

FILED
COURT OF APPEALS
DIVISION II

2013 MAR -7 AM 9:37

STATE OF WASHINGTON

BY W
DEPUTY

Cause No. 43121-1-II

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

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

Appellants,

vs.

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

REVISED BRIEF OF RESPONDENTS

JERRY J. MOBERG, WSBA No. 5282
Attorneys for Respondent
451 Diamond Drive
Ephrata, WA 98823
(509) 754 2356

2/11/36-13

TABLE OF CONTENTS

Table of Contents

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR AND ISSUES RELATED TO THE DISTRICT’S CROSS-APPEAL3

 A. ASSIGNMENT OF ERROR 1: THE TRIAL COURT ERRED IN REFUSING TO GRANT THE DISTRICT’S MOTION FOR SUMMARY JUDGMENT BASED UPON THE IMMUNITY PROVISIONS OF RCW 28A.210.270.....3

 B. ASSIGNMENT OF ERROR 2: THE TRIAL COURT ERRED IN REFUSING TO DISMISS JADA’S “BYSTANDER” CLAIM.....3

III. COUNTER STATEMENT OF THE CASE.....4

 A. PROCEDURAL FACTS.....4

 B. HISTORICAL FACTUAL BACKGROUND5

 C. THE EVENTS OF OCTOBER 7, 2008.....14

 D. SIGNIFICANT PRETRIAL RULINGS20

 E. EVENTS OCCURRING DURING THE COURSE OF TRIAL23

IV. ARGUMENT.....28

 A. STANDARD OF REVIEW28

 B. THE JURY’S VERDICT IS NOT INCONSISTENT OR CONTRARY TO THE EVIDENCE IN THE CASE WITH RESPECT TO PROXIMATE CAUSE30

C. A NEW TRIAL SHOULD NOT HAVE BEEN GRANTED PURSUANT TO CR 59(A)(2) SINCE THERE WAS NO ATTORNEY MISCONDUCT	49
1. THE EVIDENCE RELATED TO “FLOVENT” WAS PROPER.....	49
2. THERE WAS NO MISCONDUCT ON THE PART OF DEFENSE COUNSEL	56
D. SUBSTANTIAL JUSTICE WAS DONE IN THIS CASE.	62
V. ARGUMENTS IN SUPPORT OF CROSS-APPEAL	68
A. THE DISTRICT AND ITS EMPLOYEES WERE IMMUNE FROM LIABILITY UNDER RCW 28A.210.270	68
B. THE BYSTANDER CLAIM DOES NOT APPLY TO THIS CASE. ..	69
VI. CONCLUSION	71

TABLE OF AUTHORITIES

Cases

<i>A.C. ex rel. Cooper v. Bellingham School Dist.</i> , 125 Wash.App. 511, 521, 105 P.3d 400 (2004).....	62
<i>Alvarez v. Keyes</i> , 76 Wash.App. 741, 743, 887 P.2d 496 (1995).....	32
<i>Bennion v. LeGrand Johnson Const. Co.</i> , 701 P.2d 1078, 1083 (Utah, 1985).....	37
<i>Bering v. Share</i> , 106 Wash.2d 212, 220, 721 P.2d 918 (1986)).....	29
<i>Campbell v. ITE Imperial Corp.</i> , 107 Wash.2d 807, 817–18, 733 P.2d 969 (1987).....	29
<i>Canron, Inc. v. Fed. Ins. Co.</i> , 82 Wash.App. 480, 486, 918 P.2d 937 (1996).....	29
<i>Chhuth v. George</i> , 43 Wash.App. 640, 719 P.2d 562, (1986).....	34
<i>City of Aurora v. Loveless</i> , 639 P.2d 1061, 1063 -1064 (Colo., 1981).....	36
<i>Colbert v. Moomba Sports, Inc.</i> , 163 Wn.2d 43, 176 P.3d 497 (2008).....	69
<i>Daly v. Lynch</i> , 24 Wash.App. 69, 76, 600 P.2d 592, 597 (1979).....	36
<i>Edwards v. Le Duc</i> , 157 Wash.App. 455, 459, 238 P.3d 1187 (2010).....	29
<i>Estate of Lapping v. Group Health Co-op. of Pugen Sound</i> , 77 Wn. App. 612, 892 P.2d 1116 (1995).....	60
<i>Estate of Stalkup v. Vancouver Clinic, Inc., P.S.</i> , 145 Wash.App. 572, 585-586, 187 P.3d 291, 298 (2008).....	32
<i>Fitzsimmons v. Wilder Mfg. Co.</i> , App.Div., 384 N.Y.S.2d 523 (1976).....	36
<i>Foster v. Giroux</i> , 8 Wash.App. 398, 506 P.2d 897 (1973).....	32

<i>Garcia v. Providence Medical Center</i> , 60 Wn. App 635, 806 P. 2d 766 (1991).....	60
<i>Gilmartin v. Stevens Inv. Co.</i> , 43 Wash.2d 289, 261 P.2d 73 (1953), 43 Wash.2d 289, 266 P.2d 800 (1954).....	32
<i>Gjerde v. Fritzsche</i> , 55 Wash.App., 387, 392-393, 777 P.2d 1072, 1075 (1989).....	48
<i>Harrell v. Washington State ex rel. Dept. of Social Health Services</i> , 170 Wash.App. 386, 408-409, 285 P.3d 159, 171 (2012)	29
<i>Harris v. Drake</i> , 116 Wash.App. 261, 265, 65 P.3d 350 (2003).	52
<i>Herring v. Department of Soc. and Health Servs.</i> , 81 Wash.App. 1, 16, 914 P.2d 67 (1996).....	32
<i>Holland v. Columbia Irr. Dist.</i> , 75 Wash.2d 302, 304, 450 P.2d 488 (1969).....	29
<i>Hoskins v. Reich</i> , 142 Wn.App. 557, 174 P.3d 1250 (2008)	52
<i>Johnson v. Tradewell Stores, Inc.</i> , 24 Wash.App. 53, 600 P.2d 583 (1979) ...	32
<i>Kiewit-Grice v. State</i> , 77 Wash.App. 867, 871-872, 895 P.2d 6, 8 (1995).....	32
<i>Kirk v. WSU</i> , 109 Wn. 2d 448, 746 P.2d 285 (1987).....	60
<i>Kuhn v. Schnall</i> , 155 Wash.App. 560, 228 P.3d 828 (2010)	61
<i>Marsh v. Merrick</i> , 28 Wash.App. 156, 161, 622 P.2d 878, 882 (1981).....	63
<i>Minger v. Reinhard Distributing Co., Inc.</i> , 87 Wash.App. 941, 946, 943 P.2d 400, 402 (1997).....	48
<i>Pepperall v. City Park Transit Co.</i> , 15 Wash. 176, 45 P. 743, 46 P. 407 (1896).....	32
<i>Rasmussen v. Sharapata</i> , 895 P.2d 391, 397 (Utah App., 1995).....	37

<i>Salas v. Hi-Tech Erectors</i> , 168 Wn. 2d 644, 230 P.3d 583(2010).....	60
<i>Snyder v. Sotta</i> , 3 Wash.App. 190, 473 P.2d 213 (1970).....	67
<i>Stanley v. Cole</i> , 157 Wash.App. 873, 887, 239 P.3d 611 (2010).....	28
<i>State v. Avendano-Lopez</i> , 79 Wash.App. 706, 710, 904 P.2d 324 (1995)	60
<i>State v. Gresham</i> , 173 Wn.2d 405, 425 (2013).....	30
<i>State v. Guloy</i> , 104 Wash.2d 412, 421, 705 P.2d 1182 (1985).....	60
<i>State v. Hanna</i> , 87 Wash. 29, 151 P. 83 (1915).....	36
<i>State v. Hopson</i> , 113 Wash.2d 273, 284, 778 P.2d 1014 (1989).	30
<i>State v. Peerson</i> , 62 Wash.App. 755, 765, 816 P.2d 43 (1991), review denied, 118 Wash.2d 1012, 824 P.2d 491 (1992).....	32
<i>State v. Perez-Cervantes</i> , 141 Wash.2d 468, 482, 6 P.3d 1160 (2000)	60
<i>State v. Smith</i> , 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).....	30
<i>Storey v. Storey</i> , 21 Wash. App. 370, 372, 585 P.2d 183, 184 (1978)	66
<i>Thompson v. Grays Harbor Community Hosp.</i> , 36 Wash.App. 300, 309- 310, 675 P.2d 239, 244 - 245 (1983)	32
<i>Van Cleve v. Betts</i> , 16 Wash.App. 748, 559 P.2d 1006, (1977)	35
<i>Washburn v. City of Federal Way</i> , 169 Wash.App. 588, 606, 283 P.3d 567, 577 (2012).....	30
<i>Washington Irr. and Development Co. v. Sherman</i> , 106 Wash.2d 685, 724 P.2d 997 (1986).....	53
<i>Wheeler v. Catholic Archdiocese of Seattle</i> , 124 Wash.2d 634, 642, 880 P.2d 29 (1994).....	32
<i>Winbun v. Moore</i> , 143 Wash.2d 206, 213, 18 P.3d 576 (2001).....	29

Statutes

RCW 28A.210.270.....68
RCW 28A.210.270(1).....68
RCW 28A.210.320.....7
RCW 28A.210.370.....7
RCW 28A.210.380.....7

Rules

CR 59(a)(9).....62
RAP 10.3(a)(4).....63
RAP 10.3(g).....63

I. INTRODUCTION

This is a purely factual appeal. The Appellant Parents¹ disagree with the jury's verdict ruling that the actions of the Bethel School District and its employees were not the proximate cause of the death of Mercedes Mears. The jury's verdict is supported with substantial evidence and should be honored by this court.

On the morning of October 7, 2008, just a few minutes before school started, Mercedes Mears suffered an acute and severe asthma attack just outside of the school office. Her sister Jada ran to the school office and sought help for her sister. Rhonda Gibson, the health clerk at the Clover Creek Elementary School, was notified. She immediately brought Mercedes into the office. She then called 911. In the intervening 7 ½ minutes she and three other staff members attended to Mercedes. Ms. Gibson properly determined that Mercedes was having an asthma attack. Ms. Gibson followed the doctor's order that was on file for Mercedes and administered Albuterol. She and the other staff members tried to calm Mercedes while they waited for the paramedics. They checked her pulse on more than one occasion. She had a detectable pulse and was breathing

¹ The Plaintiffs are Jeanette Mears, who brought the action on her own behalf and on behalf of her decedent daughter Mercedes and her minor daughter Jada, and Michael Mears, the spouse of Jeanette Mears and father of Mercedes and Jada. In this brief they will collectively be referred to as the Parents. Where clarity requires it, they will be identified individually.

during the entire time that they waited for the arrival of the paramedics. When the paramedics arrived, they immediately checked for and found a pulse. Since Mercedes had a detectable pulse, the paramedics did not start CPR at the school. Instead, the paramedics followed their emergency asthma protocol. They then moved Mercedes to the ambulance where they started CPR. They transported her to the hospital. Mercedes died at the hospital.

The cause of death was an acute and severe asthma attack. At trial, the Parents argued that Mercedes, in fact, had an allergic reaction that morning. They argued that the school staff should have followed the protocol set forth in a second doctor's order on file for Mercedes that pertained to allergic reactions and required an injection of epinephrine. The Parents also argued that the District staff should have started CPR before the paramedics arrived.

These issues were fairly presented to the jury over a period of eight weeks. The jury determined that the actions of the District and its employees were not the proximate cause of Mercedes death. The jury accepted the District's evidence that Mercedes had an asthma attack that day and that the school staff followed the proper doctor's order when tending to Mercedes. Impliedly, the jury also found that since Mercedes was breathing and had a detectable pulse, CPR was not required. The

Parents understandably disagree with the jury verdict. Nevertheless, they received a fair trial and the jury's verdict should be upheld.

II. ASSIGNMENTS OF ERROR AND ISSUES RELATED TO THE DISTRICT'S CROSS-APPEAL.

The District has filed a cross-appeal that initially raised issues related to (1) Order Excluding Dr. Rosen from testifying, (2) Order Denying the District's Motion for Summary Judgment regarding Duty, Breach and Proximate Cause, (3) Order Denying District's Motion to Dismiss Jada Mears's By-stander claim, and (4) Order Denying Defendants Motion for Reconsideration of the Order Denying Summary Judgment.²

A. ASSIGNMENT OF ERROR 1

The trial court erred in refusing to Grant the District's Motion for Summary judgment based upon the immunity provisions of RCW 28A.210.270?

Issue: Are the District and its employees covered under the immunity provisions of RCW 28A.210.270 when providing Mercedes with her oral asthma rescue medication?

B. ASSIGNMENT OF ERROR 2

The trial court erred in refusing to dismiss Jada's "bystander" claim?

Issue: Does Washington law allow for a "bystander claim" for close family members witnessing the failure of someone to save the life of a person imperiled by a sudden and unexpected illness?

² The District is withdrawing its Cross-Appeal related to the Order Excluding Dr. Rosen as moot.

17, 2012 the Parents filed a motion for a new trial or a judgment as a matter of law. (CP 3303) On February 17, 2012 the trial court entered an order denying the Parents motion for a new trial or judgment as a matter of law. (CP 4303) The Parents then filed this appeal.

B. HISTORICAL FACTUAL BACKGROUND⁵

Without citing to the record, the Parents claim that Mercedes “generally had good control” of her asthma and her allergies. (Opening Brief at 7) In fact, according to the testimony of Mercedes own doctor, Dr. Larson, her asthma was poorly controlled. (VRP 10-20-11, Larson 123:1 - 126:5-8) The major reason for her poorly controlled asthma was her failure to consistently take Flovent, the medication proscribed by her treating doctor to control her asthma. Flovent is an inhaled corticosteroid (ICS). ICS are the most potent and consistently effective long-term medications for asthma control. (Id at 122:25 -126:9) Jeanette Mears failed to give Mercedes her Flovent because she thought it made Mercedes asthma worse. (Id. 129:4- 20) During the time period from January 2003 until December 2007, the Parents regularly failed to fill her Flovent prescription. (Id. 131:22 – 133:14) Mercedes was hospitalized in December 2007 because of an exacerbation of her asthma. One of the

⁵ On several occasions Plaintiff cites to CP 340 – 1146 as support for a number of facts set forth in this appeal. This citation is to a declaration of Paul Lindenmuth submitted in support of Plaintiffs’ Motion for Summary Judgment (CP 253) Mr. Lindenmuth’s declaration is hearsay and not proper proof of any particular fact.

reasons for her exacerbation was her failure to take the prescribed Flovent. (Id 133:15 – 134:24) Her poor compliance with the use of Flovent continued in 2008. Id. Dr. Larson was not aware of her poor compliance with using Flovent until he was cross-examined at trial. He referred to her non-compliance with Flovent as “the missing piece of the puzzle.” (Id. 134:17- 135:4)

In fact, Mercedes asthma had progressed to the point that Dr. Larson proscribed four separate courses of Prednisone, a systemic corticosteroid, between January 31, 2007 and December 18, 2007. (Id 135:9 – 136:23) The need for Prednisone treatments was a clear indication that her asthma was poorly controlled. Id. The District’s forensic pulmonary specialist also agreed that Mercedes’ asthma was poorly controlled and that she died from “uncontrolled asthma.” (VRP 11-16-11, Dr. Montanaro 9:11 - 17:2)⁶

The Parents correctly cite the fact that the health clerk, Rhonda Gibson did not have any specific medical training. (Opening Brief at 8) Health Clerks are not required to have any specialized medical training.

⁶ These facts are critical because they explain why Mercedes had such a catastrophic asthma reaction that day.

In their factual recitation, the Parents next discuss the statutory and other obligations of the District.⁷ The Parents refer generally to RCW 28A.210 arguing that these statute places some duties on the District with respect to children with serious medical conditions. They cite the court to RCW 28A.210.260, which establishes some requirements for the administration of medications in school. The statute is self-explanatory. They next cite the court to RCW 28A.210.320 that requires the student to have all of her doctor's orders and medications at school before she can attend school. The statute defines a "life threatening condition." Mercedes Mears asthma was not a life threatening condition. (VRP 10-17-11 Walker 31:17- 32:3) The Parents then cite RCW 28A.210.370 relating to the requirements that apply to students with asthma. Again, the requirements of the statute are self-explanatory. They next cite to RCW 28A.210.380, which pertains to school guidelines when dealing with anaphylaxis, that again are self-explanatory.⁸ The Parents point out that the statute recommends administration of epinephrine if a child is having and anaphylaxis (allergic) event as long as the student has an appropriate doctor's order on file with the school. The Parents correctly point out that

⁷ This citation to statutes and regulations is actually argument and not a factual recitation. For convenience sake, the District will respond to these arguments now.

⁸ Mercedes died from a severe asthma attack, so the provisions of this statute have little, if any, significance in this case.

Mercedes had the right to self-administer epinephrine at school if she suffered from an anaphylactic event. She also had the right to self-administer the rescue medication Albuterol in the event of an asthma attack. The Parents refer the court to the District's Policy 3419 which also refers to actions that are required when a student suffers from asthma or anaphylaxis. The policy requires different actions for an asthma attack than are required for an anaphylactic (allergic) reaction.⁹

After citing to these statutes and District Policies the Parents argue "that it was all but an undisputed fact below, that on the date of Mercedes death, Bethel School District and its personnel failed to comply with the rules specifically designed to address exactly what happened here."¹⁰ (Parents' Brief 14-15) This argument begs the question. If, as the jury found in this case, Mercedes had an asthma attack at school, all of the required treatment protocols were followed.¹¹

The Parents argue that they were proactive and consistent in Mercedes care. They do not cite to the trial record to support this claim.

⁹ The Parents continue to confound the issues by not clearly delineating between rules and regulations that pertain to asthma reactions and those that pertain to anaphylactic (allergic) reactions. It is important to keep the distinction in mind since the rules and duties differ greatly between the two.

¹⁰ This is argument and not a factual statement. The evidence in this regard is disputed.

¹¹ Admittedly, if Mercedes was having an anaphylactic (allergic) reaction on that fateful morning, the District was required to administer epinephrine, which they did not. Certainly, if the jury had determined that this was an allergic reaction, they would have rendered a different verdict.

In fact, as noted *supra*, they were not consistent in providing Mercedes with her asthma controller medication. Admittedly, the Parents correctly had delivered appropriate medications to the District. However, they failed to point out that the Albuterol and Epi-Pen were not delivered to the school at the beginning of the year but were delivered on September 24, 2008, just a few days before Mercedes died. (VRP 11-16-11 Jeanette Mears Cross at 9:8- 10:2) The Parents delivered two doctor's orders to the school that year; one for asthma and another for allergic reactions. (VRP 11-07-11 Christensen at 462:8 – 464:13) (EX. 454-456) These were separate orders prescribed for separate conditions. Doctor Larson ordered the administration of Albuterol for any asthma event and the injection of epinephrine (EpiPen) for any anaphylactic (allergic) reaction. *Id.*

The Parents next argue that despite the requirements of legislation and District policy, Heidi Christiansen, a Bethel school nurse, failed to take measures necessary to ensure that Mercedes could safely attend school. Again, they fail to cite to the record to support this bold and argumentative statement. They claim that Ms. Christensen was unorganized and failed to complete emergency care plans. They claim that these deficiencies were known to the District for at least a year before

Mercedes death citing the court to CP 1452-1522.¹² This is a misstatement of the facts. Even more troubling is the Parents citation to CP 1450 through 1466, which is a discovery deposition of Kellie Meyer, a former Bethel employee. This testimony was not presented to the jury.¹³ To further support their allegation, the parents cite to CP 1467 – 1491, which is the transcript of a video-taped deposition of Carolyn Krieger, a parent, who was at the school near the time that Mercedes had her asthma attack. Ms. Krieger had no knowledge about Heidi Christensen’s performance and the issue was never discussed in the deposition. Finally, the Parents cite to CP 1492 – 1522, which is the video-taped discovery deposition of Sonja Ryskamp, one of Heidi Christensen’s supervisors. This transcript was not presented to the jury and the Parents did not order her actual trial testimony as part of the report of proceedings. The Parents bold statement is unsupported by the record and should be disregarded by the court.¹⁴

Next, the Parents’ claim that Ms. Christensen “failed to have a health care plan in place for Mercedes before the 2007-08 school year.”

¹² Again, the Parents do not cite to the trial record to support this allegation, but instead cite to the hearsay declaration of their counsel.

¹³ A preservation deposition was presented to the jury, but the Parents did not order that part of the Verbatim Report of Proceedings.

¹⁴ The citation to Appendix 14 refers to Trial Exhibit 336 which is a summary of a conference that occurred on September 10, 2008 related to pre-school children at a different school. Exhibit 336 has nothing to do with Mercedes Mears.

Again, they do not cite to the record to support this claim.¹⁵ In fact, an appropriate emergency care plan was in place before the 2007-08 school year. (VRP 11-07-11 Christensen at 433:18 - 441:10) (EX. 442, 449)

The Parents claim that because of Ms. Christensen's "incompetent performance" as a school nurse, she was subjected to an "extraordinary meeting" of school officials.¹⁶ This statement is false. In fact, Exhibit 336 detailed a meeting related to a pre-school program at a different elementary school. Ms. Christensen was not the focus of that meeting and it was not evaluative. It was merely a meeting of staff at the Spanaway Elementary school to clarify everyone's role in a pre-school program. This was a new program at Spanaway and was new to Ms. Christensen as well. The rules in the pre-school program were different from the rules that pertained to Mercedes. (VRP 11-02-11 Christensen at 193:24 – 200:6) (VRP 11-05-11 Christensen at 401:7 – 405:11)¹⁷

¹⁵ This is particularly troubling since the court rejected the initial filing of the Parents Brief for their failure to adequately cite to the record. They were given additional time to file a proper brief, but still have not cited to the record for many of the "facts" that they assert in their brief.

¹⁶ The Parents citation is Appendix 14. They are in fact addressing trial Exhibit 336.

¹⁷ The Parents claim that Ms. Christensen failed to complete health care plans and was "derelict" in her training duties citing CP 1454-1466. Again, this reference is to their counsel's declaration that was not presented to the jury. The court should disregard this and other portions of the Parents statement of facts that do not refer to the trial record.

Without any citation to the record, the Parents blithely state that Ms. Christensen's performance evaluations noted that she was particularly deficient in training staff and completing emergency healthcare plans. This is a disingenuous claim. In fact, Ms. Christensen's evaluations prior to Mercedes death were all satisfactory and did not contain any criticism regarding staff training or healthcare plans. (VRP 11-07-11 Christensen at 378:19 – 410:20) (VRP 11-3-11 Christensen at 363:21 – 364:6) (EX. 335 pp. 1126-1129) Likewise, her evaluation for the next school year, 2009-10 was positive in all respects. (VRP 11-07-11 Christensen at 410:24 – 412:8) (EX. 335, pp. 1120-1121) Admittedly, in the 2010-11 school year, Ms. Christensen had some difficulties early in the year with paperwork in a pre-school program, but this had absolutely nothing to do with her performance at Clover Creek two years earlier.¹⁸ (EX. 335, pp. 1110-1119)

The Parents mistakenly claim that "It was undisputed that Nurse Christensen failed to train Ms. Gibson in the lifesaving administration of an Epi-Pen . . ."¹⁹ In fact, the trial record indicates just the opposite. Ms.

¹⁸ Ms. Christensen testified that early in the 2010-11 school year she was under a great deal of stress related to issues with her son and having to deal with this lawsuit, which weighed heavily on her mind. (VRP 11-03-11 Christensen at 360:3 – 361:10)

¹⁹ Appellant's Opening Brief at 17. The Parents attempt to support this erroneous claim by citing to CP 1454. CP 1454, again, is a declaration filed by Attorney Lindenmuth in support of a summary judgment motion. CP 1454 is a portion of

Christensen trained Ms. Gibson on issues related to anaphylaxis and administration of the Epi-Pen. (VRP 10-31-11 Gibson at 64:18–65:8; 101:5–103:20) (VRP 11-01-11 Gibson at 157:9–158:25) The Parents claim that Ms. Christensen failed to complete a proper healthcare plan for Mercedes for 2007-08 and 2008-09, making it impossible for anyone to reference an emergency healthcare plan for Mercedes on October 7, 2008. Yet again, the Parents fail to cite to the record to support their claim. In fact, the assertion is false and misleading. Mercedes had a proper healthcare plan in place for the 2007-08 school year. (VRP 11-07-11 Christensen at 441:4–449:3) (EX. 312; EX. 449) This healthcare plan was then carried over to the next school year while the District waited for the Parents to bring in a new doctors order. (EX. 310)(VRP 11-01-11 Christensen at 5:4 –6:10; 25:24 – 26:6)(RP 11-02-11 Christensen at 118:6-17)

The Parents state at page 18 of their brief that Ms. Christensen was required to have a care plan in place for Mercedes environmental allergies and her asthma. Again, the Parents fail to cite to the record to support this erroneous statement. In fact, the evidence in the record is just the opposite. Healthcare plans were not required for environmental allergies

the discovery deposition of Kellie Meyer, who never worked with Rhonda Gibson, and only worked one month with Ms. Christensen in a pre-school program. The cited testimony was never admitted at trial and does not support the Parents' claimed facts. The statement should be disregarded.

or for asthma. (VRP 10-31-11 Gibson, 57:9-22; 125:2 –126:10)(VRP 11-01-11 Christensen, 25:11-18)(VRP 11-02-11 Christensen, 125:23 – 126:4) (VRP 11-07-14 Christensen, 414:7–415:3; 470:18 – 473:9, 5, 514:3 - 515:9)(VRP 11-08-11 Christensen; 568:18 – 570:2) (VRP 10-18-11 Walker, 122:11-123:19)

C. THE EVENTS OF OCTOBER 7, 2008

The Parents describe the events of the morning Mercedes died at pages 19 through 25 of their opening brief without even once citing the court to the trial record.²⁰ Their factual statement is replete with argument and false assertions. The District feels obligated to set forth the record facts as they were presented to the jury.

On October 7, 2008, Mercedes and her sister Jada were waiting for the bus to take them to school. Lisa Dotson, a neighbor, was dropping her son off at the bus stop. She saw Jada and Mercedes waiting for the bus. She invited them to wait in the car with her son. Her son asked Ms. Dotson to drive them to school and she agreed. (VRP 10-35-11 Lisa Dotson, 6:16 – 7:10)

²⁰ They cite the court to Clerks Papers referring to attachments to summary judgment declarations, but these references did not establish the operative facts that the jury relied upon. Unfortunately, the Parents did not order up the direct testimony of Jeanette Mears or Michael Mears. Therefore, the court and counsel do not have record testimony of Mercedes actions before arriving at the bus stop and being picked up by her neighbor. Necessarily, the District's factual statement begins when Mercedes and her sister were picked up by Lisa Dotson at her bus stop.

Ms. Dotson arrived at the bus stop at 8:12 a.m. that morning. (RP 10-25-11 Lisa Dotson, 27:24 – 28:15) They all waited in the car for a few minutes. At around 8:16 a.m., Ms. Dotson started driving to the school. (Id. 30:3-5) It took approximately 5 minutes to drive to the school. She dropped the children off at the school at sometime between 8:15 and 8:20. (Id. 30:6-17) Ms. Dotson told an investigator on the day after this event that she dropped the children off at the school around 8:25. (Id. 31: - 33:11) Mercedes was in good spirits during the ride and was talking about her upcoming birthday party. (Id. 6:16 – 7:10) Ms. Dotson does recall that Jeanette Mears called her about 20 minutes later to tell her that Mercedes had an asthma attack while at school. Ms. Mears wanted to know how Mercedes was while riding in the car to school. (VRP 10-25-11 Lisa Dotson, 13:4 – 14:5)

The children were outside for a short time when Mercedes started wheezing and had trouble breathing. According to her friend Henry Dotson, Mercedes said she thought she was having an asthma attack. (VRP 10-25-11 Henry Dotson, 8:11 – 9:1, 19:3 – 20:9) Jada ran to the office to get help. Peggy Walker, the school secretary and former health clerk, and Rhonda Gibson were in the office.²¹ Jada yelled at them that

²¹ Ms. Gibson gives a fairly complete narrative of what happened in the health clerk's office in her testimony at RP 11-01-11 Gibson, 142:7 – 149:3.

her sister was outside the school and needed help. Jada may have said that her sister was having trouble breathing. (VRP 10-17-11 Walker, 141:20 - 142:9, 47:12 - 49:17) Rhonda Gibson recalled that it was 8:20 a.m. when Jada came into the office. She knew this because she looked at the time on her computer when Jada came into the office. (VRP 11-01-11 Gibson, 142:7-9)(VRP 10-31-11 Gibson, 31:20 - 32:7)²² Ms. Gibson went outside immediately to help Mercedes. Mercedes was sitting on a bench outside. She was crying uncontrollably. She told Ms. Gibson that she was not sure she could come inside. Ms. Gibson helped her to go inside to the health room. (RP 11-01-11 Gibson, 142:10 - 143:5) (RP 10-31-11 Gibson 32:13 - 35:2)²³

Ms. Gibson escorted Mercedes through the office to the health room. She helped Mercedes sit down and then immediately called 911. (VRP 11-01-11 Gibson 142:7 - 143:17)(VRP 10-31-11 Gibson, 35:12-23)(VRP 10-17-11 Walker, 55:23 - 56:13)(VRP 10-18-11 Walker, 131:1-7) She did not delay in calling 911. Ms. Gibson recognized that the

²² Peggy Walker, the school secretary, noted that the school's wired clock time was 8:15 when Jada came into the office. However, the school clocks were 5 minutes behind the actual time, so it is most likely that Jada came into the office at 8:20.(RP 10-18-11 Walker, 127:23 - 129:14)

²³ The Parents argue that Ms. Gibson "forced" Mercedes into the health room. Ms. Gibson denies this and recalls that she assisted Mercedes into the health room by carrying her belongings and holding her arm. (VRP 10-31-11 Gibson, 34:11-35:11)(VRP 11-01-11 Gibson, 142:7 - 143:6)

situation was serious. (VRP 11-01-11 Gibson, 144:22- 145:4) The first 911 call was recorded in the dispatch records at 8:22:33.²⁴ (Ex 253)

Ms. Gibson noticed that Mercedes was having trouble breathing. Mercedes had been in the office several times before with asthma like symptoms. Ms. Gibson thought that Mercedes was having an asthma attack. She reported to 911 that Mercedes was having an asthma attack. (RP 11-01-11 Gibson, 143:14 – 21) After calling 911 Ms. Gibson called Mercedes parents. (VRP 11-01-11 Gibson, 145:5-16) While she was calling 911, Peggy Walker went over to attend to Mercedes. (VRP 10-18-11 Walker, 131:1 – 7)

When Mercedes came into the health room she had her inhaler in her hand. She showed it to Ms. Walker and said that she had tried to use it. (VRP 10-17-11 Walker, 59:5-21) Ms. Walker was 100% sure that Mercedes was having an asthma attack. (VRP 10-18-11 Walker, 117:8-20; 131:11 – 133:5) Ms. Walker checked Mercedes inhaler, determined that it was functioning, and administered two doses of Albuterol to Mercedes. (VRP 10-17-11 Walker, 59:22 – 60:5, 67:3- 68:18) She administered the first dose, waited about a minute and then administered the second dose. This seemed to calm Mercedes down. Around this time,

²⁴ The Parents agree that the first call was made at 8:22. (Appellant Brief at 22) However in their factual statement, they mention the time of the call out of sequence leaving the impression that a number of other events occurred before the call. In fact, the very first action that Ms. Gibson took was to call 911.

Ms. Wolfe and Ms. Blaimayer joined them in the health room. (VRP 10-18-11 Walker, 134:7– 135:25) (VRP 10-17-11 Walker 60:6-10; 84:2-10) All four women concluded that Mercedes was having a severe asthma attack. (VRP 10-18-11 Walker, 117:8-20; 131:11 – 133:5)(10-31-11 Gibson 21:16-18; 87:15-19; 112:25- 113:3)(VRP 10-19-11 Blaimayer 58:3-17)(VRP 10-19-11 Wolfe, 53:24-54:6) She was treated accordingly.

Plaintiff argues that the District employees should have administered epinephrine to Mercedes in the form of an EpiPen. (App. Brief at 23) The Plaintiff does not cite to the record for any support for this argument and completely ignores the established record that the doctor's orders on file for Mercedes prescribed Albuterol for an asthma attack and Epi-Pen for an allergic reaction. (299; 300) The regulations and District policy prohibited the school employees from using the EpiPen to treat an asthma attack.²⁵ (VRP 10-18-11 Walker 142:1-18; 172:22-173:10)(VRP 10-31-11 Gibson 21:7-18; 41:2-19; 112:25; 113-115:4)

Ms. Gibson, Ms. Walker, Ms. Wolfe and Ms. Blaimayer continued to monitor Mercedes and keep her calm while waiting for the EMT's to arrive. Mercedes condition deteriorated rapidly. Ms. Gibson called 911 a second time. They asked if Mercedes had a discernible pulse. Ms.

²⁵ This is the same argument that they unsuccessfully made to the jury in this trial.

Gibson asked Ms. Walker to check Mercedes' pulse. Ms. Walker reported that Mercedes had a pulse. Ms. Gibson checked Mercedes pulse as well after the second 911 call. The EMT's arrived at the same time that this second 911 call was made. (VRP 11-01-11 Gibson, 147:15 – 150:17)

During this entire ordeal Ms. Gibson was 100% sure that Mercedes was having an asthma attack. (RP 11-01-11 Gibson, 151:4 – 152:20) Ms. Gibson had seen Mercedes both when having an asthma attack and when having an allergic reaction. A few weeks earlier Mercedes came to the health room complaining of a bee sting. Ms. Gibson noted that Mercedes had hives around her mouth, her lips, and the area around her mouth were swelling, she complained of itchiness and tingling in her throat.²⁶ (VRP 10-31-11 Gibson, 87:15 – 88:15) (VRP 11-01-11 Gibson, 139:6 – 141:20) Mercedes did not exhibit any of these types of symptoms on October 7, 2009. Mercedes symptoms, while more severe, were consistent with Ms. Gibson's observations of Mercedes when having an asthma attack. Ms. Walker was 100% certain that Mercedes was having an asthma attack. (VRP 10-18-11 Walker, 117:8 – 20) Ms. Wolfe, a school administrator, was 100% certain Mercedes was having an asthma attack. (VRP 10-19-11 Wolfe, 53:24: - 55:1)

²⁶ Ms. Gibson could not administer any treatment to Mercedes because the Parents had not brought in any medication or doctors orders by that time. She called the Parents and Michael Mears came to school and gave Mercedes Benadryl.

Ms. Gibson and Ms. Walker were trained in administering CPR. Neither of them attempted CPR because at all relevant times Mercedes was breathing and had a pulse. (VRP 11-01-11 Gibson, 72:11-23; 182:19 – 183:23)(VRP 10-17-11 Walker, 4:13-5:6; 116:13-117:7)(VRP 10-19-11 Wolfe, 60:16 – 61:6) In fact, when the EMT’s arrived they detected a pulse and determined that CPR was not indicated at that time. (VRP 10-25-11 Trevor Boyle, 15:5 – 23; 24:10–23; 36: –12; 37:4 – 39:9; 62:24 – 63: 2; 65:5-9) The paramedics started CPR when Mercedes was in the ambulance. (VRP 10-25-11 Trevor Boyle, 18:2–16; 39:5-9) Mercedes died while in the ambulance in route to the hospital.

This entire tragic event transpired over approximately 6 minutes. Ms. Gibson made the first 911 call at 8:22:33. The emergency units arrived at the school at 8:27:34 and 8:28:44 respectively. (VRP 10-25-11 Trevor Boyle, 8:1 – 9:3; 11:3-13; 12:3-20; 35:4 – 23) During this time, the school personnel did everything they were legally entitled to do to help Mercedes.²⁷

D. SIGNIFICANT PRETRIAL RULINGS

Next the Parents list several of the court’s pretrial rulings. They preface the identification of these rulings with argument related to

²⁷ The remainder of the Parents’ “facts” (Appellant Brief at 25-27) relate to matters that occurred at the hospital, without any citation to the trial record, or are arguments about the facts. The District will not respond to the arguments at this point in the brief.

discovery issues in this case that are not relevant to this appeal. The court entered several relevant orders. On September 9, 2011, the court entered an order that granted the Parents partial summary judgment on the following affirmative defenses:

- a. Comparative fault
- b. "Empty chair defense"
- c. Failure to Exhaust Administrative Remedies
- d. Frivolous claim
- e. Public Duty Doctrine
- f. Immunity as to the "Good Samaritan" Defense

The court reserved ruling on the District's statutory immunity. (CP 2481-85)

The Court granted the Parents Motion for Summary Judgment on the "existence of a duty," but denied the motion on issues of breach and proximate cause. The Court interlined in the order that the motion was granted regarding the existence of a duty "as set forth in the jury instructions at the appropriate time." Effectively, this order simply provided that the court would instruct the jury on the duty issue at trial. (CP 2486-88) The Court denied the District's summary judgment motion regarding Duty, Breach and Proximate Cause. (CP 2489-91)

The court entered a variety of orders on Motions In Limine. The District will set forth the In-Limine orders that are relevant to the issues on

appeal. On October 10, 2011 the court entered an order on the Parents' Motions in Limine. (CP 2765-93) The relevant rulings are as follows:

- 1.2.3 Suggestions by Bethel that Jeanette, Michael Sr. or Jada Mears somehow are responsible for Mercedes' own death should not be permitted.
Granted (CP 2770)
- 1.2.4 Argument, testimony, or comment that [any] plaintiff was contributorily negligent should be excluded.
Granted (CP 2770-71)
- 4.15.9 Argument, testimony or comment regarding any failure to bond between Jeanette Mears and her daughter Jada.
Denied as to Jada and Jeanette
Granted as to Jada and Mercedes
Denied as to Jeanette and Mercedes (CP 2784)
- 4.28.1 Argument, testimony or comment that Mercedes' asthma was not well controlled by herself or her parents and somehow contributed to her death.
Denied (CP 2789)

The Parent's have not assigned error to these rulings and they may be considered verities by the court.

On October 10, 2011, the court entered an Order on Plaintiffs' Supplemental Motions In Limine Regarding Gambling, etc. The relevant portion of this order provided that:

Any evidence re gambling pre-death excluded. Jada Mear's pre-death is out; Marital discord issues of Mr/Mrs. Mears is excluded; No questioning of post death issues without competent causation evidence; Mrs. Mears witnessing a murder is excluded; Any racial statements of Mrs. Mears is excluded; Post-partum issues re: Jada is out.

Again, the Parents did not assign any error to this ruling.

The Trial judge denied the District's Motion for Summary Judgment seeking dismissal of the claim, *inter alia*, on the basis of the immunity provided in RCW 28A.210.270 and the claim that a "bystander" claim is not recognized in Washington law for witnessing the failure of another person in attempting to save the life of a family member. (CP 4840-42; 4878-79)

E. EVENTS OCCURRING DURING THE COURSE OF TRIAL

The Parents make reference to some matters occurring during trial that they believe are significant to their appeal. They argue that the District's use of a "power point" in opening statement was misconduct. The District's counsel did use a "power point" during opening statement. The Parents claim that use of the power point violated the court's Order in Limine. They are mistaken. The only relevant "In Limine" Order related to the use of exhibits during trial. It provided that "[b]oth sides should show exhibits to the other side before showing to the jury." (CP 2792) The District did not use any exhibits during opening statement.^{28 29}

²⁸ The Parents seem to argue that the substance of the District's opening statement constituted error. However, they did not object during the opening.

²⁹ The District filed its "power point" used in opening statement with the court afterwards as is required by local rule.

The Parents devote a number of pages to the substance of the District's opening statement. This is confusing since the Parents only made one objection during the District's opening statement and it had nothing to do with any "In Limine" Order. (TE, VOL. II, 11-06-12, 66:3-5) The Parents did not argue during their motion for a new trial that the opening statement was improper.

The Parents complain about the District's reference to Mercedes lack of use of Flovent. After the opening statement, the Parents argued to the court that the reference to Mercedes non-compliance in the use of Flovent should be excluded. (TE VOL. II, 11-06-12; 91-106) After hearing argument, the court ruled that the District could pursue the issue of Mercedes lack of compliance in the use of Flovent. The court correctly indicated that it would be improper to state that the use of Flovent contributed to Mercedes death, but the District certainly could explore the issue of whether her asthma was well-controlled or not. The lack of consistent use of Flovent is important on the issue of control. (Id. at 106-117)

Again, without citation to the record the Parents claim that "defense counsel asserted that Mercedes died because she had an infection. This is incorrect. Mercedes missed school for several days before her death because of illness. The autopsy revealed that Mercedes had a viral

inflammation at the time of her death. (VRP 11-16-11, Montanaro, 36:8 – 37:2) Her mother told Principal Garrick that Mercedes was suffering from some chest congestion the morning of her death. (TE, Vol. II, 149:6-9)³⁰ The District never claimed at trial that Mrs. Mears should not have sent Mercedes to school and it never argued that Mrs. Mears was contributory at fault.

The Parents argue in their statement of facts that the District “solicited testimony from Principal Garrick that Mrs. Mears, in a conversation with him on the day following Mercedes death, had stated that she should not have let Mercedes go to school on the date of her death because she had an alleged cold.” (App. Brief at 37) This is a misstatement of the actual evidence. During Mr. Garrick’s testimony he testified that Mrs. Mears “stated to me that she was upset with herself because she let Mercedes come to school that day.” (TE VOL II., 137) No mention was made of her having a cold. In fact, she had missed school earlier that month because of asthma related issues. (EX. 404) After an objection and argument, the Court struck the answer and directed the jury to disregard it. (Id. at 148) Mr. Garrick did testify that Mrs. Mears told him in that same conversation that Mercedes was congested that day. (Id.

³⁰ After extended argument the court let the answer stand and ruled that Mercedes medical condition on that day was relevant. (TE, Vol. II, 152:16 – 153:9)

at 149) The Parents objected to that question, despite the fact that the court had specifically ruled before the lunch recess that the District could ask the parents if they thought Mercedes had a cold or flu. (Id at 150; 152-53) The Parents claimed that the evidence suggested to the jury that they were in some way at fault. The court denied the Parents motion to strike the testimony and let the answer stand. (Id. at 172)

During the trial, the Parents moved for an order to strike testimony regarding Flovent and the respiratory infection. (CP 2871- 82) The court heard oral argument on the motion on November 7, 2011. (CP 270-301)³¹ The issue of the Flovent evidence was argued extensively. The trial court noted the distinction between arguing that Flovent, or lack of Flovent, caused Mercedes' death and the argument that the Flovent evidence simply demonstrated the lack of control of Mercedes' asthma. (TE VOL. II, p. 283) The court ruled that all medical opinions had to be expressed in terms of reasonable medical certainty. (Id. at 301-02)³²

The court properly instructed the jury that the testimony and evidence concerning Mercedes past medical history was admitted for the

³¹ At oral argument, the Parents' counsel phrased the issue differently than set forth in its motion. Counsel asked the court to rule that any medical testimony should be based on a more likely true than not true standard. Actually, counsel was arguing that any medical testimony must be on a reasonable medical probability standard.

³² The court ruled that Dr. Montanaro could not offer any new opinions during trial that were not testified to in his deposition. He did not.

limited purpose of allowing the jury to evaluate her asthma condition and was not to be considered for any other purpose. (CP 3161) The court specifically rejected the Parents proposed instruction that referred to Mercedes having a cold and upper respiratory infection. (CP 3101)

The Parents brought a “by-stander” claim on behalf of their daughter Jada, who was in the Health Room for a short time while Mercedes was having a severe asthma attack. They claimed emotional damages that arose from Jada witnessing her sister’s distress. The Parents called a marriage and family therapist, Dr. Barrett, to testify that Jada’s problems in school, and in her future life, are caused by what she witnessed in the health room. (VRP 10-25-11, Barrett Cross, 2:10-20; 36:21 – 37:17; 39:10-17) Dr. Barrett seemingly ignored the fact that Jeanette Mears had significant “bonding” issues with her daughter Jada. On cross-examination the District explored the bonding issue and its relationship to Jada’s future problems. During the cross-examination the Parents objected to questioning related to the bonding, or lack of it, between Jeanette Mears and Jada. The court indicted that it had specifically denied a Motion In Limine on that point and that the District could properly explore the bonding issues between Jeanette Mears and Jada. (Id. 42:13-24; 44:17- 45:2; 47:18-25) Dr. Barrett admitted that lack of attachment (bonding) between a mother and daughter is “predictive of a

lot of long-term consequences in the mental health of a child.” (Id. at 50:3 – 13) She was then questioned regarding the lack of attachment between Jada and her mom and that Mercedes was “the preferred child.” (Id. at 51:19 – 52:19) Dr. Barrett was aware of the significant attachment issues between Jada and her mom. She was aware that Jada was sent to live with relatives when she was five because of the attachment issues. The District then explored Dr. Barrett’s knowledge of Jeanette Mears treatment to deal with the attachment issues. The Parents did not object to this questioning. (Id. 53:17- 55:16) Jeanette Mears also testified that she had significant bonding issues with Jada that certainly affected Jada. (VRP 11-16-11 Jeanette Mears Cross, 41:21 – 45:12)³³

IV. ARGUMENT

A. STANDARD OF REVIEW

This court has often expressed its commitment to the sanctity of a jury verdict. Absent clear error in law this court cannot invade the province of the jury. A strong policy favors the finality of judgments on the merits. *Stanley v. Cole*, 157 Wash.App. 873, 887, 239 P.3d 611 (2010). The grant or denial of a motion for a new trial is reviewed on an

³³ While the Parents seem to object to this testimony they have not challenged the trial court’s ruling on this issue and have not assigned error to the court’s denial of their Motion in Limine on this point.

abuse of discretion standard where the motion is not based on an allegation of legal error. *Edwards v. Le Duc*, 157 Wash.App. 455, 459, 238 P.3d 1187 (2010), review denied, 170 Wash.2d 1024, 249 P.3d 623 (2011).

The challenge of jury verdicts is reviewed under a sufficiency of the evidence standard. *Winbun v. Moore*, 143 Wash.2d 206, 213, 18 P.3d 576 (2001) So long as the facts articulated in the course of trial are based on substantial evidence and support the verdict, an appellate court cannot overturn the verdict. *Campbell v. ITE Imperial Corp.*, 107 Wash.2d 807, 817–18, 733 P.2d 969 (1987); See also, *Harrell v. Washington State ex rel. Dept. of Social Health Services*, 170 Wash.App. 386, 408-409, 285 P.3d 159, 171 (2012) “The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question.” *Canron, Inc. v. Fed. Ins. Co.*, 82 Wash.App. 480, 486, 918 P.2d 937 (1996) (citing *Bering v. Share*, 106 Wash.2d 212, 220, 721 P.2d 918 (1986)) A party challenging the sufficiency of the evidence admits the truth of the opposing party's evidence and all inferences that can be reasonably drawn there from. *Holland v. Columbia Irr. Dist.*, 75 Wash.2d 302, 304, 450 P.2d 488 (1969). Such a challenge requires that the “evidence be interpreted most strongly against the moving party and in the light most favorable to the party against whom the motion is made.”

Washburn v. City of Federal Way, 169 Wash.App. 588, 606, 283 P.3d 567, 577 (2012)

The court reviews a denial of a motion for a mistrial under an abuse of discretion standard. *State v. Hopson*, 113 Wash.2d 273, 284, 778 P.2d 1014 (1989). A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial could ensure a fair trial. *Hopson*, 113 Wash.2d at 284, 778 P.2d 1014.

The court must review the erroneous admission of evidence under ER 404(b) under the non-constitutional harmless error standard. *State v. Gresham*, 173 Wn.2d 405, 425 (2013). Under this standard, an error is harmless ““unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” “ *Gresham*, 173 Wn.2d at 425 (internal quotation marks omitted) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986))

B. THE JURY’S VERDICT IS NOT INCONSISTENT OR CONTRARY TO THE EVIDENCE IN THE CASE WITH RESPECT TO PROXIMATE CAUSE

The Parents argue that the jury’s verdict in this case is inconsistent and contrary to the “un-rebutted and undisputed” evidence presented at trial. This argument is without merit. The Parent’s entire argument in this regard is based on the underlying presumption that the jury found the District negligent for not administering CPR and for not administering

Epi-Pen. If there was evidence in the record from which the jury could conclude that CPR was not indicated or the use of EpiPen was not authorized, then the Parents arguments fails. The Parents argue that the evidence on these two points is undisputed. Nothing could be farther from the truth.

Admittedly, the jury found the District negligent. The verdict does not tell us the basis for the negligence finding. The court cannot presume what acts the jury thought constituted negligence. The jury was asked two distinct questions in the interrogatory verdict form, (1) Was District negligent in some manner, and (2) was the negligence a proximate cause of the Parents alleged injury and damages? The jury found that the District was negligent, but that its negligence was not the proximate cause of the damages. The Parents argue, without any citation of authority, that this court must presume that the jury found negligence on every possible theory alleged by the Parents. The Parents are incorrect in their claim that this court must presume from a “general verdict” that the jury found Defendants negligent in every way as argued by Plaintiff. In fact, the case law in Washington makes it clear that the court cannot presume the basis of the jury’s verdict. The court has no authority to speculate regarding the basis of a jury’s verdict, let alone presume the basis for their verdict. Thompson v. Grays Harbor Community Hosp., 36 Wash.App. 300, 309-

310, 675 P.2d 239, 244 - 245 (1983) The trial court did not have the authority to dissect the general verdict into component parts. Foster v. Giroux, 8 Wash.App. 398, 506 P.2d 897 (1973); Wheeler v. Catholic Archdiocese of Seattle, 124 Wash.2d 634, 642, 880 P.2d 29 (1994); Kiewit-Grice v. State, 77 Wash.App. 867, 871-872, 895 P.2d 6, 8 (1995) In the case of a general verdict the only question is whether the verdict is supported by the evidence.

The central question before this court is whether the answers in the special verdict are consistent. It is the duty of the court to make every effort to harmonize the verdict to the extent possible.” Herring v. Department of Soc. and Health Servs., 81 Wash.App. 1, 16, 914 P.2d 67 (1996) (citing State v. Peerson, 62 Wash.App. 755, 765, 816 P.2d 43 (1991), review denied, 118 Wash.2d 1012, 824 P.2d 491 (1992)). See also, Alvarez v. Keyes, 76 Wash.App. 741, 743, 887 P.2d 496 (1995); Estate of Stalkup v. Vancouver Clinic, Inc., P.S., 145 Wash.App. 572, 585-586, 187 P.3d 291, 298 (2008); Johnson v. Tradewell Stores, Inc., 24 Wash.App. 53, 600 P.2d 583 (1979), aff'd, 95 Wash.2d 739, 630 P.2d 441 (1981) (citing Gilmartin v. Stevens Inv. Co., 43 Wash.2d 289, 261 P.2d 73 (1953), 43 Wash.2d 289, 266 P.2d 800 (1954); Pepperall v. City Park Transit Co., 15 Wash. 176, 45 P. 743, 46 P. 407 (1896)

A jury verdict finding that a defendant is negligent, but that the negligence was not a proximate cause of the plaintiff's injuries is not inconsistent if there is evidence in the record to support a finding of some negligence on some plausible scenario, and also evidence to support a finding that the resulting injury was not proximately caused by those negligent actions. *Estate of Stalkup*, supra at 586. The court must look for a plausible scenario and may not presume any particular scenario.

In *Estate of Stalkup*, a medical negligence case, the jury returned a verdict finding the doctor negligent, but also finding that the negligence was not the proximate cause of the death. Neither party proposed a specific interrogatory to the jury to identify the specific negligent acts. After the verdict was returned the plaintiff argued that the verdict was internally inconsistent. The trial court agreed and granted a new trial. The Court of Appeals reversed the trial judge's ruling finding an abuse of discretion. The Court of Appeals reasoned that because there was evidence in the record that could support the jury's verdict on the lack of proximate cause the verdict was not inconsistent. *Id.* at 650-651. In *Estate of Stalkup*, there were plausible scenarios in the evidence upon which the jury could have properly found negligence, but no proximate cause. In that situation, the court is not permitted to speculate on which scenario the jury found credible. The court can only review the verdict to ensure that

the record contains sufficient facts to reconcile the special verdict questions.

Equally to the point is *Chhuth v. George*, 43 Wash.App. 640, 719 P.2d 562, (1986) In that case a child was killed on his way home from school while crossing a four lane street. The parents sued the motorist and the school district. The jury found the school district negligent but determined that the district's negligence was not the proximate cause of the death. The parents sought a new trial or judgment NOV. On the motion for judgment as a matter of law, post-verdict, the trial judge disregarded the jury's verdict and ruled that the district's negligence was a proximate cause of the death. The district appealed. The Court of Appeals reversed the trial court's ruling and held;

We reverse the trial court's ruling that the District's negligence was a proximate cause of Saintyro's death. It is not possible to determine from the special verdict the basis for the jury finding that the District was negligent. It could be negligent implementation and supervision of bus procedures, or breach of duty by the principal, first grade teacher or the school bus supervisor. On the other hand, the basis of negligence could have been failure to supply crossing guards. . . . The issue of proximate cause falls within the scope of the jury's duties and since the court properly instructed the jury, there is no basis for disregarding the verdict. It was error for the court to disregard the jury's verdict.

Id. at 650-651. The *Chhuth* court made it clear that it is not the prerogative of the trial judge (or this court) to substitute its reasoning for that of the jury. As long as there is a scenario supported by the evidence that supports the jury's verdict of no proximate cause, the verdict must be honored. There is simply no basis for this court to disregard the jury's verdict in this case.

Van Cleve v. Betts, 16 Wash.App. 748, 559 P.2d 1006, (1977) is also on point. In a car-pedestrian crosswalk collision case the jury properly found the driver negligent and determined that his negligence proximately caused plaintiff's injury. The jury also found the plaintiff-pedestrian negligent, but determined that her negligence was not a proximate cause of her injuries. Defendant sought a new trial arguing that the negligence/no proximate cause verdict was internally inconsistent. The trial court determined that the jury's verdict in this regard was supported by evidence and denied the motion. The Court of Appeals affirmed the trial court's ruling and held that the jury's verdict was not inconsistent. While driver contended that the only act of contributory negligence that the pedestrian could have been guilty of was walking into the side of the car, the Court of Appeals found that the evidence contained other plausible scenarios, including basing the negligence on the pedestrian's failure to maintain a proper lookout. The *Van Cleve* court

noted the well settled rule in this and other jurisdictions that answers to special interrogatories should, if possible, be read harmoniously citing State v. Hanna, 87 Wash. 29, 151 P. 83 (1915) and Fitzsimmons v. Wilder Mfg. Co., App.Div., 384 N.Y.S.2d 523 (1976). The court then concluded:

Under the facts of this case it is conceivable the jury concluded that even if Mrs. Van Cleve had maintained a proper lookout, the speed and direction of travel of the car would have made it impossible for her to avoid a collision. Because the findings of the jury are not irreconcilably inconsistent, we find no merit to this assignment of error.

16 Wash.App. at 756-757. In accord, Daly v. Lynch, 24 Wash.App. 69, 76, 600 P.2d 592, 597 (1979)

Cases in other jurisdictions are also in accord. City of Aurora v. Loveless, 639 P.2d 1061, 1063 -1064 (Colo., 1981) is a helpful example. The jury returned a verdict of negligence but no proximate cause in a police shooting case. The plaintiffs sought damages from the police officer related to the shooting. The jury heard substantial testimony concerning the shooting and the events leading up to it. The negligence instruction was general and was in no way specifically tied to any particular sequence of events. The plaintiff's complaint was that the police officer was negligent in confronting the decedent and shooting him. Plaintiff argued that the finding of negligence but no proximate cause was

inconsistent. The court noted that there were other scenarios that would rationally explain the jury's verdict. In applying the instructions on negligence and proximate cause to the evidence, the jury could have found the police officer negligent because he failed to reasonably protect bystanders from injury which might have been inflicted by the decedent, or that he should have waited a longer time before going into the house, or that he should have used some other method of limiting the danger inherent in the decedent's conduct. The court determined that it was conceivable that the jury applied the negligence instruction to a sequence of events distinct and unrelated to the eventual shooting. Given this possibility the jury's findings that the officer was negligent, but that his negligence was not a proximate cause of respondent's damages were not inconsistent and are supported by the evidence. In accord, Bennion v. LeGrand Johnson Const. Co., 701 P.2d 1078, 1083 (Utah, 1985); Rasmussen v. Sharapata, 895 P.2d 391, 397 (Utah App., 1995)

In the case before this court, the best evidence of the other plausible scenario's that were argued in this case comes directly from the Parents. During final argument the Parent's counsel showed the jury a powerpoint and argued a variety of ways that the District was negligent, including (1) failing to complete a proper and updated Emergency Healthcare plan for Mercedes, (2) using the 2007 Food Care plan as a

stopgap plan in 2008, (3) not including “if you see this do this” in the care plan, (5) not placing the plan in a location that it could be readily found, (6) not conferring with the parents to share the Care Plan with them, (7) the failure of the school nurse to do an assessment of Mercedes in the 2008-09 school year, (8) the failure to do an asthma care plan. (App. A) In fact, during final rebuttal argument, the Parent’s counsel argued 50 different ways that the District was negligent.³⁴

The Parents attempt to avoid this “plausible scenario” requirement by arguing that the jury was required to believe their experts on the issue of the administration of CPR and the administration of EpiPen. They then reason that the jury must have determined that failure to give CPR or administer EpiPen was the basis for the negligence finding; therefore, the jury finding of no proximate cause was inconsistent. The false premise in this argument is that the jury must have based its negligence determination on the failure to utilize CPR, or the failure to administer EpiPen. The evidence in the record belies this argument. Furthermore, as the District points out *infra*, there were a number of plausible scenario’s from which the jury could find negligence but no proximate cause.

³⁴ They even showed the jury another PowerPoint listing the 50 ways the District was negligent. However, they did not file that PowerPoint with the court after the argument, as the local rules required, so the District is not able to produce it now.

The Parents argue, based on the testimony of Dr. Larson and Dr. Hopp, that this court must assume that the jury was obligated to find the District negligent for failing to administer CPR. This court has no basis on this record to make any such assumption. It is more likely that the jury decided that CPR was not indicated under the circumstances of this case and therefore was not an act of negligence. It is likely that the jury accepted the testimony of Rhonda Gibson, Peggy Walker, Angie Wolfe and EMT Trevor Boyle on this point. They were all in agreement that CPR was not indicated because Mercedes was breathing and had a discernible pulse. (VRP 11-01-11 Gibson, 72:11-23; 182:19–183:23)(VRP 10-17-11 Walker, 4:13-5:6; 116:13-117:7)(VRP 10-19-11 Wolfe, 60:16 – 61:6); (VRP 10-25-11 Trevor Boyle, 15:5 – 23; 24:10 – 23; 36:1 – 12;37:4 – 39:9;62:24 – 63: 2;65:5-9) There was ample evidence in the record by a number of witnesses that CPR was not indicated if the person is breathing or still has a pulse. Peggy Walker, Angie Wolfe, and Rhonda Gibson (percipient witnesses) testified that up to the point that the EMT’s arrived Mercedes was still breathing and she still had a pulse. Id. Peggy Walker testified that she was watching Mercedes breathing and heartbeat carefully because she knew that if her heart stopped they would commence CPR. Id. Trevor Boyle, the first EMT on the scene, testified that when he arrived he immediately detected a faint carotid pulse and

determined that CPR was not required at that time. He admitted that CPR was not started until several minutes later in the ambulance when the EMT's determined that Mercedes' heart had stopped beating. Id. He testified as follows:

Q: Okay. And, sir, it's true, is it not, that it wasn't until you hooked her up to the ECG you noted that there was ventricular fibrillation, that you and your crew decided to do CPR?

A: Correct.

Q: All right. So it logically follows, does it not, that CPR is not indicated until you have evidence that there is no heart activity and no breathing, isn't that right?

A: Yes.

(VRP Boyle, 39:5-14) EMT Boyle also answered a jury question on the subject of CPR. When asked at what point CPR was started, he answered that "When we-when we got her on the monitor, we realized we had lost the pulse and we started." (Id. at 65:5-9) EMT Boyle was clear that when he first arrived he felt a carotid pulse. (Id. at 15: 21-23; 37:1-12; 62:24 – 63:2) EMT Boyle was clear that CPR was not indicated when he arrived because he could ascertain a carotid pulse.

Dr. Montanaro was also clear in his testimony that CPR was not indicated at the time that EMT Boyle first arrived. He testified:

A: So you had asked me if CPR would have been helpful. CPR would not have been indicated at the -- for the first few minutes of this encounter because, you know, she was still mentating, she was

still breathing on her own, even up to the time of agonal respiration, so CPR would not have been indicated at the time of the arrival of the EMTs when she still had a palpable pulse, CPR would not have been indicated.

(VRP 11-16-11 Montanaro, 75:1-76:7) Dr. Redding also testified that it was reasonable for the school staff to not start CPR under the circumstances of this case. (VRP 11-15-11 Redding, 32:9 – 34:23)

Even Dr. Larson agreed that you go through the ABC's before administering CPR. Dr. Larson had the "A" wrong. He thought the first thing you check for was alertness. (VRP Larson, 10-20-11, 26:8-19) In fact, the "A" stands for airway. The first thing you check for is whether the airway is clear. He did have the "B" and the "C" correct. You next check for breathing. Finally you check for cardiac status, is there a pulse, is the heart beating. All of the school witnesses testified that Mercedes was breathing and had a pulse when the EMT's arrived. The EMT testified that he found a pulse and did not need to start CPR at that time. There was ample evidence before the jury from which it could conclude that the CPR was not indicated and therefore the failure to administer CPR was not negligence at all. Therefore, the jury would never reach the issue of proximate cause on this issue.

The Parents next argue that the jury must have based their negligence determination on the argument that the District employees

should have administered EpiPen. This is mere speculation on the part of the Parents. This court cannot speculate on this point. The Parent's argument ignores the undisputed evidence of school employees regarding their training and their lack of authority to use EpiPen in this situation. Whether use of EpiPen was authorized in this case was one of the central issues at trial. While the Parents argued that the District should have used EpiPen under the facts of this case,³⁵ the District claimed with equal force that its employees had no legal authority to use EpiPen in an asthma attack and that to do so would directly violate District policy and the doctors' orders. Every witness that testified on the subject of the authority to use EpiPen agreed that EpiPen could be used only if Mercedes was having an allergic emergency (anaphylaxis). (VRP Debra Howard, TE, VOL II, 410:16 – 412:6)(VRP Walker, 10-17-11, 21:5 – 22, 142:2 – 21)(VRP Wolfe 10-19-11, 58:8 – 60:16, 64:9-21)(VRP Gibson 10-31-11, 21:2-18; 63:16-23; 112:25 – 115:4)(VRP Christensen, 11-01-11, 19:12 – 20:9; 37:23 – 38:8; 39:15-25; 40:10-20; 41:1-42:12; 44:3 – 45:10)(VRP Gibson, 11-01-11, 186:4-8)(VRP Christensen, 11-02-11, 183:2-21)(VRP Christensen, 11-07-11, 437:24 – 439:13; 464:10 – 465:2; 469:23 – 470:1; (Christensen, 11-08-11, 595:3 – 14; 598:18 – 599:23; 618:21 – 619:12;

³⁵ Interestingly, the Parents cite the testimony of Dr. Larson and Dr. Hopp that use of EpiPen might have saved Mercedes life. Neither testified that the District had any authority to administer EpiPen for an asthma attack, which is the real issue in this case.

624:25 – 626:5) The only doctor’s order on file with the school for the treatment of asthma provided for the use of Albuterol and to call 911. (EX 300)

There is overwhelming evidence in the record that Mercedes was having an asthma attack the morning she died. Dr. Montanaro testified “My opinion remains the same as we’ve stated on a more probable than not basis, there’s no question that she had an asthma attack.” (VRP 11-16-11 Dr. Montanaro, 92:18 - 93:1-4) The Parent’s own expert Dr. Hopp was 95%-98% certain that Mercedes died from an asthma attack. (VRP 10-18-11 Hopp, 78:15 – 81:20) Dr. Redding, the pulmonary specialist from Children’s Hospital concluded that Mercedes died from an asthma attack. He referred to it as sudden onset fatal asthma (SOFA). (VRP 11-15-11 Redding, 25:13 – 29:18) The official death certificate listed the cause of death as status asthmaticus. (EX 260) Rhonda Gibson, Peggy Walker and Angie Wolfe were 100% certain Mercedes was having an asthma attack. There is substantial evidence in the record from which the jury could conclude that Mercedes had an asthma attack that morning and the only available treatment that the District could provide her was the use of the rescue medication and to call 911.

The record is devoid of any evidence that Epi-Pen was ever prescribed for treatment of asthma. Dr. Redding testified that in his 30

years of practice he has never prescribed Epi-Pen for use in an asthma attack. (VRP 11-15-11 Redding, 30:3-6) He also concluded that Dr. Larson's order for Mercedes related to any asthma event only allowed the use of Albuterol. Id. at 31:1 – 32:6) Dr. Montanaro has never prescribed Epi-Pen for use to treat asthma in any setting outside of an emergency room or hospital. (VRP 11-16-11, Montanaro, 93:5 – 22) Dr. Larson has never used Epi-Pen to treat Mercedes asthma in all the years he has been her doctor. (VRP, 10-20-11, Larson, 81:14-17) The only authorized treatment for an asthma attack is the use of Albuterol. Given the evidence in the record it is most likely that the jury agreed with the District that the use of EpiPen would not be authorized in this instance. Therefore, the jury most likely concluded that the failure to use EpiPen was not a basis for negligence at all.

However, this court does not have to divine the jury's thought process in this regard. This court need only to find that there is sufficient evidence in the record from which the jury could conclude that EpiPen was not authorized in this case and therefore the District was not negligent when it failed to administer it. The record is replete with such evidence. The Parent's argument of verdict inconsistency based on the failure to administer EpiPen must fail. The verdict was not inconsistent.

The Parents spend considerable time arguing the standard for a directed verdict. (Appellant Brief at 64-67) Admittedly, it is a very difficult standard for the Parents to meet, but the argument misses the point. The focus of this court is whether there is a plausible scenario that explains the jury's verdict, not whether the court should have granted a directed verdict on its negligence claims based on CPR or use of Epi-Pen. The Parents make the rather bold claim that viewing the evidence in the light most favorable to the District, there is "no countervailing evidence on the issue of whether or not either CPR or the administration of epinephrine would have saved Mercedes' life." This statement is incorrect on two counts. First of all, the issue is not whether CPR or Epi-Pen would have saved Mercedes' life. The relevant question is whether CPR was indicated or whether the District employees had any authority to use Epi-Pen to treat an asthma attack. Secondly, to say that there is no evidence in this record to support the claim that CPR was not indicated, or that the District did not have any authority to use Epi-Pen to treat an asthma attack is irresponsible and ignores the substantial evidence in this case on that very point. As indicated above, the record is replete with evidence that supports the District's position regarding CPR and Epi-Pen.

The Parents never do address the central issue on verdict inconsistency in this case. They make no effort at all to address the

plausible scenario argument. In this case there are a number of “negligence” scenarios where the jury might find negligence that was not the proximate cause of Mercedes death.

For example, it is reasonable to assume that the jury may have found the District negligent for not having an asthma care plan for Mercedes, or an *“if you see this – do this”* food care plan in this case, but that the failure to have this plan was not the proximate cause of Mercedes death. The evidence in the record supports this scenario. (TE VOL II, 188:1 – 190:6) Under this scenario, the jury could have concluded that the lack of an asthma care plan was negligent, but that the lack of a better care plan was not the proximate cause of Mercedes death, because on that morning, the school employees in the health room provided Mercedes with everything that would reasonably be expected from a care plan while dealing with an asthma attack.

It is reasonable to assume that the jury could have concluded that the District was negligent in its adoption of policies or practices related to developing the food care plans, or in the training of Rhonda Gibson, but that the food care plan and training were not the proximate cause of Mercedes death. Plaintiffs argued that the District’s policies were inadequate, or poorly written. The District proved that regardless of the language of the policies, the employees on the scene on October 7, 2008

did everything reasonably possible when responding to Mercedes asthma attack.

The jury could have determined that the District was negligent in not excluding Mercedes from school until her medications were at school and her allergy care plan was in place, but that this negligence did not proximately cause her death. Again, the evidence suggested that exclusion from school was an option, but that the District permitted Mercedes to attend school despite not having her medications, or a complete food allergy care plan in place. At the same time, the evidence clearly establishes that this was not the proximate cause of her death because Mercedes actually experienced an asthma attack, which rendered any food allergy care plan irrelevant.

Along the same lines, the jury could have concluded that Heidi Christensen was negligent in her adoption of the “stop gap” food allergy care plan, but that this negligence did not proximately result in Mercedes death because the evidence clearly established that Mercedes died of a severe asthma attack and not from anaphylaxis.

It is plausible that the jury may have concluded that Heidi Christiansen’s job performance in the 2010-11 school year was deficient (the Parents devoted nearly 5 trial days to this issue), but then reached the

conclusion that this negligence was not the proximate cause of Mercedes death.

Therefore, it is understandable that despite any peripheral arguments of negligence, the jury was likely persuaded that there was nothing that could have been done to avert this unfortunate death. This would explain the jury's verdict of no proximate cause. The District does not have to prove the specific path taken by this jury, but only establish that there was sufficient evidence in the record to justify this verdict. Given the various plausible scenarios that are well supported by the evidence, there are several ways the jury could find negligence, but also find that the negligence was not the proximate cause of Mercedes death.

Finally, the court does not even have to address the substantive argument because the Parents waived their argument that the special verdict was inconsistent by not raising the issue at the time the jury was polled. *Gjerde v. Fritzsche*, 55 Wash.App. 387, 392-393, 777 P.2d 1072, 1075 (1989); See also, *Minger v. Reinhard Distributing Co., Inc.*, 87 Wash.App. 941, 946, 943 P.2d 400, 402 (1997) If the verdict was inconsistent, it was incumbent on the Parents to point that out to the trial judge at the time the verdict was rendered, and give the court an opportunity to send the jury back into deliberations if necessary. The Parents did not challenge the verdict then and cannot be heard to complain

about it now. The jury's verdict in this case is consistent and is supported by substantial evidence in the record.

C. A NEW TRIAL SHOULD NOT HAVE BEEN GRANTED PURSUANT TO CR 59(A)(2) SINCE THERE WAS NO ATTORNEY MISCONDUCT

1. THE EVIDENCE RELATED TO "FLOVENT" WAS PROPER

The heading of this argument in the Parents brief states that:

Defense Counsel purposely interjected into this case speculative and confusing evidence regarding "Flovent" knowing that such evidence could never be "connected" to any material issue in this case.

The argument is meritless. The Parents argue that since no expert testified on a more probable than not basis that the lack of use of Flovent caused Mercedes death, then the Flovent evidence should have been excluded from the trial. The District did not argue that the lack of use of Flovent was the cause of Mercedes death. The District's experts did not so opine. However, the Parents continue to miss the point of the relevance of the Flovent evidence.³⁶

Flovent is an inhaled corticosteroid (ICS). It is the primary medication used to control asthma. The Parents own doctor, Dr. Larson,

³⁶ The trial judge denied the Parent's Motion in Limine in this regard and held that the Flovent testimony was relevant to the issue of the level of control of Mercedes asthma. The Parent's have not assigned error to this ruling and the correctness of that ruling is not before this court.

testified that ICS's, like Flovent, "are the most potent and consistently effective long-term control medications for asthma. (VRP 10-20-11 Dr. Larson, 125:25 -126:9) He also agreed that ICS's assist in the prevention of exacerbations of asthma. (Id. at 127:6-8) Proper use of ICS's is the most potent and consistent long term control medication to reduce the number of times that an asthmatic will have to go to the emergency room for treatment of exacerbations. (Id. at 127:18 – 128:5) In addition ICS's are the most potent and consistent method of preventing deaths due to asthma. (Id. at 128:6-11)(Death rates decrease with the consistent use of inhaled corticosteroids) Dr. Larson educated the Parents on the importance of using Flovent on a consistent basis. (Id. at 129:4 – 29) Dr. Larson was reluctant to conclude that Mercedes died from an asthma event because persons with well controlled asthma normally do not die suddenly from an asthma attack. Dr. Larson assumed that Mercedes was taking Flovent on a regular basis. In fact, a review of the pharmacy records revealed that Mercedes use of Flovent was sporadic and inconsistent. (EX. 525-527) She should have used one Flovent canister each month. A summary of the pharmacy records (EX 595) revealed the following:

2003	4 canisters picked up from the pharmacy
2004	2 canisters picked up from the pharmacy
2005	5 canisters picked up from the pharmacy
2006	1 canister picked up from the pharmacy
2007	4 canisters picked up from the pharmacy

2008 3 canisters picked up from the pharmacy

Dr. Larson admitted that the sporadic use of Flovent explained, in part, why her asthma was poorly controlled. Id. at 131:22 – 133:25. Dr. Larson admitted that the Mercedes' poor compliance with the use of Flovent was one of the reasons she ended up on the hospital with an exacerbation in December 2007. (Id. 134:1 – 16)

The “Flovent” testimony was specifically admitted by the trial court over the objection of the Parents’ counsel. (VRP 11-06-12 TE VOL. II, 106:8- 107:3) The trial judge made a specific finding that the evidence was admissible to establish the level of control of Plaintiff’s asthma. The trial judge stated:

THE COURT: Let's start with Harris vs. Drake is not the issue here. That's just -- we're not talking Harris vs. Drake, we're talking about this child's condition on the day of her death and immediately prior to her death. No question about that. What was her condition. The jury's going to have to decide what her condition was. That's what you folks asked for by asking for a jury trial, so the jury gets to decide what her cause of death was. No question about that.

4.28 is, I'm going to follow 4.28 in the plaintiff's motions in limine. I denied it, so Dr. Larson gets to be asked issues about Mercedes' asthma and whether it was well controlled or not by herself or her parents and whether or not that contributed to her death. What's not going to get asked is whether Flovent contributed to her death. It's just, well, whether it was well-controlled or not. That's the issue.

* * * *

THE COURT: Okay. Well, like I said, *Harris vs. Drake* isn't the situation here. We don't have that. You know, her medical history is all subject to exploration, especially if that's coming in through Dr. Larson or some other witness. I'm going to follow my rulings in 4.27.1 and 4.28.1 about, you know, allowing argument, testimony, and comment related to the fact that Mercedes Mears, her allergic reaction situation, her medical condition, whether or not she ever had to use an Epi-Pen at home or at school, and that was one I said that you could explore. I said you could explore whether her asthma was not well-controlled by herself or her parents and somehow contributed to her death. So that's all fair game. No question about that.

(Id. at 114:23 – 115:12)

Yet, despite the court's ruling allowing the inquiry regarding Flovent, the Parents continue to argue that it was attorney misconduct for the District's counsel to use this evidence at trial. The argument is disingenuous at best and borders on being frivolous.

The Parents argue, as they did at trial, that the admission of the Flovent testimony is contrary to the rule in *Hoskins v. Reich*, 142 Wn.App. 557, 174 P.3d 1250 (2008) and *Harris v. Drake*, 116 Wash.App. 261, 265, 65 P.3d 350 (2003). While the District acknowledges that *Hoskins* was a case argued by one of the Parents' attorneys, it has no relevance in this case. In *Hoskins*, the court found that admission of evidence of a pre-existing non-symptomatic condition was error but did not prejudice the jury's verdict. The evidence allowed in *Hoskins* clearly violated the rule set down in *Harris v. Drake*, 116 Wash.App. 261, 265, 65 P.3d 350 (2003)

However, in this case the trial judge specifically found that *Harris* did not apply. (VRP 11-06-12 TE VOL. II, at 114) (Okay. Well, like I said, *Harris vs. Drake* isn't the situation here. We don't have that.)³⁷ The trial judge determined that the evidence regarding “Flovent” was relevant to the issue of the level of control of Mercedes asthma.

The Parents argue that *Washington Irr. and Development Co. v. Sherman*, 106 Wash.2d 685, 724 P.2d 997 (1986) is in point. Again, the Parents are mistaken. In *Sherman* the court, relying on Evidence Rule 703, admitted evidence that was contained in medical reports but was not in evidence actually in the trial record. The Supreme Court ruled that the admission of such evidence was error. The District does not quarrel with the holding in *Sherman*, it simply argues that the holding has nothing to do with the issues before this court.

Evidence of Mercedes lack of use of Flovent was critical and relevant evidence that explained why her asthma was so poorly controlled. Persons with poorly controlled asthma are more likely to suffer sudden and severe asthma attacks that could result in death. This was precisely the basis upon which the trial judge allowed the District to inquire of Dr. Larson.

³⁷ Interestingly, the Parents are not arguing that the judge’s ruling was incorrect. Instead they are arguing that the use of the admitted evidence by the District’s attorneys constituted attorney misconduct.

The Parents argue that the admission of evidence regarding Mercedes lack of compliance with her doctor's directive on the use of "Flovent" was "misconduct" since the evidence could never be "connected" to any material issue in this case. The trial judge specifically ruled that it was material and allowed the inquiry.

The Parents argue that the only relevance of Mercedes' lack of use of Flovent would be to prove contributory fault on the part of the parents. They argue that the only reason the District introduced the evidence (with the approval of the court) was "a clearly transparent attempt to try to prejudice the jury against Jeanette Mears, the Mother of Mercedes, by trying to create an impression that she permitted Mercedes to be non-compliant with Dr. Larson's orders, and that such non-compliance ultimately caused or contributed to Mercedes death." This argument is baseless. The District never made such an argument at any time during the trial.

In order to make sure that the jury made proper use of the evidence, the trial court granted a directed verdict on the theory that "Flovent use, or lack of use," was the proximate cause of Mercedes death. The evidence was only relevant to help the jury understand the degree of severity of Mercedes asthma, which in turn would explain how she might

be susceptible to suffering a severe asthma attack that could lead to death in a matter of minutes.

The Parents confuse the issue by injecting Dr. Montanaro's testimony into their argument. The issue related to Dr. Montanaro was a separate issue. Dr. Montanaro did not testify in his discovery deposition that the lack of use of Flovent explained Mercedes poorly controlled asthma. The Parents objected to Dr. Montanaro offering such an opinion at trial. At trial, Dr. Montanaro did not testify about Mercedes lack of use of Flovent. Dr. Montanaro's testimony was that Mercedes' asthma was "poorly controlled" based on evidence in autopsy findings unrelated to Flovent. Dr. Montanaro did not testify regarding the impact of Mercedes lack of compliance in the use of Flovent.

The trial judge properly ruled that the District could explore with Dr. Larson the medical significance of Mercedes inconsistent use of Flovent. Dr. Larson indicated that the failure to consistently use Flovent could result in a hospitalization or even death from an asthma attack. The District's counsel did exactly what the trial judge said they could do. Following the court's ruling is not a basis upon which the Parents can claim attorney misconduct.

The Parents next argue that the District violated the Motion in Limine that prohibited argument that Mercedes should have been kept

home on October 7, 2008. The issue arose during Principal Don Garrick's testimony. The day following Mercedes death, her Parents met with Principal Garrick. When asked to relate the conversation Mr. Garrick stated that "She [Mrs. Mears] stated to me that she was upset with herself because she let Mercedes come to school that date. The Parents counsel objected and the court heard argument outside the presence of the jury. The court ruled that it would instruct the jury to disregard Mr. Garrick's answer. (TE VOL. II, 146:14-17) The trial judge also held:

THE COURT: Well, the answer is yes. But that's the order of the Court right now. Mr. Harris and Mr. Moberg should follow it.

However, if the parents felt Mercedes had a cold or the flu when she went to school on the morning of the 7th of October 2008, they could certainly say what they felt. They don't -- that's just an ER701-type situation. I mean, every child is -- every parent's supposed to know the health condition of their children. But that's just an issue of fact. That's not something that requires expert testimony from a doctor. No parent has immediate access to a doctor every morning when they send their children to school

Id. at 147:3-15) The trial resumed and the court advised the jury to disregard Mr. Garrick's answer.

2. THERE WAS NO MISCONDUCT ON THE PART OF DEFENSE COUNSEL

The Parents argue that the District's Counsel committed other acts of misconduct. It is difficult to decipher precisely the conduct that the Parents claim as misconduct. At page 82 of their brief they refer to "the above

quoted question by Mr. Moberg to Ms. Barrett,” but it is not clear to what question they are referring. At page 83 of their brief they refer to the “above-quoted” question by Mr. Moberg, which accused Jeanette Mears of abusing her child, Jada, but they do not cite the court to any portion of the record that contains such a question. Then curiously, they make the statement at page 83 that “[t]he Court no doubt remembers that Mr. Moberg also asked Dr. Barrett if she knew Mrs. Mears had stated ‘thoughts of Jada made her skin crawl.’” The Parents cite to Trial Excerpts, VOL. II, page 171:14-21, but this citation is merely to an aside made during an argument by the Parent’s counsel regarding the testimony of Principal Garrick. The argument had nothing to do with the testimony of Dr. Barrett. Counsel was arguing that the court should strike the testimony of Principal Garrick where he testified that Jeanette Mears told him that Mercedes was congested that morning before she went to school.³⁸ Following that argument, the court denied the Parents motion for a mistrial and allowed the question and answer to stand. (Id. 172:13-15) At pages 41-43 of their opening brief the Parents discuss the cross-examination of Dr. Barrett. However, the Parents did not object to the questioning and it was allowed by the court. Their motion for a mistrial was denied. (VRP, 10/25/11, Barrett, P 54-56) The Parents readily admit

³⁸ The objection was actually made at Trial Excerpts VOL. II, 149:11-13

that the motion for mistrial was denied, their objections were not sustained and the cross-examination of Dr. Barrett continued. (Opening Brief at 44) This can hardly be a basis for a claim of misconduct of counsel.

The Parents next argue that it was misconduct for the District's Counsel to attempt to admit into evidence a statement made by Mrs. Mears contained in some counseling records. The Parents cite to the record of the argument regarding this matter, but do not provide the court with the actual testimony to which they object. The questioning before the jury did not mention in any manner that the documents for which foundation was being laid was a medical record. Nor did the foundation testimony reveal the contents of the document. The trial judge sustained the Parent's objection and did not admit the exhibit. He also denied the Parent's motion for a mistrial. (TE VOL. II, 420:17-21) The Parents requested that the court advise the jury that the offer of the exhibit (EX. 549) was denied and that they should not pay any attention to it. (Id. 421:23-25) The jury did not hear any evidence about the exhibit itself. There was no attorney misconduct in identifying and laying foundation for the offer.

Next the Parent's claim that "Mr. Moberg tried to illicit through Rhonda Gibson, in the presence of the jury, that Jeanette Mears, had called Ms. Gibson a name. (Parents Brief at 84, Emphasis in the original) The

Parents argument misstates the record. The total of what occurred in the presence of the jury is set forth below:

Q : Okay. By the way, during this trial, has Mrs. Mears spoken to you?

MR. MARTIN: Objection, Your Honor. Ask for a discussion.

THE COURT: She can answer yes or no.

MR. MOBERG: Answer yes or no.

THE WITNESS: Yes.

Q: (By Mr. Moberg) What did she say to you?

MR. MARTIN: Objection, Your Honor. I'd like to have a discussion outside the jury's presence.

THE COURT: Members of the jury, if I could have you step in the jury room for just a moment, please.

(TE VOL II. at 173:7-19) The questioning was not attorney misconduct or a “dirty trick” as suggested by the Parent’s counsel.

The Parents’ argue that “the above-quoted ‘child abuse’ comment, and comments regarding ‘skin crawling,’ are so prejudicial that there is no way that the curative instructions and sustaining of objecting served to cure the prejudice engendered.” (Appellant Brief at 85) This argument totally ignores the fact that the Parents never objected to the testimony as it developed; when they did object the court overruled the objection and found the questioning to be relevant and material; and the Parent’s never asked for any curative instructions. (VRP 10-25-11, Barrett, 42:13-24;

44:17- 45:2; 47:18-22); See Respondent's Brief supra at 25-27 A party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence." *State v. Avendano-Lopez*, 79 Wash.App. 706, 710, 904 P.2d 324 (1995), review denied, 129 Wash.2d 1007, 917 P.2d 129 (1996) (citing ER 103). The failure to object to the admission of evidence at trial or to testimony from witnesses precludes appellate review. *State v. Perez-Cervantes*, 141 Wash.2d 468, 482, 6 P.3d 1160 (2000); *State v. Guloy*, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986) Certainly, this cannot be the basis for a claim of misconduct either.³⁹

The Parents discuss the cases where prejudicial evidence was erroneously admitted by the court including *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 644, 230 P.3d 583(2010), *Kirk v. WSU*, 109 Wn. 2d 448, 746 P.2d 285 (1987), *Garcia v. Providence Medical Center*, 60 Wn. App 635, 806 P. 2d 766 (1991), *Estate of Lapping v. Group Health Co-op. of Puget Sound*, 77 Wn. App. 612, 892 P.2d 1116 (1995). The District does not quarrel with the holdings in those cases, where evidentiary issues

³⁹ Under the guise of misconduct, the Parents seem to argue that the court erred in not granting their Motion In Limine regarding the bonding issues between Jada and her mom in the first place. This was never an assigned error and is not a matter for consideration by this court at this late date.

were objected to and the issue properly preserved on appeal.⁴⁰ These cases have little bearing on the assigned issues on appeal in this case.

In their brief the Parent's return again to the "Flovent" testimony arguing that introduction of the Flovent evidence that was specifically permitted by the trial judge was attorney misconduct. (Appellant Brief at 88) They cite *Kuhn v. Schnall*, 155 Wash.App. 560, 228 P.3d 828 (2010) for the proposition that a new trial is justified where defense counsel used a demonstrative aid in front of a jury to punctuate an improper argument. Again, the District does not disagree with the holding in *Kuhn*, and in a case where counsel in final argument makes a argument to the jury that clearly misstates the law, was objected to and disapproved by the trial judge and uses a visual aid to augment the improper argument, then *Kuhn* would be instructive. However, in this case, no such argument was made at all. The District's counsel was making an opening statement and used a demonstrative aid to help the jury understand the "Flovent evidence." The Parents did not object to the opening statement and the court had ruled that "Flovent evidence" was relevant to the question of the level of control of Mercedes' asthma at the time of her death. It is disingenuous for the

⁴⁰ *Garcia* deals with a Motion in Limine and holds that a party does not have to object to the limited evidence at trial. However, the issue of the judge's ruling on the Motion in Limine was raised in the appeal. Here, the Parent's have not assigned error to the judge's In Limine ruling, but only argued that the District's counsel committed misconduct by obeying the courts In Limine ruling.

Parents to argue these facts were “almost identical to those which occurred in the *Kuhn* case.”

The Parent’s claims of misconduct are meritless. As the court noted in *Kuhn*,

[A] new trial may be granted based on the prejudicial misconduct of counsel if the conduct complained of constitutes misconduct, not mere aggressive advocacy, and the misconduct is prejudicial in the context of the entire record. (Footnote omitted) The misconduct must have been properly objected to by the movant and the must not have been cured by court instructions. (Footnote omitted) ‘A mistrial should be granted only when nothing the trial court could have said or done would have remedied the harm caused by the misconduct.’”(Footnote omitted)(citing *A.C. ex rel. Cooper v. Bellingham School Dist.*, 125 Wash.App. 511, 521, 105 P.3d 400 (2004))

Kuhn at 576-577. The Parent’s have not met their burden of establishing misconduct in this case.

D. SUBSTANTIAL JUSTICE WAS DONE IN THIS CASE.

Finally, the Parents argue that the court should reverse this jury verdict under CR 59(a)(9) because substantial justice has not been done. The argument under this heading is simply a rehash of the same arguments they have already made in their brief. They reassert that “there is simply no evidence justifying the jury’s verdict with respect to proximate cause. They argue again that there was misconduct related to the “Flovent” issue and the “bonding issue.” They then assert that “there were clearly other matters that constitute cumulative evidentiary error warranting a new trial

but they fail to point out any other evidentiary error. These conclusory statements are of little help to the court and impossible for the District to respond to in this brief.

The Parents then make the curious argument that there were other acts of misconduct during the pretrial proceedings. They again use the strange phraseology that “the court, upon review of the record, will no doubt recall, that two days prior to discovery cutoff, over approximately 500 pages of new discovery was produced.”⁴¹ The Parents have never identified this discovery issue as an issue on appeal and did not include it in their Assignment of Errors as is required. RAP 10.3(a)(4) Normally the court will not consider an argument where the appellant failed to assign error to the court's ruling, or include this matter in their statement of issues pertaining to the assignments of error. This issue, therefore, cannot be considered on appeal. RAP 10.3(g). *Marsh v. Merrick*, 28 Wash.App. 156, 161, 622 P.2d 878, 882 (1981) Furthermore, the Parents do not cite the court to any portion of the record that deals with this issue.⁴² The court should not consider this argument.

⁴¹ This argument, as well as many other sections of the Parents brief appear to be “cut and pasted” directly from their brief at the trial court in support of a new trial, which explains the strange phraseology and the lack of any citation to the record. (CP 4084-4131)

⁴² This is understandable since the trial court made no material rulings on this issue. Again, this is a cut and paste from the Parents’ Motion for New Trial.

Probably the most extraordinary, if not the most preposterous argument the Parents make is that the school district employees, called adversely in the Parents' case in chief, were "coached to be non-cooperative." The Parents make this outlandish claim without any fair or reasonable basis to do so. They cite the court to a portion of Peggy Walker's testimony (TE, VOL. II, 77-89) as undisputable proof that the District employees were coached to not be cooperative and not forthrightly answer questions.⁴³ A review of Ms. Walker's entire testimony reveals that she did her very best to answer counsel's questions, which were often argumentative and aggressive.⁴⁴ Peggy Walker was at Mercedes' side during this entire terrifying and tragic 6 minutes. She did everything she could to keep Mercedes alive and calm during this ordeal. The cold record does not reveal the tone of the Parents' counsel during this questioning. However, the court's caution to Parents' counsel will give the court a small insight as to how difficult it must have been for Peggy Walker to endure counsel's intense questioning. Near the end of her questioning that day, outside the jury's presence, Ms. Walker told the court that she felt bullied by Parent's counsel. She felt like she was being attacked by counsel. (Id. at 83:13 – 84:9) Ms. Walker was excused for

⁴³ This excerpt of her testimony was late in the afternoon of her first day on the stand. She had endured counsel's aggressive questioning that entire morning and it resumed again in the afternoon.

⁴⁴ Ms. Walker was on the stand for the better part of two full trial days.

the day and asked to return in the morning. After she left the room the following exchange occurred:

THE COURT: So, Mr. Barcus –

MR. BARCUS: Yes, Your Honor.

THE COURT: Hold on just a minute. Did you hear what the witness was saying?

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

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

(Id. at 85:5-12)

After Mr. Barcus denied that he was bullying her the trial judge made the following observation:

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

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

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

That's all I have to say today.

(Id. at 89:2-21)

The witness was not recalcitrant and did her best under very difficult circumstances. Many of the questions asked to her implied that she was responsible for Mercedes' death.⁴⁵ The Parent's argue that Ms. Walker's testimony was akin to what occurred in *Storey v. Storey*, 21 Wash. App. 370, 372, 585 P.2d 183, 184 (1978) and should be the basis of a new trial. *Storey* was a rancorous family dispute over a promissory note. In *Storey*, the trial judge made specific findings of fact that the defendant Betty Story purposely volunteered prejudicial remarks placing the plaintiff in a bad light. The court found that her remarks were not inadvertent or innocently made, but were done for the purpose of improperly influencing the jury. The trial judge found that the misconduct of this witness was so flagrant that an instruction or admonition would remove the harm caused. *Storey* has absolutely no applicability to this case. The trial judge did not make any negative findings regarding Ms. Walker's testimony. He only cautioned her to do her best to answer the question asked and to not go beyond the question with her answer. The Parents argument in this regard is meritless.

⁴⁵ Again, this issue was not raised in the Assignment of Error or Issues related to the Assignment and should not even be considered by the court.

Next, the Parents argue that a new trial is necessary because of the poor rapport between counsel. Again, this is not an Assignment of Error, or identified as an Issue related to any assignment of error. In addition, the argument deserves little response. The identical argument was made to the trial judge on the Parents' motion for a new trial and rejected by him. (CP 4118-20) This is not the same situation that occurred in *Snyder v. Sotta*, 3 Wash.App. 190, 473 P.2d 213 (1970), which involved a number of errors and some rancor between the trial judge and defense counsel. No such issue existed in the case before this court.⁴⁶

Lastly, the Parents raise yet another unassigned error related to the testimony of Heidi Christiansen, one of the party defendants regarding whether Rhonda Gibson followed her training on the day in question.⁴⁷ (TE, VOL. II, 305-07) This testimony was properly allowed by the trial judge. The Parents have not claimed it as an assigned error and offer no legal basis to support their claim that the trial judge improperly allowed

⁴⁶ That is not to say that there was some disagreement between counsel in this case, which occurred outside the presence of the jury. However, there was no finding by the court that this disagreement affected the jury's verdict in any manner. The Parents claim that this was caused solely by the acts of the District's counsel. The District's counsel invite the Parents and this Court to carefully review this record and identify any instance where the District's counsel made any unprofessional or derogatory comments about the Parent's counsel. Conversely, there were a number of unprofessional attacks by the Parent's counsel on both of the District's attorneys. However, pointing those out would not serve any useful purpose in this case.

⁴⁷ The identical argument was made in the Parents brief in support of their motion for a new trial. (CP 4119)

the testimony. The Parent's objection to the evidence was that it is "self-serving" and calls for speculation. The court overruled these objections.⁴⁸ The Parent's counsel was able to cross-examine Ms. Christiansen regarding her testimony. This is not a properly preserved issue for appeal and would not require a reversal of the verdict rendered in this case after an eight week trial.

V. ARGUMENTS IN SUPPORT OF CROSS-APPEAL

A. THE DISTRICT AND ITS EMPLOYEES WERE IMMUNE FROM LIABILITY UNDER RCW 28A.210.270

RCW 28A.210.270 immunizes schools and school employees from liability when they follow written instructions and prescriptions provided by a student's doctor and parents. Rhonda Gibson and Peggy Walker did that. It is clear that Mercedes had an asthma attack. Therefore, the only authorized option that the District employees had was to follow Dr. Larson's order and administer Albuterol. RCW 28A.210.270(1) provides, in part:

(1) In the event a school employee administers oral medication, . . . to a student pursuant to RCW 28A.210.260 in substantial compliance with the prescription of the student's licensed health professional prescribing within the scope of the professional's prescriptive authority or the written instructions provided pursuant to RCW 28A.210.260(4), and the other conditions set forth in RCW 28A.210.260 have been

⁴⁸ The Parents now argue that it was also improper opinion evidence in violation of ER 702. This objection was never made at trial and should not be considered by this court.

substantially complied with, then the employee, the employee's school district or school of employment, and the members of the governing board and chief administrator thereof shall not be liable . . . for civil damages in their individual or marital or governmental or corporate or other capacities as a result of the administration of the medication.

No Washington case has yet addressed this immunity and it is a matter of first impression with this court. However, the language of the statute is clear, if the District complies with the doctor's order in administering oral medication (i.e. Albuterol,) the District and its employees are immune from liability for civil damages. In this case, the District followed Dr. Larson's order and the asthma protocol. They administered Albuterol and called 911. They should have been granted immunity as a matter of law from this claim.

B. THE BYSTANDER CLAIM DOES NOT APPLY TO THIS CASE.

The Parent's argued that Jada Mears, who was present briefly while the District employees were tending to Mercedes, was entitled to make a "bystander claim" for the negligent infliction of emotional distress she suffered. There is no authority recognizing such a claim except when the "bystander" witnesses the tortious infliction of injury on a family member, or arrives at the scene of an accident soon after its occurrence. *See Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008) (reviewing the development of NEID claims by "bystanders," and holding

that a family member may recover for emotional distress caused by witnessing an accident in which a relative is injured, or observing an injured relative at the scene of an accident after its occurrence if the family member arrives both shortly thereafter and unwittingly). No authority allows a “bystander” NEID claim for witnessing the failure of a district employee to save the life of a person imperiled by sudden illness. The District did not create the peril in this case. The District employees were simply doing all that they legally could do to save Mercedes life. This cannot and should not be the basis of a NEID bystander claim. In every case recognized in Washington, the “bystander” came immediately upon the scene of an accident caused by the tortuous conduct of the defendant. It makes no sense to extend the claim against others at the scene that did not cause the accident, but are attempting to save the life of the person. If the court adopted this approach, then the claim could be maintained against the EMT’s, or even volunteers at the scene, who were trying to save the life of the injured person. Our court has not extended this limited claim that far. The trial court should have granted the District’s motion for summary judgment on this claim.

VI. CONCLUSION

The jury arrived at a fair and just verdict. The verdict was internally consistent and consistent with the great weight of the evidence in this case. This case is a much simpler case than the Parents make it out to be. The issue before the jury was clear; did Mercedes die from an asthma attack or from an allergic reaction? If she died from an asthma attack, the District's employees did everything they were authorized to do to assist her. They called 911, they provided her with her rescue medication and they comforted her while awaiting the arrival of the EMT's. On the other hand, if the jury determined that Mercedes was having an allergic reaction, then the District employees did not follow the doctor's order that would have required the administration of epinephrine. The jury accepted the overwhelming evidence that Mercedes was having an asthma attack that day, and the District's employees did precisely what they were trained to do under that circumstance.

The jury may have determined that the District was negligent in their paperwork, or in the manner in which they drafted the food care plan, or in one of the other fifty ways suggested by the Parents. However, the jury did not find these other acts of negligence were the proximate cause of Mercedes death. Mercedes died from a sudden onset fatal asthma attack

and there was really nothing that the District employees reasonably could have done that day other than what they did do.

There was no misconduct of counsel or evidentiary ruling of the trial judge that would require a new trial.

In addition, the District and its employees are entitled to immunity from these claims. Jada Mears' bystander claim should have also been dismissed by the trial court.

This court should affirm the jury verdict in this case.

RESPECTFULLY SUBMITTED March 06, 2013.

JERRY MOBERG & ASSOCIATES

/s/ Jerry J. Moberg

JERRY J. MOBERG WSBA No. 5282

Attorney for Respondent/Defendants

CERTIFICATE OF SERVICE

I certify that on this date, a copy of the document to which is affixed was caused to be served and delivered upon the following:

Filed with the Court of Appeals, Division II, via Federal Express to:

Coa2filings@courts.wa.gov
Court of Appeals Div. II
David Ponzoha
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Provided to Plaintiff/Appellant's attorneys, via email & US mail as follows:

LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, P.L.L.C.

Ben F. Barcus
4303 Ruston Way
Tacoma, WA 98402-5313
ben@benbarcus.com
HeatherS@benbarcus.com

Paul Lindenmuth
paul@benbarcus.com;
marilyn@benbarcus.com

LAW OFFICE OF THADDEUS P. MARTIN

Thaddeus P. Martin
4928 109th Street SW
Lakewood, WA 98499
corie@thadlaw.com
tmartin@thadlaw.com

Provided to Co-Counsel for Respondent/Defendant, via email & US mail as follows:

WILLIAMS, KASTNER, GIBBS

Jessie L. Harris
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101-2380
jharris@williamskastner.com
mirvine@williamskastner.com

Dan Ferm
dferm@wkg.com
ccuster@wkg.com

DATED this 6th day of March, 2013.



DAWN SEVERIN, Paralegal

APPENDIX A

**MEARS
VS.
BETHEL SCHOOL
DISTRICT
NO 403**

**Primary Rules Violated by the
Defendants**

- A. A school district must employ competent and properly trained Nurses, Health Clerks and other personnel so that **Children are not needlessly endangered.**

**Primary Rules Violated by the
Defendants**

- B. A school district must have proper policies, practices, procedures and protocols in place so that Children are provided proper care in the event of predictable life-threatening emergencies.

Primary Rules Violated by the Defendants

- C. A school district must administer available emergency medication in the event of a life-threatening illness suffered by a child, and if it does not, and a child is hurt or dies, then the school district and its employees are responsible for the harms and losses that they cause.

Jury has TWO jobs to do:

- 1. Decide the issues based upon the evidence
 - a) So that you can answer the questions in the VERDICT FORM; and
 - b) In this case we have issues concerning liability and harm caused to the Mears.
- 2. Decide what you are going to do about it, *and* be able to explain your reasons to your fellow jurors

The Jury Instructions are the RULES of the case

**BURDEN OF PROOF
INSTRUCTION # 9**

• **Burden of Proof**
 When it is said that a party has the burden of proof of any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

Negligence of the Defendants

- # 16
- # 19
- # 20
- # 17

**DUTY TO PROTECT
INSTRUCTION #16**

A School District has a duty to protect all students from dangers which can be reasonably anticipated. This duty is one of ordinary care. A School District must use such care as a reasonably prudent person would exercise under the same or similar circumstances.

**NEGLIGENCE
INSTRUCTION # 19**

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

**Ordinary Care
INSTRUCTION # 20**

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

INSTRUCTION # 17

A School District's duty to use ordinary care includes anticipating risks of harm which are reasonably foreseeable. For harm to be reasonably foreseeable, all that must be established is that the actual harm suffered fell within a general field of danger which should have been anticipated by the School District and/or its employees.

In order to find a failure of ordinary care, you should consider what a School District and its employees

knew or should have known about the risks of harm to the plaintiffs.

**PROXIMATE CAUSE
INSTRUCTION # 11**

The term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause, produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of an injury.

PROXIMATE CAUSE

Cause: To MAKE happen

Cause: To ALLOW to happen
(w/o intervening)

Funeral Book

The pinnacle of
falsehood and
disrespect – forging
name of Tom Siegal

**Direct or Circumstantial Evidence
INSTRUCTION # 3**

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

**NO FAULT OF THE MEARS OR ANY OTHERS
INSTRUCTION # 27**

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the [injury] [damage] to the plaintiff. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include the only the three named defendants in this action. You shall not apportion fault to any other person or entity.

**YOU ARE THE SOLE
JUDGES OF THE
CREDIBILITY**

*INSTRUCTION #1
PARAGRAPH 2*

**MEASUREMENT
OF DAMAGES**

**DAMAGES for
The Estate of MERCEDES MEARS
INSTRUCTION # 28**

It is the duty of the court to instruct you as to the measure of damages on the plaintiffs' claim for personal losses suffered by Mercedes Mears. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the Plaintiffs, then you must determine the amount of money that will reasonably and fairly compensate The Estate of Mercedes Mears for such damages as you find were proximately caused by the negligence of the defendants.

**DAMAGES for MERCEDES MEARS
INSTRUCTION # 28 cont.**

If your verdict is for the Plaintiffs, your verdict must include the following undisputed items:

1. Funeral Expenses:	<u>\$ 4,084.00</u>
2. Past Medical Billings:	<u>\$ 8,841.00</u>
3. Future Economic Damages:	<u>\$208,403.00 to \$560,273.00</u>

In considering the range of future economic damages you should consider:

1. The net accumulations lost to Mercedes Mears' estate

**DAMAGES for MERCEDES MEARS
INSTRUCTION # 28 cont.**

- a. In determining the net accumulations, you should take into account Mercedes Mears' age, health, life expectancy, occupation, and habits of industry, responsibility and thrift.
- b. You should also take into account Mercedes Mears' earning capacity, including her actual earnings prior to death and the earnings that reasonably would have been expected to be earned by her in the future, including any pension benefits.
- c. Further, you should take into account the amount you find that Mercedes Mears reasonably would have consumed as personal expenses during her lifetime and deduct this from her expected future earnings to determine the net accumulations.

**DAMAGES for MERCEDES MEARS
INSTRUCTION # 28 cont.**

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

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

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

**Damages for Jeannette & Michael Mears
INSTRUCTION # 29**

It is the duty of the court to instruct you as to the measure of damages on plaintiffs' claim for personal losses suffered by Plaintiff's Jeanette Mears, individually and Michael Mears, individually. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiffs, then you must determine the amounts of money that will reasonably and fairly compensate Plaintiff's Jeanette Mears and Michael Mears for such damages as you find were proximately caused by the negligence of the defendant.

**Damages for Jeannette & Michael Mears
INSTRUCTION # 29 continued**

If you find for the Plaintiffs Jeanette Mears and Michael Mears your verdict must include the following undisputed items:

Past Medical Billings:

Jeannette & Michael Mears Counseling Expenses

\$ 2,195.00

**Damages for Jeannette & Michael Mears
INSTRUCTION # 29 continued**

In addition you should consider the following items:

(1) Economic Damages

- a) The reasonable value of necessary medical care, treatment, and services received by Jeanette Mears and Michael Mears to the present and with reasonable probability to be required in the future.
- b) The economic value of services and support Mercedes Mears reasonably would have been expected to contribute to Plaintiffs Jeanette Mears and Michael Mears from the date of injury until she would have attained the age of majority, less the cost to Plaintiffs Jeanette Mears and Michael Mears of Mercedes Mears' support and maintenance during that interval.

**Damages for Jeannette & Michael Mears
INSTRUCTION # 29 continued**

(2) Noneconomic Damages

- a) The loss of love and the destruction of the parent-child relationship between Plaintiffs Jeanette Mears and Michael Mears and Mercedes Mears, including the grief, mental anguish, and suffering of Plaintiffs Jeanette Mears and Michael Mears experienced as a result of Mercedes Mears' death and with reasonable probability to be experienced in the future.
- b) The loss of companionship, including mutual society and protection, of Mercedes Mears to Plaintiffs Jeanette Mears and Michael Mears experienced and with reasonable probability to be experienced in the future.

**Damages for Jeannette & Michael Mears
INSTRUCTION # 29 continued**

In making your determinations, you should take into account Mercedes Mears' age, health, life expectancy, character, and habits, as well as her station in life.

The burden of proving damages rests upon the plaintiffs. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

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

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

**DAMAGES for Jada Mears
INSTRUCTION # 30**

- It is the duty of the court to instruct you as to the measure of damages for plaintiff Jada Mears. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.
- If your verdict is for plaintiff Jada Mears on her claim that she has suffered emotional distress by observing the death of her sister, Mercedes Mears, then you must determine the amount of money that will reasonably and fairly compensate her for such damages as you find were proximately caused by the negligence of the defendants.

**DAMAGES for Jada Mears
INSTRUCTION # 30 continued**

If you find for the plaintiff, you should consider the following economic damages:

The reasonable value of necessary medical care, treatment and services received to the present time, and with reasonable probability to be required in the future.

\$ _____

**DAMAGES for Jada Mears
INSTRUCTION # 30 continued**

In addition you should consider the following noneconomic damages elements:

1. The nature and extent of the injuries;
2. The pain and suffering both mental and physical experienced and with reasonable probability to be experienced in the future; and
3. The loss of enjoyment of life experienced and with reasonable probability to be experienced in the future.

**DAMAGES for Jada Mears
INSTRUCTION # 30**

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

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

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

**SPECIFIC DEFENDANT
INSTRUCTION #25**

You should decide the case of each defendant separately as if it were a separate lawsuit. The instructions apply to each defendant unless a specific instruction states that it applies only to a specific defendant.

Special Verdict Form

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(s)

NO. 09-2-16169-6

Special Verdict Form

v.

BETHEL SCHOOL DISTRICT,
NO. 463 a Municipal corporation;
RHONDA K. GIBSON; and
HEIDI A. CHRISTENSEN;
Defendant(s)

QUESTION # 1:
Were any of the defendants negligent?
(Answer: "yes" or "no" after the name of each defendant.)

Defendant: X
BETHEL SCHOOL DISTRICT (Yes) (No)

Defendant: X
RHONDA GIBSON (Yes) (No)

Defendant: X
HEIDI CHRISTENSEN (Yes) (No)

QUESTION # 2:

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

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

Defendant: X _____
 (Yes) (No)

BETHEL SCHOOL DISTRICT

Defendant: X _____
 (Yes) (No)

RHONDA GIBSON

Defendant: X _____
 (Yes) (No)

HEIDI CHRISTENSEN

QUESTION 3:

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

ANSWER:

1. THE ESTATE OF MERCEDES MEARS:

A) Funeral Expenses: \$ 4,084.00

B) Past Medical Billings: \$ 8,841.00

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

2. MICHAEL MEARS

A) Past Economic Damages: \$ 1,097.50

B) Future Economic Damages: \$ _____

2. MICHAEL MEARS

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

\$ _____

D) The Loss of the Care, Companionship,
Including Mutual Society and
Protection from Mercedes Mears to Michael
Mears Experienced to the Present and with
reasonable probability in the future :

\$ _____

3. JEANETTE MEARS

A) Past Economic Damages:

\$ 1,097.50

B) Future Economic Damages:

\$ _____

2. JEANETTE MEARS

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

\$ _____

D) The Loss of the Care, Companionship,
Including Mutual Society and
Protection from Mercedes Mears to Jeanette
Mears Experienced to the Present and with
reasonable probability in the future :

\$ _____

4. JADA MEARS

- A. Future Economic Damages: \$ _____
- B. Past Emotional Distress and Fear: \$ _____
- C. Future Emotional Distress and Fear: \$ _____
- E. Past Loss of Enjoyment of Life: \$ _____
- D. Future Loss of Enjoyment of Life: \$ _____

QUESTION 4:

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

ANSWER:

Defendant:	BETHEL SCHOOL DISTRICT	_____ %
Defendant:	RHONDA K GIBSON	_____ %
Defendant:	HEIDI A. CHRISTENSEN	_____ %
	TOTAL:	_____ 100%

**WE HAVE GIVEN YOU
TOOLS TO DECIDE THE
EVIDENCE, AND APPLY
THE LAW**

FACTS OF THE CASE

FRONT OF THE SCHOOL/BENCH

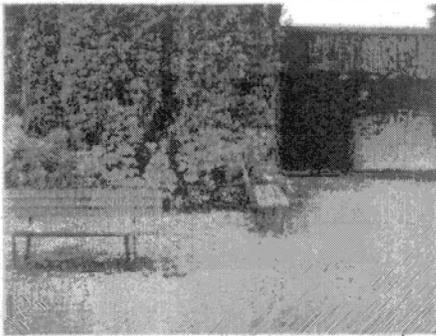


Exhibit # 191

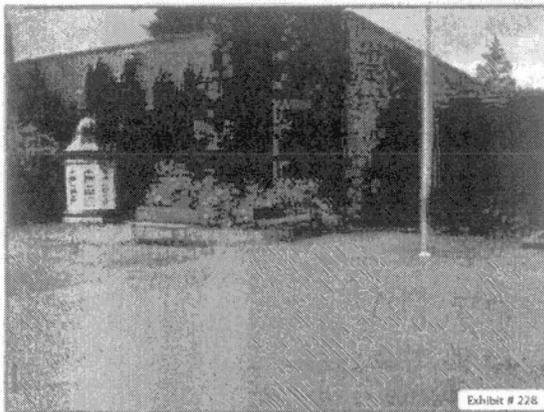
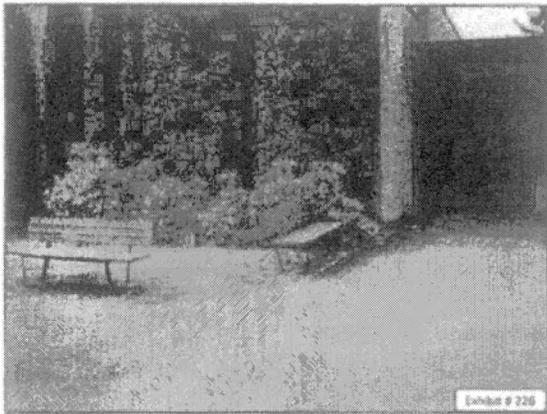
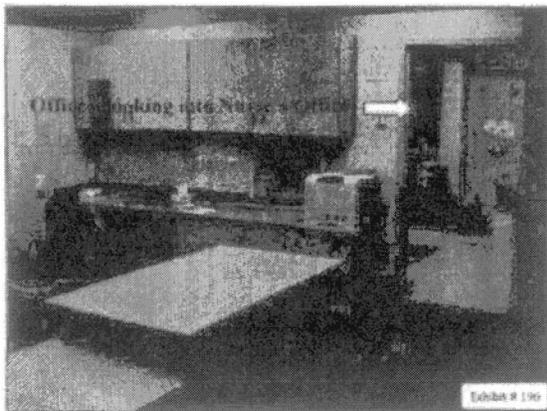
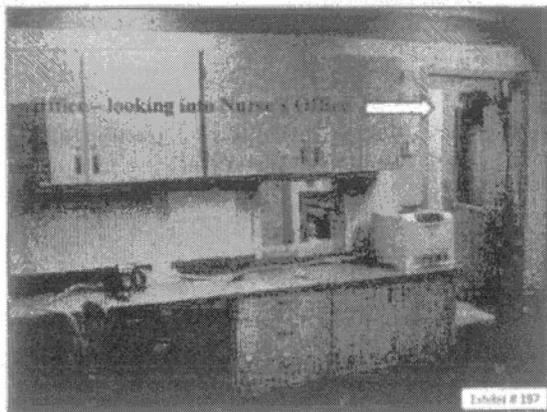
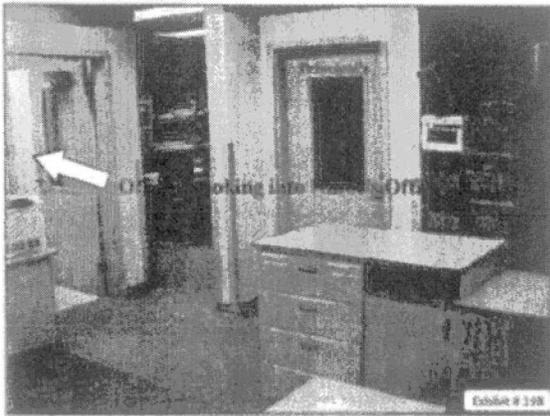


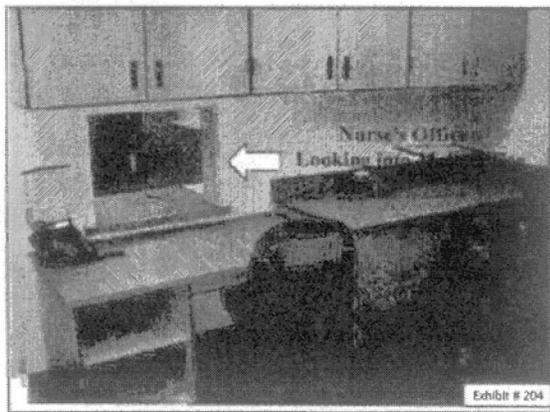
Exhibit # 226

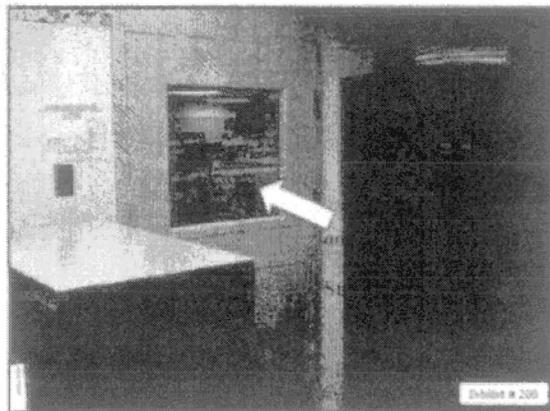




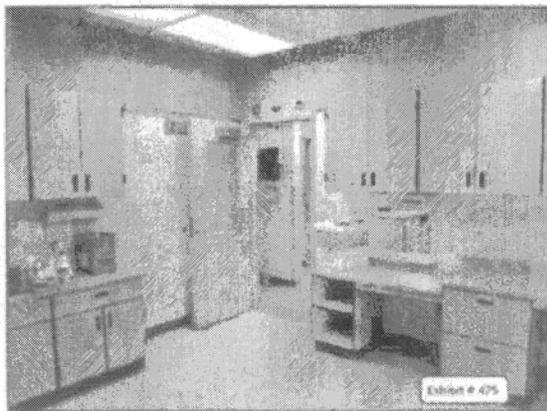












**TIMELINE
of the EVENTS**

SCHOOL DISTRICT OF PHOENIX

POLICY # 265

The board recognizes that schools are responsible for providing first aid or emergency treatment in case of sudden illness or injury to a student, but that further medical attention is the responsibility of the parent or guardian.

When a student is injured it is the responsibility of staff to see that immediate care and attention is given. The injured party shall be taken to a physician, a nurse or a doctor. Word of the accident should be sent to the principal's office and to the nurse. The principal or designated staff should immediately contact the parent so that the parent can arrange for care or treatment of the injured.

Parents should understand that in such situations, schools will be notified or contacted by emergency medical personnel. With the parent's consent, schools may then decide to provide first aid or medical attention.

The school district shall provide for a nurse with facilities to administer first aid and to be maintained on the school premises.

The responsibility shall not be transferred to a third party whether such be providing first aid or emergency medical attention on school premises.

Approved: _____ Date: _____
 Superintendent _____
 Board President _____

Exhibit # 265

**DUTIES OF THE
SCHOOL AND
EMPLOYEES AS
SUBSTITUTE PARENT
OF CHILDREN**

**What the Defendants
Did and Did not Do**

Doctor's Order – Epi Pen
9/24/08


PEDIATRIC
NORTHWEST, P.A.

PERMISSIVE ORDER FOR MEDICATION AT SCHOOL

Parent: Mercedes B. Jones
DOB: 11/14/1972

Parent agrees to medication as indicated below. Medication is indicated to be given to a child or adult only when absolutely necessary. It is indicated by the parent that the medication will be dispensed by the principal or another designee if the school nurse is not present.

Medication and dosage form: EpiPen
Dose and mode of administration: Self injected into thigh
How often to be given: In a large emergency, Call 911 if EpiPen used
Duration without subsequent order: School Year
Side effects of drug (if any) to be expected: Skin at site

9/24/08 Signature: 
Larombe Lacroix, DO

Exhibit # 295

Doctor's Order – Epi Pen
9/24/08

Medication and dosage form: EpiPen
Dose and mode of administration: Self injected in the thigh
How often to be given: In all large emergency, Call 911 if EpiPen used
Duration without subsequent order: School Year
Side effects of drug (if any) to be expected: Skin at site

9/24/08 Signature: 
Larombe Lacroix, DO

Exhibit # 299

Doctor's Order – Albuterol
9/24/08

PERMISSIVE ORDER FOR MEDICATION AT SCHOOL

Parent: Mercedes B. Jones

Medication is indicated to be given to a child or adult only when absolutely necessary. When ever possible, the parent and physician designate the designee responsible for giving medicine to the child or adult. It is indicated by the parent that the medication will be dispensed by the principal or designee if the school nurse is not present. The principal and designee are jointly responsible to dispense medication to the individual child.

The school nurse is responsible for approval of medication when the substance is administered in accordance with the physician's direction.

Indication for the medication to be given at school: Asthma

Medication and dosage form: Albuterol
Dose and mode of administration: 2 puffs
How often to be given: Every 4-6 hours with a 24 hour peak to trough
Duration without subsequent order: School Year
Side effects of drug (if any) to be expected: None

9/24/08 Signature: 
Larombe Lacroix, DO

Exhibit # 300

PARENTS WERE TOLD THAT CHILDREN WOULD BE GIVEN EPI IMMEDIATELY, W/O ANY WAITING, AND THEY HAD A RIGHT TO RELY ON THAT REPRESENTATION BY THE SCHOOL. THEY PLACED THEIR TRUST IN THE SCHOOL TO PRESERVE THE LIFE OF THEIR CHILDREN

UNFORTUNATELY, HEIDI CHRISTENSEN WAS OF THE MINDSET THAT SHE "FIGURED THAT SHE HAD UNTIL THE END OF THE SCHOOL YEAR" TO DO THE EHCP??

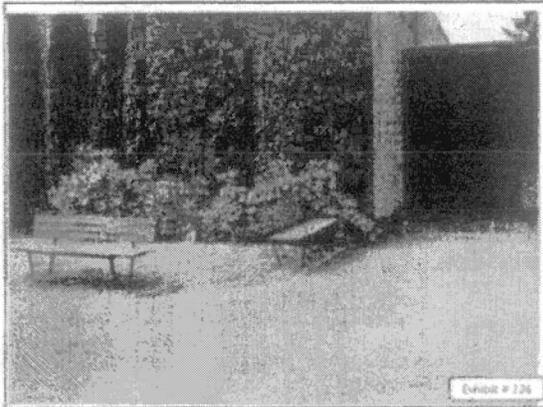
ALL SCHOOL OFFICIALS ADMIT THAT THE EHCP'S ARE THE HIGHEST PRIORITY TO PRESERVE THE LIVES OF THE CHILDREN.

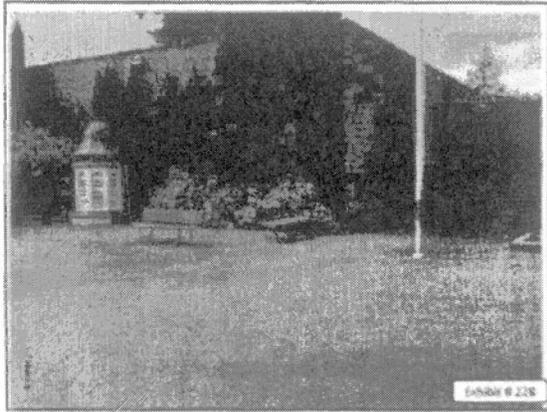


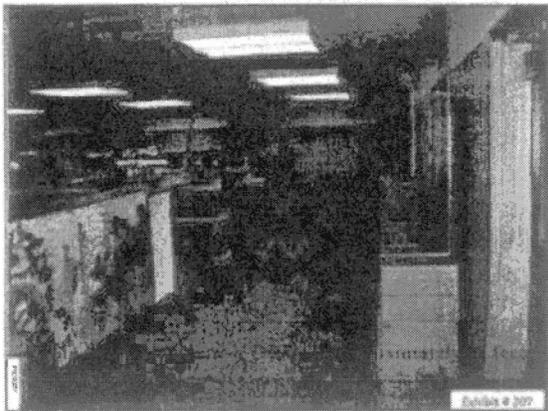
Henry Dotson,
Friend of Mercedes



Lisa Dotson
Family Friend











Jaden Rome,
Classmate at Clover Creek



Carolyn Krieger & son Jaden Rome

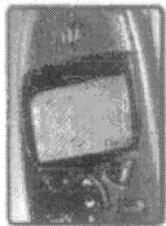


EXHIBIT #397



Amber Midkiff-Bray,
Investigator



Don Garrick,
Principal of Clover Creek Elementary





Adrian Black,
Mercedes' Uncle in Virginia

Who We are Suing
and Why:
The Safety Rules that
the Defendants
Violated.

We are suing Heidi Christenson
School Nurse -- for violating two
primary safety rules:

First, she failed to complete a
proper, updated and valid
Emergency Healthcare plan for
Mercedes

- She simply used the last year's inadequate plan, and carried it over - this is a violation of nursing protocol.
- This had old medicine within it, and was not valid.
- This plan did not have the "If you see this, do this" format, so that it was easy to understand and act upon in case of emergency.
- This plan did not provide any assistance to the non-licensed health people at the school.

- This plan could not be found when needed, and was incomplete,
- HC did not confer w/ the Mears to see if it was correct.
- HC did not call the Mears – they would have responded immediately, as they always did.
- HC did not do any assessment of M for that school year
- No asthma plan was EVER done by HC.

EXHIBIT 8 SED

Dear School Nurse:

This form is to be used by the parent or guardian to provide information to the school nurse regarding a student's medical condition and to request that the school nurse be notified of any changes in the student's condition. This form is to be completed by the parent or guardian and returned to the school nurse.

For students with a medical order to administer epinephrine at school to treat anaphylaxis or possible anaphylaxis, the recommended protocol after exposure is to immediately:

- 1. Call 911**
- 2. Administer Epinephrine**
- 3. Call Parents**

Check and re-check instructions regarding the requirements of this form. Age 14 and 25 are subject to review.

Exhibit # 381











**MORE PROBABLE THAN NOT
INSTRUCTION #6**

Medical testimony must establish the causal relationship of an injury and the alleged negligence of a defendant. Such testimony must be in terms of "probability." In other words, medical testimony in terms of possibility, speculation or conjecture is not sufficient. Medical testimony that an incident "could" cause, "can" cause, "may" cause, or "might" cause such an injury is not sufficient because these terms indicate a possibility, rather than a probability.

**EXPERT WITNESS
INSTRUCTION #5**

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

**PAST MEDICAL HISTORY
INSTRUCTION #7**

You are instructed that testimony and evidence concerning Mercedes Mears' past medical history has been allowed only for the limited purpose of her prior asthma condition.

You are not to discuss this evidence when you deliberate in the jury room, except for the limited purpose of discussing Mercedes Mears' past asthma condition.

**AGENT
INSTRUCTION #14**

An agent is a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services. One may be an agent even though he or she receives no payment for services.

Bethel School District, Rhonda Gibson and Heidi Christensen are sued as principal and agents. Bethel School District is the principal and Rhonda Gibson and Heidi Christensen are the agents. If you find either Rhonda Gibson or Heidi Christensen are liable, then you must find that Bethel School District is also liable.

**ACTS OR OMMISIONS
INSTRUCTION #15**

The employees of the Bethel School District are the agents of Bethel School District, and therefore, any acts or omissions of the agent(s), are the acts or omissions of the Bethel School District.

**DELEGATING or SEEKING TO
DELIGATE
INSTRUCTION # 18**

A school district and its employees are not relieved of its duty to Mercedes Mears by delegating or seeking to delegate that duty to another person or entity.

**STATUTE
INSTRUCTION #21**

A statute provides that:

1. The attendance of every child at every public school in the state shall be conditioned upon the presentation before or on each child's first day of attendance at a particular school of a medication or treatment order addressing any life-threatening health condition that the child has that may require medical services to be performed at the school. Once such an order has been presented, the child shall be allowed to attend school.

**STATUTE
INSTRUCTION #21 continued**

2. As used in this statute, "life-threatening condition" means a health condition that will put the child in danger of death during the school day if a medication or treatment order and a nursing plan are not in place.

**STATUTE
INSTRUCTION #21(A)**

A statute provides that:

The anaphylactic policy guidelines for schools to prevent anaphylaxis and deal with medical emergencies resulting from it shall include, but need not be limited to:

**STATUTE
INSTRUCTION #21(A) cont.**

- (a) A procedure for each school to follow to develop a treatment plan including the responsibilities for [of] school nurses and other appropriate school personnel responsible for responding to a student who may be experiencing anaphylaxis;
- (b) The content of a training course for appropriate school personnel for preventing and responding to a student who may be experiencing anaphylaxis;

**STATUTE
INSTRUCTION #21(A) cont.**

- (c) A procedure for the development of an individualized emergency health care plan for children with food or other allergies that could result in anaphylaxis;
- (d) A communication plan for the school to follow to gather and disseminate information on students with food or other allergies who may experience anaphylaxis;

**STATUTE
INSTRUCTION #21(A) cont.**

- (e) Strategies for reduction of the risk of exposure to anaphylactic causative agents including food and other allergens;
- (2) For the purpose of this section "anaphylaxis" means a severe allergic and life-threatening reaction that is a collection of symptoms, which may include breathing difficulties and a drop in blood pressure or shock.

**STATUTE
INSTRUCTION #21(B) cont.**

A statute provides that:

(1) All school districts shall adopt policies regarding asthma rescue procedures for each school within the district.

(2) All school districts must require that each public elementary school and secondary school grant to any student in the school authorization for the self-administration of medication to treat that student's asthma or anaphylaxis, if:

**STATUTE
INSTRUCTION #21(B) cont.**

(a) A health care practitioner prescribed the medication for use by the student during school hours and instructed the student in the correct and responsible use of the medication;

(b) The student has demonstrated to the health care practitioner, or the practitioner's designee, and a professional registered nurse at the school, the skill level necessary to use the medication and any device that is necessary to administer the medication as prescribed;

**STATUTE
INSTRUCTION #21(B) cont.**

(c) The health care practitioner formulates a written treatment plan for managing asthma or anaphylaxis episodes of the student and for medication use by the student during school hours; and

(d) The student's parent or guardian has completed and submitted to the school any written documentation required by the school, including the treatment plan formulated under (c) of this subsection and other documents related to liability.

**STATUTE
INSTRUCTION #21(B) cont.**

(3) An authorization granted under this statute must allow the student involved to possess and use his or her medication:

- (a) While in school;
- (b) While at a school-sponsored activity, such as a sporting event; and
- (c) In transit to or from school or school-sponsored activities.

**STATUTE
INSTRUCTION #21(B) cont.**

(4) An authorization granted under this statute:

- (a) Must be effective only for the same school and school year for which it is granted; and
- (b) Must be **renewed** by the parent or guardian each subsequent school year in accordance with this subsection.

**STATUTE
INSTRUCTION #21(B) cont.**

(5) School districts must require that **backup medication**, if provided by a student's parent or guardian, be kept at a student's school **in a location to which the student has immediate access in the event of an asthma or anaphylaxis emergency.**

**STATUTE
INSTRUCTION #21(B) cont.**

(6) School districts must require that information described in subsection (3)(c) and (d) of this section be kept on file at the student's school in a location easily accessible in the event of an asthma or anaphylaxis emergency.

(7) Nothing in this section creates a cause of action or in any other way increases or diminishes the liability of any person under any other law.

**STATUTE
INSTRUCTION #21(C)**

A statute provides that:

1) The office of the superintendent of public instruction, in consultation with the department of health, shall develop anaphylactic policy guidelines for schools to prevent anaphylaxis and deal with medical emergencies resulting from it. The policy guidelines shall be developed with input from pediatricians, school nurses, other health care providers, parents of children with life-threatening allergies, school administrators, teachers, and food service directors.

**STATUTE
INSTRUCTION #21(C) cont.**

The policy guidelines shall include, but need not be limited to:

(a) A procedure for each school to follow to develop a treatment plan including the responsibilities for [of] school nurses and other appropriate school personnel responsible for responding to a student who may be experiencing anaphylaxis;

STATUTE
INSTRUCTION #21(C) cont.

(b) The content of a training course for appropriate school personnel for preventing and responding to a student who may be experiencing anaphylaxis;

(c) A procedure for the development of an individualized emergency health care plan for children with food or other allergies that could result in anaphylaxis;

STATUTE
INSTRUCTION #21(C) cont.

(d) A communication plan for the school to follow to gather and disseminate information on students with food or other allergies who may experience anaphylaxis;

(e) Strategies for reduction of the risk of exposure to anaphylactic causative agents including food and other allergens.

STATUTE
INSTRUCTION #21(C) cont.

(2) For the purpose of this section "anaphylaxis" means a severe allergic and life-threatening reaction that is a collection of symptoms, which may include breathing difficulties and a drop in blood pressure or shock.

(3) By September 1, 2009, each school district shall use the guidelines developed under subsection this statute to develop and adopt a school district policy for each school in the district to follow to assist schools to prevent anaphylaxis.

INSTRUCTION #23

Internal Bethel School District policies have been admitted in evidence in this case. The violation, if any, of an internal School District policy is not necessarily negligence, but may be considered by you as evidence in determining negligence.

**EMOTIONAL DISTRESS
INSTRUCTION #24**

Plaintiff Jada Mears claims that she suffered serious emotional distress as a result of perceiving the injury or death of Mercedes Mears. To establish this claim, Plaintiff Jada Mears must prove all of the following:

**EMOTIONAL DISTRESS
INSTRUCTION #24 cont.**

1. That one or more Defendants negligently caused the injury to or death of Mercedes Mears;
2. That Jada Mears was present at the scene of the injury or death or arrived shortly after it occurred and witnessed Mercedes Mears' pain and suffering; and
3. That Jada Mears suffered severe mental stress proximately caused by witnessing Mercedes Mears in that circumstance.

**EMOTIONAL DISTRESS
INSTRUCTION #24 cont.**

“Severe mental stress” is objective symptoms of emotional trauma such as intense fear, helplessness, horror, or shock caused by the personal experience in the immediate aftermath of an especially horrendous event of seeing the victim, the surrounding circumstances, and effects of the incident as it actually occurred.

**EMOTIONAL DISTRESS
INSTRUCTION #24 cont.**

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for Plaintiff Jada Mears on this claim. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for the Defendants on this claim.

**Life Expectancy
INSTRUCTION # 31**

Mercedes Mears = 70.41 years to age 80.41
Jeannette Mears = 34.81 years to age 80.81
Michael Mears = 24.01 years to age 79.01
Jada Mears = 67.44 years to age 79.44

INSTRUCTION # 32

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

**APPLYING THE
FACTS TO THE
LAW**



Thomas Siegel,
Bethel Superintendent



Don Garrick,
Principal of Clover Creek Elementary



Kim Hanson,
Principal of Spanaway Elementary



Sonja Ryskamp Hemmerling,
Administrative Evaluator



Janice Doyle, RN
Bethel School District Lead Nurse



Heidi Christensen, RN
School Nurse



Rhonda Gibson,
School Health Clerk



Jeffrey Poljak
School Psychologist/ Counselor



Angela Wolfe,
Dean of Students



Peggy Walker,
School Secretary



Marjorie Blaimayer,
Para-educator



Alicia Jensen,
School Teacher



Debra Howard



Sigmund Menchel, MD.
Medical Examiner



Lawrence Larson, DO, FAAP, FAAAAI
Pediatric Pulmonology, Pediatric and Adult
Allergy/Immunology, General Pediatrics



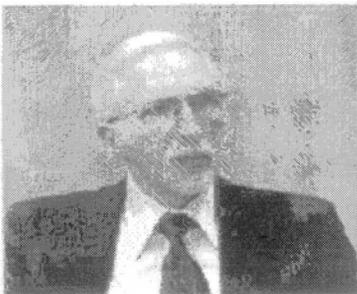
Dr. Russell J. Hopp, DO
Rheumatology, Pediatrics and
Allergy & Immunology



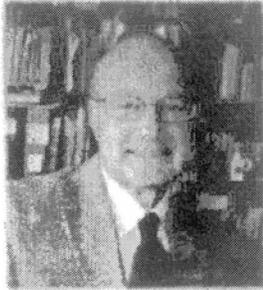
Dr. Michael Freeman
Medical Epidemiologist and Forensic
Epidemiologist



Mariann Cosby
MPA, MSN, RN, PHN, CEN, NE-BC, LNCC,
CLCP, CCM, MSCC



Dr. Csaba Hegyvary
Clinical Psychiatrist



Lawrence Majovski,



Dr. Kim Barrett,



Rudy Crew, EdD



Dr. Donald Reay
Former Chief Medical Examiner



Amber Midkiff-Bray,
PC Med. Examiner's Investigator

Robert Moss,
Economist



Anthony Montanaro



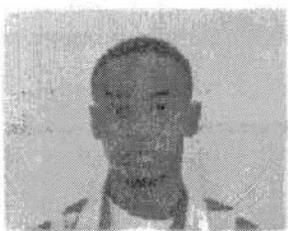
Gregory Redding,



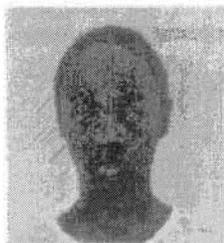
Jeanette Mears,
Mercedes' Mom



Michael Mears,
Mercedes' Dad



Michael Mears, JR
Mercedes' Brother/ Best Friend



Jada Mears,
Mercedes' Little Sister/ Best Friend



Adrian Black,
Mercedes' Uncle in Virginia



Tracy Grant,
Mercedes' Aunt



Ronald Pratt,
Mercedes' Big Brother



Jonari Grant,
Mercedes' Big Brother



Amelia Hyatt,
Mercedes' "Big Sister"



Marlene Corpuz,
Family Friend



Paulena Perry,
Neighborhood Friend



Monique Perry,
Neighborhood Friend



Russell Perry,
Neighborhood Friend
