization for the distribution or circulation of substantial quantities of printed material or the posting of such material on school property. Students responsible for the distribution of material which leads to a substantial disruption of school activity or otherwise interferes with school operations shall be subject to corrective action or punishment, including suspension or expulsion, consistent with student discipline policies.

Materials shall not be distributed on school grounds by non-students and non-employees of the District.

Cross Reference

Board Policy 2340 Religious-Related Activities and Practices

Legal Reference

WAC 180-40-215 Student Rights

Adopted 04-26-99

Revised 04-12-04

THE HONORABLE SUSAN K. SERKO

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

M.R.B., individually; *et al.*

Plaintiffs,

v.

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

Defendant.

No. 09-2-04459-2

**PLAINTIFF M.R.B.'S RESPONSE TO  
DEFENDANT PSD'S REQUEST FOR  
STATEMENT OF DAMAGES**

Plaintiff, by and through her attorneys of record, hereby submits her response to  
Defendant Puyallup School District's Request for Statement of Damages:

**A. SPECIAL DAMAGES**

These figures have not been calculated with specificity at this time and are still in the  
process of being determined. Supplementation will occur through expert testimony and  
during the course of discovery.

**B. GENERAL DAMAGES**

General damages fall within the exclusive province of the jury. This is a case in which  
the sexual histories of young girls and boys were broadcast to the entire high school student  
body and surrounding community. This resulted in extreme humiliation, harassment,

PLTF M.R.B.'S RESPONSE TO DEF PSD'S  
REQUEST FOR STATEMENT OF DAMAGES 1 of 2

**COPY**

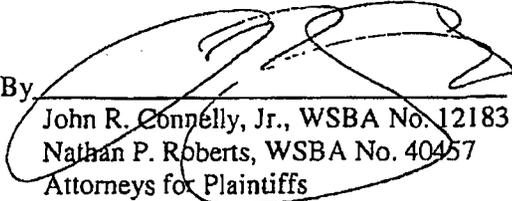
**CONNELLY LAW OFFICES**

2301 North 30<sup>th</sup> Street  
Tacoma, WA 98403  
(253) 593-5100 Phone - (253) 593-0380 Fax

embarrassment, and ridicule to the plaintiffs. Juries in similar cases involving public ridicule, embarrassment, and invasion of privacy have awarded general damages in the \$2 million to \$4 million range. An award within this range would be appropriate in this case. See, e.g., *Corey v. Pierce County*, King Co. Sup. Ct. No. 06-2-14647-6, 2008 WL 5100876; *Hussein v. Universal Development Management, Inc.*, U.S. District Court, W.D. PA, No. 2:01-cv-02381, 2005 WL 3334686; *Stewart v. The Oklahoma Publishing Company*, 2003 WL 22410402.

DATED this 14<sup>th</sup> day of August, 2009.

CONNELLY LAW OFFICES

By   
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Attorneys for Plaintiffs

THE HONORABLE SUSAN K. SERKO

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

M.R.B., individually; *et al.*

Plaintiffs,

v.

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

Defendant.

No. 09-2-04459-2

**PLAINTIFF W.R.H.'S RESPONSE TO  
DEFENDANT PSD'S REQUEST FOR  
STATEMENT OF DAMAGES**

Plaintiff, by and through her attorneys of record, hereby submits her response to  
Defendant Puyallup School District's Request for Statement of Damages:

**A. SPECIAL DAMAGES**

These figures have not been calculated with specificity at this time and are still in the  
process of being determined. Supplementation will occur through expert testimony and  
during the course of discovery.

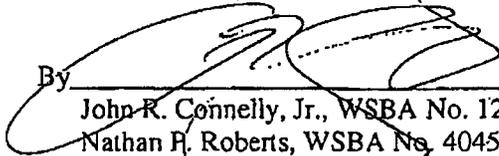
**B. GENERAL DAMAGES**

General damages fall within the exclusive province of the jury. This is a case in which  
the sexual histories of young girls and boys were broadcast to the entire high school student  
body and surrounding community. This resulted in extreme humiliation, harassment,

1 embarrassment, and ridicule to the plaintiffs. Juries in similar cases involving public ridicule,  
2 embarrassment, and invasion of privacy have awarded general damages in the \$2 million to  
3 \$4 million range. An award within this range would be appropriate in this case. *See, e.g.,*  
4 *Corey v. Pierce County*, King Co. Sup. Ct. No. 06-2-14647-6, 2008 WL 5100876; *Hussein v.*  
5 *Universal Development Management, Inc.*, U.S. District Court, W.D. PA, No. 2:01-cv-02381,  
6 2005 WL 3334686; *Stewart v. The Oklahoma Publishing Company*, 2003 WL 22410402.

7 DATED this 14<sup>th</sup> day of August, 2009.

8 CONNELLY LAW OFFICES

9  
10 By   
11 John R. Connelly, Jr., WSBA No. 12183  
12 Nathan R. Roberts, WSBA No. 40457  
13 Attorneys for Plaintiffs

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THE HONORABLE SUSAN K. SERKO

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

M.R.B., individually; *et al.*

Plaintiffs,

v.

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

Defendant.

No. 09-2-04459-2

**PLAINTIFF M.L.F.'S RESPONSE TO  
DEFENDANT PSD'S REQUEST FOR  
STATEMENT OF DAMAGES**

Plaintiff, by and through her attorneys of record, hereby submits her response to  
Defendant Puyallup School District's Request for Statement of Damages:

**A. SPECIAL DAMAGES**

These figures have not been calculated with specificity at this time and are still in the  
process of being determined. Supplementation will occur through expert testimony and  
during the course of discovery.

**B. GENERAL DAMAGES**

General damages fall within the exclusive province of the jury. This is a case in which  
the sexual histories of young girls and boys were broadcast to the entire high school student  
body and surrounding community. This resulted in extreme humiliation, harassment,

PLTF M.L.F.'S RESPONSE TO DEF PSD'S  
REQUEST FOR STATEMENT OF DAMAGES 1-152

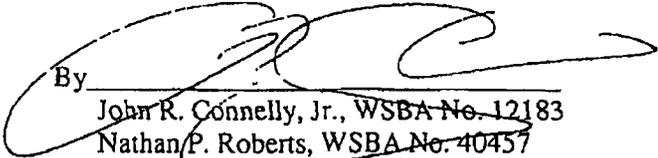
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**CONNELLY LAW OFFICES**  
2301 North 30<sup>th</sup> Street  
Tacoma, WA 98403  
(253) 593-5100 Phone - (253) 593-0380 Fax

1 embarrassment, and ridicule to the plaintiffs. Juries in similar cases involving public ridicule,  
2 embarrassment, and invasion of privacy have awarded general damages in the \$2 million to  
3 \$4 million range. An award within this range would be appropriate in this case. See, e.g.,  
4 *Corey v. Pierce County*, King Co. Sup. Ct. No. 06-2-14647-6, 2008 WL 5100876; *Hussein v.*  
5 *Universal Development Management, Inc.*, U.S. District Court, W.D. PA, No. 2:01-cv-02381,  
6 2005 WL 3334686; *Stewart v. The Oklahoma Publishing Company*, 2003 WL 22410402.

7 DATED this 14 day of August, 2009.

8 CONNELLY LAW OFFICES

9  
10 By 

John R. Connelly, Jr., WSBA No. 12183

Nathan P. Roberts, WSBA No. 40457

11 Attorneys for Plaintiffs  
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THE HONORABLE SUSAN K. SERKO

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

M.R.B., individually; *et al.*  
  
Plaintiffs,  
  
v.  
  
PUYALLUP SCHOOL DISTRICT, a political  
subdivision of the State of Washington,  
  
Defendant.

No. 09-2-04459-2  
  
**PLAINTIFF K.B.W.'S RESPONSE TO  
DEFENDANT PSD'S REQUEST FOR  
STATEMENT OF DAMAGES**

Plaintiff, by and through his attorneys of record, hereby submits his response to  
Defendant Puyallup School District's Request for Statement of Damages:

**A. SPECIAL DAMAGES**

These figures have not been calculated with specificity at this time and are still in the  
process of being determined. Supplementation will occur through expert testimony and  
during the course of discovery.

**B. GENERAL DAMAGES**

General damages fall within the exclusive province of the jury. This is a case in which  
the sexual histories of young girls and boys were broadcast to the entire high school student  
body and surrounding community. This resulted in extreme humiliation, harassment,

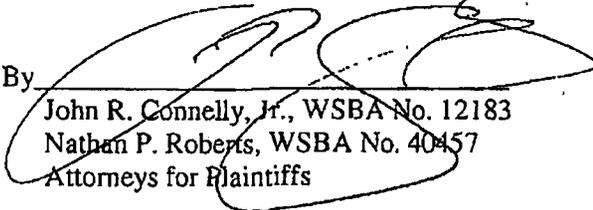


1 embarrassment, and ridicule to the plaintiffs. Juries in similar cases involving public ridicule,  
2 embarrassment, and invasion of privacy have awarded general damages in the \$2 million to  
3 \$4 million range. An award within this range would be appropriate in this case. See, e.g.,  
4 *Corey v. Pierce County*, King Co. Sup. Ct. No. 06-2-14647-6, 2008 WL 5100876; *Hussein v.*  
5 *Universal Development Management, Inc.*, U.S. District Court, W.D. PA, No. 2:01-cv-02381,  
6 2005 WL 3334686; *Stewart v. The Oklahoma Publishing Company*, 2003 WL 22410402.

7 DATED this 19<sup>th</sup> day of August, 2009.

8 CONNELLY LAW OFFICES

9  
10 By

  
John R. Connelly, Jr., WSBA No. 12183  
Nathan P. Roberts, WSBA No. 40457  
Attorneys for Plaintiffs

THE HONORABLE SUSAN K. SERKO

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

M.R.B., individually; *et al.*

Plaintiffs,

v.

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

Defendant.

No. 09-2-04459-2

**PLAINTIFF RICHARD HIGGINS  
RESPONSE TO DEFENDANT PSD'S  
REQUEST FOR STATEMENT OF  
DAMAGES**

Plaintiff, by and through his attorneys of record, hereby submits his response to  
Defendant Puyallup School District's Request for Statement of Damages:

**A. SPECIAL DAMAGES**

These figures have not been calculated with specificity at this time and are still in the  
process of being determined. Supplementation will occur through expert testimony and  
during the course of discovery.

**B. GENERAL DAMAGES**

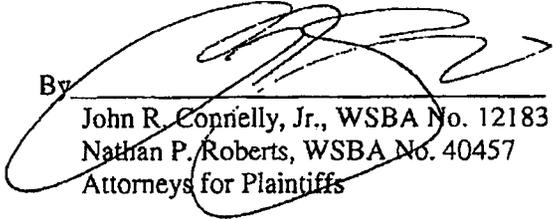
General damages fall within the exclusive province of the jury. This is a case in which  
the sexual histories of young girls and boys were broadcast to the entire high school student  
body and surrounding community. This resulted in extreme humiliation, harassment,

embarrassment, and ridicule to the plaintiffs. Juries in similar cases involving public ridicule, embarrassment, and invasion of privacy have awarded general damages in the \$2 million to \$4 million range. An award within this range would be appropriate in this case. See, e.g., *Corey v. Pierce County*, King Co. Sup. Ct. No. 06-2-14647-6, 2008 WL 5100876; *Hussein v. Universal Development Management, Inc.*, U.S. District Court, W.D. PA, No. 2:01-cv-02381, 2005 WL 3334686; *Stewart v. The Oklahoma Publishing Company*, 2003 WL 22410402.

DATED this 14<sup>th</sup> day of August, 2009.

CONNELLY LAW OFFICES

By

  
John R. Connelly, Jr., WSBA No. 12183  
Nathan P. Roberts, WSBA No. 40457  
Attorneys for Plaintiffs

THE HONORABLE SUSAN K. SERKO

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

M.R.B., individually; *et al.*

Plaintiffs,

v.

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

Defendant.

No. 09-2-04459-2

**PLAINTIFF KAREN HIGGINS  
RESPONSE TO DEFENDANT PSD'S  
REQUEST FOR STATEMENT OF  
DAMAGES**

Plaintiff, by and through her attorneys of record, hereby submits her response to  
Defendant Puyallup School District's Request for Statement of Damages:

**A. SPECIAL DAMAGES**

These figures have not been calculated with specificity at this time and are still in the  
process of being determined. Supplementation will occur through expert testimony and  
during the course of discovery.

**B. GENERAL DAMAGES**

General damages fall within the exclusive province of the jury. This is a case in which  
the sexual histories of young girls and boys were broadcast to the entire high school student  
body and surrounding community. This resulted in extreme humiliation, harassment,

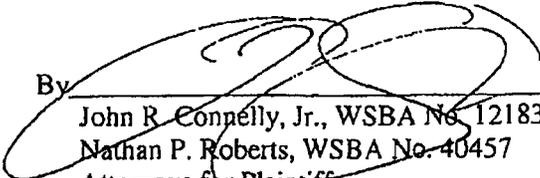
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1 embarrassment, and ridicule to the plaintiffs. Juries in similar cases involving public ridicule,  
2 embarrassment, and invasion of privacy have awarded general damages in the \$2 million to  
3 \$4 million range. An award within this range would be appropriate in this case. See, e.g.,  
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6 2005 WL 3334686; *Stewart v. The Oklahoma Publishing Company*, 2003 WL 22410402.

7 DATED this 14<sup>th</sup> day of August, 2009.

8 CONNELLY LAW OFFICES

9  
10 By

  
11 John R. Connelly, Jr., WSBA No. 12183  
Nathan P. Roberts, WSBA No. 40457  
12 Attorneys for Plaintiffs

THE HONORABLE SUSAN K. SERKO

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

M.R.B., individually; *et al.*

Plaintiffs,

v.

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

Defendant.

No. 09-2-04459-2

**PLAINTIFF CHARLES FREEDLE'S  
RESPONSE TO DEFENDANT PSD'S  
REQUEST FOR STATEMENT OF  
DAMAGES**

Plaintiff, by and through his attorneys of record, hereby submit his response to Defendant Puyallup School District's Request for Statement of Damages:

**A. SPECIAL DAMAGES**

These figures have not been calculated with specificity at this time and are still in the process of being determined. Supplementation will occur through expert testimony and during the course of discovery.

**B. GENERAL DAMAGES**

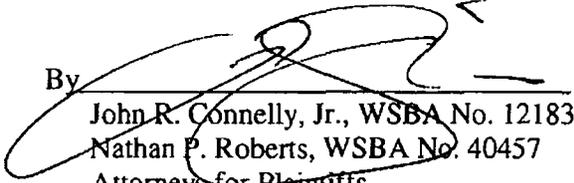
General damages fall within the exclusive province of the jury. This is a case in which the sexual histories of young girls and boys were broadcast to the entire high school student body and surrounding community. This resulted in extreme humiliation, harassment,

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1 embarrassment, and ridicule to the plaintiffs. Juries in similar cases involving public ridicule,  
2 embarrassment, and invasion of privacy have awarded general damages in the \$2 million to  
3 \$4 million range. An award within this range would be appropriate in this case. See, e.g.,  
4 *Corey v. Pierce County*, King Co. Sup. Ct. No. 06-2-14647-6, 2008 WL 5100876; *Hussein v.*  
5 *Universal Development Management, Inc.*, U.S. District Court, W.D. PA, No. 2:01-cv-02381,  
6 2005 WL 3334686; *Stewart v. The Oklahoma Publishing Company*, 2003 WL 22410402.

7 DATED this 14 day of August, 2009.

8 CONNELLY LAW OFFICES

9  
10 By   
11 John R. Connelly, Jr., WSBA No. 12183  
Nathan P. Roberts, WSBA No. 40457  
Attorneys for Plaintiffs