90971-7

Supreme Court No.:

Court of Appeals State of Washington Division II - No.: 43121-1-II

Pierce County Superior Court No: 09-2-16169-6

JEANETTE MEARS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF MERCEDES MEARS, AND AS LIMITED GUARDIAN FOR JADA MEARS, AND MICHAEL MEARS,

Appellants/Plaintiffs,

vs.

BETHEL SCHOOL DISTRICT, NO. 403, A MUNICIPAL CORPORATION; RHONDA K. GIBSON, AND HEIDI A. CHRISTENSEN,

Respondents/Defendants.

APPELLANTS' PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF PETITIONERS

The Petitioners, Jeanette Mears, individually and as personal representative for the Estate of Mercedes Mears, and as limited guardian for Jada Mears, and Michael Mears, seeks review of the Court of Appeals decision which affirmed an adverse verdict and judgment in favor of the Bethel School District Number 403, a municipal corporation; and individual defendants Rhonda K. Gibson and Heidi A. Christensen, (defendants below, Respondents herein), despite acknowledging, *inter alia*, during the course of trial defense counsel engaged in flagrant misconduct by asking highly inflammatory questions clearly calculated to inflame the passions and prejudices of the jury.

II. COURT OF APPEALS DECISION

The Court of Appeals decision was filed on August 12, 2014. The published and unpublished portions of that decision are attached hereto as Appendix A. The court's order denying Petitioner's Motion to Publish was entered on September 22, 2014 as attached hereto as Appendix B.

III. ISSUED PRESENTED FOR REVIEW

Jeanette and Michael Mears are the parents of Mercedes, (deceased), and Jada, who witnessed her sister's death. Despite multiple

orders on motions in limine prohibiting such questioning, during the course of trial, counsel for the defendants asked these questions based on statements allegedly within Jeanette Mears and Jada Mears counseling record:

> *Did [Jeanette] ... tell you that her treatment, one of her treatment goals for dealing with the attachment with Jada was to be able to tolerate the presence of Jada without feeling her flesh was crawling or without coming loose in her stomach content [?]*
> ....
>
> *Did she tell you her goal was in treatment, was so that she could end up being in the same room with her daughter Jada and not feel like your skin was crawling [?]*
> ....
>
> *[Did] you read the reports that Jada had in her medical record where she claimed that her mother had told her that she was stupid, she was ugly, that why couldn't she be more like Mercedes [?]*
> ....
>
> *Now, you know, don't you, that Jada reported to her counselors and before this event an instance of what was described by the counselors as severe emotional abuse that she suffered from her mom [?]*
>
> (Slip Op., page 22).

The Appellate Court acknowledged these questions violated a number of the trial court's prior orders on motions in limine, and followed a misleading offer of proof made by Respondent's counsel. (*Id.*, page 24).

Nevertheless, the Court of Appeals found that despite the fact these highly inflammatory questions, accusing a plaintiff mother of child abuse, to be "flagrant misconduct," a new trial was not warranted because, ultimately, the witness to whom such questions were asked did not actually answer the questions.

1. Does the decision of the Court of Appeals relating to the flagrant misconduct of Respondent's counsel, conflict with the decisions of the Supreme Court and the Court of Appeals within the meaning of RAP 13.4(b)(1) and (2), because it assumes that such grievous misconduct could have no impact on the jury, given that the trial court gave a general instruction regarding the comments of the attorneys, and the highly inflammatory questions were never actually answered?

2. Was the Court of Appeals interpretation of the verdict form in this case inconsistent with the Supreme Court's opinion in *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d. 907, 915, 302 P.3d 250 (2001)?

3. Should the Supreme Court review the Court of Appeals decision with regard to the impact of Respondent's counsel's "flagrant misconduct" in this case, because it involves a matter of substantial public interest within the meaning of RAP 13.4(b)(4), given the public has an interest in fair trials, - a trial where the trial court's ruling on motions in

limine are honored and where flagrant misconduct of counsel is not tolerated?

4. Upon acceptance of review of the above issues, will the Supreme Court consider the other instances of evidentiary error and/or attorney misconduct discussed within the Court of Appeals opinion?

IV. STATEMENT OF THE CASE

As discussed at Pages 1 through 5 of the slip opinion in this case, this case involves the tragic and untimely death of Mercedes Mears, who died on the floor oF the nurse's office at Clover Creek Elementary School, which is part of the Bethel School District. As discussed at Page 2 of the slip opinion, it was undisputed at time of trial that had the school personnel, (who were attending to Mercedes during the health emergency which took her life), engaged in the *de minimus* acts of providing her with her EpiPen or CPR, it would have saved her life. It was also uncontradicted at time of trial that Mercedes had her own personal EpiPen at Clover Creek Elementary School on the date of her death. In fact her EpiPen was stored in a cabinet literally within feet of where she perished. She had provided the school a doctor's order directing and/or permitting its use, should she suffer an "allergic emergency." During the course of trial proceedings, it was disputed as to whether or not Mercedes died as a result of an "allergic

emergency" and/or a long-standing asthma condition she suffered from. It was uncontradicted that in either event had either CPR and/or an EpiPen been utilized, her life would have been saved.

Jury selection began in this case on October 10, 2011 and the case concluded on November 28, 2011 when the jury returned a verdict finding negligence, but no proximate cause. The jury verdict form is attached as Appendix C to this Petition.

Pretrial proceedings in this case spanned many hours and several days. Such proceedings included crossing motions for summary judgment, as well as a vast array of motions in limine brought by both sides. A critical focus of the motions in limine brought by the Plaintiffs was solidifying the trial court's previous rulings on summary judgment that the Plaintiff parents did nothing to cause or contribute to Mercedes injuries, nor did Jada. Additionally, substantial effort was made to exclude on relevancy grounds and pursuant to ER 403 what otherwise under ER 403 could be highly prejudicial evidence within Jeanette's personal counseling records. While there was a question regarding a preexisting "bonding" issue between Jada and her mother, Jeanette, the trial court, within its motion in limine ruling, specifically excluded any argument, testimony or comments relating to allegations of abuse by Jeanette toward her daughter

Jada. Significantly, with respect to any matters relating to "past counseling," defense counsel, prior to probing into such matters, was ordered to make an offer of proof outside of the presence of the jury.

Yet, despite Plaintiff's counsel's efforts, and great care in crafting such motion in limine and acquiring such advance rulings, Respondent's counsel, nevertheless asked the highly inflammatory and ill-intentioned above-referenced questions.

Unfortunately, despite hours and hours of effort to ensure that the Plaintiffs' received a fair trial, defense counsel from the "opening bell," (opening statement), engaged in calculated efforts to violate the Court's orders in limine, or to skirt them at every possible step. Within Bethel's opening statement, counsel immediately began discussing highly irrelevant medical history in an obvious calculated effort to bias the jury against the Plaintiff parents for not forcing Mercedes, (several years prior), to be more compliant with her asthma medications. Witnesses aligned with the school district were obviously coached and were unresponsive to Plaintiff's counsel's questions. Despite a motion in limine specifically excluding any contention that Mercedes should not have gone to school the day of her death, the defense elicited testimony from the School's principal suggesting to the contrary. Although the above-quoted inflammatory question

certainly was the "crescendo" of misconduct within the trial, the Court of Appeals failed to recognize that it, in combination with a host of other misconduct, was more than adequate to make a determination that the Plaintiffs did not receive a fair trial. It was an abuse of discretion for the trial court not to have ordered one under the terms of CR 59.[1]

As discussed below, although a critical portion of the Court of Appeals' opinion is "unpublished," it is nothing more than an invitation to defense counsel, in high stakes personal injury cases, to abuse the court system in order to further a "win at all costs" mentality. The Court of Appeal's willingness to condone such actions is nothing but an invitation for future misconduct. It is also predicated on a legal analysis which runs afoul a number of well-established principles within the case law, not only generated by this court, but also other divisions of the courts of appeals.

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1 Even prior to the case being called for trial, the defendants engaged in such substantial discovery abuse that their forensic psychologist expert was stricken. Plaintiff's case preparation was substantially disrupted when, on the eve of trial, the defense produced in response to discovery requests, over 500 pages of documentation, including a number of "smoking gun" documents. See, *Berry v. Coleman Systems Company* 23 Wn.App. 622, 596 P.2d 1165 (1979) (bad faith actions perpetrated by defense in discovery injured the Plaintiffs to such a degree that the Plaintiff was entitled to a new trial "on the grounds that substantial justice has not been done."). Curiously, such discovery abuse was not even referenced within the Court of Appeals partially published opinion. The cumulative effect of the above-referenced misconduct was a jury verdict that is difficult to reconcile with the proof presented at the time of trial. The jury found that the Bethel School District and its employees were negligent, but that such negligence was not the proximate cause of the Plaintiff's injuries, including the unfortunate death of Mercedes Mears, which indisputably was easily preventable.

V. REASONS WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeal's Decision Regarding Misconduct of Counsel and Evidentiary Error is and Was Inconsistent With Well-Established Legal Principles.

It is respectfully suggested that one can look long and hard within the case law within the State of Washington and be hard pressed to find an instance in a civil case where more prejudicial information was placed in front of a jury - whether in the form of a question, answer or a comment during closing. As pointed out by the Court of Appeals, given the suggestion that a parent in a wrongful death of a child case has engaged in acts of "child abuse," is highly inflammatory and prejudicial. At page 26 of the slip opinion, the Court of Appeals acknowledged:

> *Even though the statements and allegation of the counseling records have some relevance in the issue of Jada's damages, however,* ***public attitudes concerning child abuse certainly pose as great a danger of unfair prejudice as a person's undocumented immigration status****. Under Salas, the initiative of such statements poses such a great risk of prejudice that the misconduct of the district counsel in this regard might well merit reversal....* (Emphasis added).

Nevertheless, the Court went on to hold that a generalized instruction telling the jury to disregard the remarks and statements of counsel" was powerful enough to overcome the toxic and highly

prejudicial impact such comments presumptively had during the course of trial.

The approach taken by the Court of Appeals stands in marked contrast to the opinions of this Court and, frankly, to some degree defy the common sense reality how such toxic comments can and did fatally affect this trial. In reviewing the cases of the Supreme Court, it is hard to imagine how this case is consistent with them, and how the Court of Appeals could have concluded that such flagrant, ill-intentioned and highly prejudicial misconduct would not be the basis for the grant of a new trial, regardless of the fact that the witness ultimately was blocked from answering the inappropriate questions by vociferous and timely objection.

The Court can take note that in *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 672, 230 P.3d 583 (2010), the Supreme Court granted a new trial due to prejudicial admission of evidence regarding the Plaintiff's immigration status. It did so despite the fact that the admission of such evidence was reviewed under the deferential "abuse of discretion" standard. In *Salas,* the Court reasoned that, given the prejudicial nature of such evidence, a new trial was warranted because there was "no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Citing to *Thomas v. French*, 99 Wn.2d 995, 105, 659

P.2d 1097 (1983) (new trial granted when negative prejudicial hearsay letter was admitted into evidence).

Further, the Court of Appeal's opinion suggests that the words of counsel alone, no matter how inflammatory, ill-intentioned and flagrant will not justify granting a new trial when the statement was made in the form of a question to a witness, which remained unanswered. In contrast, when prejudicial statements are made by counsel during the course of closing argument it is a basis for a new trial. See, *Adkins v. Aluminum Company of America* 110 Wn.2d 128, 140, 750 P.2d 1257 (1998). In *Adkins,* the Supreme Court held that an improper "Golden Rule" argument warranted reversal and remand for a new trial, despite the fact, (as in this case), the jurors were provided the general instruction that comments of counsel are not evidence. In *Adkins,* the prejudice was shown by the fact that in an earlier trial there had been a finding of liability in favor of the Plaintiff, and a defense verdict in the second trial. Under such circumstances, the Court concluded that the improper argument "presumptively affected the outcome of the trial" and required reversal.

In this case, like *Adkins,* there were certain aspects of what transpired which are indicative that defense counsel's misconduct affected the verdict. The jurors in this case found negligence with respect to all

defendants, with no proximate cause, even though it was an undisputed fact that had the school personnel, (who were supposed to be trained and knowledgeable regarding the use of an EpiPen and Mercedes' medical needs), administered the EpiPen or performed CPR, Mercedes would have survived.[2]

Further, the Court of Appeal's ruling "stands on its head" and undermines the entire purpose of acquiring pretrial rulings on motions in limine, (particularly as it relates to highly prejudicial information). It is well recognized that motions in limine are proper and should be granted, particularly as it relates to highly prejudicial information, because a jury can be inflamed and/or prejudiced if there is a "mere asking of the question." *Osborn v. Lake Washington School District* 1 Wn.App. 534, 539, 462 P.2d 966 (1969). As discussed in *Osborn,* the purpose of the motion in limine is to "...prevent the very damage caused by defense counsel. At that time, both court and counsel recognized prejudice could be caused by the mere asking the question and even objection thereto."

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2 It is noted that in *Adkins* the Golden Rule argument was made in that case was subject to objection, but the trial court failed to provide a curative instruction. In this case, for inexplicable reasons, the trial court never actually ruled on the objections and, of course, no curative instruction could be provided absent such a ruling.

Here, the mere asking of such highly inflammatory questions, in violation of a number of motions in limine, should be considered as so severe that no curative instruction nor objection on the part of Plaintiff's counsel could have "unrung the bell." In fact, by asking such questions the defense forced Plaintiff's counsel to vociferously object in front of the jury and resulted in the jury's speedy removal from the courtroom so that a record could be made and the objection could be heard. By forcing Plaintiff's counsel to object only emphasizes that such information, in the eyes of Plaintiff's counsel, was likely to hurt the Plaintiff's case. As one of this Court's brethren recognized, at the time World War II was coming to a close, "One cannot unring a bell. I marvel at the audacity of appellate courts which declare their ability to unravel the admissible and inadmissible evidence and say that the inadmissible evidence did not influence the jury." See, *State v. Redwine* 23 Wn.2d 467, 476, 116 P.2d 205 (1945) (J. Millard dissenting).

This is not a case where Plaintiffs' counsel in any way "gambled on the verdict," given that contemporaneous with this deplorable defense conduct, Plaintiff's counsel moved for a mistrial.

Further, it is hard to imagine that accusing a mother of "child abuse" is not such "flagrant" misconduct that, even had the Plaintiff's counsel

stood silent, it nevertheless would be grounds for an award of a new trial, even though the inflammatory question ultimately remained unanswered. In, *Carabba v. Anacortes School District,* 72 Wn.2d 939, 954, 435 P.2d 936 (1968), the Court provided:

> *The necessary inquiry, therefore, is whether the incident of misconduct referred to were so flagrant that no instruction of the court, or admonition to disregard, could suffice to remove the harm caused thereby. If such is the case, appellant's failure to bolster his objection by moving for a mistrial did not waive, and the instruction and admonition by the trial court did not cure, the harm produced. The only effective remedy is a new trial, free from prejudicial misconduct of this magnitude.*

The Court of Appeals' holding in this case violates this wisdom.

It was respectfully suggested that, in order to maintain consistency in the law and, if anything, for deterrent purposes, the Court of Appeals' decision should be subject to review, not only due to the fact it is inconsistent with precedent, but also its tolerance of the type of misconduct involved in this case, raises the clear specter of a matter of substantial public import.

In *Teter v. Deck* 174 Wn.2d 207, 274 P.3d 336 (2012), this Court, in support of the actions of now Justice Gonzalez, sent a clear message that the cumulative misconduct of experienced trial counsel, calculated to expose

juries to inadmissible evidence would not be tolerated, and a new trial would be a remedy, even if such misconduct was regularly subject to objection and curative instruction. Here, there was no curative instruction provided, nor could there have been one which would have cured the inflammatory actions taken by the defense in this case. Such actions should be viewed as being indicative of a distain for the trial court's rulings in limine, and a willingness to violate Court orders in order to win a defense verdict. What transpired in this case was deplorable, and the Supreme Court should correct the Court of Appeal's willingness to accept what transpired without affording these victimized Plaintiffs the remedy of a new trial.

B. The Court of Appeals' Determination Regarding the Nature of General and Special Verdicts was Erroneous and Inconsistent With this Court's Prior Precedent.

The verdict form in this case essentially contained four questions; 1) negligence (as to each individual defendant); 2) proximate cause, (as to each individual defendant); 3) damages and 4) allocation amongst the named defendants. The specific answers to the question regarding the "negligence" should have been treated by the trial court, and the Court of Appeals, as being a "general verdict," because it actually resolved the ultimate question of whether or not the defendant breached a standard of

care. See, *Guijosa v. Wal-Mart Stores, Inc.* 144 Wn.2d 907, 918, 32 P.3d 250 (2001). (Answers to interrogatories regarding each claim "yes/no" constitute a general verdict where "the jury pronounces generally upon all or any of the issues in favor of either the Plaintiff or defendant."). See, CR 49(-). As noted in *Hawley v. Mellem* 66 Wn.2d 765, 105 P.2d 243 (1965), "When the verdict of a jury is consistent with the pleadings, the evidence, the instructions of the court, all issues are resolved and inhere in the verdict." A "general verdict" is the integral final product of the jury's findings, and it cannot readily be separated into its component elements. See, *Rowe v. Safeway Stores* 14 Wn.2d 363, 373, 128 P.2d 293 (1942). As stated in *Rowe,* citing to, 29 Yale Law Review 253, 258:

> *The peculiarity of the general verdict is the merger into a single individual residuum all matters, however numerous, whether in want or fact. It is a compound made by the jury which is incapable of being broken up into its constituent parts. No judicial re-agents exist for either a qualitative or a quantitative analysis. The loss applies the means for determining neither what facts were found, nor what principles of law were applied, nor how the application was made. There are therefore three unknown elements which enter into a general verdict: (a) the facts; (b) the law; (c) the application of the law to the facts.*

Thus, a "general verdict" must be presumed to be in favor of whichever party it is entered as to any and all possible combination of the

application of the laws and facts based on the evidence presented during the course of trial.

Here, there was a "general verdict" of negligence and the Court of Appeals characterization of that being a "special verdict" is contrary to the above.[3]

The Court of Appeals' opinion mistakenly assumes that negligence and proximate cause cannot separately be viewed as ultimate questions of fact. Further, the Court of Appeal's opinion ignores the presumption built into CR 49(-) applicable to general verdicts. Under the approach taken by the Court of Appeals, the party in whose favor the verdict was entered, here the Plaintiffs, are not being provided the benefit of a presumption that all potential theories of negligence were found in their favor. Under the Court of Appeal's analysis, the exact opposite is true, i.e., there is a built-in assumption that, because it cannot be proven exactly what the jury rested its decision on, that nothing can be construed in favor of the party whose favor the verdict was rendered. Such an approach is clearly inconsistent with the language of CR 49(-) and the above-cited authority.

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3 In reaching this conclusion, that the general negligence verdicts in this case were actually "special verdicts," the Court of Appeals relied heavily on the cases of *Brashear v. Puget Sound Power and Light Co., Inc.* 100 Wn.2d 204, 667 P.2d 78 (1983) and *Stalkup v. Vancouver Clinic, Inc., P.S.* 145 Wn.App. 572, 586, 189 P.3d 291 (2008). The *Brashear* case and *Stalkup* are readily distinguishable because in neither case did the appellate court address the presumption created by CR 49(-).

Moreover, the approach taken by the Court of Appeals requires a speculative analysis as to what the jury may or may not have concluded despite the above-referenced presumption. Such an approach is inconsistent with the basic notion that a verdict cannot be based on mere theory or speculation. See, *Curtis Allen v. YMCA of Lower Columbia Basin* 82 Wn.2d 455, 465, 511 P.2d 991 (1973).

Here, under the evidence presented at the time of trial, any general verdict in Plaintiff's favor, it must be presumed that the jury found in Plaintiff's favor on the theory that the school district was negligent in failing to provide Mercedes with CPR and/or her EpiPen. There was no evidence presented at the time of trial which in any way disputed the fact that such failures were "a proximate cause of her death," thus, that aspect of the jury's verdict was unsupported by "substantial evidence" warranting the grant of a new trial.

The Court of Appeals' opinion, at page 3, establishes that there in fact was no real issue regarding "proximate cause" at time of trial:

> ***At trial, undisputed expert testimony established that an injection of epinephrine by the time Mercedes lost consciousness probably would have saved her life. Expert testimony similarly established that, had school personnel initiated cardiopulmonary resuscitation (CPR) when Mercedes became unresponsive, she likely would have survived. The District's experts conceded***

> ***that administering epinephrine posed no significant risk of harmful side effects and that an asthma attack may qualify as an "allergic emergency."*** (Citations to record omitted. Emphasis added).

That is proximate cause, and the trial court's and the Court of Appeals' determination that the jury's verdict of "no proximate cause" is baffling, and unsupported by "substantial evidence." In fact, it is directly contrary to the undisputed evidence referenced above.

The trial, and the Appellate Court's analysis regarding the meaning of a general verdict was erroneous, and given such erroneous analysis, review should be granted because the public would have a substantial interest in preserving the sanctity of general verdicts.

VI. CONCLUSION

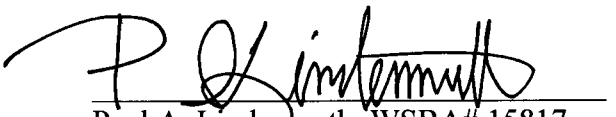
For the reasons stated above, this Petition For Review should be granted. The Court of Appeals' decision substantially conflicts with the prior decisions of this Court and other Courts of Appeals as it relates to what remedy should be available when a party engages in flagrant misconduct, of such severity, that nothing can be done to cure the prejudice suffered as a result. The mere fact that such prejudicial information was imparted to the jury in the form of an unanswered question should not change the analysis or otherwise be outcome determinative.

The Court of Appeals should have recognized that accusing a mother of child abuse falls within that rare category of cases where the inflammatory nature of such information is so highly prejudicial that a new trial is mandated.

The Court of Appeal's decision was erroneous as it relates to the verdict in this case, and is inconsistent with the previous opinions of this court. If the verdict is properly analyzed as a "series of general verdicts," there was **no evidence** from which to sustain a verdict of "no proximate cause," given the fact that it must be presumed that the jury found that the School District was negligent in failing to provide Mercedes life-saving care.

The decision of the Court of Appeals should be reversed and this matter remanded for a new trial limited to damages, or a full new trial.

RESPECTFULLY SUBMITTED this 21st day of October, 2014.



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DECLARATION OF SERVICE

I, Marilyn DeLucia, hereby declare under penalty of perjury that the following statements are true and correct: I am over the age of 18 years and am not a party to this case.

On October 21, 2014, I caused to be served delivered to the attorney for the Respondents/Cross-Appellants, a copy of **APPELLANTS' PETITION FOR REVIEW**, and caused those same documents to be filed with the Clerk of the above-captioned Court.

Filed with the Supreme Court of the State of Washington, via the Court of Appeals, Division II, via legal messenger (original and one copy, plus filing fee of $250.00) to:

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These documents were provided to Respondents'/Cross-Appellants' attorneys, via email and U.S. Mail to:

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DATED this 21st day of October, 2014, at Tacoma, Pierce County, Washington.

Marilyn DeLucia, Paralegal
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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JEANETTE MEARS, individually and as Personal Representative for the ESTATE OF MERCEDES MEARS and as Limited Guardian for JADA MEARS; and MICHAEL MEARS, Appellants/Cross Respondents, v. BETHEL SCHOOL DISTRICT NO. 403, a municipal corporation; RHONDA K. GIBSON; and HEIDI A. CHRISTENSEN, Respondents/Cross Appellants.	No. 43121-1-II PART PUBLISHED OPINION

BJORGEN, A.C.J. — This appeal from a defense verdict in a wrongful death case arises out of the untimely death of Mercedes Mears, a student at Clover Creek Elementary School. Mercedes[1] began having difficulty breathing shortly after arriving at school on October 7, 2008. Mercedes's sister Jada Mears informed Rhonda Gibson, the school's health clerk, who escorted Mercedes to the school's health room and called 911. By the time emergency rescue personnel arrived, Mercedes had stopped breathing and lost consciousness. Resuscitation efforts failed, and she died en route to the hospital.

Mercedes's parents, Jeannette and Michael Mears, subsequently filed this suit against the Bethel School District, school health clerk Gibson, and school nurse Heidi Christensen (collectively, "District"). They alleged that various omissions by the school's staff amounted to negligence and proximately caused Mercedes's death and that Mercedes's sister Jada could recover for the emotional distress of witnessing the death. After a long and strenuously litigated

[1] We use the Mears family members' first names where necessary for clarity. We intend no disrespect.

trial, the jury answered special interrogatories, finding each defendant negligent, but also finding that the defendants' negligence did not proximately cause Mercedes's death. The court entered judgment for the District on the jury's verdict. The Mears filed a motion for judgment as a matter of law on the issue of proximate cause and for a new trial solely on the issue of damages, or in the alternative, for a new trial on all issues, but the trial court denied the motion.

The Mears appeal, arguing that the trial court erred in denying their post-trial motions, because substantial evidence does not support the jury's verdict as to proximate cause and because defense misconduct deprived them of a fair trial. The District cross appeals, claiming statutory immunity and arguing that the Mears' failure-to-rescue theory precludes Jada's negligent infliction of emotional distress claim as a matter of law. We affirm, and therefore do not address the District's cross appeal.

FACTS

Mercedes suffered from persistent asthma and also had severe, life-threatening allergies. Shortly after arriving at school with her sister Jada and their friend Henry Dotson, Mercedes began having difficulty breathing. She sat down on a bench outside the school, saying she felt sick. Jada ran inside and returned with Gibson, the school's health clerk, who escorted Mercedes inside.

Mercedes's asthma had frequently caused her to visit the school's health room, where the school kept an inhaler prescribed by her doctor, Lawrence Larson, containing an asthma medication known as Albuterol. Gibson and other staff knew of Mercedes's asthma and understood that Mercedes also had serious food allergies. Of those present during the emergency

that led to Mercedes's death, those who formed an opinion on the matter testified that they believed Mercedes was having an asthma attack, not an allergic reaction to food.

As Mercedes's condition deteriorated, her EpiPen sat in a cupboard a few feet away. An EpiPen is a medical device that allows someone with no medical training to safely inject herself or another with a pre-measured dose of epinephrine, a potent hormone commonly known as adrenaline. MARJORY SPRAYCAR, STEDMAN'S MEDICAL DICTIONARY 585 (26th ed. 1995). Mercedes's doctor had prescribed the EpiPen, and her parents had delivered it to the school along with a signed permission form and an order from the doctor to dispense the EpiPen to Mercedes in the event of an "allergic emergency." Ex. 454.

At trial, undisputed expert testimony established that an injection of epinephrine by the time Mercedes lost consciousness probably would have saved her life. Verbatim Report of Proceedings (VRP) (Oct. 20, 2011 (Lawrence Larson) at 48-49; VRP (Oct. 18, 2011) (Michael Freeman) at 30; VRP (Oct. 18, 2011) (Russell Hopp) at 67, 74-75; VRP (Nov. 15, 2011). Expert testimony similarly established that, had school personnel initiated cardiopulmonary resuscitation (CPR) when Mercedes became unresponsive, she likely would have survived. The District's experts conceded that administering epinephrine posed no significant risk of harmful side effects and that an asthma attack may qualify as an "allergic emergency." VRP (Nov. 16, 2011) (Anthony Montanaro) at 73.

The notebook containing the doctor's orders for using the Albuterol inhaler and the EpiPen, along with Mercedes's "emergency health care plan," were nearby in the health room. VRP (Oct. 17, 2011) (Peggy Walker) at 87-88. School nurse Christensen had prepared the emergency health care plan, pursuant to state law and school district policy, so that staff without

formal medical training could appropriately respond should Mercedes have a medical emergency. The school staff present did not open the notebook or consult the documents inside it. Those present also did not attempt to perform CPR. Instead, as Mercedes's condition worsened, they again called 911, attempted to administer additional doses of Albuterol, tried to make Mercedes more comfortable, and waited for the ambulance to arrive.

At trial, the parties sharply disputed the cause of Mercedes's death. The medical examiner who performed the autopsy had attributed her death to asthma, and experts called by the District concurred. The District presented expert testimony that "uncontrolled asthma" also sometimes results in sudden death. VRP (Nov. 16, 2011) (Montanaro) at 35-37.
The Mears presented opinion testimony from Dr. Larson and a forensic pathologist that Mercedes had more likely died of anaphylaxis, a sudden and often fatal allergic reaction that affects various body functions, including the respiratory system.

The District cross-examined Dr. Larson extensively, over the Mears' objection, concerning Flovent, an inhaled corticosteroid medication used for long-term control of asthma, which had been prescribed for Mercedes. The day after Dr. Larson's testimony, the Mears offered a curative instruction concerning the Flovent testimony. A few days later, the Mears moved to strike all testimony concerning Flovent and proposed another curative instruction on the issue. The trial court refused to give the Mears' proposed instructions, instead giving a different instruction allowing consideration of Flovent only for the limited purpose of Mercedes's prior asthma condition.

After the close of evidence, the Mears moved for judgment as a matter of law on the issue of proximate cause as to certain undisputed items of damages. The trial court granted the Mears'

motion in part, and included the undisputed items as mandatory on the damages portion of the verdict form. The court also ruled that neither an infection nor the nonuse of Flovent proximately caused Mercedes's death and prohibited argument to the contrary, but allowed the District to argue that Mercedes died of uncontrolled asthma and that Flovent was important in controlling asthma.

The jury returned answers to special interrogatories finding Gibson, Christensen, and the school district all negligent, but also finding that their negligence did not proximately cause Mercedes's death. The trial court entered judgment for the District on the jury's verdict.

The Mears moved for judgment as a matter of law as to proximate cause and a new trial limited to the issue of damages, or in the alternative, for a new trial as to all issues. The trial court denied the motion. The Mears timely appealed, and the District cross appealed. Because we affirm the judgment, we do not reach the issues raised in the District's cross appeal.

ANALYSIS

I. INTERNAL CONSISTENCY OF THE JURY'S ANSWERS ON THE VERDICT FORM AND THEIR CONSISTENCY WITH THE EVIDENCE

The Mears initially contend that the trial court erred in denying their motion for a new trial and, alternatively, for judgment as a matter of law, because the jury's verdict was inconsistent and contrary to the evidence. The District contends that the Mears base their argument on a false premise and that the verdict "is consistent and supported by substantial evidence in the record." Br. of Resp't at 49. We agree with the District.

A. Standard of Review

We review de novo a trial court's denial of a motion for judgment as a matter of law. *Bishop of Victoria Corp. Sole v. Corporate Bus. Park, LLC*, 138 Wn. App. 443, 454, 158 P.3d

1183 (2007). In that review, we engage in the same inquiry as the trial court, admitting the truth of the nonmoving party's evidence and all reasonable inferences that can be drawn from it. *Faust v. Albertson*, 167 Wn.2d 531, 537, 222 P.3d 1208 (2009). A motion for judgment as a matter of law is properly granted only when the court can find, as a matter of law, that there was no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

We review an order denying a motion for a new trial for abuse of discretion by the trial court. *See Aluminum Co. of Am. v. Aetna Cas. & Sur. Co. (ALCOA)*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). Generally, a trial court abuses its discretion in denying a motion for a new trial if "'such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial.'" *ALCOA*, 140 Wn.2d at 537 (quoting *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)). However, the deference usually shown a trial court's denial of a new trial does not apply when the court based the decision on an issue of law. *Ayers v. Johnson & Johnson Baby Prod. Co.*, 117 Wn.2d 747, 768, 818 P.2d 1337 (1991). Review of a denial of a new trial based on an issue of law is de novo. *Ayers*, 117 Wn.2d at 768; *see* CR 59(a) (ground for new trial).

A trial court may grant a new trial after the jury has returned a verdict when "there is no evidence or reasonable inference from the evidence to justify the verdict." CR 59(a)(7). A trial court abuses its discretion by denying a motion for a new trial where the verdict is contrary to the evidence. *Palmer v. Jensen*, 132 Wn.2d 193, 198, 937 P.2d 597 (1977). When a litigant unsuccessfully moves for a new trial on the ground that the verdict was contrary to the evidence, we review the record to determine whether sufficient evidence supported the verdict. *Palmer*,

132 Wn.2d at 197-98. In this analysis we consider the evidence in the light most favorable to the nonmoving party. *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). "[S]ubstantial evidence" is required, meaning evidence of a character "which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *Hojem*, 93 Wn.2d at 145 (internal quotation marks omitted). Although reasonable inferences from the evidence suffice to support a verdict, "mere theory or speculation" alone does not. *Hojem*, 93 Wn.2d at 145.

In evaluating a claim of inconsistent findings on a special verdict form, we must reconcile the jury's answers and we do not substitute our judgment for the jury's. *Estate of Stalkup v. Vancouver Clinic, Inc., PS*, 145 Wn. App. 572, 586, 187 P.3d 291 (2008). If the answers on the verdict form reveal a clear contradiction, however, such that we cannot determine how the jury resolved an ultimate issue, we will remand for a new trial. *Stalkup*, 145 Wn. App. at 586. A jury verdict finding a defendant negligent, but also finding that the negligence did not proximately cause the plaintiff's injuries, "is not . . . inconsistent if there is evidence in the record to support a finding of negligence but also evidence to support a finding that the resulting injury would have occurred regardless of the defendant's actions." *Stalkup*, 145 Wn. App. at 587 (citing *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 209, 667 P.2d 78 (1983)).

B. Whether the Mears Have Preserved the Issues for Review on Appeal

As a preliminary matter, the District urges us not to consider the alleged inconsistency because the Mears did not raise it when the court polled the jury and thus failed to preserve the issue. The relevant court rule provides that

> [w]hen the answers [to the jury interrogatories] are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall

> not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

CR 49(b). We have declined to consider challenges based on seemingly inconsistent answers to jury interrogatories where the appealing party did not raise the alleged inconsistencies prior to the discharge of the jury. *Gjerde v. Fritzsche*, 55 Wn. App. 387, 393, 777 P.2d 1072 (1989) ("We decline to consider this challenge to the jury interrogatories, because Gjerde waived the issue below by failing to bring the inconsistency in the answers to the interrogatories to the attention of the court at the time the jury was polled."); *accord Minger v. Reinhard Distrib. Co., Inc.*, 87 Wn. App. 941, 946, 943 P.2d 400 (1997); *State v. Barnes*, 85 Wn. App. 638, 668, 932 P.2d 669 (1997).

In other cases, however, we have addressed the merits of claims based on inconsistency in a verdict despite the failure to raise the issue prior to the discharge of the jurors. In *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 510-11, 814 P.2d 1219 (1991), for example, Division One of our court rejected a similar waiver argument and reached the inconsistency claim, distinguishing *Gjerde* on the ground that the record there showed that counsel had immediately recognized the inconsistency but "deliberately remained silent" in order to obtain a second chance with a different jury.[2]

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[2] The *Gjerde* court did appear to limit its holding to the factual circumstances presented:

> "If counsel who had submitted the questions . . . raised no objection to the discharge of the jury, we can, at least under the circumstances of this case, see no reason why he should be permitted to try his luck with a second jury."
>
> . . . .
>
> Such silence in the face of actual knowledge of an inconsistency at a time it could be cured waives the issue on appeal.

55 Wn. App. at 394 (quoting *Strauss v. Stratojac Corp.*, 810 F.2d 679, 683 (7th Cir. 1987)). Although the *Minger* court purported to follow *Gjerde*, it did not recognize *Gjerde*'s limitation to its circumstances or discuss actual knowledge of the inconsistency. *Minger*, 87 Wn. App. at 945-46.

We do not attempt to resolve these divergent approaches to the waiver question here. In order to provide guidance to trial courts faced with inconsistent verdict claims, and because we ultimately conclude that no inconsistency appears in the verdict, we address the Mears' claim.

C. The Trial Court Did Not Err in Denying the Motion for Judgment as a Matter of Law and for a New Trial Based on Inconsistency in the Verdict or Its Inconsistency with the Evidence

We begin with the parties' dispute over the proper scope of our inquiry. Specifically, they disagree as to whether the jury's decision constituted a general or a special verdict, a question upon which the proper analysis of the issue depends.

The Mears contend that the jury's answers to the questions on the verdict form amounted to a general verdict because "specific interrogatories were not provided for a determination of each specific allegation of negligence" the Mears had made. Br. of Appellant at 48. Because "[a] general verdict is that by which the jury pronounces generally upon all or any of the issues," CR 49(-), the Mears argue that "it must be presumed that the jury found in [the Mears'] favor with respect to all claims of negligence set forth within the pleadings and proof presented" at trial, including the allegation that the District negligently failed to administer epinephrine or perform CPR. Br. of Appellant at 49. The Mears then argue that, because they presented unrebutted expert testimony that Mercedes would likely have survived had the District taken either of these measures, the jury's finding as to proximate cause has "no factual basis within the evidence." Br. of Appellant at 50 (emphasis omitted).

The District, on the other hand, characterizes the "central question" as "whether the answers in the special verdict are consistent" according to "some plausible scenario" supported by substantial evidence in the record, pointing out that courts must seek to harmonize a seemingly inconsistent jury verdict. Br. of Resp't at 32-33. The District thus argues that, as long

as the record contains substantial evidence from which the jury could reasonably have found that the defendants committed negligent acts or omissions that did not proximately cause Mercedes's death, the jury's verdict must stand. The District maintains that the evidence and instructions in the case allowed for a number of plausible scenarios under which the jury could find the District negligent, but also find that the negligent acts or omissions did not proximately cause Mercedes's death.

At the outset, we cannot accept the Mears' argument that the jury's finding of negligence requires us to presume that it agreed with each and every allegation the Mears made that some act or omission by the District breached the duty of due care. As a matter of logic, a plaintiff who prevails on a negligence claim in an auto accident case, for example, after presenting evidence that a defendant both drove at excessive speed and failed to take a driver's education course in high school, has not established that the jury found that the defendant's lack of training proximately caused the accident.

Turning to the characterization of the verdict, we have treated verdict forms with substantially similar interrogatories as special verdicts. *Stalkup*, 145 Wn. App. at 587 ("The trial court submitted a two-part special verdict form to the jury, and the jury found that the power company was negligent but that its negligence was not a proximate cause of the plaintiff's injuries."). Our Supreme Court's decision in *Guijosa*, 144 Wn.2d at 918, however, makes clear that neither a court's labeling a document as a special verdict form nor its inclusion of interrogatories in the verdict form is dispositive. The *Guijosa* court rejected our characterization of a verdict form that included interrogatories for each defendant with respect to each claim as a

special verdict form, holding instead that, because the jury's answers resolved ultimate questions regarding particular claims, they constituted multiple general verdicts. 144 Wn.2d at 918.

At first blush, the answer to the first question the verdict form posed to the jury here, "Were any of the defendants negligent?", might appear to resolve an ultimate issue with respect to the Mears' negligence claim. Clerk's Papers (CP) at 3196; *see Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002) ("The elements of negligence are duty, breach, causation, and injury."). The word "negligence," however, also has the more limited meaning of "conduct that falls below the legal standard established to protect others against unreasonable risk of harm." BLACK'S LAW DICTIONARY 1133 (9th ed., 2009). The context makes clear that the trial court intended the jury to understand this question to refer only to this more limited definition of negligence, corresponding to the duty and breach elements of a negligence claim; otherwise, the court would not have needed to include an interrogatory on proximate cause. As such, the answer to the interrogatory does not ultimately resolve any particular claim; instead, it merely establishes two elements of a claim. Thus, the jury's findings here amounted to a special verdict.

Having established that we are considering a special verdict, our Supreme Court's analysis in *Brashear*, 100 Wn.2d at 209, controls. Brashear had alleged four different acts of negligence at trial, including failure to warn, and "[t]he jury found, in answer to interrogatories, that Puget Power was negligent but that its negligence was not the proximate cause of [Brashear's] injuries." *Brashear*, 100 Wn.2d at 206. The trial court denied Brashear's motion for judgment as a matter of law and entered a judgment for Puget Power on the jury's verdict. *Brashear*, 100 Wn.2d at 206. We reversed and entered judgment for Brashear, holding the verdicts inconsistent and concluding that the evidence presented failed to adequately support the

finding that Puget Power's breach did not proximately cause Brashear's injuries. *Brashear*, 100 Wn.2d at 206. Our Supreme Court, however, held that "[a]lthough the verdict appears inconsistent when analyzed, as the Court of Appeals did, using the first three theories of negligence, . . . the strong presumption in favor of jury verdicts . . . requires a contrary result." *Brashear*, 100 Wn.2d at 209. Because the failure-to-warn allegation did not necessarily conflict with the jury's finding of no proximate cause, our Supreme Court found no inconsistency, and would have reinstated the verdict but for the trial court's defective proximate cause instruction. *Brashear*, 100 Wn.2d at 209.

We followed *Brashear* in *Stalkup*, a medical malpractice case in which the plaintiff alleged numerous negligent acts and omissions, and the jury, using a form indistinguishable from that used here, found the defendant negligent but also found that the defendant's negligence did not proximately cause the injuries. *Stalkup*, 145 Wn. App. at 582. The trial court ordered a new trial based in part on a perceived inconsistency in the verdict. *Stalkup*, 145 Wn. App. at 586. We reversed, holding that "the trial court erred when it granted a new trial based on the 'inconsistency' of the jury verdict" because "there was more than one scenario under which the jury's findings of negligence but lack of proximate cause can be reconciled." *Stalkup*, 145 Wn. App. at 591.

These decisions leave no room for the Mears' contention that the jury's finding as to negligence requires us to assume that the jurors agreed that every act or omission alleged by the Mears had breached the due care standard. The trial court therefore did not err in denying the Mears' motion for judgment as a matter of law on the issue of proximate cause. Further, as long as the Mears alleged that each defendant committed some act or omission that the jury could

properly have found to be negligent, but not a proximate cause Mercedes's death, no inconsistency would lie in the verdict, and it would have been within the trial court's discretion to deny the alternative motion for a new trial as to all issues. We examine now whether evidence was submitted from which the jury could have reasonably concluded that the acts or omissions alleged by the Mears against each defendant were negligent but did not lead to Mercedes's death.

With respect to defendant Gibson, the Mears presented evidence that Gibson did not attempt to consult Mercedes's emergency health care plan or contact a school nurse during Mercedes's medical emergency, and the Mears' counsel argued in closing that these omissions violated the duty of due care under the circumstances. The jury could have agreed that these omissions established breach of duty, but still reasonably concluded that, had Gibson called the nurse and consulted the plan, she still would not have administered epinephrine or initiated CPR and Mercedes still would have died.

With respect to defendant Christensen, the Mears presented voluminous evidence concerning Christensen's failure to properly complete students' emergency health care plans, including Mercedes's, as well as other important administrative tasks. Again, the Mears' counsel argued that these failures breached the duty of due care. Certainly, the jury could have agreed that this evidence established a breach of duty, but still reasonably concluded that, even had Christensen timely completed all her health care plans, the staff present that day could not have been expected to administer epinephrine or begin CPR.

Having found Gibson and Christensen breached the duty of due care, the trial court's instructions required the jury to impute those breaches to the District as a matter of law. Thus,

the jury could also have imputed to the District the alleged breaches just discussed and still reasonably have found that those breaches did not proximately cause Mercedes's death. Alternatively, the jury could have agreed that the District breached a duty by not properly supervising Christensen, as the Mears' counsel argued, and still reasonably concluded that better supervision would not have helped Mercedes.

The jury's findings in this case do not clearly contradict themselves, and substantial evidence in the record supports them. The trial court did not err in denying the Mears' motion for judgment as a matter of law or for a new trial.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

II. ATTORNEY MISCONDUCT AND THE TRIAL COURT'S EVIDENTIARY RULINGS

The Mears also contend that the trial court erred in refusing to grant a new trial due to various acts of misconduct by the District in the course of the litigation, as well as due to the trial court's improper admission of evidence. The Mears base these claims on the District's (1) introduction of evidence concerning Mercedes's use of the asthma medication Flovent;[3] (2) use of Jeanette's counseling records and Jada's counseling and school discipline records; (3) eliciting other testimony intended to improperly engender among the jurors antipathy toward Jeanette;

[3] The District contends that the Mears "are not arguing that the judge's ruling [allowing testimony regarding Flovent] was incorrect . . . [but instead] that the use of the admitted evidence by the District's attorneys constituted attorney misconduct." Br. of Resp't at 53 n.37. The Mears' third assignment of error plainly addresses the court's admission of the Flovent testimony, however, and the Mears explicitly argue the point in their opening brief. Br. of Appellant at 77 (arguing that the Flovent testimony "issue clearly not only involves an erroneous admission of evidence, but also clearly involves misconduct of counsel" and citing CR 59(a)(8), concerning errors of law occurring at trial). We address the claim on its merits.

and (4) coaching witnesses to give nonresponsive answers to the Mears' questions. We first address the appropriate framework for analysis, then address each claimed error or incident of misconduct in turn.

A. Standard of Review

According to CR 59(a):

> On the motion of the party aggrieved, a verdict may be vacated and a new trial granted. . . . Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:
> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;
> (2) Misconduct of prevailing party . . .;
> . . . .
> (8) Error in law occurring at the trial and objected to at the time by the party making the application; or
> (9) That substantial justice has not been done.

Thus, in addition to the requirements specific to each enumerated ground, the Mears must show that a substantial right was materially affected.

We review a trial court's ruling on a motion for a new trial based on attorney misconduct in a civil case for abuse of discretion, applying a more deferential standard than in the criminal context, one that "generally upholds trial court decisions." *ALCOA*, 140 Wn.2d at 539. Our Supreme Court has articulated the standard for granting a new trial based on attorney misconduct in a civil case as follows:

> "A new trial may properly be granted based on the prejudicial misconduct of counsel. As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record. . . . The movant must ordinarily have properly objected to the misconduct at trial, . . . and the misconduct must not have been cured by court instructions."

ALCOA, 140 Wn.2d at 539-40 (quoting 12 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 59.13[2][c][i][A] at 59-48 (3d ed.1999)). Where an attorney commits misconduct "so flagrant that no instruction could have cured the prejudicial effect," however, failure to timely object does not preclude appellate review. *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 171, 15 P.3d 664 (2001) (citing *Warren v. Hart*, 71 Wn.2d 512, 518-19, 429 P.2d 873 (1967)).

We also generally review a trial court's decision to admit or exclude evidence for abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). Evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is admissible unless its admissibility is otherwise limited. ER 401, 402. "The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible." *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). The failure to object to the admission of evidence at trial generally precludes appellate review. *Faust*, 167 Wn.2d at 547 (citing ER 103(a)(1)). Even a party who timely objected in superior court, however, "may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

B. The Trial Court Did Not Err in Denying the Motion for a New Trial Based on the Flovent Evidence

The Mears contend that the District's use of evidence concerning Mercedes's use of Flovent amounted to misconduct warranting a new trial because it (1) violated a number of the trial court's orders in limine and (2) amounted to "a clearly transparent effort to try to prejudice the jury against Jeanette Mears . . . by trying to create an impression that she permitted Mercedes

to be non-compliant with Dr. Larson's orders, and that such non-compliance ultimately caused or contributed to Mercedes'[s] death." Br. of Appellant at 70. We disagree.

In response to the allegation that its use of Flovent evidence violated a number of the trial court's orders in limine,[4] the District correctly points out that the court specifically addressed the Flovent evidence and ruled it admissible. Presenting arguably relevant evidence in accordance with an explicit ruling of the trial court cannot serve as the basis for a claim of attorney misconduct.

The Mears also claim that the District's summary of Flovent prescription refills in its opening statement[5] violated the trial court's order on their motion in limine 4.34, which required the parties to show any demonstrative exhibits to opposing counsel before showing them to the jury. While the failure to show this exhibit to the Mears' counsel does violate the court's order, the Mears made no contemporaneous objection and the court admonished the jury to consider the

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[4] Specifically, the Mears point to the trial court's orders on their motions in limine 4.2.1-4.2.4, prohibiting claims that the Mears themselves were contributorily negligent; 4.7-4.7.3, excluding evidence not disclosed during discovery; 4.13 excluding evidence concerning unrelated, asymptomatic medical conditions; 4.14.1, excluding medical testimony not supported by an appropriate expert; 4.15.8, prohibiting argument or testimony that the Mears failed to provide medical care to Mercedes; and 4.33, prohibiting "speculative questions that are not based upon reasonable medical, psychiatric, psychological certainty." CP at 2769, 2792.

[5] The Mears allege that the District's illustrative exhibits purporting to summarize the pharmacy records of Mercedes's Flovent refills misrepresented the actual number of Flovent canisters dispensed because the District incorrectly assumed that the pharmacy dispensed only one canister per refill. Although the trial court admitted the prescription and the pharmacy records into evidence, neither those documents nor the relevant portion of Jeanette's testimony appear in the record. The only discussion of this in the record consists of a similar argument the Mears' counsel made to the trial court, outside the presence of the jury, to which the District did not respond. We do not consider matters not in the record, and the appellant bears the burden of providing a record adequate for review of the issues raised: If the appellant fails to meet this burden, the trial court's decision must stand. RAP 9.2; *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988). Thus, we do not consider whether the District's exhibits accurately summarized the pharmacy records.

Flovent evidence only for a proper purpose. Thus, assuming their motion in limine properly preserved the issue, the Mears cannot show that the misconduct was "prejudicial in the context of the entire record" such that the court's subsequent limiting instruction did not cure it. *ALCOA*, 140 Wn.2d at 539. The District's failure to show the exhibit to opposing counsel, while misconduct, does not require reversal.

The Mears argue also that evidence concerning Mercedes's Flovent usage was irrelevant, relying on a line of cases holding that "unrelated medical history is irrelevant, thus inadmissible in an action for personal injury, or death." Reply Br. of Appellant at 14 (citing *e.g.*, *Little v. King*, 160 Wn.2d 696, 705, 161 P.3d 345 (2007); *Harris v. Drake*, 152 Wn.2d 480, 494, 99 P.3d 872 (2004)). These cases hold that such evidence has no relevance because, "[w]hen an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to the accident, the preexisting condition is not a proximate cause of the resulting damages." *Harris*, 152 Wn.2d at 494.

The cases cited have no bearing on the issue here. The Mears did not claim that Mercedes's asthma was asymptomatic until conduct attributable to the District exacerbated it. In fact, uncontroverted evidence at trial showed that Mercedes suffered from persistent asthma and had visited the health room due to asthma many times during the year preceding her death, including the weeks immediately prior.

The District claimed that its employees correctly perceived that Mercedes's medical emergency was an asthma attack and did everything that state law permitted to assist her. The Mears contended that Mercedes suffered an allergic emergency and presented expert testimony that Mercedes actually died of anaphylaxis. These experts based their opinions partly on the

suddenness of Mercedes's death. The District presented expert testimony that "uncontrolled asthma" sometimes results in sudden death. VRP (Nov. 16, 2011) (Montanaro) at 35-37. Mercedes's treating physician admitted that consistent use of controller medications reduces the likelihood of "major [asthma] episodes" resulting in "bad outcomes," and that he had prescribed Flovent as Mercedes's controller medication. VRP (Oct. 20, 2011) (Larson) at 107-08.

Thus, the cause of death was a factual issue in the case, and the frequency of Mercedes's use of Flovent had some tendency to make the District's theory more or less probable. The Flovent evidence thus met the basic relevance test, ER 401, and its admission therefore lay in the discretion of the trial court. Although the Mears correctly note that the jury could have found the evidence confusing or used it for some improper purpose, the trial court gave a proper limiting instruction, which we must assume, in the absence of evidence to the contrary, that the jurors followed. *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 117, 249 P.3d 607 (2011). The trial court did not abuse its discretion in admitting the Flovent evidence.

In the same vein, the Mears assign error to the trial court's limiting instruction concerning Flovent, to which they timely took exception, and its refusal to instead give plaintiffs' proposed jury instruction 29. The proposed instruction reads in full:

> You are instructed that testimony and evidence concerning Mercedes Mears' past medical history has been allowed only for the limited purpose of her prior asthma condition. It has not been allowed to suggest that the use or non-use of medication such as Flovent at some time in the past, in any way caused or contributed to Mercedes Mears' death on October 7, 2008.
>
> You are also instructed that you are not to consider whether Mercedes Mears had a cold, or an upper respiratory tract infection in determining whether the defendants were negligent and whether such negligence was a proximate cause of Mercedes Mears' death on October 7, 2008.
>
> You are not to discuss this evidence when you deliberate in the jury room, except for the limited purpose of discussing Mercedes Mears' past asthma condition.

> You must disregard any evidence that is not supported by a proper evidentiary standard concerning medical issues, that is, "on a more probable than not basis" or "to a reasonable degree of medical certainty." Those terms are used interchangeably, under the requirement that you must determine all evidence under that standard of "what is more likely true, than not true."
>
> There has been no evidence submitted to you on a proper legal basis that the use or nonuse of Flovent by Mercedes Mears, or a cold or an upper respiratory tract infection, caused, or in some way contributed to her death on October 7, 2008, and it must therefore be fully disregarded.

CP at 3101. The instructions given by the court include much, but not all, of the language proposed by the Mears:

> Medical testimony must establish the causal relationship of an injury and the alleged negligence of a defendant. Such testimony must be in terms of "probability." In other words, medical testimony in terms of possibility, speculation or conjecture is not sufficient. Medical testimony that an incident "could" cause, "can" cause, "may" cause, or "might" cause such an injury is not sufficient because these terms indicate a possibility, rather than a probability.
>
> You are instructed that testimony and evidence concerning Mercedes Mears' past medical history has been allowed only for the limited purpose of her prior asthma condition.
>
> You are not to discuss this evidence when you deliberate in the jury room, except for the limited purpose of discussing Mercedes Mears' past asthma condition.

CP at 3160-3161. The instructions given were consistent with the trial court's rulings on the Flovent evidence, which, as discussed above, did not amount to an abuse of discretion.

However, "[w]hen evidence is admitted for a limited purpose and the party against whom it is admitted requests an appropriately worded limiting instruction, the court is under a duty to give the instruction." *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 623-24, 762 P.2d 1156 (1988). Here, the language in the proposed instruction that does not appear in the instruction actually given purports to resolve factual matters and is broader than warranted by the court's rulings. Thus, the court's refusal to give the requested instruction was consistent with its orders

in limine and was not an abuse of its discretion. The trial court did not err in refusing to give the plaintiff's requested instruction.

C. The Trial Court Did Not Err in Denying the Motion for a New Trial Based on Counseling and School Discipline Records

The Mears also contend that the District's use of statements contained in Jeanette's counseling records, and in Jada's counseling and school discipline records, amounted to prejudicial misconduct and that the trial court erred in refusing to declare a mistrial or grant a new trial on that basis. The District contends that it generally used these records in accordance with the rulings of the trial court and that the Mears waived the issue by failing to properly object. Although the claim that the District committed misconduct has merit, the Mears fail to show sufficient prejudice, in the context of the entire trial, to warrant reversal.

The Mears base this misconduct claim in large part on the District's cross-examination of Kimberly Barrett, a family therapist the Mears' called as an expert witness on the issue of Jada's emotional distress damages. The District's counsel asked Barrett about Jada's anger problems prior to Mercedes's death, at which point the Mears objected. The court heard argument outside the presence of the jury and overruled the objection. Counsel for the District made an offer of proof, stating that he intended to explore whether the lack of attachment between Jeanette and Jada would also explain some of the psychological problems that Barrett had attributed to Jada's experiences on the morning of Mercedes's death. The District's counsel promised he would not "go into those areas that the Court excluded." VRP (Oct. 25, 2011) (Barrett) at 47. The Mears continued to object, and specifically asked whether the District intended to raise allegations that Jeanette had abused Jada, at which point the court cut off the discussion and brought the jury back in.

Counsel for the District soon began asking questions based on statements in Jeanette's and Jada's counseling records, including the following questions:

> Did [Jeanette] . . . tell you that in her treatment, one of her treatment goals for dealing with the attachment with Jada was to be able to tolerate the presence of Jada without feeling like her flesh was crawling or without coming loose in my stomach contents[?]
>
> . . . .
>
> Did she tell you her goal was in treatment, was so that she could end up being in the same room with her daughter Jada and not feeling like her skin was crawling[?]
>
> . . . .
>
> [D]id you read the reports that Jada had in her medical records where she claimed that her mom had told her that she was stupid, she was ugly, that why couldn't she be more like Mercedes[?]
>
> . . . .
>
> Now, you know, don't you, that Jada reported to her counselors and before this event an instance of what was described by the counselors as severe emotional abuse that she suffered from her mom[?]

VRP (Oct. 25, 2011) (Barrett) at 54-56. At that point the Mears again objected,[6] and the court held another discussion outside the presence of the jury.

During the course of that discussion, the Mears moved for a mistrial, pointing out that the court had excluded entirely Jeanette's counseling records from before Mercedes's death in ruling on the motions in limine. The District argued that the court's denial of a different motion in limine, in which the Mears had sought to exclude evidence of the lack of attachment between Jada and Jeanette, permitted such questioning. The Mears requested another offer of proof, and the District disclosed a number of additional questions.

Ultimately, the trial court never ruled on the Mears' objection to the emotional abuse question, which Barrett had not answered, and the District did not repeat it. The court denied the motion for a mistrial and ruled that the District's remaining questions were proper.

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[6] The District claims in its brief that "the [Mears] did not object to the questioning" of Barrett on these topics. Br. of Resp't at 57. The record does not support this assertion.

The District correctly argues that the trial court's order on the Mears' motion in limine 4.15.9, allowed testimony concerning Jeanette and Jada's failure to bond. That order, however, also had a handwritten limitation requiring an offer of proof outside the presence of the jury. Similarly, the trial court's order on the Mears' motion in limine 4.13.1 contained a handwritten limitation requiring an offer of proof outside the presence of the jury for any evidence concerning counseling prior to Mercedes's death. The court's order on a motion in limine the Mears subsequently made also excluded evidence regarding "Jada Mears pre-death" and "post-partum issues RE: Jada."[7] CP at 2795.

The District did not make such an offer of proof before delving into the counseling records, and when the Mears objected, demanding such an offer, the District did not disclose the inflammatory nature of the questions it intended to pose, even when the Mears specifically asked whether the District planned to raise the allegations of abuse. Furthermore, the District presents no argument, and cannot reasonably claim, that the question concerning child abuse comported with the trial court's order on the Mears' motion in limine 4.15.2.1, which order expressly prohibited testimony or comment concerning allegations that Jeanette abused Jada.

The Mears plainly preserved their challenge to the comments relating to abuse, contrary to the District's contention, by moving in limine to exclude the subject, objecting contemporaneously, and moving for a mistrial. *See Sturgeon*, 52 Wn. App. at 622-23. A more difficult question is whether the Mears failed to preserve their misconduct claims as to the other questions concerning the degree of Jeanette's discomfort with Jada by failing to contemporaneously object.

[7] The court's oral ruling on the motion suggests, however, that the order applied only to Jeannette's claims, not Jada's negligent infliction of emotional distress claim.

We have held that "[w]hen a trial court makes a tentative ruling before trial, error is not preserved for appeal unless the party objects to admission of the evidence when it is offered." *Eagle Grp., Inc. v. Pullen*, 114 Wn. App. 409, 416-17, 58 P.3d 292 (2002). Conversely, where "the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial." *State v. Koloske*, 100 Wn.2d 889, 896, 676 P.2d 456 (1984). Furthermore, were we to conclude that the relevant orders did not amount to a final ruling excluding the counseling records, where "misconduct is so flagrant that no instruction could have cured the prejudicial effect," a contemporaneous objection is not necessary to preserve the issue for review. *Sommer*, 104 Wn. App. at 171. Raising it in a motion for a new trial suffices.

Whatever relevance these matters may have had to the question of Jada's damages, the statements contained in the counseling records pose such an obvious risk of unfair prejudice that the decision of the District's attorney to paraphrase them in front of the jury, despite the court's pretrial orders requiring a preliminary offer of proof outside the jury's presence, was flagrant and ill-intentioned. The District could certainly have explored the issue of lack of attachment to her mother as an alternative explanation for Jada's psychological problems in a way less likely to expose Jeanette to the hostility of any parents on the jury. We agree with the Mears that the District's attorney committed misconduct by posing these inflammatory questions in violation of the trial court's orders.

The District also attempted to introduce the 2004 counseling intake form containing some of the inflammatory statements discussed above during the subsequent cross-examination of Jeanette. The Mears timely objected and again moved for a mistrial. The trial court sustained

the objection but denied the motion for a mistrial. Consequently, the Mears have sufficiently preserved the claims for review. We thus consider whether this misconduct prejudiced the Mears sufficiently to require reversal.

The Mears rely on *Garcia v. Providence Medical Center*, in which we held that the trial court had erred in admitting evidence that a woman claiming emotional distress due the loss of her baby in childbirth had previously had three abortions. 60 Wn. App. 635, 642-44, 806 P.2d 766 (1991). Because the abortion evidence did not change the expert witness's opinion, and no other expert testimony connected the prior abortions to Garcia's psychological problems, the court held that they did not even meet the basic ER 401 relevance test. *Garcia*, 60 Wn. App. at 644. We further held in *Garcia* that the error was so prejudicial, given people's strong feelings about abortion, it required reversal. 60 Wn. App. at 644. Particularly relevant here, we also noted that the same analysis applied to the admission of evidence that authorities had investigated Garcia for child abuse. *Garcia*, 60 Wn. App. at 644 n.2.

In *Salas*, our Supreme Court reversed a defense verdict on a negligence claim and ordered a new trial because the trial court admitted evidence that Salas resided in the United States illegally, his entrance visa having expired many years earlier. 168 Wn.2d at 667, 673-74. Although it recognized that the trial court had correctly ruled the evidence relevant to the issue of lost future earnings, the *Salas* court held that "the probative value of immigration status, by itself, is substantially outweighed by its risk of unfair prejudice" under ER 403, and the trial court had thus abused its discretion by acting for untenable reasons. *Salas*, 168 Wn.2d at 673. The court went on to note that "where there is a risk of prejudice and 'no way to know what

value the jury placed upon the improperly admitted evidence, a new trial is necessary.'" *Salas*, 168 Wn.2d at 673 (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)).

Here, as in *Garcia*, the questions posed by the District's counsel did not change the expert's opinion, and the District presented no expert testimony of its own as to the cause of Jada's psychological problems. The District did, however, introduce Barrett's deposition, in which Barrett admitted that a child's lack of attachment to a parent figure is "predictive of a lot of long-term consequences in the mental health of [the] child." VRP (Oct. 25, 2011) (Barrett) at 50. The questions thus arguably had some bearing on a matter at issue in the case.

Even though the statements and allegations in the counseling records have some relevance to the issue of Jada's damages, however, public attitudes concerning child abuse certainly pose as great a danger of unfair prejudice as a person's undocumented immigration status. Under *Salas*, the admission of such statements poses such a great risk of prejudice that the misconduct of the District's counsel in this regard might well merit reversal.

Unlike in *Salas*, however, here the trial court never actually admitted the potentially prejudicial statements into evidence. In addition, the trial court properly instructed the jury that "the lawyers' remarks, statements, and arguments are not evidence" and admonished the jurors to "disregard any remark, statement, or argument that is not supported by the evidence or the law as" explained by the court. CP at 3154. We must presume that the jury obeyed this instruction, a presumption that prevails until overcome by a contrary showing. *Nichols v. Lackie*, 58 Wn. App. 904, 907, 795 P.2d 722 (1990). The Mears have not made such a showing here.

Barrett never admitted any knowledge of the statements District's counsel paraphrased from the counseling and school records, and did not answer the question concerning Jada's

emotional abuse. Thus, we are left with a series of remarks by counsel that we must presume the jury disregarded, in accordance with the trial court's instructions. Although the better practice would have been to sustain the Mears' objection to the improper abuse question and instruct the jury to disregard it, we cannot say that the District's misconduct posed sufficient risk of prejudice to merit reversal.

D. The Trial Court Did Not Err in Denying the Motion for a New Trial Based on Other Testimony Concerning Jeanette Mears

The Mears also allege that the District improperly (1) elicited testimony from Clover Creek Elementary School Principal Donald Garrick about a conversation in which Jeanette allegedly said that she should not have let Mercedes go to school on October 7 due to Mercedes having respiratory congestion; and (2) attempted to elicit testimony from Gibson that Jeanette had allegedly approached Gibson during the trial and insulted her. The Mears allege that Garrick's testimony violated the trial court's order on their motion in limine 4.15.1.1, prohibiting testimony that Mercedes should have been kept home from school the day of her death. The court sustained the Mears' contemporaneous objection lodged on that ground, however, and instructed the jury to disregard the remark. Similarly, when the District asked Gibson whether Jeanette had spoken to Gibson during the trial, the court sustained the Mears' objection and the jury never heard the substance of the alleged remark.

The Mears do not provide sufficient argument or analysis in their briefing to merit review of these issues, contrary to the requirements of RAP 10.3(a)(6). In particular, they make no attempt to show how these events resulted in prejudice. Because the jury presumptively disregarded Garrick's improper testimony, and did not hear the testimony the District sought to

elicit from Gibson, we fail to see how the Mears could show prejudice in any event. We decline to address the matter further.

E. The Trial Court Did Not Err in Denying the Motion for a New Trial Based on the Claim of Coaching Witnesses

The Mears also contend that the District "coached" its witnesses "to be non-cooperative with [the Mears'] counsel in responding to . . . questions." Br. of Appellant at 91. Although difficult to evaluate from the record before us, the trial transcripts do contain some indication that the District may have engaged in such misconduct.

In at least two instances, counsel for the District made speaking objections in the presence of the jury during the Mears' examination of District employees, in which he stated that Mercedes had suffered an asthma attack. These statements arguably amounted to improper testimony from counsel and could have served to prompt the witnesses to answer questions in conformity with the District's theory of the case.

District employee Peggy Walker's testimony is particularly troubling in regard to allegations of coaching. As one of many examples, when the Mears asked Walker whether District policy required an emergency health care plan for students with life threatening allergies, Walker repeatedly refused to answer directly, asserting instead that the student's parents and doctor are entirely responsible. In fact, the District did have such a policy. The record discloses at least five instances in which the court admonished Walker to answer the questions, including during an extensive colloquy with Walker outside the presence of the jury.

The Mears direct our attention to *Storey v. Storey*, in which we upheld the grant of a new trial based on misconduct of the prevailing party following a trial in which witnesses repeatedly offered nonresponsive, prejudicial answers. 21 Wn. App. 370, 375-77, 585 P.2d 183 (1978). As

we noted, "[t]he cumulative effect of many errors may sustain a motion for a new trial even if, individually, any one of them might not." *Storey*, 21 Wn. App. at 374. *Storey*, however, involved a challenge to a trial court's decision to *grant* a new trial. Here, the trial court denied the Mears' motion. "[W]here the claimed grounds for a new trial involve the assessment of occurrences during the trial and their potential effect on the jury, we will accord great deference to the considered judgment of the trial court in ruling on such a motion." *Levea v. G.A. Gray Corp.*, 17 Wn. App. 214, 226, 562 P.2d 1276 (1977). Although the record discloses several instances of improper conduct by the District over the course of the trial, in the context of the entire eight-week proceeding, these improprieties do not appear so prejudicial that they denied the Mears a fair trial. Under the circumstances presented here, we cannot say the trial court abused its discretion in denying the Mears' motion for a new trial.

III. CONCLUSION

The trial court did not abuse its discretion in denying the Mears' post trial motion for judgment as a matter of law or a new trial. Because we affirm the judgment in favor of the District, we need not address the matters raised in the District's cross appeal.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

We concur:

Hunt, J.
HUNT, J.

Maxa, J.
MAXA, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JEANETTE MEARS, individually and as Personal Representative for the ESTATE OF MERCEDES MEARS and as Limited Guardian for JADA MEARS; and MICHAEL MEARS,

Appellants/Cross-Respondents,

v.

BETHEL SCHOOL DISTRICT NO. 403, a municipal corporation; RHONDA K. GIBSON; and HEIDI A. CHRISTENSEN,

Respondent/Cross-Appellants.

No. 43121-1-II

ORDER DENYING MOTION TO PUBLISH OPINION

APPELLANT/CROSS-RESPONDENT moves to publish the remainder of the Court's **August 12, 2014,** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Hunt, Maxa

DATED this 22nd day of September, 2014.

FOR THE COURT:

Bjorgen, A.C.J.
ACTING CHIEF JUDGE

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APPENDIX C

SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF PIERCE

JEANETTE MEARS, individually and as personal representative for the Estate of Mercedes Mears and as Limited Guardian for JADA MEARS; and MICHAEL MEARS,

Plaintiffs,

vs.

BETHEL SCHOOL DISTRICT, NO. 403, a municipal corporation; RHONDA K. GIBSON; and HEIDI A. CHRISTENSEN,

Defendants.

No. 09-2-16169-6

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Were any of the defendants negligent?

(Answer "yes" or "no" after the name of each defendant.)

Defendant:	**BETHEL SCHOOL DISTRICT**	X (Yes)	_____ (No)
Defendant:	**RHONDA GIBSON**	X (Yes)	_____ (No)
Defendant:	**HEIDI CHRISTENSEN**	X (Yes)	_____ (No)

ORIGINAL

(INSTRUCTION: If you answered "no" to Question 1 as to each defendant, sign this verdict form. If you answered "yes" to Question 1 as to any defendant, answer Question 2.)

QUESTION 2: Was such negligence a proximate cause of injury or damage to the plaintiffs?

(Answer "yes" or "no" after the name of each defendant found negligent by you in Question 1.)

Defendant:	**BETHEL SCHOOL DISTRICT**	_____ (Yes)	X (No)
Defendant:	**RHONDA GIBSON**	_____ (Yes)	X (No)
Defendant:	**HEIDI CHRISTENSEN**	_____ (Yes)	X (No)

(INSTRUCTION: If you answered "no" to Question 2 as to all defendants, sign this verdict form. If you answered "yes" to Question 2 as to any defendant, answer Question 3.)

QUESTION 3: What do you find to be the plaintiffs' amount of damages?

ANSWER:

1. THE ESTATE OF MERCEDES MEARS:

A) Funeral Expenses: $ 4,084.00

B) Past Medical Billings: $ 8,841.00

C) Future Economic Damages: ($208,530.00 to $560,272.00): $ _____

2. MICHAEL MEARS

A) Past Economic Damages: $ _____

B) Future Economic Damages: $ _____

ORIGINAL

C) The Loss of Love and Destruction Of the Parent/Child Relationship Between Michael Mears and Mercedes Mears Including the Grief, Mental Anguish and Suffering as a Result of Mercedes Mears' Death Experienced to the Present and With Reasonable Probability to Be Experienced in the Future: $_____

D) The Loss of the Companionship, Including Mutual Society and Protection, from Mercedes Mears to Michael Mears Experienced to the Present and With Reasonable Probability to be experienced in the Future: $_____

3. **JEANETTE MEARS**

A) Past Economic Damages: $_____

B) Future Economic Damages: $_____

C) The Loss of Love and Destruction Of the Parent/Child Relationship Between Jeanette Mears and Mercedes Mears Including the Grief, Mental Anguish and Suffering as a Result of Mercedes Mears' Death Experienced to the Present and with reasonable probability to be experienced in the future: $_____

D) The Loss of the Companionship, Including Mutual Society and Protection, from Mercedes Mears to Jeanette Mears Experienced to the Present Experienced and With Reasonable Probability in the Future: $_____

4. **JADA MEARS**

A) Future Economic Damages: $_____

B) Past and Future:

Emotional Distress and Fear: $_____

C) Past and Future:

Loss of Enjoyment of Life: $_____

(INSTRUCTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form.)

QUESTION 4: Assume that 100% represents the total combined negligence that proximately caused the plaintiffs injury. What percentage of this 100% is attributable to each defendant whose negligence was found by you in Question 2 to have been a proximate cause of the injury to the plaintiff? Your total must equal 100%.

ANSWER:

Defendant:	BETHEL SCHOOL DISTRICT	_____%
Defendant:	RHONDA GIBSON	_____%
Defendant:	HEIDI CHRISTENSEN	_____%
	TOTAL:	**100%**

(INSTRUCTION: Sign this verdict form and notify the Judicial Assistant.).

DATE: 11/28/2011

SIGNED: _____
Presiding Juror

ORIGINAL