FILED
SUPREME COURT
STATE OF WASHINGTON
2/26/2018 3:26 PM
BY SUSAN L. CARLSON
CLERK

No. 95342-2

FILED
SUPREME COURT
STATE OF WASHINGTON
3/7/2018
BY SUSAN L. CARLSON
CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

K.H., as guardian for her minor daughter D.H.;
K.H. and G.H. individually,

Plaintiffs/Petitioners,

vs.

OLYMPIA SCHOOL DISTRICT,

Defendant/Respondent.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM IN SUPPORT OF REVIEW

Valerie D. McOmie
WSBA No. 33240
4549 NW Aspen Street
Camas, WA 98607
(360) 852-3332

Daniel E. Huntington
WSBA No. 8277
422 W. Riverside, Ste. 1300
Spokane, WA 99201
(509) 455-4201

On Behalf of
Washington State Association for Justice Foundation

I. IDENTITY AND INTEREST AMICUS CURIAE

Washington State Association for Justice Foundation (WSAJ Foundation) is a nonprofit corporation under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the right of an injured plaintiff to recover general damages caused by the conduct of a negligent tortfeasor.

II. BACKGROUND

This Petition presents the Court with an opportunity to address two issues involving the interests of injured plaintiffs: 1) whether a plaintiff suffering injury due to negligence is entitled to recover general damages when evidence of such damages is uncontroverted; and 2) whether a jury solely considering liability of a negligent tortfeasor should be instructed to segregate damages caused by an unnamed intentional tortfeasor.

Plaintiffs K.H. and G.H. are the parents of D.H., and bring this action for negligence against Olympia School District (OSD) arising out of the sexual molestation of D.H. perpetrated by Gary Shafer, a former OSD school bus driver. The facts are drawn from the unpublished Court of Appeals opinion and the parties' briefing. *See K.H. v. Olympia Sch. Dist.*, *noted at* 200 Wn. App. 1028, 2017 WL 3601888 (2017), *review pending*; Pet. for Rev. at 1-3, 6-9; Ans. to Pet. for Rev. at 2; Plaintiffs' Op. Br. at 31.

For purposes of this amicus curiae memorandum, the following facts are relevant. In 2011, Shafer was arrested, and admitted that on three occasions in 2010, he molested D.H. on the school bus. She was four years old at the time. D.H. suffers from a condition known as Trisomy X, which causes delays in certain developmental areas, including language and social skills. Shafer stated he selected D.H. because she would be "less likely . . . to tell on" him. *K.H.*, 2017 WL 3601888, at *2. Following one of the incidents, D.H. got off the bus and asked "Why that man touch my bottom?" *Id.* at *3. D.H. was upset that day and thereafter refused to ride the bus. In the years following, D.H. exhibited various signs of distress, including tantrums, aggressiveness and acting out sexually. *See id.*

Plaintiffs filed a negligence action against OSD related to its conduct in hiring, supervising and training Shafer, as well as failing to properly train other OSD employees who were in a position to potentially prevent the abuse. Plaintiffs presented the testimony of sex abuse trauma expert Jon Conte, who opined that D.H. suffered a period of deterioration of functioning as a result of the assaults, and was "at significant risk to develop one or more of the evidence-based effects of childhood sexual abuse." Plaintiffs' Op. Br. at 31. Conte stated that K.H. also suffered significant distress as a result of her daughter's abuse, including depression and anxiety. *See K.H.*, 2017 WL 3601888, at *3.

Psychiatrist Russell Vandenbelt testified for OSD. He stated D.H.'s

symptoms resulted from Trisomy X and not the molestation. He admitted, however, that the assault caused her to be "transiently upset." *Id*. Vandenbelt conceded the trauma suffered by K.H. as a result of the sexual molestation. *See id*. at *5. Distress suffered by G.H. was also not disputed.

OSD requested an instruction directing the jury to segregate damages caused by Shafer. Relying on *Rollins v. King County Metro* Transit, 148 Wn. App. 370, 199 P.3d 499, *review denied*, 166 Wn.2d 1025 (2009), OSD offered "instruction 19," which stated:

> In calculating a damage award, you must not include any damages that were caused by acts of Gary Shafer and not proximately caused by negligence of the [District]. Any damages caused solely by Gary Shafer and not proximately caused by negligence of the [District] must be segregated from and not made part of any damage award against [the District].

K.H., 2017 WL 3601888, at *5.

Plaintiffs objected to instruction 19, arguing it misstated the law, "unfairly and prejudicially" framed the issue in the negative and improperly directed the jury to "exclud[e] damages immediately as opposed to describ[e] in a positive fashion what they are to award." *Id.* (brackets added). Plaintiffs also argued the instruction was unnecessary in light of instruction 22, which defined proximate cause and explained there may be more than one proximate cause of an injury or event. *See* Pet. for Rev. at 6-8. Plaintiffs further stated instruction 19 is a "*Rollins/Tegman* type instruction," and would be misapplied in this case. *See* Pet. for Rev.

at 8-9. The trial court accepted OSD's proposed instruction 19, noting its use in *Rollins* and observing the "significant parallels to this case." *K.H.,* 2017 WL 3601888, at *5.

The jury returned a special verdict form, answering "yes" as to whether OSD was negligent, and "yes" as to whether OSD's negligence was a "proximate cause of injury or damage" to the Plaintiffs. The jury found Plaintiffs' damages resulting from OSD's negligence to be $0. *Id.*

Plaintiffs moved for a new trial on the issue of damages pursuant to CR 59(a)(1), (5), (7) & (9). Plaintiffs argued 1) the verdict was irreconcilable because the jury found negligence, proximate cause and injury, but awarded $0; and 2) the award of $0 was not supported by substantial evidence because evidence demonstrating Plaintiffs' general damages was uncontroverted. The trial court denied the motion. *See id.*

On appeal, Plaintiffs challenged the trial court's denial of a new trial, as well as its use of instruction 19. The Court of Appeals affirmed. It held "the jury could decline to award damages to the Appellants if the jury was not convinced that the [Plaintiffs] had proven that the amount of compensation they were entitled to was greater than '$0.'" *Id.* at *8 (brackets added). It concluded that despite the sexual abuse, D.H. exhibited only temporary signs of upset, and evidence documenting her ongoing distress was disputed. Regarding D.H.'s parents' damages, the court agreed the evidence was uncontroverted, but held "guilt, anger,

depression and anxiety, although evidence of emotional upset, could reasonably have been assessed by the jury not to rise to the level of upset that would merit a damages recovery." *Id.* at *11.

Regarding instruction 19, the Court of Appeals held Plaintiffs' claims that the instruction was redundant and slanted in favor of OSD were not raised at trial and were waived. As to their claim the instruction was misleading and confusing due to its negative phrasing, the Court stated that negatively-phrased instructions are not per se prohibited. It then noted the use of a similar instruction in *Rollins* and held that given its factual similarity to this case, instruction 19 was proper. *See id.* at *11-12.

III. ISSUES PRESENTED

This memorandum discusses two issues in the petition, reframed:

1) Does Division II's opinion conflict with decisions of this Court, including *Palmer v. Jensen,* 132 Wn.2d 193, 937 P.2d 597 (1997), recognizing that a plaintiff suffering injuries caused by a defendant's negligence is entitled to recover general damages documented by uncontroverted evidence?

2) In an action by a plaintiff against a negligent tortfeasor, must a jury be instructed to segregate damages proximately caused by an unnamed intentional tortfeasor from damages proximately caused by the negligent defendant named in the action?

IV. ARGUMENT IN SUPPORT OF REVIEW

A. Review is warranted under RAP 13.4(b)(1) because the Court of Appeals opinion conflicts with opinions of this Court holding that uncontroverted evidence of pain and suffering caused by a defendant's negligence generally entitles a plaintiff to recovery of general damages.

Under RAP 13.4(b)(1), review is warranted if a decision conflicts with a decision of this Court. Here, the court failed to properly apply this Court's jurisprudence recognizing a plaintiff proffering uncontroverted evidence documenting significant pain and suffering is entitled to recovery of such damages. *See Palmer v. Jensen,* 132 Wn.2d 193, 201, 937 P.2d 597 (1997); *see also Ide v. Stoltenow*, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955). This Court in *Palmer* did state there is "no per se rule that general damages must be awarded to every plaintiff who sustains an injury," but concluded that "a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages." 132 Wn.2d 201.

In *Palmer*, plaintiffs were a mother and son injured in an auto accident. While the son suffered only a contusion and minimal discomfort, the mother underwent extensive medical care and documented ongoing pain. The jury awarded special damages but no general damages. This Court held that because the son's injuries were "minimal," the denial of general damages was not improper. 132 Wn.2d at 202. In contrast, where the mother substantiated pain and suffering, the jury verdict denying general damages was not supported by substantial evidence.

In *Meinhart v. Anaya*, 1 Wn. App. 2d 59, 403 P.3d 973 (2017), Division II recently examined the rule in *Palmer*, attempting to distinguish pain and suffering that may be deemed "minimal" from that which is substantial enough to require an award of general damages. It observed:

> [I]t is an abuse of discretion for a trial court in a personal injury case to deny a motion for a new trial when a jury awards economic damages but fails to award noneconomic damages if (1) the plaintiff presents substantial evidence that an accident caused injury and pain, and (2) the defendant presents no contrary evidence or inference . . . . On the other hand, case law shows that an award of noneconomic damages may not warrant a new trial when the defendant presents a legitimate challenge to the plaintiff's injuries or the injuries' proximate cause.

Meinhart, 1 Wn. App. 2d at 68 (brackets added).[1]

Here, Plaintiffs established OSD negligently failed to protect D.H. from sexual abuse perpetrated by its bus driver. The jury found OSD's negligence caused injury to Plaintiffs. Both Plaintiffs' and OSD's experts agreed Plaintiffs suffered trauma as a result of the assault.[2] Whether, under *Palmer* and its progeny, the sexual assault of a developmentally disabled four year old child and the resulting distress on her and her parents were

---

[1] OSD appears to concede a plaintiff documenting significant pain and suffering is entitled to general damages, but suggests this is limited to cases in which a plaintiff is awarded special damages. *See* Ans. to Pet. for Rev. at 6-7. None of the Washington cases cited by OSD, however, hold an award of special damages is a prerequisite to entitlement to general damages supported by uncontroverted evidence. Rather, these cases upheld verdicts denying general damages because evidence of general damages was disputed. *See Lopez v. Salgado-Guadarama*, 130 Wn. App. 87, 92-93, 122 P.3d 733 (2005), *review denied*, 157 Wn.2d 1011 (2006); *Minger v. Reinhard Dist. Co.*, 87 Wn. App. 941, 946, 943 P.2d 400 (1997). While many cases involving disputes over general damages include an award of special damages, the relevance of such an award appears to be that it offers proof of injury and causation for purposes of examining resultant general damages. *See, e.g., Fahndrich v. Williams,* 147 Wn. App. 302, 308-09, 194 P.3d 1005 (2008) (noting an award of substantial special damages may demonstrate an incident and resulting injury are not "minimal"). Where, as here, these elements are established, an award of special damages would appear to be irrelevant.

[2] OSD asserts there is "insufficient evidence of compensable damages," and this demonstrates that the existence of general damages is disputed. *See* Ans. to Pet. for Rev. at 5. As Plaintiffs point out, however, both experts agreed Plaintiffs suffered emotional distress. *See* Pet. for Rev. at 5-6. Significantly, the Court of Appeals appears to agree the evidence of emotional distress is undisputed, but upholds the jury verdict because it may have deemed Plaintiffs' distress to have no "legally compensable value." *K.H.,* 2017 WL 3601888, at *8.

so minimal as to justify an award of no general damages is a matter warranting review by this Court.

B. Review is warranted under RAP 13.4(b)(2) because the Court of Appeals holding that instruction 19 was proper conflicts with Division I's holding in *Rollins*, which held that under *Welch v. Southland,* 134 Wn.2d 629, 952 P.2d 162 (1998) and *Tegman v. Accident & Medical Investigations, Inc.,* 150 Wn.2d 102, 75 P.3d 497 (2003), a jury need not be instructed to segregate damages caused by unnamed intentional tortfeasors.

The Court of Appeals held that the trial court's use of the *Rollins* instruction in this case was proper: "Given the similarity of this case to *Rollins*, the trial court's decision that instruction 19 would be helpful to the jury and was not misleading or confusing was not unreasonable." *K.H.*, 2017 WL 3601888, at *12.[3] As Plaintiffs argue, however, this instruction was inconsistent with the underlying holding in *Rollins*, that where joint and several liability is not at issue, as when only negligent tortfeasors are named in the action, a segregation instruction is unnecessary.

In *Rollins*, plaintiffs were attacked on a King County Metro bus and brought a negligence action against King County. The trial court used an instruction similar to instruction 19. The jury found for the plaintiffs,

[3] OSD asserts Plaintiffs did not preserve their substantive objection to instruction 19 based on *Rollins*. *See* Ans. to Pet. for Rev. at 8. Plaintiffs did object to instruction 19 at trial, however, arguing it was unfair, prejudicial, and improperly directed the jury to segregate damages from intentional conduct at the outset. *See* Pet. for Rev. at 12 n.33. Plaintiffs also argued the instruction was a misapplication of *Tegman*. *See* Pet. for Rev. at 8-9. An issue is reviewable if the argument is "sufficient to apprise the trial court of the nature and substance of the objection." *Washburn v. City of Federal Way*, 178 Wn.2d 732, 746, 310 P.3d 1275 (2013). The court here held Plaintiffs preserved the argument that instruction 19 was misleading because it was negatively phrased, and went on to hold the use of the *Rollins* segregation instruction was proper. *See* 2017 WL 3601888, at *12.

and King County appealed. Relying on *Tegman*, it argued the trial court was required to instruct the jury to segregate "the percentage of damages caused by negligent conduct and the percentage of damages caused by the assailant's intentional conduct." *Rollins,* 148 Wn. App. at 376. Addressing King County's arguments, the court in *Rollins* examined two seminal cases of this Court that speak to the interplay between Ch. 4.22 RCW on the one hand and segregation of damages among negligent and intentional tortfeasors on the other: *Welch v. Southland Corp.*, *supra*, and *Tegman v. Accident & Medical Investigations, Inc., supra*.

In *Welch,* the plaintiff was shot by an unknown assailant outside a 7-11 store and brought suit against the owner of 7-11, Southland Corporation. Southland argued the court must apportion fault between Southland and the unnamed assailant. This Court held apportionment was improper, as intentional tortfeasors are not "at fault" entities under the definition of fault in RCW 4.22.015. *Welch,* 134 Wn.2d at 634.

Rollins noted that in contrast, the plaintiff in *Tegman* sued both intentional and negligent tortfeasors. The question faced by this Court in *Tegman* was thus distinct from the issue facing the Court in *Welch:*

> [Tegman] considered how to allocate liability where the conduct of multiple defendants is negligent, intentional, or both. Specifically, the court considered whether RCW 4.22.070 permits a negligent defendant to be held jointly and severally responsible for damages caused both by that negligence and the intentional acts of other defendants.

Rollins, 148 Wn. App. at 378 (brackets added; citation omitted).

Applying *Welch* and *Tegman* to the facts before it, *Rollins* held:

> *Tegman* is about joint and several liability. Here, Metro is the only defendant and negligence is the plaintiffs' only theory. To recover at all, plaintiffs had to prove their injuries were proximately caused by Metro's negligence. There is no issue of joint and several liability in this case. . . . [T]his case is akin to *Welch*. . . . Here and in *Welch,* plaintiffs sought recovery only for damages proximately caused by the *defendant's* negligence. In neither case was there a risk that the negligent defendant would be held liable for the assailants' "share" of the damages, so there is no need for the jury to determine the size of that share or to deduct it from its damages award.

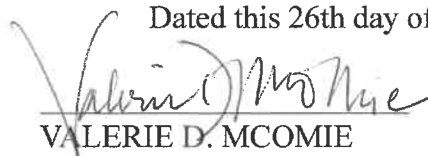
148 Wn. App. at 379 (brackets added). Thus, *Rollins* held that under *Welch* and *Tegman*, a jury assessing liability of only negligent tortfeasors should not be instructed to segregate damages to unnamed intentional tortfeasors.

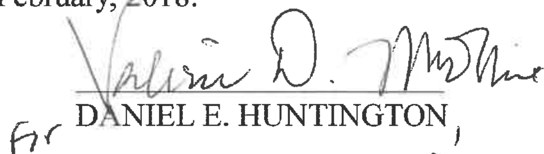
It is true *Rollins* left intact its segregation instruction. The plaintiffs did not challenge the instruction, however, and the court did not determine whether, in light of its holding, a jury should be instructed to segregate damages caused by intentional conduct. This Court should accept review to address whether the opinion below conflicts with the holding in *Rollins*, that segregation of damages is unwarranted when there is no issue of joint and several liability among intentional and negligent tortfeasors.

V. CONCLUSION

The Petition for Review should be granted.

Dated this 26th day of February, 2018.





VALERIE D. MCOMIE

For DANIEL E. HUNTINGTON, with authority

On Behalf of WSAJ Foundation

February 26, 2018 - 3:26 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95342-2
Appellate Court Case Title:	K.H. & D.H. v. Olympia School District
Superior Court Case Number:	14-2-01243-5

The following documents have been uploaded:

- 953422_Letters_Memos_20180226152118SC036920_5304.pdf
  This File Contains:
  Letters/Memos - Other
  The Original File Name was KH ACM. - Final.pdf
- 953422_Motion_20180226152118SC036920_5622.pdf
  This File Contains:
  Motion 1 - Other
  The Original File Name was Motion for Leave to File ACM - K.H.- Final.pdf

A copy of the uploaded files will be sent to:

- chris@pcvalaw.com
- danhuntington@richter-wimberley.com
- darrell@pcvalaw.com
- ken@appeal-law.com
- kevin@pcvalaw.com
- paralegal@appeal-law.com
- sawes@pcvalaw.com
- shelby@appeal-law.com

Comments:

Attached please find a Motion for Leave to File Amicus Curiae Memorandum in Support of Review and accompanying Amicus Curiae Memorandum (ACM) of Washington State Association for Justice Foundation. As the ACM is technically not an amicus curiae brief, it is submitted under "Letters/Memos" as "other." The Motion is submitted as a "Motion," also under "other."

Sender Name: Valerie McOmie - Email: valeriemcomie@gmail.com
Address:
4549 NW ASPEN ST
CAMAS, WA, 98607-8302
Phone: 360-852-3332

Note: The Filing Id is 20180226152118SC036920