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No. 67711-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MADHURI PATEL,

Appellants and Cross-Respondents,

v.

KENT SCHOOL DISTRICT,

Respondent and Cross-Appellant.

APPEAL FROM THE
SUPERIOR COURT FOR KING COUNTY WASHINGTON
HONORABLE HOLLIS HILL

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This case involves claims brought by two plaintiffs: (1) Amanda Hingorani ("Amanda"); and (2) Madhuri Patel ("Ms. Patel"). Amanda is developmentally disabled. Ms. Patel is Amanda's mother. Plaintiffs' claims involve injuries that occurred when Amanda was a student in the Kent School District ("KSD" or "Defendant"). The facts are straight forward. The claims are not complex.

Defendant knew Amanda since she was three years old, when it first classified Amanda as "mentally retarded." Amanda participated in Defendants' Special Education Program since the 1st grade. Amanda remained in Special Education throughout her academic career.

During Amanda's freshman and sophomore years in high school, Defendant received many warnings to keep Amanda safe at school ("*especially [at] bathroom time*"). In response, Defendant acknowledged that Amanda would be closely supervised and protected at school ("*supervised at all times*" "*throughout her school day*" "*under complete adult supervision throughout her school day*").

Nonetheless, Amanda was sexually molested (oral, anal, digital penetration) many times in the boys' bathroom, during class. The class was comprised of only seven special education students, with three adult instructors. Despite the luxurious student/teacher ratio, the classroom

teacher admits that "*not one of the three adults in the class had any inkling of what was going on.*"

Trial started in June 2011. Plaintiffs' case took four days. The trial court permitted the trial to stretch an additional ***four weeks.*** Lacking discipline in the extreme, the trial court failed to manage the courtroom, and consistently demonstrated a haphazard approach to decision-making. Most importantly, the trial court generated a constellation of reversible legal errors. This brief is limited to seven of those legal errors – each requiring a new trial.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The Trial Court Erred by Refusing to Grant Parental Immunity.

2. The Trial Court Erred by Allowing the Jury to Diminish Amanda's Damages based Upon the Alleged Fault of a Parent.

3. The Trial Court Erred by Submitting Inconsistent Jury Instructions and Special Verdict Forms.

4. The Trial Court Erred in its Application of Evidence Rule 412.

5. The Trial Court Erred by Excluding Evidence that Amanda is Legally Incapacitated.

6. The Trial Court Erred by Instructing the Jury on Criminal Standards in a Case Involving Civil Claims.

7. The Trial Court Erred In Denying Plaintiffs' Motion to Amend the Complaint.

B. Issues Pertaining to Assignments of Error

1. The Washington Supreme Court recognizes that a parent is not liable for ordinary negligence in the performance of parental responsibilities. Over Plaintiffs' objection, Defendant was allowed to argue that a mother was negligent in failing to protect her daughter from harm which occurred at a public school. Did the trial court err in refusing to grant parental immunity?

2. Under Washington's comparative fault statutes, even when parental immunity is denied, the fault of a parent cannot be used to reduce damages claimed by a child. The trial court provided a special verdict form allowing the jury to conclude that a mother's negligence may reduce or nullify the damages claimed by Amanda. Did the trial court err in light of Washington law's clear mandate that the fault of a parent cannot reduce damages claimed by a child?

3. Jury instructions and special verdict forms are required to be consistent, avoid confusing the jury and inform the trier of fact of the applicable law. The trial court instructed the jury that it could not consider the alleged negligence of the mother when assessing Amanda's damages. However, the trial court's special verdict form allowed the jury to find that the alleged negligence of the mother could reduce or nullify Amanda's damages. Did the trial court err in providing a special verdict form that was inconsistent with the jury instructions?

4. Evidence Rule 412 requires the exclusion of evidence or argument regarding an alleged rape victim's sexual history or to prove sexual predisposition. The presumptive exclusion can only be overcome if the Court finds that its probative value substantially outweighs the danger of harm to any victim and unfair prejudice to any party. Did the trial court err by allowing Defendant to introduce evidence that Amanda previously sought birth control and

allegations that she had been molested by a cousin several years prior to the incidents giving rise to her claims?

5. At trial, the parties disputed whether Amanda, a developmentally disabled special education student, had the legal capacity to consent to sex. On this issue, Plaintiffs offered a King County Superior Court order which declares that Amanda is legally incapacitated and in need of full guardianship. Did the trial court err in excluding this Order while simultaneously allowing the Defendant to argue that Amanda had legal capacity to consent to sex?

6. Plaintiffs brought civil claims for state law negligence and failure to report child abuse pursuant to RCW 26.44. The trial court instructed the jury on the Washington Criminal Code's definition of consensual sex and mental incapacity. Did the trial court err in giving criminal jury instructions in a civil action?

7. Prior to trial, Plaintiffs sought to amend the Complaint to add claims under RCW 74.34, the Abuse of Vulnerable Adult Act. RCW 74.34 defines a vulnerable adult to include all persons with developmental disabilities, regardless of age. It is undisputed that Amanda is developmentally disabled. Did the trial court err in denying Plaintiffs' motion to amend?

III. STATEMENT OF THE CASE

A. Factual Background

Amanda was a student in the Kent School District for her entire academic career where she was always classified as mentally retarded. Exs. 1, 6; CP 2104-2118. Amanda was diagnosed with cognitive and intellectual delays when she was three years old and never received a Full Scale Intelligence Quotient ("FSIQ") score higher than 71. Ex. 2; CP 2099-2102. Amanda participated in the Special Education Program since

the 1st grade and remained eligible for special education services throughout her academic career.

In March 2006, while enrolled in the 9th grade at Kentridge High School ("KHS"), Amanda was evaluated by KSD to assist in preparing her Individualized Education Program ("IEP"). The District's evaluation found that: (1) Amanda had an FSIQ of 68, placing her in the "Extremely Low" range for her age (in the bottom 2% of her peers); (2) Amanda scored a 71 on the Vineland Adaptive Behavior test (exceeding only 3% of her peers in social and behavioral skills); and (3) Amanda's adaptive and cognitive skills continued to be consistent with a person functioning in the range of mental retardation. Ex. 6; CP 2104-2118.

During the 2006 evaluation, Amanda's mother, Ms. Patel, specifically warned officials at KHS that Amanda often exhibited unsafe behaviors and required near constant supervision. *Id.* The staff at KHS acknowledged that "Amanda is not aware of the potential danger of situations and does not necessarily use caution when encountering risky social situations." *Id.*

Shortly after Ms. Patel's warnings, Amanda was financially and sexually exploited at KHS. In April 2006, Ms. Patel found a note that a classmate sent to Amanda. CP 240. The note showed that Amanda was

coaxed to steal money from her mother's wallet in exchange for friendship, affection and sex. Ex. 7; CP 260-261.

Upon finding this letter, Ms. Patel contacted staff at KHS to discuss her concerns. CP 240-241. On April 26, 2006, Ms. Patel met with Assistant Principal Eric Hong, School Counselor Jeff Vanderport and David Fowler (school security). *Id.* Ms. Patel warned that her developmentally disabled daughter was being extorted and sexually victimized by other students at school. Assistant Principal Hong took no action regarding the incident because he was not convinced of the veracity of Ms. Patel's allegations. *Id.*

Ms. Patel returned home and printed out emails demonstrating the exploitation of Amanda which lasted from at least November 2005 through April 2006. The emails retrieved by Ms. Patel revealed graphic examples of the exploitation suffered by Amanda while a student at KHS, including: (1) five months of threatening emails sent by other KHS students to Amanda; (2) financial extortion in exchange for friendship and sex; and (3) evidence that Amanda was the victim of sexual victimization in the bathrooms at KHS during school hours. Ex. 75; CP 1207-1224.

Ms. Patel requested a second meeting with the administration at KHS. On April 27, 2006, Ms. Patel provided KHS officials with further documentation of Amanda's exploitation. Ex. 9. Ms. Patel specifically

warned KHS staff that Amanda was being sexually victimized at school. Exs. 9, 47-49; CP 1273, 1275, 1277-1278. Amanda was pulled from her mainstream classes and a "no contact" order was implemented between Amanda and the other students involved. Ex. 13. Ms. Patel removed Amanda from KHS until an appropriate plan of supervision was established.

On April 28, 2006, Sally McLurg, the school psychologist for KHS, wrote that her recent evaluation showed that Amanda "cannot function safely and independently in the IP [integrated placement] setting because she is being victimized[.]" Ex. 11; CP 1133. Ms. McLurg also found that Amanda "does not have the skills necessary to make appropriate choices … and/or to ask for help from teachers when she is in trouble." *Id.* Ms. McLurg concluded that Amanda "needs to be to be in a smaller class where teachers can monitor her safety[.]" *Id.* The same day, the KHS Special Education Department Chair, Jennifer Grajewski, agreed that Amanda should be given increased monitoring and protection from known dangers at school:

> …given the situation of her being harassed and needing closer supervision, due to her inability to make good decisions and seek adult help, we need to move her. She is being victimized. Ex. 10; CP 1131.

Days later, on May 3, 2006, Amanda's special education teacher, Francine Wilhelm, wrote to Ms. Grajewski, school counselor Vanderport and Vice-Principal Edwards stating her impression that another student was "grooming Hingorani for possible mental, emotional, and physical/sexual abuse." Ex. 12; CP 1140. In the same e-mail, Ms. Wilhelm relayed a comment from KHS teacher Linda Kilpatrick about how Amanda had been treated, Ms. Kilpatrick saying "I have never seen anything like it." Ex. 12; CP 1140.

On May 5, 2006, a plan of supervision was established. Ex. 13; CP 282-284. The plan required KHS to provide one-on-one supervision for Amanda during school hours. *Id.* This plan remained in effect for Amanda's 9th grade year.

When she returned to begin her 10th grade year during fall 2006, the school did not immediately continue the supervision plan implemented at the end of Amanda's 9th Grade year. As a result, Ms. Patel requested a meeting to insist that KSD re-institute the supervision protocols.

On September 13, 2006, a meeting was held between Ms. Patel and KHS personnel, including Ms. Wilhelm, Amanda's teacher. This meeting was also attended by Marnee Crawford, a family counselor. Ex. 33.

Ms. Crawford warned KHS staff that "there were reasons to be concerned with Amanda's safety if she was left in any unsupervised times.

This included lunch, passing times, and *especially bathroom time*." Ex. 33.

Following the September 2006 meeting, Ms. Wilhelm wrote to Department Chair Grajewski about the issue of closer monitoring and escorting Amanda, stating "I want to write in a 1:1 [supervision on Amanda's IEP] based on the psych eval. from last year and the new information we have from the new therapist." Ex. 62; CP 1293.

On October 6, 2006, Ms. Wilhelm sent another e-mail to Ms. Grajewski regarding a phone conversation she had with Ms. Patel. In the e-mail, Ms. Wilhelm stated that Ms. Patel "confirmed [what] we have been suspecting: Amanda does not know the difference between right and wrong ... " Ex. 34; CP 1295.

Ms. Wilhelm also relayed Ms. Patel's request for "no physical contact between Amanda and any young man at school" (emphasis in original) then stated that:

> Amanda's behavior very forcefully drove home to me the reality of why Madhuri wants her daughter with an adult at all times. Now I understand. This is not just a mother who is over protective. *Id.*

On October 17, 2006, a second meeting was held between Ms. Patel and KHS staff. Issues discussed included: (1) Ms. Patel's ongoing concerns that Amanda's safety was in danger in light of the financial and

sexual exploitation which occurred during her 9th grade year; (2) Ms. Patel's warnings that Amanda remained vulnerable to exploitation and was easily taken advantage of; (3) Amanda's inability to know right from wrong; and (4) Amanda's inability to make safe decisions. Ex. 35; CP 2122-2146.

Ms. Patel again requested that the supervision plan instituted by KSD at the end of Amanda's 9th grade year be re-instituted for Amanda's 10th grade year. Because the plan of supervision was necessary to ensure Amanda's safety, Ms. Patel insisted upon its implementation as a pre-condition of Amanda's return to KHS. Ex. 30; CP 240-241; 1142.

In the agreement drafted at the October 17, 2006 meeting, KSD specifically acknowledged that, "Amanda is vulnerability [sic] to exploitation as file records indicate." Ex. 35; CP 2122-2146. Accordingly, KHS agreed to re-implement the one-on-one supervision plan. "In this way, staff is able to provide the safety and close monitoring needed." *Id.*

KHS told Ms. Patel that while Amanda was receiving special education instruction at least three adults were present in the classroom. CP 241-242. These adults included Ms. Wilhelm and two additional adult classroom aides. *Id.* Additionally, Ms. Patel was assured that Amanda was required to use a bathroom specifically reserved for the female special

education students. Ms. Patel was also assured that Amanda would be accompanied to and from the bathroom by KHS staff. CP 242.

During this same period, Ms. Wilhelm documented additional examples of Amanda's vulnerability. For example, on February 2, 2007, Ms. Wilhelm noted that Amanda "will do anything to be involved" in social groups at school and did not understand the difference between "violent rape" and "desire or love." Ex. 39; CP 1148.

Ms. Wilhelm understood her obligation to supervise Amanda. Ms. Wilhelm wrote, "the agreement we have with Hingorani's mom is that [Amanda] be supervised *at all times*." Ex. 42. (emphasis added).

During this time period, the supervision provided by KHS began to unravel. By late April 2007, KHS abdicated its responsibility to protect and supervise Amanda by abandoning the supervision protocols. As a direct result, Amanda was repeatedly sexually victimized in the boys' bathroom during Ms. Wilhelm's class. Ex. 52.

On April 30, 2007, Ms. Wilhelm sent an e-mail to Ms. Grajewski noting that school administrator Molly King found Amanda and a male student "hugging" in the school hallway during class -- when each was supposed to be under Ms. Wilhelm's direct supervision. Ex. 44; CP 1263. After reviewing Ms. Wilhelm's message, Ms. Grajewski sent an

exclamatory response, "contact Amanda's mom and alert her about the bathroom incident! This is serious." *Id.*

On April 30, 2007, Ms. Wilhelm sent an e-mail to Ms. Patel regarding an incident involving Amanda and the male special education student. Ms. Wilhelm wrote, without providing detail, that "I have a report of some seriousness." Ex. 45; CP 1267. She informed Ms. Patel that a few days earlier, Ms. Wilhelm caught another student, "Matt," sneaking out of class immediately after Amanda left to use the bathroom. Ms. Wilhelm "assume[d] that [Amanda] may have been about to repeat some of the same behaviors in our bathroom with "Matt" that she engaged in last year." *Id.*

Ms. Patel became very concerned by the clear lack of supervision. Ms. Patel asked Amanda about Ms. Wilhelm's report. Ex. 46; CP 1269. Amanda disclosed that "Matt" had sex with her in the boy's bathroom located immediately next to Ms. Wilhelm's self-contained classroom on several occasions during Ms. Wilhelm's third period class. *Id.*

On May 2, 2007, Ms. Patel wrote to KHS Principal Mike Albrecht. Ex. 47. She reminded him of her many meetings and discussions concerning her disabled daughter's safety at KHS. "If you remember last year I came to talk with you to get problems assessed and provide supervision Amanda needed while attending school . . . I met with

teachers/special ED manager . . . many subsequent follow up . . . to have close supervision over my daughter due to her cognitive/intellectual deficits." *Id.*

Ms. Patel advised Mr. Albrecht that, while KHS failed to provide supervision for her daughter, Amanda was sexually victimized during Ms. Wilhelm's third period class. Ms. Patel concluded her email with this:

> I feel school has not provided supervision she needs. She is a minor cannot consent, she has poor cognition she cannot consent, knowing Amanda has history with school with similar situation before why teacher would let her go to bathroom alone when thus has been requests to be watched over and over. I do not feel school is doing enough to keep her safe. I am taking my daughter out of school till I am reassured of her safety. *Id.*

Mr. Albrecht immediately forwarded the email he received from Ms. Patel to Vice-Principal Kim Edwards and the Special Education Chair (Ms. Grajewski). Mr. Albrecht simply wrote, "See me." *Id.*

Ms. Grajewski acknowledged that she and Ms. Edwards met with Ms. Patel "numerous times" and that "[Ms. Wilhelm] was instructed to have an IA with Amanda at all times." Ex. 47. Principal Albrecht agreed, writing "I thought that Amanda was under complete adult supervision throughout the entire day." Ex. 48. Vice-Principal Edwards also

expressed her belief that "we were under the impression that Amanda was under complete adult supervision throughout her school day." Ex. 49.

By the end of the day on May 2, 2007, Mr. Albrecht, Ms. Edwards, Ms. Wilhelm and Ms. Grajewski each had knowledge that Amanda -- a developmentally disabled, special education student at KHS -- had allegedly been sexually victimized in the bathroom during school hours. However, none of these administrators nor anyone else at KHS, called law enforcement to fulfill their legal duties as mandatory reporters.

According to a written and signed statement obtained by KHS staff, Mills admitted that he "had sexual relations with Amanda at least five times" between the months of March and April 2007 in the bathroom located next to Ms. Wilhelm's classroom. Ex. 52. Mills admitted that Amanda was repeated sexually victimized -- during third period class -- while under the supervision of the KHS Special Education Department. *Id.* School officials never asked Amanda for a statement about these incidents. RP 2795.

In an email dated May 3, 2007, Ms. Wilhelm acknowledges that the restroom in which Mills admits to engaging in sex acts with Amanda "is right next door to the classroom." Ex. 47. However, Ms. Wilhelm admits that "not one of the three adults in the class had any inkling of what was going on." Ex. 47. Ms. Wilhelm's third period class was comprised

of seven special education students, with three adult instructors. RP 3318-3319.

On June 18, 2008, Plaintiffs filed a Complaint for Damages against KSD. CP 9-25. Plaintiffs alleged two causes of action pertaining to KSD: (1) negligence; and (2) failure to report child abuse and/or neglect pursuant to RCW 26.44. CP 22, 24.

Trial commenced on June 13, 2011 and lasted more than six weeks. CP. 2378-2448. On July 27, 2011, the jury found that both KSD and Ms. Patel were negligent on the special verdict form reflecting Amanda's claims. CP 2445. The jury also concluded that both KSD and Ms. Patel failed to report allegations that Amanda had been abused and/or neglected, as required by RCW 26.44. CP 2446.

As briefed below, the trial court's inclusion of Ms. Patel on Amanda's verdict form, and its submission of conflicting and inapplicable jury instructions, impermissibly allowed KSD to argue that Ms. Patel's alleged fault should negate Amanda's damages.

Compounding the error, the trial court allowed the Defendant to deny causation by introducing evidence of Amanda's sexual history, sexual predisposition and birth control.

Although the trial court allowed the Defendant to put Amanda's sexual history on trial to establish Amanda's alleged ability to "consent to

sex," the trial court excluded its own Order which determines that Amanda is legally incapacitated and in need of a full guardianship.

Throughout this six-week jury trial (which should have lasted two weeks), the trial court committed error on several material issues. These errors resulted in extreme prejudice during the presentation of Plaintiffs' case and culminated in a thicket of mish-mash, irreconcilable jury instructions. A new trial is warranted.

B. Procedural History

a. Parental Immunity and Allocation of Fault to the Mother of the Child-Victim

Prior to trial, Plaintiffs filed a Motion Re: Parental Immunity. CP 1349-1356. The purpose of Plaintiffs' motion was two-fold:

> Plaintiffs request an order precluding Defendants from arguing or suggesting that alleged fault or negligence of Amanda's parent [Ms. Patel] should be imputed to Amanda. Plaintiffs further request an Order that Amanda's damages cannot be reduced due to the alleged acts of negligence on the part of her parent. CP 1350.

Defendant's Amended Answer and discovery responses reflected its intention to argue that Ms. Patel was responsible for her daughter's injuries. CP 1351-1352. Plaintiffs' motion demonstrated that the "Washington Supreme Court 'has consistently held a parent is not liable for ordinary negligence in the performance of parental responsibilities.'" quoting *Zellmer v. Zellmer*, 164 Wn.2d 147, 155-156 (2008).

It is reversible error when a trial court denies parental immunity and allows a defendant to impute the alleged fault of a parent to diminish a child's claims. Citing *Chuth v. George*, 43 Wn. App. 640, 642, (1986). CP 1354.

Plaintiffs also cited RCW 4.22.020 which states, in relevant part:

> The contributory fault of one spouse or one domestic partner shall not be imputed to the other spouse or other domestic partner or the minor child of the spouse or domestic partner to diminish recovery in an action by the other spouse or other domestic partner or the minor child of the spouse or other domestic partner, or his or her legal representative, to recover damages caused by fault resulting in death or in injury to the person or property .... CP 1355.

On May 24, 2011, Plaintiffs filed initial motions *in limine*. CP 1689-1708. On May 27, 2011, the trial court issued an Order Re: Plaintiffs' Motion Re: Parental Immunity. CP 1877-1878. The court ruled that Defendant could both apportion fault to Ms. Patel and reduce the damages claimed by her daughter, Amanda, based upon Ms. Patel's alleged negligence. CP 1877. In so ruling, the trial court concluded that RCW 4.22.020 does not apply to a minor child. CP 1877.

During oral argument on Plaintiffs' motions *in limine*, the trial court was reminded that Washington law prohibits using the claimed fault

of Ms. Patel to diminish the damages of her daughter.[1] Nonetheless, the trial court denied Plaintiffs' request for parental immunity. CP 2488.

b. Inconsistent Jury Instructions and Special Verdict Forms

Reflecting the law accurately, Plaintiffs' Proposed Jury Instruction No. 14 stated "The damages claimed by plaintiff, Amanda Hingorani, cannot be reduced based upon the actions or omissions of her parent, Ms. Patel." CP 1959.

After the parties submitted competing jury instructions and special verdict forms, Plaintiffs filed a Brief Regarding Proposed Jury Instructions and Special Verdict Forms. CP 6543-6556. Once again, Plaintiffs' briefing took exception with Defendant's request to allocate fault to Ms. Patel on the special verdict form reflecting Amanda's claims:

> Defendant KSD is barred from diminishing Amanda's claims based upon the alleged contributory negligence of Ms. Patel. See WPI 11.04 (negligence of parent not imputed to child pursuant to RCW 4.22.020). It would be reversible error to allow Defendant KSD to allocate fault to Ms. Patel for any reason. CP 6554-6555.

Plaintiffs' briefing attached a proposed special verdict form reflecting that Ms. Patel should <u>not</u> be identified as a negligent actor on Amanda's special verdict form. CP 6583-6586.

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[1] RP p. 99, l. 10 – RP p. 100, l. 4.

During oral argument on the jury instructions and special verdict forms, Plaintiffs' counsel reminded the trial court that it was clear error to allow Defendant to claim that Ms. Patel was an at-fault entity:

> MR. McLEAN: There's a jury instruction on this issue. It says, the negligence, if any, of a parent is not imputed or charged to his or her child. That is a Washington pattern jury instruction, Your Honor.[2]

Capriciously, the court offered jury instructions that both prohibited ***and*** allowed the jury to diminish Amanda's damages based upon allegations that Ms. Patel was at fault.

Jury Instruction No. 15 states that Ms. Patel's alleged negligence could be considered for purposes of her claim, but <u>not</u> Amanda's claim:

> You may consider whether Madhuri Patel was contributorily negligent regarding her claim on her own behalf but not regarding her claim on behalf of Amanda. If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to Madhuri Patel. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any. CP 6667.[3]

However, other instructions offered by the court contradict Jury Instruction No. 15. Instruction No. 23 asks the jury to determine the

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[2] RP p. 4436, l. 14-21; p. 4437; l. 3-20.

[3] The trial court's Jury Instruction No. 20 also reflects that Ms. Patel's alleged negligence should not be considered for purposes of Amanda's claims. CP 6672.

degree of negligence of several entities, including Ms. Patel, when calculating damages on the special verdict forms provided by the court:

> If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury to the plaintiff. The court will provide you with a special verdict form for this purpose. Your answers to the special verdict form will furnish the basis by which the court will apportion damages, if any. Entities may include the defendant, ***Madhuri Patel***, King County Public Health, Dr. Ruth Conn, Marnee Crawford, Dennis Ballinger. CP 6675. (emphasis added)

Likewise, the special verdict form reflecting Amanda's claims mirrors Instruction No. 23 and directs the jury to consider Ms. Patel's claimed negligence when calculating Amanda's damages. CP 6694-6697.

Compounding the inconsistency between the jury instructions and the special verdict form, during closing argument, defense counsel urged the jury to forego awarding damages to Amanda if it found that her mother, Ms. Patel, was at fault:

> By Mr. Northcraft: If she [Amanda] had the capacity, she willingly did it. She can't -- the district wasn't negligent and doesn't owe her money, because she willingly did something. On the other hand, if she doesn't have the mental capacity, she didn't understand sex, she didn't consent, then every one of those people that knew, ***including the mother***, who is a mandatory reporter herself, Dr. Conn, Clark, and Ms. Crawford should have reported that.
>
> *****
>
> In either theory the district does not owe Amanda Hingorani any money. She either willingly did it or [sic]

other people's fault and failure to report caused this sex to happen.[4]

On July 28, 2011, the jury found that Ms. Patel was a negligent actor on the special verdict form reflecting Amanda's claims. CP 6695. The jury did not award damages to Amanda. CP 6696.

c. Evidence Rule 412

On May 27, 2011, Plaintiffs filed a motion *in limine* seeking to exclude evidence of Amanda's sexual behaviors and sexual predisposition beyond those alleged in the Complaint. CP 1851-1862. The basis for the motion was Evidence Rule 412, commonly referred to as the Rape Shield law.

On June 13, 2011, the Defendant confirmed that it intended to offer evidence of Amanda's sexual behaviors and sexual predisposition both before and after the sexual misconduct alleged in the Complaint. This evidence included that Amanda sought birth control and allegations that she had sex with a cousin several years before the incidents at KHS.

Defendant claimed this evidence was relevant to demonstrate that Amanda had the mental capacity to consent to sex:

> MR. MORRISON: Thank you, Your Honor. The Kent School District requests that it be allowed to present evidence of Amanda Hingorani's sexual behaviors before and after her time at Kentridge High School. Evidence

[4] RP p. 4647, l. 25 – p. 4648, l. 16; p. 4648, l. 21-24.

> offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible and its probative value substantially outweighs the danger of harm to any victim and of any unfair prejudice to any party.
>
> *****
>
> The capacity to consent to sex is a direct issue in this case. The plaintiffs' expert claims that Amanda was victimized by Erik Warren and Matthew Mills because she can't consent to sex. The evidence, however, shows otherwise. Amanda twice got birth control, once even behind her mother's back. She ended a sexual relationship with her cousin because she did not want genetically damaged children.[5]

Defendant's attorneys argued that they must be allowed to introduce evidence of Amanda's past sexual behaviors and predisposition to rebut claims that Amanda suffered harm:

> MR. MORRISON: The District cannot defend this claim without showing Amanda's condition prior to the incidents at Kentridge High School. The District thus needs to show that Amanda made a topless masturbation video prior to the Kentridge incidents, that she was possibly sexually abused by both her cousin and her father. All of this is relevant to Amanda's condition prior to the incidents and thus necessary for showing what damages Amanda has sustained specifically from the Kent School District -- the Kentridge incidents.[6]

Plaintiffs explained that Amanda's capacity to consent to sex is determined by her mental disabilities, not her sexual history, making this evidence both irrelevant and extremely prejudicial:

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[5] RP p. 17, l. 3-13; p. 17, l. 23 – p. 18, l. 6.

[6] RP p. 20, l. 7-16.

> MR. McLEAN: A person's capacity to consent to sex turns on their cognitive functioning. It doesn't turn on the number and nature of sexual encounters they're engaging in. Just like the prostitute who's raped. You can't -- you can't go back and say, 'But you're a prostitute; you must have consented this time.'[7]

Plaintiffs also argued that the protections of Evidence Rule 412 would be eviscerated if a defendant could avoid the Rule's protections by arguing that a victim's ancillary sexual history was necessary to rebut the victim's claim of damages. RP p. 43, l. 12 - p. 44, l. 5.

The trial court disagreed and suggested that the ancillary evidence of Amanda's sexual history should be admitted because Amanda's decision to bring a claim for sexual misconduct also caused her harm:

> THE COURT: Isn't there a substantial harm to the victim in the bringing of the case and in all the material that's been put in the public record already about all of these matters that we're now talking about...?
>
> MR. McLEAN: No. I -- first of all, to -- to say that an individual who has been the victim of sexual misconduct causes themself harm by bringing a case is -- is -- is really not right.[8]

Plaintiffs reminded the trial court that Evidence Rule 412 was designed to exclude unrelated, inflammatory sexual innuendo and to encourage victims to come forward when faced with sexual misconduct:

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[7] RP p. 34, l. 10-16.

[8] RP p. 40, l. 17-25.

> MR. McLEAN: Now, it takes a lot of courage for someone to come into Court and say, I've been -- I've been the victim of sexual misconduct. It is an insidious offense against a person's bodily integrity. If you -- if you make a ruling like this that says, If you bring this up in court, your life's an open book, what do you think that does to the incentive to come forward and report sexual misconduct? Would you do it? Would I do it? I certainly wouldn't if it meant everything I've ever done in my life is going to be put on trial. That's why we have ER 412, Your Honor.[9]

Over Plaintiffs' objection, the court allowed Defendant to offer evidence regarding Amanda's ancillary sexual predisposition relying upon Washington criminal statutes regarding capacity to consent to sex:

> THE COURT: Amanda's request for birth control pills is relevant to the issue of her capacity to consent under the criminal statute that defines capacity to consent to sexual intercourse, because it does -- it does show her under -- it tends to show an understanding of -- of the consequences of sexual intercourse.[10]

The trial court also allowed the Defendant to introduce evidence that, at age 7 or 8, Amanda had allegedly been victimized by her cousin more than eight years before she was victimized in the restrooms at KHS. CP 5942.

In addition, the court determined that if Defendant's expert concluded it was relevant, evidence of Amanda's sexual history was admissible:

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[9] RP p. 41, l. 19 – p. 42, l. 5.

[10] RP p. 55, l. 4-9.

> THE COURT: With respect to sex with her cousin, I -- again, if -- if -- if the defense expert finds that that is relevant to her damages claim and if there is some competent proof of that having happened, then that would be -- then -- then that would be something where the probative value substantially outweighs the danger of harm and that would be admissible. And also with respect to capacity because she evidently testified in her deposition or told someone -- I guess she could be impeached on having told someone that she felt she would -- she stopped having sex with him because she thought she would have messed up children. So that shows a capacity to understand the consequences of sexual intercourse.[11]

d. Exclusion of Plaintiffs' Evidence Regarding Incapacity

Days after the trial court allowed Defendant to introduce evidence of Amanda's ancillary sexual behaviors and predisposition from several years prior to the incidents alleged in the Complaint, the court excluded critically-relevant, and more recent, evidence showing that Amanda lacked capacity to consent to sex.

In July 2008, a Petition for Guardianship was filed on Amanda's behalf. On July 10, 2008, a Guardian Ad Litem ("GAL") was appointed by the King County Superior Court to assess the Petition. CP 1797. On August 7, 2008, the GAL filed her report. CP 1797-1807.

The GAL report noted that "[Amanda] is not able to distinguish when kindness ends and perhaps when harm will begin. She lacks skills and maturity at this time. Amanda can be considered vulnerable." CP

[11] RP p. 56, l. 1-15.

1800-1801. The GAL also noted "[Amanda] is vulnerable to exploitation due to inability to problem solve and assess situations that could be risky or result in harm." CP 1801. The GAL concluded that there were no alternatives to guardianship. CP 1804.

On August 27, 2008, King County Superior Court issued Findings of Fact, Conclusions of Law and Order Appointing Guardian of Person and Estate. CP 2148-2158. The court concluded that Amanda was legally-incapacitated within the meaning of RCW 11.88 and in need of a full guardianship over her person and estate. CP 2151.

On May 31, 2011, Defendant filed a motion *in limine* seeking to exclude the guardianship Order. CP 1894. Defendant argued this evidence was irrelevant because it was "made on August 27, 2008, well over one year after the last event that was the basis of this lawsuit (Matt Mills incident in April 2007)." CP 1895. Defendant also argued that, because the guardianship Order did not assess capacity to consent to sex, it should be excluded. CP 1895-1896.

Plaintiffs responded that, in order for a person to be deemed "legally incapacitated," the Court must find "[t]he individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety." CP 2195. Plaintiffs noted that, under the permissive standard for

relevance, a victim's ability to understand a full range of non-sexual concepts is relevant to assessing capacity to consent to sex. CP 2195.

During oral argument, Plaintiffs noted the inconsistency of admitting allegations that Amanda was victimized by a cousin more than eight years prior to the incidents at KHS, yet excluding a much more recent order from the court which squarely addresses Amanda's lack of capacity:

> MR. McLEAN: It's just like the evidence that they want to put on that she's having sex with her cousin and she's getting birth control, and that tends to show that she has capacity. If we're going down that path, we ought to be able to say ["]hang on a second. There's other evidence that shows she doesn't have capacity.["][12]

Despite allowing the Defendant to introduce allegations that Amanda sought birth control and had sex with her cousin more than five years before the incidents in the KHS restrooms, the trial court excluded critical evidence relating to Amanda's capacity to consent. Specifically, the trial court granted Defendant's motion *in limine* to exclude "any evidence or argument regarding appointment of a guardian for Amanda Hingorani." CP 2478.

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[12] RP p. 344, l. 7-22.

e. Criminal Jury Instructions Re: Consent and Capacity

Plaintiffs filed a motion *in limine* seeking to prevent Defendant from introducing criminal standards and burdens of proof during trial. CP 1701-1702. Criminal standards are irrelevant and likely to confuse the jury by suggesting a different burden of proof than actually applied. CP 1702. On June 23, 2011, the trial court granted Plaintiffs' motion. CP 2488. All criminally-related evidence or argument was excluded from trial.

Following the close of evidence, Defendant proposed several jury instructions reflecting criminal standards applicable to statutory rape and consensual sex. CP 2024; 2026-2027. One jury instruction stated, "It is a crime for a person to have sexual intercourse when a person is incapable of consent by reason of being mentally incapacitated. CP 2026.

Plaintiffs took exception to Defendant's proposed instructions regarding the elements of the crime of sexual abuse, particularly since the court had excluded all evidence of criminal activity during the trial.[13] Once again, Plaintiffs argued that offering Defendant's instructions would conflate the criminal and civil standards and impose a burden of proof that was not applicable:

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[13] RP p. 4344 -4354.

> MR. MOODY: I think any criminal code instruction in a civil case is a dead bang guarantee an appeal. I think it's conflating civil and criminal standards. There's no place for that in a negligence case...[14]

Over Plaintiffs' objection, the court instructed the jury regarding criminal standards applicable to sexual abuse, consensual sex and mental incapacity. CP 6678; 6683; 6684; 6685; 6686.

One instruction ignored the dispute regarding Amanda's capacity to consent to sex and imposed a *mens rea* of intentionality, "'sexual abuse' means that a child has been the victim of an intentional sexual offense that is a violation of the Washington state criminal code." CP 6683.

f. Denial of Plaintiffs' Motion to Amend Complaint

Prior to trial, Plaintiffs filed a Motion for Leave to Amend Complaint. CP 2325-2328. From the outset of this litigation, Plaintiffs pursued claims for failing to report abuse and/or neglect pursuant to RCW 26.44. CP 195. Plaintiffs' proposed amendment did not rely upon additional evidence or allege additional facts, but merely added a claim with additional remedies available under RCW 74.34, the Abuse of Vulnerable Adult Act. CP 2339.

During oral argument on Plaintiffs' motion, the trial court was not concerned about the timeliness of the request, but whether Amanda

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[14] RP p. 4345, l. 8-13.

qualified as a "vulnerable adult" under the terms of the statute. The court sought supplemental briefing regarding whether RCW 74.34. is ambiguous in terms of its application:

> THE COURT: I'm not concerned so much about the timeliness here, but -- but what I'm – what I'm going to ask you to do is if I'm short on -- on statutory construction, I'm going to give you the opportunity to present me with information on the issue of the ambiguity that arises from the definition, because it appears that the subcategories are in direct conflict with the legislative purpose of the statute with all the -- the understanding of the statute by the regulating agencies and -- and the history, the reason the statute was enacted in the first place.[15]

Citing RCW 74.34.020(16), Plaintiffs' supplemental briefing emphasized that, because Amanda is developmentally disabled,[16] she fits the definition of "vulnerable adult" under the statute. CP 2460.

Because the text of the statute clearly applies to all developmentally disabled individuals, no ambiguity exists regarding its application to Amanda. CP 2459. Consequently, it was not necessary, or appropriate, for the trial court to engage in further statutory construction – the statute clearly applies to Amanda. CP 2459.

After reviewing the parties' supplemental briefing regarding whether RCW 74.34 was ambiguous, the court denied Plaintiffs' motion to amend. CP 2472-2473.

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[15] RP p. 247, l. 1-11.

[16] CP 842.

IV. LEGAL ARGUMENT

A. Standard of Care for Washington Schools

Washington law recognizes that a public school assumes an *in loco parentis* role over students. In the words of one Washington court:

> [A]s it supervises the pupils within its custody, the district is required to exercise such care as a reasonable prudent person would exercise under the same or similar circumstance. The basic idea is that a school district has the power to control the conduct of its students while they are in school or engaged in school activities, and with that power goes the responsibility of reasonable supervision.

J.N. v. Bellingham Sch. Dist., 74 Wn. App. 49, 56-57 (1994).

As part of this duty of supervision, it is well-established that "a school has a duty to protect students in its custody from reasonably anticipated dangers." *Niece v. Elmview Group Home*, 131 Wn.2d 29, 44 (1997) (citing *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 320 (1953)); *J.N.*, 72 Wn. App. at 49.

B. The Trial Court Erred by Denying Parental Immunity

As recently as 2008, the Washington Supreme Court reaffirmed the doctrine of parental immunity finding that "a parent is not liable for ordinary negligence in the performance of parental responsibilities." *Zellmer v. Zellmer*, 164 Wn.2d 147, 155-156 (2008) [(citing *Talarico v. Foremost Ins. Co.*, 105 Wn.2d 114 (1986) (disallowing negligent supervision claim where parent started backyard fire then left three-year-

old son unattended, resulting in severe burns); *DeLay v. DeLay*, 54 Wn.2d 63 (1959) (disallowing negligence action against parent who instructed son to siphon gas, resulting in burn injuries)].

The parental immunity doctrine bars not only direct claims by the injured child against the parent, but also bars claims by tort defendants seeking contribution, indemnity or apportionment of fault against a parent based on the parent's alleged negligence. *See Jenkins v. Snohomish Cy. PUD 1*, 105 Wn.2d 99 (1986) (disallowing contribution claim where parents allowed child to wander free in neighborhood; child electrocuted at utility power station); *Baughn v. Honda Motor Co.*, 105 Wn.2d 118, 119 (1986) (disallowing contribution or indemnity claim where parents allowed sight-impaired child to ride motorcycle, resulting in fatal crash).

In *Chuth v. George*, a minor was struck by a vehicle on his way home from school. The child's estate and the child's parents sued the school district and vehicle's driver for common law negligence. *Id.*, 43 Wn. App. 640, 642 (1986). Defendants in *Chuth* argued that the child's damages should be reduced because the alleged negligence of his parents caused the child's damages. *Id.* at 647-648. The trial court agreed. However, on appeal, the Court of Appeals confirmed that parental immunity applied and that the trial court committed reversible error by allowing the jury to apportion fault to the parents. *Id.* at 646-647.

The only basis for denying parental immunity is to find that a parent acted willfully or wantonly towards a child. *See Zellmer*, 164 Wn.2d at 147. Washington law recognizes that "'[w]illful' requires a showing of actual intent to harm, while 'wanton' infers such intent from reckless conduct." *Zellmer*, 164 Wn.2d at 147 (citing *Adkisson v. City of Seattle*, 42 Wn.2d 676, 684-85, (1953) and quoting RESTATEMENT (SECOND) OF TORTS § 500 (1965)).

Here, Defendant offered no evidence, nor did the trial court require any, that Ms. Patel acted with willful or wanton conduct evidencing her intent to cause harm to her disabled daughter while her daughter was attending school. Absent such evidence, parental immunity is mandatory. As recognized in *Zellmer*, *Talarico*, *Jenkins*, *Cox* and *Chuth*, Ms. Patel is entitled to parental immunity.

Throughout trial, Defendant urged the jury to find that the alleged negligence of the victim's parent was the source and cause of damages. This was wrong. The trial court's refusal to grant parental immunity requires a new trial. *See Chuth*, 43 Wn. App. at 646-647. The trial court's denial of parental immunity undermined the primary objective of the doctrine which is "to avoid undue judicial interference with the exercise of parental discipline and parental discretion." *Zellmer*, 164 Wn. 2d at 159.

C. The Trial Court Erred by Allowing the Jury to Diminish Amanda's Damages Based upon the Actions of her Mother

Even if the trial court was correct in concluding that Ms. Patel was not entitled to parental immunity, it committed reversible error by allowing the jury to diminish Amanda's damages based upon Ms. Patel's alleged fault. As described in Section III, b, *supra*, the trial court provided jury instructions and a special verdict form inviting the jury to negate Amanda's damages to the extent it concluded that Ms. Patel was at fault.

Imputing the fault of a parent for purposes of reducing his or her child's damages is expressly prohibited by statute:

> The contributory fault of one spouse or one domestic partner shall not be imputed to the other spouse or other domestic partner or the minor child of the spouse or domestic partner to diminish recovery in an action by the other spouse or other domestic partner or the minor child of the spouse or other domestic partner, or his or her legal representative, to recover damages caused by fault resulting in death or in injury to the person or property ....

RCW 4.22.020.

The trial court ignored the clear directive of RCW 4.22.020 by finding the statute does not apply to minor children. CP 1877. However, Washington courts interpreting RCW 4.22.020 recognize that the statute applies to claims brought by children, as well as adults: [17]

[17] The trial court's conclusion that RCW 4.22.020 does not apply to claims of minor children overlooks that the term "minor children" is used in the statute's heading.

> The direction in RCW 4.22.020 that contributory fault shall not be imputed applies only when a spouse, child or their legal representative brings an independent cause of action for their injury or death, not when the action is for damages incurred under RCW 4.20.010... [18]

Ginochio v. Hesston Corp., 46 Wn. App. 843, 847 (1987).

Moreover, the Washington Pattern Jury Instructions underscore the impropriety of the trial court's decision to allow the jury to consider the alleged negligence of Ms. Patel when assessing the claims of Amanda:

> Contributory negligence, if any, of the child affects the claims of both child and parent, whether the parent was negligent or not. Contributory negligence, if any, of the parent affects the claim of the parent only, ***but does not affect the claim of the child***.

See WPI 11.05 (emphasis supplied); *see also Poston v. Mathers*, 77 Wn.2d 329 (1969); *Griffin v. Gehret*, 17 Wn. App. 546 (1977).

The trial court's finding that RCW 4.22.020 does not apply to minor children was plain error. Both Washington case law and the pattern jury instructions adopted by the Washington Supreme Court make clear that the jury was <u>not</u> entitled to consider the alleged negligence of Ms. Patel when assessing Amanda's claims.

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[18] RCW 4.20.010 applies to actions for wrongful death and is not implicated here.

D. Conflicting Jury Instructions and Inconsistent Special Verdict Forms Require a New Trial

In order for jury instructions to be sufficient, they must: (1) allow counsel to argue their theory of the case; (2) not mislead the jury; and (3) when read as a whole properly inform the trier of fact of the applicable law. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732 (1996). An erroneous or misleading jury instruction is reversible error when it is prejudicial. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92 (1995); *see also Walker v. State*, 67 Wn. App. 611, 617 (1992). It is prejudicial error for the trial court to provide inconsistent and contradictory jury instructions:

> [W]e have held consistently that it is prejudicial error to give irreconcilable instructions upon a material issue in the case. Where instructions are inconsistent or contradictory on a given material point, their use is prejudicial, for the reason that it is impossible to know what effect they may have on the verdict.

Hall v. Corporation of Catholic Archbishop, 80 Wn.2d 797, 804 (1972).

Likewise, when a jury instruction misstates the applicable law, prejudice is presumed. *State v. Wanrow*, 88 Wn.2d 221, 239 (1977). Claimed errors in jury instructions are reviewed *de novo*. *Keller v. City of Spokane*, 104 Wn. App. 545, 551, (2001), *aff'd*, 146 Wn.2d 237 (2002).

Errors in special verdict forms are reviewed under the same standard as jury instructions – *de novo. Capers v. Bon Marche*, 91 Wn.

App. 138, 142 (1998). When read as a whole, the special verdict form must adequately present the contested issues to the jury in an unclouded and fair manner. *See Lahmann v. Sisters of St. Francis*, 55 Wn. App. 716, 723 (1989). A special verdict form is defective when it contradicts accompanying jury instructions. As this Court held in *Capers*:

> Although a special verdict form need not recite each and every legal element necessary to a particular cause of action where there is an accurate accompanying instruction, it may not contain language that is inconsistent with or contradicts that instruction.

91 Wn. App at 144.

Here, the trial court committed reversible error by providing jury instructions that were confusing, misstated the applicable law, and which contradicted other instructions given on the same material issue -- whether the jury could diminish Amanda's damages based upon the alleged negligence of her parent, Ms. Patel. The trial court compounded its error by providing a special verdict form plagued by the same contradictions and inaccurate reflection of the law.

Jury Instructions 15 and 20 directed the jury ***not*** to consider the alleged negligence of Ms. Patel when assessing the claims of her daughter, Amanda. CP 6667; 6672. As stated above, Washington law prohibits the diminution of damages claimed by a child based upon the alleged fault of

a parent. Consequently, Jury Instructions 15 and 20 properly reflect the law.

However, in contrast to Instructions 15 and 20, Jury Instruction 23 directed the jury to attribute negligence to each entity that proximately caused harm, including Ms. Patel. Specifically, the jury was instructed that the entities to which it may assign fault included "defendant, ***Madhuri Patel***, King County Public Health, Dr. Ruth Conn, Marnee Crawford, Dennis Ballinger." CP 6675 (emphasis supplied). The instruction indicated that "the court will provide you with a special verdict form for this purpose."

As the Washington Supreme Court held in *Hall v. Corporation of Catholic Archbishop*, it was prejudicial error to submit jury instructions that are irreconcilable and contradictory on the material question of whether Ms. Patel's alleged contributory negligence should be considered when assessing Amanda's damages. The error was prejudicial because it "it is impossible to know what effect" that these contradictory instructions had on the jury's verdict. *See Hall*, 80 Wn.2d at 804.

The special verdict form provided by the Court was also prejudicially flawed. As this Court recognized in *Capers*, a special verdict form is defective when it contains language that is inconsistent with or contradicts an accompanying jury instruction on the same, material

issue.[19] Here, there is no question that the special verdict form invites the jury to diminish Amanda's damages based upon Ms. Patel's alleged contributory negligence – a statement of law that is irreconcilable with the directive given by Instructions 15 and 20.

Jury Instruction 23, and the special verdict form reflecting Amanda's claims, also misstate Washington law. Both improperly allowed the jury to find that Ms. Patel's alleged negligence could act to reduce or bar recovery by Amanda. Consequently, prejudice is presumed and a new trial is necessary. *See Wanrow*, 88 Wn.2d at 239.

E. The Trial Court Erred in its Application of Evidence Rule 412

Pursuant to Evidence Rule 412, evidence of a victim's sexual history and/or sexual predisposition is presumed inadmissible. ER 412(b). The presumptive exclusion can only be overcome in limited circumstances when "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." ER 412(c).

The principal purpose of Rule 412 is to protect victims from degrading and embarrassing disclosure of intimate details about their

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[19] Similar to the situation in *Capers*, defense counsel compounded the contradictory jury instructions and special verdict form during closing argument by claiming that Amanda should not be awarded damages if the jury concluded that others, including Ms. Patel, were at fault. RP p. 4647, l. 25 – p. 4648, l. 16; p. 4648, l. 21-24.

private lives.[20] *See United States v Cardinal*, 782 F.2d 34 (6th Cir. 1986), *cert denied at* 476 US 1161 (1986); *see also United States v Saunders*, 943 F.2d 388 (4th Cir. 1991); *cert denied,* 502 US 1105 (1992) (evidence that victim was prostitute that traded sex from drugs properly excluded pursuant to Rule 412). The categories of evidence subject to the protections of Rule 412 are broad. *See, e.g., Wolak v. Spucci*, 217 F.3d 157 (2nd Cir. 2000). Rule 412 applies to victims of sexual misconduct occurring at school. *See J.M. v. Hilldale Independent School District No. 1-29*, 397 Fed. Appx. 445 (2010) (student-victim's journal and evidence of other sexual behavior properly excluded pursuant to Rule 412).

Rule 412 bars evidence of sexual predisposition and includes matters "relating to the alleged victim's mode of dress, speech, or lifestyle" *Id.,* (citing *Sheffield v. Hilltop Sand & Gravel Co.,* 895 F. Supp. 105, 109 (E.D. Va. 1995)). Evidence regarding use of contraceptives is inadmissible under Rule 412 since use implies sexual activity. *See, e.g., United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S.Ct. 418 (1992).

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[20] ER 412 is derived from Federal Rule of Evidence 412. Federal case law interpreting an identical federal rule may be used by this Court to construe ER 412. *In re Det. of Stout*, 159 Wn.2d 357, 386 (2007).

A trial court's admission or exclusion of evidence pursuant to Rule 412 is reviewed for abuse of discretion. *United States v. White Buffalo*, 84 F.3d 1052 (8th Cir. S.D. 1996). However, the Supreme Court of the State of Washington makes clear that failure to exercise discretion is an abuse of discretion. *Kucera v. DOT*, 140 Wn.2d 200 (2000). A trial court's decision must also be reversed when it is based on an erroneous view of the law or an incorrect legal analysis. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833 (2007).

The trial court abused its discretion by: (1) abdicating its responsibility to exercise discretion; and (2) applying an incorrect legal analysis when admitting evidence regarding Amanda's past sexual behavior and predisposition. Specifically, the trial court admitted allegations that Amanda was sexually victimized by a cousin (age 8) several years prior to the incidents alleged in the Complaint (age 16). The trial court also erred in admitting evidence that Amanda received a prescription for birth control. CP 180-210, 5942.

It is clear that the trial court failed to exercise discretion. Instead, the trial court deferred to Defendant's expert to determine whether Rule 412 should exclude ancillary sexual evidence several years removed in time:

> THE COURT: With respect to sex with her cousin, I -- again, if -- if -- if the defense expert finds that that is relevant to her damages claim and if there is some competent proof of that having happened, then that would be -- then -- then that would be something where the probative value substantially outweighs the danger of harm and that would be admissible.[21]

Applying *Dix*, the trial court abused its discretion by failing to determine, for itself, the relevancy of this ancillary evidence or prior alleged sexual activity. The danger in allowing "the defense expert" to determine the admissibility of inflammatory and self-serving sexual innuendo evidence is obvious. The protections of Rule 412 would be gutted by allowing one party to determine when the Rule applies. The trial court's failure to apply the balancing test of Rule 412, as required, was an abuse of discretion.

Separately, the court concluded that the allegations regarding Amanda and her cousin, as well as evidence regarding Amanda's efforts to obtain birth control, were relevant to Amanda's capacity to understand the consequences of sexual intercourse under criminal statutes defining capacity.[22] The court's legal analysis was erroneous.

Pursuant to RCW 9A.44.010:

> (4) "Mental incapacity" is that condition existing *at the time of the offense* which prevents a person from

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[21] RP p. 56, l. 1-7

[22] RP p. 56, l. 1-14

> understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

Applying RCW 9A.44.010(4), the Washington Supreme Court makes clear that mental incapacity must be measured by a person's understanding at the time of the offense:

> It is important to distinguish between a person's *general* ability to understand the nature and consequences of sexual intercourse and that person's ability to understand the nature and consequences at a given time and in a given situation. This treatment of the two as identical contradicts the express language of the statute. *RCW 9A.44.010(4)* specifically notes "'mental incapacity' is that condition existing *at the time of the offense* which prevents a person from understanding the nature or consequences of the act of sexual intercourse . . .." (Italics ours.)

State of Washington v. Ortega-Martinez, 124 Wn.2d 702, 716 (1994).

As recognized by *Ortega-Martinez*, evidence that Amanda was allegedly involved in a sexual relationship with her cousin when she was 8 years old has no bearing on her capacity to consent to sex when she was 16 years old -- her age when the incidents occurred at school.

Likewise, the trial court's decision to allow the jury to consider that Amanda may have sought birth control several months before the incidents at school ignores that mental incapacity must be measured at the

specific time of the offense and "contradicts the express language of the statute." *Id.* at 716.

The trial court erred by allowing evidence from several years prior to Amanda's victimization to be utilized to assess her mental capacity at the time of the offense. Consequently, the court abused its discretion.

The trial court's reliance on allegations of prior sexual conduct to demonstrate Amanda's capacity to consent to sex also ignores that the underlying cause of Amanda's incapacity are her life-long developmental disabilities. This Court recognizes that evidence of prior sexual conduct is irrelevant where a victim, like Amanda, suffers from permanent, developmental impairments:

> Where the lack of capacity is based on a permanent, organic condition, it logically follows that prior acts of intercourse cannot demonstrate that the victim understands the nature and consequences because the prior acts may have occurred due to the same lack of capacity. The risk of undue prejudice from the admission of such evidence is high, while the benefit to the defense is insubstantial.

State of Washington v. Summers, 70 Wn. App. 424, 435 (Div. I. 1993).

The *Summers* decision eloquently underscores the impropriety of the trial court's admission of evidence that Amanda allegedly engaged in sexual activity with her cousin several years prior to the incidents at KHS, and evidence that Amanda previously attempted to obtain birth control.

As stated in *Summers*, these "prior acts of intercourse cannot demonstrate the victim understands the nature and consequences because the prior acts may have occurred due to the same lack of capacity." *Id.* at 435.

Stated another way, allegations that Amanda engaged in sexual conduct with a cousin eight years prior to the incidents at school, and attempted to obtain birth control, are not helpful to understand Amanda's capacity to consent to sex because Amanda's severe cognitive limitations persisted throughout the entire period of time.

Even assuming this evidence has minor relevance, Evidence Rule 412 requires its exclusion unless "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." ER 412(c). *Summers* recognizes that this type of evidence is highly prejudicial compared to its relevance: "The risk of undue prejudice from the admission of such evidence is high, while the benefit to the defense is insubstantial." *Id.* at 435.

The trial court's admission of evidence of Amanda's alleged past sexual behaviors and/or predisposition was the result of flawed legal analysis, blind deference to the "defense expert," and constitutes an abuse of discretion. Amanda's capacity to consent to sex turns on her mental

disabilities, not on alleged events that occurred long before the incidents which give rise to this litigation.

Where there is a risk of prejudice arising from improperly admitted evidence and "no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673 (2010) (*quoting Thomas v. French*, 99 Wn.2d 95, 105 (1983)).

Here, there is no way to know the value the jury placed upon the highly inflammatory allegations that Amanda had engaged in sexual conduct with a cousin eight years prior to the incidents giving rise to her claims. Likewise, the trial court improperly admitted evidence that, several months before the sexual victimization at issue, Amanda was prescribed birth control. Because this evidence was improperly admitted, a new trial is required.

F. The Trial Court Erred by Excluding Evidence that Amanda was Legally Incapacitated

The trial court allowed Defendant to offer allegations of years-prior sex-related conduct despite the presumptive exclusionary provisions of Rule 412. Compounding the prejudice, the trial court excluded relevant evidence that Amanda lacked capacity to consent.

Specifically, the court denied Plaintiffs' efforts to introduce the Findings of Fact, Conclusions of Law and Order Appointing Guardian of Person and Estate issued by the King County Superior Court on August 27, 2008. CP 2148-2158. This Order sets forth facts regarding Amanda's significant disabilities and finds that Amanda is legally "incapacitated" under Washington law. It is difficult to imagine a more relevant and probative piece of evidence to demonstrate Amanda's lack of capacity than the Superior Court's findings on the same issue.

The trial court's refusal to admit this Order prevented Plaintiffs from presenting critically relevant evidence regarding Amanda's disability and to counter the argument that Amanda had capacity to consent to sex.

Under ER 401, evidence that has "any tendency" to make a material fact more or less probable is relevant. "Even a minimal logical relevancy is adequate if there exists a reasonable connection between the evidence and the relevant issues." *State v. Suarez-Bravo*, 72 Wn. App. 359, 364, (1994); *see also City of Kennewick v. Day*, 142 Wn.2d 1, 8-10, (2000) ("the threshold for relevance is extremely low under ER 401"); *State v. Luvene*, 127 Wn.2d 690, 706-07(1995) (so long as evidence "has at least some tendency to make the inference" regarding a disputed fact, it is relevant.); *State v. Bebb*, 44 Wn. App. 803, 814, (1986) ("the connection

between evidence and relevant issues need not be a necessary connection but only *reasonable* and not latent or conjectural.") (emphasis in original).

Applying the "extremely low" threshold for relevancy, there is no question that evidence of Amanda's legal incapacity, and the facts underlying that finding, are relevant to whether Amanda had capacity to consent to sex. The court-appointed GAL found that Amanda "lacks skills and maturity" and that she is "vulnerable to exploitation due to inability to … assess situations that could be risky or result in harm." CP 1800-1801.

In support of its argument that this evidence was inadmissible, Defendant cited one criminal case: *State v. Ortega-Martinez*, 124 Wn.2d 702 (1994). However, the *Ortega-Martinez* court recognized that a full range of evidence must be considered when determining whether a person has capacity to consent to sex:

> In assessing whether the … victim had a condition which prevented him or her from understanding the nature or consequences of sexual intercourse at the time of an incident, the jury may evaluate, in addition to that person's testimony regarding his or her understanding, other relevant evidence such as the victim's demeanor, behavior, and clarity on the stand. It may also take into consideration a victim's IQ, mental age, ability to understand fundamental, nonsexual concepts, and mental faculties generally, as well as a victim's ability to translate information acquired in one situation to a new situation.

Id. at 714.

The Superior Court found Amanda to be "legally incapacitated" pursuant to RCW 11.88 and in need of a full guardianship of her person and estate. In order for an individual to be deemed legally "incapacitated," a Court must find that:

> [T]he individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

RCW 11.88.010(1)(a).

The trial court's exclusion of the guardianship Order is not justified under ER 403, which allows exclusion of relevant evidence only if the risk of prejudice posed by admission substantially outweighs its probative value. Rule 403 is considered an extraordinary remedy and the burden is on the party seeking to exclude evidence to demonstrate that the unfair prejudice substantially outweighs its probative value. *Carson v. Fine*, 123 Wn.2d 206 (1994). Evidence should be considered unfairly prejudicial only if it has the capacity to skew the truth-finding process. *See State v. Reed*, 100 Wn. App. 776 (2000). As one court interpreting the identical federal rule pointed out, the rule was not designed to permit the court to "even out" the weight of the evidence. *Barrera v. E.I. Du Pont De Nemours and Co., Inc.*, 653 F.2d 915, 921 n. 6 (5th Cir. 1981). Unless the balance is substantially skewed towards unfair prejudice, the evidence must be admitted. *Lockwood v. AC &S, Inc.*, 44 Wn. App. 330 (1986).

Defendant argued that Amanda had the capacity to consent. Notwithstanding ER 412 (the Rape Shield Law), Defendant was allowed to offer inflammatory and remote evidence supporting its argument. At a minimum, Plaintiffs were entitled to offer similar, more recent evidence of Amanda's profound cognitive limitations.

G. The Trial Court Erred by Giving Criminal Jury Instructions

Prior to trial, Plaintiffs moved *in limine* to exclude evidence of criminal charges or convictions relating to the abuse of Amanda because such evidence would confuse civil and criminal standards. The trial court granted the motion. CP 2488.

Despite this pre-trial ruling, at Defendant's request and over Plaintiffs' objections, the trial court gave jury instructions involving forcible compulsion, statutory rape and consensual sex -- all based on criminal standards and designed for use in criminal trials. See CP 6678; 6683; 6684; 6685; 6686. For example, one jury instruction improperly suggests that no liability can arise without the criminal *mens rea* of intent: "'sexual abuse' means that a child has been the victim of an intentional sexual offense that is a violation of the Washington state criminal code." CP 6683.

Confusing or inconsistent jury instructions merit reversal. *Cox v. Spangler,* 141 Wn.2d 431, 442 (2000). Giving jury instructions that

improperly increase or shift the burden of proof is reversible error. *See, e.g., State v. Savage*, 94 Wn.2d 569, 577 (1980); *see also Vogler v. Henry Ford Hospital*, 177 Mich. App. 552, 557 (Mich. 1989) reversed on other grounds ("instructional errors which increase a plaintiff's burden of proof are grounds for a reversal of a jury verdict."); *Deshotel v. Atchison, T. & S. F. R. Co.*, 126 Cal. App. 2d 303, 309 (Cal. 1954) (it is "erroneous" to instruct jury with criminal section of vehicle code in civil action).

Courts recognize that it is improper to use criminal instructions in civil actions or vice-versa, as this can be confusing to the jury. *See, e.g., United States v. Buras*, 633 F.2d 1356, 1360 (9th Cir. 1980) (explaining that the availability of civil remedies "is irrelevant to the issue of criminal liability" and finding that a jury instruction regarding civil remedies "would serve only to confuse the jury"); *See also Kyle v. Fok*, 18 Ohio St 2d 70 (Ohio 1969) (use of the word "guilty" in civil jury instructions was reversible error).

Whether the facts presented at trial satisfy a criminal standard is not germane. Washington courts repeatedly recognize the impropriety of introducing criminal concepts into civil trials. *See, e.g., Young v. Seattle*, 25 Wn.2d 888, 894-895 (1946); *In re Estate of Kissinger*, 166 Wn.2d 120, 128 (2009); *Leavy v. Metro. Life Ins. Co.*, 20 Wn. App. 503, 507 (1978). Yet, that is precisely what the trial court allowed. By giving multiple

criminal instructions, the trial court committed prejudicial error, necessitating a new trial.

H. The Trial Court Erred in Denying Plaintiffs' Motion to Amend

Prior to trial, Plaintiffs moved to amend the Complaint to include claims under RCW 74.34. The proposed new claim was based on identical facts and evidence. The sole effect of the proposed amendment was a new legal theory and additional statutory remedies. *See* CP 2339.

Based on a finding that there was an "ambiguity" in RCW 74.34, the trial court denied the motion to amend. Specifically, the court suspected a discrepancy between the title of the statute ("Abuse of Vulnerable Adults Act") and the statutory definitions, which define a "Vulnerable Adult" as anyone with a developmental disability. RP p. 247, l. 1-11.

Under Civil Rule 15(a), leave to amend a pleading "shall be freely granted as justice requires." According to Civil Rule 15(b), courts will allow pleadings to be amended to conform to the evidence, even after trial has commenced. Courts routinely allow amendment of pleadings close to, during, or even after trial. *See, e.g., Herron*, 108 Wn.2d at 166 (1987) ("Appellate decisions permitting amendments have emphasized that the moving parties in those cases were merely seeking to assert a new legal theory based upon the same circumstances set forth in the original

pleading."); *Kirkham v. Smith*, 106 Wn. App. 177, 181 (2001) (allowing amendment three weeks before trial because "the trial court recognized the similarity between the essential elements of [plaintiff's] FIPA claim and their already-existing misrepresentation claim and concluded that the amendment would not prejudice the [non-moving party]").

To deny a motion to amend, a court is required to find that amendment will be "meritless, futile, or unfairly prejudicial." *Haselwood v. Bremerton Ice Arena*, 137 Wn. App. 872, 889 (2007). Therefore, a moving party need not demonstrate that the claim will be successful, or make *a prima facie* case, to support the new allegations.

Here, Plaintiffs sought to add a single cause of action under the Abuse of Vulnerable Adults Act, RCW 74.34. This statute requires "mandated reporters" like KHS staff to make reports of suspected abandonment, abuse, neglect or exploitation to the proper authorities. RCW 74.34 mirrors the reporting requirement found at RCW 26.44.

Like RCW 26.44, RCW 74.34 provides a cause of action against anyone who abandons, abuses, neglects or exploits a person protected by the statue. RCW 74.34.200. However, RCW 74.34 contains an additional remedy. The prevailing party in a civil claim under RCW 74.34 is permitted to recover damages, attorneys' fees and costs, including guardian and expert costs. RCW 74.34.200(3).

Although the statute is entitled the "Abuse of Vulnerable Adults Act," it expressly applies to a much larger population. The Act defines "Vulnerable Adult" to include any person "[w]ho has a developmental disability as defined under RCW 71A.10.020[.]" RCW 74.34.020(16)(c). There is no dispute that Amanda is developmentally disabled.[23] By statutory definition, Amanda qualifies as a "vulnerable adult."

Despite the clarity found in the statute's definition section (any person "who has a developmental disability"), the trial court looked to legislative history or other sources. This was erroneous. The starting point for a statutory analysis is "[i]f a statute's meaning is plain, then the court must give effect to the plain meaning as expressing what the legislature intended." *Campbell v. DSHS*, 150 Wn.2d 881, 894 (2004); *see also State v. Hale*, 146 Wn. App. 299, 307 (2008) ("We will not add to or subtract from the clear language of a statute even if we believe the legislature intended something else but did not adequately express it."). If a statute contains plain language, a court should not conduct further analysis and must apply the statute as written.

Washington courts have held that titles or headings are not controlling: "Rather than look to the caption or label, we look to the actual

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[23] In its Answer to Plaintiffs' Complaint, Defendant admits that Amanda is "developmentally disabled." CP 10, at ¶2; and CP 842, at ¶2.

text of the statute to interpret its meaning[.]" *State v. T.A.W.*, 144 Wn. App. 22, 26 (2008). Therefore, "[w]hile such labels are meant to be helpful, they cannot change the meaning of the statute in question." *Id.* at 26. The courts have been emphatic that when a statute is unambiguous, titles or headings cannot create an ambiguity. *See, e.g.*, *State v. Lundell*, 7 Wn. App. 779, 782 (1972) ("Of course where the meaning of the act is clear and unambiguous, courts will not consider section headings and marginal notes.").

For almost a century, the Supreme Court of the State of Washington has held that, even if titles and headings are specifically enacted by the legislature and may therefore be clues to legislative intent, those materials cannot be used to change clear statutory language:

> [W]hen the body of the act is clear, plain and concise, leaving nothing open to construction, we cannot hold that a headnote, even though enacted by the legislature as a part of the act, should be permitted to cast doubt upon that which is not doubtful, and be made an excuse for construing that which, without it, would require no construction.

State v. Crothers, 118 Wash. 226, 228 (1922).

The statute applies to any individual with a developmental disability, not just "adults" with a developmental disability. Moreover, case law indicates that RCW 74.34 was intended to apply a broader population than geriatric citizens:

> It is clear that the abuse of vulnerable adults act was intended to protect those who are unable to care for themselves and whose physical or mental disabilities have placed them in a dependent position. See RCW 74.34.005 (legislative findings). In light of this objective, this statute often appears in the context of **protecting elderly, mentally ill, *and* *disabled persons*** from abuse, neglect, financial exploitation, and abandonment by family members, care providers, and other persons with whom the vulnerable adult has a relationship.

Calhoun v. State, 146 Wn. App. 877, 889 (2008) (emphasis supplied).

As a result of the trial court's denial of the motion to amend, Plaintiffs were prevented from asserting a claim against Defendant. RCW 74.34 claims incorporate distinct standards and additional remedies. The Act "creates a separate cause of action from common law negligence that includes its own standard by which we measure the claimed misconduct or inaction." *Raven v. Dep't of Soc. & Health Servs.*, 167 Wn. App. 446, 464 (Div. I, 2012) (citing *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 134 (2006)). Another critical difference is that, unlike negligence claims, RCW 74.34 claims do not require a claimant to prove proximate cause. *See Raven*, 167 Wn. App. at 464-65.[24]

The only basis for the trial court's denial of Plaintiffs' motion to amend was its finding that Amanda was not an "adult." As a matter of

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[24] The omission of a causation requirement for RCW 74.34 claims is significant considering that the jury concluded that Defendant violated the similar reporting requirements of RCW 26.44 *et seq.*, but did not cause damages.

law, the trial court's error requires that Plaintiffs be permitted to amend their complaint and present RCW 74.34 claims to a jury.

V. CONCLUSION

The trial court committed reversible error in several areas. Each serves as an independent basis for a new trial. However, Plaintiffs respectfully request that the Court of Appeals address each assignment of error, providing direction to the trial court on remand.

RESPECTFULLY SUBMITTED this 19th day of June, 2012.

HAGENS BERMAN SOBOL SHAPIRO LLP

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No. 67711-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MADHURI PATEL,

Appellants and Cross-Respondents,

v.

KENT SCHOOL DISTRICT,

Respondent and Cross-Appellant.

APPEAL FROM THE
SUPERIOR COURT FOR KING COUNTY WASHINGTON
HONORABLE HOLLIS HILL

CERTIFICATE OF SERVICE

HAGENS BERMAN SOBOL SHAPIRO LLP
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I, Nicolle Grueneich, declare under penalty of perjury of the State of Washington that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within-entitled cause. I am an employee of Hagens Berman Sobol Shapiro LLP and my business address is 1918 8th Ave., Suite 3300, Seattle, Washington 98101.

On June 22, 2012, I caused an original of the following document(s) to be filed with the Clerk of the Court, Washington State Court of Appeals, Division I:

1. **APPELLANT'S OPENING BRIEF**
2. **APPELLANT'S RENEWED MOTION TO FILE OVERLENGTH BRIEF**

On June 22, 2012, I caused a copy of the preceding document(s) and **a CD containing the Verbatim Report of Proceedings** to be served on the parties in the manner indicated:

VIA HAND DELIVERY

Mark Northcraft
Northcraft Bigby and Biggs
819 Virginia St., Suite C-2
Seattle, WA 98101

Dated this 22nd day of June 2012 at Seattle, Washington.

Nicolle Grueneich

Nicolle Grueneich