NO. 44324-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ABBIGAIL GUTIERREZ,
individually and as Guardian for N.L., a minor,

Respondent,

v.

OLYMPIA SCHOOL DISTRICT,
a municipal corporation,

Appellant.

APPELLANT'S REPLY BRIEF

Jerry J. Moberg WSBA #5282
JERRY J. MOBERG &
ASSOCIATES
451 Diamond Dr.
Ephrata, WA 98823
Ph: (509) 754-2356

Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER &
GIBBS PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

pm 9/20/13

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATE CASES

RULES

OTHER AUTHORITIES

I. OSD's ARGUMENT IN REPLY

A. Respondent May Not Avoid Instruction 13.

Instruction 11, CP 1093, imposed on plaintiff the burden of proving that OSD was negligent. Instruction 6, CP 1088, defined negligence as failure to exercise ordinary care. Instruction 13, CP 1095, defined the exercise of ordinary care in terms of "reasonably foreseeable dangers," and further specified that an employee's *criminal* action – which would include molesting a child – is a "reasonably foreseeable danger" against which OSD had to exercise ordinary care "*only* if OSD *and* its employees knew or should have known *the* employee *was* a risk of harm to a student [italics added]." "The employee" necessarily means Gary Shafer, not people in general or the tiny percentage of men who are pedophiles.

Under Instruction 13,[1] the jury could find OSD negligent in failing to prevent Gary Shafer's crime against NL only if it found that OSD knew or should have known Shafer was a risk of criminal harm to a student. Plaintiff did not argue at trial that OSD *knew* Shafer was a criminal-harm risk; her case depended on proving OSD *should* have known he was. All of her "should have known" evidence consisted of hearsay testimony.

Respondent's brief argues the evidence and law as if she is entitled to dismissively ignore the last paragraph of Instruction 13, as "an incorrect

[1] As respondent points out, appellant's brief mis-referred to CP 1095 as Instruction 12.

statement of the law" that was included "as a concession to the District." *Resp. Br. at 34-35.* But respondent neither cites nor can cite authority for the proposition that she is entitled to a presumption that the jury would have found in her favor had Instruction 13 not included its last sentence, and she did not cross-appeal and assign error to the instruction. In any event, as explained in OSD's opening brief at pages 30-32, Instruction 13 reflects the holdings of *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108, *rev. denied*, 120 Wn.2d 1005 (1992), and *C.J.C. v. Corp. of Catholic Bishop of Yakima,* 138 Wn.2d 699, 985 P.2d 262 (1999). Respondent cites *Peck, Resp. Br. at 33,* but does not attempt to distinguish it, and does not even acknowledge *C.J.C.*[2]

Under Instruction 13 plaintiff had to do more than persuade the jury that OSD should have known being molested by a man is a "general field of danger" young girls can encounter, or that Shafer was a bad person, or that NL would not have been molested if OSD had enforced poli-

[2] Respondent cites *N.K. v. Corp. of the Presiding Bishop of the Church of Jesus of Latter-Day Saints*, 175 Wn. App. 517, __ P.3d __ (2013), *Resp. Br. at 32,* although not for the proposition that an entity that has a custodial relationship with a minor who was molested during the course of an entity-sponsored activity need *not* have had prior specific knowledge that the molester posed a threat to minors. *See N.K.*, 175 Wn.2d at 529-30. Presumably, that is because respondent did not cross-appeal and assign error to Instruction 13, making Instruction 13 the law of this case. OSD would also note that the court held in *N.K.* that, if it is necessary for the defendant church to have had prior specific knowledge that the molester was a risk, there is evidence that the church had such knowledge. *Id. at 531-32. N.K.* neither distinguishes nor acknowledges *Peck v. Siau*, 65 Wn. App. 285, discussed at pages 31-32 of OSD's opening brief, and, in OSD's view, misapprehends the holding of the Supreme Court's decision in *C.J.C.*, discussed at pages 30-31 of OSD's opening brief.

cies that plaintiff's "safety expert" thought up after the fact to keep little girls out of the reach of any man riding on a bus.

Instruction 13 made "general fields of danger" relevant, but it also made proof that OSD should have known Shafer was a criminal-harm risk a separate and more specific gateway through which plaintiff's liability case had to pass. Plaintiff could not show that Shafer had a prior record of molesting children, and could not show that OSD had observed Shafer or heard about him behaving questionably with a child. Plaintiff had to resort to a "red flag" *constructive*-notice theory. She had to pursue that theory with witnesses other than NL, VMV, or Shafer, none of whom had been deposed or was going to be a trial witness.

The theory her counsel came up with was that OSD should have noticed that Shafer was obsessively seeking the company of young girls and, specifically, had taken to riding along on Mario Paz's mid-day kindergarten bus even after the one or two rides it would take to learn a route,[3] and was able to ride Paz's bus *so* often that he was able to molest NL after grooming her to consider him a friend.

The problem for plaintiff was how to prove the theory. Paz recalled Shafer riding along on his bus route three times, total, in 2010, including to learn the route. RP 89-93, 107-10. Gutierrez had watched

[3] RP 109-110, 628, 1231-32.

NL get on the bus every day, RP 1090-91, but never saw a man riding on it, RP 1092,[4] and NL hadn't mentioned "Gary" to her, RP 1093. NL had told Stines on January 4, 2010, only that Shafer rode on her bus "some" days and put his hand in her panties once, sometime between Halloween and Thanksgiving. RP 200-04. Shafer could not have groomed NL on days when he drove other mid-day bus routes as a substitute or rode along on kindergarten routes other than Paz's. *See* Ex. 43.

Plaintiff's counsel tried but failed to persuade the court to let him present out of court statements by Shafer.[5] The court, however – as if it felt a need to seem evenhanded in its rulings – allowed plaintiff to get in out of court statements by *NL*. First, over OSD's hearsay objection, RP 205-16, and without plaintiff having laid a foundation to make NL's or VMV's "state of mind" at the time an issue, the court allowed plaintiff's counsel to elicit, under ER 803(a)(3) – to which OSD also objected, RP 212 – testimony by Stines relating untaped statements she said the girls had made to her and interpreting what those statements meant, *i.e.*, that Shafer rode along and groomed NL on "multiple" bus rides. RP 216-222.

Next (albeit ostensibly under ER 703 and thus for a purpose other than its truth, RP 671-72 and 989), counsel managed to get in, twice, RP

[4] NL rode the bus only to school, never home from school. RP 1059.

[5] 9/1/0/2012 RP 11-15, 31-37; RP 286-307.

672 and 988, and over OSD's hearsay objections, RP 668-69, 973-74, NL's own "20 times" statement – made in October 2010 to a psychologist plaintiff's counsel had retained. Finally, counsel persuaded the court to let Gutierrez testify, over OSD's hearsay objection, that NL had told her Shafer rode her bus "always" and "twice a week," RP 1073-74.

OSD did not waive its objections to the hearsay testimony, and the evidence's admission was not harmless error.

B. OSD Did Not Waive Its Hearsay Objection to Questions Asking Gutierrez How Often Shafer Rode the Bus According to NL.

At page 50 of her brief, respondent seems to suggest that this Court should affirm the trial court's ruling admitting the Gutierrez hearsay testimony because OSD did not object to *other* questions Gutierrez was asked that *also* called for hearsay testimony. The Court should decline respondent's suggestion. Respondent cites no legal authority, and none of the unobjected-to questions elicited the same testimony as the questions to which OSD objected. OSD's counsel was entitled to make tactical decisions not to object to questions asking for hearsay testimony to prove Fact A and Fact B and Fact C without waiving an objection to a question asking for hearsay testimony to prove Fact D based on counsel's assessment of how each fact impacted OSD's defense.

C. Gutierrez's and Stines' Hearsay Testimony Was Not Admissible to Prove "State of Mind".

Respondent defends the admission of Gutierrez's or Stines' testimony relating statements NL or VMV made to them as admissible under ER 803(a)(3) to prove "state of mind." *Resp. Br. at 50, 51-53.* The trial court admitted *Gutierrez's* testimony after plaintiff's counsel argued that it was not hearsay and that *Stines* had related what NL told *her.* RP 1073. The court had admitted Stines' testimony under ER 803(a)(3), over OSD's objection that it was not admissible under that rule. ER 212. That was a "the door has been opened" rationale, but OSD was not responsible for the door being opened; OSD had been trying to keep the door shut.

What NL and VMV said to Stines did not qualify for admission under ER 803(a)(3), and what NL said to Gutierrez did not, either. The statements Gutierrez attributed to NL and that Stines attributed to NL or VMV were statements of memory or belief unrelated to either child's will. A declarant's out-of-court statement of memory or belief unrelated to her will is not admissible under ER 803(a)(3). *Ensley v. Mollmann*, 155 Wn. App. 744, 754-55, 230 P.3d 599, *rev. denied*, 170 Wn.2d 1002 (2010); *In re Dependency of Penelope B.*, 104 Wn.2d 643, 658, 709 P.2d 1185 (1985). The word "then" in "then-existing state of mind" in ER 803(a)(3) "refers to the time the statement was made, not the earlier time the

statement describes." *State v. Sanchez-Guillen*, 135 Wn. App. 636, 646, 145 P.3d 406 (2006). No foundation was laid based on which the court could have ruled that what NL's or VMV's states of mind had been when they made their statements to Gutierrez or Stines was at issue. *Betts v. Betts*, 3 Wn. App. 53, 59, 473 P.2d 403 (1970), the custody case on which respondent relies, *Br. at 52*, is not close to being on point. The child's statement that her mother's husband was mean, had killed her brother, and would kill her mother was relevant to whether, considering how she felt about the husband, her mother's home was the better one for her. Whether to put NL back in contact with Shafer was not an issue in this case.

Respondent argues that NL's statements to Stines (those not part of the videotaped interview and that were specifically objected to by OSD, RP 205-16) were admissible under ER 803(a)(3) to "demonstrat[e] that Shafer had ridden her bus frequently enough to cultivate a friendship and groom her for sexual molestation. . ." *Resp. Br. at 53*. But that only *admits* to an impermissible use of ER 803(a)(3), because the "state of mind" exception may not be used to prove conduct by a third person that explains the declarant's state of mind. *State v. Parr*, 93 Wn.2d 95, 104, 606 P.2d 263 (1980); *State v. Sublett*, 56 Wn. App. 160, 199, 231 P.3d 231 (2010), *aff'd*, 176 Wn.2d 58 (2012). Furthermore, that Shafer had made NL, a five year old, think of him as a friend did not tend to prove that the

number of his ride-alongs on a bus route that was scheduled to take 47 minutes from NL's pickup to school (Ex. 221) exceeded three, much less that there were *many* more than three, ride-alongs. Allowing Stines to opine, over OSD's objections, RP 205-16, 221, that the girls' statements signified grooming during "multiple" rides, RP 222, put words in the girls' mouths and was error prejudicial to OSD's defense.

Had the trial court excluded Gutierrez's and Stines' hearsay testimony, as it ought to have in response to OSD's timely and valid hearsay objections, the jury would have had no evidentiary basis for finding that OSD should have known Shafer was a criminal-harm risk.

D. The Other Evidence Respondent Recites Did Not Make Admitting Gutierrez's and Stines' Hearsay Testimony Harmless Error

Respondent's harmless error argument asserts that there was "ample evidence to sustain the verdict" even if this Court agrees with OSD that the jury should not have heard the evidence challenged in OSD's assignments of error, *Resp. Br. at 60*; that there was circumstantial evidence of negligence on OSD's part, *id. at 60-63*; and that the trial outcome would not likely have been different had all the challenged evidence been excluded, *id. at 64*. Respondent cites, however, no unchallenged evidence based on which the jury was entitled to find, specifically, that OSD should have known Gary Shafer was a criminal-harm

risk.[6] Even the evidence to which respondent refers at pages 61-63 of her brief presupposes the admissibility and persuasiveness of her "many more than three rides on NL's bus/opportunity to groom NL" evidence, all of which was hearsay. Defense witness Janet Barry did agree, that is, that someone riding along on a bus more than *ten* times would be unusual and would warrant scrutiny, *Br. at 62*, but evidence that Shafer rode on NL's bus more than *three* times consisted of nothing but hearsay.

As for evidence that Shafer had ridden along on Dale Thompson's mid-day kindergarten route "60 to 70" times, *Resp. Br. at 6 and 62*, that referred not to one year or semester but rather to ride-alongs over six or seven *years*. RP 241, 256, 264. It was uncontroverted that Thompson drove the most difficult of all OSD's kindergarten bus routes,[7] that the route changed from year to year, RP 1239, that Thompson often asked for ride-along help,[8] and that he regularly got ride-along help from as many as 15 to 30 drivers.[9] There was no evidence that Shafer behaved inappro-

---

[6] Respondent notes that Instruction 13 said only that she had to prove only that OSD should have known Shafer "posed 'a risk of harm to a student," not necessarily that he was a child molestation risk. *Resp. Br. at 61* (her underlining). That is true in the abstract only. The instruction addressed harm resulting from a criminal act. In this case, "risk of harm to a student" meant risk to molest a school bus passenger, because all Shafer did for OSD was drive or ride on buses, and plaintiff never suggested that OSD should have known Shafer was a risk of unspecified "harm" to a student riding a bus that might have included reckless driving, or slapping, or verbal abuse.

[7] RP 259, 291-93, 315-16, 588-89, 1154, 1318.

[8] RP 589, 1154-55, 1304-05.

[9] RP 264, 291-92, 316, 322, 326, 328, 1154-55, 1319.

priately on Thompson's bus, and Thompson specifically denied seeing or suspecting anything. RP 289-90, 321-23.[10] Willingness to help Thompson does not fairly imply a criminal-harm risk.

Nor did Kevin Gearhart's testimony, *Resp. Br. at 20-23* and RP 746-764, provide evidence that OSD had reason to know Shafer was a risk of harm to a student. Even ignoring problems with Gearhart's recall[11], plaintiff offered no evidence that Shafer molested Gearhart's daughter or behaved in her presence in any way that suggested Shafer was a criminal-harm risk. Gearhart testified that his daughter acted upset and didn't want to ride the bus anymore after the one long ride home, RP 750-54, but there was no evidence as to why, let alone any evidence that Gearhart's daughter experienced or saw criminal or even inappropriate behavior by the driver of, or anyone else riding on, the bus that day.

E. OSD Did Not Waive Its Assignment of Error to the Admission of Shafer's Convictions.

Respondent argues, *Br. at 53*, that OSD waived its ER 404(b)

---

[10] Respondent asserts, inaccurately, that "Shafer would forego paid driving assignments and, instead . . . 'rid[e] along' with other bus drivers to allegedly 'learn' their midday routes or to help," *Resp. Br. at 6*, citing RP 534-35. There was no evidence that Shafer ever "rode along" on a mid-day route when he could have driven one for pay.

[11] Barbara Greer testified that Gearhart complained to her in *September* 2010 that his daughter's bus took an inordinate amount of time to reach her home one time while the regular driver was on leave, and wanted OSD to assign the same substitute driver every day, but that Shafer had driven that route as a substitute only on October 19, 2010, RP 1171-75. Gearhart denied fixing the date of his daughter's late arrival home at October 19 after learning that Shafer had molested girls on OSD buses and that Shafer had driven his daughter's bus only on October 19. RP 790-94.

objection to the admission of Shafer's convictions and sentence because its counsel said, after the trial court had denied its motion *in limine* to exclude that evidence, that "the convictions are clearly admissible" but that what Shafer had said was hearsay. RP 36-37.[12] The record does not bear out respondent's argument that OSD intentionally waived its earlier argument. In context, OSD's counsel was acceding to the court's ruling *in limine*, and offering a "but not" argument; he was not retracting OSD's motion *in limine* and agreeing with the ruling.

Shafer's convictions and sentence were irrelevant and were inadmissible hearsay and, except to argue waiver, respondent does not contend otherwise. OSD admitted that Shafer molested NL on its school bus, so evidence that he was *convicted* of doing so proved nothing in issue. That Shafer was convicted of molesting VMV and a child on a second bus (while serving as its substitute driver, not while riding along) also proved nothing in issue – VMV was not a plaintiff, and neither was the other girl, and NL's molestation came to light first – and did not tend to prove that OSD should have known Shafer was a groomer/molester based on how often he rode along on NL's and VMV's bus. Contrary to what respondent's footnote 20 asserts, Shafer's convictions and sentence were not admissible under ER 404(b) for the reasons explained at pages 51-52

[12] Respondent relegates to a footnote her argument that the convictions and sentence were admissible under ER 404(b).

of OSD's opening brief. They were not admissible to prove "'notice' of Shafer's proclivities" (1) because ER 404(b) would bar proving Shafer's "proclivities" and (2) because Shafer's convictions and sentence were not probative of how often, or how many times, he rode along on NL's bus.

If OSD were challenging on appeal *only* the evidence of Shafer's convictions and sentence, harmless error might be a close call for the Court. But even if that evidence might relatively harmless standing alone, its admission was error and exacerbated the prejudice resulting from the admission of NL's and VMV's hearsay statements.

F. Evidence Cited at Pages 5 - 29 of Respondent's Brief Are Red Herrings, Not Red Flags, for Purposes of Instruction 13's Notice Requirement.

To the extent that the "substantial evidence" respondent refers to at page 67 of her brief consists of the testimony and exhibits cited in respondent's argumentative statement of the case at pages 2-29 of her brief that are not discussed above, that evidence is not probative for purposes of the "should have known" issue framed by Instruction 13. The fact that plaintiff presented a considerable amount of testimony and exhibits to try to paint OSD as not having done enough to protect its kindergarteners from being molested by men on school buses does not mean there was any evidence, aside from the evidence OSD challenges, to support a finding of negligence under the law on which the jury was instructed.

It does not matter, that is, what OSD did not do when it hired Shafer. *Resp. Br. at* 5. No negligent hiring claim went to the jury because there was no evidence that more extensive background checks would have revealed Shafer to be a practicing or potential child molester. That Shafer said in his job interview that he was ready for the responsibility of driving children, but that "it's kind of scary," *id.*, is no basis for finding that OSD should have regarded him as a criminal-harm risk. Shafer did return to driving buses for OSD after trying long-haul truck driving briefly in 2006 or 2007, and explained that he missed the children, *id.*, but what the trucking job had entailed was not in evidence, and it is absurd even to suggest that preferring driving a school bus to working as a long-haul trucker makes one a criminal-harm risk.

Respondent cites testimony in which Mario Paz admitted to the existence of OSD safety policies that have never existed in any school district, including OSD,[13] and to feeling personally responsible for Shafer's molestation of NL on his bus. *Resp. Br. at 11-16.* Even ignoring what the trial court recognized as Paz's insecure command of English (RP 114-16) and Paz's natural regret that a child was molested on his bus while he was driving it, nothing Paz was confused or intimidated into admitting constitutes notice to *OSD* that Shafer was a child molestation

[13] RP 293, 385-86, 576-7, 609-10, 860-65, 1101-02, 1121-22, 1161-64, 1247, 1317-21, 1456-63, 1575-89.

risk *unless* one credits plaintiff's hearsay-dependent theory that Shafer rode Paz's bus more like 20 than three times. Unless Paz's observations were chargeable to OSD, his admissions were not probative of what OSD should have known. *Peck v. Siau*, 65 Wn. App. at 291-92. Plaintiff did not show or argue, and the trial court did not rule, that Paz was a speaking agent for OSD, and Paz had not been a supervisor whose observations concerning Shafer would be chargeable to OSD under *Peck*.

Under Instruction 13, CP 1095, plaintiff had to prove, with admissible evidence, that "OSD *and* its employees . . . should have known [Shafer] was a risk to harm a child [italics added]." Furthermore, when respondent asserts that Paz was not sufficiently vigilant when Shafer rode along on his bus – ignored "red flags" – she avoids acknowledging that Paz's testimony was that Shafer rode his bus only three times in the fall of 2010 and sat by himself two of those times, RP 107, and that adult men sitting with kindergarteners is not unusual and is something OSD's superintendent (ER 860) and the principal of NL's school (ER 1099) both testified they sometimes did. Plaintiff did argue that Paz understated the *number* of times Shafer had ridden along on his bus before Thanksgiving 2010, and she was free to so argue *if* she could cite admissible evidence to prove it – and whether she did is what this appeal is about.

Likewise red herrings, and not red flags, under Instruction 13 are the fact that OSD disciplined a male bus driver in 2008 for touching students on a route he was driving (not riding along on), *Resp. Br. at 24*, *see* RP 540-42, and that OSD did not provide certain "boundaries" training to its transportation department before 2011, *Resp. Br. at 26-29*. None of that was evidence that OSD was on notice that "the employee" who molested NL in 2010 was a criminal-harm risk.

Respondent is also incorrect in arguing that Chris McGoey's expert testimony independently supports the jury's negligence finding under the law stated in Instruction 13, such that a new trial rather than dismissal is in order.[14] Plaintiff called McGoey to attribute NL's molestation to OSD's failure to appreciate that men molest children and be the only school district that forbid adult men to sit with children on buses. McGoey was not qualified to so opine – no one is – because there is no such standard of care. Even ignoring the trial court's failure to apply any rigor to the question of McGoey's qualifications, whether OSD had lax ride-along policies was not probative of whether OSD should have known

[14] Respondent argues that OSD failed to renew its objection to McGoey's qualifications to testify at all and thus waived its third assignment of error. *Resp. Br at 56-57*. OSD believes that the record shows that the court's ruling that McGoey was qualified, RP 645 was a final ruling, subject only to plaintiff laying a foundation at trial consistent with the written showing she had made in opposition to OSD's motion, which plaintiff did, obviating any need for OSD to object for lack of foundation to preserve its objection to McGoey's qualifications. *See Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 621-23, 762 P.2d 1156 (1993).

before November 2010 that Shafer was a criminal-harm risk *unless* he exploited that laxity by riding on NL's bus many more than three times.

Even if NL's molestation could have been prevented if OSD had forbidden ride-along drivers to sit with children, that did not tend to establish, for purposes of Instruction 13, that OSD should have known Shafer was a molestation risk. That no man will molest a child he lacks access to is true but not the same as establishing that OSD should have known Shafer was a criminal-harm or molestation risk, unless the law requires a school district to assume its male bus drivers are all criminal-harm or child molestation risks, which is not the law in this state and was not the law under the jury's instructions.

For McGoey's testimony to have been pertinent to the jury's fact-finding under Instruction 13, there had to be *admissible* evidence that Shafer rode along on NL's bus many more than three times before he molested her. As OSD showed in its opening brief and re-explains here in reply to respondent's arguments, there was no such *admissible* evidence.

Respondent seems to argue in her ninth footnote that OSD has failed to argue that NL's "20 times" statement is not information on which security consultants ordinarily rely. That is inaccurate. OSD's counsel made exactly that argument at RP 668-69. McGoey was not being called as an expert to estimate how many times Shafer rode NL's bus. He was

called, ostensibly, to opine as to policies OSD should have had for training bus drivers and where nondriver adult males may sit on a school bus. RP 645-46. As OSD counsel pointed out to the court ahead of time,[15] McGoey had reverse-engineered his policy opinions based on nothing more than the fact that Shafer was male and had molested NL while riding as a nondriver on her school bus. McGoey had no expertise in transportation, much less in school busing.[16] There was no basis for counsel's bald assertion that statements like NL's is "relied on by experts," RP 669, much less that reliance is "routine" for an expert testifying about– actually, making up – school bus male ride-along policies.

In her Footnote 10, respondent asserts that NL's statement "helped explain how McGoey reached his opinion on how the District's complete lack of policies and monitoring of bus ride-alongs led to molestation. . ." McGoey, though, wasn't called to opine about causation; he was called to pontificate about safety policies OSD should have had in place. That McGoey believed NL's statement did not validate such opinions.

Respondent contends, *Br. at 65, n. 29*, that, even without McGoey's testimony, "a layperson was fully capable of understanding that lacking any procedures governing how many times an adult could ride

[15] CP 1250-59; RP 638-41.

[16] RP 702-05, 707-08, 710-12, 714, 724-26.

along on a bus and in what seats they [sic] could sit, as well as allowing an adult male to sit in a blind spot with kindergarten girls, violated common sense or any other applicable standard of care." Respondent fails again to account for Instruction 13, *Peck v. Siau*, 65 Wn. App. 285, and *C.J.C.*, 138 Wn.2d 699. Even if testimony about where-men-may-sit policies was legitimately admitted despite uncontroverted testimony that no standard of care required them, it was not enough for plaintiff to persuade the jury that NL would not have been molested if OSD had had such a policy. Under Instruction 13, plaintiff had to prove specifically that OSD should have known, before NL was molested, that Gary Shafer was a criminal-harm risk. Plaintiff did so persuade the jury, but the verdict in her favor cannot stand because she relied on inadmissible evidence to do it.

G. OSD Did Not Waive Its Arguments About NL's "20 Times" Statement.

1. OSD did not waive its assignment of error to the admission of NL's "20 times" statement to Whitehill's colleague.

Respondent asserts that OSD is arguing at pages 40-42 of its opening brief that the trial court had to assess NL's competency before allowing Whitehill's videotape to be shown, and that OSD waived any objection to NL's competency and any objection based on its inability to cross-examine the videotape. *Resp. Br. at 42.* Respondent misses OSD's actual point, which is that, even if the videotape had been of *testimony NL*

had given under oath, the court would have had to undertake assessment of her competency. The court could not have allowed the tape to be shown simply because "it's [NL] talking, and it's Dr. Whitehead [sic], a psychologist, for his purposes, and it's very limited you say," and because the court had already let McGoey refer to it. RP 975. Because the court would have had to undertake assessment of NL's competency in order to show a tape of her *testifying*, at least *some* safeguard would have been afforded OSD, which instead got none. What NL said on the videotape was not even asserted by her *as* testimony, yet the court showed it anyway because the tape was brief and the person shown talking on it was NL. Neither reason for admitting the statement, let alone for showing the videotape of it being made, was valid.

Respondent's contention that OSD waived the specific complaint that it could not cross-examine the videotape, *Resp. Br. at 42*, is without merit because such a complaint is inherent in any hearsay objection. *State v. Chapin*, 118 Wn.2d 681, 685, 826 P.2d 194 (1992) (the hearsay rule "represents 'a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination'" (citing 5 J. Wigmore, *Evidence* § 1362 (1974), at 3)).

Respondent argues, *Br. at 44*, that OSD's complaint that Whitehill and McGoey both vouched for NL's statement is one OSD did not pre-

serve in the trial court and thus waived. While it is true that OSD did not specifically object to or move to strike the vouching-for testimony, the trial court had already ruled that Whitehill and McGoey could show and refer to NL's statement to explain their opinions and had given limiting instructions against having the jury consider NL's statement for its truth. But OSD complains about the vouching not just because it was prejudicial error but to demonstrate (a) that it was disingenuous for plaintiff's counsel to represent that Whitehill and McGoey would refer to NL's statement only to offer a basis for their opinions, and (b) that limiting instructions likely were ineffective, because the vouching occurred in the context of a trial at which the frequency of Shafer's ride-alongs on NL's bus was crucial to plaintiff's liability theory as well as to her injury claim. There was no reason to *ask* Whitehill and McGoey to vouch for NL's statement in their capacities as putative experts.

2. OSD did not waive its hearsay objection to Whitehill's videotape of NL's "20" statement by not objecting to the tape of Stines' interview.

Respondent argues, *Br. at 43-44*, that OSD invited any error in allowing the jury to see Whitehill's videotape of NL saying "20" in October 2010 by not objecting to the jury seeing the videotape of Stines' January 4, 2010 interview of NL. Respondent characterizes the two videotapes as similar. *Br. at 44*. They were not at all similar. NL told Stines on

January 4, 2010 that Shafer rode her bus "some days" and not others, RP 204, but told her lawyer's hired expert's assistant in October 2010 that he rode on her bus 20 times, RP 989-90. In a footnote, respondent surmises that OSD challenged Whitehill's videotape because NL said Shafer rode her bus "20" times, and assertes that OSD could have argued, but failed to argue, "on cross," that the number twenty could have been suggested to NL between January and October 2010.

Obviously, OSD interposed no objection to the showing of *Stines'* interview because what NL said to Stines tended not to support plaintiff's "many more than three ride-alongs" theory. NL told Stines that one molestation incident had occurred and, in response to Stines' question "has Gary been on your bus every day?", NL answered "some days," and "some days there's a different guy. Some days there's no one." RP 204. OSD objected to the *Whitehill* tape for the equally obvious reason that it tended to support plaintiff's theory: *20* – not just "some" – ride-alongs.

OSD was entitled to object to the Whitehill tape but not to the Stines tape, and it did not "invite" error in doing so. In our adversary system, one objects, if the rules allow it, to evidence that supports one's adversary's case. Conversely, even if the rules would permit an objection, one refrains from making the objection to evidence that tends not to support, or that undermines, one's adversary's case. If the two videotapes

showed NL saying the same thing, respondent might be able to argue that OSD, by not objecting to Stines' tape, made any error in admitting Whitehill's tape *harmless*, but there is no basis for an *invited* error argument with respect to tapes on which NL says different things. As for respondent's footnoted argument that OSD could have suggested "on cross" that NL had been coached between January and October 2010, OSD wonders: "on cross" of whom? NL did not testify, which is a reason why testimony as to what she said out of court is hearsay.

H. Ultimately, It Makes No Difference Whether the Limiting Instructions Were Effective or Ineffective.

The fact that the trial court instructed the jury, during Whitehill's and McGoey's testimony, that it could not consider NL's statement for its truth, RP 671-72 and 989, means this Court has a choice. It can agree with OSD that the limiting instructions likely were ineffective. If the Court agrees with OSD, the verdict cannot stand because the prejudice is manifest. OSD is entitled at least to a new trial, unless (as OSD also argues) no other admissible evidence supports the jury's negligence finding, either, such that dismissal is the proper remedy.

If this Court indulges the presumption that juries obey their instructions, that only means that NL's "20 times" statement and Whitehill's and McGoey's references to it do not support the jury's finding –

necessarily implicit in its verdict, because of Instruction 13 – that OSD should have known Shafer was a criminal-harm risk. The issue then becomes whether Gutierrez's and Stines' testimony relating out-of-court statements that NL or VMV made to them about how often Shafer rode her bus were admissible under ER 803(a)(3) to prove "state of mind." They were not, for the several reasons explained above at pages 6-8. They thus do support the jury's finding that OSD should have known Shafer was a criminal-harm risk. Remand for dismissal is necessary.

I. Damages Would Have to Be Retried if Liability Is.

Respondent argues that substantial evidence supports what the jury awarded as damages. *Br. at 68.* That misses the point. Whitehill opined that NL was harmed by Shafer's grooming as well as by the molestation. RP 1002-04. That made sense only if the jury was persuaded – by inadmissible hearsay – that Shafer had been afforded many more than three bus rides to groom NL. If liability is retried, damages must be, too.

J. OSD's Appeal Isn't Frivolous.

Respondent cites no authority under which any of OSD's arguments, much less its whole appeal, could be found frivolous. Part IV-J of respondent's brief is without merit, in case it requires a response at all.

II. CONCLUSION

Evidence tending to prove that Gary Shafer had ridden along on NL's kindergarten school bus so many times before he molested her in November 2010 that OSD should have d recognized a "red flag" for "grooming" consisted entirely of inadmissible hearsay that the trial court admitted over OSD's objections. This Court should remand for dismissal.

RESPECTFULLY SUBMITTED September 20, 2013.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Daniel W. Ferm, WSBA #11466

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

JERRY J. MOBERG & ASSOCIATES

By _____
Jerry J. Moberg WSBA #5282

451 Diamond Dr.
Ephrata, WA 98823
Ph: (509) 754-2356

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 20th day of September, 2013, I caused a true and correct copy of the foregoing document, "APPELLANT'S REPLY BRIEF," to be delivered in the manner indicated below to the following counsel of record:

Co-counsel for Appellant:
Jerry J. Moberg WSBA No. 5282
JERRY J. MOBERG & ASSOCIATES
451 Diamond Dr.
Ephrata, WA 98823
Ph: (509) 754-2356
Email: jmoberg@canfieldsolutions.com

SENT VIA:

- ☐ Fax
- ☐ ABC Legal Services
- ☐ Express Mail
- ☑ Regular U.S. Mail
- ☐ E-file / E-mail

Counsel for Respondents:
Darrell C. Cochran, WSBA #22851
Kevin M. Hastings, WSBA #42316
PFAU COCHRAN VERTETIS AMALA, PLLC
911 Pacific Ave., Suite 200
Tacoma, WA 98402
Ph: 253.777.0799
Email: darrell@pcvalaw.com
kevin@pcvalaw.com

SENT VIA:

- ☐ Fax
- ☐ ABC Legal Services
- ☐ Express Mail
- ☑ Regular U.S. Mail
- ☐ E-file / E-mail

DATED this 20th day of September, 2013, at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer, Legal Assistant