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DIVISION II

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STATE OF WASHINGTON

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No. 43121-1-II

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

**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'/CROSS-RESPONDENTS' REPLY
BRIEF/OPENING BRIEF ON CROSS-APPEAL**

**BEN F. BARCUS, WSBA# 15576
PAUL A. LINDENMUTH, WSBA #15817
LAW OFFICES OF BEN F. BARCUS
& ASSOCIATES, P.L.L.C.
Attorney for Appellants/Plaintiffs
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444**

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I. INTRODUCTION TO REPLY

In this case, Respondent appears to ignore the undisputed fact that the jury below found in favor of the Appellants, (hereafter, Plaintiffs), on the issue of negligence. The Respondent's failure to assign error and/or cross-appeal with respect to the jury's verdict requires that such a determination be treated as verity on appeal. See generally, *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995) (RAP 10.3(g)). As discussed below, this is extremely significant.

The jury entered what are effectively two "general verdicts," one relating to the claims of negligence, and another relating to proximate cause. The Plaintiffs' claim of negligence, under the proof presented at trial, encompassed a number of potential theories of liability, (negligence), which were **all resolved by the jury in Plaintiffs' favor**. A general verdict exists when "the jury pronounces generally upon all or any of the issues in favor of either the plaintiff or the defendant." CR 49; *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 918, 32 P.2d 250 (2001). Contrary to the position apparently taken by Respondents, this does not mean that Plaintiff failed to prove negligence with respect to any theories encompassed by the evidence, pleadings and instruction in this case, but rather the Plaintiffs, prevailed on

every potential claim of negligence possibly within this case. Again, "a general verdict is that by which the jury pronounces generally upon all or any of the issues in favor of either the plaintiff or the defendant." CR 49. Thus, when the verdict of the jury is consistent with the pleadings, evidence and instructions of the court **all issues are resolved and inhere in the verdict.** See, *Hawley v. Mellem*, 66 Wn.2d 765, 771, 405 P.2d 243 (1965). As long ago explored by our Supreme Court, in the case of *Rowe v. Safeway Stores, Inc.*, 14 Wn.2d 363, 374, 128 P.2d 293 (1942) a "general verdict" resolves issues in favor of one party or another:

*A general verdict is the integrated final product of the jury's findings, and it cannot readily be separated into its component elements. In the words of Edson R. Sunderland, Professor of Law of the University of Michigan, in his scholarly article in 29 Yale Law Review 253, 258: 'the purities of the general verdict is the merger into a single indivisible residuum of all matters, **however numerous**, whether of law or fact. It is compound made by the jury which is incapable of being broken up into its constituent's parts. No judicial reagent exists for either a qualitative or quantitative analysis. The law supplies the means for determining either what facts were found, nor what principle of the law were applied, nor how the application was made. There are therefore three unknown elements which enter into the general verdict: (a) the facts; (b) the law; (c) the application of the law to the facts.'*(Emphasis added).

As a result, the conundrum created by such "unknowns" are resolved by the language of CR 49 which commands, and presumes, that all such issues are resolved in favor of the party whom the verdict is entered. As a

result, contrary to the Respondent's assertions at page 30-31 of its revised Opening Brief, yes, the Court must presume that the jury concluded that the Defendants were negligent by failing to administer CPR, and by failing to use EpiPen which, based on the undisputed evidence explored in Plaintiffs' Opening Brief, established as "a proximate cause" of Mercedes's untimely and unfortunate death. Otherwise, the language set forth within CR 49 regarding "general verdicts" becomes absolutely meaningless. Here, by finding negligence the jury found in favor of the Plaintiffs with regard to all aspects of negligence presented in this case.

Contrary to the Respondent's position that does not require the Court to parse or dissect the verdict in any way, shape or form. Rather, all that is required is the Court generally recognize that on any issue regarding negligence in this case the Plaintiff prevailed. That is what the Court Rule commands. See, Respondent's Revised Brief, page 32 citing to *Foster v. Giroux*, 8 Wn.App. 398, 506 P.2d 897 (1973); *Wheeler v. Catholic Archdiocese of Seattle*, 124 Wn.2d 634, 642, 880 P.2d 29 (1994); and *Kiewit-Grice v. State*, 77 Wn.App. 867, 871-72, 895 P.2d 6, 8 (1995). It appears to be Respondent's position that the jury verdict on negligence is

meaningless and should be effectively construed as a defense verdict - a position which is facially absurd.

The cases relied upon by the defense are either distinguishable on the facts or, if not, are irreconcilable with the plain language set forth with in CR 49. *The Estate of Stalkup v. Vancouver Clinic, Inc.*, 145 Wn.App. 572, 187 P.3d 1291 (2008), case is distinguishable because the evidence in that case lended itself to the proposition that the plaintiff's decedent in that case would have perished "regardless of the defendant's actions." *Id.* at 586, citing to *Brashear v. Puget Sound Power and Light Co.* 100 Wn.2d 204, 209, 667 P.2nd 78 (1983). Here, in marked contrast, there was **no expert testimony**, (which is required on such medical/complex causation issues), that even if Mercedes had been administered CPR and/or EpiPen that she nevertheless would have perished.¹ Similarly, the result in the case of *Chhuth v. George* 43 Wn.App. 640, 719 P.2d 562 (1986), was premised upon the notion that even if all aspects of negligence were found in favor of the Plaintiff, the case

¹ As it is, it is Plaintiffs' position that there was simply no contrary evidence on the issue of proximate cause thus the jury verdicts in that regard is simply not supported by "substantial evidence" thus at a minimum a new trial should have been granted. See, *Schmidt v. Coogan* 170 Wn.App. 602, 287 P.3d 681 (2012). The appropriate standard of review in this case is the substantial evidence test for the challenge to the sufficiency of a jury verdict under CR 50, and not the standards applicable to arguably "inconsistent" answers within general verdict.

still lent itself for a determination that such negligence was not the proximate cause of the injury at issue.

Here, in marked contrast, assuming, which must be done, that the jury presumptively found in favor of Plaintiffs on the issue of whether or not the school district was negligent by failing to provide CPR and/or EpiPen, then there are no alternative results which could result in a finding of lack of proximate cause. Again, it is emphasized that the testimony provided by Plaintiff experts that Mercedes would have survived had either of these lifesaving procedures been utilized was un-rebutted by the defense below, and the sufficiency and/or propriety of such evidence has not been challenged on appeal.

To hold otherwise would serve to outright deny Plaintiffs the benefit of the verdict of negligence which was rendered in their favor. Such a construction of CR 49 would require the Plaintiffs to prove with exactitude what findings were otherwise encompassed within the general verdict, and takes the language of CR 49 and stands it "on its head." The issue is not whether the defense could come up with some speculative, manufactured "plausible scenarios" from which a jury could find negligence but an absence of proximate cause. What is at issue is the sufficiency of the evidence **in this**

case supporting a verdict for the defense on the issue of proximate cause in light of its determination that the defense was negligent in all manners suggested by the pleadings, instructions and evidence **in this case**. As discussed in Plaintiffs' Opening Brief, in great detail there is and was simply no evidence supporting such a finding, in light of the jury's verdict on negligence.

Further, by way of introductory comments it is noted that the defense's criticism of the Plaintiffs' utilization of citations to the record within its Opening Brief simply ignores the fact that where particularly relevant not only did the Plaintiffs cite to the record but also included substantial passages from the record supportive of Plaintiffs' position. As "negligence" has been conclusively resolved in the Plaintiffs' favor, the record relating to such a determination is only relevant as to background, and to the extent the defense disagrees with Plaintiffs' version of the facts, such a disagreement has already been resolved in Plaintiffs' favor by the unappealed (unchallenged) verdict of negligence.

Despite the defense's desire to reargue negligence, the bottom line is that there has been no cross-appeal or assignment of error with respect to such a determination. This is an appeal brought before this Court on a partial

record and only those records relevant to the issues raised within Appellant's Opening Brief. Had the defense desired to order the entirety of the record relating to negligence and challenge the jury's negligence determination on appeal it clearly could have done so. To the extent the Defendants desire to reargue negligence issues such as whether the school employees' had "authority" to administer EpiPen under the circumstance of this case, such efforts are wasted because such issues are not before the Appellate Court.

Further, the finding of negligence against the school district has conclusively resolved the issue of whether or not the school district can somehow escape liability by manufacturing the false dichotomy that Mercedes died from asthma versus anaphylaxis. Ultimately, the school district was liable in either event because the undisputed evidence established that the administration of CPR and/or EpiPen would have saved her life if either condition were present, and caused the fatal medical emergency which took her life. It is undisputed that the school district's own policies precluded school personnel at the scene to try to engage in diagnostic determinations and their job was to administer EpiPen immediately and let otherwise qualified healthcare providers make such determinations at a subsequent time. See, (Appellant's Appendix No. 16).

The school district's arguments with respect to the sufficiency's of Appellant's assignment of errors, the failure to preserve issues by not objecting to below, and the like, in each and every instance are meritless. Whether matters are characterized as "evidentiary error," versus that of attorney misconduct, ultimately is a distinction without a difference. As discussed in Appellant's Opening Brief, highly inflammatory and prejudicial evidence was submitted in front of this jury despite absence of having any meaningful probative value, or which could have been explored without resort to information barred by ER 403 and/or the Trial Court's Orders in Limine. The bottom line is that evidence was presented to jury that was highly inflammatory and so prejudicial that the jury had no business hearing it.

There is no question that the defense's entire strategy in this case was to mislead and confuse the jury by introducing irrelevant evidence regarding "Flovent," which not only purposely muddled proximate cause issues, but also served to point blame towards the parents, who had been exonerated as a matter of law, (no issues of comparative fault), by the Trial Court's pre-trial rulings which have not been subject to assignment of error or cross-appeal.²

² With respect to the defenses criticisms of the Plaintiffs' Assignment of Errors, it is noted that quite clearly the assignment of errors set forth within Appellant's Opening Brief at Pages 4 and 5, and the issues related thereto, set forth at Pages 5 through 7, were more than

II. LEGAL DISCUSSION

A. **There's Insufficient Evidence Within the Record to Sustain the Jury's Verdict in Favor of the Defense on the Issue of Proximate Cause.**

When reviewing a motion for judgment notwithstanding the verdict, (judgment as a matter of law), the Appellate Court applies the same standard as the trial court. See, *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d at 915, citing to, *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995). Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the non-moving party, the Court can reasonably say, as a matter of law, that there is no substantial evidence or reasonable inference which sustain a verdict for the non-moving party. *Id.* Such a motion can be granted only when it can be said, "as a matter of law, that there is no competent substantial evidence upon which a verdict can rest. *Id.* Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* A verdict

adequate to inform the Court and the defense as to what issues were being raised within this appeal. Appellant's Assignment of Errors satisfy the requirements RAP 10.3(g). Further, to the extent that one could be critical of Appellant's Assignment of Errors, it is noted that in combination with the related issue statement there is no question as to what are the subjects of appeal in this matter. See, *Polygon Northwest Co. v. American National Fire Insurance Co.* 143 Wn.App. 753, 189 P.3d 777 (2008) (minor or technical violations of rule on assignment of error will not bar appellate review where the nature of the challenge is perfectly clear and the challenge rulings are set forth fully and discussed in the Appellant's Opening Brief). Here, as is rather self-evident from Respondent's extensive "Revised Opening Brief," Appellant's Assignment of Errors were more than adequate to inform.

cannot be founded upon mere theory, speculation or conjecture. *Id.* citing to, *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 356, 493 P.2d 1018 (1972). Such standards have equal application even when a verdict is in favor of a defendant in a civil case. See, *Sommer v. DSHS*, 104 Wn. App. 160, 15 P.3d 664 (2001). Here, the defense all but concedes, apparently misconstruing the appropriate standards necessary to sustain a verdict, that the verdict in the defense's favor on the issue of proximate cause rests upon nothing but speculation and conjecture. A "plausible scenario" is something far less than the quantitative proof necessary to sustain a verdict, particularly as it relates to complex matters involving medical causation. (See, Revised Brief of Respondents, page 37).

At its core this case is a "failure to rescue case." It was never the Appellant's theory of the case that the school district "caused" the medical emergency Mercedes suffered from on October 7, 2008, which ultimately resulted in her death. Rather, Plaintiff's case rested upon the proposition that the school district and its personnel failed to appropriately react to such an emergency, (whether caused by an asthma attack and/or anaphylaxis), by either providing Mercedes with CPR and/or Epinephrine from her EpiPen which literally was stored in a cabinet a few feet from where Mercedes

passed away. As discussed extensively at pages 48 through 67 of Appellant's Revised Opening Brief, the only competent and admissible evidence on this subject matter was that had either an EpiPen been administered, or CPR provided, Mercedes would have survived. There was, and is, simply no countervailing evidence presented to this jury based on the requisite standards of "reasonable medical probability and/or certainty" applicable to medical expert testimony on complex issues such as causation. See, *Anderson v. Azko Noble Coating, Inc.*, 172 Wn.2d 593, 280 P.3d 857 (2011); *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007) (and the cases discussed therein). Here there is or is not a "plausible scenario," based on the medical/legal standard that, in the absence of negligence, Mercedes would have died anyway, and such an assertion is nothing more than a statement and/or evidence of what "might have," or "could have," or possibly did" cause Mercedes' death, which is insufficient, see, *Little v. King*, 160 Wn.2d at 705, citing to, *Ugolini v. State Marine Lines*, 70 Wn.2d 404, 407, 429 P.2d 213 (1967), (among others).

In sum, the only admissible evidence in this case from qualified medical experts with respect to the cause of Mercedes' death, established that defendant's, (unappealed), negligence was "a proximate cause" of Mercedes'

death. There was, and is, no "substantial evidence," (beyond pure speculation), from which the jury could have reached its verdict. As such, the Trial Court erred in failing to find as a matter of law in favor of Plaintiffs on the issue of proximate cause and either directing a verdict in Plaintiffs' favor or in an abundance of caution ordering a new trial limited to the issues of causation and/or damages.³

B. The Respondents Ignore the Fact that the Trial Court Directed a Verdict on the Issue of "Flovent" and Failed to Acknowledge that Such Evidence Was Highly Misleading, Confusing and Prejudicial under ER 403 and Cannot and Could Not Meet the Basic Test of Relevancy.

Respondents in this matter seem to ignore that on November 21, 2011 the Trial Court granted Plaintiffs a directed verdict on the question of whether or not the use, or absence of use, of "Flovent" was a proximate cause of Mercedes Mears' death. A copy of the transcript from the motion hearing of November 21, 2011, pages 13 through 31, are attached hereto as Appendix No. 1, for easy review. Unfortunately, the Trial Court did not go far enough and provide a detailed instruction excluding from consideration the use of

³ In order to try to avoid this inescapable conclusion, the defendants mistakenly focus their challenge on the facts which relate solely relating to the issue of negligence. See pages 38-47 of Respondent's Revised Opening Brief. Issues, such as whether or not there was a "asthma attack versus anaphylaxis" and whether or not the school district employees had the "authority" to utilize an EpiPen under the circumstances presented all relate to the issue of negligence and have nothing to do with whether or not such negligence was "a proximate cause" of Mercedes' death.

"Flovent" evidence in its entirety because, despite defense representations to the contrary, the use or lack of use of "Flovent" was never "connected" by competent expert medical testimony as having any causal relationship to Mercedes' death. To the extent that the defense argues that "Flovent" was relevant to "medical history," because it served to establish that Mercedes had "uncontrolled asthma" at the time of her death is nothing more than speculative argumentative assertions, unsupported by even the expert medical testimony submitted by the defendant in this case. Ultimately, the defense expert Dr. Montanaro, as conceded by the defense at page 55 of their Brief, made his determination that Mercedes died from "poorly controlled" asthma based on autopsy findings "unrelated to Flovent." Dr. Montanaro did not testify regarding the impact of Mercedes' lack of compliance in the use of Flovent," (Respondent's Revised Opening Brief, page 55), and there was no evidence that such an alleged lack of compliance existed "immediately prior" to her death, or played any role in it. The only reason the defense desired to introduce such evidence was to create confusion, and to prejudicially and speculatively suggest to the jury that the parents' failure to follow doctor's orders played a role in Mercedes' tragic death.

Thus, the defendants' efforts to submit evidence regarding Mercedes' Flovent usage dating as far back as 2003, inclusive of an unrelated hospitalization occurring in December 2007, did nothing more than place before the jury irrelevant, unrelated medical history, that should have been excluded because it had no tendency to prove or disprove any fact of consequence. See, *Hoskins v. Reich*, 142 Wn. App. 557, 569, 174 P.2d 1250 (2008). As the *Hoskins* case teaches, by claiming personal injury, (in this instance, death), a victim does not put their entire medical history at issue when such history has no causal relationship to the injury claimed. *Hoskins*, at 570; ER 401. In other words, unrelated medical history that has no causal relationship to the injury at issue, lacks relevancy within the meaning of ER 401.

The long line of authority indicating that unrelated medical history is irrelevant, thus inadmissible in an action for personal injury, or death, does not distinguish between cases where issues of causations are simple as opposed to complex. See, *Hoskins*, supra; see also, *Little v. King*, 160 Wn.2d at 705; *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004); *Bennett v. Messick*, 76 Wn.2d 474, 478-79, 457 P.2d 609 (1969); *Greenwood v. Olympick, Inc.*, 51 Wn.2d 18, 23, 315 P.2d 295 (1957); *Reeder v. Sears*

Roebuck and Co., 41 Wn.2d 550, 555-56, 250 P.2d 518 (1952), see also, *Wash. Irrigation and Dev. Co. v. Sherman*, 106 Wn.2d 685, 691-92, 724 P.2d 997 (1986).

Additionally, as succinctly stated in *Little v. King*, at 705, not only does evidence regarding unrelated medical history fail to meet the test of basic relevancy but also once it is admitted creates substantial concerns that otherwise are addressed under the terms of ER 403:

We have long held that the mere existence of a pre-existing condition is an insufficient basis to infer a causal relationship between the injury complained of and the pre-existing condition.

Vaughan v. Bartell Drug Co., 56 Wn.2d 162, 164, 351 P.2d 925 (1960) (reversible error to invite jury to speculate about contribution of pre-existing condition when no evidence about it had been submitted); *Greenwood v. Olympick, Inc.*, 51 Wn.2d 18, 23, 315 P.2d 295 (1957) (same). *Without competent evidence of causation, evidence of other injuries is thus inadmissible. Such evidence would only invite the trier of fact to speculate without an appropriate factual basis. Wash. Irrigation and Dev. Co. v. Sherman*, 106 Wn.2d 685, 691-92, 724 P.2d 997 (1986) (reversible error to allow trier of fact to speculate about pre-existing conditions when only admissible hearsay evidence supported any causal connection to current injury).

In this case there was simply no evidence that the use or lack of use of "Flovent" caused or contributed to Mercedes' death. There also is no evidence under the appropriate medical/legal standard that Mercedes'

"uncontrolled" and/or poorly controlled asthma at the time of her death had anything to do with "Flovent" usage. Rather, as indicated above such a proposition was predicated on autopsy findings and not "Flovent" prescription records, or the like. As such, the Court should reject the Respondents' speculative arguments regarding relevancy set forth at pages 49 through 52 of Respondents' Revised Opening Brief, which is absolutely unsupported by any expert testimony under the appropriate standard for the admissibility of such proof.

Absent evidence, with medical sponsorship for such a proposition, the defense's efforts to summarize Mercedes' pharmacy records regarding filling of her "Flovent" prescriptions, and her December 2007 hospitalization, invited the jury to speculate that there must have been some causal link between the use or non-use of "Flovent" and Mercedes' death. To be clear, the Plaintiffs' position, both before the Trial Court and on appeal, is that such evidence should not have been admitted for any purposes, given its potential, and actual use, of misleading and confusing the jury.

Simply because someone has previously suffered from a condition, even if involving the same parts of their body, does not make such testimony admissible. *Vaughan v. Bartell Drug Co.*, 56 Wn.2d at 164-65. When such

evidence is erroneously admitted the presumptive remedy is the grant of a new trial. *Id.* See also, *Greenwood v. Olympick, Inc.*, supra; *Wash. Irrigation and Dev. Co. v. Sherman*, 106 Wn.2d at 695.⁴

In this case, the jury found negligence but failed to find proximate cause in Plaintiffs' favor. It is respectfully suggested that since the erroneously admitted evidence regarding "Flovent" was directed towards "proximate cause" and permitted the jury to speculate without an appropriate factual basis, that the use of "Flovent" or the lack thereof somehow caused or contributed to Mercedes' untimely death, it should be presumed that the admission of such evidence was prejudicial, and on this basis alone a new trial should have been granted.

C. The Trial in this Case Was Tainted By Inflammatory and Prejudicial Evidence Which Otherwise Should Have Been Found Inadmissible Under the Terms of ER 403.

Whether characterized as an issue regarding the misconduct of counsel or simply one regarding a trial court's erroneous admission of prejudicial evidence ultimately makes no difference in the analysis of whether or not such evidence should not have been admitted and whether or not it was highly prejudicial.

⁴ Compare *Hoskins v. Reich*, supra, wherein prejudicial error was not shown given that the jury's verdict was within the range of the evidence and otherwise could be explained by a substantial gap in treatment.

In this case, as discussed in Appellant's Opening Brief, at pages 30 through 35, (and as set forth in Appendices No. 4 and 5), the Trial Court ruled on a host of Motions in Limine. One Motion in Limine precluded evidence, argument or comment that the Mears parents failed to provide any medical care to Mercedes on the day of her death or prior to his death, had no impact on the defense actions referenced above. (See, Opening Brief, Appendix No. 4, page 20). Additionally, and rather obviously the Court's order that both sides were required to show their exhibits to the other side before showing them to the jury had no impact on the Defendants' actions, particularly as it related to their use of "Flovent" during opening statement.⁵

Not only did the Trial Court enter a Motion in Limine precluding any testimony regarding the Mears parents' failure to provide medical care to Mercedes, but also specifically excluded any argument, testimony or comment that Mercedes should have been kept home on the date of her death. (Appendix No. 4, page 16). Nevertheless the defense presented "surprise" testimony from Principal Garrick wherein he alluded that Mrs. Mears felt

⁵ The defense attempts to justify its defiance of this particular Court Order based on the fact that, in compliance with local rule, their power point was filed within the court file. But it is respectfully submitted that a local rule does not trump a Trial Court's very specific and clear Order. See, *Raymond v. Ingram*, 47 Wn. App. 781, 737 P.2d 314 (1987) (trial courts have inherent authority to waive the local rules so long as it does not result in a manifest injustice). Here, the Court's specific Order clearly controls over any local rule to the contrary.

guilty over allowing Mercedes to go to school with a cold. (TE Vol II, pages 137-149). This testimony was directly contrary to the Court's prior Order in Limine.

It is noted that within Respondents' Revised Opening Brief, there are a number of instances where words like "disingenuous" are used. As indicated, it is respectfully submitted that in most respects this appears to be a case of the "pot calling the kettle black." For example, at page 63 of Respondents' Brief, it is suggested that the Plaintiffs failed to assign error to the fact that, two days prior to discovery cutoff, the defense produced 500 pages of new discovery, and the Court should not consider that such an issue due to lack of citation of the record. The 500 pages of discovery were filed with the Trial Court on September 9, 2011, and can be found at Clerk's Papers (CP) 1935 through 2480. Further, Appellant's Assignment of Error No. 5 provides:

The trial court erred in failing to grant plaintiff's motion for a new trial under the terms of CR 59(a)(8) and (9) due to cumulative errors; the cumulative misconduct of defense counsel, including not only efforts to violate the court's order in limine, but also interjecting irrelevant and highly prejudicial matters in front of the jury; and discovery abuse and conduct, which in toto created such a rancorous trial that it served to deny plaintiff a fair trial and resulted in a failure of substantial justice.

Similarly Issue Statement No. 6 clearly discloses "discovery abuse" as part of the cumulative error which served to deny the plaintiffs a fair trial.

As pointed out by Respondents, other aspects of the Defendant's misconduct including putting on evidence, over Plaintiffs' objection, which were violative of ER 403 in combination with efforts to place before the jury evidence despite the fact it has previously been excluded. In the latter circumstances, the issue is not admission of such evidence, but rather improper actions which forced Plaintiffs to object in front of the jury under circumstances where the "bell could not be unrung."

In that respect, it is hard to separate what transpired in this case from what occurred in the case of *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) where the Supreme Court upheld the Trial Court's grant of a new trial after a jury verdict for the defense, based on misconduct of defense counsel, who repeatedly violated the Evidence Rules by attempting to put exhibits before the jury that had not been admitted into evidence, (or as here previously already been deemed inadmissible), and by efforts to elicit testimony regarding subjects that the Court had already ruled inadmissible, or irrelevant, and other misconduct, (speaking objections in violation of pretrial instructions). As in *Teter*, defense counsel below violated the duty

imposed by ER 103(c) to keep inadmissible evidence from the jury, and persistently asked knowingly objectionable questions. This is misconduct, even when such objections are sustained, because it prejudicially places the opposing party in the position of having to make constant objections. *Teter*, at 223, citing to, *14A Karl B. Tegland*, Washington Practice, Law and Civil Practice §§ 30:33 and 30:41 (2d ed. 2009). When such objections have to be made, even if sustained, it leaves the jury with the impression that the objecting party is hiding something important. *Id.*

Here, having to know no answer would result in the admission of relevant evidence, defense counsel nevertheless persisted in asking witness Gibson whether or not Plaintiff, Mrs. Mears, had said anything untoward to her. Such a question occurred in front of the jury and, despite the fact that the jury was asked to leave, and the objection ultimately was sustained, would not serve to unring the bell that Ms. Mears had said something inappropriate, which was otherwise being hidden from the jury. (See RP, Trial Excerpts, page 173-176). Similar misconduct occurred when defense counsel attempted to admit, again in front of the jury, medical records which had previously been excluded, and were of such a prejudicial nature, that the Trial

Court after ruling on their inadmissibility, placed such records under seal. (RP, Trial Excerpts, pages 419-420).

In these instances, the defense purposely intended to "ring the bell," with respect to inadmissible evidence contrary to the duty imposed under ER 103(c). At other times, the defense, over Plaintiffs' objections, was successful in placing highly inflammatory and irrelevant evidence in front of the jury.

Despite Respondent's mock confusion, the objected to testimony regarding Mrs. Mears' alleged statements regarding Jada's presence making her feel like her "skin was crawling" is clearly set forth verbatim at pages 42 through 43 of Appellant's Revised Opening Brief ,with appropriate citations to the record. Not only did Plaintiffs object to such evidence, but also moved for a mistrial. (RP, 10/25/11 Page 58). Thus, the defense's suggestion that the Plaintiffs did not preserve error by objecting to such evidence is preposterous.

Even if one would assume arguendo that such evidence regarding "bonding" between Janette Mears and Jada was relevant to Jada's claim of negligent infliction of emotional distress, (NEID), such relevancy in no way

outweighed prejudicial impact warranting its inclusion.⁶ As Our Supreme Court explored in *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 670-73, 230 P.3d 583 (2010), the determination as to whether or not evidence is relevant, is only the first step in an analysis of probative value versus prejudicial impact which must be performed under the terms of ER 403. See also, *Kirk v. WSU*, 109 Wn.2d 448, 746 P.2d 285 (1987).

It is hard to imagine how testimony that a mother, when considering her own daughter, was so repulsed that it felt as if her skin was crawling would not be viewed by any reasonable person as being highly prejudicial and highly inflammatory, and thus inadmissible under the terms of ER 403.

Even if we assume *arguendo*, that the absence of "bonding" between Jada and her mother had some marginal relevancy to Jada's emotional distress claim, it is respectfully submitted that there were so many other ways to

⁶ It is noted that the defense's damage expert Dr. Rosen was excluded due to discovery abuse. Thus, the defense had no witness who could testify that Janette's alleged lack of "bonding" with Jada had anything to do with the injuries suffered by Jada as a byproduct of witnessing Mercedes' death), which even the defense has characterized as "terrifying and tragic" (at page 64 of Respondent's Opening Brief). Dr. Barrett had not reviewed such records and they formed no basis for her opinion. Such information was not offered outside the presence of the jury, despite their clear inflammatory nature and in contravention to the Trial Court's previous Orders in Limine, requiring that such information be handled in such a manner. Further, it is noted that the Court's treatment of the information which was inappropriately exposed to the jury during the course of Dr. Barrett's testimony was inconsistent with the Trial Court's previous approach when it came to similar information which had not been considered by plaintiff's other expert Dr. Hegyvary. (See, Appellant's Revised Opening Brief Page 31-33) (RP 10/6/11, Trial Excerpts Page 87-88).

explore such issues without asking questions likely to expose Mercedes' mother to outright disdain.

Finally, with respect to the testimony of School District employee witness Peggy Walker, Plaintiffs' position is neither "extraordinary," "preposterous," nor "outlandish." On the other hand, the School District's contentions that this witness was "cooperative" and "forthright," is not a proposition evidenced or supported by Ms. Walker's actual testimony. Excerpts of Ms. Walker's testimony is attached hereto as Appendix No. 2 (see, RP 10/17/11, trial excerpts, page 77 - 89).

Careful review of such testimony would lead a reasonable person to conclude that Ms. Walker had a clear agenda to espouse the "company line" of the defense that Mercedes suffered from an asthma attack, and not an allergic emergency, ("anaphylaxis").

Given the fact that Ms. Walker was obviously taking cues from Mr. Moberg's objection, in her refusal to answer simple questions with anything but the defense's argument that Mercedes suffered an asthma attack, it is respectfully respected that, at a minimum, the circumstantial evidence suggests that Ms. Walker, either for her own purposes, or at the behest of the

defense, had an agenda to interject “asthma” in response to every possible question asked.

Further, the Respondent is clearly misstating Plaintiff’s citation to the case of *Storey v. Storey*, 21 Wn.App 370, 372, 585 P.2d 183 (1978). Plaintiff is not arguing that Ms. Walker’s testimony *alone* establishes the kind of rancor or toxicity, necessary for the grant of a new trial. Rather, it is Plaintiff’s position that Ms. Walker’s testimony, along with all other negative acts perpetrated by the defense warrants the grant of a new trial. See also, *Snyder v. Sotta*, 3 Wn.App 190, 473 P.2d 213 (1970). It is again reiterated, based on the matters addressed within Appellant’s Revised Opening Brief, and in this Brief, based on “cumulative error,” Plaintiffs did not receive a fair trial, and a new trial should be ordered.

III. RESPONSE TO CROSS-APPEAL

A. Respondent’s Arguments On Cross-Appeal Are Deficient.

Passing treatment of an issue, or lack of reasoned argument, supports a determination by an appellate court that an issue does not merit consideration. See, *Palmer v. Jensen*, 81 Wn.App 148, 153, 913 P.2d 413 (1996), reversed on other grounds, 132 Wn.2d 193, 937 P.2d 597 (1997). Further, argument without authority and/or which is insufficiently developed

should not be considered by an appellate court. See, *State v. Thomas*, 150 Wn.2d 821, 869, 83 P.3d 970 (2004). It is further inappropriate for a party on appeal to inadequately brief an issue in its opening brief, and then make its full arguments only in reply. See, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992) (an issue raised and argued for the first time in a reply brief is too late to warrant consideration). Also, as recognized by the Respondents, a party is obligated to cite to the record or otherwise face sanction. *Iverson v. Snohomish County*, 117 Wn.App 618, 624, 72 P.3d 772 (2003). Additionally, the Court of Appeals does not consider conclusory arguments that do not cite to authority. See, *West v. Thurston County*, 168 Wn.App 162, 187, 275 P.3d 1200 (2012).

With respect to both issues raised in cross-appeal, the briefing provided by Respondents is woefully deficient at every level. The deficiencies are so severe that the Court should not permit any correction by way of Respondent's reply.

For example, with respect to the first issue, i.e., whether or not the School District and its employees are entitled to immunity under RCW 28A.210.270, the Respondents provide absolutely no analysis, let alone even passing treatment of the issue. It is noted that the School District makes no

effort to provide any kind of a statutory analysis, nor does it cite to any authority supporting its position that such a statute even has application in this case.

Additionally, Respondents' Opening Brief is silent as to what point in the proceeding it is alleging that it was erroneously denied the immunity allegedly afforded by the statute to which they cite.

Naturally, this is significant because the standard of review applicable to such alleged error may be dependent upon which point in the proceedings the Defendant is alleging that the error occurred. Are the Respondents contending that the Trial Court should have granted summary judgment with respect to this claim of immunity, (or for that matter Jada's infliction of emotional distress claim), or are they contending that the Trial Court erred by failing to grant a directed verdict with respect to such claim? If so, what portion of the record, are the Respondents claiming shows the existence of such an error? Without such information, frankly, it is all but an impossibility for the Appellants/Cross-Respondents to formulate a meaningful response.

Obviously, such questions can make a meaningful difference with respect to the scope of review. For example, if the Defendant is contending

that either of these issues involve a “pure question of law,” then the Court’s decision denying Defendants’ Motion for Summary Judgment would be subject to de novo review. See, *Washburn v. City of Federal Way*, 169 Wn.App 588, 609, 283 P.3d 567 (2002). As discussed in *Washburn*, an Appellate Court reviews de novo a grant or denial of summary judgment, and can review such an order under summary judgment standards following a trial, “if the parties dispute no issues of fact and the decision on summary judgment turns solely on a substantive issue of law.” *Id.* However, a summary judgment denial cannot be appealed following a trial if the denial is based upon a determination that material facts are in dispute and needed to be resolved by the fact finder. See also, *Kaplan v. Northwest Mutual Life Insurance Co.*, 115, 791, 65 P.3d 16 (2003).

Presumptively, since this case was fully presented to a duly instructed jury, a different standard of review would have application. Presumptively, a jury’s determination of negligence, in light of the immunity statute, would have to be reviewed under the “substantial evidence standard.” See, *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007) (reviewing decision granting or denying judgment as a matter of law, the appellate courts apply a “substantial evidence” standard).

In any event, if the Court is inclined to address the issues raised on cross-appeal, despite the above-referenced deficiencies, the following responses are provided.

B. RCW 28A.210.270 Has No Application to the Facts at Issue in this Case.

What was at issue in this case was the School District's failure to administer an EpiPen, (an injectable medication), and its failure to provide CPR. Plaintiffs are not contending that the School District erred when it attempted to administer Albuterol to Mercedes during her medical emergency. Thus, the above-referenced immunity statute, on its face, has no application to any issue of significance in this case.

Generally, whether or not a party is entitled to an immunity is a matter which is an affirmative defense, upon which the proponent of immunity has the burden of proof. See, *Kaahumanu v. County of Maui*, 315 F.3d 215, 1220 (9th Cir. 2003). Courts are generally quite sparing in recognizing claims of immunity. See, *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1230 (9th Cir. 1996). Typically, legislation will not be construed in a manner which is in derogation of the common law. See, *Price v. Kitsap Transit*, 125 Wn.2d 456, 464, 886 P.2d 556 (1994). Here, the common law obligation of school districts to protect their students from foreseeable harms is well and long

established. See, *J.M. v. Bellingham School District*, 74 Wn.App 49, 57, 871, P.2d 1006 (1994). Such a duty is extremely broad. See, *Christiansen v. Royal School District No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005). As with other immunity statutes, RCW 28A.210.270 is in derogation of the common law, and thus, must be strictly construed. See, *Matthews v. Elk Pioneer Days*, 64 Wn.App 433, 437, 824 P.2d 541 (1992).

The fundamental purpose in construing the statute is to ascertain and carry out legislative intent. See, *City of Seattle v. Fuller*, – Wn.App –, – P.3d – (WL 1843342) (5/2/13), citing to *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004). The legislative intent can be discerned from the plain meaning of the statute. *Id.*

On its face, RCW 28A.210.270 only applies to “school employees” who “administer oral medication..” Thus, EpiPen, which by its very nature is not an oral medication, but rather is injectable, falls outside the coverage of this statutory language. The same is true with respect to CPR.⁷

⁷ It is noted that a reasonable argument could be made that “oral medication,” which is not otherwise defined, is limited to prescribed pills and not inhalants such as Albuterol. It is further noted that Plaintiffs’ decedent’s particular conditions, asthma and a potential for suffering from anaphylaxis, are subject to specific provisions within the same statutory scheme. See, RCW 28A.210.370 (asthma); see also, RCW 28A.210.380 (anaphylaxis). These specific provisions should be deemed to govern over the general provisions of RCW 28A.210.260, which addresses on-school premises administration of

Additionally, it is noted that by its terms, RCW 28A.210.270 (1) has inherently factual elements, i.e., immunity is only afforded when there is “substantial compliance with the prescription...” Whether or not there has been such “substantial compliance” is inherently a factual issue. This is a proposition that apparently even the defense recognizes, given the fact that they proposed an instruction to the jury based on RCW 28A.210.270. (See, Appendix No. 3). Thus, given the factual nature of such claimed immunity, the Respondents have waived any claim with respect to error by failing to assign error, or brief, the question of whether or not the Trial Court erred by failing to give their proposed instruction to the jury.

C. Jada’s Negligent Infliction of Emotional Distress Claim Was Properly Before the Jury.

The Respondents appear not to be challenging Jada Mears’ ability to meet any particular element of a negligent infliction of emotion distress claim. Rather, in an *ipsa dixit* fashion, the Respondents assert that there is no authority which allows an NEID claim when a family member witnesses a

oral medication. Where a general statute addresses the same subject matter as a specific statute, and the two cannot be harmonized, the specific statute will prevail over the general. See, *AOL, LLC v. Washington State Dept of Revenue*, 149 Wn.App 533, 542, 205 P.3d 159 (2009).

sister perishing due to the negligence of others. Given the broad and general nature of such an assertion, frankly, it is difficult to formulate a response, and the Appellate Court should not consider such an issue.

Again, the Respondents' argument on this issue simply ignores the fact that the jury found negligence in this case. Respondents' overbroad statement that such an action is inappropriate because it could be brought against an EMT who is trying to rescue and injured person is, of course, incomplete because it fails to include the concept that such EMTs would only have liability if their actions were "negligent." (Respondents' Brief, page 70).

As it is, there is no question that Jada was in and out of the room as her sister perished, and observed the events which formed the predicate of the jury's finding of negligence in this case. The whole essence of a NIED claim is witnessing the consequences of someone else's negligence. See, *Hunsley v. Giard*, 87 Wn.2d 424, 553, P2d 1096 (1976) (plaintiff shocked when her neighbor drove a car through the plaintiff's wall and into her utility room); see also, *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 787 P.2d 553 (1990) (family member could recover for NIED, only if they were present at the scene of the accident, or shortly thereafter); see also, *Hagel v. McMahon*, 136

Wn.2d 122, 132, 960 P.2d 424 (1998) (family member must arrive at the scene before a substantial change in the relative conditions or locations).

In this case, it is undisputed that Jada saw her sister's final moments as she struggled to breathe, began to fade, losing consciousness, and dying on the nurse's office floor, while a competent adult negligently floundered about. It is respectfully submitted that what Jada observed was akin to seeing and experiencing the pain and suffering of the victim, and the personal experience of such horror. See, *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 57, 176 P.3d 497 (2008). What she saw was akin to seeing conditions of a "crushed body," or hearing "cries of pain or dying words." *Id.*, at 57.

Liability on claims similar to Jada's can be avoided by not engaging in injury-producing negligence to a loved one, in a presence of someone such as a sibling.

Respondents' challenge to Jada's NEID claim has no merit.

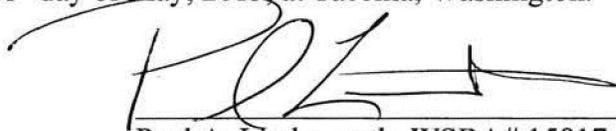
IV. CONCLUSION

For the reasons stated above, and in Appellant's Opening Brief, the Appellate Court should reverse the Trial Court on the issue of proximate cause as a matter of law, and remand with direction, finding that Plaintiff prevails on such an issue. Alternatively, Plaintiff should be granted a new

trial on the issues of proximate cause and damages for the reasons discussed.

Finally, the Respondents' undeveloped and passingly brief cross-appeal issues should be afforded no relief.

Dated this 21st day of May, 2013, at Tacoma, Washington.

A handwritten signature in black ink, appearing to read 'P. Lindenmuth', written over a horizontal line.

Paul A. Lindenmuth, WSBA# 15817
Attorney for Appellants/Cross-Respondents

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 21st day of May, 2013, I caused to be served delivered to the attorney for the Respondents/Cross-Appellants, a copy of **APPELLANTS'/CROSS-RESPONDENTS' REPLY BRIEF/OPENING BRIEF ON CROSS-APPEAL**, and caused those same documents to be filed with the Clerk of the above-captioned Court.

Filed with the Court of Appeals, Division II, In and For The State of Washington, via email and legal messenger to:
coa2@filings@courts.wa.gov

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

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

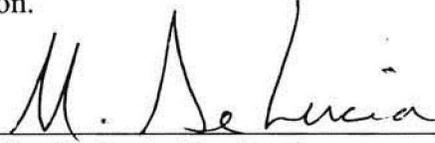
Gerald J. Moberg, Esq.
Jerry J. Moberg & Associates
451 Diamond Drive
Ephrata, WA 98823
509-754-4202 fax
jerrymoberg@canfield-associates.com

Jessie L. Harris, Esq.
Williams, Kastner & Gibbs, PLLC
601 Union St. Suite 4100
Seattle, WA 98101
206-628-6611 fax
jharris@williamskastner.com

FILED
COURT OF APPEALS
DIVISION II
2013 MAY 21 PM 2:34
STATE OF WASHINGTON
BY _____
DEPUTY

DATED this 21st day of May, 2013, at Tacoma, Pierce

County, Washington.

A handwritten signature in cursive script, appearing to read "M. DeLucia", written over a horizontal line.

Marilyn DeLucia, Paralegal

The Law Offices of Ben F. Barcus & Associates, PLLC

APPENDIX NO. 1

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF PIERCE

3 _____
4 JEANETTE MEARS, INDIVIDUALLY)
AND AS PERSONAL REPRESENTATIVE)
5 FOR THE ESTATE OF MERCEDES)
MEARS, AND AS LIMITED GUARDIAN)
6 FOR JADA MEARS, AND MICHAEL)
MEARS,)

7)
8)
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Plaintiff,

vs.

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

DEFENDANTS.

No. 09-2-16169-6

No. 43121-1-II

14 VERBATIM REPORT OF PROCEEDINGS
15 MOTION FOR DIRECTED VERDICT

16 APPEARANCES:

17 FOR THE PLAINTIFFS:

BEN F. BARCUS/THADDEUS MARTIN
Attorneys at Law
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444

20 FOR THE DEFENDANTS:

JERRY MOBERG/JESSIE L. HARRIS
Attorneys at Law
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

23 Before the Honorable Brian Tollefson
24 Monday, November 21, 2011
Tacoma, Washington

1 MONDAY, NOVEMBER 21, 2011; TACOMA, WASHINGTON

2 --oo0oo--

3 THE COURT: Okay. Let's take care of these
4 motions that everybody needs to be resolved before we
5 move further in the jury instructions.

6 So, I have the first one I think everybody
7 sort of got rolling in front of me is this motion for a
8 directed verdict on some of these damage items.

9 So, are you ready to argue that first?

10 MR. BARCUS: We are, Your Honor.

11 THE COURT: Okay. I'm listening.

12 MR. BARCUS: All right. We've submitted the
13 billings, Your Honor. We have indicated that we have
14 testimony that they're directly related to the trauma
15 of the plaintiffs in this case, that they're reasonable
16 and necessary, and that there has been no
17 countervailing evidence whatsoever, so it's un rebutted
18 at this point.

19 And it's our request that they be printed in
20 the verdict form as mandatory damages.

21 THE COURT: Before I hear from Mr. Harris,
22 tell me again which items you think there's un rebutted
23 evidence for.

24 MR. BARCUS: The Central Fire and Rescue,
25 \$1124; Mary Bridge Children's Hospital, \$4,963.

1 The emergency room physician, Dr. Chalett,
2 from Mary Bridge, \$2,754.

3 Mountain View Funeral Home, funeral expenses,
4 \$4,084.

5 And Dr. Lawrence Majovski, \$2,195.

6 If our math is right, it adds up to \$14,520.

7 THE COURT: So were you planning on having
8 those listed if I grant your motion? Where were you
9 planning on having those listed?

10 MR. BARCUS: Well, the Central Fire and
11 Rescue and Mary Bridge Children's Hospital, ER
12 physician, and funeral home should all be within the
13 estate of Mercedes Mears as her economic losses.

14 The Lawrence Majovski, \$2195, is essentially
15 a split cost between Mr. and Mrs. Mears, so...

16 THE COURT: Two thousand one hundred what?

17 MR. BARCUS: \$95. So what I was thinking of
18 doing is just, since we have separate -- we have
19 separated Mr. and Mrs. Mears and just split that cost
20 between the two of them, one-half to each. They had
21 individual sessions, as the Court will recall, and they
22 had conjoint sessions also with Dr. Majovski together.

23 THE COURT: So the past medical billings,
24 that adds up to how much, excluding Majovski?

25 MR. BARCUS: Okay.

1 THE COURT: They add up to \$6,087?

2 MR. BARCUS: No, \$8,841 is our math. Let me
3 just do it right here with the calculator.

4 (Pause in Proceedings)

5 MR. BARCUS: We've got \$1124 for Central Fire
6 and Rescue; \$4,963 for Mary Bridge Children's Hospital;
7 \$2,754 for emergency room physician; and that's \$8,841,
8 not including the funeral expenses.

9 THE COURT: That's \$8,841?

10 MR. BARCUS: Yes.

11 THE COURT: Your turn, Mr. Harris.

12 MR. HARRIS: Okay. I just want to make sure
13 I understand. So we have funeral, the past medical
14 billings, \$8,441. And funeral expenses, what do you
15 have for that?

16 MR. BARCUS: Funeral expenses are \$4,084.

17 MR. HARRIS: Okay. That's the same number.

18 Your Honor, we don't have any objection as to
19 the funeral expenses or the past medical billings
20 sought on behalf of the estate. Our own objection or
21 concern was that it not be listed twice, that if it's
22 recoverable, that it be recoverable either under the
23 estate's claim for her or the Mears' claim. And I
24 think the Court's already ruled in that regard.

25 So we don't have any objection as to the past

1 medical billings on behalf of Mercedes Mears' estate
2 nor the funeral expenses, but we do object to the
3 amount with Dr. Majovski, the past amount. We don't --
4 we think there's a dispute as to whether that
5 counseling is reasonable or related to the issues in
6 this case. There's been -- there was ample testimony
7 or there's ample evidence that Mr. and Mrs. Mears had
8 issues outside the death of Mercedes that merited
9 counseling, and -- plus, a jury could reasonably find
10 that the counseling that was received by Dr. Majovski,
11 although even if you accept that it was in connection
12 with Mercedes passing away, it's not causally related,
13 nor is it reasonable or necessary, or reasonably
14 related to this incident. So we just think that the
15 jury might, could very well find that it's neither
16 reasonable nor necessary.

17 MR. BARCUS: If they did that, Your Honor,
18 then they would be nullifying the testimony, they'd be
19 going against the unrebutted testimony. We have
20 unrebutted testimony in that regard. The defense has
21 not put on any evidence to the contrary whatsoever.
22 It's unrebutted.

23 THE COURT: How do you spell Dr. Majovski?

24 MR. BARCUS: M-A-J-O-V-S-K-I.

25 THE COURT: Anything else, Mr. Harris?

1 MR. HARRIS: No, that's it, Your Honor.

2 MR. BARCUS: The other thing, obviously, Your
3 Honor, rather than other than just those economic
4 losses is the net loss to the estate, the future
5 economic damages, the range we have for that, \$208,530
6 to \$560,272, that's obviously based upon the AA versus
7 the BA education level. Again, that is unrebutted.
8 The defense has chosen not to call an economist in this
9 matter, and we have opinions that this is reasonable,
10 and based upon reasonable economic certainty.

11 And again, the defense has chosen not to
12 rebut it, so it's our request that the range be put in
13 the verdict form.

14 THE COURT: Mr. Harris?

15 MR. HARRIS: Your Honor, we absolutely
16 dispute that. The Court is giving an instruction on
17 the weight that may be accorded to an expert witness.
18 It's routine that folks do not call an economist or
19 rebuttal economist. The jury could very well decide
20 not to accept Mr. Moss' assertions as to the range or
21 the amount of damage that Mercedes' estate will
22 experience, which Dr. Moss, on cross-examination,
23 admitted that his ranges are based upon assumptions.
24 He didn't try to hide anything in that regard. So we
25 have some built-in assumptions. And it's speculative.

1 And the jury can certainly conclude, under
2 the WPI instruction that instructs the jury on the
3 weight that can be assigned to expert testimony, they
4 can rely and consider credibility. They can consider
5 education, training, the facts upon which the opinions
6 are based upon. And in this case, those facts would be
7 speculative.

8 With regard to the -- this is different than
9 a treating physician. If you have a treating physician
10 that's, you know, testifying as to the reasonableness
11 and necessity of actual cost of treatment, that's a
12 completely different type of special damage, and I
13 understand that. But when you have the assertions of
14 losses to an estate, that's not -- that's a different
15 type of opinion; that's an expert opinion and it's open
16 to dispute. We absolutely dispute that. And there's
17 nothing that require that we call our own economist.
18 We can do that at our election. And just because --
19 there's no case law that says just because one party
20 does not, the defense decides not to call an economist,
21 that is somehow -- the jury has to accept as a matter
22 of law or as a matter of directed verdict, that the
23 jury has to accept the numbers that plaintiff's
24 economist puts out there. So we absolutely dispute
25 that.

1 We think there's ample grounds by which the
2 jury may just discount that opinion outright.

3 Thank you, Your Honor.

4 THE COURT: So you weren't able to find a
5 case one way or the other? Is that what you're saying?
6 No cases that support the position of the plaintiff, no
7 cases that are contrary to the plaintiff's position?

8 MR. HARRIS: There are cases that are
9 contrary, you know, on this discrete issue, but there
10 are cases that deal with the instruction. If you look
11 at the WPI behind the instruction, at the comments
12 behind the instruction that deal with weight that can
13 be afforded to an opinion of an expert, there's a
14 plethora of cases dealing with that, and we think those
15 line of cases apply.

16 In this situation, the only difference
17 between Dr. Moss, or Mr. Moss, and one of plaintiff's
18 other experts, is that he's opining on a matter of
19 economy and a matter of what the purported damages
20 would be or losses, net losses would be to the estate,
21 which plaintiffs will use to say that's part of their
22 damages claim, just like they will any other claim.
23 But he falls in the same category of experts. It's no
24 different than if you have an expert testifying on
25 liability or causation or something to that effect.

1 The jury may still decide what weight they would like
2 to accord to that expert's opinion.

3 Just listing whatever that expert says,
4 listing that amount as an undisputed amount just
5 because we don't call our own economist, I guess what
6 I'm saying is there's no proposition, I mean there's no
7 case that accepts that proposition. All the cases that
8 I'm aware of tracking the jury instruction pretty much
9 says that the jury can accord whatever weight it wants
10 to an expert opinion. This is completely different
11 than a treating physician.

12 THE COURT: Okay. The moving party always
13 gets the final word, so what else do you folks want to
14 tell me?

15 MR. BARCUS: Well, we fully briefed it, Your
16 Honor. I'm sure you've had an opportunity to take a
17 look at it. Clearly, when we come forward with the
18 evidence, if they have anything to counter, they then
19 have to do so. They have not done so. The only
20 assumptions here is that it's a range between an AA and
21 a BA. It's based upon a reasonable economic certainty
22 on a more probable than not economic basis. We've met
23 our burden in that regard. The defense has done
24 nothing. They can't -- the case law tells us they
25 can't just come in and say, oh, no, oh, no, we

1 disagree. That's what they're trying to say. That's
2 not what the case law is.

3 When we come forward with our evidence and we
4 put it forth under the correct standard, which we have,
5 then it's incumbent upon the defense to come forward
6 with something to contradict it if they have it. If
7 they decide not to do that, then that's the evidence of
8 the case. We have this range that we also have, the
9 other factors here that are in the instruction, as the
10 Court has indicated, so they have nothing to counter
11 this. And if they had believed that these numbers were
12 in any way incorrect, they most certainly would have
13 had their own economist here. They've decided not to
14 do that. They haven't challenged this evidence.

15 And they can, you know, they still have
16 these, these other indications in the instruction, they
17 can still argue that, but these numbers are simply
18 math, and it's set forth, that's the law of this case.
19 At this point, they haven't challenged it. They
20 cannot, just like in a summary judgment, in defending a
21 summary judgment, I don't think the Court would listen
22 too much just to say, well, we disagree. And there's
23 case law on that effect, too, saying, well, we just
24 disagree with the averments of the plaintiffs in the
25 case, and that doesn't carry the day either. They have

1 to have evidence to support it. They don't in this
2 case. They've chosen not to.

3 MR. HARRIS: Your Honor--

4 THE COURT: Go ahead, Mr. Harris.

5 MR. HARRIS: I'll just direct the Court to
6 the case of, it's Gerber versus Crosby (phonetic).
7 It's a 1956 case. There's also, it cites Windsor vs
8 Bourcier. It's 21 Wn.2d 313.

9 THE COURT: What page of the instructions are
10 you looking at?

11 MR. HARRIS: I'm looking at Page 46. And
12 basically it says, it's the notes that appear behind
13 that, the jury instruction regarding an expert witness.
14 And it says that it is for the jury to determine what
15 weight should be given expert testimony. This is no
16 different. Mr. Moss' range as to the losses, net
17 losses suffered by Mercedes' estate, that's his
18 opinion, and it's based upon assumptions. He didn't
19 know Mercedes. You know, there was extensive
20 cross-examination conducted. And so I think we're
21 invading the province of the jury if we just give them
22 numbers. Those numbers absolutely are disputed.

23 So I just urge the Court to, to adhere to the
24 instruction and to the cases cited in support of that
25 instruction.

1 MR. BARCUS: My response obviously is:
2 Where's your evidence that these numbers are in any way
3 incorrect? Where is your challenge to these numbers?
4 They don't have any. Our numbers are the only numbers
5 in evidence before this jury.

6 Same thing, Your Honor, as if you put an
7 expert witness on causation, they didn't rebut it
8 either.

9 THE COURT: Okay. I'll grant the motion.

10 MR. BARCUS: Thank you, Your Honor.

11 MR. LINDENMUTH: Thank you, Your Honor.

12 THE COURT: So, on the instruction for Jada
13 Mears' estate, excuse me, Mercedes Mears' estate,
14 funeral expenses, we had a line for funeral expenses,
15 \$4,084. You had a line for past medical billings,
16 which now has to be increased to \$8,841, right, \$8,841?

17 MR. BARCUS: I'm sorry, Your Honor. Thank
18 you. \$8,841 is the past medical expenses and the
19 funeral expenses are the same, \$4,084. So the past
20 medical bills, you're right, have to go up to \$8,841.
21 And then the economic damages obviously stay the same.
22 So we're just increasing the number two, past medical
23 billings.

24 THE COURT: So then on the instruction for
25 Jeanette Mears and Michael Mears, I was just going put

1 the one amount.

2 MR. BARCUS: That's fine, too.

3 THE COURT: Past economic damage, Dr.
4 Majovski, \$2,195.

5 MR. BARCUS: That's fine. Then I can just
6 tell them in the verdict form that they can just split
7 it. That's fine. Thank you, Your Honor.

8 THE COURT: So we need to cover the rest of
9 the motions?

10 MR. BARCUS: Yes.

11 THE COURT: Are there any other motions?

12 MR. LINDENMUTH: Your Honor, at this point in
13 time, I would like to renew our motion with respect to
14 any argument regarding Flovent. I can incorporate this
15 into my exceptions to my jury instructions as well,
16 because we did an Instruction No. 29. Instruction No.
17 29 explicitly references that there's no proof that
18 Flovent nor an upper respiratory tract infection had
19 any causal relationship to young Mercedes' death.

20 There has simply been no testimony, no
21 competent testimony based on the appropriate medical
22 legal standard that Flovent caused or contributed to
23 Mercedes Mears' death. I know the defense has pointed
24 to some testimony from Dr. Larson, but if you actually
25 listen to what the testimony is, it just isn't there.

1 They're making some large assumptions about what he's
2 saying and it's not what he was saying, and he
3 certainly didn't say it based on reasonable medical
4 probabilities or certainties.

5 So any speculative testimony regarding
6 Flovent, any upper respiratory tract infection, should
7 be excluded as a matter of law and the jury should be
8 so instructed.

9 And there should be no argument or allusions
10 to it because there was no causal relationship ever
11 established between the use of or absence there of
12 Flovent. It's just an effort at misdirection.

13 The instruction that I proposed was 29, which
14 the Court gave in a shortened version, as instruction
15 number, Court's Instruction No. 7. That would have
16 been in our first packet.

17 MR. HARRIS: What are you referring to,
18 counsel?

19 MR. LINDENMUTH: Plaintiff's proposed
20 Instruction 29.

21 (Pause in Proceedings)

22 THE COURT: Ready to make your argument, Mr.
23 Harris?

24 MR. HARRIS: I am, Your Honor. I think the
25 Court properly excluded this language. This is an

1 instruction that the Court modified substantially. And
2 the Court's instruction properly reflects its exclusion
3 of any comment regarding Flovent or somehow saying that
4 instructing the jury that Flovent is not at issue or
5 somehow irrelevant, that's just simply not the case.

6 There was ample evidence at trial, lay
7 witness testimony, medical testimony from medical
8 witnesses, including Mercedes' own doctor, so there's
9 just no basis. We should be allowed to argue the facts
10 that are in evidence. There are ample facts in
11 evidence regarding Mercedes' poorly controlled asthma,
12 or uncontrolled asthma. We had an expert who rendered
13 that opinion; there's ample evidence.

14 If you look at Defense Exhibits Numbers 26,
15 27, and 28, are all prescription records that reference
16 the refill of a number of medications, including
17 Flovent. Those records were all in evidence; they were
18 all admitted. So we should be able to argue the facts
19 that are in evidence.

20 Thank you, Your Honor.

21 MR. LINDENMUTH: Your Honor, with respect to
22 the proposed exhibit, they misread the exhibit, they
23 speculated about its contents, and that was clarified
24 by way of the testimony during the course of trial.
25 The actual, the actual prescription was for it to be

1 utilized once per day, and also it had multiple
2 refills. And, in fact, this thing was, this is Exhibit
3 No. 605, indicating that there were four refills that
4 could be bought at any one time, and that, in fact, is
5 what occurred here.

6 MR. BARCUS: It was a three-month
7 prescription.

8 MR. LINDENMUTH: So it was a three-month
9 prescription, not a monthly prescription. So, to the
10 extent that those exhibits are in, they are inaccurate,
11 they are predicated on speculation, which was all
12 clarified during the course of trial.

13 There is no testimony in this case, and I
14 have reviewed Dr. Larson's trial testimony in detail,
15 where anybody ever asked the question: Doctor, based
16 on reasonable medical probability, did the non-use of
17 Flovent or the use of Flovent in any way cause or
18 contribute to this death? And the answer to that
19 question was never given because it was never asked.

20 But there's been several different witnesses
21 indicating, I think even Dr. Redding indicated, at
22 least in his deposition testimony that I'm aware of and
23 I'm sure he repeated this during the course of trial,
24 that he could not see how possibly how Flovent would
25 cause or contribute to this death. And Dr. Hopp and

1 Dr. Larson did not, or Dr. Hopp indicated the same.
2 Dr. Larson's testimony did not indicate that he felt
3 the Flovent was a proximate cause to this death. That
4 testimony just isn't there.

5 There's some talk about some missing link
6 issue, but that was never followed up with the
7 appropriate question to the witness to really establish
8 that this is being a factor in this case. You know, we
9 have an instruction that indicates it can't be
10 possible, merely, maybe. That's all they've got into
11 evidence in this case on that question, and if even
12 that. So it should not be considered by this jury as
13 being a causative factor. They're just, it's just --
14 there just isn't any proof of it.

15 THE COURT: Ready for me to rule or did you
16 want to say something else, Mr. Harris?

17 MR. HARRIS: If the Court's ready to rule,
18 unless the Court has questions for me.

19 THE COURT: So, I think this is one where you
20 have to agree with both sides in certain respects. I
21 don't believe there was any testimony or evidence that
22 Flovent itself was a medically probable cause of death,
23 the lack of Flovent. What the testimony and evidence
24 was, was there was poorly controlled asthma, if you
25 believe the experts for the defense and decide you

1 don't want to believe the experts for the plaintiff.
2 Okay. So each side should be allowed to argue their
3 case. And, certainly, there was testimony that Flovent
4 was a controller medication. And the defense should be
5 allowed to argue, as long as they don't say in any way,
6 shape, or form - I'm granting a part of the plaintiff's
7 motion in the sense that I'm saying that the defense
8 can't say that Flovent use or non-use by itself somehow
9 was a medically probable cause or contribution to the
10 death of Mercedes Mears - however, the defense can
11 argue, and I'm denying the motion to the extent that
12 the defense can argue that there's evidence on a more
13 probable than not medical basis that Mercedes Mears had
14 poorly controlled asthma. And one of the ways you
15 control asthma is through use of Flovent. There's
16 other ways to control it, too, but the parents chose
17 Flovent, I'm presuming on the doctor's advice.

18 MR. BARCUS: Isn't that giving them license
19 to argue what you just said?

20 MR. HARRIS: I understand the Court's ruling.

21 MR. BARCUS: I'm trying to understand,
22 because if you're saying that they can say Flovent is a
23 controller medication that wasn't used, then isn't that
24 just obviating the exclusion of that lack of opinion
25 evidence?

1 MR. HARRIS: No. He just ruled that we can
2 argue the facts that are--

3 THE COURT: I'll stop closing arguments dead
4 in their tracks if out of the mouths of either defense
5 counsel comes the words "Flovent use" or "non-use" was
6 a cause or contributed to the death of Mercedes Mears.

7 MR. BARCUS: Okay.

8 MR. HARRIS: Your Honor --

9 MR. BARCUS: Then other thing, too--

10 MR. HARRIS: -- I'd like to seek
11 clarification --

12 MR. BARCUS: Please don't try to shout me
13 down, Mr. Harris.

14 MR. HARRIS: Well, you've been shouting this
15 whole trial.

16 MR. BARCUS: I was discussing the ruling with
17 the Judge and --

18 MR. HARRIS: Well, I need clarification as
19 well. If you move on to another issue, I'd like to get
20 clarification from the Judge.

21 MR. BARCUS: One of the things I'm concerned
22 about is that during their opening statement, they put
23 up some exhibits that were not disclosed to me in their
24 PowerPoint about Flovent and their prescriptions.
25 They're wrong in that it was a monthly prescription,

1 and they put it in. And they have two different
2 exhibits. They have one for illustrative and during
3 the course of trial also. They're wrong. And the
4 prescription on Flovent shows that they're wrong. The
5 prescription as of 7-22-08, the last day of treatment,
6 was that it was for two puffs, one time a day, not
7 twice. And it wasn't a one-month prescription, it's on
8 a three-month prescription, four refills per year and--

9 MR. HARRIS: Can I seek clarification before
10 we move on, on that issue --

11 MR. BARCUS: You know, can I not be
12 interrupted for a moment? Can you show some
13 professionalism, please?

14 THE COURT: Hold on. Let's just hear from
15 Mr. Barcus. I'd like to get the jury out here this
16 morning sometime.

17 MR. BARCUS: Yes, Your Honor. So I don't
18 know, I haven't seen his PowerPoint today, but if he's
19 got something like that again today, I'm going to ask
20 that it be excluded because it's not correct, and it's
21 only misleading and confusing, and I think it would
22 violate the Court's order in that regard. If they try
23 to put another exhibit, illustrative or not, there
24 isn't any foundation for it at all.

25 MR. HARRIS: Your Honor--

1 THE COURT: Your turn, Mr. Harris.

2 MR. HARRIS: Thank you. I would like to go
3 back and revisit this issue, okay?

4 THE COURT: Okay.

5 MR. HARRIS: Here's the issue: The Court
6 directly identified that Flovent was one of the
7 controller medications; it was the controller
8 medication that she was on at the time.

9 The question is, is we should be able to
10 argue -- the issue is we should be entitled to argue
11 facts that are in evidence.

12 Here's a fact that's in evidence: Ms. Mears
13 testified, um, in her deposition, that she had just
14 started Mercedes on Flovent four days prior. We had
15 testimony that it take months for a controller
16 medication to work as it's designed to work. That's a
17 fact in evidence.

18 If that's something that we want to argue, is
19 that, listen, Flovent was discontinued, and it wasn't
20 restarted or it wasn't administered continually, it
21 wasn't restarted until three, four days before October
22 7, 2008. That's a fact in evidence. We should be able
23 to argue that. I understand the Court's ruling is that
24 we can't argue that that's the sole proximate cause.

25 THE COURT: Or any kind of proximate cause.

1 I don't believe there's any evidence from any expert
2 that was allowed to give an opinion on this issue. We
3 had all sorts of motions that said no expert gets to
4 say, because it was undisclosed opinion, so no expert
5 was allowed to say Flovent was on a more probable than
6 not basis either a contribution to the cause of
7 Mercedes' deaths or was the cause of Mercedes Mears'
8 death.

9 MR. HARRIS: Your Honor, the problem with
10 that is the whole notion of uncontrolled asthma. You
11 can't have uncontrolled asthma without a failure to
12 stay on and regularly take controller medications, of
13 which Flovent is one. That's the only -- I just want
14 to -- I want to make sure I get some clarification now.

15 Now, to say that that was the only proximate
16 cause, I think there's a jury instruction that deals
17 with that, there may be more than one proximate cause
18 of an injury. So I just think -- I don't -- I want to
19 make sure we don't have a ruling that ties our hand or
20 impairs our ability to argue facts that are already in
21 evidence.

22 THE COURT: Okay. You have two experts,
23 right? Dr. Redding and Doctor...

24 MR. BARCUS: Montanaro.

25 THE COURT: Montanaro.

1 MR. HARRIS: And we also have the benefit of
2 a strenuous cross-examination of plaintiff's expert.

3 THE COURT: Okay. Let's start with the
4 strenuous cross-examination of plaintiff's expert from
5 Nebraska. Did he say in any way, shape, or form
6 anything about Flovent?

7 MR. HARRIS: He said controller medications.

8 THE COURT: Okay, but he didn't say Flovent?

9 MR. HARRIS: Which Flovent is one --

10 MR. BARCUS: He disagreed with regard to --

11 MR. HARRIS: I'm addressing the Court at this
12 point.

13 THE COURT: One at a time, Mr. Barcus,
14 please.

15 MR. HARRIS: He testified as to the -- he
16 testified regarding the importance of staying on
17 controller medications. As a matter of fact, during my
18 cross-examination of him, I asked him specifically:
19 That's the first thing you ask patients when they come
20 into your office is what medications are you on? So
21 every single expert that's testified that's
22 knowledgeable of this subject matter has testified that
23 controller medications are paramount to properly
24 controlling asthma.

25 Now, we know for a number of years that

1 Flovent was the controller medication. But I think,
2 you know, I just want to make sure that the record's
3 clear, that the Court's clear as to what clarification
4 we need on this point.

5 THE COURT: Okay. Nothing came out of the
6 doctor from Nebraska's mouth about Flovent being the
7 cause or contributing to the death of Mercedes Mears.

8 MR. MOBERG: Not in those specific terms.

9 THE COURT: Okay. Now, let's move on to Dr.
10 Larson. Anything come out of his mouth about Flovent
11 causing or contributing to the death of Mercedes Mears?

12 MR. HARRIS: Your Honor, you're using the
13 term "Flovent," but to do that analysis--

14 THE COURT: No.

15 MR. HARRIS: We have to use --

16 THE COURT: This motion is directly on
17 Flovent being the cause or contributing to the death.

18 MR. HARRIS: We're talking about controller
19 medications. There's ample testimony that controller
20 medication is causally, you know, there's a causal
21 relationship there. There's just no way to get around,
22 Flovent is the controller medication, is the primary
23 controller medication that she was on. Just because
24 counsel doesn't like it --

25 THE COURT: Okay.

1 MR. HARRIS: Just doesn't want --

2 THE COURT: Well, I'm not finished yet. Did
3 Dr. Larson say Flovent or lack of Flovent was on a more
4 probable -- medical probability basis the cause or
5 contribution to the death of Mercedes Mears? He didn't
6 say --

7 MR. HARRIS: Judge, we attacked Dr. Larson's
8 opinion on the basis that he did not have the benefit
9 of the refill records. He admitted that. So to the
10 extent we can say that Dr. Larson's opinion that
11 Mercedes died of something other than an asthma attack,
12 the basis or the facts upon which that opinion was
13 based, it's shifting sands. He admitted that on the
14 stand, that this was a missing piece. He didn't have
15 the pharmacological data.

16 So, I mean, we can -- I just want to make
17 sure that the -- okay. As I understand the Court's
18 order now, or ruling, is that we're permitted to say
19 that Mercedes died of uncontrolled asthma or poorly
20 controlled asthma. Okay. I think we can operate
21 within those. Thank you.

22 THE COURT: That's my ruling on that.

23 Is there another motion for me?

24 MR. LINDENMUTH: Your Honor, the second part
25 of that motion, of course, is going along with

1 Instruction No. 29, is also any allegation that she
2 died of an upper respiratory tract infection. And I
3 think they're attempting to elicit such testimony
4 indicating that she came to school with a cold or this,
5 that, or the other thing, but there's no expert
6 testimony indicating that in fact the cold caused her
7 death.

8 THE COURT: What about the autopsy?

9 MR. BARCUS: Autopsy didn't show it. It
10 showed inflammation. That's chronic inflammation as a
11 result of asthma, which is always there with
12 asthmatics. It did not show an upper respiratory
13 infection. And, in fact, Dr. Reay corrected Mr. Harris
14 when he tried to interchange those terms, you may
15 recall, he tried to change "inflammation" to
16 "infection," and Dr. Reay caught him and said no.

17 MR. HARRIS: We already have Dr. Reay --
18 well, I'll wait until you finish.

19 MR. LINDENMUTH: Our motion is specific to
20 upper respiratory tract infection.

21 Thank you, Your Honor.

22 THE COURT: You get the last word.

23 So, Mr. Harris, where are we on this one?

24 MR. HARRIS: Well, Your Honor, it just
25 depends on what the Court's inclination is at this

1 point. I can tell you that Dr. Reay did not say
2 unequivocally that there was no upper respiratory tract
3 infection; he said that inflammation may be caused by a
4 viral infection or bacterial infection. That was how
5 he parsed it out.

6 Then he said that it may be caused by other
7 things, but he didn't exclude, he said there was
8 chronic inflammation, which is -- the overarching issue
9 was is that's entirely consistent with an asthmatic
10 presentation. That was the basis of Dr. Reay's
11 opinion.

12 So to try and somehow parse out facts and say
13 which facts are already in evidence that we can or
14 can't argue, I'm just somewhat perplexed by this.

15 THE COURT: Where's the evidence of an upper
16 respiratory infection?

17 MR. HARRIS: The last visit, that's Exhibit
18 524, would have been the 7-22-2008 visit to Dr.
19 Larson's office that was made.

20 There's also evidence where Mr. Garrick
21 testified that Ms. Mears told him that Mercedes was
22 congested. That's evidence that Mercedes was
23 congested.

24 THE COURT: Who said this now?

25 MR. HARRIS: Don Garrick testified that Ms.

1 Mears told him that Mercedes was congested when he
2 spoke to them the day afterwards. Plaintiffs dispute
3 that; they can dispute it all they want, but there's--

4 THE COURT: Okay, the 7-22-08 visit, Harris
5 versus Drake?

6 MR. HARRIS: Your Honor, that doesn't apply
7 in this case.

8 THE COURT: I mean, you're talking about an
9 issue, she came in and saw Dr. Larson on July 22nd of
10 '08. That's...

11 MR. LINDENMUTH: Over two months.

12 THE COURT: Are you going to say she had a
13 cold for two months?

14 MR. HARRIS: Oh, yeah, absolutely. Your
15 Honor, we're talking about chronic inflammation that
16 was present. And I think the Court's identified
17 already that when you talk about Harris vs. Drake and
18 its applicability, that has very limited applicability.
19 We're talking about a chronic asthmatic condition. And
20 there's testimony that the presentation that was noted
21 is present for weeks, if not months, so there's ample
22 evidence in the record, so...

23 THE COURT: Okay.

24 MR. HARRIS: That's...

25 THE COURT: So if that's all the evidence

1 there is, then motion's granted as far as there being
2 some sort of, you know, bronchitis or cold or something
3 like that. But, obviously, the motion's denied as with
4 respect to asthma. Asthma, I think I already ruled, is
5 not a Harris vs. Drake situation. If you have asthma,
6 you pretty much have it chronically.

7 MR. BARCUS: There's no dispute she had
8 persistent asthma.

9 MR. HARRIS: Thank you, Your Honor.

10 THE COURT: All right. Next one.

11 MR. LINDENMUTH: That would be it as far as
12 any form of a directed verdict. But are we going to
13 deal with those issues in the instructions or are they
14 just precluded from arguing or how does the Court want
15 to address that?

16 THE COURT: I think you both, you all know
17 pretty much where I am with the instructions.

18 MR. LINDENMUTH: All right.

19 MR. HARRIS: Your Honor, there's...

20 THE COURT: Are we ready for exceptions and
21 objections?

22 MR. HARRIS: There's an issue regarding the
23 verdict form, too.

24 THE COURT: I've been working on the verdict
25 form, trying to get that issue.

1 MR. BARCUS: Non-economic.

2 MR. HARRIS: Yeah. The modifications that
3 the Court indicated would be made. I don't know that
4 was --

5 MR. BARCUS: Non-economic --

6 MR. HARRIS: Did you folks revise what the --

7 MR. BARCUS: There's a non-economic --

8 THE COURT: Here's the verdict form that I
9 think I've submitted.

10 THE CLERK: I'll print another copy.

11 THE COURT: If you can review that. You can
12 review the final set of jury instructions somewhere.

13 (Pause in Proceedings)

14 MR. LINDENMUTH: On the verdict form, Your
15 Honor, we noted that at question D regarding Jeanette
16 Mears --

17 MR. BARCUS: 3D.

18 MR. LINDENMUTH: Three D, the word "and"
19 should be present. And, let's see...

20 THE COURT: And with reasonable probability
21 to be experienced in the future, right?

22 MR. BARCUS: The same as the above, 2D, it's
23 just the "and" is missing.

24 THE COURT: Okay. That's an easy one.

25 MR. LINDENMUTH: Yeah, that's it.

1 MR. BARCUS: It looks like just that easy
2 one, Your Honor.

3 THE COURT: I'm thinking maybe it would be
4 prudent for you to just look over these jury
5 instructions one last time before Mr. Matson goes to
6 the effort of printing out 16-plus copies for the jury,
7 plus all the copies for the attorneys, so I'm going to
8 have him make one extra copy of this.

9 So, let's see. We changed that verdict form,
10 right? Did I have that there? You already changed it?

11 THE CLERK: Yes, with the "and."

12 THE COURT: So I will have him make a copy of
13 that. Please look these over. I think we're going to
14 be ready to do the formal exceptions and objections, I
15 hope.

16 MR. LINDENMUTH: I'm ready to go, Your Honor,
17 taking a final look here.

18 THE COURT: Okay. Good.

19 MR. BARCUS: Thank you, Your Honor.

20 MR. LINDENMUTH: It looks good.

21 THE COURT: We'll take a break.

22 MR. LINDENMUTH: Thank you, Your Honor.

23 (Recess Taken)

APPENDIX NO. 2

1 MONDAY, OCTOBER 17, 2011; TACOMA, WASHINGTON

2 --oo0oo--

3 (The following is an excerpt of the testimony of Peggy
4 Walker that occurred from approximately 4:09 to 4:20 p.m.)

5 DIRECT EXAMINATION

6 BY MR. BARCUS:

7 Q All this occurred, and that took what, seven, eight,
8 nine minutes?

9 A I told you I was not looking at a clock. I know that
10 the first puff I gave her, we did wait a couple minutes
11 and then did the second puff, and then Ms. Marge came
12 in and Ms. Wolfe was there. She knocked because they
13 were asking what's going on. I explained, you know, I
14 gave her her medication, she brought it in, she had
15 tried.

16 I showed them where the medicine was. We
17 were all looking at the counter. Mercedes was
18 explaining to them, too, yes, this is the medication,
19 it's on the counter. I think she went to grab at it
20 and it knocked off onto the floor, so Ms. Marge picked
21 it up. She didn't ask my opinion. She didn't say
22 anything. Her first gut reaction, as a caring, loving
23 adult was she picked it up and gave her another dose of
24 the medicine. I mean, it was clear it wasn't working.
25 So she attempted to do what she could for her. And

1 Mercedes showed her where it was on the counter and
2 knocked it onto the floor.

3 Q Are you trying to convey to this jury that Mercedes was
4 in a state that she could explain what medication that
5 she had taken or give -- make any words ---

6 MR. MOBERG: Objection to the form of the
7 question. It's argumentative, Your Honor. Seems
8 argumentative.

9 THE COURT: Objection overruled.

10 A She had it in her hand. I mean, I didn't go searching
11 through her bag or backpack or coat for it.

12 Q (By Mr. Barcus) Listen to my question, please. I'm
13 just trying to ascertain. You're not trying to tell
14 this jury that Mercedes was in a state that she could
15 actually speak words to explain anything?

16 A She did initially. And then I explained to Marge and
17 Angie when they came in what was going on. She looked
18 and pointed at the inhaler laying on the counter. She
19 was the one that knocked it off onto the floor.

20 Q So these sequence of events that I've gone through, all
21 these things happened before Mercedes went down on the
22 floor?

23 A Yes.

24 Q Okay. So there was -- at that period of time when she
25 was conscious, fully conscious, screaming, saying, I'm

1 going to die, before she goes on the floor and has an
2 altered sense of consciousness where an Epi-Pen could
3 have been administered--

4 MR. MOBERG: Objection. Argumentative.
5 Misstates the evidence.

6 THE COURT: Objection sustained.

7 Q (By Mr. Barcus) During the seven or eight or nine
8 minutes that went by before Mercedes was on the floor,
9 could she have self-administered an Epi-Pen?

10 MR. MOBERG: Objection, Your Honor. It's
11 irrelevant. We're dealing with asthma.

12 MR. BARCUS: No, Your Honor. I object to the
13 speaking objections.

14 THE COURT: Objection overruled.

15 THE WITNESS: I wouldn't just poke a child
16 with an Epi-Pen because she's having an asthma attack.

17 MR. BARCUS: Your Honor--

18 THE WITNESS: They're two separate items. I
19 think you're confusing people. Asthma is one illness
20 and Epi-Pen for food allergies is a totally different
21 issue. If she would have come in carrying a banana or
22 carrying a carrot or some food item or if Jada would
23 have said we ate breakfast, there was no food
24 conversation.

25 The child, Mercedes, came in with an inhaler

1 in her hand. She obviously thought she was having an
2 asthma attack. She wanted us to help her.

3 MR. BARCUS: Objection, Your Honor. Move to
4 strike the nonresponsive portion of the question.

5 THE COURT: Objection sustained and motion to
6 strike granted.

7 MR. BARCUS: Ask the Court to instruct the
8 jury to disregard.

9 THE COURT: The jury will disregard the
10 answer of the witness, please.

11 Q (By Mr. Barcus) You don't know what Mercedes thought,
12 did you?

13 A I do. She told me I'm having an asthma attack. She
14 gives me the inhaler. You're asking me to assume
15 things. I think the child -- I mean, to me, if you're
16 ten or eight years old, this probably wasn't her first
17 asthma attack. I think she would know herself, her
18 body, herself.

19 Q Did you know that there was a doctor's order there
20 allowing Mercedes to self-administer an Epi-Pen?

21 A For asthma? There was no doctor --

22 Q Allergic emergency.

23 A Asthma is not considered the--

24 Q I'm not asking for your opinion. You're not qualified
25 to render a medical opinion or diagnosis, are you?

1 A Okay. You're asking me with all my experience what I
2 would do.

3 Q No. Listen to my question: Did you know at any time
4 that there was a doctor's order there in the nurse's
5 office that allowed Mercedes Mears to self-administer
6 an Epi-Pen in the case of an allergic emergency?

7 MR. MOBERG: Objection. Argumentative.

8 THE COURT: Objection overruled.

9 A An Epi-Pen is not--

10 Q (By Mr. Barcus) Is the answer yes or no, please.

11 A You're--

12 MR. BARCUS: Your Honor, I would ask that the
13 witness answer the question rather than give these
14 long-winded, non-responsive answers.

15 THE WITNESS: You're talking apples and
16 oranges.

17 MR. MOBERG: Objection. That's
18 argumentative, Your Honor.

19 THE COURT: Well, the objection is sustained.
20 Please just listen to the question.

21 THE WITNESS: It's apples and oranges though.
22 He's not making sense. He's talking about two
23 different things. You can't talk about asthma and why
24 didn't I stick her with an Epi-Pen or let her stick
25 herself with an Epi-Pen. How? That's two separate

1 items.

2 I don't have a doctor's order saying if see
3 asthma, stick her with an Epi-Pen. There's no doctor's
4 order that gives me that permission. That permission I
5 would have is the child's given me her inhaler to give
6 her the inhaler. I have no physician's order telling
7 me to stick her with an Epi-Pen over an asthma attack.

8 MR. BARCUS: Move to strike the
9 non-responsive portion and have the jury instructed.

10 THE COURT: Motion to strike --

11 MR. BARCUS: And ask the jury be instructed.

12 THE COURT: Ladies and gentlemen, please
13 disregard the answer.

14 Ladies and gentlemen, we're going to stop
15 here for the day. Tomorrow, we're going to try and get
16 going as close to 9:00 as we possibly can. Go ahead
17 and leave those notepads on your chairs. See you back
18 here, try to get going as close to 9:00 o'clock as we
19 possibly can. Thank you very much. Be sure to wait
20 for Mr. Matson in the jury room for just a moment,
21 please.

22 (Jury Leaves the
23 Courtroom)

24 THE COURT: Have a seat for a minute, Ms.
25 Walker.

1 Ms. Walker, please, I've asked you this
2 several times. I'm going to ask you one more time: If
3 you would please listen to the question that's being
4 asked of you, make sure you understand that question,
5 and if you understand the question, please answer the
6 question you're being asked.

7 THE WITNESS: What if I don't understand the
8 question?

9 THE COURT: Well, don't answer it. But make
10 sure you answer the question that's being asked of you.
11 Don't answer some other question that's not being asked
12 of you.

13 THE WITNESS: I was trying to answer his
14 questions. He's very argumentative and bullying. I
15 feel very harassed and bullied. I feel like I've
16 explained myself over and over, and to have someone
17 attacking on you. That's not in my daily life--

18 THE COURT: I understand, Ms. Walker.

19 THE WITNESS: He's very confusing.

20 THE COURT: Ms. Walker, if you don't
21 understand the question, please ask the attorney to
22 restate the question. But don't try and answer a
23 question that hasn't been asked of you.

24 THE WITNESS: I'm trying to stick within what
25 the question of what he asked. I'm sorry.

1 THE COURT: If you don't understand the
2 question, ask the attorney to restate the question.

3 THE WITNESS: But why is he allowed to bully
4 me? Do I sit here and get to be bullied? I mean, I've
5 just never been a witness before.

6 THE COURT: I understand.

7 THE WITNESS: And I just didn't expect to be
8 attacked. I thought it would be more of a I'm giving
9 my statement, this is what happened.

10 THE COURT: Okay. Go ahead and step down.
11 Please watch your step.

12 THE WITNESS: Okay.

13 MR. BARCUS: May Ms. Walker be excused for
14 the time being, Your Honor? I have a matter to take up
15 with the Court.

16 MR. MOBERG: I'm not going to lie, Your
17 Honor, we need to finish her testimony. She'll be the
18 first witness in the morning.

19 MR. BARCUS: That's not what I'm suggesting
20 right now. I'm excusing her for now.

21 THE COURT: Thanks, Ms. Walker. You want her
22 back here tomorrow morning?

23 MR. MOBERG: Yes, we're going to -- I have
24 some questions to ask her and I don't know if counsel's
25 finished or not. I thought he was, but...

1 THE COURT: Thanks, Ms. Walker. We will see
2 you tomorrow morning as close to 9:00 as possible.

3 (Witness leaves the
4 Courtroom)

5 THE COURT: So, Mr. Barcus --

6 MR. BARCUS: Yes, Your Honor.

7 THE COURT: Hold on just a minute.

8 Did you hear what the witness was saying?

9 MR. BARCUS: I heard what the witness was
10 saying.

11 THE COURT: What did she say? She said
12 you're bullying her. How do you feel about that?

13 MR. BARCUS: That's unfortunate, because I
14 was trying to be as kind as I could to her, but she's
15 doing everything she can to be evasive and not answer
16 my questions. I've asked all the gallery and everyone
17 about their impressions of her. She is absolutely
18 trying to -- she has an agenda, she's obviously been
19 prepared by the defense. She's doing everything she
20 possibly can to carry through their agenda and not
21 answer my questions. It's very unfortunate that she
22 can't answer a simple question.

23 I asked her very carefully, I've been doing
24 everything I can to be as nice as I can to her, but she
25 simply will not answer my questions. You've heard me

1 ask questions up to six times, a very simple question.
2 I've taken them down to the very elementary, to ask
3 Heather, and she will not answer the question. She has
4 an agenda. There's no question about that. She does
5 not want to answer the questions.

6 And then, Your Honor, I wasn't going to bring
7 it up, not once, but twice, Mr. Moberg made a speaking
8 objection and coached her with regard to asthma, and
9 she picked right up on that. And I ask the Court to
10 admonish counsel and indicate that if he does it again,
11 he's going to be sanctioned. Speaking objections and
12 coaching the witness, not once, but twice, the record
13 will reflect. We should not have that ever again in
14 this trial.

15 THE COURT: Mr. Moberg?

16 MR. MOBERG: First of all, I do believe that
17 Mr. Barcus is bullying the witness. I think he went
18 too far. I think he was badgering. This witness was
19 trying to answer the questions. What he's implying in
20 the questions and in the bullying, and if you listen to
21 the tone of his voice, it's not reflected on the
22 record, but watching, listening to his tone of voice,
23 his body gesture, his posture, he's leaning forward,
24 everything else, I do think that a reasonable-minded
25 person could see that as bullying. And what he's

1 implying is that it was this witness who caused the
2 death of Mercedes Mears. She was trying to explain
3 herself and he kept asking the questions over and over
4 again. He didn't like the answer. He'd come back
5 again. I think that's badgering and bullying. That's
6 issue one.

7 And I think that the Court was appropriate.
8 And I think Mr. Barcus might be well-served to think
9 about that a little bit, because, frankly, I think
10 that's a dangerous tactic for any lawyer.

11 As far as the speaking objection, in order to
12 make the objection as to relevance, Your Honor, I was
13 very terse in my words and indicated the reason it
14 wasn't relevant was because this witness believed she
15 was dealing with asthma, and the document they were
16 requesting about had to do with food allergies.

17 I don't know how else I can say that and
18 fairly apprise the Court of the basis for my relevance
19 objection. If I just said relevance, I could see the
20 Court would wonder why. And it's not relevant to take
21 a food allergy plan and ask the witness why they didn't
22 do everything in the food allergy plan when the witness
23 has clearly said we're dealing with an asthma attack.
24 So I don't know how else -- I know what speaking
25 objections are, and, frankly, I'm very careful not to

1 do that. I think counsel has made more speaking
2 comments in front of the jury in his questioning.

3 But if you think I made a speaking objection,
4 then let me know, and I'll try to correct my way, Your
5 Honor, but I think it was an appropriate objection. It
6 wasn't for coaching, it was so the Court could
7 understand why I believe it was not relevant.

8 MR. BARCUS: I will remind the Court, Your
9 Honor, that we had a telephonic hearing during the most
10 recent depositions of Ms. Gibson and Ms. Christensen.
11 Your Honor had to consider that Mr. Moberg was coaching
12 the witnesses at that time and made a specific order
13 admonishing him not to coach the witnesses during the
14 course of those depositions. This is not the first
15 time that we have had this.

16 Now, we're in the middle of court, and he's
17 in front of a jury, and he's doing it again. He
18 obviously was coaching this witness when he said
19 asthma, not once, but twice, and she picked up on it,
20 and that was her response after that coaching
21 objection.

22 We should not have any further coaching
23 objections whatsoever. That's his propensity.
24 Obviously, he's done it before. He was doing it at the
25 deposition. The Court's already had to hear our motion

1 and order in that regard and now he's doing it again.

2 THE COURT: All right. Number one, Mr.
3 Barcus, you are an imposing figure and everybody knows
4 you're a big guy. You're just going to have to calm
5 down. I would appreciate it if you just stand as far
6 back from this witness as you possibly can. She
7 obviously feels a little something. I can't think of
8 the right word right now, but she just feels like
9 you're bullying her. And if that's the way she feels,
10 then you just have to be careful about that. That's
11 number one.

12 Number two, I do not want hear any speaking
13 objections. I know what the issues are in this case.
14 We've had so many pretrial motions that I'm very
15 well-educated on what the issues are, so I don't want
16 to hear any speaking motions either, or objections, I
17 mean. So no speaking objections, number one.

18 And, number two, Mr. Barcus, you need to
19 realize you're an imposing figure, and if the witness
20 feels bullied, you got to pick up on that because the
21 jury is certainly going to pick up on it.

22 That's all I have to say today.

23 MR. BARCUS: Thank you, Your Honor.

24 THE COURT: See you at 9:00 o'clock tomorrow.

25 MR. MOBERG: Very well.

APPENDIX NO. 3



**SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE 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;

Plaintiff,

v.

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

Defendant(s).

NO. 09-2-16169-6

DEFENDANTS' PROPOSED JURY
INSTRUCTIONS WITH CITATIONS

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Respectfully submitted November 14th, 2011.

Jerry J. Moberg, WSBA# 5282
Jessie Harris, WSBA#29399
Attorneys for Defendants

INSTRUCTION NO. _____

Under a Washington state statute pertaining specifically to schools, a public school district may, but is not required to, provide for the administration of oral medication to students who are in the district's custody at the time of medication administration, provided that the school district is:

(1) in receipt of a written and current request from a parent or legal guardian of the student to administer the oral medication; and

(2) in receipt of a written and current request from a doctor prescribing the medication for the student and authorizing its administration to the student for a valid health reason during hours when the school is in session or when the student is under the supervision of school officials. The school official is obligated to administer the medication in strict compliance with the doctors order.

If a school employee administers a prescribed oral medication in substantial compliance with such written orders, the employee and school district are not liable for any harm to the student resulting from administration of the oral medication.⁸

⁸ RCW 28A 210 270.