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WASHINGTON STATE
SUPREME COURT

95342-2

No. 48583-4-II

48583-4-II

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.

PETITION FOR REVIEW

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B. Review is required under RAP 13.4 (b)(4) because (1) the Court of Appeals' reliance on dicta in Rollins upholding Instruction 19 in disregard of Rollins's core holding limiting the Tegman segregation requirement to cases where the intentional tortfeasor is a party defendant further contributes to the "considerable confusion" in this area of the law,

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I. IDENTITY OF PETITIONERS

Petitioners D.H., a disabled minor, and her mother and father K.H. and G.H., respectively, ask this Court to accept review of the decision designated in Part II below.

II. THE DECISION OF THE COURT OF APPEALS

The Petitioners before this Court consist of a young, special needs girl with cognitive and communicative disabilities sexually abused by an Olympia School District ("District") bus driver and serial pedophile, Gary Shafer ("Shafer"), and her horrified and emotionally traumatized parents. At trial, on Petitioners' negligence suit solely against the District, the jury heard undisputed testimony from Shafer himself regarding his fondling and licking of D.H.'s genitals while on District busses. As the Court of Appeals acknowledged, the jury also heard from the District's own damages expert that, at a minimum, D.H. had demonstrated emotional distress the afternoon following one instance of abuse, immediately after being dropped off by the bus; indeed, D.H. acknowledged this period of distress with the statement, "Why that man touch my bottom?"[1] As the Court of Appeals further acknowledged, the jury heard uncontroverted evidence of both parents' anguish after learning of Shafer's abuse of their daughter.

The trial court's Instruction 19 told the jury that it was required to segregate and not award damages caused solely by Shafer, despite Petitioners' objections that the instruction was inconsistent with *Tegman*[2]

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[1] Report of Proceedings Volume 7 ("7 RP") at 1231.

[2] *Tegman v. Accident & Med. Investigators, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003).

and *Rollins*[3]; unwarranted given the other instructions before the jury; and potentially confusing and misleading given its negative phrasing, defense-oriented slant, and redundancy.

Consistent with this uncontroverted evidence, the jury returned unchallenged special verdict interrogatory answers finding the District was negligent and grossly negligent and that such negligence proximately caused "injury or damage" to each Petitioner. Shockingly inconsistent with both the evidence and these findings, however—but unsurprising given Instruction 19—the jury awarded Petitioners nothing—not even a single dollar—despite D.H.'s undisputed sexual abuse and Petitioners' resultant emotional pain and suffering.[4] In denying Petitioners' motion for a new damages trial, the trial court ruled that the jury could have concluded that Petitioners failed to prove their damages or relied on Instruction 19 to award zero damages.

In affirming the trial court, the Court of Appeals held that the jury's unchallenged findings of gross negligence, negligence, and proximate cause of "injury or damage" and uncontroverted evidence of damages were nonetheless reconcilable with its award of no damages because the jury was entitled to disregard the uncontroverted evidence of D.H.'s sexual abuse and, as to Petitioners' other damages, the jury could have concluded that those damages were too "insignificant" or did not "rise to the level . . . that

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[3] *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P.3d 499, *review denied*, 166 Wn.2d 1025 (2009).

[4] A copy of the complete jury special verdict form is provided in the appendices to this petition. Appendix A; Clerk's Papers ("CP") at 6447-49.

would merit a damages recovery." *K.H. for D.H. v. Olympia Sch. Dist.*, 200 Wn. App. 1028, 2017 WL 3601888, at * 9-11 (Wash. Ct. App. Div. II Aug. 22, 2017).

The Court of Appeals also held that the trial court properly gave Instruction 19, concluding that *Rollins* "held that it was not misleading to give" the instruction, thus approving its general use and specific, negative phrasing. *K.H.*, 2017 WL 3601888, at * 12. For the following reasons, both holdings conflict with numerous decisions of this Court and the Court of Appeals and raise multiple issues of substantial public interest, requiring review by this Court. RAP 13.4 (b)(1), (b)(2), (b)(4).

III. ISSUES PRESENTED FOR REVIEW

A. **Should review be granted under RAP 13.4 (b)(1) and (b)(2) because the Court of Appeals' holding in this case that the jury's award of no damages is reconcilable with its unchallenged findings of gross negligence, negligence, and proximate cause of "injury or damage" and uncontroverted evidence of sexual abuse and resultant emotional pain and suffering damages conflicts with decisions of this Court and of the Court of Appeals upholding a right to recover general damages under these circumstances?**

B. **Should review be granted under RAP 13.4 (b)(2) because the Court of Appeals' holding that Instruction 19 properly instructed the jury on damages segregation even though the intentional tortfeasor was not a party defendant conflicts with the holding in *Rollins* that this Court's requirement in *Tegman* regarding damages segregation does not apply under such circumstances because no issue of joint and several liability is presented?**

C. **Should review be granted under RAP 13.4 (b)(4) because the Court of Appeals determination upholding the trial court in giving Instruction 19 is of substantial public interest because it affects all tort litigants in Washington, the Court of Appeals' decisions on the issue are now inconsistent, and the Court of Appeals has otherwise acknowledged "considerable confusion" in this general area of the**

law?

D. Should review be granted under RAP 13.4(b)(4) because the issue of whether the jury was required to award general damages in the face of its unchallenged special verdict form answers finding fault and proximate cause and the uncontroverted damages evidence is of substantial public interest because it affects all Washington tort litigants?

IV. STATEMENT OF THE CASE

A. Background

At the time she was sexually abused on a District bus, D.H. was a four-year old District student in her second year of preschool who rode a special needs bus route.[5] D.H. has Trisomy X, a genetic condition that results in cognitive and communicative difficulties, particularly "speech problems" with her vocabulary and "trying to get across what she wanted to say."[6] Shafer admitted to molesting D.H. and specifically targeting her because he assumed that, due to her condition, she would be "less likely . . . to tell on" him.[7] After Shafer's arrest and guilty plea for molesting three other District students, Petitioners sued the District for gross negligence, negligence, and negligent infliction of emotional distress based on the District's failure to prevent Shafer from abusing D.H. *K.H.*, 2017 WL 3601888, at * 1. Shafer is not a party defendant in this case.

B. Trial Evidence of the District's Liability and Petitioners' Uncontroverted Damages

For purposes of this petition, Petitioners accept as sufficient the Court of Appeals' recitation of the trial evidence regarding the District's

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[5] 2 RP at 229; 7 RP at 1225-1226, 1228; CP at 4551-4552.

[6] 7 RP at 1214-1215, 1227; 8 RP at 1521-1522.

[7] 2 RP at 325.

liability. *K.H.*, at * 2.

Regarding damages, Shafer testified he molested D.H. on three separate occasions.[8] He touched her vaginal area through her clothing on the first and second occasions and pulled her pants and underwear down, touched her vaginal area, and attempted to perform oral sex on her on the third occasion.[9]

D.H.'s mother, K.H., testified that on one day in November or December of 2010, when D.H. got off the bus, she was not smiling, which was unusual, and right away D.H. asked her mother, "Why that man touch my bottom?"[10] For the remainder of that afternoon, D.H. was "really upset," "moody," and "off," so much so that D.H.'s father, G.H., returned home early from work out of concern.[11]

The District's damages expert, Dr. Russell Vandenbelt, admitted that one of the instances of Shafer's abuse of D.H. occurred on the day that D.H. was dropped off and asked her mother the above-quoted question.[12] Dr. Vandenbelt further agreed that, at a minimum, D.H. was "upset that afternoon."[13] According to him, this demonstrated that the abuse had "impact[ed]" D.H. and was "upsetting" to her.[14] Finally, although he attempted to minimize D.H.'s emotional distress on this day as

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[8] 3 RP at 457.

[9] 2 RP at 322-323, 329; 3 RP at 449-450, 451-57; 9 RP at 1606-1607.

[10] 7 RP at 1228-1231.

[11] 7 RP at 1232-1233.

[12] 9 RP at 1610-1611.

[13] 9 RP at 1611.

[14] 8 RP at 1546.

"transient[],"[15] he acknowledged:

> The best available information in the records is that [DH] really wasn't any different in the immediate time frame following what happened on the bus ***outside of the afternoon when supposedly something happened*** and carrying forward.[16]

Thus, even Dr. Vandenbelt testified that, at least for that afternoon, D.H. had manifested emotional distress ***at the time of and as a result of*** the bus incident—not her Trisomy X.

Similarly, as acknowledged by the Court of Appeals, the jury heard uncontroverted evidence from multiple witnesses—including Dr. Vandenbelt—that D.H.'s parents had suffered multiple forms of emotional distress, "all of which resulted from [their] understanding of what had happened on the bus."[17]

C. The Jury Returns an Inconsistent Verdict After the Trial Court's Erroneous Damages Segregation Instruction, Instruction 19

During the initial December 11, 2015 instructions conference, Petitioners objected to the District's proposed instruction 15, the predecessor to the trial court's Instruction 19, arguing that any such damages segregation instruction was improper because it was unwarranted under the facts, law, and other instructions, and due to its negative

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[15] 8 RP at 1546.

[16] 8 RP at 1531 (emphases added).

[17] *K.H.*, at *10 (describing the damages evidence regarding K.H. and G.H. and the District's lack of cross-examination on their damages); *see also* 7 RP at 1207, 1237, 1274-75 (K.H.'s testimony regarding her various forms of emotional distress and marital problems resulting from her knowledge of D.H.'s sexual abuse); 9 RP at 1631-32 (Dr. Vandenbelt's testimony that K.H. had experienced guilt, anger, anxiety, stress, and heightened depression as a result of D.H.'s sexual abuse); 7 RP at 1354-1355, 1360, 1362 (G.H.'s testimony regarding his specific fear and anxiety resulting from his knowledge of D.H.'s sexual abuse).

phrasing.[18] Specifically, Petitioners argued:

> So the plaintiffs have pretty much relied on the WPIs, on just the standard WPIs about what cause is. ***There is a good cause instruction, for example, that talks about more than one proximate cause can be determined for the same harm. In this case, that would cover the fact that Gary Shafer is the cause of harm while allowing us to argue that the district is a cause of harm as well.*** So we did not deviate outside the WPIs for that; the district, however, has.[19]
>
> The proximate cause instructions that they have proposed are generally phrased in the negative, which is frowned on by the pattern jury instruction committee, which I'm well acquainted with. ***In other words, they're saying, for example, the jury cannot award damages that are proximately caused by whatever, whatever. Typically in the pattern jury instructions that are adopted by the high court, they want the instruction to be framed in the positive, proximate cause can be found with such and such, and then contain the standard WPI instruction that says there can be more than one proximate cause.***
>
> And then it goes on to say, if you find that the defendant has

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[18] 7 RP at 1368, 1380; 10 RP at 1911, 2004, 2055, 2186; 11 RP at 2065-2066; CP at 6155.

[19] The referenced WPI, WPI 15.04, corresponds to the trial court's Instruction 22. CP at 6436. Instruction 22 stated:

> The cause of an injury or event is a proximate cause if it is related to the injury or event in two ways: (1) the cause produced the injury or event in a direct sequence, and (2) the injury or event would not have happened in the absence of the cause.
>
> There may be more than one proximate cause of the same injury or event. If you find that the defendant was negligent and that such negligence was a proximate cause of injury or damage to the plaintiff, it is not a defense that the act of some other person who is not a party to this lawsuit may also have been a proximate cause.
>
> ***However, if you find that the sole proximate cause of injury or damage to the plaintiff was the act of some other person who is not a party to this lawsuit then your verdict should be for the defendant.***

CP at 6436 (emphasis added); Appendix B. As Petitioners argued below, this instruction was both consistent with controlling Washington law and sufficient for the District to argue its theory that Shafer, not the District, caused Petitioners' damages.

> not proximately caused damages, you can't award for plaintiffs, you have to find for the defendant. So I submit that as to proximate cause, we should stick closely with the WPI standards. Instructions outside of that when the WPIs apply are very dangerous, and ***there's no need to in this case.***[20]

Ultimately, however, the trial court chose to give the District's proposed instruction 15—modified by the deletion of a single sentence immaterial to this appeal—as its own Instruction 19 because it "defaulted . . . to the instruction used in the *Rollins* case that the Court there appeared to confirm was an appropriate instruction."[21] Instruction 19 states,

> 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 Olympia School District. ***Any damages caused solely by Gary Shafer and not proximately caused by negligence of the Olympia School District must be segregated from and not made a part of any damage award against Olympia School District.***[22]

On December 16, 2015, when afforded an opportunity for additional instructional objections, Petitioners again objected to Instruction 19 on the basis that it was improper under controlling law, slanted toward the defense's theory of the case, and misleading in its negative phrasing:

> [A]s to the instructions that the Court will be giving, the one exception that we'll take is to Instruction No. 19, which is a *Rollins/Tegman* type instruction. We are taking exception to it because in our opinion it frames the issue in the negative and has the jury excluding damages immediately as opposed to describing in a positive fashion what they are to award. We also believe for appellate purposes that *Tegman* is

[20] CP at 4164; 7 RP at 1383-1385, 1391; 10 RP at 1922 (emphases added).

[21] 10 RP at 1930; *see also Rollins*, 148 Wn. App. at 379-80.

[22] CP at 6433; Appendix C (emphasis added).

> misapplied or would be misapplied in a situation like this and that the district can be liable for all damages caused by Gary Shafer as a result of owing the duty to prevent the criminal misconduct because Gary Shafer was an employee. So for those purposes, we take exception to the giving of 19.[23]

During trial closing argument the District's counsel exploited the misleadingly negative and one-sided nature of instruction 19 by further misrepresenting and emphasizing it:

> So let's look at that. What damages can you award? Well, if you look at Instruction No. 19, "In calculating a damage award, ***you must not include any damages that were caused by acts of Gary Shafer.***"[24]

After the trial court failed to sustain Petitioners' objection that the District's argument "misstate[d] the law" (instead merely commenting that it had "advised the jury to make sure you read the entire sentence,") the District continued:

> ***So you start from that premise***, and here is the qualification: Any damages that were not proximately caused by the negligence of the Olympia School District, okay? So I've talked to you a lot about proximate cause. Proximate cause means that there's a cause and effect. So that gets back to what did the school district employees see or reasonably should have seen that they didn't take action on and report? That's where proximate cause comes in. ***And so the only damages that you can award in this case are ones that are not caused by Gary Shafer and not proximately caused by the negligence of the district.***[25]

On December 17, the jury returned special verdict interrogatories finding that the District was both negligent and grossly negligent and that

[23] CP at 6155; 11 RP at 2066.

[24] 11 RP at 2161 (emphasis added).

[25] *Id.* at 2161-2162 (emphasis added).

such negligence and gross negligence was "a proximate cause of injury or damage to the plaintiffs."[26] The special verdict form then directed the jury, having affirmatively answered either proximate cause interrogatory, to determine Petitioners' damages.[27] However, the jury entered "$0" as to each Petitioner's damages.[28]

D. Motion for New Trial and Appeal

Petitioners then moved for a new trial on damages alone under CR 59 (a)(1), (a)(5), (a)(7), and (a)(9), arguing that the jury's findings of no damages were irreconcilable with its findings of gross negligence, negligence, and proximate cause, and the uncontroverted evidence of sexual abuse and damages.[29] The District responded that reconciliation was possible because: (1) the jury attributed the cause of all of Plaintiffs' damages to Shafer under Instruction 19 or (2) the jury rejected all of Petitioners' damages evidence.[30]

Ultimately, the trial court denied Petitioner's motion for a new trial, ruling that the jury's verdict was reconcilable because either the jury considered Shafer "as the sole cause" of any damages under Instruction 19 or "gave more weight" to the District's argument that Petitioners had suffered no damages at all.[31]

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[26] CP at 6447-48; Appendix A.

[27] CP at 6449.

[28] *Id.*

[29] CP at 6518-6521; RP (Jan. 15, 2016) at 7, 13.

[30] CP at 6564-6565, 6569-6573.

[31] RP (Jan. 15, 2016) at 31-32.

On appeal, Petitioners asserted that (1) the jury's award of no damages was inconsistent both with its finding of proximate causation of "injury or damage" to Petitioners and the uncontroverted evidence of their damages and (2) the trial court erred in giving instruction 19 because it was improper given the governing law, facts, and other instructions in the case; misleading given its negative phrasing; and prejudicially slanted toward the District's theory of the case.[32]

In upholding the jury's verdict awarding no damages despite its findings of "injury or damage" and the uncontroverted damages evidence, the Court of Appeals primarily relied on a decision of an intermediate New Jersey appellate court, *Kozma v. Starbucks Coffee Co.*, 412 N.J. Super. 319, 990 A.2d 679 (2010), for the proposition that the evidence of K.H.'s damages was "'susceptible to an interpretation that minimized the monetary equivalent of [K.H.'s] pain and suffering to its vanishing point" so that "the impact . . . was so insignificant that no additional injury beyond plaintiff's preexisting condition was sustained," thus holding that the evidence supported "the jury's award of '$0' as DH's compensation for the molestations." *K.H.*, at * 10.

Similarly, again citing *Kozma*, the Court of Appeals reasoned that "even where several witnesses have given uncontroverted testimony"—as with the emotional pain and suffering of D.H.'s parents—it "could reasonably have been assessed by the jury not to rise to the level of upset

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[32] Appendix D.

that would merit a damages recovery." *K.H.*, at *11. Thus, despite acknowledging that this uncontroverted testimony was "evidence of emotional upset," the Court of Appeals held that the evidence "support[ed] a '$0' verdict for DH's parents." *Id.*

Turning to Instruction 19, the Court of Appeals held that Petitioners had not preserved their arguments that the instruction was unwarranted under the law and facts and unfairly slanted toward the District's theory of the case.[33] Regarding Petitioners' "negative phrasing" argument, the Court of Appeals reasoned that "[*Rollins*] held that it was not misleading to give" an instruction like Instruction 19 under similar circumstances and, thus, "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.*, at * 12.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Review is required under RAP 13.4 (b)(1) and (b)(2) because (1) the Court of Appeals' conclusion that the award of zero damages does not render the verdict form answers inconsistent

[33] As Petitioners argued to the Court of Appeals in their motion for reconsideration, the record clearly demonstrates that Petitioners sufficiently preserved both arguments. First, Petitioners' argument at the first instructional conference that there was "no need" for Instruction 19, given that Instruction 22 would allow the District to argue that Shafer was the sole cause of Petitioners' damages instead of the District, mirrors Petitioners' argument on appeal that the instruction was unwarranted and improper. Second, when the trial court afforded an opportunity for additional objections, Petitioners argued that Instruction 19 was not warranted under *Tegman* and "'unfairly and prejudicially'" "'frame[d] the issue in the negative ***and ha[d] the jury excluding damages immediately*** as opposed to describing in a positive fashion what they are to award' and misstated the law." *K.H.*, at * 5 (quoting CP at 6155; 11 RP at 2065-66). These were arguments that the instruction was improper under controlling law and slanted in the defense's favor. Because these contentions were arguably related to the issues raised in the trial court, the Court of Appeals erred in finding a lack of preservation. *See Mavis v. King Cty. Pub. Hosp. No. 2*, 159 Wn. App. 639, 651, 248 P.3d 558 (2011) (quoting *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007)) (appellate court will consider "'newly-articulated theories'" "'arguably related to issues raised in the trial court.'") Accordingly, Petitioners request that this Court include these issues—including the Court of Appeals' preservation holdings—in its grant of review.

disregards existing Washington precedent regarding entitlement to general damages under these circumstances, and (2) in upholding Instruction 19 the Court of Appeals ignored the core holding in *Rollins* limiting the *Tegman* segregation requirement to cases where the intentional tortfeasor is a party defendant, relying instead on dicta in *Rollins* inconsistent with that core holding.

Division Two's holdings that (1) the jury could minimize or otherwise reject uncontroverted damages evidence in awarding no damages and (2) *Rollins* approved of giving a segregation of damages instruction similar to Instruction 19, are each in conflict with decisions of this Court or the Court of Appeals, requiring review under RAP 13.4 (b)(1) and (b)(2).

Regarding the inconsistent verdict issue, this Court long ago rejected arguments that a jury simply could minimize or reject uncontroverted damages and award no compensation, concluding:

> The difficulty with that argument is that, carried to its logical conclusion, there never could be an inadequate verdict, because the conclusive answer would always be that the jury did not have to believe the witnesses who testified as to damages, even though there was no contradiction or dispute.

Ide v. Stolenow, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955); *see also Palmer v. Jensen*, 132 Wn.2d 193, 200, 937 P.2d 597 (1997) (quoting the same); *Washburn v. City of Federal Way*, 169 Wn. App. 588, 283 P.3d 567 (2012), *aff'd on other grounds*, 178 Wn.2d 732 (2013) (stating the same).

Regardless of *Kozma*, *supra*, or other New Jersey precedent, numerous Washington appellate opinions hold that "a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages." *Palmer*, 132 Wn.2d at 201; *see also Ide*, 47 Wn.2d at 851 (in

determining whether damages were inadequate, court is "entitled to accept as established those items of damage which are conceded, undisputed, and beyond legitimate controversy"); *Washburn*, 169 Wn. App. at 617 (citing *Palmer* and *Ide* and holding new damages trial warranted where jury heard undisputed evidence of daughters' "pain and suffering as a result of [their mother's] death" and found that the defendant's negligence was "a proximate cause of injury and damage to the plaintiffs"); *Fahndrich v. Williams*, 147 Wn. App. 302, 306-07, 194 P.3d 1005 (2008) (reversing for new trial on damages where defendants "presented no evidence to contradict" plaintiff's evidence of pain and suffering but jury awarded no general damages). Where the jury here found gross negligence, negligence, and proximate cause of "injury or damage," and heard uncontroverted evidence of D.H.'s sexual abuse and each Petitioners' resultant emotional pain and suffering, the Court of Appeals' decision in this case conflicts with these decisions, requiring review under RAP 13.4(b)(1) and (b)(2).

Regarding the *Rollins/Tegman* issue, the Court of Appeals overlooked the core holding in *Rollins* limiting *Tegman*'s application, when it concluded that "[*Rollins*] held that it was not misleading to give" an instruction like Instruction 19 in this case. *K.H.*, at * 12. *Rollins* involved a lawsuit where the plaintiffs sued a negligent tortfeasor, King County Metro Transit (Metro) for damages, but ***not*** the intentional tortfeasors for damages. *See Rollins*, 148 Wn. App. at 372-73. On appeal, Metro argued that the trial court was required under *Tegman* to give its proposed jury instruction "stating that the plaintiffs must prove 'the percentage of

damages caused by negligent conduct and the percentage of damages caused by the assailants' conduct.'" *Rollins*, 148 Wn. App. at 376 (quoting *Rollins* Clerk's papers at 103)).

Division One rejected this argument, observing that where the *Tegman* plaintiffs sued to recover for both negligence and intentional wrongdoing and the trial court held all defendants jointly and severally liable for all damages, *Tegman* held that because "joint and several liability under RCW 4.22.070 applies only to damages caused by negligence" and negligent tortfeasors cannot be joint and severally liable for damages caused by intentional tortfeasors, segregation of damages is required. *Rollins*, 148 Wn. App. at 378-379 (citing *Tegman*, 150 Wn.2d at 105, 115, 119-20).

However, *Rollins* limited the application of *Tegman*, holding that, in the case before it,

> 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.
>
> . . . .
>
> The intentional conduct of unknown assailants was a proximate cause of injury in [*Rollins* and *Welch v. Southland Corp.*, 134 Wn.2d 629, 634, 636-37, 952 P.2d 162 (1998)], but no recovery was sought for those injuries. 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 was no need for the jury*** **to** determine the size of that share or ***to deduct it from its damages award***.

Id. (emphasis added).[34]

In other words, the principal holding of *Rollins* was overlooked by the Court of Appeals below. *Rollins* limits application of *Tegman* when only a negligent defendant is sued for damages caused by their negligence. Under *Rollins*, there is no need to instruct a jury on segregating damages caused by an intentional tortfeasor, as that issue is not present in the case. This core holding rejected Metro's challenge on appeal that it was entitled to a segregation instruction based on *Tegman*.

Unfortunately, the *Rollins* court undermined its holding by engaging in dicta stating that under an unchallenged instruction Metro was allowed to argue its theory that the damages caused by intentional tortfeasors should be segregated:

> The court also instructed the jury about calculating damages:
>
> "In calculating a damage award, you must not include any damages that were caused by acts of the unknown assailants and not proximately caused by negligence of the defendant. ***Any damages caused solely by the unknown assailants and not proximately caused by negligence of defendant King County must be segregated from and not made a part of any damage award against King County.***"
>
> Jury instructions are sufficient if they permit each party to argue its theory of the case, are not misleading, and properly

[34] This was Petitioners' precise argument to the trial court when the parties were given an opportunity for any additional objections to the trial court's instructions. *See* 11 RP at 2065-66. In other words, because Petitioners were seeking only damages caused by ***the District's*** own negligent or grossly negligent breach of its duties to prevent Shafer's conduct and protect D.H., there was "no need for the jury . . . to deduct [Shafer's "share" of the damages] from its damages award." *See Rollins*, 148 Wn. App. at 379. And, as discussed above, Petitioners argued to the trial court that this damages segregation instruction was unnecessary due to its redundancy given other instructions such as Instruction 22.

> inform the jury of the applicable law when read as a whole. These instructions accurately stated the law and allowed Metro to argue its theory of the case.

Rollins, 148 Wn. App. at 379–80 (internal footnotes omitted) (emphasis added) (quoting *Rollins* Clerk's Papers at 155); *compare with* trial court Instruction 19, CP at 6433.

This discussion of the damages segregation instruction was both unnecessary to disposition of the appeal and ***inconsistent with*** the court's earlier core holding, and should be disregarded as non-binding dicta. *See Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914, *review denied,* 178 Wn.2d 1022 (2013). Instead, the Court of Appeals below seized on this flawed analysis while overlooking the core holding in *Rollins*. This is a clear error of law requiring review and reversal by this Court. The *Rollins* damages segregation instruction ***was not challenged at all*** in that appeal. Rather, Division One seized on it in its dicta, having already held that no damages segregation instruction should have been given in the case, Metro's ***only*** challenge on appeal. The *Rollins* dicta should be valued only as only suggesting that in any event that the jury instructions had allowed Metro to argue its theory of the case. *Rollins*, 148 Wn. App. at 379-80.

Notably, the *Rollins* dicta did ***not*** comment on whether the damages segregation instruction in that case was misleading or confusing in any way, shape, or form, particularly with respect to whether it ***should*** have been given or its negative phrasing. Accordingly, the Court of Appeals' decision in this case contains multiple conflicts with *Rollins*, requiring review under

RAP 13.4 (b)(2).[35]

B. Review is required under RAP 13.4 (b)(4) because (1) the Court of Appeals' reliance on dicta in *Rollins* upholding Instruction 19 in disregard of *Rollins*'s core holding limiting the *Tegman* segregation requirement to cases where the intentional tortfeasor is a party defendant further contributes to the "considerable confusion" in this area of the law, acknowledged by *Rollins* and (2) the Court of Appeals' disregard of existing Washington precedent requiring an award of damages under the circumstances present here is of unquestionable substantial public interest as it will impact both tort litigants and vulnerable individuals in Washington.

Finally, RAP 13.4 (b)(4) provides that review will be accepted where the petition involves an issue of substantial public interest that should be determined by the Supreme Court. This petition involves two groups of such issues.

First, this petition involves the issues of (a) whether the holding in *Rollins* that when an intentional tortfeasor is not a party to a case against a negligent tortfeasor segregation of damages caused by the intentional tortfeasor is not for the jury's consideration was erroneously disregarded by the Court of Appeals below, and (b) if *Rollins* so holds, must this Court disapprove of the *Rollins* dicta—forming the basis of the Court of Appeals upholding Instruction 19 in this case—suggesting the jury should be

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[35] Petitioners also note that, in *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 874-77, 281 P.3d 289 (2012), this Court reviewed de novo whether a trial court erred in giving a jury instruction that the appellant argued was misleading. Although the parties in this case initially accepted an abuse of discretion standard of review, in their Motion for Reconsideration Petitioners urged the Court of Appeals to reconsider its decision under the correct de novo standard. Appendix E . If this Court accepts review of whether Instruction 19 was misleading, it necessarily should accept review of the proper standard of review in determining that issue, particularly given the conflict between the Court of Appeals' decision and *Anfinson*.

instructed to segregate damages caused solely by the intentional tortfeasor from any damages award against the negligent tortfeasor; and (c) did the Court of Appeals err in upholding the trial court's decision to give Instruction 19 over Petitioners' challenges that it was improper under *Tegman* and *Rollins*, and misleading as phrased?

Rollins itself expressly acknowledged "the considerable confusion that surrounds application of the tort reform act of 1986 . . . and subsequent case law," namely, *Tegman* and *Welch*. *Rollins*, 148 Wn. App. at 376-79. Indeed, *Rollins* perpetuates this confusion because the court undermined its own core holding that there is "no need for the jury to determine the size of [the intentional tortfeasor's share of the damages] or deduct it from its damages award," *id* at 379, under such circumstances with unnecessary dicta inconsistent with this core holding. *Id.* at 379-80. And Division Two's decision in this case to rely on that dicta to reject Petitioners' challenge to Instruction 19 further sows confusion and destabilizes *Tegman* precedent by suggesting that *Rollins* holds juries ***should*** be instructed on damages segregation in lawsuits involving a negligent defendant and non-party intentional tortfeasor.[36] Because these issues potentially impact many

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[36] As further evidence of the lack of clarity surrounding *Rollins* and its application of *Tegman*'s principles, a comment to Washington Pattern Instruction ("WPI") 15.04 states that *Tegman* "requires that a jury segregate damages caused by intentional tortfeasors from those caused by negligent tortfeasors." 6 WASH. PRAC., Wash. Pattern Jury Instr. Civ. WPI 15.04 (6th ed. 2017). The comment continues on to state aptly, "How best to instruct the jury on this process is not yet settled." *Id.* However, the comment ***then*** states that *Rollins* "approv[ed]" the damages segregation instruction in that case. *Id.* Thus, even the WPI both acknowledges and perpetuates both the internal inconsistency of *Rollins* and attendant confusion surrounding this area of the law. Because courts rely on the WPIs as persuasive, they may very well defer to this comment, reinforcing the substantial public importance of this issue and adding to the necessity of clarification from this Court. *See* WPI 0.10.

Petitioners also note that, even though the Court of Appeals' decision in this case

tort suits in Washington—and because the *Rollins* court itself acknowledged "considerable confusion" in Washington courts regarding this area of the law—they are unquestionably of substantial public interest, requiring clarification from this Court.[37]

Second, this petition involves the issue of whether the Court of Appeals erred in upholding the trial court's denial of a new damages trial when the jury found gross negligence, negligence, and proximate causation of "injury or damage" and Petitioners presented uncontroverted evidence of sexual abuse and resultant emotional pain and suffering? The answer to this question turns, in part, on whether Washington law (a) requires a jury to award some general damages to a plaintiff when fault, causation, and injury are established or (b) entitles a jury to minimize or otherwise ignore or reject uncontroverted damages evidence, particularly of sexual abuse and

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was unpublished, GR 14.1(a) now allows citation to it as a persuasive authority. Given that the decision directly adopted *Rollins*'s dicta as its own holding, *Rollins*'s own observation that "considerable confusion" surrounds this area of the law, and the WPI comment's observation that this area of the law is "not yet settled," practitioners and trial courts likely cannot and will not refrain from relying on this decision despite its unpublished status; thus, this status does not diminish the substantial public interest requiring review by this Court.

Finally, as discussed above, in *Anfinson*, 174 Wn.2d at 874-77, this Court previously reviewed de novo whether a jury instruction was misleading, but the Court of Appeals applied an abuse of discretion standard in its decision. This Court should also accept review of that issue, as clarification of the proper standard of review—and the latitude of trial courts in some areas regarding jury instructions—is of substantial public interest to ***all*** Washington litigants.

[37] Petitioners note that even if the Court accepts review—or reverses—only on this issue, it necessarily must also consider whether the remedy is remand for a damages-only trial. Given the unchallenged jury findings regarding the District's gross negligence, negligence, and proximate cause of "injury or damage" to them, Petitioners argued before the Court of Appeals that remand for a new, damages-only trial was the only appropriate remedy before the Court of Appeals. Moreover, ***the District***'s argument both to the trial court and the Court of Appeals was that Instruction 19 allowed the jury to find the District liable but nonetheless exclude damages caused by Shafer from any award. CP at 6571-72; Appendix F.

resultant emotional distress? The answers to these legal questions are of substantial public interest because they potentially impact ***every*** tort case in Washington in terms of the quantum of proof necessary to establish such damages, the latitude of the jury in interpreting or rejecting uncontroverted evidence of such damages, and the extent of the obligation of trial courts to correct irreconcilable jury findings or verdicts contrary to uncontroverted evidence. Moreover, the answers to these questions may impact very young children or special needs individuals, such as D.H., who are extremely vulnerable to predation but mostly unable to articulate its occurrence or effects. Respectfully, the Court of Appeals' opinion in this case may be read by some as sending a message to those entities responsible for the custody of vulnerable individuals that the potential financial consequences of failing to protect the most vulnerable among us are minimal, if not nonexistent.

VI. CONCLUSION

For the above reasons, Petitioners respectfully request that the Court accept review of Division Two's decision in this case and the issues presented in this petition.

RESPECTFULLY SUBMITTED this 21st day of December, 2017

PFAU COCHRAN VERTETIS AMALA, PLLC

By: /s/ Darrell L. Cochran
Darrell L. Cochran, WSBA No. 22851
Christopher E. Love, WSBA No. 42832

STATE OF WASHINGTON)
)ss
COUNTY OF KING)

I, Sarah Awes, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on December 21, 2017, I delivered via Email/ECF a true and correct copy of the above, directed to:

Kenneth Wendell Masters
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DATED this 21st day of December, 2017.

/s/ Sarah Awes
Sarah Awes
Legal Assistant

APPENDIX

K.H., et al. v. Olympia School District
Petition for Review

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APPENDIX A

14-2-01243-5
VRD
Verdict Form
54980

THE HONORABLE MARY SUE WILSON

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
15 DEC 17 PM 5:08
Linda Myhre Enlow
Thurston County Clerk

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

K.H., as guardian for her minor daughter D.H.; K.H. and G.H. individually, Plaintiffs, vs. Olympia School District, Defendant.	NO. 14-2-01243-5 **SPECIAL VERDICT FORM**

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Was the Olympia School District grossly negligent in this case?

ANSWER: Yes X No ____

If your answer to Question No. 1 is "Yes," please proceed to Question No. 2. If your answer is "No," please proceed to question No 3.

QUESTION NO. 2: Was such gross negligence a proximate cause of injury or damage to the Plaintiffs?

ANSWER: Yes_X_____ No_______

Please proceed to Question 3.

QUESTION NO. 3: Was the Olympia School District negligent in this case?

ANSWER: Yes_X_____ No_______

If your answer to Question No. 3 is "Yes," please proceed to Question No. 4. If your answer to **both** Question No. 2 **and** Question No. 3 is "No," do not answer any further questions; you are finished with this form, and the presiding juror should sign, date, and return it to the bailiff.

QUESTION NO. 4: Was such negligence a proximate cause of injury or damage to the Plaintiffs?

ANSWER: Yes_X_____ No_______

If your answer to **either** Question No. 2 **or** Question No. 4 is "Yes," please proceed to Question No. 5. If you answered "No" to **both** Question No. 2 **and** Question No. 4, do not answer any further questions; you are finished with this form, and the presiding juror should sign, date, and return it to the bailiff.

QUESTION NO. 5: What do you find to be the measure of plaintiffs' damages proximately caused by the defendant Olympia School District?

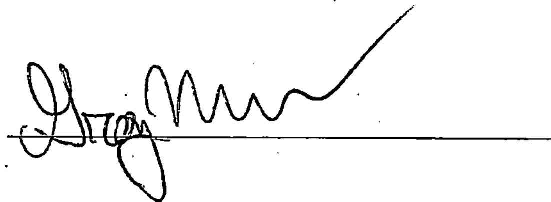
ANSWER:

1. D.H. $ Ø

2. K.H. $ Ø

3. G.H. $ Ø

Date this 17 day of December, 2015



Presiding Juror

4827-8799-0316, v. 1

APPENDIX B

INSTRUCTION NO. 22

The cause of an injury or event is a proximate cause if it is related to the injury or event in two ways: (1) the cause produced the injury or event in a direct sequence, and (2) the injury or event would not have happened in the absence of the cause.

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

However, if you find that the sole proximate cause of injury or damage to the plaintiff was the act of some other person who is not a party to this lawsuit then your verdict should be for the defendant.

APPENDIX C

INSTRUCTION NO. 19

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 Olympia School District. Any damages caused solely by Gary Shafer and not proximately caused by negligence of the Olympia School District must be segregated from and not made a part of any damage award against Olympia School District.

APPENDIX D

No. 48583-4-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

K.H, D.H., and G.H.,

Appellants,

vs.

OLYMPIA SCHOOL DISTRICT,

Respondent.

APPELLANTS' OPENING BRIEF

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After the trial court presented the damages segregation instruction it intended to give, Instruction 19, Appellants argued that any *Tegman*[181] or *Rollins*[182] instruction like Instruction 19 was improper because it was negatively phrased and redundant in light of other instructions.[183]

Ultimately, however, the trial court gave Instruction 19 because it concluded the instruction was an accurate statement of the law under *Rollins*.[184] The District twice emphasized this instruction during its closing argument and, as discussed above, the jury ultimately awarded zero damages to Appellants despite finding that the District's gross negligence and negligence both proximately caused Appellants' damages.[185]

2. Standard of review

This Court reviews a trial court's decision regarding the number and specific language of jury instructions for an abuse of discretion. *Douglas v. Freeman*, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991). But a trial court need not "'give a requested instruction that is erroneous in any respect.'" *Crossen v. Skagit County*, 100 Wn.2d 355, 360, 669 P.2d 1244 (1983) (quoting *Vogel v. Alaska S.S. Co.*, 69 Wn.2d 497, 503, 419 P.2d 141 (1966)). Jury instructions are sufficient if the instructions are supported by the evidence; allow each party to argue its theory of the case; are not misleading; and when read as a whole, properly inform the trier of fact of

[181] *Tegman v. Accident & Med. Investigators, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003).

[182] *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P.3d 499 (2009).

[183] XI VRP at 2065-2066; CP at 6155.

[184] X VRP at 1930.

[185] XI VRP at 2161-2162.

the applicable law. *Ferqen v. Estro*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015); *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). If any of these elements is absent, the instruction is erroneous. *Anfinson*, 174 Wn.2d at 860. If the instruction misstates the law, prejudice is presumed and is grounds for reversal unless the error was harmless. *Ferqen*, 182 Wn.2d at 803. Here, Instruction 19 was misleading, redundant, confusing, slanted the case in favor of the District's theory of the case, and had a demonstrably harmful effect on the trial. Indeed, the trial court relied on Instruction 19 to uphold the jury's inconsistent verdict.

3. The trial court abused its discretion in giving Instruction 19 because it was misleading, redundant, confusing, and slanted toward the District's theory of the case

The trial court abused its discretion in giving Instruction 19 because it was (1) misleading and confusing given its negative phrasing, (2) redundant given the other jury instructions, and (3) slanted toward the District's theory of the case. First, the instruction was misleading because it was phrased in the negative, redundant, and confusing. In general, "jury instructions framed in the negative . . . are disfavored because they can be misleading." *Terrell v. Hamilton*, 190 Wn. App. 489, 505, 358 P.3d 453, 461 (2015). For example, in *Rickert v. Geppert*, 64 Wn.2d 350, 355-56, 391 P.2d 964 (1964), the trial court gave a negatively-phrased instruction "telling the jury not to compare negligence of the parties, if any exists." On review, our Supreme Court reasoned that the instruction was "more likely . . . to confuse, than aid, the jury" because it had already been instructed on the issue of contributory negligence and held that the negative instruction

should not be given during the new trial it ordered. *Rickert*, 64 Wn.2d at 356; *see also Terrell*, 190 Wn. App. at 505 (affirming trial court's refusal to give *Rickert* instruction on grounds that negative phrasing was likely to confuse the jury).

Even more than the criticized negative instruction in *Rickert*, the negative phrasing of Instruction 19 was undoubtedly misleading and confusing to the jury. On its face, Instruction 19 creeps into the territory of double negatives, instructing the jury to "not include . . . damages . . . not proximately caused" and that damages "not proximately caused . . . must be . . . not made a part of any damage award." The jury in this case should be commended for attempting to make what it could of that problematic complex of words, but the end result was predictably illogical: an award of zero damages inconsistent and irreconcilable with the jury's clear findings of gross negligence, negligence, and causation.

Second, like the negative *Rickert* instruction, Instruction 19's capacity to confuse and mislead the jury is even more apparent when considering its redundancy. Instruction 22 already instructed the jury regarding the definition of proximate cause and required the jury to return a defense verdict if it found a third party was the sole cause of Appellants' damages. Accordingly, this instruction was sufficient for the District to argue its theory that Shafer was the sole proximate cause of Appellants' damages, regardless of any negligence by the District. Likewise, Instruction 28 already required the jury to calculate damages only "for such damages as you find were proximately caused by the [District]."

Accordingly, this instruction was sufficient for the District to argue that any damages that it did not proximately cause should not have been included in any damages award.[186]

Third, the trial court abused its discretion in giving Instruction 19 because it was slanted toward the District's theory of the case. Jury instructions that "arguably slant[] the instructions towards the defense's theory of the case" are improper and should not be given. *Terrell*, 190 Wn. App. at 505 (citing *Watson v. Hockett*, 107 Wn.2d 158, 161, 727 P.2d 669 (1986)). Here, Instruction 19 immediately emphasized that the jury "***must not include***" damages within a damage award that "were caused" by Shafer, misleadingly suggesting that segregating damages was a default requirement for the jury in this case. This was not so, as Instruction 22 informed the jury that harm could have more than one proximate cause, including Shafer's proximate causation of damages also caused by the District. Thus, rather than segregation being a default position and a necessity in this case, it was equally possible for the jury to conclude that there was no distinction between the damages caused by Shafer and those caused by the District, thus obviating any need for segregation.

Moreover, this implicit bias in Instruction 19 was compounded by the contrast between describing damages caused by Shafer in the positive

[186] Particular care must be taken when instructing juries on these particular points of law. As even the *Rollins* court observed, whether and how to instruct on segregating damages depends on the particular circumstances of any given case, and the issue of segregating damages causes "considerable confusion." 148 Wn. App. at 376, 382. Clearly, in this case Instruction 19, especially given its misleadingly negative phrasing, hindered the jury's understanding more than it helped.

while describing the District's liability in the negative, reinforcing the misleading suggestion that Shafer did indeed cause some damages that the District did not, requiring segregation in this case. Accordingly, the trial court abused its discretion in giving this instruction that was improperly slanted toward the District's theory of the case.[187]

Finally, the record demonstrates the prejudice and harm resulting from Instruction 19. Indeed, in order to "reconcile" the verdict, both the District and the trial court relied on the likelihood that the jury returned an award of zero damages based on Instruction 19. Although Appellants disagree that the instruction reconciles the jury's other inconsistent findings, Appellants agree that it is highly likely that the jury relied on this improper instruction to reach its verdict. Moreover, given its implicitly biased wording, Instruction 19 ***encouraged*** the jury to find that Appellants' damages were attributable to Shafer. Accordingly, Instruction 19 was not harmless, requiring a new trial.

C. The Trial Court Erred in Denying Appellants' Collateral Estoppel Summary Judgment Motion Regarding Liability

1. Relevant facts

As discussed above, this case was the fourth in a series of lawsuits arising from District bus driver Gary Shafer's sexual abuse of pre-

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[187] Although Appellants contend that no specific segregation instructions should have been given, as the trial court's other instructions were more than sufficient to argue that theory, a differently-phrased version of Instruction 19 illustrates its potential for confusion. For example, the trial court simply could have instructed the jury that "In calculating a damage award, you should include only damages proximately caused by the District." This still would have required Appellants to prove the District proximately caused any and all of their damages; allowed the District to argue segregation; and avoided the confusing labyrinth of multiple negatives implicitly slanted toward some segregation of damages.

APPENDIX E

No. 48583-4-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

OLYMPIA SCHOOL DISTRICT,

Respondent.

APPELLANTS' MOTION FOR RECONSIDERATION

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Further, unlike the plaintiff in *Kozma* who may not have felt any ***new*** or ***additional*** knee pain as a result of a minor slip-and-fall, DH had not been sexually abused prior to the abuse for which the jury found the District liable; her parents never before had to live with the knowledge of such abuse; DH, at least on one afternoon, suffered emotional distress (significant enough to provoke a spontaneous disclosure) caused by the abuse and distinct from her Trisomy X symptomology; and the abuse itself caused DH's parents to experience depression, anxiety, and other emotional distress. Simply put, *Kozma* is many universes removed both legally and factually from this case and offers nothing to remedy the jury's, trial court's, or this Court's error.

B. This Court Erred in Upholding Instruction 19 Over Appellants' Unquestionably Preserved "Redundancy" and "Slanted" Challenges to Instruction 19

The Court's opinion correctly holds that Appellants preserved their challenge to instruction 19 on the basis that it was misleading and confusing.[12] However, the Court's opinion erroneously holds that Appellants failed to preserve their "redundancy" and "slanted" challenges to instruction 19 because their "instruction conference arguments"—

---

the lower end of the . . . continuum," in Dr. Vandenbelt's opinion, is still sexual abuse that DH undisputedly suffered. As discussed above, under Washington law a jury cannot "minimize" to the point of nonexistence such evidence of damages when it is uncontroverted. Moreover, the jury heard uncontroverted evidence of all three Appellants' resultant emotional pain and suffering. Perhaps had the jury "minimized" this uncontroverted evidence of pain and suffering to a nominal general damages award, even a single dollar, its verdict would have been consistent with Washington law. But those are not the facts or law before this Court. In this case, the jury impermissibly "minimized" uncontroverted evidence of Appellants' pain and suffering to the point of completely discounting it, necessitating a new damages trial.

[12] Slip Op. at 22-23.

apparently referring to the second of two instructions conferences in this case—insufficiently raised those issues. As a threshold matter, the Court cites no authority for the proposition that only arguments made at ***an instruction conference*** are sufficient to preserve an objection. Rather, the requirement is that an alleged error must be called to the trial court's attention "at a time when the error can be corrected." *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975). And in considering the sufficiency of the objection, Washington courts consider "the content of the objection at the time of trial and the context in which it was taken." *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 340, 878 P.2d 1208 (1994). When considering the entire record in this case, Appellants timely and sufficiently preserved both their "redundancy" and "slanted" objections.

First, two jury instruction conferences took place in this case: a December 11, 2015 instructions conference regarding the parties' proposed instructions, and a December 16, 2015 conference regarding the trial court's instructions.[13] During the first conference, Appellants' counsel objected to the District's proposed instruction 15—that became the trial court's instruction 19 after the deletion of a single sentence from the proposed instruction—arguing:

> So the plaintiffs have pretty much relied on the WPIs, on just the standard WPIs about what cause is. ***There is a good cause instruction, for example, that talks about more than one proximate cause can be determined for the same harm.***[14] ***In this case, that would cover the fact that***

[13] 7 RP at 1368, 1380; 10 RP at 1911, 2004, 2055, 2186.

[14] This WPI corresponds to instruction 22 given by the trial court. CP at 6436.

> ***Gary Shafer is the cause of harm while allowing us to argue that the district is a cause of harm as well.*** So we did not deviate outside the WPIs for that; the district, however, has.
>
> The proximate cause instructions that they have proposed are generally phrased in the negative, which is frowned on by the pattern jury instruction committee, which I'm well acquainted with. ***In other words, they're saying, for example, the jury cannot award damages that are proximately caused by whatever, whatever.***[15] ***Typically in the pattern jury instructions that are adopted by the high court, they want the instruction to be framed in the positive, proximate cause can be found with such and such, and then contain the standard WPI instruction that says there can be more than one proximate cause.***
>
> And then it goes on to say, if you find that the defendant has not proximately caused damages, you can't award for plaintiffs, you have to find for the defendant. So I submit that as to proximate cause, we should stick closely with the WPI standards. Instructions outside of that when the WPIs apply are very dangerous, and ***there's no need to in this case.***[16]

Subsequently, on December 16, in discussing the jury instructions it had decided to give, the trial court stated:

> Finally, having spent time with the Robbins and the Tegman case, I defaulted to -- Rollins, not Robbins. I defaulted to the instruction used in the Rollins case that the Court there appeared to confirm was an appropriate instruction in a setting that had significant parallels to this case.[17]

It then stated:

> So those are my explanations as to what I think were

[15] This statement was in reference to the District's proposed instruction 15, which was given as the trial court's instruction 19. CP at 4164; 10 RP at 1922 (emphasis added).

[16] 7 VRP at 1383-1385, 1391 (emphasis added).

[17] 10 VRP at 1930.

> the key disputed areas for how to instruct the jury. ***It's my thought that the record you created on Friday is sufficient to capture your exceptions and objections*** . . . .[18]

In other words, Appellants' counsel argued that there was "no need" for the proposed instruction that became instruction 19 because the eventual instruction 22 would allow the District to argue that Shafer was the cause of Appellants' damages instead of the District. This was Appellants' "redundancy" argument on appeal. And the trial court subsequently stated that it had been sufficiently apprised of Appellants' counsel's objections before relying on *Rollins* to give instruction 19. Appellants timely and unquestionably preserved their "redundancy" argument on appeal, and they respectfully ask this Court to reconsider its opinion and address the prejudicial redundancy of this instruction—namely, that it was unnecessary and confusing and argumentatively so, as it shifted the jury's focus from determining damages proximately caused by the District (as properly and entirely captured by instruction 22) to unduly emphasizing damages caused by Shafer and implying that there existed such damages that "must" be segregated. *Accord Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 117 n. 2, 323 P.3d 1036 (2014) (concluding that appellants had sufficiently appraised the trial court of their objections to jury instructions where trial court acknowledged previous discussion of objections and stated "your arguments on why they are incorrected are preserved in the record").

Second, at the end of the second instructions conference, the trial

[18] *Id.* Emphasis added.

court afforded an opportunity for any additional objections.[19] As acknowledged in this Court's opinion, Appellants' counsel argued that instruction 19 "'unfairly and prejudicially'" "'frame[d] the issue in the negative ***and ha[d] the jury excluding damages immediately*** as opposed to describing in a positive fashion what they are to award' and misstated the law."[20] This was a "slanted in the defense's favor" objection. Indeed, it mirrors Appellants' arguments on appeal.[21] Appellants timely and unquestionably preserved this objection, and this Court should reconsider its opinion and address the merits of their arguments on appeal.

C. This Court Erred in Misapprehending the Principal Holding in *Rollins* and Instead Relied on Non-Precedential and Inconsistent Dicta in Rejecting Appellants' Challenge to Instruction 19

Appellants also ask the Court to reconsider its decision because it misapprehended the holding in *Rollins* when it concluded that "[*Rollins*] held that it was not misleading to give" an instruction like instruction 19 in this case. *Rollins* involved a lawsuit where the plaintiffs sued a negligent tortfeasor, King County Metro Transit (Metro), but not intentional tortfeasors for damages. *Rollins*, 148 Wn. App. at 372-73. On appeal, Metro argued that the trial court was required to give its proposed jury instruction "stating that the plaintiffs must prove 'the percentage of

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[19] 11 RP at 2064.

[20] Slip Op. at 22 (quoting CP at 6155; 11 RP at 2066) (emphasis added).

[21] Appellants' Opening Brief at 49 ("Instruction 19 immediately emphasized that the jury '***must not include***' damages within a damage award that 'were caused' by Shafer, misleadingly suggesting that segregating damages was a default requirement for the jury in this case."); 50; Appellants' Reply Brief at 23-26.

damages caused by negligent conduct and the percentage of damages caused by the assailants' conduct'" under *Tegman v. Accident & Med. Investigators, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003). *Rollins*, 148 Wn. App. at 376 (quoting *Rollins* Clerk's papers at 103)).

However, Division One observed that *Tegman* involved a factual scenario where the plaintiff sued both negligent and intentional tortfeasors but the trial court held all defendants jointly and severally liable for all damages; because "joint and several liability under RCW 4.22.070 applies only to damages caused by negligence" and negligent tortfeasors cannot be joint and severally liable for damages caused by intentional tortfeasors, the *Tegman* court remanded for segregation of damages. *Rollins*, 148 Wn. App. at 378-379.

In contrast to the *Tegman* scenario, however, the *Rollins* court held that, in the case before it,

> 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.
>
> . . . .
>
> The intentional conduct of unknown assailants was a proximate cause of injury in [*Rollins* and *Welch v. Southland Corp.*, 134 Wn.2d 629, 634, 636-37, 952 P.2d 162 (1998)], but no recovery was sought for those injuries. 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 was no need for the jury*** to determine the size of that share or ***to deduct it from its damages award.***

Id.[22] Emphasis added.

In other words, the principal holding of *Rollins* overlooked by this Court in its opinion was that, in a case where only a negligent defendant is sued only for damages caused by their negligence, there is no need to instruct a jury on segregating damages caused by an intentional tortfeasor, as those issues are not present in the case. This holding therefore resolved Metro's challenge on appeal that it was entitled to a segregation instruction. Unfortunately, the *Rollins* court immediately continued on to consider the sufficiency of the jury instructions in the case, including the so-called "*Rollins* instruction" regarding segregation of damages, despite just having held that there was no need for the jury to segregate damages. *Id.* at 379-80. Because this discussion of the damages segregation instruction was both unnecessary to and ***inconsistent with*** the case's earlier core holding, it was non-binding dicta and an error of law. *Protect the Peninsula's Future*

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[22] This was Appellants' precise argument to the trial court when the parties were given an opportunity for any additional objections to the trial court's instructions:

> [A]s to the instructions that the Court will be giving, the one exception that we'll take is to Instruction No. 19, which is a Rollins/Tegman type instruction.
>
> . . . .
>
> We also believe for appellate purposes that Tegman is misapplied or would be misapplied in a situation like this and that the district can be liable for all damages caused by Gary Shafer as a result of owing the duty to prevent the criminal misconduct because Gary Shafer was an employee. So for those purposes, we take exception to the giving of 19.

11 RP at 2065-66. In other words, because Appellants were seeking only damages caused by ***the District's*** own negligence regarding DH or Shafer, there was "no need for the jury . . . to deduct [Shafer's "share" of the damages] from its damages award." *Accord Rollins*, 148 Wn. App. at 379. And, as discussed above, Appellants argued to the trial court that this damages segregation instruction was unnecessary due to its redundancy given other instructions, such as instruction 22.

v. City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914, *review denied*, 178 Wn.2d 1022 (2013) ("A statement is dicta when it is not necessary to the court's decision in a case . . . . Dicta is not binding authority."). Yet this is the portion of *Rollins* on which this Court relied in its opinion. Particularly given how it undermines *Rollins*'s core holding of "no need for the jury to segregate damages under these circumstances," this Court should neither consider the damages segregation instruction dicta as binding nor follow it as persuasive.[23]

Moreover, the *Rollins* damages segregation instruction ***was not challenged at all*** on appeal; rather, Division One seized on it in its dicta regarding the sufficiency of the jury instructions after having already held that no allocation of fault instruction should have been given in the case, Metro's ***only*** challenge on appeal. And even the *Rollins* dicta only erroneously and gratuitously suggested that the jury instructions had allowed Metro to argue its theory of the case and adequately stated the applicable legal principle—i.e., that the jury should focus on determining

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[23] Indeed, the entirety of the *Rollins* court's dicta regarding jury instructions both heightens how the dicta undermines *Rollins*'s actual holding and underscores the dicta's entirely unnecessary nature. In discussing other jury instructions, the *Rollins* court observed:

> The jury here was instructed that plaintiffs had to prove that Metro was negligent, that Metro's negligence was a proximate cause of plaintiffs' injury, that there may be more than one proximate cause of an injury, and that its verdict should be for Metro if it found the sole proximate cause of injury was a cause other than Metro's negligence.

Rollins, 148 Wn. App. at 379. These instructions alone were sufficient for Metro to argue that the jury should not award damages caused ***solely*** by unintentional tortfeasors ***without***—consistent with its holding—needlessly submitting damages segregation, an issue not present in the case, to the jury. Regardless, the *Rollins* court proceeded to address and approve an additional damages segregation instruction.

whether Metro's own negligence caused the plaintiff's damages. *Rollins*, 148 Wn. App. at 379-80. But "[j]ury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). These are three separate elements and, if ***any*** of them are missing, an instruction is erroneous. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012) (emphasis added).[24] Thus, even the *Rollins* dicta did ***not*** comment on whether the damages segregation instruction in that case was misleading or confusing in any way, shape, or form.

As a result, this Court's reliance on these portions of *Rollins* only compounds its error of law: not only were these portions non-precedential dicta inconsistent with *Rollins* principal holding, but also this inconsistent and erroneous dicta did not even address the damages segregation instruction in light of the specific challenges raised in this appeal: that such an instruction was ***misleading*** and confused the jury. Those issues were not

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[24] Appellants note that in *Anfinson* our Supreme Court reviewed de novo whether a trial court erred in giving a jury instruction that the appellant argued was misleading due to its ambiguous wording. 174 Wn.2d at 860, 874-877. *Anfinson*'s standard of review conflicts with this Court's application of an abuse of discretion standard to "the trial court's decision regarding how to word an instruction or whether to give an instruction." Slip Op. at 21 (citing *Terrell*, 190 Wn. App. at 498). Although the parties admittedly both asserted an abuse of discretion standard of review, however, this Court has committed an error of law and should reconsider this issue under a correct de novo standard of review.

Even if this Court declines to reconsider for purposes of applying a de novo standard to this issue, however, a trial court nonetheless errs when it gives a misleading instruction. *Anfinson*, 174 Wn.2d at 860. And, where an instruction is erroneous, a trial court necessarily abuses its discretion by giving it, as giving an erroneous instruction would be "outside the range of acceptable choices." *In re Marriage of Littlefield*, 133 Wn. 2d 39, 47, 940 P.2d 1362 (1997). But, even applying this standard, this Court must nonetheless directly address whether the instruction was misleading.

before or decided by the *Rollins* court. Thus, the *Rollins* damages segregation instruction dicta has ***no bearing*** on the particular challenges raised in this appeal. Both before the trial court and this Court, Appellants raised multiple, specific reasons why the *Rollins* damages segregation instruction was more likely to confuse than aid the jury given its negative wording, its undue emphasis on excluding damages caused by Shafer, and the other instructions given in this case. Specifically, instruction 19 heavily suggested to the jury that it ***must*** segregate damages caused by Shafer when it otherwise found that the District's negligence proximately caused Appellants' damages. This reliance on a misapprehension of the issues decided by *Rollins* necessarily was an error of law by the trial court repeated here by this Court. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2017) ("If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion.").[25]

Further, this Court's opinion characterizes Appellants' arguments as relying on a "per se rule that the giving of a negatively phrased jury instruction is an abuse of discretion." Contrary to the Court's framing,

[25] Moreover, this Court's reasoning verges on creating a per se rule in practice: a *Rollins*-type damages segregation instruction in practice will be given, unaltered, when offered in cases with similar facts simply because (as this Court's opinion holds) it was given in *Rollins*. But this conclusion is contrary to the disclaimer of *Rollins* itself: "How to instruct on damages will often depend upon the circumstances of the case . . . ." *Id.* at 382; *see also Terrell v. Hamilton*, 190 Wn. App. 489, 506, 358 P.3d 453 (2015) (reasoning "[b]ecause the instruction was given in a case, does not compel its use in a different case" and declining "to hold that the . . . instruction must be given whenever it is requested"). This Court should reconsider the portions of its opinion discussing and erroneously relying on the *Rollins* dicta and address Appellants' specific challenges to instruction 19.

however, Appellants' arguments on appeal addressed specifically how instruction 19's negative wording potentially was confusing and misleading in the context of this case.[26] These were not "per se rule" arguments and should not be hand-waved away as such without addressing their specific merits.

Instead, the Court should, at a minimum, reconsider its opinion and address whether instruction 19 was misleading for the specific reasons argued. Specifically, instruction 22—consistent with *Rollins*'s holding that, where a plaintiff sues only a negligent tortfeasor for damages caused by the tortfeasor's negligence, a jury need not consider or deduct damages caused by an intentional tortfeasor—properly focused the jury on determining whether the District's own negligence proximately caused any damages to Appellants, regardless of any concurrent proximate cause. This instruction also allowed the District to argue its own theory of the case—that Shafer was the sole proximate cause of some or all of Appellants' damages.

Prejudicially, however, and contrary to instruction 22 and *Rollins*'s actual holding, instruction 19—particularly its second sentence that "Any damages caused solely by Gary Shafer and not proximately caused by negligence of the [District] ***must be segregated*** from and not made a part of any damage award against [the District],"[27]—confusingly redirected the jury's focus onto damages caused by Shafer, despite the fact that instruction 22 already ordered the jury to focus on determining what damages were

[26] Appellants' Opening Br. at 48-50; Appellants' Reply Br. at 24-26.

[27] CP at 6433 (emphasis added).

caused by the District, the actual damages sought in this case. Moreover, instruction 19's repeated, negative phrasing misleadingly suggested to the jury that its default focus should be on excluding some damages by Shafer. Further, instruction 19's sole affirmative statement—that damages caused solely by Gary Shafer "must be segregated"—imparted an improperly argumentative slant by suggesting the ***existence*** of damages solely caused by Shafer in this case and the ***necessity*** of damages segregation even where a damages award against the District was otherwise contemplated. *See Terrell*, 190 Wn. App. at 506 (holding that proposed instruction stating "The mere skidding of a pickup truck, alone, is not evidence of negligence" imparted an improper argumentative slant and approving the trial court's refusal to give instruction on the basis that it did not "even want to get close to commenting on evidence or ***suggesting that this is a fact in this case***. . . .") (emphasis added). And the mere fact of instruction 19's existence—despite the fact that instruction 22 already directed the jury to determine whether the District caused any damages to Appellants in light of the existence of a concurrent tortfeasor—further reinforced the misleading suggestion that the jury should be focused on determining and excluding damages caused by Shafer.

Finally, Appellants reiterate that the prejudicial effect of instruction 19 is unquestionably manifest on this record. As discussed at oral argument before this Court, the District's counsel compounded the misleadingly negative and one-sided nature of instruction 19 by further misrepresenting and emphasizing it. Indeed, the District ***began*** its closing argument by

stating, "So from the standpoint of Gary Shafer, ***the Court will tell you in the instructions*** – we'll talk about some of them – ***that the district is not responsible for the damages that Gray Shafer caused.***"[28] Later, the District repeated these misrepresentations, stating:

> So let's look at that. What damages can you award? Well, if you look at Instruction No. 19, "In calculating a damage award, ***you must not include any damages that were caused by acts of Gary Shafer.***"[29]

After the trial court failed to sustain Appellants' objection that the District's argument "misstate[d] the law" (instead merely commenting that it had "advised the jury to make sure you read the entire sentence,") the District continued:

> ***So you start from that premise***, and here is the qualification: Any damages that were not proximately caused by the negligence of the Olympia School District, okay? So I've talked to you a lot about proximate cause. Proximate cause means that there's a cause and effect. So that gets back to what did the school district employees see or reasonably should have seen that they didn't take action on and report? That's where proximate cause comes in. ***And so the only damages that you can award in this case are ones that are not caused by Gary Shafer and not proximately caused by the negligence of the district.***[30]

Moreover, both the District argued and the trial court found that a likely explanation for the jury's award of zero damages to Appellants was that it had attributed all of Appellants' damages to Shafer under instruction 19.[31]

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[28] 11 RP at 2134 (emphasis added).

[29] 11 RP at 2161 (emphasis added).

[30] *Id.* at 2161-2162 (emphasis added).

[31] CP at 6569-6573; RP (Jan. 15, 2016) at 31-32.

Especially given the District's repeated reliance on (and misstatement of) instruction 19 during closing argument and the trial court's reliance on instruction 19 in upholding the verdict, the trial court's error in giving it was not harmless and requires remand for a damages-only trial.

IV. CONCLUSION

For all the above reasons, Appellants respectfully request that the Court grant their motion, reconsider its opinion, and reverse and remand for a damages-only trial.

Dated: September 11, 2017.

Presented by:

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APPENDIX F

No. 48583-4-II

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON, DIVISION II

K. H., et al.,

Appellants,

vs.

OLYMPIA SCHOOL DISTRICT,

Respondent.

BRIEF OF RESPONDENT

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exacerbation of her pre-existing condition, and will suffer no future problems, due to the 2010 bus incident....11

5. Even Plaintiffs' own expert – who is not medically trained and has no expertise in Trisomy X – admitted that immediate reactions proximate to the incident are the most significant predictors. 12

6. The School District's employees uniformly testified that Shafer exhibited no concerning behaviors in their presence....13

7. Despite presenting scant evidence of appreciable injury, plaintiffs asked for $4 to $6 million....14

ARGUMENT....14

A. The plaintiffs failed to preserve their argument that the jury's verdict is inconsistent, failing to object and to ask that the jury be sent back for further deliberations before the jury was polled. 14

B. The verdict is consistent for at least three reasons....18

1. Legal Standards....19

2. The jury's verdict is consistent with the evidence that plaintiffs proved no compensable damages....21

3. Under the trial court's (unchallenged and uncorrected) Jury Inst. No. 5, the jury necessarily imputed Schafer's intentional acts to the District, but since Jury Inst. No. 19 forbade them from awarding damages solely caused by Schafer's acts, and not by alleged School District negligence, the jury rendered a *consistent* $0 verdict. 25

4. The jury's verdict is consistent because Shafer caused all of the plaintiffs' injury or

damage, particularly where they proved no damages. 30

5. Remand is not necessary, but if it was, a "damages only" trial would be improper. 30

C. Jury Instruction No. 19 correctly states the law of Washington – under controlling case law – so the trial court did not abuse its discretion. (BA 45-50). 31

1. Most of plaintiffs' arguments are not preserved. 31

2. Jury Instruction No. 19 correctly stated the law and allowed the parties to argue their theories. 32

3. Jury Instruction No. 19 is neither "negatively phrased" nor an abuse of discretion. 33

4. Jury Instruction No. 19 was not redundant. 34

5. Jury Instruction No. 19 was not "slanted." 35

D. The trial court properly denied plaintiffs' summary judgment motion on collateral estoppel (BA 50-58). 35

E. The trial court did not abuse its discretion regarding *Crunkleton*. (BA 58-66). 41

1. General admissions of liability are not sufficient. 43

2. ER 403 – no abuse of discretion. 46

F. The plaintiffs were not entitled to attorneys fees under CR 37(c), and their argument is frivolous at best. (BA 67). 47

CONCLUSION 50

slight care – they were horrible.[7] The jury thus *necessarily* imputed his criminal acts to the School District under Jury Inst. No. 5. The jury then necessarily found that the School District – i.e., Shafer – was negligent and grossly negligent and that its (his) negligence proximately caused plaintiffs injury or damage (under Jury Inst. No. 12 (CP 6426) and the other negligence instructions). CP 6447-48.

But then the jury arrived at Jury Inst. 19, which concerns *calculating damages* (CP 6433, emphases added):

> 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 Olympic School District. Any damages solely caused by Gary Shafer and not proximately caused **by negligence** of the Olympia School District must be segregated from and not made a part of any damage award against Olympia School District.

Plainly read, this instruction[8] expressly forbade the jury from awarding any damages "caused by acts of Gary Shafer and not

---

[7] It is crucial here that legally trained minds not make unexamined assumptions based on their training. While all lawyers should understand that intentional acts are not negligent acts, the jury can only follow the instructions it is given. They are not lawyers, and cannot be held to that standard. The Court should not impute even basic legal knowledge to them.

[8] As discussed *infra*, this instruction is closely drawn from the instruction approved as an accurate statement of the law in ***Rollins***, *supra*. The plaintiffs' baseless objections to this instruction are addressed *infra*.

proximately caused by negligence of the" District. Taken together with the above instructions, only one conclusion is possible.

That is, the jury verdict is consistent because its negligence, gross negligence, and proximate cause findings are *required* under Jury Instruction Nos. 5, 13, 14, 15, and 18. Shafer's horrific acts are indisputably imputed to the District, they indisputably lack ordinary care, or even slight care, and they indisputably caused injury or damage to the plaintiffs. In light of these instructions, the $0 verdict is perfectly consistent because the instructions allowed the jury to find that the School District's *negligence* – as opposed to Shafer's criminal acts – caused the plaintiffs no *damages*.[9]

Among the plaintiffs' arguments is an assertion that this analysis cannot be correct due to a subsequent jury instruction, No. 22 (CP 6436). *See* BA 41. They are mistaken. That instruction explained (a) that there can be more than one proximate cause of

---

[9] "Damage" is of course distinct from "damages," both legally, and under the unchallenged jury instructions. *See, e.g.*, BLACK'S LAW DICTIONARY, 445-46 (defining "damage" as injury to person or property, and "damages" as "Money . . . ordered to be paid to a person as compensation for . . . injury"); *compare* CP 6448 (Special Verdict Form asking whether defendant proximately caused "injury or damage" to plaintiffs) *with* CP 6442 (Jury Inst. No. 28, discussing the measure of "damages" – the "amount of money ...").

Districts' own alleged negligence did not proximately cause any damages. This Court should affirm.

4. The jury's verdict is consistent because Shafer caused all of the plaintiffs' injury or damage, particularly where they proved no damages.

Finally, the jury could properly have found that Shafer was the sole proximate cause of plaintiffs' injury or damage *and* that plaintiffs failed to prove an amount of damages that would fairly compensate them. As explained above, the instructions necessitated and allowed the findings. Additional instructions might have helped, but plaintiffs objected to those, over and over. They should not be heard to chunter now.

5. Remand is not necessary, but if it was, a "damages only" trial would be improper.

Plaintiffs argue the Court should remand for a "damages only" trial due to the alleged inconsistency in the verdict. BA 45. As explained above, the verdict is consistent, so no remand is necessary. But in the unlikely event that Court remands, a "damages only" trial would be improper for the reasons stated above. Specifically, the issue with the jury instructions is Jury Inst. No. 5, which plaintiffs failed and refused to correct. That instruction goes to *liability*, not damages. Remand would have to be for a full trial.

But there is no inconsistency, so the Court should affirm.

legal conclusions." 153 Wn.2d at 472. Moreover, the District told the plaintiffs' counsel about this authority, and argued to the trial court that this argument is meritless. CP 7430-32. Yet plaintiffs *cite* ***Thompson***, while withholding that it is directly contrary to their claims. The argument is frivolous at best.

CONCLUSION

For the reasons stated, this Court should affirm.

RESPECTFULLY SUBMITTED this 13th day of December, 2016.

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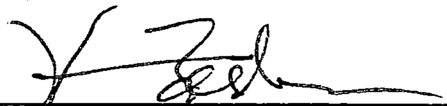

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Division Two

August 22, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

K.H., as guardian for her minor daughter D.H.; K.H. and G.H. individually, Appellant, v. OLYMPIA SCHOOL DISTRICT, a public corporation Respondent.	No. 48583-4-II UNPUBLISHED OPINION

JOHANSON, J. — DH and her parents (collectively the "Appellants") sued Olympia School District for negligence after district employee Gary Shafer admitted to molesting DH, a district student, and a jury returned a verdict that the District was liable but that the value of the Appellants' damages was "$0." On appeal, the Appellants argue that the trial court erred when it denied the Appellants' motion for a new trial, gave one of the jury instructions, and denied the Appellants' motion for summary judgment on liability, the Appellants' motion in limine to admit prior admissions on liability, and the Appellants' motion for attorney fees under CR 37(c). Finding no prejudicial error, we affirm.

FACTS

I. BACKGROUND

In January 2011, police arrested district school bus driver Shafer for molesting three district students—NL, VV, and TC—and for possessing child pornography. In August, Shafer pleaded guilty as charged and was sentenced to 175 months in prison. In June 2014, the Appellants, parents of DH, a fourth district student whom Shafer had also molested, sued the District for gross negligence, negligence, and negligent infliction of emotional distress based upon the District's failure to prevent Shafer from abusing DH.

II. SUMMARY JUDGMENT AND EVIDENTIARY MOTION

In September 2015, the Appellants moved for summary judgment on the issue of the District's liability on the ground that collateral estoppel applied. The trial court denied the summary judgment motion, ruling that collateral estoppel did not apply.

In October, the Appellants moved to have the trial court admit the complaint and the District's admissions of negligence and gross negligence in *Crunkleton v. Olympia School District*[1] as substantive evidence under ER 801(d)(2).[2] In response, the District argued that the *Crunkleton*

[1] Following Shafer's convictions, NL, VV, TC, and their families or guardians brought three civil lawsuits against the District—*Gutierrez v. Olympia School District*, noted at 184 Wn. App. 1059, 2014 WL 6984636, *review denied*, 183 Wn.2d 1004 (2015), *Villarreal v. Olympia School District*, No. 11-2-01970-2, Thurston County Super. Ct., and *Crunkleton v. Olympia School District*, No. 12-2-02039-3, Thurston County Super. Ct. The *Gutierrez* plaintiffs prevailed at trial and were awarded $1.4 million in damages. The *Villarreal* plaintiffs obtained summary judgment against the District on the issue of breach of duty. And in *Crunkleton*, the District admitted liability, although it contested the amount of damages. Whether damages were awarded in the latter two cases is not in the record before us.

[2] ER 801(d)(2) excludes from the definition of hearsay a party opponent's admissions when the admissions are offered against the party opponent.

documents were not admissions under ER 801(d)(2) and, alternatively, that the *Crunkleton* documents were inadmissible under ER 403. The trial court denied the Appellants' motion and their subsequent motion for reconsideration.

III. OTHER PRETRIAL PROCEEDINGS

Trial was set for November 30. In the months preceding trial, the District represented that it would contest liability at trial. The parties disputed the division of trial time, with the Appellants requesting either that trial be allowed to proceed until both parties had fully presented their cases or a 60/40 allocation with the possibility of extending trial.

On November 24, the parties appeared for a pretrial hearing, and both the Appellants and the District informed the trial court that they were prepared for trial on November 30. The Appellants told the trial court that when they had agreed that eight days was appropriate, they had "always assumed that the District would . . . admit[] liability or that it would be otherwise established." Report of Proceedings (RP) (Nov. 24, 2015) at 9. In response, the trial court stated that "I understand the [Appellants] made some assumptions about admissions by the [District], but it's pretty late, and there's been no motions to the Court to ask for extra time other than a very recent motion to either divide the trial time in a particular way or give you extra days, and it's not possible at this stage." RP (Nov. 24, 2015) at 10. The District subsequently sought a continuance of the trial date, which the Appellants "vehemently oppose[d]" and the trial court denied. Clerk's Papers (CP) at 6864.[3]

[3] The Appellants' witness list included multiple damages experts. In the first week of trial, the Appellants moved for two additional days of trial time to present their case, including three of the damages experts' testimony. The trial court granted the Appellants only an additional half day because in its view, the Appellants had run out of time because they "made some assumptions that the case would shrink before it started and that eight days would be sufficient." 6 RP at 1177.

IV. TRIAL

A. APPELLANTS' LIABILITY TESTIMONY

Shafer testified that he was a district employee who had joined the District as a bus driver in 2005. Shafer explained that at least once a week, in order to groom children, he rode along on buses driven by other district drivers. Beginning in the fall or early winter of 2010, Shafer molested DH three times. DH suffers from a congenital condition known as Trisomy X.[4] Shafer assumed that due to her condition, DH would be "less likely . . . to tell on" Shafer. 2 RP at 325. The first two times, Shafer molested DH while Shafer rode along on DH's bus. The third time, Shafer drove DH's bus, and he pulled the bus over in order to molest DH.

District employees described a failure to train bus drivers to recognize the signs of grooming and sexual molestation and a lack of procedures documenting when other bus drivers would ride along on a bus. The district superintendent admitted that after a driver had been fired in 2009 for misconduct, Shafer's supervisors should have been "on the lookout." 4 RP at 644. Documenting ride-alongs would have helped district employees to recognize when there was an unusual pattern or behavior by a bus driver. And the Appellants' expert witness testified that the District did not meet the standard of care in Washington when it hired Shafer.

According to the trial court, the "[Appellants] had information well before trial that the case had not been narrowed in terms of the issues and nonetheless did not seek a continuance, knowing that the case had been confirmed for eight trial days." 6 RP at 1177.

[4] DH's mother testified that DH's Trisomy X caused her to have delayed speech, language, and motor skills, to have a slightly lowered IQ, and to be shy.

B. DAMAGES TESTIMONY

1. APPELLANTS' TESTIMONY

DH's mother explained that in November or December 2010, four-year-old DH, who rode a special needs bus, had been dropped off by a school bus driven by two men. DH was not smiling, which her mother noted was "different," and right away, DH asked her mother, "'Why that man touch my bottom?'" 7 RP at 1231. DH was "really upset," "moody," and "off" that afternoon—so much so that DH's father returned home early from work because he was concerned—although DH's behavior eventually returned to normal and her parents attributed her behavior that afternoon to a "misunderstanding." 7 RP at 1232.

DH's mother called DH's preschool teacher, Simona McEwen, who testified that DH's statement about a man touching her had "stood out to" McEwen at the time. 9 RP at 1721. In McEwen's view, it was remarkable for DH to utter such a long sentence because DH typically spoke in "pretty short sentences." 9 RP at 1721. DH refused to ride the bus after the incident. After DH began kindergarten, approximately three years after the molestations, her toilet training regressed, and at home, she had tantrums and was destructive and abusive to the family pets. DH began to act out sexually between second and third grade to the point that DH's parents felt that she was "out of control." 7 RP at 1268.

According to DH's mother, DH's behavior was "stressful," caused DH's parents to have marital problems, and led DH's mother to worry that DH's sexual behavior would cause her future problems. 7 RP at 1275. It was not until May 2011, when police informed DH's mother that Shafer had admitted to molesting a child on DH's bus, that DH's mother learned that Shafer had potentially molested DH. DH's mother testified that she believed that DH was the child that Shafer

had molested and that the news emotionally upset her, so that she "felt like [her] whole world was coming down." 7 RP at 1237. She felt "[l]ike [she had] not been a good mom . . . [b]ecause this happened to [DH]" and because she "didn't follow up." 7 RP at 1274-75. DH's mother explained that she had preexisting depression.

Jon Conte, the Appellants' "sex abuse trauma expert," also briefly testified regarding DH's mother's damages. 1 RP at 66. Conte opined that DH's mother suffered as a result of DH's abuse—in particular, she worried and felt "guilty" and she could not "stop thinking about" and imagining "what must have happened on the bus." 6 RP at 1031. The abuse had caused DH's mother to experience depression and anxiety.

Conte did not testify regarding the effect of Shafer's abuse of DH on DH's father. DH's father testified about his fears that "all of this" would continue to affect DH because DH would be unable to complete high school and college and would become pregnant in high school and involved in "other things," such as prostitution. 7 RP at 1360. These fears were "very disturbing" to DH's father. 7 RP at 1360.

2. District Testimony

Dr. Russell Vandenbelt, a psychiatrist, testified regarding which of DH's symptoms were attributable to her Trisomy X and which could be attributed to the molestations. He explained that Trisomy X resulted in developmental delays, particularly in speech and language acquisition and motor skills, below average intelligence, and difficulty in social situations resulting in anger, tantrums, and anxiety. Dr. Vandenbelt acknowledged that DH had been "transiently upset[]" (8 RP at 1546) on the afternoon of the bus incident but opined that

> [t]he best available information in the records is that [DH] really wasn't any different in the immediate time frame following what happened on the bus outside

> of the afternoon when supposedly something happened and carrying forward. So the picture that emerges is one of someone who is pretty much the same after the time of whatever happened on the bus as she was before.

8 RP at 1531. DH immediately reported the bus incident, and thus Dr. Vandenbelt explained that DH had not repressed the incident, which he characterized as "at the lower end of the severity continuum with regard to what can happen . . . in childhood sexual abuse." 8 RP at 1544.

According to Dr. Vandenbelt, DH's shyness, sensitivity to wearing clothing, aggression, temper tantrums, anger, immaturity, social and emotional issues, and speech delays all preexisted the molestations and were attributable to DH's Trisomy X, not to the molestations. Dr. Vandenbelt explained that DH's abuse of the family pets and difficulties at home were "attributable to her developmental issues related to the Trisomy X" and were "repeated examples of her having difficulty managing . . . different frustrations." 8 RP at 1561. Similarly, DH's incontinence issues were unrelated to "past incidences of sexual abuse" because her incontinence correlated with changes in DH's schedule and was not a "pervasive pattern." 8 RP at 1564-65. And DH's sexual acting out was "not related" to the molestations because the sexualized behaviors occurred in isolation, rather than being part of the aftermath of an earlier event that carried forward. 8 RP at 1571. The "[p]robability" was that DH would not "have any future problems" related to the molestation, which DH did not seem to remember.[5] 8 RP at 1545.

The District also called DH's mother, who admitted that DH had not had concerning "toileting issues" until kindergarten, which had later resolved, and that DH's mother had told a doctor in 2013 that she noticed no regression or loss of skills in DH. 8 RP at 1447. In June 2011,

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[5] On cross-examination, the Appellants' expert Conte similarly testified that DH had no independent memory of the molestations on the bus.

after DH's mother had learned of the abuse, DH's mother stated at a doctor's appointment that she felt that DH did not have any significant issues related to the bus incident.[6] DH's mother had also admitted in December 2012 that she had seen nothing in DH's behavior that caused her to believe that there had been significant contact. It was not until a therapist's appointment in 2015 that DH's mother stated that DH had been acting out sexually. However, DH's mother did note that DH's behavior had become "increasingly more difficult . . . to handle" since 2011. 8 RP at 1498. DH's mother also stated, "[A] lot of what I have seen and simply shrugged off as just problematic and something that was part of [DH], I can see [was] most likely due to an evolving problem with her having been sexually molested." 8 RP at 1498.

McEwen testified that when DH was McEwen's student, DH never acted aggressively and exhibited no unusual or concerning behaviors. McEwen noted "[n]o change" in DH's behavior following the bus incident and that DH continued to make "steady progress." 9 RP at 1721-22. Similarly, DH's kindergarten and first-grade teachers reported that DH appeared reserved yet friendly and happy and did not have any angry outbursts or aggressive or sexualized behaviors.

Dr. Vandenbelt had also evaluated DH's mother. He acknowledged that DH's mother suffered guilt, anger, anxiety, and depression; DH's mother was stressed by her own understanding of what had happened on the bus. Dr. Vandenbelt acknowledged that DH's mother had preexisting depression, and he testified that the depression was "affected by [DH's mother's] understanding

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[6] Dr. Vandenbelt had also testified that he reviewed records of a doctor's visit in July 2012, where no symptoms attributable to any events that occurred in the fall of 2010 were discussed. Having interviewed DH's mother, Dr. Vandenbelt believed that DH's mother was someone who would be particularly likely to notice if DH had symptoms resulting from the abuse.

of her daughter having been sexually abused. [However, t]hat's a different thing than saying . . . that her . . . depression over time has been made worse." 9 RP at 1632-33.

C. Jury Instructions and Verdict

At a jury instructions conference, the trial court explained that it would include as instruction 19 an instruction proposed by the District and used in *Rollins v. King County Metro Transit*, a case that the trial court believed had "significant parallels to this case." 10 RP at 1930 (citing 148 Wn. App. 370, 199 P.3d 499 (2009)). Instruction 19 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 a part of any damage award against [the District].

CP at 6433. The Appellants objected to instruction 19 and argued that the instruction "unfairly and prejudicially" "frame[d] the issue in the negative and has the jury excluding damages immediately as opposed to describing in a positive fashion what they are to award" and misstated the law. CP at 6155; 11 RP at 2065-66. The trial court also gave instruction 5, proposed by the Appellants, which stated that "[a]ny act or omission of an officer or employee is the act or omission of the" District. CP at 6419.

During deliberation, the jury asked whether under instruction 5, Shafer should be considered an employee of the District for purposes of determining negligence. The District argued that the jury had "found a flaw" in the instructions and speculated that the jury wondered whether Shafer's intentional acts could be imputed to the District. 11 RP at 2189. The Appellants disagreed, argued that there were a "myriad of reasons" that the jury could have asked the question, and proposed that the jury be told to read its instructions. 11 RP at 2198. After consulting with

both attorneys, the trial court agreed with the Appellants, rejected the District's request for an additional instruction, and directed the jury to reread the instructions. The trial court reasoned that it was unclear from the question whether the jury thought "that there is vicarious liability here" and accepted the Appellants' argument that "the instructions together guide the jury to the overall instructions and legal principles that apply." 12 RP at 2217.

On December 17, the jury returned a special verdict form in which it answered, "Yes" to the questions of whether the District was negligent or grossly negligent and whether such negligence or gross negligence was "a proximate cause of injury or damage to the [Appellants]." CP at 6447-48. However, the jury found the measure of each of the Appellants' damages "proximately caused by" the District to be "$0" in response to three separate interrogatories. CP at 6449. After the jury returned its verdict and was polled, neither party raised any issues to address, and the trial court recessed.

V. MOTION FOR A NEW TRIAL

In January 2016, the Appellants moved for a new trial on the issue of damages alone under CR 59(a)(1), (5), (7), and (9).[7] The Appellants argued that the verdict was inherently contradictory because the jury had found that the District's negligence proximately caused the Appellants' damages, yet failed to award the Appellants any damages. The Appellants further argued that because the evidence of their damages was undisputed, the jury's damage award of "$0" was not

[7] CR 59 provides that a trial court may vacate a verdict and grant a new trial on the basis of "[i]rregularity in the proceedings of the court, jury or adverse party . . . by which such party was prevented from having a fair trial," "[d]amages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice," "[t]hat there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law," or "[t]hat substantial justice has not been done." CR 59(a)(1), (5), (7), (9).

supported by the evidence. In response, the District argued that the Appellants waived the issue of whether the verdict was internally inconsistent because they failed to raise it while the jury was impaneled. The District also argued that the verdict was consistent.

The trial court denied the Appellants' motion for a new trial. The trial court disagreed that the Appellants had waived the argument. Further, the trial court determined that the jury's verdict was internally consistent on the basis that either the jury believed that there were no damages caused solely by the District and not also by Shafer or that the jury determined there was no proof of monetary value of any injury caused by the District.

VI. Attorney Fees Request

After trial, the Appellants moved for fees and costs and argued that fees were appropriate under CR 37(c)[8] because the Appellants' requests for admissions[9] had sought the District's "opinion with regard to the application of law to fact." CP at 6703. The District responded that it had properly refused to "admit negligence" and that the requests were improper because they required the District to admit a legal conclusion. CP at 7431. The District also noted that it was

[8] CR 36 governs requests for admission; CR 37(c) provides that "[i]f a party fails to admit . . . the truth of any matter as requested under [CR] 36, and if the party requesting the admissions thereafter proves . . . the truth of the matter, the party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to [CR] 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true . . ., or (4) there was other good reason for the failure to admit."

[9] In September 2015, the Appellants had requested that the District admit that it "failed to act reasonably in protecting D.H. from [Shafer's] sexual abuse" and that it "breached its duty of care in failing to protect D.H. from [Shafer's] sexual abuse." CP at 4561-62. The District refused these requests and explained that each request did "not refer to a factual issue but involve[d] a question of law." CP at 4561-62.

not required to admit factual matters central to the lawsuit. The trial court denied the Appellants' fee request.

ANALYSIS

I. Motion for a New Trial

A. No Waiver

The District argues that the Appellants waived their arguments that the verdict was irreconcilable because the Appellants failed to object while the jury was still impaneled. We disagree.

The existence of a waiver is a mixed question of fact and law that, where the facts are undisputed, we review de novo. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 440-41, 191 P.3d 879 (2008). We have noted inconsistency in cases deciding whether a party waived its challenge to a jury verdict when it did not raise the alleged inconsistency prior to the jury's discharge. *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn. App. 919, 928, 332 P.3d 1077 (2014), *review denied*, 182 Wn.2d 1021 (2015). In *Mears*, we stated that *Gjerde v. Fritzsche*, a Division One case declining to consider a challenge to jury interrogatories, appeared to be limited to the circumstances presented: counsel who was silent in the face of actual knowledge of an inconsistency when it could be cured and remained silent in order to "'try his luck with a second jury.'" 182 Wn. App. at 929 n.2 (quoting 55 Wn. App. 387, 394, 777 P.2d 1072 (1989)).

Here, after the jury returned the special verdict and was polled, the Appellants did not object to the verdict. The Appellants first argued that the verdict was irreconcilable in their new trial motion. When the District subsequently argued that the Appellants had waived their objection, the trial court correctly determined that there is no absolute standard that a party waives

its claim of an irreconcilable verdict when it fails to raise the issue before the jury's discharge. *See Mears*, 182 Wn. App. at 928.

On appeal, the District claims that here, there was actual knowledge of an inconsistency and that this is a situation where counsel remained silent despite actual knowledge in order to try his luck with a second jury. *See Mears*, 182 Wn. App. at 929 n.2 (quoting *Gjerde*, 55 Wn. App. at 394). The District points to the jury's question during deliberations: "'In regards to Instruction 5, should [Shafer] be considered an employee of the [District] in determining negligence?'" 11 RP at 2187. But in response to this question, the Appellants contended that it was unclear why the jury asked about negligence and argued against the District's speculation that the jury had found a flaw in the instructions. Thus, it is not clear that the Appellants remained silent despite actual knowledge of an inconsistency, and the rule from *Gjerde* does not apply. *See Mears*, 182 Wn. App. at 929 n.2. We hold that the Appellants did not waive their irreconcilable verdict argument.

B. VERDICT IS RECONCILABLE

The Appellants argue that the jury's verdict was irreconcilable so that the matter must be reversed and remanded for a new trial on damages. We disagree.

1. LEGAL PRINCIPLES

We generally review the denial of a motion for new trial for an abuse of discretion; however, where the trial court based its decision upon an issue of law, we review the issue de novo. *Mears*, 182 Wn. App. at 926-27. Where the jury's answers to a special verdict cannot be reconciled, "'[n]either a trial court nor an appellate court may substitute its judgment for that which is within the province of the jury'" and "'[t]he only proper recourse is to remand the cause for a new trial.'" *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 131, 875 P.2d 621 (1994)

(alterations in original) (quoting *Blue Chelan, Inc. v. Dep't of Labor & Indus.*, 101 Wn.2d 512, 515, 681 P.2d 233 (1984)). We have stated that "[i]n reviewing a verdict, an appellate court must try to reconcile the answers to special interrogatories." *Alvarez v. Keyes*, 76 Wn. App. 741, 743, 887 P.2d 496 (1995). And in reviewing the verdict, we read the verdict "as a whole, including instructions." *Espinoza v. Am. Commerce Ins. Co.*, 184 Wn. App. 176, 197, 336 P.3d 115 (2014).

2. JURY INSTRUCTIONS

As relevant to this appeal, the trial court provided the following instructions to the jury:

> **INSTRUCTION NO. 5**
>
> . . . Any act or omission of an officer or employee [of the District] is the act or omission of the [District].
>
> **INSTRUCTION NO. 6**
>
> The [Appellants] claim that [the District] was grossly negligent and/or negligent in one or more of the following respects:
>
> 1. Failing to provide reasonable protection for D.H.;
> 2. Failing to use reasonable care in the hiring, retention and supervision of the activities of . . . Gary Shafer;
> 3. Failing to enforce rules designed to protect passengers from inappropriate touching; and
> 4. Failing to train employees;
>
> [The Appellants] claim that this negligence caused injuries and damages to the [Appellants].

CP at 6419-20.

> **INSTRUCTION NO. 19**
>
> 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 a part of any damage award against [the District].

CP at 6433.

INSTRUCTION NO. 22

The cause of an injury or event is a proximate cause if it is related to the injury or event in two ways: (1) the cause produced the injury or event in a direct sequence, and (2) the injury or event would not have happened in the absence of the cause.

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

However, if you find that the sole proximate cause of injury or damage to the [Appellants] was the act of some other person who is not a party to this lawsuit then your verdict should be for the [District].

CP at 6436.

INSTRUCTION NO. 28

. . . .

If your verdict is for the [Appellants], then you must determine the amount of money which will reasonably and fairly compensate the [Appellants] for such damages as you find were proximately caused by the [District].

[The instructions then listed the elements of noneconomic damages for DH and factors to be considered if the jury awarded DH's parents damages.]

The burden of proving damages rests with the [Appellants] and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon the evidence and not upon speculation, guess or conjecture.

The law has not furnished us with any fixed standard by which to measure pain, suffering, or disability. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

CP at 6442-43.

3. ANALYSIS

Here, the jury returned a verdict that the District had been both negligent and grossly negligent, that the negligence and gross negligence proximately caused "injury or damage to the [Appellants]," but that the "measure of [Appellants'] damages proximately caused by the [District]" was "$0" for DH, DH's mother, and DH's father. CP at 6448-49. These answers to the

special verdict are reconcilable under the instructions because the jury could have determined that the District was liable, yet that the Appellants had proved no legally compensable damages.

The Appellants contend that the verdict is irreconcilable under this theory because the jury could not have found that the Appellants had proven damage proximately caused by the District but then awarded nothing in compensation. We disagree with this argument; nothing in the jury instructions foreclosed the jury from determining that the Appellants had suffered injuries or damages yet assessing that the legally compensable value of the injury or damages was "$0." For instance, although instruction 6 stated that the Appellants claimed that the District's negligence caused the Appellants' "injuries and damages" (CP at 6420) and instruction 22 discussed whether the District's negligence was a "proximate cause of injury or damage to the [Appellants]" (CP at 6436), instruction 28 told the jury,

> If your verdict is for the [Appellants], then you must determine the amount of money which will reasonably and fairly compensate the [Appellants] for such damages as you find were proximately caused by the [District].
>
> . . . .
>
> The burden of proving damages rests with the [Appellants] and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

CP at 6442-43. Thus, the instructions allowed the jury to conclude that even if it found that the District was liable, the jury could decline to award damages to the Appellants if the jury was not convinced that the Appellants had proven that the amount of compensation they were entitled to was greater than "$0."

When we review whether the answers to a special verdict are reconcilable under the instructions and the verdict as a whole, we *must* try to reconcile the answers where possible. *See Alvarez*, 76 Wn. App. at 743. Here, the jury's verdict may be reconciled under the District's theory

that the jury decided that the value of the Appellants' damages was "$0." We reject the Appellants' arguments that a new trial should have been granted because the verdict was irreconcilable.[10]

Next, we turn to whether the trial evidence substantially supports the verdict.

C. SUBSTANTIAL EVIDENCE TO SUPPORT A "$0" VERDICT

The Appellants further argue that even if the verdict was reconcilable, the trial court abused its discretion when it ruled that there was substantial evidence to support a "$0" verdict for each Appellant. Again, we disagree.

A trial court abuses its discretion when it denies a motion for a new trial where the verdict is contrary to the evidence. *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 172, 15 P.3d 664 (2001). We review the record to determine whether there was sufficient evidence to support the verdict: that is, viewing the evidence in the light most favorable to the nonmoving party, there must be "'substantial evidence'" to support the verdict and the verdict must not be founded on mere theory or speculation. *Sommer*, 104 Wn. App. at 172 (quoting *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)).

We have stated that

when a court reviews a jury's verdict

> [the] court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative

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[10] We note that the Appellants proposed the instruction that became instruction 5 and that the Appellants had an opportunity to clarify instruction 5 when the jury posed a question regarding that instruction. The Appellants, however, chose not to do so and repeatedly "urg[ed] the Court not to give" any additional instructions. 12 RP at 2212, 2215. Further, we are not asked to decide whether it was error to give instruction 5 together with instruction 19, and thus we do not reach this issue. We have doubts whether instruction 19 was properly given due to the interplay between instructions 19 and 5 as discussed here. But Appellant's challenge to instruction 19 is solely on the grounds that it was "misleading and confusing" because it was negatively phrased, redundant, and biased in favor of the District. Br. of Appellants at 47.

> to the issues before it. The inferences to be drawn from the evidence are for the jury and not for [the] court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.

Estate of Stalkup v. Vancouver Clinic, Inc., P.S., 145 Wn. App. 572, 586, 187 P.3d 291 (2008) (alterations in original; citation omitted). In *Stalkup*, we further stated that "[e]ven in those instances, where several competent experts concur in their opinion and the opposing party does not offer contrary expert evidence, the jury is bound to decide the issue on its own fair judgment, assisted by the expert testimony." 145 Wn. App. at 591. "[T]here is no per se rule that general damages must be awarded to every plaintiff who sustains an injury, [although] a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages." *Palmer v. Jensen*, 132 Wn.2d 193, 201, 937 P.2d 597 (1997).

The District cites to *Kozma v. Starbucks Coffee Co.*, which is illustrative that a defendant may be liable for injury to a plaintiff, yet the plaintiff may suffer no legally compensable injury. 412 N.J. Super. 319, 990 A.2d 679 (2010). There, the plaintiff, who had a preexisting knee injury, slipped and fell outside a Starbucks and sued Starbucks Corporation for damages. *Kozma*, 412 N.J. Super. at 322. At trial, the jury allocated "sixty percent of the negligence and proximate cause to Starbucks and the balance" to the plaintiff. *Kozma*, 412 N.J. Super. at 321. However, the jury unanimously declined to award any compensatory damages. *Kozma*, 412 N.J. Super. at 321. The appellate court affirmed the jury's verdict, noting that a jury "'need not give controlling effect to any or all of the testimony provided by experts even in the absence of [contrary] evidence.'" *Kozma*, 412 N.J. Super. at 325 (quoting *State v. Spann*, 236 N.J. Super. 13, 21, 563 A.2d 1145 (1989), *aff'd*, 130 N.J. 484, 617 A.2d 247 (1993)). Rather, "the evidence was susceptible to an

interpretation that minimized the monetary equivalent of plaintiff's pain and suffering to its vanishing point. . . . The jury could reasonably find that the impact of the fall was so insignificant that no additional injury beyond plaintiff's preexisting condition was sustained." *Kozma*, 412 N.J. at 325-27.

Here, the District and the Appellants hotly disputed whether or not DH suffered any compensable damages because of the molestation. The District's expert acknowledged that DH had been briefly upset on the afternoon of the bus incident but also that the

> best available information in the records is that [DH] really wasn't any different in the immediate time frame following what happened on the bus outside of the afternoon when supposedly something happened and carrying forward. So the picture that emerges is one of someone who is pretty much the same after the time of whatever happened on the bus as she was before.

8 RP at 1531. The expert further testified at length that all of DH's symptoms were attributable not to any molestations but to her preexisting Trisomy X. Finally, the expert opined that the "[p]robability" was that DH would not "have any future problems" related to the molestation, which DH did not seem to remember. 8 RP at 1545. Notably, the Appellants' own expert confirmed on cross-examination that DH did not independently remember the incidents.

DH's mother also testified that DH's toileting issues had begun in kindergarten and that DH's mother did not report any of DH's symptoms allegedly related to the molestations until long after the incidents. Finally, multiple teachers testified that they witnessed no changes in DH's behavior following the molestations. Thus, viewing the evidence in the light most favorable to the District, there is substantial evidence to support the jury's award of "$0" as DH's compensation for the molestations. *Sommer*, 104 Wn. App. at 172.

The parties did not as clearly contest whether DH's parents suffered damages. In fact, at trial, Dr. Vandenbelt confirmed that DH's mother suffered symptoms including guilt, anger, anxiety, and effects to her preexisting depression, all of which resulted from DH's mother's own understanding of what had happened on the bus. During the Appellants' case, they presented undisputed testimony that learning about the molestation had caused DH's mother to feel "like [her] whole world was coming down." 7 RP at 1237. The Appellants' expert briefly testified that DH's mother suffered as a result of DH's abuse—in particular, she worried and felt "guilty," and she could not "stop thinking about" and imagining "what must have happened on the bus." 6 RP at 1031. The abuse had caused DH's mother to experience depression and anxiety. DH's father testified about his "disturbing" fears that DH's future would be affected because she had been molested. 7 RP at 1360. Notably, the District did not focus upon DH's mother's injuries during her cross-examination and did not cross-examine DH's father at all.

However, even where several witnesses have given uncontroverted testimony, a jury is "bound to decide the issue on its own fair judgment," assisted by the testimony. *Stalkup*, 145 Wn. App. at 591. DH's parents' testimony about "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. *See, e.g.*, *Kozma*, 412 N.J. Super. at 325-27. Thus, again, viewing the evidence in the light most favorable to the District, substantial evidence supports a "$0" verdict for DH's parents. For these reasons, we hold that the trial court did not abuse its discretion when it denied Appellant's new trial motion.

II. JURY INSTRUCTION CHALLENGE

The Appellants argue that the trial court abused its discretion when it gave instruction 19, which the Appellants contend was (1) misleading and confusing because it was phrased negatively, (2) redundant with instructions 22 and 28, and (3) slanted in favor of the District. The Appellants further contend that (4) the claimed error was harmful because instruction 19 allegedly provides the only grounds to reconcile the jury's verdict. We hold that the Appellants' arguments either fail or are waived.

A. LEGAL PRINCIPLES

We review de novo whether a jury instruction is an accurate statement of the law. *Terrell v. Hamilton*, 190 Wn. App. 489, 498, 358 P.3d 453 (2015). But we review for an abuse of discretion the trial court's decision regarding how to word an instruction or whether to give an instruction. *Terrell*, 190 Wn. App. at 498. A party must make a proper objection to a jury instruction to preserve its challenge for appellate review. *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 313, 372 P.3d 111 (2016). The exception must be sufficient to apprise the trial judge of the objection's nature and substance. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 746, 310 P.3d 1275 (2013). Negatively phrased instructions may be objectionable for at least two reasons: first, they may be misleading and confuse the jury, and second, they may slant the instructions in the opposing party's favor. *Terrell*, 190 Wn. App. at 505.

B. WAIVER

In its proposed jury instructions, the District included instruction 19 with an additional sentence at the end. At a jury instructions conference, the trial court explained that it would include

instruction 19 (without the additional sentence) as the instruction used in *Rollins*, a case with "significant parallels to this case." 10 RP at 1930 (citing 148 Wn. App. 370). Instruction 19 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 a part of any damage award against [the District].

CP at 6433. The Appellants objected to instruction 19 and argued that the instruction "unfairly and prejudicially" "frame[d] the issue in the negative and ha[d] the jury excluding damages immediately as opposed to describing in a positive fashion what they are to award" and misstated the law. CP at 6155; 11 RP at 2066.

On appeal, the Appellants reiterate their argument that instruction 19 was improper because it was negatively framed and further argue that instruction 19 is redundant and slanted in the District's favor. The arguments that the instruction is redundant and slanted in the District's favor were not made before the trial court. Thus, we decline to review these arguments unless Appellants' instruction conference arguments were "'sufficient to apprise the trial judge of the nature and substance of the objection[s].'" *Washburn*, 178 Wn.2d at 746 (quoting *Crossen v. Skagit County*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983)).

Here, the Appellants' argument that instruction 19 is redundant with other instructions was not raised in the trial court and accordingly has not been preserved. *See Millies*, 185 Wn.2d at 313; *Washburn*, 178 Wn.2d at 746. Further, the Appellants' argument that instruction 19 is one-sided is not sufficiently related to the Appellants' argument that it is confusing—*Terrell* indicates that one-sidedness and capacity to be misleading are distinct reasons that a negatively phrased instruction may be objectionable. *See* 190 Wn. App. at 505. For these reasons, we hold that the

Appellants preserved only their arguments that instruction 19 was misleading, and accordingly confusing, because it is negatively phrased.

C. No Abuse of Discretion

As discussed, the Appellants' remaining argument is that the trial court abused its discretion because instruction 19 was misleading and confusing. We disagree.

Contrary to the Appellants' arguments, there is no per se rule that the giving of a negatively phrased jury instruction is an abuse of discretion. The Appellants rely upon *Rickert v. Geppert*, in which the court determined that an instruction "not to compare negligence of the parties, if any exists" was more likely to confuse, than aid, the jury. 64 Wn.2d 350, 355-56, 391 P.2d 964 (1964). But *Rickert* does not absolutely bar the giving of a jury instruction phrased in the negative; rather, there, the court granted a retrial on other grounds and determined that while there was "no abuse of judicial discretion in the giving of the instruction," a similar instruction "should not be given in a retrial" if it were proposed. 64 Wn.2d at 356.

Here, the trial court gave instruction 19 because the instruction had been used in *Rollins*. In *Rollins*, a passenger sued King County Metro Transit for negligence arising out of an altercation on a Metro bus. 148 Wn. App. at 372-73. Division One of this court observed that "[t]he intentional conduct of unknown assailants was a proximate cause of injury" but that the passenger sought recovery solely from Metro and not from the assailants who intentionally attacked her. *Rollins*, 148 Wn. App. at 379. Division One held that it was not misleading to give an instruction that,

> "[i]n calculating a damage award, you must not include any damages that were caused by acts of the unknown assailants and not proximately caused by negligence of the defendant. Any damages caused solely by the unknown assailants and not

> proximately caused by negligence of defendant [Metro] must be segregated from and not made a part of any damage award against [Metro.]"

Rollins, 148 Wn. App. at 379. 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. Accordingly, the Appellants' argument that the trial court abused its discretion when it gave instruction 19 because that instruction was negatively phrased fails. Because the trial court acted within its discretion and accordingly did not err, we do not address the Appellants' contention that the alleged error was not harmless.

III. SUMMARY JUDGMENT

The Appellants contend that the trial court erred when it denied their summary judgment motion on liability.[11] We decline to address this argument.

An issue is moot if we can no longer provide effective relief. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010). Because we affirm the jury verdict finding the District liable, it is no longer material that the trial court denied summary judgment on liability.

IV. EVIDENTIARY RULING

The Appellants also argue that the trial court abused its discretion when it excluded the District's liability admissions from *Crunkleton*. The Appellants contend that exclusion of the District's prior liability admissions was not harmless error because had the evidence been

[11] The Appellants also argue that the summary judgment ruling was "not harmless." Br. of Appellants at 55. But we do not address this argument because we do not review the denial of summary judgment motions for harmless error. *See Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

admitted, the Appellants could have streamlined their liability case and focused upon presenting evidence of damages. We reject this argument.

Evidentiary error is harmless unless it affects the outcome of the case. *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 729, 315 P.3d 1143 (2013). Thus, we reverse a jury's verdict on the basis of evidentiary error only where we can say that the error affected that verdict. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

We assume without deciding that the trial court abused its discretion when it declined to admit the *Crunkleton* documents. Turning to harmless error, the Appellants do not argue that the *Crunkleton* documents would have proven damages. The Appellants argue instead that the admissions were probative "regarding the central issues of duty, breach, and liability." Br. of Appellants at 65. We thus assume that any effect of their admission would go to liability. As discussed, the jury found that the District was, in fact, liable. Therefore, even if we were to agree that the trial court erred, the error would be harmless because it could not have affected the liability verdict. *See Brown*, 100 Wn.2d at 196.

The Appellants provide no authority for the proposition that the exclusion of evidence is harmful merely because it would have allowed for a more "streamlined" presentation of a party's case. Here, the Appellants were unable to more fully present their damages case because they wrongly assumed that the District would not contest liability, failed to seek a continuance, and even opposed the District's request for a continuance shortly before trial. We reject the Appellants' arguments and hold that even assuming error in the exclusion of the *Crunkleton* documents, that error would have been harmless.

V. TRIAL COURT ATTORNEY FEE MOTION

The Appellants contend that they are entitled to an award of fees under CR 37(c) because the District "fail[ed] to admit its negligence prior to trial," in particular its "breach of its duty." Br. of Appellants at 72, 75. We reject the Appellants' arguments.

"We review a trial court's decision to impose discovery sanctions under CR 37(c) for an abuse of discretion"; a trial court "abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds." *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 472, 105 P.3d 378 (2005). CR 36(a) governs requests for admission of the truth of matters including "the application of law to fact"; the purpose of the rule "is to eliminate from controversy factual matters that will not be disputed at trial." *Thompson*, 153 Wn.2d at 472. Thus, "a party is not required to concede either factual matters central to the lawsuit or legal conclusions." *Thompson*, 153 Wn.2d at 472.

> If a party fails to admit the . . . truth of any matter as requested under [CR] 36, and if the party requesting the admissions thereafter proves . . . the truth of the matter, the party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to [CR] 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true[,] or (4) there was other good reason for the failure to admit.

CR 37(c).

In September 2015, the Appellants requested that the District admit that it "failed to act reasonably in protecting D.H. from [Shafer's] sexual abuse" and that the District "breached its duty of care in failing to protect D.H. from [Shafer's] sexual abuse." CP at 4561-62. The District refused these requests and explained that each request did "not refer to a factual issue but

involve[d] a question of law." CP at 4561-62. After trial, the Appellants moved for fees and costs and argued that fees were appropriate under CR 37(c) because the Appellants' requests sought the District's "opinion with regard to the application of law to fact." CP at 6703. The District responded that it had properly refused to "admit negligence" and that the requests were improper, relying on both the rules that a party is not required to admit factual matters central to the lawsuit and that requests for admission cannot request that a party admit a legal conclusion. CP at 7431. The trial court denied the Appellants' request.

In *Thompson*, the plaintiff requested that the defendant admit that its negligence was, among other things, "the sole proximate cause" of a fire. 153 Wn.2d at 473. Our Supreme Court noted that although this request could be characterized as the "'application of law to fact'" under CR 36(a), the request "undoubtedly requested [the defendant] to admit [a] legal conclusion[]." *Thompson*, 153 Wn.2d at 474 (quoting CR 36(a)). "Negligence and proximate cause are legal conclusions and are matters usually reserved for the jury." *Thompson*, 153 Wn.2d at 474. Thus, despite the request's phrasing, the defendant had "'good reason for the failure to admit'" under CR 37(c)(4).

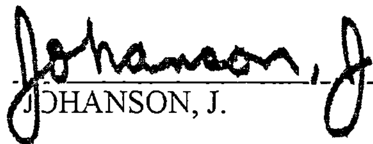
Here, unlike in *Thompson*, at issue are admissions requiring that the District admit *breach of duty*, rather than proximate cause or negligence. *See* 153 Wn.2d at 473. The Appellants argue that breach of duty is "'a question[] of fact for a jury,'" so that *Thompson* should not apply. Br. of Appellants at 74 (quoting *Bowers v. Marzano*, 170 Wn. App. 498, 506, 290 P.3d 134 (2012)). But the Appellants' reliance upon *Bowers* is misplaced—that case states that both breach of duty *and proximate cause* are "generally questions of fact for a jury." 170 Wn. App. at 506. As discussed, *Thompson* held that proximate cause is a legal conclusion usually reserved for the jury. 153 Wn.2d

at 474. Thus, *Bowers*' language that proximate cause and breach of duty are both questions of fact for the jury fails as a reason to distinguish *Thompson.*

Because the District was not required to concede breach of duty, the District had "'good reason for the failure to admit.'" *Thompson*, 153 Wn.2d at 474 (quoting CR 37(c)(4)). Accordingly, we hold that the trial court did not abuse its discretion when it denied the Appellants' motion for costs under CR 37.[12]

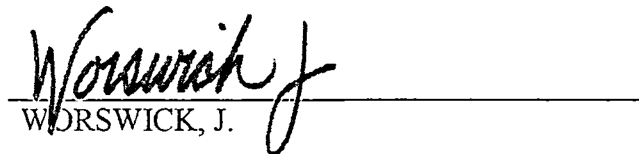
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

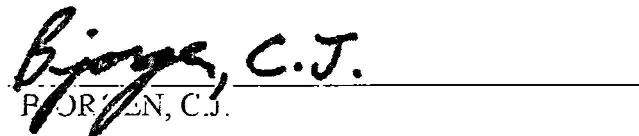


JOHANSON, J.

We concur:



WORSWICK, J.



BJORGEN, C.J.

[12] In the alternative, the District was not required to admit breach of duty because breach of duty was a central issue in dispute. *See Thompson*, 153 Wn.2d 472. At trial, the District contested whether it had breached its duty; for instance, in closing, the District argued that in order to find it liable, the jury would have to find that the District "did something wrong . . . that violated the standard of care." 11 RP at 2135. The District also elicited testimony from Shafer that he had carefully hidden his actions from others to avoid detection.