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SUPREME COURT  
STATE OF WASHINGTON  
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No. 95342-2

Court of Appeals No. 48583-4-II

IN THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

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K. H., et al.,

Appellants,

vs.

OLYMPIA SCHOOL DISTRICT,

Respondent.

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ANSWER TO AMICUS CURIAE MEMO OF WASHINGTON  
STATE ASSOCIATION FOR JUSTICE FOUNDATION (WSAJF)

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## ANSWER

**A. This Court should not consider issues first raised by Amicus WSAJF.**

Amicus WSAJF raises two issues that were neither raised in the trial or appellate court, nor preserved. This Court does not generally consider issues first raised by *amici*. See, e.g., ***Madison v. State***, 161 Wn.2d 85, 104 n.10, 163 P.3d 757 (2007) (citing ***Citizens for Responsible Wildlife Mgmt. v. State***, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) (citing ***Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1***, 140 Wn.2d 403, 413, 997 P.2d 915 (2000))). It should not do so here.

**B. This Court should not invade the jury's constitutionally protected province in determining general damages.**

WSAJF's first issue is posed as whether the assault on the child and the parents' alleged distress "were so minimal as to justify an award of no general damages" under ***Palmer v. Jensen***, 132 Wn.2d 193, 937 P.2d 597 (1997) and its progeny. WSAJF Brf. at 7-8. That is not a question presented to the trial court or to the appellate court. Nor do ***Palmer*** and its progeny have anything to do with such a question.

Essentially – like the plaintiffs' new argument in their Petition – WSAJF asks whether this Court will invade the province of the jury

and decide whether general damages are “sufficient” or “justified.” As explained in the Answer, this Court does not do that. Answer at 3-4 (citing, *inter alia*, ***Sofie v. Fibreboard***, 112 Wn.2d 636, 771 P.2d 711 (1989); see also ***Burnside v. Simpson Paper Co.***, 123 Wn.2d 93, 864 P.2d 937 (1994); ***Bingaman v. Grays Harbor Cmty. Hosp.***, 103 Wn.2d 831, 699 P.2d 1230 (1985)). Simply put, the jury’s general damages verdict is constitutionally inviolable.

Remarkably, WSAJF has nothing to say about ***Sofie, et al.***

Nor do ***Palmer*** and its progeny have anything to do with WSAJF’s new issue. Answer at 5-7. Where, as here – and contrary to WSAJF’s mistaken assumptions – the existence of compensable damage was “hotly disputed,” and no special damages were awarded, no case permits an appellate court to invade a defense verdict. See, e.g., ***K.H. v. Olympia School Dist.***, No. 48583-4-II, Slip Op. at 19 (Wash. App. Aug. 22, 2017) (“Here, the District and the Appellants hotly disputed whether or not DH suffered any compensable damages”); ***Palmer***, 132 Wn.2d at 201 (there exists “no per se rule that general damages must be awarded to every plaintiff who sustains an injury”); ***Lopez v. Salgado-Guadaram***, 130 Wn. App. 87, 92-93, 122 P.3d 733 (2005) (disputed damages evidence justifies \$0 in general damages); ***Minger v. Reinhard Dist.***

**Co., Inc.**, 87 Wn. App. 941, 946, 943 P.2d 400 (1997) (where liability and proximate cause found, \$0 general damages affirmed).

**Palmer** and its progeny do not support WSAJF. No other authority supports its novel claims. Defense verdicts are still possible in Washington. For justice's sake, they must remain so.

**C. WSAJF's second issue is also unpreserved.**

WSAJF claims it has "reframed" plaintiff's issues, but it is merely raising waived or otherwise unpreserved issues. WSAJF Brf. at 5. It asks whether segregation is necessary where, as here, the plaintiff chooses not to sue the intentional tortfeasor. *Id.* at 8-10. It argues that the answer is no, under **Rollins v. King Cy. Metro Transit**, 148 Wn. App. 370, 199 P.3d 499, *rev. denied*, 166 Wn.2d 1025 (2009) and **Welch v. Southland Corp.**, 134 Wn.2d 629, 952 P.2d 162 (1998). *Id.* If – as WSAJF argues – this Court already answered this question in **Welch**, review is unnecessary here.

Plaintiffs simply waived this argument in the trial court. WSAJF omits from its third footnote (*id.* at 8 n.3) the material portion of the Court of Appeals' opinion: that court *held* that the plaintiffs *sole* preserved objection to Jury Inst. 19 was that it is "misleading" because it is "negatively phrased." Slip Op. at 21-23; Answer at 8-9. WSAJF's footnote adopts misstatements from the Petition that are

irrelevant where, as here, petitioners fail even to challenge this Court of Appeals holding in their Petition. Answer at 8-9 (citing PFR 3-4). This issue is not properly before this Court.

WSAJF's suggestion that the Court of Appeals "went on to hold the use of the *Rollins* segregation instruction was proper" is inaccurate. WSAJF Brf. at 8 n.3. The Court of Appeals did not address whether giving that instruction was proper, but instead held that the language of the given instruction (even if "negatively phrased") was not an abuse of discretion. Slip Op. at 23-24; Answer at 8-9. Again, this issue is not properly before this Court.

While WSAJF nonetheless goes on to raise new substantive arguments (WSAJF Brf. at 8-10), it fails to grapple with the District's Answer, which notes that the *unchallenged* instructions in this case comport well with *Rollins*'s instructions that the verdict "should be for [the defendant] if [the jury] found the sole proximate cause of injury was a cause other than [that defendant's] negligence." *Rollins*, 148 Wn. App. at 379. This unremarkable proposition is the law of this case. It fully supports the jury's \$0 damages verdict.

As in *Rollins*, the "plaintiffs did not challenge the instruction" in substance. WSAJF Brf. at 10. No substantive issue is properly presented here. This Court should deny review.



## CONCLUSION

Amicus WSAJF raises only new and unpreserved issues. Although it cites RAP 13.4(b) & (2), it nowhere shows a conflict with any existing decision – at least not one that the plaintiffs properly raised in the trial and appellate courts. The outcome it seeks would directly conflict with **Sofie** and our Constitution's mandate that this jury's general damages verdict must remain inviolate. This Court should deny review.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of March 2018.

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**CERTIFICATE OF SERVICE**

I certify that I caused to be filed and served, a copy of the foregoing, **ANSWER TO AMICUS CURIAE MEMO OF WSAJF**, on the 20<sup>th</sup> day of March 2018, as follows:

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