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No. 52609-3

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

T.W.,

Respondent,

v.

BOYS AND GIRLS CLUBS OF SOUTH PUGET SOUND,
a Washington corporation,

Appellant.

BRIEF OF APPELLANT

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
Attorney for Appellant

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INTRODUCTION

For eighteen months prior to trial, Todd Wagner unequivocally swore that in 1984 (when he was 13 years old) Charles Urlacher (an alleged volunteer at the Tacoma Boys and Girls Club called Gonyea) and Gene Anderson (Assistant Manager at Gonyea) sexually assaulted him at Gonyea. On the first day of trial, for the first time, Wagner changed his story, swearing instead that a Joe Taylor was the second man. Wagner based this change on a letter Anderson wrote in October 1984, terminating Taylor's college student practicum at Gonyea based on unrelated allegations of sexual misconduct. Wagner never identified Taylor. He has not been found.

The trial court made numerous errors that led to a \$1.53 million verdict. Its duty instruction essentially imposed a directed verdict – or strict liability – on the Boys and Girls Clubs of South Puget Sound, while failing to instruct the jury that it could not be vicariously liable for its alleged volunteers' alleged criminal assault. Another instruction added words to the special statute of limitations, RCW 4.16.340. The court also excluded a key expert witness on memory: Wagner's alleged memories were the key issue in the case.

And the jury rendered a quotient verdict. But the trial court denied the Club's motion for new trial. This Court should reverse.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying the new trial motion based on the jury's misconduct in rendering a quotient verdict.
2. The trial court erred in instructing the jury (under Court's Inst. 15, App. C, CP 1202) and in failing to instruct them (under Proposed Inst. D15-D18, D23, D25, D26, Apps. A & B) regarding duty.
3. The trial court erred in instructing the jury in Court's Inst. 11 (App. C, CP 1198) on the special statute of limitations (RCW 4.16.340).
4. The trial court erred in excluding expert testimony.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the jury agreed to add their verdicts, divide by 12, and abide the result, and therefore refused to alter the resulting calculation, did the trial court err in denying a new trial under CR 59(a)(2)?
2. Does an employer owe a duty to protect a third party from its volunteers' criminal acts, where it neither knew nor should have known about their dangerous propensities? If not, did the trial err in failing to so instruct the jury?
3. Did the trial court err in adding language to RCW 4.16.340?
4. Where the reliability of the plaintiff's memory was the central issue in the case, did the trial court err in excluding the expert testimony of Dr. Elizabeth Loftus, a highly qualified expert in memory?

STATEMENT OF CASE

A. The parties.

Plaintiff Todd Wagner (b. 1971) has lived in Tacoma his entire life. RP 396-97. He began attending a Tacoma Boys and Girls Club in the fall of 1984, at roughly age 13. RP 400, 544. The Boys and Girls Clubs are currently a national network of IRS § 501(c)(3) organizations. RP 777. Their mission is to “inspire and enable all young people and especially those who need us most to reach their full potential” as “productive, caring, and responsible adults.” RP 799.

Wagner attended one of four separate clubs in the Pierce County area, the Northwest Tacoma Club (a/k/a “Gonyea”), an independent 501(c)(3) charitable organization in 1984. RP 781, 784, 800-01, 804. It had its own board, and a long-time director, Craig Lowery. RP 804. Gene Anderson was assistant program director. *Id.* There were also front-line staff, volunteers, and interns. *Id.*

In 1996, the four Pierce County Clubs joined into one organization, Boys and Girls Clubs of Tacoma Pierce County. RP 801. In 2003, another merger occurred with the Olympic Peninsula clubs, creating the Boys and Girls Clubs of South Puget Sound (“Boys and Girls Club” or “Club”). *Id.* This Club was the defendant in this case and is the appellant here.

B. Wagner alleged that Charles Urlacher, whom Wagner claimed was a volunteer at Gonyea, sexually assaulted Wagner in Urlacher's home, but Wagner told no one and returned to Gonyea, continuing to work with Urlacher.

Beginning in the fall of 1984, Wagner attended Gonyea every other week through the end of the school year, participating in photography and woodworking. RP 401, 542, 544. He claimed that Charles Urlacher, whom he knew as "Chuck," volunteered as an instructor in the wood shop.¹ RP 402. Wagner initially enjoyed working with Urlacher. RP 403.

But Wagner alleged that Urlacher invited him to his home to look at Playboy magazines. RP 403-04. Wagner's mother approved the visit. RP 404. They looked at the magazines in Urlacher's basement and Wagner became sexually aroused. *Id.* In his August 2017 deposition, Wagner said that he then pulled out his penis and began touching himself at Urlacher's urging and that Urlacher fondled him. RP 477-78. But at trial, Wagner instead said that they first went up to Urlacher's bedroom, laid on his bed, and then, while Urlacher's wife watched, Wagner took out his penis at Urlacher's urging and began masturbating. RP 405. Urlacher then placed his

¹ Gonyea Assistant Manager Anderson testified that he has no memory of Urlacher ever volunteering at Gonyea. RP 1038.

mouth on Wagner's penis. *Id.* Wagner told him to stop. *Id.* Wagner insisted that Urlacher take him home. RP 406. Wagner alleged that this was his first sexual experience. *Id.*

Back at Wagner's home, Urlacher came inside and spoke to Wagner's mother, telling her how polite and talented Wagner was. *Id.* This "creeped out" Wagner. *Id.* But Wagner did not tell his mother what had happened. RP 407.

After the alleged abuse at Urlacher's home, Wagner went back to Gonyea. RP 417. He claimed that he did not want to go back, but his mother "pretty much, you know, forced me – didn't force me but didn't leave me any way out on that deal." RP 421-22. He did not tell his mother why he did not want to go back because he was "ashamed." RP 422. He never mentioned these incidents, or anything about Urlacher, to his sister. RP 545-46.

C. Wagner alleged that Urlacher and a second man – a "manager" at Gonyea – threatened him and then sexually assaulted him at Gonyea.

Wagner alleged that after his return to Gonyea, Urlacher and a second man – whom Wagner perceived to be a "manager" at Gonyea – threatened to tell "everybody" that Wagner was "gay." RP 423. He perceived this as belittling and intimidating behavior. *Id.* It was "absolutely a threat." RP 424.

It also “implied” that this “manager” knew “what Chuck did to me.” RP 424. This “scared” Wagner because the second man was a “person of authority” who “automatically had my respect.” RP 425-26. The two men then allegedly lured Wagner into another room – a photography darkroom – with promises of looking at more Playboys. RP 426.² They again induced him to masturbate. *Id.* Urlacher again performed “oral sex” on Wagner. *Id.*

Wagner then heard “a click on the door that’s the lock on the click.” RP 426-27.³ The other man then allegedly raped him, causing him to bleed. RP 427. They ordered him to give them his underwear, and clean himself with paper towels, and not to “let anybody find” them. *Id.* They belittled him because he did not ejaculate. RP 428. They let him leave; he ran out to his mother’s Camaro, crying, but did not talk to her all the way home. RP 427.

After this incident, Wagner did not return to Gonyea. RP 428. The “holidays had come upon us,” and “classes [were] canceled because of the holidays,” so he was “just able to transition out of that.” RP 428, 944.

² Gonyea had a policy of keeping all doors locked, and only paid employees, not volunteers, had keys. RP 998.

³ The darkroom had no lock on it. RP 998-99.

D. Wagner alleged that he “buried” his memories of these events for the next 30 years, but discovered a story about Urlacher in 2015.

Wagner alleged that he “buried” his memories of these events between 1984 and 2015 (RP 429):

. . . I don’t know if you call it repression. I don’t know if you call it amnesia. I don’t know what the hell it is. All I know is, I buried this shit and I didn’t think about it. Period.

He did think about it for a few months in 1984. *Id.* He questioned his sexuality. RP 430. He later became a “work alcoholic.” *Id.* He buried himself in his work, and still does. *Id.* He denied having any PTSD-type symptoms during this 30-year period. RP 959.

At trial, Wagner claimed that he brought up his alleged abuse in a single family-counseling session in July 2015. RP 407, 429, 449.⁴ On cross examination, Wagner claimed that the first time since 1984 that he “had any memory of these” alleged events was July 2015. RP 453. He also agreed that he “had absolutely no recollection of these events from about three months after the alleged events until sometime in July of 2015.” RP 452-53 (answer: “Correct”). Yet in his August 2017 deposition, he had sworn that although he saw the family counselor three times (once by himself, once with his ex-wife,

⁴ The counselor, Rebecca Schiltz, clarified that they addressed his allegations, “Very vaguely in the one session.” RP 772-74.

and once with his daughter) in July through August 2015, he never mentioned his sexual abuse to that counselor. RP 450-52; RP 775.

And in August 2018, Wagner filed a declaration under oath, stating that he “did not begin to recognize or connect the impact of sexual abuse on any physical or mental symptoms or injuries until after July 2015’s counseling session with Rebecca Schiltz, LMFT.” RP 454 (emphasis added). And in his August 2017 deposition, he said he began to piece things together *after* the July 2015 counseling session. RP 455. He said all this despite his having seen various doctors from his mid-20s up until 2015 in relation to various sexual dysfunction issues he suffered for his entire adult life. RP 953-55.

In any event, Wagner claimed that he Googled sex offenders named “Chuck” in July 2015, finding one or more newspaper stories about Urlacher and his wife molesting children. RP 395-96, 409, 455. He also searched sex-offender registries. RP 456. He found a picture of Urlacher. RP 409, 456. He claimed that he immediately identified Urlacher as his alleged attacker. RP 457.

E. Wagner unequivocally identified Gene Anderson as the second man who allegedly assaulted him at Gonyea, and so maintained for a year-and-a-half, right up to the first day of trial.

Wagner claimed to remember “faces” of volunteers and staff at Gonyea, but no names. RP 417. During his deposition, he claimed that a manager, or “person of authority,” had a name that began with a “G” or a “J”. RP 418. He also testified that the perpetrator was approximately 5’ 9”, and had an 80s-style mustache, a stocky build, and a straight, dark, full head of hair. RP 437.

In April 2018, Wagner swore in a declaration that the alleged manager who assaulted him was Gene Anderson. RP 437; *see also* RP 418-19. He further swore that he believed this because he was “shown several photographs of Gene Anderson from his Facebook page including one photograph that appears to be from the 1908’s [sic] or 1990’s.” RP 438. He further swore that he was certain about Anderson: “Upon seeing these photographs, it was completely confirmed he [Anderson] was the Gonyea club manager that [sic] sexually abused me in the fall of 1984.” RP 438 (emphases added); Ex 81. Wagner reconfirmed this allegation in court pleadings as late as July 31, 2018. CP 680-700; *but see* RP 419-20 (saying at trial, for the first time, that the photos were “grainy”).

To the contrary, Wagner claimed at trial that he swore to this only because “that’s the name that the Boys Club offered.” RP 419. At that point, Wagner had unequivocally identified Anderson as the alleged second man for about a year and a half. RP 419.

F. Anderson did not abuse Wagner.

But Anderson did not abuse Wagner. RP 479, 973. At the time of trial, Anderson was 62, had lived in Tacoma for 60 years, had been married for 39 years, and had a son who was about to graduate from Seminary. RP 973-74. Anderson was then employed by the Metro Parks Tacoma Point Defiance Marina, active in his church, a 37-year Kiwanis member, and a volunteer for Tacoma Rescue Mission’s Transitional Homeless Housing Friday-night feeds. RP 973-74.

It is no exaggeration to say that Anderson has dedicated his entire life to helping children: from being a lifeguard and swimming instructor in college; to being a group life counselor at Oakridge Group Home (for juveniles reintegrating from institutionalization); to working for the Boys and Girls Clubs from 1979 through 2011, where he obtained a certification as a Boys and Girls Clubs of America professional employee on the executive level. RP 974-78. After being laid-off from the Club, he worked at Goodwill Industries doing youth programs, working with homeless youth. RP 978.

And in his current position as Marina Manager (arising from his other great love, fishing) he still runs classes and camps for young people and adults. RP 979. He works with Wounded Warriors, arranging fishing trips for the soldiers and their families. *Id.* He runs a youth group at his church, Skyline Presbyterian Church, providing activities for the kids while their parents are upstairs at Alcoholics Anonymous meetings. RP 980. Since his son was born (in 1990) Anderson has also worked with CRISTA Camps, ensuring that kids at the Boys and Girls Clubs who would not otherwise get to go camping have that opportunity. RP 981; Ex 79.

As he summed it up, "I help kids be successful." RP 981. Other than this case, and despite all those years working with children, Anderson has never been accused of being inappropriate with any child at any time. RP 984. His reaction to Wagner's allegations: "Complete Shock. Disgust. Frustration." RP 985. But because children's safety always comes first, and to protect the many charitable organizations with which he is involved, he told his employer, his church pastor and elders, and the other organizations he volunteered with, about the allegations. *Id.* None of them asked him to step down. RP 986.

He also had to tell his wife and his son. RP 986.

When he learned – just a few days before he gave testimony in this case – that Wagner no longer accused him of abuse, he cried. RP 987. He also thanked God “for some justification.” *Id.*

The first expression of “regret” he got from Wagner was through Wagner’s counsel, during Anderson’s cross-examination. RP 1022. Despite being positive until a week before trial, Wagner unequivocally retracted his accusation at trial. *See, e.g.*, RP 1036.

PROCEDURAL HISTORY

A. Discovery regarding a 30-year-old allegation was difficult.

Discovery of documents regarding an incident that allegedly occurred over 30 years ago was, understandably, quite difficult. *See, e.g.*, RP 804-05. There were no separate records marked “Gonyea Club,” much less boxes labeled “1984.” *Id.* The search for records took months. RP 805. Employees were pulled from their regular duties to comb through boxes and crawl around in attics. *Id.* “Dress down” days were instituted to facilitate these activities. *Id.* Hundreds and hundreds of hours were consumed in searching for documents and organizing them for production. *Id.*

The Club received five different sets of discovery requests, so the arduous process had to be repeated again and again. RP 806. At least one production involved a thousand pages. *Id.*

B. For the first time at trial, Wagner changed his story, now alleging that a Joe Taylor was the second man.

Wagner claimed that seven-to-ten days before trial began in February 2019, he first saw a letter that the Club produced in discovery in December 2017. RP 435-36, 492, 509. Anderson wrote the letter on October 31, 1984. RP 420; Ex 32. It says that a Joe Taylor (who was a college “student practicum” at Gonyea, not an employee) was alleged to have intentionally or unintentionally exposed himself to an eight-year-old boy in the bathroom and to have made an inappropriate comment on October 25, so Anderson terminated his internship. RP 493-94, 506-07, 817, 1004-05; Ex 32.

From this unrelated incident, *and for the first time at trial*, Wagner testified that Anderson was not the perpetrator in his case, but rather Taylor. RP 420-21, 479, 778, 809. At trial, Wagner now agreed that, “if it’s someone, it was” Taylor. RP 421. Wagner never even saw a picture of Taylor. RP 513. But he thought Taylor was then 5’ 9”, stocky, and in his 30s. RP 506.

In fact, Taylor was a community college student, in his early 20s, and of average build. RP 1007. He was also shorter than Anderson. *Id.* Taylor was recommended by his college professor, and prior to starting his practicum, Gonyea subjected Taylor to a

background check. RP 1005-06. Anderson never saw Taylor alone with any student. RP 1008. Taylor had no keys. RP 1009.

As to the incident referenced in the letter, Taylor admitted to Anderson that an eight-year-old boy came into the bathroom while Taylor was at the urinal (which lacked a “modesty panel”) and made “a comment about the size of Joe’s private part.” RP 1011. Taylor denied intentionally exposing himself to the boy, but admitted that he made an inappropriate comment. RP 1011. Even the child’s own mother was not sure whether the incident was intentional. RP 1012. Anderson was convinced that Taylor had not acted intentionally, but he, together with Gonyea’s Director and Taylor’s college professor, decided to terminate the practicum based on the inappropriate comment. RP 1012-13, 1018, 1037.

C. The jury returned a \$1.53 million verdict.

The jury returned a \$1,530,000 verdict. CP 1229. The Club sought a new trial. CP 1376-98, 1542-48, 1574-84. The court denied a new trial. CP 1587-89. The Club timely appealed. CP 1590-99.

ARGUMENT

A. The quotient verdict invalidates the judgment.

1. The standard of review is *critical* abuse of discretion review.

“A trial court’s decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion.” ***Gilmore v. Jefferson Cnty. Pub. Transp. Benefit Area***, 190 Wn.2d 483, 494-95, 415 P.3d 212 (2018) (citing ***Alum. Co. of Am. v. Aetna Cas. Sur. Co.***, 140 Wn.2d 517, 537, 998 P.2d 856 (2000)). But this Court reviews a denial of a new trial more critically than it does a grant of a new trial because a new trial places the parties back where they were, while a denial concludes their rights. ***M.R.B. v. Puyallup Sch. Dist.***, 169 Wn. App. 837, 848, 282 P.3d 1124 (2012) (citing ***State v. Taylor***, 60 Wn.2d 32, 41 n.11, 371 P.2d 617 (1962)). Where, as here, the verdict is obtained in a direct, if quite rare, violation of CR 59(a)(2), a new trial should be mandatory.

But generally, the first step in addressing alleged juror misconduct is to determine “whether the facts alleged ‘inhere[] in the verdict.’” ***Long v. Brusco Tug & Barge, Inc.***, 185 Wn.2d 127, 131, 368 P.3d 478 (2016) (quoting ***Ayers v. Johnson & Johnson Baby Prods. Co.***, 117 Wn.2d 747, 768, 818 P.2d 1337 (1991)). This is a question of law, reviewed *de novo*. *Id.*

2. Procedure.

During deliberations, two jurors did not agree with the verdict. CP 1393, 1396. Late in the difficult deliberations, Juror 11 “suggested that we all agree to put our individual numbers for damages together” and “divide that by 11 to come up with a verdict amount.” *Id.* Juror 11 stated that since his damages number was \$0, he would not object to excluding his number and dividing by 11. CP 1397. The jury did so. *Id.* But Juror 12 then objected that it was unfair to exclude Juror 11, so they should redo the calculation and divide by 12. CP 1394, 1397. They agreed to do that instead. *Id.*

That is how the jury arrived at its \$1,530,000 verdict. CP 1393-94, 1396-97. Juror 12 then suggested that they round down to \$1.5 million. CP 1394. The other jurors objected because “we agreed beforehand that the average would be a suitable number for the verdict.” *Id.* No further discussion on damages occurred. *Id.* Upon polling, Jurors 11 and 12 denied this was their verdict. RP 1397.

3. The trial court erred in failing to grant a new trial due to the quotient verdict.

The facts alleged do not inhere in the verdict as a matter of law. Indeed, they cannot, or CR 59(a)(2) would be dead letter:

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question

or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors.

Under this unequivocal law, the misconduct proved by these affidavits cannot inhere in the verdict. And in any event, the affidavits simply describe an objective *process* that can be tested without probing the jurors' mental impressions. **Long**, 185 Wn.2d at 131-32.

Under CR 59(a)(2), it is plainly jury misconduct to arrive at a "quotient verdict,"⁵ as they did. **Gardner v. Malone**, 60 Wn.2d 836, 839-40, 376 P.2d 651 (1962). Such a verdict, determined by lot or chance, is invalid as "a composite fraud washed with a golden name." **Goodman v. Cody**, 1 Wash. Terr. 329 (1871).

Our Supreme Court reversed a quotient verdict in **United Iron Works v. Wagner**, 98 Wash. 453, 167 Pac. 1107 (1917). Those juror affidavits indicated that the amount was arrived at by taking the average, and that after the average was determined, at least 10 jurors accepted the average without further discussion (*id.* at 456):

Considering all the affidavits, it is plain the jury did agree in advance to abide the result that should be obtained by each juror writing upon a slip of paper the amount he thought the

⁵ A "quotient verdict" is an "improper damage verdict that a jury arrives at by totaling what each juror would award and dividing by the number of jurors." BLACK'S LAW DICTIONARY at 1697 (9th Ed. 2009). This definition is dated 1867. It precisely describes what happened here.

verdict should be for and dividing by the sum of 12. This was a quotient verdict, and, under the authorities above cited, cannot be sustained.

See also Karl B. Tegland, 14A WASH. PRAC., *Civil Procedure* §§ 32:26 and 38:16 (2d ed. & 2017 update):

CR 59 permits an attack on the verdict by juror's affidavit on the ground that the verdict was arrived at by chance or lot. The rule has been construed to allow an attack on a verdict that represents a mathematical averaging of the amounts that the individual jurors felt should be awarded, often called a quotient verdict, but only if the jurors agree in advance to be bound by the averaged amount.

Accord ***Stanley v. Stanley***, 32 Wash. 489, 493, 73 P. 596 (1903); *but cf.*, e.g., ***Watson v. Reed***, 15 Wash. 440, 46 P. 647 (1896) (averaging not improper where no agreement in advance that the average had to be the verdict); ***Sorenson v. Raymark Indus., Inc.***, 51 Wn. App. 954, 959, 756 P.2d 740 (1988) (same).

These jurors agreed to be bound by the average of 12 jurors, and when Juror 12 suggested rounding it down, other jurors objected that they all agreed in advance to be bound by the exact result. CP 1394, 1397. No further discussion and no further ballots occurred. CP 1397. With the wide range of damages discussed (\$0 to \$4,000,000) this verdict was not the result of deliberation, but rather of lot or chance. *Id.* The verdict must be reversed.

B. The trial court erred in failing to instruct the jury that Gonyea had no duty to protect Wagner from alleged criminal acts unless it knew or should have known that Taylor presented a risk to Wagner, instead imposing strict liability on the Club.

The trial court failed to instruct the jury that the Club had no vicarious liability for Urlacher and Taylor's alleged criminal acts, and could not be liable in negligence unless it knew or should have known they presented a risk to Wagner. The court instead instructed the jury that the Club was liable for their criminal acts if they were foreseeable and that sexual assault is foreseeable. In short, it imposed strict liability on the Club. This Court should reverse and remand for trial.

1. The standard of review is *de novo*.

"A trial court's decision to instruct the jury on a point of law is reviewed de novo." *Wilcox v. Basehore*, 187 Wn.2d 772, 782, 389 P.3d 531 (2017) (citing *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009)). Instructions are insufficient unless "they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Id.* (citing *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996))). Instructional errors must be prejudicial for reversal and a "clear

misstatement of the law . . . is presumed to be prejudicial.” **Lewis v. Simpson Timber Co.**, 145 Wn. App. 302, 318, 189 P.3d 178 (2008) (quoting **Keller v. City of Spokane**, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002)).

2. Procedure.

The Club submitted its initial set of proposed jury instructions, including four instructions addressing its duty of care. CP 930-33 (attached as App. A). During an initial jury-instruction colloquy, it appeared that the trial court had agreed to instruct the jury based on a modified version of these proposals, as follows (RP 864-65):

defendant is liable for negligence [*sic*] supervision of a student with whom a volunteer or other staff member had sexual contact only when the defendant knew or in exercise of reasonable care should have known that the volunteer or other staff member was a risk to students.

As discussed *infra*, this was a correct paraphrase of the law, but the trial court did not give it to the jury.

The Club submitted its first supplemental proposed instructions based on the very recent appellate decisions in **Anderson v. Soap Lake Sch. Dist.**, 196 Wn. App. 1071, slip op. (Nov. 22, 2016), *aff'd*, 191 Wn.2d 343, 423 P.3d 197 (2017). CP 950-53 (attached as App. B). During colloquy, the Club explained that **Anderson** strengthened the rule stated above that where, as here,

an employee (or volunteer) engages in sexual misconduct, it is outside the scope of his employment, so the employer can be liable only if it knew or reasonably should have known the risk. RP 870-74.

In further colloquy, the Club explained that under **Anderson**, there is a distinction between a negligent supervision claim – which Wagner was not bringing – and a negligent protection claim. RP 1091. Under negligent protection, the employer cannot be liable for the criminal acts of its employees or volunteers outside the scope of their duties. *Id.* Wagner responded that the so-called “**Rollins**” instruction, which the trial court gave as Court’s Inst. 18 (CP 1205),⁶ covers this duty question. RP 1092. But as the Club explained, the **Rollins** instruction is a *damages* instruction, not a liability instruction. RP 1093. “The issue of whether or not we can be held liable for the criminal conduct of our employees and volunteers is a liability issue, and the Court has not addressed that in the instructions.” *Id.*

Rather than give the proposed instruction that it crafted at RP 864-65, quoted above, the trial court instead suddenly ruled, at the last possible moment, that **Anderson** states “a duty to protect from reasonably foreseeable dangers as long as a harm is within the

⁶ The Court’s Instructions to the Jury are attached as App. C.

general field of danger which should have been anticipated it is foreseeable.” RP 1095. It therefore refused the Club’s proposed instructions and instead gave Court’s Inst. 15 (App. C, CP 1202):

A defendant has a legal duty to exercise ordinary care to protect a minor from reasonably foreseeable dangers during times when the minor is in the “custody” of the defendant.

A minor is in a defendant’s “custody” when the minor is in the defendant’s facility during programs provided by the defendant.

Sexual contact with minors is not unforeseeable as long as the possibility of sexual contact was within the general field of danger which the defendant should have anticipated.

In short, the Club is strictly liable for any sexual contact.

The Club objected to this instruction on two additional grounds. RP 1104-05. First, as the only liability instruction, it fails to tell the jury that the Club is not vicariously liable for the criminal acts of volunteers unless it knew or reasonably should have known they presented a danger. *Id.* Second, the statement that sexual contact is foreseeable is a comment on the evidence. RP 1105.

The Club also objected to the Court’s failures to give its proposed instructions D15-D18, D23, D25, D26 (Apps. A & B). RP 1106-11. On the initial group (App. A, CP 930-33), while Wagner withdrew his vicarious-liability claims, the jury was not told that the Club cannot be vicariously liable for criminal acts, where both in

opening and during the trial such claims were referenced. RP 1106-07. With the Court's Inst. 15 saying that the Club is simply liable for all sexual contact, regardless of its knowledge, the failure to give these instructions was highly prejudicial. RP 1107. That is, the "jury has absolutely no guidance whatsoever about the fact that they are restricted from finding the defendant liable for the sexual misconduct of its volunteers." RP 1108.

On the second group (App. B, CP 950-53), while the negligent retention claim was withdrawn during the trial, the jury was not told that it could not impose liability for it. RP 1109-10. And again, the jury was not told in any instruction that a corporation is not liable for acts of volunteers outside the scope of their employment. RP 1110-11. These failures to instruct were highly prejudicial. RP 1106-11.

- 3. The trial court erred in failing to instruct the jury that the Club cannot be vicariously liable for the alleged perpetrators' alleged intentional assault, and cannot be negligent unless it knew or should have known of the alleged perpetrators' alleged dangerous propensities.**

As a general rule, no duty exists to prevent third parties from intentionally harming others unless "a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct." *Hutchins v. 1001 Fourth Ave.*

Assocs., 116 Wn.2d 217, 227, 802 P.2d 1360 (1991) (citations omitted). A duty to prevent harm arises only where “(a) a special relation exists between the [defendant] and the third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation exists between the [defendant] and the other which gives to the other a right to protection.” **Petersen v. State**, 100 Wn.2d 421, 426, 671 P.2d 230 (1983) (quoting REST. (SECOND) OF TORTS § 315 (1965)).

But “Washington courts uniformly have held that an employee’s intentional sexual misconduct is not within the scope of employment.” **Evans v. Tacoma Sch. Dist. No. 10**, 195 Wn. App. 25, 38, 380 P.3d 553, *rev. denied*, 186 Wn.2d 1028 (2016).⁷ An employer is not liable where an employee’s or volunteer’s

⁷ Citing **C.J.C. v. Corp. of Catholic Bishop of Yakima**, 138 Wn.2d 699, 719-20, 985 P.2d 262 (1999) (two priests’ sexual molestation of altar boy outside scope of employment even though, from their victim’s perspective, they were acting within their authority); **Niece v. Elmview Grp. Home**, 131 Wn.2d 39, 48, 929 P.2d 420 (1997) (staff member at group home sexually assaulted disabled woman); **Smith v. Sacred Heart Med. Ctr.**, 144 Wn. App. 537, 543, 184 P.3d 646 (2008) (nursing assistant at hospital sexually abused former psychiatric patients); **Bratton v. Calkins**, 73 Wn. App. 492, 500-01, 870 P.2d 981 (1994) (teacher’s sexual relationship with student outside scope of employment even though position provided opportunity for wrongful conduct); **Thompson v. Everett Clinic**, 71 Wn. App. 548, 553, 860 P.2d 1054 (1993) (staff physician sexually assaulted patient).

intentionally tortious or criminal acts are not in furtherance of the employer's business. **Thompson**, 71 Wn. App. at 551.⁸

Whether an employee or volunteer was acting within the scope of employment depends on whether he “was fulfilling his . . . job functions at the time he . . . engaged in the injurious conduct.” **Robel v. Roundup Corp.**, 148 Wn.2d 35, 53, 59 P.3d 611 (2002). An employee is not fulfilling his job functions when his conduct “is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.” *Id.* (quoting REST. (SECOND) OF AGENCY § 228(2) (1958)). And where, as here, the perpetrators allegedly committed an assault for purposes of their own, the employer is not liable as a matter of law. **Kyreacos v. Smith**, 89 Wn.2d 425, 429, 572 P.2d 723 (1977); **Blenheim v. Dawson & Hall, Ltd.**, 35 Wn. App. 435, 440, 667 P.2d 125 (1983).

A duty of *supervision* may extend to acts outside the scope of employment, but only where the employer knew, or in the exercise of reasonable care should have known, that the “*particular*

⁸ See also **Anderson**, 191 Wn.2d at 374 & n.22; **Niece**, 131 Wn.2d at 48; **Bratton**, 73 Wn. App. at 500-01; **Peck v. Siau**, 65 Wn. App. 285, 827 P.2d 1108 (1992); **Scott v. Blanchet High School**, 50 Wn. App. 37, 44, 747 P.2d 1124 (1987).

employee” presented a risk of danger to others. **Anderson**, 191 Wn.2d at 363-64 (emphasis added in **Anderson**) (citing **Niece**, 131 Wn.2d at 48-49, 52; **Peck**, 65 Wn. App. at 294 (quoting REST. (SECOND) OF TORTS § 317 (1979))). But Wagner disavowed any claim of negligent supervision. *Compare* CP 681 (Wagner’s trial brief asserting negligent supervision) *with* RP 829 (Wagner prefers failure to protect claim, in light of **Anderson**’s holding that negligent training and supervision “is applicable *only* when the [employee] is acting outside the scope of his employment” because, if the employee is acting within the scope of his employment, vicarious liability applies; *see Anderson*, 191 Wn.2d at 361).

Unfortunately, the jury was not instructed that Wagner was no longer bringing his negligent supervision claim, nor was it instructed that the Club could not be liable for negligently supervising its alleged volunteers unless it knew or should have known of their alleged dangerous propensities. But in light of the evidence presented at trial,⁹ the trial court erred in failing to so instruct the jury.

⁹ The jury heard quite a bit of evidence regarding whether and how the Club supervised and trained its volunteers. *See, e.g.*, RP 666-67, 670-72, 686-88, 821-22, 976-77, 1003-04, 1008, 1020-23, 1041-42; Ex 23.

The trial court failed to give the Club's proposed instructions – or any instructions – on these legal matters, exposing the Club to strict liability. Under these incorrect legal instructions, prejudice is presumed. But the instructions also failed to inform the jury of the relevant law, badly hamstringing the Club's closing argument. The trial court erred as a matter of law. This Court should reverse and remand for trial on this independently sufficient ground.

4. The trial court erred in instructing the jury that the Club was strictly liable for its alleged volunteers' alleged sexual misconduct.

Neither “current Washington case law” nor “public policy favor the imposition of respondeat superior or strict liability for an employee's intentional sexual misconduct.” *Evans*, 195 Wn. App. at 38 (citing *C.J.C.*, 138 Wn.2d at 718-19). On the contrary, as explained above, the Club is not liable for the alleged perpetrators' sexual misconduct as a matter of law. Yet the trial court instructed the jury that because Wagner was a minor in the Club's “custody,” it had a duty to protect him from foreseeable dangers, and that sexual contact is foreseeable if it was “within the general field of danger” the Club should have anticipated. App. C, CP 1202.

It is unclear why the trial court suddenly refused to give the instruction it culled from the Club's proposed instructions at RP 864-

65. One possible error would be to impose on the Club – a private, nonprofit organization – the duty imposed on public schools, churches, and care homes, under cases like **McLeod v. Grant Cnty. School Dist. No. 128**, 42 Wn.2d 316, 255 P.2d 360 (1953) (because a child is compelled to attend school and is in an involuntary relationship with the school district, the district has a heightened duty “to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers”); **N.L. v. Bethel Sch. Dist.**, 186 Wn.2d 422, 378 P.3d 162 (2016) (school districts have “an enhanced and solemn duty’ of reasonable care to protect their students”; quoting **Christensen v. Royal Sch. Dist. No. 160**, 156 Wn.2d 62, 67, 124 P.3d 283 (2005)); **N.K. v. Corp. of the Bish. of the Ch. of J.C. of L.-D. S.**, 175 Wn. App. 517, 522, 307 P.3d 730 (2013) (church owed duty, but Boy Scouts did not); **C.J.C.**, 138 Wn.2d at 706 (church with knowledge of prior inappropriate conduct of perpetrator had duty); **Doe v. Corp. of Pres. of Ch. of J.C. of L.-D. S.**, 141 Wn. App. 407, 445, 167 P.3d 1193 (2007) (dismissing negligence claim for lack of causal connection and because, “unlike the church in **C.J.C.**, [the LDS church] had not been warned that [the perpetrator] had previously abused children or made inappropriate advances towards them”);

Niece, 131 Wn.2d at 41 (totally incapacitated vulnerable adult); **J.N. v. Bellingham Sch. Dist. No. 501**, 74 Wn. App. 49, 58-59, 871 P.2d 1106 (1994) (school). As the seminal **McLeod** case makes clear, the enhanced duty is correlative of the school's right to enforce State-mandated rules and regulations on the students, arising from the involuntary nature of mandatory schooling. 42 Wn.2d at 319-20 (citing and discussing **Briscoe v. Sch. Dist. No. 123**, 32 Wn.2d 353, 201 P.2d 697 (1949)).

The Club is a voluntary organization dedicated to helping children. Wagner was not required to attend. He was not incapacitated – he simply did not tell his mother, father, sister, or anyone at the Club, what had happened to him in Urlacher's home. He cited no authority for misplacing onto the Club a schools' heightened duty arising from their involuntary control of students. The Club has no involuntary custodial relationship with children. To the extent this was the court's reasoning, it erred.

For instance, Federal District Court Judge Ricardo S. Martinez ruled that the Boy Scouts of America (BSA) has no special, involuntary or protective custodial relationship with its scouts, in **Boy 1 v. BSA**, 832 F. Supp. 2d 1282 (2011). "The Washington Supreme Court has yet to decide whether the BSA and similar youth-serving

organizations owe a duty towards the youth members of its organization to take reasonable precautions to protect them from the danger of sexual molestation at the hands of organization members.” **Boy 1**, 832 F. Supp. 2d at 1287. **C.J.C.** imposed such a duty on churches because the church had a “special relationship” with *both* “vulnerable persons within its custody” *and* its clergy. *Id.* at 1287-88. But in **Boy 1**, like here, there was no allegation that BSA (or the Club) had a special relationship with its volunteers and its scouts, so the claim was dismissed. *Id.* As here, those plaintiffs did not describe the relationship with the volunteers at all. *Id.* at 1288. And in **C.J.C.**, the Supreme Court imposed liability only where the church knew or should have known of the perpetrator’s deviant propensities. *Id.* at 1290. Judge Martinez was thus “reticent to hold that the BSA could owe a duty to all boy scouts to protect them from sexual abuse at the hands of any scout leader, based solely on generalized knowledge that some proportion of former BSA scout leaders had engaged in inappropriate behavior with other scouts.” *Id.* at 1290. Wagner presented no more evidence here.

Judge Martinez also distinguished the group home sexual abuse case, **Niece**. *Id.* at 1290-91. That case involved a resident who was totally disabled and institutionalized in a nursing home, where a

nursing home employee sexually assaulted her. *Id.* Those double “special relationships” with the victim and the perpetrator gave rise to a duty to protect the resident from employee sexual attacks. There are no such “special relationships” here, where Wagner was a voluntary attendee at Gonyea, which had no information that the volunteers presented a threat to the boys.

And in the second **Boy 1 v. BSA**, 993 F. Supp. 2d 1367 (2014) (“**Boy 2**”), Judge Martinez noted that plaintiffs failed to establish a sufficient relationship between BSA and the two volunteer perpetrators. **Boy 2**, 993 F. Supp. 2d at 1371-72. The only evidence presented here was Wagner and his sister’s bald assertions, but Anderson had no recollection of Urlacher volunteering at Gonyea, and there was no evidence that he was a registered volunteer. RP 1025-26. As for Taylor, he was on a student practicum, and as soon as any allegation was made, his practicum was terminated. This is insufficient to establish a special relationship with them.

Judge Martinez also noted that in **N.K.**, where an adult who was molested as a child by a scout leader sued the church, the BSA, and the local scouting counsel, for failure to protect him from the assault 32 years earlier, “the duty to control another’s conduct ‘depends on proof that the defendant was aware of the tortfeasor’s

dangerous propensities.” **Boy 2**, 993 F. Supp. 2d at 1372 (quoting **N.K.**, 175 Wn. App. at 535). **N.K.** “rejected the plaintiff’s assertion that BSA had a special relationship with an unofficial adult troop volunteer absent any evidence raising an inference that BSA knew about the volunteer’s existence.” *Id.* Here too, Wagner presented no evidence that the defendant – Boys and Girls Clubs of South Puget Sound – knew anything about the alleged perpetrators.

The Club is more like the scouting defendants in **N.K.**, and is not like a school, a church, or a group home. There, even evidence showing BSA had control over the scouting program; registered scouts, collected dues from them, and could exclude them; screened volunteers and rejected some; provided training and education to volunteers and staff; encouraged boys to trust scout leaders; and had the most extensive knowledge regarding the history of sexual abuse in scouting, with the best opportunity to warn scouts and their families; together was insufficient to impose liability. *Id.* at 1372-73. By comparison, Wagner presented little to no evidence justifying extending this heightened duty to the Club.

In sum, Wagner failed to present adequate evidence of any “special relationship,” or any other reason justifying imposing a heightened, **McLeod**-style duty on the Boys and Girls Club of South

Puget Sound. Court's Inst. 15 effectively imposed strict liability on the Club. It is wrong on the law, and thus presumed prejudicial. But in any event, it caused severe prejudice where, as here, Wagner changed his story at the last minute and no substantive evidence was presented that the Club or Gonyea knew or should have known that the alleged perpetrators presented any risk of harm to Wagner. This Court should reverse and remand for trial.

C. The trial court erred in instructing the jury beyond the special statute of limitations, RCW 4.16.340(1)(b).

1. The standard of review is *de novo*.

As noted *infra*, instructions on points of law are reviewed *de novo*. **Wilcox**, 187 Wn.2d at 782. Instructions are insufficient unless “they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Id.* Instructional error must be prejudicial for reversal and “[a] clear misstatement of the law . . . is presumed to be prejudicial.” **Lewis**, 145 Wn. App. at 318.

The interpretation of statutes is also a question of law, reviewed *de novo*. **Randy Reynolds & Assocs. v. Harmon**, 193 Wn.2d 143, 155-56, 437 P.3d 677 (2019) (citing **Dep't of Ecology v. Campbell & Gwinn, LLC**, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). The Court fundamentally seeks to ascertain and carry out the

Legislature's intent. *Id.* If the statute's meaning is plain on its face, the Court gives effect to that plain meaning (*id.*, emphasis added):

Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." While we look to the broader statutory context for guidance, we "must not add words where the legislature has chosen not to include them," and we must "construe statutes such that all of the language is given effect."

(quoting *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010)) (further citations omitted).

2. Procedure.

Wagner saw doctors for the alleged consequences of his alleged abuse from age 20 (roughly 1991) through at least 2015. See *infra*, Statement of the Case § D. Wagner testified that he cannot have children because he "can't have an orgasm with a partner." RP 431. He has been depressed. *Id.* He hides from "everybody." RP 432. He has "erectile dysfunction problems that are well documented." *Id.* Although he was married, he does not "even bother to date." *Id.*

Wagner admitted that although he had his first girlfriend at age 26, he noticed his sexual dysfunction "way before" that. RP 475. He started seeing doctors for his dysfunction in his mid-20s, including his family doctor, who performed tests. RP 475-76. He also saw a urologist about it in 2000 (when he would have been roughly 29 years

old). RP 475. He has used Viagra since 2000. RP 476. He also saw a doctor at the Mayo Clinic regarding this issue. *Id.*

Yet during all this testing and seeking medical attention, Wagner claimed he never mentioned sexual abuse. *Id.*

Wagner proposed (CP 1170)¹⁰ what became Court's Inst. 11 (App. C, CP 1198):

For purposes of the statute of limitations, the "injury for which the claim is brought" includes all of the qualitatively different and/or distinct harms.

The quoted phrase is at the end of Court's Inst. 10 (App. C, CP 1197):

A statute of the State of Washington provides:

All claims or causes of action based on intentional conduct brought by any person for the recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:

1. Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or
2. Within three years of the time the victim discovered that the act caused the injury for which the claim is brought.

Court's Inst. 10 was taken directly from RCW 4.16.340 and, but for Court's Inst. 11, correctly stated the law.

¹⁰ In support of his proposed Inst. 11, Wagner cited RCW 4.16.340; **Carollo v. Dahl**, 157 Wn. App. 796, 801, 240 P.3d 1172 (2010); **B.R. v. Horsely**, 186 Wn. App. 294, 345 P.3d 838 (2015); and nonprecedential, unpublished opinions that he failed to identify as such, *contra* GR 14.1. CP 1170.

The Club objected to Court's Inst. 11. RP 1103-04. Specifically, it is not a correct statement of the law, Court's Inst. 10 adequately states the law, and the evidence does not support the instruction. RP 1104.

Wagner's own expert testified that he engaged in "avoidance," which means he made "efforts to not think about" the abuse, "not that [he] lost the memory." RP 646. That is, "avoidance is effortful." RP 647. Avoidance can become automatic, but the memory is there. *Id.*

3. Court's Inst. 11 misstated the law, overemphasized Wagner's theory, and prejudiced the Club.

RCW 4.16.340(1)(b) & (c) provide:

(1) All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:

. . .

(b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or

(c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought.

This special statute of limitations "is unique in that it does not begin running when the victim discovers an injury. Instead, it specifically focuses on when a victim of sexual abuse discovers the causal link between the abuse and the injury for which the suit is brought."

v. McMahon, 136 Wn. App. 202, 208, 148 P.3d 1081 (2006). This is because “the legislature specifically anticipated that victims may know they are suffering emotional harm or damage but not be able to understand the connection between those symptoms and the abuse.” *Korst*, 136 Wn. App. at 208.

Application of the statute allowed the plaintiffs in *Korst* to go forward, while it precluded the plaintiffs in *Carollo*. In *Korst*, the plaintiff sued her parents for damages caused by sexual abuse by her father when she was eight to 14 years old. 136 Wn. App. at 204. After the abuse ended, Korst wrote her father a letter acknowledging his mistreatment of her. *Id.* at 204, 209. Seven years after that, Korst sought counseling for problems she was having with her son. *Id.* at 204. During those counseling sessions, she learned that being abused by her father was probably the cause of her problems. *Id.* A clinical psychologist diagnosed her with posttraumatic stress disorder due to her father’s sexual abuse. *Id.* at 204-05.

At trial, Korst’s parents successfully moved for a directed verdict. *Id.* at 205. The court reasoned that Korst’s letter to her father showed she must have connected her abuse with her injuries at that time. *Id.* at 205. This Court reversed, where the “letter simply

indicates that she resented her father for sexually abusing her, not that Korst understood the effects of that abuse.” *Id.* at 209.

In **Carollo**, the plaintiff was molested as a teenager by a camp counselor. 157 Wn. App. at 798. He sought counseling for emotional difficulties in 1988. *Id.* He was then told that his childhood sexual abuse was likely the source of his difficulties. *Id.* In 1995, he was diagnosed with posttraumatic stress disorder resulting from the molestation. *Id.* at 798-99. He had depression, flashbacks, and nightmares. *Id.* at 799. In 2008, the plaintiff filed suit after his symptoms became much worse and he was unable to function at his job. *Id.* The new symptoms included panic disorder, major anxiety, major depressive disorder, and agoraphobia. *Id.* His counselor related the new symptoms to the childhood sexual abuse. *Id.*

The trial court dismissed the suit as time barred. *Id.* Division Three affirmed, holding that unlike Korst, the **Carollo** plaintiff could not claim that he had only recently connected his emotional harm to childhood sex abuse. *Id.* at 802-03. “Rather, Carollo is claiming that the severity of his most recent symptoms should entitle him to the more lenient provisions of the discovery of harm provision in the statute.” *Id.*

Although the result in **Carollo** is contrary to his position, Wagner (at CP 1170) relied upon language from **Carollo** to support his proposed Inst. 11 (157 Wn. App. at 801, emphasis added):

Appellate courts have found actions in compliance with the three year limitation of RCW 4.16.340(1)(c) in two sets of circumstances: (1) where there has been evidence that the harm being sued upon is qualitatively different from other harms connected to the abuse which the plaintiff had experienced previously, or (2) where the plaintiff had not previously connected the recent harm to the abuse.

The emphasized phrase is a condensation of one of two “sets of circumstances” in which appellate courts have addressed RCW 4.16.340(1)(c). It is not a statement of the law of Washington. It certainly is not in the statute.

“Qualitative” is an extremely vague term. It means “of, relating to, or involving quality or kind.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1858. “Quality” has two distinct definitions and no fewer than ten different senses. *Id.* at 1858-59. “Kind” is worse, with four definitions and 12 senses. *Id.* at 1243. Division Three was noting the difference between qualitative and quantitative changes. See **Carollo**, 157 Wn. App. at 802 (distinguishing a supposedly qualitative difference between the **Korst** plaintiff’s old and new injuries, from the merely quantitative difference in the **Carollo** plaintiff’s injuries, which only got worse).

But the Legislature – quite wisely – chose not to use such vague language in a statute. The trial court should not have attempted to add it to the statute, which is plain on its face. It is legal error to add language to an unambiguous statute – even if in a separate jury instruction. And similar symptoms that only increase in severity – like the sexual dysfunction for which Wagner sought treatment throughout his life – do not toll the statute of limitations. *Id.* at 802. This Court should reverse.

D. The trial court erred in excluding evidence from the Club’s expert witness, Dr. Elizabeth Loftus.

1. The standard of review for exclusion of experts under *Frye* is *de novo*.

Exclusion of evidence under *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923) is reviewed *de novo*. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011) (“*Akzo*”) (citations omitted). And notwithstanding their “gate keeping function” regarding evidence, courts must be mindful that evidence rules are interpreted so “that the truth may be ascertained and proceedings justly determined.” *Id.* at 600 (quoting ER 102). Expert testimony is appropriate “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

experience, training, or education, may testify thereto in the form of an opinion or otherwise.” **Esparza v. Skyreach Equip., Inc.**, 103 Wn. App. 916, 924, 15 P.3d 188 (2000) (quoting ER 702). Exclusion under ER 702 is reviewed for an abuse of discretion. **Aubin v. Barton**, 123 Wn. App. 592, 608, 98 P.3d 126 (2004) (citing **Hall v. Sacred Heart Med. Ctr.**, 100 Wn. App. 53, 64, 995 P.2d 621 (2000)).

2. Procedure

Despite maintaining – unequivocally – for roughly 18 months – that Anderson had been the second man, Wagner flipped on a dime at trial, allegedly based on Anderson’s letter terminating Taylor. See *infra*, Proc. Hist. § B. That letter was disclosed in December 2017, well over a year before trial. *Id.* Wagner never actually identified Taylor (*e.g.*, with a picture). *Id.*

Nor did Wagner ever explain how he could turn dead certainty about Anderson into a speculative allegation against Taylor, whom Wagner has never seen – or at least not for 35 years. Taylor has never been found. The reliability of Wagner’s allegedly newly discovered (if evolving) “memories” was the key issue at trial.

The Club therefore offered the testimony of Dr. Elizabeth Loftus. See, *e.g.*, RP 906-31. Dr. Loftus’s credentials are ample. See,

e.g., RP 906-07 (Wagner accepts Dr. Loftus's credentials); Exs 83, 83A (Dr. Loftus's C-Vs). She has testified in over 300 cases. RP 924.

But the trial court preliminarily ruled that her testimony would not be helpful to the jury because "it's a matter of common knowledge. I mean, all of these jurors have memories. They all know how memory works because they live it every day. I don't think they need an expert to tell them that." RP 905.

On the contrary, in an offer of proof, Dr. Loftus explained that she has written over 20 books and 600 scientific publications in the area of memory studies. RP 909. She has conducted "maybe hundreds" of controlled experiments in which she exposed subjects to simulated crimes and accidents, and later exposed them to suggestive information, and then studied the extent to which suggestion distorts memory. RP 909-10. She further referenced studies that she and others in her field have done since the 1980s, and as recently as 2006, showing that jurors have misconceptions about how memory works. RP 910. They will believe things to be true that are unsupported by scientific information or are even contradicted by science. *Id.* Her findings were used by the National Academy of Sciences to recommend, in a 2014 report, greater use of expert testimony to correct juror misconceptions. *Id.*; RP 923-24.

Dr. Loftus testified that while people may forget things and then remember them, claims of “massive repression” are not scientifically supported. RP 911-12. Indeed, no science supports the claim that “you can take extensive brutalization [and] banish it into the unconscious where it’s walled off and that there’s some process beyond ordinary forgetting and remembering that’s going on.” RP 912.

But the main thrust of her testimony would be that when one is exposed to post-event information, particularly misleading information, it can contaminate and distort memories. RP 913. Exposure to media coverage – such as the newspaper article Wagner claimed he saw – can provide an opportunity for new information to enter a witness’s memory and distort it. *Id.* She also distinguished between lying and “false memory,” wherein the witness honestly believes a distorted or supplemented memory. RP 913-14. The photographs Wagner and his sister were shown, complete with people’s names on them, are prime examples. RP 914-15.

Ultimately, the most stunning example is Wagner’s 11th hour conversion from absolutely positive identification of Anderson to supposition about Taylor based on the letter dismissing him. RP 915-17. Based on her long study of memory, this was classic suggestion

that alters memories. RP 918, 926-27. Her opinions were all based on reasonable scientific certainty. RP 927.

After this offer of proof, the trial court stood by its preliminary ruling. RP 931. Despite Dr. Loftus's testimony – and no other expert testified that her methodology was unreliable or questionable – the court was “still not convinced that there is a sound scientific basis or methodology that Dr. Loftus has used in this case.” *Id.* Although the doctor based her opinions on Wagner's own deposition testimony, the court also did not believe that she had a proper factual foundation for her opinions. RP 926, 931. The court was also concerned Dr. Loftus could not confirm her opinions were given on a more-probable-than-not basis. RP 931.

This last concern arose when counsel asked Dr. Loftus if her opinions were based on reasonable scientific certainty, and she said yes. RP 927. Counsel then asked, “And based on a more-probably-true-than-not-true basis?”; she responded, “Well, I mean . . . we don't talk like that.” *Id.* And counsel said, “I'm sorry, we do.” *Id.* And she responded, “So I can just say that I've used scientific methodology to reach my conclusions.” RP 927-28.

3. The trial court erred in excluding Dr. Loftus's testimony.

No expert testified that Dr. Loftus's methodology was not based on the scientific method. She testified that it was, describing hundreds of studies she has performed on the subject. The trial court's apparent instinct that her science is unsound – based on no evidence whatsoever – is insufficient to exclude her testimony.

“Expert testimony is usually admitted under ER 702 if it will be helpful to the jury in understanding matters outside the competence of ordinary lay persons.” *Akzo*, 172 Wn.2d at 600 (citing *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995) (citing *State v. Ciskie*, 110 Wn.2d 263, 279, 751 P.2d 1165 (1988))). Dr. Loftus repeatedly testified that jurors are largely ignorant of the workings of memory. The trial court's apparent belief – again based on no contrary evidence – that this is “common knowledge” is not sufficient to exclude her testimony.

Dr. Loftus's testimony went to the heart of the central issue in this case: does Wagner actually have an accurate memory of Urlacher and Taylor, particularly where he swore numerous times the second man was Anderson. This is particularly troubling because Wagner was exposed to many suggestions (e.g., newspaper articles

and photos) that could have affected his memory. Jurors are not memory experts. The trial court badly prejudiced the Club's defense by excluding this key witness based on supposition.

This Court should reverse and remand for trial.

CONCLUSION

For the reasons stated, this Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 31st day of May 2019.

MASTERS LAW GROUP, P.L.L.C.



Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
Attorneys for Appellant

APPENDIX A

CP 930-33

The Club's Proposed
Instructions D-15 to D-18

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8/2/2018

INSTRUCTION NO. D-15

Defendant is liable for the wrongful actions of its employees only if they are foreseeable. Activities will only be foreseeable if the defendant knew, or in the exercise of reasonable care should have known of the risk that resulted in their occurrence.

Allowing an employee to work with or be with a youth participant does not constitute a breach of the defendant's duty to supervise a youth participant.

Peck v. Siau, 65 Wash.App. 285, 827 P.2d 1108 (Wash.App.,1992);
Dia CC v. Ithaca City School Dist., 304 A.D.2d 955, 956, 758 N.Y.S.2d 197, 200 (N.Y.A.D. 3 Dept.,2003)Allowing a teacher to work alone one-on-one with a student did not breach the District's duty to supervise students.

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8/2/2018

INSTRUCTION NO. D-16

Defendant cannot be held liable for negligent supervision of a student with whom a volunteer or other staff member had sexual contact absent showing that the Defendant knew, or in exercise of reasonable care should have known, that the volunteer or other staff member was a risk to students.

Peck v. Siau, 65 Wash.App. 285, 827 P.2d 1108 (Wash.App.,1992)

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8/2/2018

INSTRUCTION NO. D-17

Defendant has a legal duty to exercise ordinary care to protect a youth participant from reasonably foreseeable dangers during times when the youth participant is in the “custody” of the Defendant. Dangers to which this duty of ordinary care applies are physical hazards in the building or on grounds, as well as harmful acts by volunteers or other staff members.

A youth participant is in a defendant’s “custody” when in its facility during programs provided by Defendant.

Defendant is not negligent merely because a youth participant is in its custody suffers injury because a Defendant is not an insurer or guarantor of its youth participants safety and health

Peck v. Siau, 65 Wn. App. 285, 292, 827 P.2d 1108, rev. denied, 120 Wn.2d 1005 (1992).see *Wagenblast v. Odessa Sch. Dist.*, 110 Wn.2d 845, 856,758 P.2d 968 (1988), and *Carabba v. Anacortes Sch. Dist.*, 72 Wn.2d 939, 956-57, 435 P.2d 936 (1967), see *Travis v. Bohannon*, 128 Wn. App. 231, 115 P.3d 342 (2005).

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8/2/2018

INSTRUCTION NO. D-18

The Defendant cannot be held responsible for the criminal actions of its employees or volunteers. Inappropriate sexual touching of a student is a criminal act. Such actions are outside of the employee's or volunteer's scope of employment.

Bratton v. Calkins 73 Wash.App. 492, 500-501, 870 P.2d 981, 986 (Wash.App. Div. 3,1994)
Peck v. Siau, 65 Wn. App. 286 (Div. II, 1992) *Scott v. Blanchet High School*, 50 Wash.App. at 44, 747 P.2d 1124. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238, 60 A.L.R.4th 225, 235 (1986) *Niece v. Elmview Group Home* 131 Wash.2d 39, 48, 52-58, 929 P.2d 420 (1997).

APPENDIX B

CP 950-53

The Club's Supplemental Proposed
Instructions D-23 to D-26

INSTRUCTION NO. D-23

To hold the Defendant liable for negligent retention of an employee or volunteer, the Plaintiff must prove that the Defendant retained the employee or volunteer with knowledge of his unfitness, or failed to use reasonable care to discover it before retaining him.

Anderson v. Soap Lake Sch. Dist., 93977-2, 2018 WL 3765079, at *6 (Wash. Aug. 9, 2018) *See also*, " *Peck*, 65 Wash. App. at 288, 827 P.2d 1108 (quoting *Scott*, 50 Wash. App. at 43, 747 P.2d 1124)

INSTRUCTION NO. D-24

To hold the Defendant liable for negligently hiring an employee or volunteer who is incompetent or unfit, Plaintiff must show that the employer had knowledge of the employee or volunteer's unfitness or failed to exercise reasonable care to discover unfitness before hiring or retaining the employee or volunteer.

Anderson v. Soap Lake Sch. Dist., 93977-2, 2018 WL 3765079, at *5 (Wash. Aug. 9, 2018) citing *Scott v. Blanchet High Sch.*, 50 Wash. App. 37, 43, 747 P.2d 1124 (1987); see also *Carlsen v. Wackenhut Corp.*, 73 Wash. App. 247, 252, 868 P.2d 882 (1994) ("To prove negligent hiring in Washington, the plaintiff must demonstrate that ... the employer knew or, in the exercise of ordinary care, should have known, of its employee's unfitness at the time of hiring."). This holding parallels the rule in the Restatement (Second) of Torts § 307 (Am. Law Inst. 1965): "It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, inappropriate, or defective, that its use involves an unreasonable risk of harm to others." The difference between negligent hiring and negligent retention is timing. *Peck v. Siau*, 65 Wash. App. 285, 288, 827 P.2d 1108 (1992). Negligent hiring occurs at the time of hiring, while negligent retention occurs during the course of employment.

INSTRUCTION NO. D-25

The Defendant may be liable for negligently supervising an employee or volunteer. This duty requires that Defendant exercise ordinary care in the supervision of the employee or volunteer.

A duty of supervision extends to acts beyond the scope of employment. Acts of sexual misconduct are beyond the scope of employment. In order to prevail on the claim of negligent supervision, the Plaintiff, for acts that are beyond the scope of employment, must prove that the Defendant knew, or in the exercise of reasonable care should have known that the employee or volunteer presented a risk of danger to others.

Anderson v. Soap Lake Sch. Dist., 93977-2, 2018 WL 3765079, at *7 (Wash. Aug. 9, 2018)
Niece v. Elmview Grp. Home, 131 Wash.2d 39, 51, 929 P.2d 420 (1997), *Scott*, 50 Wash. App. at 44, 747 P.2d 1124

To meet the requirements of Restatement (Second) of Torts § 317(b), Washington courts have “require[d] a showing of knowledge of the dangerous tendencies of the particular employee.” *Niece*, 131 Wash.2d at 52, 929 P.2d 420 (emphasis added). We discussed this rule in *Niece*, where the record failed to show that the employer knew or should have known that an employee would sexually assault residents *Anderson v. Soap Lake Sch. Dist.*, 93977-2, 2018 WL 3765079, at *9 (Wash. Aug. 9, 2018)

Peck v. Siau, 65 Wash.App. 285, 827 P.2d 1108 (Wash.App.,1992);
Dia CC v. Ithaca City School Dist., 304 A.D.2d 955, 956, 758 N.Y.S.2d 197, 200 (N.Y.A.D. 3 Dept.,2003)(Allowing a teacher to work alone one-on-one with a student did not breach the District's duty to supervise students.)

INSTRUCTION NO. D-26

Normally, a corporation acts through its employees and volunteers as long as the employees and volunteers are acting within the scope of their employment and on the employer's behalf. When an employee or volunteer pursues a personal objective, rather than the employer's purpose, the employee's and volunteer's acts are outside the scope of employment and the employer cannot be held vicariously liable for those acts. Inappropriate sexual touching of a minor is an action that is outside of the employee's or volunteer's scope of employment and does not constitute an act of the corporation.

The District has no vicarious liability acts of personal sexual gratification which are outside the scope of his employment as a matter of law; *Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. 25, 29, 380 P.3d 553, 555 (2016), *review denied*, 186 Wn.2d 1028, 385 P.3d 124 (2016); An employer will not be held liable where the intentionally tortious or criminal acts of an employee are not performed in furtherance of the employer's business. *Thompson v. Everett Clinic*, 71 Wash.App. 548, 551, 860, 860 P.2d 1054 P.2d 1054 (1993).

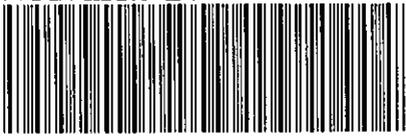
See also, Anderson v. Soap Lake Sch. Dist., 93977-2, 2018 WL 3765079, at *14 (Wash. Aug. 9, 2018) *Bratton v. Calkins* 73 Wash.App. 492, 500-501, 870 P.2d 981, 986 (Wash.App. Div. 3,1994) *Peck v. Siau*, 65 Wn. App. 286 (Div. II, 1992) *Scott v. Blanchet High School*, 50 Wash.App. at 44, 747 P.2d 1124. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238, 60 A.L.R.4th 225, 235 (1986) *Niece v. Elmview Group Home* 131 Wash.2d 39, 48, 52-58, 929 P.2d 420 (1997).

APPENDIX C

CP 1186-1207

Court's Instructions to the Jury

0091



17-2-08564-8 51957343 CTINJY 09-04-18

THE HONORABLE SHELLY K. SPEIR
TRIAL DATE: Tuesday, July 31, 2018

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

T.W.,

Plaintiff,

v.

BOYS AND GIRLS CLUBS OF SOUTH
PUGET SOUND, a Washington corporation,

Defendants.

NO. 17-2-08564-8

COURT'S INSTRUCTIONS TO THE
JURY

FILED
DEPT 5
IN OPEN COURT

AUG 30 2018

PIERCE COUNTY, Clerk
By *[Signature]*
DEPUTY

PROPOSED COURT'S INSTRUCTIONS TO THE JURY

The Court provides the following instructions to the jury.

Dated this 30th day of August, 2018

[Signature]

THE HONORABLE SHELLY K. SPEIR

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9/5/2018

INSTRUCTION NO. 1

It is your duty to determine the facts in this case from the evidence produced in court. It also is your duty to accept the law from the judge, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and the ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

Counsel's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any

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remark, statement or argument that is not supported by the evidence or the law as given to you by the judge.

The lawyers have the right and the duty to make any objections that they deem appropriate. Such objections should not influence you, and you should make no presumption because of objections by counsel.

The law does not permit me to comment on the evidence in any way and I have not intentionally done so. If it appears to you that I have so commented, during either the trial or the giving of these instructions, you must disregard the comment.

Jurors have a duty to consult with one another and to deliberate with a view to reaching a verdict. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous. You should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence you.

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9/5/2018

INSTRUCTION NO. 2

The plaintiff claims that the defendant, the Boys and Girls Clubs of South Puget Sound, was negligent in failing to protect Todd Wagner from sexual abuse.

The plaintiff claims that the defendant's conduct was a proximate cause of injuries and damage to the plaintiff.

The defendant denies these claims and further denies the nature and extent of the claims injuries and damage.

The defendant further claims that the plaintiff's claims are barred by the statute of limitations. The Plaintiff denies this claim.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

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9/5/2018

INSTRUCTION NO. 4

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

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9/5/2018

INSTRUCTION NO. 5

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the financial reasons for Gene Anderson's layoff, and may be considered by you only for the purpose of the reasons for Gene Anderson's layoff. It may not be considered by you for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

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INSTRUCTION NO. 6

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

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INSTRUCTION NO. 7

The law treats all parties equally whether they are corporations, government entities, partnerships or individuals. This means that corporations, government entities, partnerships and individuals are to be treated in the same fair and unprejudiced manner.

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INSTRUCTION NO. 8

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a “preponderance” of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all of the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

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INSTRUCTION NO. 9

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent;

Second, that the plaintiff was injured; and

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendant has the burden of proving the following affirmative defense claimed by the defendant:

That the plaintiff's claim is barred by the statute of limitations.

If you find from your consideration of all the evidence that all three of the plaintiff's propositions have been proved, and that the defendant's proposition has not been proved, your verdict should be for the plaintiff. On the other hand, if any one of the plaintiff's first three propositions has not been proved, or the defendant's proposition has been proved, your verdict should be for the defendant.

INSTRUCTION NO. 10

A statute of the State of Washington provides:

All claims or causes of action based on intentional conduct brought by any person for the recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:

1. Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or
2. Within three years of the time the victim discovered that the act caused the injury for which the claim is brought.

INSTRUCTION NO. 11

For purposes of the statute of limitations, the “injury for which the claim is brought” includes all of the qualitatively different and/or distinct harms.

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INSTRUCTION NO. 12

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

INSTRUCTION NO. 13

The term "proximate cause" means a cause in which a direct sequence unbroken by any new independent cause, produces the injury complained of and without such injury would not have happened.

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INSTRUCTION NO. 14

There may be more than one proximate cause of the same injury. If you find that the defendant was negligent and that such negligence was a proximate cause of injury or damage to the plaintiffs, it is not a defense that some other cause or the act of some other person who is not a party to this lawsuit may also have been a proximate cause.

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9/5/2018

INSTRUCTION NO. 15

A defendant has a legal duty to exercise ordinary care to protect a minor from reasonably foreseeable dangers during times when the minor is in the "custody" of the defendant.

A minor is in a defendant's "custody" when the minor is in the defendant's facility during programs provided by the defendant.

Sexual contact with minors is not unforeseeable as long as the possibility of sexual contact was within the general field of danger which the defendant should have anticipated.

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9/5/2018

INSTRUCTION NO. 16

When any social worker has reasonable cause to believe that a child has suffered abuse or neglect, he shall report the incident, or cause to report to be made, to the proper law enforcement agency.

“Social worker” shall mean anyone engaged in a professional capacity during the regular course of employment in encouraging or promoting the health, welfare, support or education of children, or providing social services to adults or families, whether in an individual capacity, or as an employee or agent of any public or private organization or institution.

“Child abuse or neglect” shall mean the injury, sexual abuse, sexual exploitation, or negligent treatment of a child by any person under circumstances which indicate that the child’s health, welfare, and safety is harmed.

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INSTRUCTION NO. 17

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

You should consider the following non-economic damages:

- (1) The nature and extent of the plaintiff's injuries both mental and physical.
- (2) The pain, suffering, anxiety, emotional distress, humiliation, and fear experienced by plaintiff and with reasonable probability to be experienced in the past and future.
- (3) The disability, disfigurement, and loss of enjoyment of life experienced by plaintiff and with reasonable probability to be experienced in the past and in the future.

Your award must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

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INSTRUCTION NO. 18

In calculating a damage award, you must not include any damages that were caused solely by acts of Charles Urlacher and/or Joe Taylor and not proximately cause by the negligence of the defendant. Any damages caused solely by Charles Urlacher and/or Joe Taylor and not proximately caused by the negligence of the defendant must be segregated from and not made a part of any damage award against the defendant.

INSTRUCTION NO. 19

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

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In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the judicial assistant that you have reached a verdict. The judicial assistant will bring you back into court where your verdict will be announced.

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **BRIEF OF APPELLANT** on the 31st day of May 2019 as follows:

Co-counsel for Appellant

Jerry Moberg & Associates, P.S.
Gerald J. Moberg
P.O. Box 130
124 – 3rd Avenue SW
Ephrata, WA 98823
jmoberg@jmlawps.com

U.S. Mail
 E-Service
 Facsimile

Counsel for Respondent

Connelly Law Offices
Evan T. Fuller
Lincoln C. Beauregard
2301 North 30th Street
Tacoma, WA 98403
efuller@connely-law.com
lincolnb@connely-law.com

U.S. Mail
 E-Service
 Facsimile



Kenneth W. Masters, WSBA 22278
Attorney for Appellant

MASTERS LAW GROUP

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