67711-0

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No. 67711-0-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

MADHURI PATEL,

Appellants and Cross-Respondents,

v.

KENT SCHOOL DISTRICT,

Respondent and Cross-Appellant.

APPEAL FROM THE
SUPERIOR COURT OF KING COUNTY, WASHINGTON
HONORABLE HOLLIS HILL

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 4

A. The Evidence Revealed That Amanda and Matt Were Willingly and Consensually Involved in a Brief Sexual Adventure 11

B. The Jury's Reasonable Conclusion That Neither Amanda nor Ms. Patel Were Damaged by any Actions of the School District is Fully Supported by Testimony 14

C. Ms. Patel's Proportionate Fault was Properly Considered 15

D. The Trial Court Properly Exercised its Discretion Involving the Evidence That Amanda Ended a Prior Consensual Sexual Relationship with her Cousin, and That She Sought Birth Control; Both Being Relevant to Issues of Capacity and Damages 16

E. Amanda's Guardianship Order, Issued More Than a Year After the Events of This Lawsuit, and Based on Different Legal Standards, Was Properly Excluded From Evidence 19

F. The Trial Court Issued Jury Instructions on Criminal Sexual Abuse 20

G. The Trial Court Properly Denied the Plaintiffs' Improper Attempt to Amend the Complaint to Add Claims Under the Vulnerable Adult Statute 21

TABLE OF CONTENTS *(continued)*

III. ARGUMENT 22

A. THE TRIAL COURT PROPERLY RULED THAT FAULT MUST BE APPORTIONED TO THE MOTHER, AN IMMUNE PARTY 22

B. RCW 4.22.020 DOES NOT BEAR ON THIS CASE, NOR DOES IT AFFECT ALLOCATION OF FAULT TO A PARENT 25

C. THE TRIAL COURT USED APPROPRIATE DISCRETION TO BALANCE THE ISSUES RELATING TO EVIDENCE ADMITTED PURSUANT TO ER 412 32

1. The Evidence That Amanda Had a Sexual Relationship with Her Cousin, and Ended it Because She Was Afraid They Might Have Genetically Damaged Babies is Properly Admitted to Show Her Capacity to Consent. 34

2. The ER 412 Evidence is Also Admissible on the Issue of Amanda's Damages 40

D. THE TRIAL COURT PROPERLY DENIED THE INTRODUCTION OF AMANDA'S GUARDIANSHIP ORDER 41

E. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE DEFINITION OF SEXUAL ABUSE 46

TABLE OF CONTENTS *(continued)*

1. The Court's Jury Instructions on Sexual Abuse Were Also Proper for the Plaintiffs' Claims Under the Reporting Statute, RCW 26.44.030 48

2. The Court's Instructions on Capacity to Consent are Substantially Identical to the Restatement (Second) of Torts 49

F. THE TRIAL COURT PROPERLY DENIED THE PLAINTIFFS' ATTEMPT TO ADD CLAIMS UNDER RCW 74.34.035, THE VULNERABLE ADULT STATUTE 51

G. THE JURY CONCLUDED THAT AMANDA WAS NOT PROXIMATELY DAMAGED, AND THERE IS NO BASIS ON WHICH THAT VERDICT CAN BE OVERTURNED 54

CROSS APPEAL 56

I. STATEMENT OF THE CASE 56

A. The Trial Court Incorrectly Allowed the Jury to Consider Whether Certain Events Triggered a Duty to Report Pursuant to RCW 26.44.030 56

B. The Jury Should Not Have Been Asked to Determine Whether the District Was Negligent by Not Presenting Medical Releases to Amanda's Counselor 57

C. Ms. Patel's Claim Should Have Been Dismissed at the Close of the Plaintiffs' Case Because She Failed to Present Any Competent Evidence of

TABLE OF CONTENTS *(continued)*

Damages 59

II. ASSIGNMENTS OF ERROR ON CROSS APPEAL 60

III. ISSUES ON CROSS APPEAL 62

IV. ARGUMENT 63

A. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO CONSIDER WHETHER CERTAIN EVENTS TRIGGERED A DUTY TO REPORT, PURSUANT TO RCW 26.44.030 63

1. Amanda's Stealing Money from Her Mother and Giving it to Her Friends is Not Abuse as Defined by the Reporting Statute 65

2. Francine Wilhelm's Questions About Amanda Hedstrom Possibly Grooming Amanda Hingorani Were Speculation, and Do Not Give Rise to the Level of a Reasonable Suspicion of Child Abuse, and Were Not Required to Be Reported 66

B. THE DISTRICT'S ALLEGED FAILURE TO PROVIDE COUNSELOR WITH THE RELEASES FOR AMANDA'S RECORDS COULD NOT HAVE RESULTED IN DAMAGES BECAUSE THE COUNSELOR WOULD REFUSE TO RELEASE THE RECORDS EVEN WITH A RELEASE FORM 67

TABLE OF CONTENTS *(continued)*

C. THE TRIAL COURT IMPROPERLY ALLOWED THE JURY TO CONSIDER WHETHER MADHURI PATEL WAS DAMAGED 69

1. There is No Competent Evidence Showing Ms. Patel Was Damaged by the Incidents at Kentridge 70

2. Dr. Urquiza Did Not Express a Medical Opinion Regarding Ms. Patel's Damages 73

D. THE TRIAL COURT GAVE INACCURATE JURY INSTRUCTIONS REGARDING THE DISTRICT'S DUTY 74

V. CONCLUSION 78

TABLE OF AUTHORITIES

PAGE(S)

CASES

Adamson v. Traylor,
60 Wn.2d 332, 373 P.2d 961 (1962) 24

Adcox v. Children's Orthopedic Hosp.,
123 Wn.2d 15, 864 P.2d 921 (1993) 30

Anfinson v. FedEx Ground Package Sys., Inc.,
174 Wn. 2d 851, 281 P.3d 289 (2012) 77

Baughn v. Honda Motor Co.,
105 Wn.2d 118, 712 P.2d 293 (1986) 23, 24

Beggs v. Dep't of Soc. & Health Servs.,
171 Wn.2d 69, 247 P.3d 421 (2011) 64, 65

Burton v. Lehman,
153 Wn.2d 416, 103 P.3d 1230 (2005) 29

C.J.C. v. Corp. of the Catholic Bishop of Yakima,
138 Wn.2d 699, 985 P.2d 262 (1999) 34, 46

Chavez v. Waterford Sch. Dist.,
2011 U.S. Dist. LEXIS 25758 (E.D. Mich. 2011) 44

Chhuth v. George,
43 Wn. App. 640, 19 P.2d 562 (1986) 24

Christensen v. Royal Sch. Dist.,
156 Wn.2d 62, 124 P.3d 283 (2005) 26, 47, 48

TABLE OF AUTHORITIES *(continued)*

City of Auburn v. Hedlund,
165 Wn.2d 645, 201 P.3d 315 (2009) 32

City of Spokane v. Rothwell,
166 Wn.2d 872, 215 P.3d 162 (2009) 29

Cox v. Hugo,
52 Wn.2d 815, 29 P.2d 467 (1958) 24

Dot Foods, Inc. v. Dep't of Revenue,
166 Wn.2d 912, 215 P.3d 185 (2009) 49

Gorman v. Garlock, Inc.,
155 Wn.2d 198, 118 P.3d 311 (2005) 29

Gregg v. King County,
80 Wn. 196, 141 P. 340 (1914) 24

Griffin v. Gehret,
17 Wn. App. 546, 564 P.2d 332 (1977) 26

Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue,
106 Wn.2d 391, 722 P.2d 787 (1986) 72

Harris v. Drake,
152 Wn.2d 480, 99 P.3d 872 (2004) 69

Hartley v. State,
103 Wn.2d 768, 698 P.2d 77 (1985) 54

Hue v. Farmboy Spray Co.,
127 Wn.2d 67, 896 P.2d 682 (1995) 30

In re Blessing,
174 Wn.2d 228, 273 P.3d 975 (2012) 28

TABLE OF AUTHORITIES *(continued)*

Jenkins v. Snohomish Cy. PUD 1,
105 Wn.2d 99, 713 P.2d 79 (1986) 23, 24

Kilian v. Atkinson,
147 Wn.2d 16, 50 P.3d 638 (2002) 29

Knight v. Trogdon Truck Co.,
191 Wn. 646, 71 P.2d 1003 (1937) 69

Lambert v. Smith,
54 Wn.2d 348, 340 P.2d 774 (1959) 70

McLeod v. Grant County School District,
42 Wn.2d 315, 255 P.2d 360 (1953) 75, 76, 77

Peck v. Siau,
65 Wn. App. 285, 827 P.2d 1108 (1992) 77

Poston v. Mathers,
77 Wn.2d 329, 462 P.2d 222 (1969) 26

Rest. Dev., Inc. v. Cananwill, Inc.,
150 Wn.2d 674, 80 P.3d 598 (2003) 29

Rodriguez v. Loudeye Corp.,
144 Wn. App. 709, 189 P.3d 168 (2008) 53

Seattle First Nat. Bank v. Shoreline Concrete Co.,
91 Wn.2d 230, 588 P.2d 1308 (1978) 22, 25

State v. Cheatam,
150 Wn.2d 626, 81 P.3d 830 (2003) 73

State v. DeVries,
149 Wn.2d 842, 72 P.3d (2003) 72

TABLE OF AUTHORITIES *(continued)*

State v. Frost,
141 N.H. 493, 686 A.2d 1172 (1996) 37, 38

State v. Martinez,
78 Wn. App. 870, 899 P.2d 1302 (1995) 72, 74

State v. Powell,
126 Wn.2d 244, 893 P.2d 615 (1995) 33

State v. Rehak,
67 Wn. App. 157, 834 P.2d 651 (1992) 42

State v. Summers,
70 Wn. App. 424, 853 P.2d 953 (1993) 36, 37

State v. Wanrow,
88 Wn.2d 221, 559 P.2d 548 (1977) 30, 31

Stiley v. Block,
130 Wn.2d 486, 925 P.2d 194 (1996) 30

Tincani v. Inland Empire Zoological Soc'y,
124 Wn.2d 121, 875 P.2d 621 (1994) 54

Travis v. Bohannon,
128 Wn. App. 231, 115 P.3d 342 (2005) 77

Vasey v. Vasey,
44 Wn. App. 83, 721 P.2d 524 (1986) 27

Wolff v. Coast Engine Prods.,
72 Wn.2d 226, 432 P.2d 562 (1967) 41

Zellmer v. Zellmer,
164 Wn.2d 147 (2008) 23

TABLE OF AUTHORITIES *(continued)*

STATUTES

RCW 4.16.340 . . . . . 46, 48

RCW 4.16.350 47

RCW 4.22.005 25

RCW 4.22.020 . . . . . 25, 26, 27, 28

RCW 4.22.070 . . . . . 22, 23, 24

RCW 4.24.010 . . . . . 59, 70

RCW 9A.44 21

RCW 9A.44.010 43

RCW 9A.44.010 (4) 34, 44, 50

RCW 9A.44.050(1)(b) 34

RCW 9.92.020 64

RCW 11.88 . . . . . 20, 42, 43, 45

RCW 26.28.010 52

RCW 26.44 . . . . . 49, 53, 66

RCW 26.44.010 65

RCW 26.44.020 (1) 49, 63

RCW 26.44.020 (2) 52

TABLE OF AUTHORITIES *(continued)*

RCW 26.44.020 (20) 63

RCW 26.44.030 . . . . . 48, 52, 53, 56, 61, 62, 63, 64, 65, 67

RCW 26.44.080 64

RCW 71A.10.020 52

RCW 74.34 . . . . . 53, 66

RCW 74.34.020 (17) 52

RCW 74.34.035 . . . . . 21, 51, 53, 64

RCW 74.34.035 (1) 53

WAC 388.15.009 (3) 49

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 52 (7TH EDITION) 52

BLACK'S LAW DICTIONARY 398 (7TH EDITION) 77

ER 401 . . . . . 33, 42

ER 402 . . . . . 33, 42

ER 403 43

ER 412 . . . . . 18, 32, 33, 39, 40

ER 703 . . . . . 71, 72

ER 801 71

TABLE OF AUTHORITIES *(continued)*

ER 802 71

ER 803(4) 70

RESTATEMENT (SECOND) OF TORTS 892A 50, 51

I. INTRODUCTION

This appeal arises from a case in which a student, Amanda Hingorani, and her mother, Madhuri Patel, sued the Kent School District alleging negligent supervision. The plaintiffs relentlessly pursued the School District through pre-litigation claims, through discovery, and through trial, and they even enlisted the media to help them try to cast aspersions against the School District. After a long, difficult trial, the School District was vindicated. The jury awarded nothing to either the student or her mother. This appeal follows.

Amanda Hingorani was a mildly intellectually disabled 16-year old student in the high school special education program. During her junior year at school, Amanda and another student, Matthew Mills, began a sexual relationship. The trial evidence showed that both Amanda and Matt were willing participants, and on at least one occasion, they engaged in sexual acts in a school bathroom near their classroom. Despite the plaintiffs' constant use of the words sodomy, rape, and abuse – before, during, and after the trial, the jury agreed that the students were voluntarily engaging in the sexual behavior.

The plaintiffs' approach at trial was quite unusual: neither Amanda nor her mother testified at trial. In fact, neither of the plaintiffs even attended the trial (other than a brief appearance by the mother during jury

selection). For whatever strategic reason they might have had, the plaintiffs remained completely hidden from the jury. Nevertheless, Amanda asked the jury to award her $6.5 million in damages, and her mother asked for $1 million in damages. Without any testimony from either Amanda or her mother, the plaintiffs claimed that Amanda was so severely mentally incapacitated that she could not consent to sexual activities, so she must have been subjected to forcible sex at school. The jury rejected that incredible leap of logic and accepted the plentiful evidence to the contrary.

The plaintiffs attempted to establish their entire case on the backs of hired expert witnesses. After calling four expert witnesses, the plaintiffs presented a single fact witness – a teacher who never taught and who did not even know Amanda until after the events that form the basis of this lawsuit. The plaintiffs failed to call any of the School District teachers, counselors, or administrators who knew Amanda and who worked with her at school. Likewise, the plaintiffs failed to call any of the many witnesses who dealt with Amanda's mother while Amanda was a student in the Kent School District.

The jury rejected the plaintiffs' attempt to spoon-feed a contrived and inaccurate version of the facts, and they found that neither Amanda nor her mother was damaged by any conduct of the School District. The

jury further concluded that Amanda was not damaged by her sexual involvement with Matt Mills.

The plaintiffs refuse to accept the jury's conclusion. They raise seven assignments of error, none of which are persuasive. The plaintiffs argue that the Trial Court erred by: 1) declining to accept the plaintiffs' incorrect position of the issue of parental immunity; 2) allowing the jury to consider the mother's well-demonstrated fault; 3) claiming that the special verdict form was inconsistent with jury instructions; 4) letting the jury learn about Amanda's mental capacity, knowledge and consent to sexual activities as shown by her request for birth control, and her own description of her sexual relationship with her cousin; 5) excluding misleading evidence of a guardianship order created more than one year after the events with Mr. Mills; 6) using criminal statutes as a standard for determining the arguments and issues relating to the unsupported claims of sexual abuse; and 7) denying the plaintiffs' last-minute request to amend the complaint to add a statutory claim that did not apply to this case. As is more fully described below, each of the assignments of error fail, and the Court should deny the plaintiffs' appeal.

In the unlikely event that the Court finds any basis for reversing the jury's verdict, the School District presents its own assignments of error and requests that the entire verdict be overturned in light of errors made at

the trial court level, and which prejudiced the District.

II. STATEMENT OF THE CASE[1]

In April 2007, Amanda Hingorani, was a 16-year old mildly mentally retarded high school girl who engaged in sexual acts with a special education classmate named Matthew Mills, in a school bathroom. Ex. 52, RP 2512:14-21. Matt, who was 18 years old at the time, believed Amanda was his girlfriend. RP 2212:7-2213:2, 2240:22-24.

Although the Kent School District classified Amanda as mildly mentally retarded, her actual performance in school was considerably higher than her cognitive data suggested. Ex. 6 at KSD 1656; Ex. 35 at KSD 0005; RP 3722:8-19. During her freshman year of high school, the 2005-06 school year, Amanda was placed in a combination of special education and general education classes and she did well in her general education math, science, and elective classes. RP 3722:8-19.

In April of her freshman year, Amanda's mother found a note and

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[1] The District objects to the plaintiffs' Statement of the Case. RAP 10.3 requires that all parties present a fair statement of the case. The plaintiffs' Statement is neither fair nor objective, and the plaintiffs do not even attempt to present an accurate picture of the trial testimony. They completely fail to present any citation to trial testimony, and instead present their own skewed interpretation of a few of the documents used at trial. In their appellate materials, the plaintiffs completely ignore six weeks of trial testimony – much of which directly contradicts their presentation of the facts and their interpretation of the documents.

emails showing that Amanda was stealing money from her mother and giving it to friends and fellow students, Amanda Hedstrom, Erik Warren, and Tayana Bryant. Ex. 75; Ex. 104 at KSD 4071-73. Although the emails between Amanda and Erik Warren contained sexually explicit language, there was no indication that any of the students were actually involved in sexual relationships at school or in any other place. Ex. 75.

When the mother brought the e-mails to the school's attention, Associate Principal Kimberley Edwards spoke to both Amanda and Erik Warren, both of whom confirmed no sexual relationship, and there was no other evidence showing that the two students were sexually involved. RP 2924:4-5. However, because Eric and Tayana admitted asking Amanda to steal money from her mother, they were both placed on long-term suspension. RP 2937:8-13; RP 2593:12-22. Neither Eric nor Tayana returned to Kentridge again, so the issue was promptly and fully resolved. RP 2950:3-8; RP 2593:12-22. Amanda Hedstrom and Amanda Hingorani did continue in school together, but both signed no-contact orders, forbidding them from contacting one another. RP 2950:9-20. Amanda Hingorani had no further problems with those students. RP 1501:5-23.

The District also worked with Amanda's mother and moved Amanda to a more restrictive special education classroom with Francine Wilhelm for the remainder of her freshman year. RP 3720:23-3724:16;

RP 3087:17-3088:19. Ms. Wilhelm's classroom is in a separate building with only four classrooms, separated from the general population students. RP 3110:18-3111:7. The school also provided escorts to walk Amanda between classes, and to walk her to and from the bus during the remainder of the 2005-2006 school year. RP 3730:12-3732:15.

The next fall, during Amanda's sophomore year, as part of the IEP team, Ms. Patel twice met with school officials to discuss Amanda's education and supervision plan. RP 3725:12-3727:4; RP 3757:9-3758:25. Although Ms. Patel asked the school to provide the extraordinary measure of having a one-on-one para-educator with Amanda at all times during the school day, she refused to tell the school what she privately knew about the subject. RP 3733:4-20; 3757:4-25. Marnee Crawford, Amanda's counselor from Kent Youth and Family Services (KYFS) also attended both meetings. RP 3725:12-3727:4. At the first meeting on September 13, 2006, Ms. Crawford said that there were reasons to be concerned with Amanda's safety if she was left unsupervised, but neither Ms. Crawford nor the mother would elaborate. RP 3742:14-3743:18. They both kept the school people completely in the dark. The jury learned that Ms. Crawford knew what the District did not: Amanda said she had sex with Erik Warren in a bathroom at Kentridge during the spring of her freshman year. Ex. 217 at KYFS 595. The IEP team that worked directly to address

Amanda's needs at school never learned about that history. Ms. Crawford testified that she intentionally withheld the information from the school, for "privacy" reasons. RP 3447:6-3449:10. Likewise, the mother intentionally withheld valuable information. At trial, Jennifer Grajewski, Kentridge High School's special education director, testified that she repeatedly pressed for details regarding the concern about the bathroom, but none were provided. RP 3743:9-3745:12.

The jury learned that schools are bound by the legal requirement that students must be educated in the least restrictive environment, which dictates that students may not be restricted or given such a high level of supervision unless specific need can be demonstrated. RP 3729:8-18. Based on the information provided to the team, the team determined that one-on-one supervision was neither appropriate nor allowable for Amanda. RP 3759:1-5. The IEP team, of which the parent is a member, determined that Amanda would stay in her support center room with Francine Wilhelm, with escorts between classes, but she would not have one-on-one supervision. RP 3758:4-3765:12. Amanda's formal, written IEP provided for limited supervision outside of class, and the supervision language was quite specific:

> [S]taff escorts Amanda to and from her classes. Upon arrival at school, Amanda is escorted to her first class. At days end she is walked to her bus. In this way, staff is able

to provide the safety and close monitoring needed.[2]

Ex. 35 at KSD 0005.

The jury heard that, on the day of the second meeting at which Amanda's supervision was discussed, October 17, 2006, Amanda privately told her mother that she had sex with Erik Warren in a school bathroom the previous year, before Eric was suspended, and before Amanda was moved to Ms. Wilhelm's classroom. Ex. 222. Despite learning this very important information, Ms. Patel never informed the school of the very important information she held. RP 3759:6-9.

The plaintiffs claimed at trial that the school should have taken better steps to "protect" Amanda, but the testimony and other evidence shows that the mother and the counselor withheld the critical information, and left the school operating with inadequate information. (Appellants' Opening Brief, pg. 6-7). In her brief, Ms. Patel alleges that she told Kentridge staff that Amanda was being sexually victimized at school in spring 2006 but, as noted, she never took the stand and testified about that at trial. And, as the jury saw, Ms. Patel's own note demonstrates that she did not learn about Amanda and Erik Warren until October 17, 2006. Ex.

---

[2] In her Opening Brief, the plaintiffs claim that the Kent School District agreed to provide one-on-one supervision by quoting parts of Amanda's IEP. Appellants' Opening Brief, pg. 10. In fact, no witness testified that the District agreed to provide one-on-one supervision. Ex. 35.

222. The jury heard from multiple witnesses that neither the counselor nor the mother ever told them about Amanda having sex at school before the Mills incident.

Ms. Wilhelm was careful to keep an eye on Amanda. Even though it was not required by the IEP, Ms. Wilhelm often provided additional supervision for her. RP 3188:12-25; 3110:4. One of Ms. Wilhelm's aides initially escorted Amanda to the bathroom right outside her classroom and Amanda would eat lunch with Ms. Wilhelm. RP 3188:12-3189:5; RP 3166:21-24. Understandably, Amanda was not happy about being escorted and having strict supervision. Ex. 217 at KYFS 550. Amanda's counselor, David Bennett, described how Amanda talked about her frustration with being followed everywhere by a school staff person. *Id.* Because of Amanda's progress, by February 2007, Amanda's mother and her teacher were discussing easing some restrictions for Amanda. RP 3223:20-3224:1.

The jury saw that the bathroom, that is the subject of this case, is right next to Ms. Wilhelm's classroom. Ms. Wilhelm eventually stopped escorting Amanda the few feet to the bathroom, because it was not part of her IEP, and Ms. Wilhelm felt that Amanda had earned that privilege. RP 3242:20-3243:14. Still, the teacher watched the clock to ensure that Amanda was not gone for very long – and Amanda was never gone for

more than five minutes. RP 3246:1-4. Unbeknownst to Ms. Wilhelm, during that brief time, Amanda apparently engaged in sexual acts with Matthew Mills. RP 3322:7-11; Ex. 52.

Very soon after Matt and Amanda's activities began, on April 27, 2007, Assistant Principal Molly King came across Amanda and Matt Mills hugging in the hallway. Hugging in the hallways is not unusual with high school students, but in Amanda's case, the school was trying to be particularly vigilant. RP 1836:17-1837:5. Ms. King noticed Matt standing behind Amanda with his arms around her waist, and Amanda was leaning back against him. Amanda was comfortable and she was smiling. *Id.* Ms. King notified Ms. Wilhelm, and Ms. Wilhelm promptly notified Amanda's mother about the incident. Ex. 46. That evening, when Amanda's mother confronted Amanda, Amanda told her mother that she had sex with Matt on April 23 and April 24, 2007, in the boys' bathroom. Ex. 46. The jury also learned that, although they really did not know how to do it, Matt and Amanda tried to have anal sex because Amanda did not want to get pregnant. Matt told the jury that it was Amanda's idea to do it that way. RP 2223:12-14; 2225:1-8.

Because the plaintiffs declined to present a balanced and objective recitation of the facts elicited at trial, we will attempt to do so on an issue-by-issue basis.

A. The Evidence Revealed That Amanda and Matt Were Willingly and Consensually Involved in a Brief Sexual Adventure.

For years prior to trial, the plaintiffs claimed that Amanda was "forcibly raped" by Matthew Mills. RP 33:18-34:5. That tactic, however, abruptly shifted at trial, and the plaintiffs instead argued that Amanda could not consent to sex due to mental incapacity. RP 4538:24-4539:4. The plaintiffs finally accepted that the overwhelming evidence proves that Amanda freely engaged in her activities with Matt.

The testimony, including Amanda's own words, showed that she knew what she was doing, and she did so voluntarily. For example, Amanda's counselor testified that "[f]reedom to meet with boys in order to be physically intimate with them is a huge concern for [Amanda]. Matt wants me to meet him during the assembly or leave for the school day but I always have escorts." Ex. 38, KYFS 561. That was December 19, 2006, (well before the incident at issue here). The jury also learned that Amanda wrote a note to Matt, expressing her interest in him:

> "Hey Matt. What's up with life. I really love you + like you lots! Do you have a cell phone so I can call you when I get my cell phone? I do want you to kiss me. Also I was wondering are you going to ask me out to homecoming? I love your hugs there (sic) so combortable (sic). ***Do you want to do you know what whenever your (sic) ready***. Write me back. I really miss you a lot and think of us! Ok bye! Loveya."

Ex. 132 at KSD 3611 (emphasis added).

The counselor also told the jury that Amanda said "[Matt] has been trying to get me to meet him during assemblies but I can't get away from the escort. . . . I want to but I don't want to get kicked out of my house." Ex. 217 at KYFS 569. And the counselor noted that "[Amanda] is very frustrated that she has no privacy to be sexual with Matt." Ex. 217 at KYFS 560. The school was never told about Amanda's desire to be intimate with Matt (or anyone else).

After discovering Amanda and Matt's secret, Amanda's mother took her to Harborview Medical Center. The experienced trauma nurse told the jury what Amanda said: "What happened was, I went to the bathroom and Matt, this guy, he went behind me. He asked if I wanted to have sex, and I said, um, like, okay. So, he took me to the boys' bathroom. He took my pants off. He took his pants off, and he did it from the back." Ex. 220 at Harborvw M C 12. Amanda said this happened twice. *Id.* The jury learned that Amanda was relaxed and in no distress as she described her activities. Ex. 220 at Harborvw M C 13.

The police were also asked to investigate the incident, including the mother's claim that Amanda was "forced" to have sexual activities with a boy at school. Detective Belinda Ferguson, a highly experienced investigator of sexual allegations and crimes, testified that Amanda said

that she fully consented and participated with Matt: "[Amanda] said she liked Matt and he liked her. He asked her if she wanted to have sex, she agreed and the two went into the bathroom (boys) together. She said after she and Matt were hugging in the hall and the vice principal talked with them." Ex. 221 at KC Sheriff 8. "Amanda was very calm talking about the incident. I asked her if Matt forced her to do anything she didn't want to do, she said no." *Id.* Detective Ferguson concluded that there was no crime: they were consensual acts between students.

Although Amanda's attorneys hid her from the jury, the jury did get to "meet" Amanda through portions of her video deposition testimony. The jury saw Amanda describe herself as a willing participant, and how she and Matt tried to avoid detection:

> Q. And did you know that it wouldn't be appropriate to have sex in the bathroom at school?
>
> A. Correct.
>
> Q. Why would not be [appropriate]?
>
> A. Because it's [not] the right place and the right time.
>
> ...
>
> Q. And then you said he kissed you?
>
> A. Yes.
>
> Q. At any time that you were having sex with Matt in the bathroom, did anyone come in?

A. Actually, once, yes, somebody did.

. . .

Q. Did you or Matt say anything while this person was in the bathroom?

A. No.

Q. Did you try to keep quiet?

A. Yes.

Q. Why did you do that?

A. Because we didn't want to get, you know, caught.

RP 2303:19-2305:13.

The jury's conclusion that Amanda was willing, if not eager, to try to have relations with Matt is supported by considerable evidence.

B. The Jury's Reasonable Conclusion That Neither Amanda nor Ms. Patel Were Damaged by any Actions of the School District is Fully Supported by Testimony.

After six weeks in trial, the jury concluded that neither Amanda nor her mother was damaged by any actions of the School District. CP 2445-47. They found that both the mother and the District were negligent, but proximate cause was lacking, and Amanda suffered no damages. *Id.* The jury also concluded that both Madhuri Patel and the District failed to report "suspected" abuse or neglect, but again, that failure did not proximately lead to any damages. *Id.* With regard to Ms. Patel's separate

claims, the jury found that the District was not negligent, and that she was not damaged. *Id.*

The jury considered lengthy, detailed evidence, and concluded that the plaintiffs failed to prove that the School District is liable to Amanda or her mother as the result of Amanda's secret activities with Matt. Those conclusions are fully supported by the evidence.

C. Ms. Patel's Proportionate Fault Was Properly Considered.

The mother's proportionate fault was clearly at issue in this case, and the District proved that Ms. Patel was an at-fault party, because she had knowledge of Amanda's sexual activities at school, but she failed to tell the school. CP 6657; RP 4617:1-4620:4. The plaintiffs incorrectly argue that the doctrine of parental immunity bars apportionment of fault to a parent. CP 349-356; CP 1698-1700. The Court properly instructed the jury on the issue. RP 99: 10-100:13; CP 6694-6701; CP 6675.

> JURY INSTRUCTION NO. 23:
>
> 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...
>
> Entities may include the defendant, Madhuri Patel, King County Public Health, Dr. Ruth Conn, Marnee Crawford, Dennis Ballinger.

CP 6675. The referenced jury instruction is completely consistent with

Washington law, which requires a jury to allocate fault to all at-fault entities, including immune parties such as parents. It is important to note, however that, even though the mother was found to be negligent, no fault was allocated to her because the jury concluded that Amanda was not damaged. CP 6694-6697. Even though no allocation was done, the plaintiffs complain that the instruction was incorrect and prejudicial. There is no support for that argument.

The plaintiffs also incorrectly argue that the contributory negligence instruction, No. 15, was incorrect and prejudicial. In fact, the Court properly instructed the jury that contributory negligence applies to the mother's own claims, but not Amanda's claims:

> 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 Ms. Patel.

CP 6667. The instructions, when viewed as a whole, correctly state the law and apply it to the case.

D. The Trial Court Properly Exercised its Discretion Involving the Evidence That Amanda Ended a Prior Consensual Sexual Relationship with her Cousin, and That She Sought Birth Control; Both Being Relevant to Issues of Capacity and Damages.

The plaintiffs' theme at trial was that Amanda could not consent to

any sexual activities due to her alleged lack of understanding. Psychological expert, Dr. Shirley Feldman-Summers,[3] who examined Amanda, and who reviewed all of the relevant records, offered contrary testimony. RP 4155:7-4156:12. Dr. Feldman-Summers testified that Amanda discussed having sex with her cousin, Sunil Patel – "the penis in vagina kind of sex," which showed that Amanda understood the nature of vaginal intercourse. RP 4160:20-25; Ex. 217 at KYFS 587. Amanda told her counselor that she "told [her cousin] I did not want to [have sex] anymore because I did not want to have a messed up baby since we're cousins.' Ex. 217 at KYFS 571. Dr. Feldman-Summers testified that this statement shows that Amanda knew the consequences of sex and has the capacity to say no to sexual contact, and Amanda's fear of having genetically damaged children is a sophisticated concept showing that Amanda understands the possible consequence of having relations with somebody that is close in your family's blood line. RP 4118:20-

[3] At trial, the plaintiffs' counsel, David Moody, showed a complete disrespect for the court, Dr. Feldman-Summers, and all women. Mr. Moody stated in closing argument: [Dr. Feldman-Summers has] got her hand in the school district's pocket and they've got their hand up her you-know-what and she's just their mouthpiece. RP 4521:22-4522:2. While stating this, Mr. Moody made hand gestures suggesting a hand going up a woman's skirt. Later, Mr. Moody said of Dr. Feldman-Summers: This was a hired gun, a witness that whored herself out intellectually for money. RP 4554:5-6.

4120:7;RP 4177:25-4179:10; Ex. 217 at KYFS 587.

Dr. Feldman-Summers also noted that Amanda was very assertive in acquiring birth control and that Amanda freely demonstrated knowledge that condoms were used to prevent pregnancy and sexually transmitted diseases. RP 4155:7-4156:12; RP 4162. Amanda also told her counselor "My friend with a car can't take me and I want to go on birth control because Eric wants me to have a baby with him but I am not ready." Ex. 217 at KYFS 589. Again, Dr. Feldman-Summers testified that this showed that Amanda knew the effects of having sexual relations. RP 4118:20-4120:7.

Although the plaintiffs later complained about the Court allowing the testimony about birth control and Amanda's sexual relationship with her cousin, the plaintiffs previously used the very same, unredacted records as affirmative evidence in their motion for summary judgment. The plaintiffs' own filings referred to Amanda using birth control and her sexual relationship with her cousin. CP 7122-7134, 7135-7197. After having used the evidence for their own purposes, the plaintiffs sought to bar the School District from using the evidence at trial. The plaintiffs brought a motion in limine pursuant to E.R. 412, seeking to exclude evidence of Amanda using birth control and having sex with Sunil, as well as other acts. CP 1851-1862. The District also brought its own motion

pursuant to ER 412, asking the Court to admit the various pieces of evidence. *Id.*

The Court considered multiple briefs and heard lengthy argument regarding the issues. CP 9479-9553, CP 9466-9473, CP 9474-9478, 9458-9465, 9449-9457; RP 17:3-60:22.[4] The Court applied the balancing test and determined that the probative value of Amanda's use of birth control, and the statements she made regarding sex with Sunil, substantially outweighed the chance of undue prejudice or harm to Amanda. RP 54:19-56:14. Specifically, the Court stated that this evidence was relevant to Amanda's damages and capacity to consent to sex. RP 56:1-14.

The Court did, however, exclude some of the evidence the District sought to use, because the Court determined that its relevance did not substantially outweigh the chance of undue prejudice or harm to Amanda. RP 54:19-56:14. The Court correctly balanced the facts and legal issues and exercised its discretion.

E. Amanda's Guardianship Order, Issued More Than a Year After the Events of This Lawsuit, and Based on Different Legal Standards, Was Properly Excluded From Evidence.

On August 27, 2008, more than a year after the incidents with Matt

[4] Note that the plaintiffs quote only one paragraph (of many) in which the judge explained her reasoning and balancing of the issues.

Mills (and completely unrelated to them), the King County Superior Court issued an unopposed, ex-parte guardianship order appointing Amanda's mother as her guardian. CP 2148-2158. The order contains boiler-plate language stating that Amanda is an incapacitated person within the meaning of RCW Chapter 11.88.[5] The District's motion in limine was granted because the order was issued more than a year after the events of the lawsuit and there were differing standards for capacity to consent to sex and capacity with regard to RCW Chapter 11.88. CP 1895-1896. The trial court agreed that its prejudicial effect and ability to confuse the jury outweighed its relevance, but allowed the plaintiffs to argue the underlying reasons why Amanda was found to be incapacitated. RP 337:4-349:21. The plaintiffs never presented such evidence at trial, and none of the persons involved in the guardianship testified.

F. The Trial Court Issued Jury Instructions on Criminal Sexual Abuse.

The plaintiffs' theory of the case involved claims that the District had an obligation to report "suspected" abuse, including their oft-cited claims of "sexual abuse," "sodomy," "extortion," and other criminal conduct. They based their negligence claims on the issue of sexual abuse,

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[5] The judge correctly denied the plaintiffs' attempt to use the order as evidence that Amanda could not consent to sex.

which necessarily includes issues of legal consent. In fact, the plaintiffs steadfastly argued that Amanda could not consent, as a matter of law. In the instructions, the Court advised the jury on certain criminal standards for sexual abuse. RP 4343:9-4349:23.

Specifically, the Court provided the following instructions:

> Instruction Number 31: "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.
>
> Instruction Number 32 instructed the jury on the criminal standards of statutory rape of a child as defined in RCW 9A.44.
>
> Instruction Number 33 instructed the jury on the meaning of consent and stated that a person with mental incapacity cannot consent.
>
> Instruction Number 34: Mental Incapacity means a condition that at the time of the sexual intercourse or contact prevents a person from 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.

CP 6683-86. Despite inviting the jury to speculate about criminal standards and alleging criminal conduct, the plaintiffs claim that using the instructions was reversible error.

G. The Trial Court Properly Denied the Plaintiffs' Improper Attempt to Amend the Complaint to Add Claims Under the Vulnerable Adult Statute.

Days before trial, the plaintiffs brought a motion to amend the complaint to allege that the Kent School District violated RCW 74.34.035,

a statute dealing with reporting abuse of vulnerable adults. CP 2325-28. At all relevant times, Amanda was a minor, and the Trial Court properly denied the plaintiffs' motion to amend the complaint. The referenced statute relates to *adults*, not minors. The plaintiffs incorrectly claim the judge's decision was in error.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY RULED THAT FAULT MUST BE APPORTIONED TO THE MOTHER, AN IMMUNE PARTY.

As this Court is well aware, before the tort reform statutes came into effect, Washington had a system of joint and several liability, whereby defendants who were liable to a plaintiff for an indivisible harm were each liable for the entire harm done, regardless of their proportionate fault. *Seattle First Nat. Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 588 P.2d 1308 (1978). In 1986, the legislature completely revised that outdated scheme, by enacting RCW 4.22.070, which requires a jury to determine the percentage of total fault attributable to ***every entity which caused the claimant's damages*** with the single exception of entities immune from liability to the claimant under Title 51 RCW [Industrial Insurance]. The statute provides a mechanism to distribute fault among tortfeasors, and it expressly states that allocation of fault is done for immune parties. Laws of 1986, ch. 305, RCW 4.22.070. The clear

language of the statute tells us that defendants cannot be forced to pay for damages caused by immune parties. In the case at hand, the District is only liable for its proportionate share of the fault, taking into account the fault of all parties, including dismissed parties such as KYFS and the counselors, and immune parties, such as parents.

Washington recognizes the limited parental immunity doctrine, whereby parents are immune from claims by their children unless their behavior rises to the level of wanton misconduct." *Zellmer v. Zellmer*, 164 Wn.2d 147, 154, 188 P.3d 497 (2008). *Jenkins v. Snohomish Cy. PUD 1*, 105 Wn.2d 99, 105, 713 P.2d 79 (1986) (citations omitted). Parental immunity also acts to bar contribution and indemnity actions against parents to recover for awards to their children. *See Jenkins*, 105 Wn.2d 99; *Baughn v. Honda Motor Co.*, 105 Wn.2d 118, 119, 712 P.2d 293 (1986). The parental immunity cases tell us that (1) children may not sue their parents for negligence, and (2) defendants may not obtain indemnity or contribution from parents.

Here, the plaintiffs are attempting to persuade this court that – simply because a parent has parental immunity – fault may not be allocated under RCW 4.22.070. That argument is patently incorrect and it is contrary to both the intent and the clear language of the statute, which requires juries to determine the fault of immune parties. It is important to

note that no Washington court has ever agreed with the plaintiffs' position. The plaintiffs' reliance on *Chhuth v. George*, 43 Wn. App. 640, 719 P.2d 562 (1986) is misguided. *Chhuth* was decided prior to RCW 4.22.070 being enacted,[6] and Washington did not even have its current system of apportioning fault when *Chhuth* was decided. The discussion of apportioning fault in *Chhuth* actually refers to a contribution action against a parent, which is clearly barred by parental immunity. *Id.* at 646-47. Similarly, none of the other cases cited by the plaintiffs address allocation of fault pursuant to RCW 4.22.070. *See Jenkins v. Snohomish Cy. PUD 1,* 105 Wn.2d 99, 713 P.2d 79 (1986); *Baughn v. Honda Motor Co.*, 105 Wn.2d 118, 712 P.2d 293 (1986); *Cox v. Hugo*, 52 Wn.2d 815, 329 P.2d 467 (1958); *Gregg v. King County*, 80 Wn. 196, 141 P. 340 (1914); *Adamson v. Traylor*, 60 Wn.2d 332, 373 P.2d 961 (1962).

There was never an issue at trial as to whether Ms. Patel was entitled to parental immunity, because neither her daughter nor any defendant sought damages from Ms. Patel. The only question was whether fault could be allocated to a parent, and the Court reached the obvious conclusion that fault is properly allocated to parents. The Court

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[6] The Tort Reform Act of 1986 took effect on August 1, 1986. Laws of 1986, ch. 305, 910. *Chhuth* was decided on April 29, 1986. 43 Wn. App. 640.

recognized that allocating fault reaches the desired effect of having a defendant such as the District only pay for its own share of fault, and not the percentage of fault attributable to a parent. The parent remains immune, and she is not subject to an award of damages. The effect of the allocation is on the defendant; the defendant cannot be forced to pay the portion of damages allocated to an immune party.

Further, Ms. Patel had her own individual negligence claim against the District, so the jury had to consider her own fault for the comparative negligence issues. Ms. Patel's individual claims are subject to the normal rule that contributory fault diminishes her claim pursuant to RCW 4.22.005. The District thus was properly allowed to discuss Ms. Patel's fault for Amanda's damages.

B. RCW 4.22.020 DOES NOT BEAR ON THIS CASE, NOR DOES IT AFFECT ALLOCATION OF FAULT TO A PARENT.

The plaintiffs incorrectly argue that RCW 4.22.020 overrides the tort reform act and prevents a defendant from allocating fault to a parent. Before the tort reform statutes came into effect, Washington had a system of joint and several liability, whereby defendants who were liable to a plaintiff for an indivisible harm were each liable for the entire harm done, regardless of their proportionate fault. *Seattle First Nat. Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 588 P.2d 1308 (1978). Generally,

contributory fault of a plaintiff was a complete bar to recovery prior to 1981. *Christensen v. Royal Sch. Dist.*, 156 Wn.2d 62, 66, 124 P.3d 283 (2005). However, a minor child's claim would not be barred by the contributory fault of a *parent,* in an action brought by a minor child against a third party. *Poston v. Mathers*, 77 Wn.2d 329, 462 P.2d 222 (1969); *Griffin v. Gehret*, 17 Wn. App. 546, 564 P.2d 332 (1977). In other words, the child's own claim would not be barred simply because one of the child's parents was partially at fault for the injury (the parent's negligence is not imputed onto the child).

The general rule was codified in 1973 by RCW 4.22.020; at first the statute only applied to actions brought by spouses against third parties, but in 1981 it was amended to include claims brought by minor children:

> The contributory fault of one spouse shall not be ***imputed to*** the other spouse or ***the minor child*** of the spouse to diminish recovery in an action by the other spouse or the minor child of the spouse, or his or her legal representative, to recover damages caused by fault resulting in death or in injury to the person or property, whether separate or community, of the spouse. In an action brought for wrongful death, the contributory fault of the decedent shall be imputed to the claimant in that action.

RCW 4.22.020 (1973), RCW 4.22.020 (1981) (emphasis added). Notably, when the references to claims brought by minor children were added, the legislature added the language "of the spouse" to the end of the first sentence. The statute served to clarify that the fault of a parent or spouse

would not be imputed to another. The statute was important because it kept defendants from arguing that the negligence of one party could be imputed to another – which was historically important in intra-spouse and intra-family situations, where imputation can sometimes be applied. As Division One of the Court of Appeals described (prior to the Tort Reform Act of 1986), the statute merely dictates that husbands and wives will be treated like everyone else in tort law. *Vasey v. Vasey*, 44 Wn. App. 83, 96, 721 P.2d 524 (1986). There is no disparity of treatment which can form the basis of a constitutional challenge. *Id.*

As the Court will surely notice, the case at hand does not involve ***imputation*** of fault between family members; it involves nothing more than the garden-variety method of allocating fault among at-fault parties. The Court should not be confused by the plaintiffs' attempt to apply RCW 4.22.020 to this case. The concept of imputing fault to another family member is an entirely different concept than the tort reform method of allocating fault between entities. The allocation must be made to all entities with immunity, such as parents protected by parental immunity.

In simple terms, *every* plaintiff's damages are reduced by the proportionate fault of released and immune parties. That has been the case for nearly thirty years; plaintiffs – whether they are children or not – cannot force defendants to pay damages that are attributable to other

entities, even if those entities are immune from suit. Here, the School District pays for only its own share of damages. That is truly one of the hallmarks of the tort reform legislation: defendants do not pay 100% of the damages if there are other entities which are also at fault.

The Washington Pattern Jury Instructions clearly describe the allocation process to be used in every case in which released and immune entities share fault with a defendant. For example, instructions state that the contributory negligence of a parent affects the claim of the parent only, but does not affect the claim of a child, which is in conformity with the statutory scheme; a parent's negligence affects only that parent's claim, and a child's comparative negligence only affects the child's claim. The negligence of one is not imputed to the other. The plaintiffs' reliance on RCW 4.22.020 is simply misplaced.

Statutory interpretation involves questions of law that the court of appeals reviews de novo. *In re Blessing*, 174 Wn.2d 228, 231, 273 P.3d 975 (2012). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Id.* Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *Id.* If a statute is susceptible to two or more reasonable interpretations, it is

ambiguous. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). If a statute is ambiguous, the court may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

Statutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). The court must also avoid constructions that yield unlikely, absurd or strained consequences. *Id.* To resolve apparent conflicts between statutes courts generally give preference to the more specific and more recently enacted statute. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 210, 118 P.3d 311 (2005). Courts may not read into a statute matters that are not in it. *Id.* Courts do not favor repeal by implication but where potentially conflicting acts can be harmonized, the court construes each to maintain the integrity of the other. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 877, 215 P.3d 162 (2009). But where the conflict is irreconcilable, a more recent statute takes priority over an older statute. *Id.*

As noted above, the question of the mother's own negligence was an important, necessary, and proper part of the work the jury did in this case. With only their own speculative conclusions as support, the plaintiffs

incorrectly argue that the jury instructions were somehow misleading or confusing. The jury instructions were proper.

On appeal, civil jury instructions are reviewed de novo, to determine whether they permit the parties to argue their theories of the case, whether they are misleading, and whether they accurately inform the jury of the applicable law. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 36, 864 P.2d 921 (1993). And, even if an instruction erroneously states the applicable law, there is no reversible error unless a party can demonstrate prejudice. *Hue*, 127 Wn.2d at 92. An error is prejudicial only where the outcome at trial is affected. *Stiley v. Block*, 130 Wn.2d 486, 499, 925 P.2d 194 (1996).

Here, the plaintiffs incorrectly rely on *State v. Wanrow*, 88 Wn.2d 221, 239, for the proposition that prejudice is presumed when a jury instruction contains an erroneous statement of law. (Appellant's Opening Brief, pg. 36). However, the Supreme Court actually held that prejudice is not presumed if it affirmatively appears that the error was harmless. *Wanrow*, 88 Wn.2d at 237, 559 P.2d 548 (1977). An error on a verdict form is treated similarly; it is reversible only if there is prejudice. *See Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92-93, 896 P.2d 682 (1995).

The question becomes, then, if one assumes for the sake of

argument that fault should not be allocated to the mother, were the jury instructions and verdict form so misleading as to be prejudicial to the plaintiffs – or was the error harmless? A review of the instructions shows that any error was harmless because, as they should, the instructions treated Amanda and her mother as separate parties, each with her own instructions. There is no credible reason to believe that, merely because the jury was asked to determine the percentage of fault for the mother – while being instructed not to do so for Amanda – the jury's conclusions about proximate cause and Amanda's claims were prejudicially affected. In fact, the jury was specifically instructed that any contributory negligence of a parent does not affect the claim of the child.

A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *Wanrow*, 88 Wn.2d at 237. Here, the plaintiffs argue that the trial court erred in the instructions relating to the mother's fault. Although it is clear that the court properly instructed the jury, even if this court determines that errors were made in the instructions, they are harmless errors. The plaintiffs have not demonstrated how any such errors impacted the jury's decision that the District was not the proximate cause of any damages to Amanda, and that she was not even damaged at all by the school activities.

Any suggestion of prejudice is particularly insupportable when we consider that, because the jury first reached the conclusion that Amanda was not damaged, the jury never even reached the section of the verdict form in which the mother's fault was to be determined. Given that both the District and the mother were found to have been negligent, but neither was the proximate cause of any damages, there is no reason to even suspect that any possible error in the instructions or verdict form were prejudicial. The jury clearly and accurately held that the plaintiffs failed to prove that Amanda was harmed by her activities at school. That conclusion was based on fair instructions that allowed the plaintiffs to argue their theories, and which did not confuse or mislead the jury.

C. THE TRIAL COURT USED APPROPRIATE DISCRETION TO BALANCE THE ISSUES RELATING TO EVIDENCE ADMITTED PURSUANT TO ER 412.

The plaintiffs argue that the trial court improperly admitted evidence relating to Amanda's ability to consent to sexual activities, and her history that shows knowledge and consent to such activities. A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). A trial court abuses its discretion if the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.

State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Relevant evidence is generally admissible. ER 402. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

In some cases, ER 412 limits certain types of evidence:

> (b) The following evidence is not admissible in any civil proceeding involving alleged sexual misconduct except as provided in sections (c) and (d):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (c) **Exceptions**. In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under [the evidence] rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party....

ER 412 provides that such evidence is admissible if it is otherwise admissible and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The plaintiffs incorrectly argue that there is a presumption that evidence offered to prove sexual behavior is inadmissible. There is no such presumption.

Here, the District offered evidence that Amanda was

knowledgeable about birth control, pregnancy and genetics, and evidence about her historical sexual dealings with her cousin as evidence that Amanda had the capacity to consent to sex, as well as damages. Obviously, the plaintiffs placed both consent and damages in the forefront of the case.

Amanda claimed she was subjected to sexual abuse. In order for sexual abuse to be actionable, it must amount to a violation of the criminal code. If it does not, no claim of any type against any person lies. *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 712, 985 P.2d 262 (1999). Amanda was 16 years old at the time, and she did not allege at trial that she was forcibly raped, so her sexual encounters with Matt Mills would only violate the criminal code if Amanda could not consent to sex due to mental incapacity. *See* 9A.44 RCW; RCW 9A.44.050(1)(b). For purposes of the ability to consent to sex, 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 whether that condition is produced by illness, defect, the influence of a substance or from some other cause. RCW 9A.44.010 (4).

1. The Evidence That Amanda Had a Sexual Relationship with Her Cousin, and Ended it Because She Was Afraid They Might Have Genetically Damaged Babies is Properly Admitted to Show Her Capacity to Consent.

There was evidence that for several years Amanda had a sexual relationship with her cousin, Sunil, and that she chose to end the relationship because she feared having a genetically damaged baby because they were cousins. The evidence was relevant to the knowledge and consent issues in several ways. First, the fact that Amanda ended the sexual relationship shows that Amanda had the capacity to say no. Second, Amanda stopped having sex with Sunil because she did not want genetically damaged children. This shows that she understands that pregnancy is a consequence of sex. Third, the evidence shows that Amanda understands that sex with a family member can lead to having genetically damaged children. This is a highly sophisticated concept for a person, whose lawyers claim is mentally incapacitated, to understand and to have expressed to her treating psychologist long before her lawyers arrived.

Likewise, the evidence about Amanda seeking birth control shows her understanding of how pregnancy is caused, and how to avoid getting pregnant. Both of those concepts are at odds with the plaintiffs' claims that she did not meet the legal standard for consent. Amanda asked her counselor, Marnee Crawford, take her to get birth control and she told Ms. Crawford, "My friend with a car can't take me and I want to go on birth control because Eric wants me to have a baby with him but I am not

ready." Ex. 217 at KYFS 589. Ms. Crawford then took her to a teen clinic to get birth control. *Id.* That testimony relates directly to the question of whether or not Amanda understood the nature and consequences of sex. It shows that Amanda knows that having sex can get one pregnant and that she knows that birth control is a way to prevent that outcome.

The trial court engaged in lengthy oral argument with the parties and considered multiple briefs regarding the issue of whether to admit evidence regarding birth control and Amanda's relationship with Sunil. CP 9479-9553; 9466-9473; 9474-9478, 9458-9465; 9449-9457; RP 17:3-60:22. The judge did not simply defer to the District's expert's opinion as the plaintiffs claim, but rather, as can be seen in the record, the court carefully considered the issues. The plaintiffs argued and made innuendos suggesting that Amanda was sexually molested or victimized, but they presented no actual evidence that Amanda was forced to engage in sexual acts with Matt Mills. Rather, the evidence was completely to the contrary; and the evidence shows that Amanda, in fact, consented to her sexual activities with Matt Mills. Surely, the judge has the discretion to allow a defendant to provide evidence of the truth, to debunk the plaintiffs' claims.

The plaintiffs' reliance on *State v. Summers*, 70 Wn. App. 424, 853

P.2d 953 (1993) is misplaced. The criminal defendant in *Summers* was merely trying to introduce evidence of past sexual behavior of a rape victim, without any of the unique characteristics present in our case. *Id.* at 432-33. The two cases present completely different issues and completely different uses for the evidence. The *Summers* court was not dealing with the issue of whether or not there was evidence that one had the capacity to consent to the activity:

> 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.

Id. at 435 (emphasis added).

In a more relevant case, in *State v. Frost*, 141 N.H. 493, 501-02, 686 A.2d 1172 (1996), the New Hampshire Supreme Court contrasted the above *Summers* quote. The case similarly involved a defendant tried for having sexual encounters with a potentially mentally incapacitated woman. However, there the defendant offered evidence that the complainant and her boyfriend engaged in sexual contact, but the boyfriend had claimed that this contact did not include sexual intercourse because the complainant refused to consent. *Id.* at 500.

The *Frost* court stated:

> In contrast, the potential testimony by the prior boyfriend

> that he and the complainant refrained from certain sexual activities because she refused to consent is *highly probative of the issue of her capacity to decide whether or not to consent.* So is other evidence of the complainant's thought process in making such decisions, assuming a reasonable proximity in time to the charged crimes. The issue the jury must decide is the complainant's mental capacity to choose whether to consent; the defendant is correct that evidence that she had exercised that mental capacity on prior occasions would be highly probative. Moreover, evidence of her engaging in such a reasoning process, and especially evidence of her refusing to consent to sex on prior occasions, would have at most a minimal prejudicial effect on her.

Frost, 141 N.H. at 502 (emphasis added). The evidence in our case is nearly identical to that in *Frost.*

The evidence is highly probative of the issues, particularly considering that Amanda made the statement about Sunil on October 31, 2006, mere months before her encounters with Matt Mills in March 2007. The plaintiffs argue that, because the relationship with Sunil ended years earlier, the evidence has no bearing on her capacity to consent to sex with Matt. Of course, that position defies logic and it assumes that Amanda previously had the capacity to consent to sex with her cousin, but she somehow lost the capacity by the time she was 16 years old. And note that Amanda's comments to her counselor (about ending the sex with her cousin) were made on a date after she had supposedly had sex with Erik Warren, but before she had sexual encounters with Matt Mills. Regardless

of when or if the actual sex occurred, the fact that Amanda was able to intelligently discuss her knowledge about sex, birth control, pregnancy, and about saying "no" to sex is highly relevant. Using the ER 412 standards, the judge correctly used her discretion and determined the evidence was admissible.

On appeal, the plaintiffs claim that Amanda was somehow personally harmed by having the evidence discussed at trial, but have offered no support for that conclusion. Amanda did not attend even one day of trial; she was not present for opening and closing arguments, and was never forced to discuss these topics in front of the jury or hear testimony regarding the issues. Similarly, the mother did not attend the trial, so she did not hear the evidence. There is simply no evidence that Amanda is even aware that the evidence was discussed or admitted at trial, so any suggestion to the contrary is pure speculation. According to her attorneys, Amanda did not even know that the trial was happening. RP 4559:6-7. Thus, there is little chance that Amanda was harmed in any way by the evidence.

The court must also remember that it was the plaintiffs who first used the evidence they now seek to exclude. CP 7122-7197. In their motion for summary judgment, the plaintiffs used the same evidence, including counseling records discussing Amanda's encounters with her

cousin, and including her use of birth control. The plaintiffs' attorneys made no effort to redact the documents or request that they be sealed, but rather used them to their own advantage. *Id.* It can hardly be argued that Amanda was harmed when the District used the evidence, after her own attorneys had done so. And, it is imminently unfair for the plaintiffs to make use of the evidence and then later argue it is inadmissible.

Weighing the issues, Judge Hill felt that it would have been extremely prejudicial to the District to exclude the important evidence, unfairly limiting the ability to respond to plaintiffs' allegations both with respect to the capacity of Amanda to consent and the damages that are alleged by the plaintiffs. RP 54:12-18.

2. The ER 412 Evidence is Also Admissible on the Issue of Amanda's Damages.

Not only is the ER 412 evidence necessary for a proper analysis of the consent issues, but it is also admissible for the purpose of dealing with the plaintiffs' damages claims. Although neither Amanda nor her mother testified at trial (so there was no direct damages testimony), the hired psychological witness, Dr. Urquiza, testified that Amanda's view of relationships became "distorted" after her sexual relationship with Matt Mills, such that Amanda was now vulnerable to further exploitation. RP 1122:16-11:23:9. Based on Dr. Urquiza's bald testimony, the plaintiffs'

damages expert, Cloie Johnson, testified that Amanda needs 24 hour guidance and supervision to ensure that she is "safe." She told the jury that, when combined with treatment costs, the expense would be $3.25 million. RP 1796:16-1799:1. Dr. Urquiza's testimony completely ignored the fact that Amanda had other voluntary sexual encounters, and he essentially tried to get the jury to believe that Amanda had no other sexual experiences. He led them to believe that this single event scarred Amanda and caused her incurable trauma; that Amanda had a distorted view of sexual relationships solely because of her acts with Matt Mills.

The trial court properly allowed the District to present evidence to contest the plaintiffs' unfair and distorted portrayal of Amanda and her potential damages. In a case such as this, it is not right to allow an expert witness to simply pick one (of several) events as the sole cause of a plaintiffs' injuries – while hiding the other possible sources and events from the jury. When determining whether Amanda was damaged, the jury had a right to know Amanda's preexisting conditions. *See Wolff v. Coast Engine Prods.*, 72 Wn.2d 226, 432 P.2d 562 (1967).

D. THE TRIAL COURT PROPERLY DENIED THE INTRODUCTION OF AMANDA'S GUARDIANSHIP ORDER.

Approximately one and one-half years after the events leading to this lawsuit, Amanda had turned 18 years old, and her mother sought a

guardianship order for her. The guardianship matter was completely separate from this case, and it was prepared by the mother and filed without any notice to or input from the District. At trial, the plaintiffs attempted to use language they inserted in that order, against the District. The Court correctly denied the plaintiffs' attempt to use the order as evidence that Amanda could not consent to sex. The judge agreed that the order was prejudicial and potentially confusing, because the order was issued more than a year after the events of the lawsuit, and there were differing standards for capacity to consent to sex and capacity with regard to guardianship standards. RCW Chapter 11.88. CP 1895-1896. The Trial Court, however, allowed the plaintiffs to argue the underlying reasons why Amanda was found to be incapacitated. RP 337:4-349:21. The plaintiffs never presented such evidence at trial, and none of the persons involved in the guardianship testified.

The exclusion of evidence lies largely within the trial court's discretion and will not be overturned absent a manifest abuse of such discretion. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Only relevant evidence is admissible. ER 402. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. However, even

relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403.

As was true with every issue raised in court, the judge gave careful consideration to the issues and the argument of counsel, and she precluded introduction of the document. RP 337:4-347:19. As noted, Amanda's capacity to consent to sex was an important issue in this case, and the jury was likely to be confused by a court order which states that Amanda is incapacitated based on a different legal standard.

The test for incapacitation under RCW 11.88 for guardianship proceedings is completely different than the test for determining whether one is capable of consenting to sexual activities. Under the guardianship statute, a person may be deemed incapacitated due to an inability to adequately provide for nutrition, health, housing, or physical safety. Or, a person may be deemed incapacitated if a court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs. Those standards do not have any application to the area of sexual consent. And as noted, persons with guardianships are not *per-se* barred from having consensual sexual relationships, and many such persons have happy family lives.

RCW 9A.44.010, not the guardianship statutes, provides the

specific standard for mental incapacity as it relates to sexual conduct, defining mental incapacity as a condition which prevents a person from 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. RCW 9A.44.010 (4). The question, then, is whether the person understands the nature and consequences of sexual conduct, not whether they have some other type of incapacity.

A federal district court was faced with a similar situation in *Chavez v. Waterford Sch. Dist.*, 2011 U.S. Dist. LEXIS 25758 (E.D. Mich. 2011). In *Chavez,* the plaintiff filed claims against her employer under the Americans with Disabilities Act (ADA). *Id.* at *1. One of the issues at trial for the jury to determine was whether the plaintiff was a qualified individual with a disability who could not perform the essential functions of the employment position that she held. *Id.* at *6. The defendant sought to exclude disability determinations made by the plaintiff's short term and long term disability insurance carriers and the Social Security Administration (SSA) because the standards for determining disability for insurance carriers and the SSA were different than those under the ADA. *Id.* at *2-5. The court held that it did not find those determinations to be relevant, *Id.* at *6, and said:

[A]n issue for the jury to determine is whether Plaintiff is a

> qualified individual with a disability who cannot perform the essential functions of the employment position that she held. *Because this issue is so pivotal to the outcome of the trial, any other determination stating that Plaintiff is, or is not disabled, based on a different standard, would only serve to confuse and mislead the jury. This confusion would outweigh any probative value.*

Id. at *6 (emphasis added).

The situation before this court is very similar to that in *Chavez.* This court should likewise dispense with the plaintiffs' attempt to mix two different standards that are really quite different. A finding that one is incapacitated under RCW 11.88 has no bearing on whether that person is incapacitated as it relates to the ability to consent to sexual relations.

Further, because the plaintiffs failed to accept the court's invitation to call witnesses who could describe the facts and circumstances leading to the creation of the Guardianship Order (RP 347:1-25), they cannot now complain that they were prejudiced by the judge excluding the order itself. The plaintiffs had a full opportunity to develop the testimony themselves, and they chose not to do so. An appellant cannot complain about a trial court ruling when they did not avail themselves of the opportunity to cure the issue. *See State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Because the guardianship order was not shown to be relevant to the issues in the case, and it is otherwise legally defective, the trial court properly used its discretion and excluded the Guardianship Order. CP 2148-58.

E. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE DEFINITION OF SEXUAL ABUSE.

Again, this court is reminded that the plaintiffs used the term "sexual abuse" on countless occasions throughout the trial, and it was a central issue in their case. RP 4557:14-23. An essential part of the plaintiffs' argument is that Matt sexually abused Amanda, and the School District failed to stop or prevent the alleged sexual abuse. It is certainly appropriate for the court to provide the jury with the legal definition of the term.

The Washington Supreme Court has held that, for childhood sexual abuse to be actionable in tort, the alleged sexual abuse must amount to a violation of the criminal code. If it does not, no claim of any type against any person lies. *See C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 711-12, 985 P.2d 262 (1999). *C.J .C.*, 138 Wn.2d at 268-69. In *C.J.C.*, two plaintiffs brought claims against their respective churches after they were molested by their pastors. *Id.* at 705-06. As part of its decision, the Supreme Court had to decide whether RCW 4.16.340 applied to causes of action sounding in negligence. *Id.* at 708.

The Supreme Court stated in *C.J.C.*:

> [U]nder the facts presented here, intentional sexual abuse is the predicate conduct upon which all claims are based, including negligence claims. The alleged sexual abuse is

> essentially an element of the plaintiffs' negligence claims. Absent the abuse, plaintiffs would not have suffered any injury and their negligence claims could not stand. Thus, the gravamen of plaintiffs' claims is that defendants are liable for injuries resulting from acts of intentional sexual abuse. Equal to any other element of the negligence causes of action, the injury resulting from the abuse forms the grounds for the claims. As such, the negligence claims are based on intentional conduct within the meaning of the statute because they stem from injuries suffered as a result of intentional sexual abuse.

Id. at 709-10 (citations omitted).

The court continued:

> More significantly, the act expressly includes within its scope suits against *negligent* entities. RCW 4.16.350. By definition, a negligent actor does not act intentionally. Furthermore, entities, ipso facto, cannot directly perpetrate sexual abuse. Entity liability is, in all circumstances, derived from the acts of its agents, whether it be under theories of respondeat superior negligence, or other imputed conduct (civil or criminal).
>
> Rather than a limitation on the *parties* who may sue or be sued under the act, we read the statutory definition of the childhood sexual abuse as limiting only the specific predicate sexual *conduct* upon which all claims or causes of action must be based. Thus, the alleged sexual abuse must amount to a violation of the criminal code. If it does not, no claim of any type against any person, lies.

Id. at 711-12 (emphases in original).

The Supreme Court reaffirmed the view that sexual abuse must rise to the level of a violation of the Washington criminal code in order to be actionable in *Christensen v. Royal Sch. Dist.*, 156 Wn.2d 62, 124 P.3d 283

(2005). In that case involving sexual abuse of a minor by a teacher, the court stated, "While we acknowledge that the cause of action which has generated the instant certified question is a civil case and not a criminal case, the notion that minors are incapable of meaningful consent in a criminal law context should apply in the civil arena and command a consistent result." *Id.* at 68.

There is a specific statute of limitations for civil cases based on intentional conduct resulting in childhood sexual abuse, which specifically refers to the criminal standard: childhood sexual abuse means any act committed by the defendant against a complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 9A.44 RCW or RCW 9.68A.040. RCW 4.16.340. In other words, if an act does not violate the criminal standard, then it is not "sexual abuse" in the civil context.

1. The Court's Jury Instructions on Sexual Abuse Were Also Proper for the Plaintiffs' Claims Under The Reporting Statute, RCW 26.44.030.

The plaintiffs argued that the School District was negligent by not reporting Amanda's activities to the authorities, and the District's claims against the mother (a mandatory reporter herself) were based on the same statute. RCW 26.44.030 requires professional school personnel to make a report if he or she has reasonable cause to believe that a child has suffered

abuse or neglect. The definition of "abuse or neglect" includes "sexual abuse." RCW 26.44.020 (1). The term "sexual abuse" is not defined in Chapter RCW 26.44. However, the Department of Social and Health Services (DSHS), the agency responsible for investigating reports made under Chapter RCW 26.44, has defined sexual abuse in the Washington Administrative Code. WAC 388.15.009 (3). The WAC incorporates the criminal definition: "Sexual abuse means committing or allowing to be committed any sexual offense against a child as defined in the criminal code." WAC 388.15.009 (3).

Courts are to give great deference to how an agency interprets an ambiguous statute within its area of special expertise. *Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009). Here, it is clear that the statutes, administrative regulations and the courts all tell us that "sexual abuse" in a civil context must be measured by whether the act complained of meets the test set forth in the criminal code. The judge's reference to the criminal code in the jury instructions is not only proper, it is necessary. Without these court's instructions, the jury would not have been equipped to deal with the plaintiffs' numerous references to sexual abuse.

2. The Court's Instructions on Capacity to Consent are Substantively Identical to the Restatement (Second) of Torts.

The Restatement (Second) of Torts 892A bars causes of action when the plaintiff consented to the conduct. This section reads:

> Effect of Consent
>
> (1) One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.
>
> (2) To be effective, consent must be
>
> (a) by one who has the capacity to consent or by a person empowered to consent for him, and
>
> (b) to the particular conduct, or to substantially the same conduct.

RESTATEMENT (SECOND) OF TORTS 892A.

Comment b to 892A states, "If the person consenting is a child or one of deficient mental capacity, the consent may still be effective if he is capable of appreciating the nature, extent and probable consequences of the conduct consented to, although the consent of a parent, guardian or other person responsible is not obtained or is expressly refused." RESTATEMENT (SECOND) OF TORTS 892A, Comment b.

When applied to Amanda's acts, Comment b is substantively identical to Jury Instruction No. 34, based on RCW 9A.44.010 (4), which stated: "Mental incapacity means a condition existing at the time of the sexual intercourse or contact which prevents a person from 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."

If this court were to determine that the trial court erred by using the criminal standards in the jury instructions, then it would be appropriate to instead use the standards from the Restatement. Using that test, if Amanda had the capacity to consent to sex, and if she in fact consented to her sexual relations with Matt Mills, then she would have no cause of action. The outcome is the same whether the Restatement test is used, or whether the statutory scheme is used: no sexual abuse or sexual assault exists if the complaining party consented to the act. Therefore, any error by the trial court is harmless.

F. THE TRIAL COURT PROPERLY DENIED THE PLAINTIFFS' ATTEMPT TO ADD CLAIMS UNDER RCW 74.34.035, THE VULNERABLE ADULT STATUTE.

Shortly before trial, the plaintiffs filed a motion to add claims under RCW 74.34.035, a statute relating to reporting claims of abuse of vulnerable adults. However, that statute is only for the protection of adults, not minors, and Amanda was a minor at the time of the alleged occurrences. RCW 74.34.035 provides:

> (1) When there is reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect ***of a***

> ***vulnerable adult*** has occurred, mandated reporters shall immediately report to the department [of social and health services].

A vulnerable adult includes a person: (c) Who has a developmental disability as defined under RCW 71A.10.020. RCW 74.34.020 (17). Although the definition of vulnerable adult does not expressly state that one needs to be over eighteen years of age to qualify, it is implied by use of the term "adult." An adult is generally defined as a person who has attained the legal age of majority. 18. BLACK'S LAW DICTIONARY 52 (7th Edition). In Washington, the legal age of majority is 18 years old. RCW 26.28.010.

The plaintiffs' argument that the adult abuse statute should be applied in the case of a disabled minor does not make sense. RCW 74.34.035 is a statute pertaining to vulnerable adults, and there is a different, specific statute dealing with reporting suspected abuse of children. RCW 26.44.030. Under that statute, a child is defined as any person under the age of eighteen years of age. RCW 26.44.020 (2). Logic and statutory interpretation principals tell us that a "vulnerable adult" cannot be a child.

Further, the reporting of abuse of dependent adults and developmentally disabled persons was formerly a part of RCW 26.44.030, which now only pertains to abuse of children. RCW 26.44.030 (1998). In

1999, the legislature split abuse of vulnerable adults out of RCW 26.44.030 and into its own section. Laws of 1999, ch. 176. One of the major differences between chapters RCW 26.44 and RCW 74.34, is that RCW 74.34 requires the reporting of financial exploitation of vulnerable adults, whereas RCW 26.44 does not have a similar requirement for children. RCW 74.34.035 (1). The legislature clearly intended to have two statutes, one for adults, and one for minors.

Denying a motion for leave to amend is not an abuse of discretion if, as is true here, the proposed amendment is futile. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 829, 189 P.3d 168 (2008). The Court acted within its discretion by denying the motion to amend the complaint because RCW 74.34.035 pertains to vulnerable adults, and Amanda was only 16 years old at the relevant time.

In addition, the plaintiffs failed to demonstrate how the judge's denial of the motion to amend the complaint prejudiced them at trial. The plaintiffs argued to the jury that the financial exploitation, among other things, should have been reported under RCW 26.44.030, the child reporting statute. They were able to fully argue their theories of the case, and the jury concluded that the District was obligated to report the suspected conduct. However, the jury also concluded that the failure to report did not proximately cause any injury to Amanda, so even if the

court erred, the error was harmless. The jury verdict was clear: Amanda's damages (for every kind of alleged improper conduct) were $0.

G. THE JURY CONCLUDED THAT AMANDA WAS NOT PROXIMATELY DAMAGED, AND THERE IS NO BASIS ON WHICH THAT VERDICT CAN BE OVERTURNED.

The plaintiffs have raised numerous assignments of error, but they have overlooked the most important aspect of the jury's decision: Amanda was not proximately damaged as the result of her school activities. In essence, the plaintiffs baldly allege that the various assignments of error each are prejudicial and warrant a new trial, without any discussion of how they could have impacted the jury's finding that Amanda was not proximately damaged by the school events. If Amanda was not damaged, then all of the plaintiffs' assertions are meaningless.

A cause of action for negligence requires the plaintiff to show (1) that the defendant owed a duty to the plaintiff, (2) defendant breached that duty, (3) an injury occurred, and (4) evidence of the proximate cause between the breach and the injury. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621, 625 (1994). Washington law recognizes two elements to proximate cause: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause in fact refers to the "but for" consequences of an act; the physical

connection between an act and an injury. *Id.* at 778. Legal causation, on the other hand, rests on policy considerations as to how far the consequences of one's acts should extend. *Id.*

For example, the plaintiffs' assignments of error relating to allocation of fault to Madhuri Patel do not affect Amanda's damages or proximate cause issues. The fact that the trial court allowed the jury to allocate fault to Madhuri Patel has no bearing on whether Amanda was injured or whether the District proximately caused her injuries. The jury concluded that Amanda had no damages, and it is pure speculation to suggest that the jury did so because of the instructions given for her mother's claim. And, it is important to note that, even if the jury had concluded that Amanda suffered damages as the result of her activities with Matt, the jury specifically held that proximate cause was lacking.

To prevail on any of their assignments of error, the plaintiffs must establish that the particular issue affected the jury's conclusion that Amanda was not damaged. Other than simply arguing that the various alleged errors "must have" affected the outcome, there is no basis on which the jury's conclusion that Amanda was uninjured can be overturned.

CROSS APPEAL

I. STATEMENT OF THE CASE

In the unlikely event that the court finds in favor of the plaintiffs on one or more of the assignments of error, the School District urges this court to reverse the trial court on several grounds:

A. The Trial Court Incorrectly Allowed the Jury to Consider Whether Certain Events Triggered A Duty to Report Pursuant to RCW 26.44.030.

At trial, the plaintiffs were permitted to introduce the following evidence as support for their claim that the District was negligent for not reporting the below incidents to law enforcement pursuant to RCW 26.44.030, the mandatory reporting of child abuse statute: 1) the year prior to the events in question, Amanda thought she might be pregnant but was confused about the subject; 2) learning that Amanda had been stealing money from her mother to give to friends at school and exchanging sexually-charged emails with Erik Warren; and 3) Francine Wilhelm having expressed concern that Amanda Hedstrom might possibly be grooming Amanda for physical, emotion, and sexual abuse. CP 6656. In fact, none of the above items were reportable events.

Prior to trial, the District brought a motion for summary judgment to have the above claims dismissed, arguing that they did not rise to the level of a reasonable suspicion of child abuse, as is required by the

mandatory reporting statute. CP 953-965. The Court heard oral argument by both sides and denied the District's motion.

The facts relating to the first two issues have been described above.

As for the third: The evidence showed that Francine Wilhelm became suspicious of Amanda Hedstrom, but she had no actual knowledge that Amanda was being groomed for abuse by Amanda Hedstrom. RP 3119:13-19. Ms. Wilhelm, Amanda's teacher, testified that she was being cautious and her comments were speculation based on another teacher's comment that she had never seen anything like it. *Id.* Ms. Wilhelm raised the question: "It sounds to me like Amanda is grooming Hingorani for possible mental, emotion, and physical/sexual abuse. Am I on target at all? Linda has told me some fairly bizarre things." Ex. 12. Ms. Wilhelm was on alert for problems, but she did not have any evidence to raise a reasonable suspicion of child abuse. When Ms. Wilhelm discussed the matter with her superior, she learned she had nothing to worry about. RP 3119:23-3120:12. There is no competent evidence suggesting that Ms. Wilhelm actually had a reasonable suspicion of child abuse, and that evidence should not have been allowed.

B. The Jury Should Not Have Been Asked to Determine Whether the District Was Negligent By Not Presenting Medical Releases to Amanda's Counselor.

Over objection, the trial court permitted the plaintiffs to argue that

the District was negligent because it did not request Amanda's counseling records from Ms. Crawford. The District had two authorizations, one signed by Amanda and one signed by her mother. Ex. 15; Ex. 29.

However, at trial, Ms. Crawford plainly and emphatically testified that she would not release Amanda's records to the District, even though the District had a signed authorization. Amanda, the client, told the counselor not to release the records, and the counselor testified that she was bound by law to follow Amanda's instructions by keeping the records confidential. CP 6656; RP 3522:20-3523:11. Without Amanda's permission, the records could not be released to anyone, including Amanda's mother. *Id.*

Ms. Crawford testified that the records contained information about Amanda's sexual activity at school, and she would not have released the records to the School District even if presented with the two authorizations. Amanda's counseling records showed that Amanda had sex with Erik Warren in a school bathroom in the spring of her freshman year. Ex. 217. The counselor testified that Amanda specifically told her that she did not want the information released to anyone, and the counselor would not release it. RP 3522:20-3523:11.

Before trial, the District moved for partial summary judgment, because it was undisputed that the counselor would refuse to give the

counseling records to the school, even if the school had a release. Because the District's actions would have had no effect on Ms. Crawford refusing to release the records, the District's actions could not have been a proximate cause of any alleged damage to Amanda. CP 977-982.

C. Ms. Patel's Claim Should Have Been Dismissed at the Close of the Plaintiffs' Case Because She Failed to Present Any Competent Evidence of Damages.

The plaintiffs made the highly unusual and tactical choice that neither Ms. Patel nor Amanda testified at trial, so neither Amanda nor her mother presented any direct evidence of damages. RP 4615:7-15. In fact, the mother's claims for damages were based entirely on the loss of consortium statute, RCW 4.24.010. The jury never heard whether or how the incidents at school might have damaged the mother. They heard nothing about any emotional distress, or any way in which the mother's relationship with Amanda might have changed, or any loss of love and companionship of her daughter. The mother's only "damages" testimony came from the plaintiffs' paid psychological expert, Dr. Anthony Urquiza, who merely relayed statements that Ms. Patel made to him out of court.

As the court can see from the trial transcript, Dr. Urquiza is an evasive witness who gave lengthy testimony, but he never once provided a medical opinion or offered any actual opinion about the mother's alleged damages. RP 1135:22-1141:7. At the end of a lengthy answer regarding

his opinion on Ms. Patel's damages, Dr. Urquiza testified, "The end result answer to your question is, [Ms. Patel] was devastated, and I think eventually she became very angry because the school should have protected her. That was her opinion to me. *Id.* The court denied the District's objection and motion to strike the testimony. RP: 1135:22-1141:7.

There was no further testimony about any damages allegedly suffered by the mother. After the plaintiffs rested their case, the District moved for a directed verdict with regard to Ms. Patel's damages, claiming there was insufficient evidence for the jury to find in favor of Ms. Patel. RP 1824:24-1828:17. The trial court denied the District's motion. RP 2836:23-2837:8.

II. ASSIGNMENTS OF ERROR ON CROSS APPEAL

The plaintiffs certainly received a fair chance to present their case at trial, and the jury got the decision mostly right: the Kent School District's actions were not the proximate cause of any damage to Amanda, and in fact, Amanda was not damaged by the school incidents. The overwhelming evidence shows that despite her limitations, Amanda was fairly sophisticated in her knowledge and understanding of sex, and she was able to keep her actions secret from both the school and her mother. The Court of Appeals should not disturb the jury's findings.

However, there are four errors that the trial court made which significantly prejudiced the District at trial, and if this court grants the relief the plaintiffs seek, the following issues should be corrected as well.

1. The trial court erred by allowing the jury to consider whether certain events triggered a duty to report pursuant to RCW 26.44.030. Those events include Amanda thinking she might be pregnant, Amanda stealing money from her mother and exchanging graphic e-mails, and a teacher's question about whether another student might possibly be intending to take advantage of Amanda.
2. The trial court erred by allowing the jury to consider whether the District was negligent by not presenting medical releases to Amanda's counselor, when the counselor testified that she would not release the records even if a release was provided.
3. The trial court erred by not granting the District's motion for directed verdict regarding Madhuri Patel's damages.
4. The trial court erred by using jury instructions that defined the District's duty to protect against "harm" and "reasonably anticipated harm," as instead of using the correct standard: "reasonably anticipated danger."

III. ISSUES ON CROSS APPEAL

1. Did the trial court err by allowing the jury to consider whether certain events triggered a duty to report pursuant to RCW 26.44.030, including Amanda thinking she might be pregnant, Amanda stealing money from her mother and exchanging graphic e-mails, and a teacher's question about whether another student might possibly be intending to take advantage of Amanda?
2. Did the trial court err by allowing the jury to consider whether the District was negligent by not presenting medical releases to Amanda's counselor, when the counselor testified that she would not release the records even if a release was provided?
3. Did the trial court err by denying the District's motion for directed verdict with regard to Madhuri Patel's damages when the only evidence that Ms. Patel was damaged was presented through the Plaintiff's paid expert who did not render a medical opinion about Ms. Patel's damages?
4. Did the trial court err by providing jury instructions stating that the District had a duty to protect against "harm" and "reasonably anticipated harm" as opposed to "reasonably anticipated dangers?"

IV. ARGUMENT

A. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO CONSIDER WHETHER CERTAIN EVENTS TRIGGERED A DUTY TO REPORT, PURSUANT TO RCW 26.44.030.

As is noted above, RCW 26.44.030 requires professional school personnel to report suspected abuse or neglect, defined as sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety. RCW 26.44.020 (1). Sexual exploitation includes: (a) allowing, permitting, or encouraging a child to engage in prostitution by any person; or (b) allowing, permitting, encouraging, or engaging in the obscene or pornographic photographing, filming, or depicting of a child by any person. RCW 26.44.020 (20). Sexual abuse, is defined in the WAC as committing or allowing to be committed any sexual offense against a child as defined in the criminal code. WAC 388-15-009(3).

There are errors with how the judge handled the mandatory reporting issues. First, Amanda went to the school nurse the year prior to the incidents involved in this case, and she said she thought she might be pregnant, but she was confused about the subject. Amanda's mother was advised about the visit to the nurse, and the issue seemed to be resolved. RP 1895:16-1898:24. The plaintiffs now allege that the visit to the nurse

should have been reported to the authorities. Notably, however, there was no evidence of sexual abuse, or abuse of any kind to report, and the mother (a mandatory reporter herself as a nurse), felt the issue was resolved. It was error for the court to allow that issue to go to the jury.

The jury was also allowed to consider whether the reporting statute was triggered by knowledge that Amanda was stealing money from her mother and giving it to friends, and by Ms. Wilhelm's queries about Amanda Hedstrom's activities in relation to Amanda Hingorani (discussed further below). The District's summary judgment motion on those topics was denied. CP 953-65. The plaintiffs' theory was that if law enforcement or DSHS had conducted an investigation of Amanda's activities during her freshman year, they would have prevented her from having sexual interaction with Matt Mills in her sophomore year. RP 1666:22-1668:2. What the plaintiffs failed to show, however, is that the events triggered an obligation to report, and no reasonable juror could find that these acts rise to the level of a reasonable suspicion of child abuse or neglect as required by RCW 26.44.030.

It is notable that RCW 26.44.030 is a criminal statute with penalties for failure to report including up to 364 days in jail and up to a $5000 fine, and the statute has an implied civil remedy. RCW 26.44.080; RCW 9.92.020, *Beggs v. Dep't of Soc. & Health Servs.*, 171 Wn.2d 69,

77, 247 P.3d 421 (2011). The Court of Appeals is urged to be cautious in accepting the expansive approach taken by the Trial Court.

1. Amanda's Stealing Money from Her Mother and Giving it to her Friends is Not Abuse as Defined by the Reporting Statute.

RCW 26.44.030 is not intended to be used in every instance of problems between parents and children, or in problems between school children. Rather, its goal is to prevent serious child abuse or neglect. *See* RCW 26.44.010. While children stealing money from parents and giving it to friends is serious, that sort of activity does not fall within the statutory framework of the abuse reporting statute; it is not abuse or neglect which causes harm to a child's health, welfare, or safety.

The Court should consider whether the intent of the legislature was to subject teachers to serious criminal penalties for not reporting issues such as students stealing twenty dollars and giving it to their friends. Under the plaintiffs' theory, a teacher should call the police or CPS every time a child steals another child's lunch money, or even if a student hides another student's backpack. Such an approach would thwart the purpose of the child abuse statute, and it would overwhelm the police and DSHS. It is notable that "financial exploitation" does not appear as a reportable offense in RCW 26.44.030 (the child abuse reporting statute), yet the term is included in the vulnerable adult abuse statute, RCW 74.34.035. The

fact that, when the legislature created a separate vulnerable adults statute, it included financial exploitation as reportable under RCW 74.34 but not RCW 26.44, shows that the legislature did not consider financial exploitation of children to be a reportable offense.

Certain incidents rise to the level contemplated by the legislature, while others fall within the range normally handled by parents and schools, without police or DSHS involvement. The statute is not designed to require reporting of every event.

2. Francine Wilhelm's Questions About Amanda Hedstrom Possibly Grooming Amanda Hingorani Were Speculation, and Do Not Give Rise to the Level of a Reasonable Suspicion of Child Abuse, and Were Not Required to Be Reported.

The plaintiffs contend that Ms. Wilhelm was required to call CPS or the police to tell them that she wondered if Amanda Hedstrom was possibly grooming Amanda Hingorani, even though there was no evidence of grooming. Ms. Wilhelm testified at trial, and explained that she was trying to be particularly vigilant over the interactions between Amanda Hedstrom and Amanda Hingorani, because she felt that Amanda Hedstrom was a bad influence and might try to get Amanda Hingorani to steal money again.

Ms. Wilhelm had no actual knowledge that Amanda was being groomed, but she asked her supervisor, Jennifer Grajewski, if it was

possible that Amanda Hedstrom was grooming Amanda Hingorani for possible mental, emotional, and physical/sexual abuse. RP 3119:13-19. Ms. Wilhelm testified that she was trying to be really aware of Amanda, and she was speculating, based on a comment made by another teacher. *Id.* Ms. Wilhelm's testimony is by her words in the exhibit: "It sounds to me like Amanda is grooming Hingorani for possible mental, emotion, and physical/sexual abuse. ***Am I on target at all***? Linda has told me some fairly bizarre things." Ex. 12 (emphasis added). Ms. Wilhelm discussed the question with her superior, and learned she had nothing to worry about. RP 3119:23-3120:12. The trial evidence proved that Ms. Wilhelm's knowledge does not rise to the level of a reasonable suspicion of child abuse. It was reversible error for the trial court to allow the jury to consider whether Ms. Wilhelm's unsupported speculation was reportable under RCW 26.44.030.

B. THE DISTRICT'S ALLEGED FAILURE TO PROVIDE COUNSELOR WITH THE RELEASES FOR AMANDA'S RECORDS COULD NOT HAVE RESULTED IN DAMAGES BECAUSE THE COUNSELOR WOULD REFUSE TO RELEASE THE RECORDS EVEN WITH A RELEASE FORM.

The undisputed evidence in this case shows that the Kent School District did in fact attempt to get information from Marnee Crawford about Amanda's activities in the school restroom and Ms. Crawford

refused to provide such information. RP 3523:23-3526:19. Ms. Crawford testified that, if the Kent School District had asked her ten times about her concern with regard to the bathroom, she would not have told the District what she knew. RP 3539:1-6.

Further, Ms. Crawford testified that none of the releases at issue permitted her to give information to the school, because Amanda told her to keep the information confidential. RP 3534:24-3536:3; RP 3517:16-3523:11. Ms. Crawford even spoke to her supervisor, Dennis Ballinger, about whether to release such information and the decision made was that the information could not be released. RP 3435:25-3438:13. Therefore, the undisputed evidence shows that no matter how much the Kent School District attempted to receive Amanda's counseling records, KYFS would not have provided the records.

The only reasonable conclusion is that, even if the District was somehow negligent by not giving the releases to Ms. Crawford, any such negligence could not have been the proximate cause of injuries to Amanda. Ms. Crawford testified that no matter how many times the District presented her with the releases, she would not have released the records. The issue should not have gone to the jury. The jury found that the District was negligent, but there is no way to tell from the verdict form on which of the several theories the jury relied. Because failure to provide

the releases to the counselor was one of the theories presented, the jury might have found negligence on that improper basis. Therefore, the Court should overturn the finding that the District was negligent.

C. THE TRIAL COURT IMPROPERLY ALLOWED THE JURY TO CONSIDER WHETHER MADHURI PATEL WAS DAMAGED.

The plaintiffs chose to hide the mother during trial, and they never put her on the stand to talk about any damages she alleges as the result of the school incidents involving her daughter. It is wholly inappropriate for them to be allowed to argue damages when they presented no evidence of damages.

If a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party with respect to that issue, judgment as a matter of law is appropriate. CR 50 (a)(1). A trial court should grant a motion for directed verdict if, as a matter of law, no competent evidence or reasonable inferences exist to sustain a verdict for the nonmoving party. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004).

A scintilla of evidence is insufficient to carry a case to the jury. *Knight v. Trogdon Truck Co.*, 191 Wn. 646, 653, 71 P.2d 1003 (1937). The evidence sufficient to support a verdict must be substantial. *Id.* In ruling upon a motion challenging the legal sufficiency of the evidence, no

discretion is involved, and the court does not weigh the evidence. *Lambert v. Smith*, 54 Wn.2d 348, 351, 340 P.2d 774 (1959). The moving party assumes the truth of the opponent's evidence together with all favorable inferences from it. *Id.* at 351-52. If the court finds there is no evidence to support the plaintiff's claim, then the motion may be granted. *Id.*

Here, Ms. Patel's claims were entirely based on loss of consortium pursuant to RCW 4.24.010, which permits a parent to recover damages for medical, hospital, medication expenses, loss of services and supports, loss of love and companionship of the child and injury to or destruction of the parent-child relationship. RCW 4.24.010. Ms. Patel offered no testimony about any of those topics. The only arguable evidence of Ms. Patel's damages was from the Plaintiff's expert, Anthony Urquiza, based on statements Ms. Patel allegedly made to him.7

1. There is No Competent Evidence Showing Ms. Patel was Damaged by the Incidents at Kentridge.

Dr. Urquiza's opinion regarding Madhuri Patel is not competent evidence showing damage to Ms. Patel as a result of the incidents at Kentridge High School. Dr. Urquiza testified, "Ms. Patel was devastated

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[7] And, note that Urquiza is an expert witness, not a treating physician to whom hearsay statements may be made for the purpose of treatment. ER 803(4).

and I think eventually she became very angry because the school should have protected her. ***That was her opinion to me.*** (Transcript pg. 17) (emphasis added). Despite the length of his testimony, Dr. Urquiza's sole actual opinion regarding Ms. Patel's damages was that she was angry and devastated because of the events at Kentridge, but such opinion is merely an adoption of the hearsay statements of Ms. Patel. Dr. Urquiza did not offer any formal diagnosis. The plaintiffs – by their own choice – left out the damages portion of their case and the matter should not have been considered by the jury.

The statements made by Ms. Patel to Dr. Urquiza were hearsay. Hearsay is an out of court statement offered to prove the truth of the matter asserted and it is generally not admissible into evidence. ER 801 (c), ER 802. Ms. Patel's out-of-court statements, repeated by Dr. Urquiza, were offered to prove the truth of the matter asserted; that Ms. Patel was devastated and angry following the incidents at Kentridge. The statements should have been excluded.

Any reliance on ER 703, is likewise misplaced. ER 703 reads:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

While Rule 703 permits an expert witness to take into account matters which are unadmitted and inadmissible, it does not follow that such a witness may simply report such matters to the trier of fact: The Rule was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence. *State v. DeVries*, 149 Wn.2d 842, 848 n.2, 72 P.3d 748 (2003); *State v. Martinez*, 78 Wn. App. 870, 880, 899 P.2d 1302 (1995). Specifically, ER 703 should not be construed so as to bootstrap into evidence hearsay that is not necessary to help the jury understand the expert's opinion. *Martinez*, 78 Wn. App. at 880.

While ER 703 allows an expert to base an opinion on facts or data reasonably relied on by experts in their field, even if those facts or data are otherwise inadmissible, ***when the court admits such testimony it is not substantive evidence.*** *Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986); *Martinez*, 78 Wn. App. at 879. That is, it is not offered to prove its truth and thus does not contravene the rule against hearsay. *Martinez*, 78 Wn. App. at 879. *Martinez* affirmed the trial court's decision to exclude the defendant's expert repeating hearsay statements of third parties because allowing such evidence could have been misleading because the jury would likely construe it as substantive evidence. *Martinez*, 78 Wn. App. at 880, 881.

2. Dr. Urquiza Did Not Express a Medical Opinion Regarding Ms. Patel's Damages.

Expert psychological testimony may only be admitted to assist juries in understanding phenomena not within the competence of the ordinary lay juror. *See State v. Cheatam*, 150 Wn.2d 626, 646, 81 P.3d 830 (2003). Dr. Urquiza's sole opinion regarding Ms. Patel's damages was that she was angry and devastated because of the events at Kentridge High School. He did not provide testimony about a single medical condition from which Ms. Patel might be suffering. He did not diagnose her with depression or any other ailment which would require medical testimony, but only that Ms. Patel was "devastated" and "angry." Those are not expert medical diagnoses, and that is not competent evidence of any damages.

It is within the competence of an ordinary lay juror to understand testimony that Ms. Patel was angry; no expert testimony is necessary. Regardless of any alleged negligence, it would be natural for Ms. Patel to be upset by the fact that her 16 year old daughter had sexual relations at school. Expert testimony such as that of Dr. Urquiza is only admissible if it is necessary for forming a medical opinion, but he did not offer any medical analysis or opinions.

The statements Ms. Patel made to Dr. Urquiza are not substantive

evidence, and they do not turn into substantive evidence merely because Dr. Urquiza repeated them. Dr. Urquiza did not provide an independent medical opinion of Ms. Patel's mental state. Rather, he simply adopted Ms. Patel's own hearsay statements and related them to the jury under the guise of a medical opinion. That is exactly the bootstrapping into evidence of hearsay that the *Martinez* court warned about. Courts do not permit such attempts to bypass the hearsay rules.

In this case, Ms. Patel decided not to testify about her alleged damages. That was her choice to make, but she cannot be permitted to replace her own testimony with that of a hired expert. The trial court should have sustained the District's objection to Dr. Urquiza's testimony and it should have granted the District's directed verdict. If the case is remanded to the trial court, the jury should not be allowed to consider Ms. Patel's damage claim. The claim was fully litigated, and she failed to prove any damages.

D. THE TRIAL COURT GAVE INACCURATE JURY INSTRUCTIONS REGARDING THE DISTRICT'S DUTY.

The jury instructions referred to the District's duty in three different places:

> Instruction No. 5: Plaintiffs Madhuri Patel and Amanda Hingorani claim that Defendant Kent School District was negligent and/or liable in … failing to exercise reasonable care by taking reasonable

> precautions to protect Amanda from *reasonably anticipated harm.* CP 6656.
>
> Instruction No. 10: A school district has an affirmative duty to protect students in its custody from *reasonably anticipated dangers.* The district is required to exercise such care as a reasonably prudent person would exercise under the same or similar circumstances. The district's duty to use reasonable care only extends to such risks of harms as are foreseeable. In order to establish foreseeability, the harm sustained must be reasonably perceived as being within the *general field of danger* covered by the specific duty owed by the defendant. CP 6662.
>
> Instruction No. 11: The duty of a public school to *protect students from harm* includes *protection from foreseeable harm*, including intentional injuries inflicted by third-parties. CP 6663.

The District objected to the trial court's mixed use of terms "harm" and "danger," and in particular, the use of "harm" in Instructions 5 and 11. RP 4373:5-4386:20, 4407:1-25. By instructing that the duty is to protect "Amanda from reasonably anticipated harm," and that the "duty of a public school to protect student from harm *includes* protection from foreseeable harm" the court created a greater duty than that which a school actually owes its students.

Long-established case law tells us that the duty is to protect students from reasonably anticipated *dangers*. *McLeod v. Grant County School District* is the seminal case defining a district's duty to protect its students. 42 Wn.2d 316, 255 P.2d 360 (1953). The Washington Supreme Court held that "the duty of a school district ... is to anticipate ***dangers***

which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such ***dangers***." *Id.* at 320 (emphasis added).

The court ruled that the terms are not interchangeable, and the Supreme Court expressly rejected the trial court's use of the word "harm" when describing a school district's duty. *Id.* at 321:

> Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of ***danger*** which should have been anticipated.

Id.

Jury Instruction No. 10 accurately describes the District's duty to students (per *McLeod*), but Instructions 5 and 11 do not properly reflect the law. The terms "harm" and "reasonably anticipated harm" in Instructions 5 and 11 impermissibly expand the duty owed by the District. By using those terms the court has changed the inquiry from (correct) "whether the actual harm fell within a general field of danger which should have been anticipated," to (incorrect) whether "the actual harm was of a particular kind which was expectable." The trial court's instructions clearly ran afoul of the law as set forth in *McLeod*. *Id.*

Some courts have misstated the rule from *McLeod* by stating that

schools have a duty to protect students from reasonably foreseeable harm. *See Travis v. Bohannon*, 128 Wn. App. 231, 239, 115 P.3d 342 (2005). Courts doing so appear to have unintentionally misstated the expressed duty announced in *McLeod,* and have arguably turned school districts into insurers for all harm that could befall a student. But, a school district is not an insurer of the safety of its pupils. *Peck v. Siau*, 65 Wn. App. 285, 293, 827 P.2d 1108 (1992).

Harm and danger are not the same things. "Harm" is defined by Black's Law Dictionary as "Injury, loss, or detriment." BLACK'S LAW DICTIONARY 722 (7th Edition). "Danger," by contrast, is defined as "1. Peril; exposure to harm, loss, pain, or other negative result. 2. A cause of peril; a menace." BLACK'S LAW DICTIONARY 398 (7th Edition). Harm thus can be caused by danger but danger is not the only cause of harm.

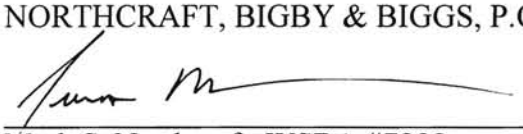
Notably, prejudice must be demonstrated if the instruction is merely misleading, but when the instruction contains a clear misstatement of law, prejudice is presumed. *Anfinson v. FedEx Ground Package Sys., Inc.,* 174 Wn.2d 851, 861, 281 P.3d 289 (2012). Here, instructing that the District had a duty to protect against reasonably anticipated harm, as opposed to danger, is a clear misstatement of law and it warrants reversing the jury's verdict that the District was negligent, should the case be remanded.

V. CONCLUSION

The plaintiffs participated in a long and thorough trial in which they had every opportunity to present their claims to the jury. One can certainly question the wisdom of the plaintiffs' trial tactics, but no one can question the fairness of the trial. The jury reached the well-supported conclusion that Amanda's activities with Matt at school did not proximately result in any damages. This Court is respectfully urged to uphold the verdict.

DATED this 13th day of November, 2012.

NORTHCRAFT, BIGBY & BIGGS, P.C.



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