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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.

BRIEF OF APPELLANT

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I. SUMMARY

On December 30, 2010, NL told her mother that “Gary,” a “helper” on the mid-day bus she rode to kindergarten, had touched her inappropriately. NL’s mother called 911. A detective interviewed NL on January 4, 2011. NL identified Gary Shafer from his driver’s license photo as the “grown-up boy” who, after Halloween and before Thanksgiving, had put his hand in her panties one time. NL’s mother sued the Olympia School District (OSD) for negligently supervising Shafer. Plaintiff contended OSD should have known Shafer was a child molestation risk because he frequently “rode along,” unpaid, on NL’s bus when he was not driving his own route in the morning and afternoon. A jury found OSD liable and awarded NL and her mother \$1,425,000. This Court should vacate the verdict because of several erroneous evidentiary rulings but for which plaintiff’s proof failed and should remand for dismissal.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by allowing plaintiff:
 - (a) to play for the jury Ex. 139, RP 989-90, a videotape showing NL saying “twenty,” in an October 21, 2011, interview with Mark Whitehill, Ph.D., in response to what Whitehill told the jury was a question asking her how many times Shafer rode her bus, which statement Whitehill pronounced “factually correct,” RP 1046

(b) to let Chris McGoey, a standard of care expert, cite NL's "twenty [times]" statement as the basis for his opinion that Shafer "definitely" rode NL's bus so frequently that OSD should have recognized behavior by a man that is a red flag for child molestation.

(c) to elicit testimony that NL told her mother than Shafer rode her bus "always" and rode it "twice a week."

(d) to elicit, from Detective Cheryl Stines, testimony relating statements that NL's school bus seatmate, VMV, made to Stines, and

(e) to elicit Stines' lay opinion that VMV's statements mean Shafer groomed NL on "multiple" bus rides.

2. The trial court erred in admitting:

(a) Ex. 12, the record of Shafer's criminal conviction of and sentence for molesting three girls and possessing child pornography, and

(b) testimony by Stines that Shafer stands convicted of molesting VMV and another girl, TMC, in addition to NL, on OSD buses.

3. The trial court erred in admitting McGoey's opinions concerning what OSD should have done to prevent NL's molestation.

4. The trial court erred in denying OSD's directed verdict motion, entering judgment on the verdict, and denying OSD's new-trial motion.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Assignments of Error 1(a) and 4:

In a civil trial arising out the molestation of a kindergarten girl on a school bus, does a trial court commit *per se* reversible error when it lets the plaintiff show the jury a videotape of the child making an unsworn out of court statement the essence of which is that the main factual proposition on which plaintiff's liability theory depends is true, without making any determination that the child would be competent to testify as a witness?

Assignments of Error 1(a), (1)(b) and 4:

1. During the direct examination of a plaintiff's expert witness, may the trial court, without balancing probative value against prejudicial effect, permit the expert to relate, as the basis for his opinion, a statement that would be inadmissible hearsay if offered for its truth?

2. Is a limiting instruction that the jury may consider a hearsay statement only for purposes of assessing the opinion of an expert witness who professes to have based his opinion on the statement, and not for the statement's truth, likely to be effective to protect the nonproponent of the expert's opinion from unfair prejudice and/or jury confusion when: (a) the statement bears directly on the principal issue of fact in dispute for purposes of liability; and (b) the validity of the expert's opinion depends on the hearsay statement being true?

3. Is it likely that the limiting instructions the trial court gave when plaintiff's experts Chris McGoey and Mark Whitehill related a hearsay statement by NL were effective?

Issue pertaining to Assignments of Error 1(c) and 4:

Is the admission of a hearsay statement by a six year old that the main factual proposition on which plaintiff's liability theory depends is true necessarily reversible error if the jury returned a plaintiff's verdict when the proposition is not supported by separate admissible evidence?

Issue pertaining to Assignments of Error 1(d) and 4:

Were VMV's statements admissible for any purpose?

Issue pertaining to Assignments of Error 1(e) and 4:

Was Stines' opinion that Shafer had groomed NL on "multiple" bus rides admissible for any purpose?

Issue pertaining to Assignments of Error No. 2 and 4:

In the lawsuit against a school district seeking damages for the molestation of the plaintiff's daughter on her kindergarten bus, is evidence that the employee who molested the girl since been convicted of molesting that girl and two others on district buses, and of possessing child pornography, probative of whether the district should have known the employee who molested the girl was a child molestation risk, when there is no dispute that the employee molested the plaintiff's daughter and there

is no evidence that the district had reason to know of or suspect the other two molestations before it learned the employee was being investigated for molesting the plaintiff's daughter?

Issues pertaining to Assignments of Error No. 3 and 4

1. Did the trial court abuse its discretion in ruling that Chris McGoey was qualified to opine concerning procedures that school districts should follow to protect children from being molested on school buses?

2. In deciding whether to permit the proponent of a liability expert's opinion to elicit from the expert, on direct examination, testimony that the expert's opinion is based on a hearsay statement, does the trial court abuse its discretion if it fails to consider the fact that the statement bears directly on the principal issue in dispute for purposes of liability?

Issues pertaining to all Assignments of Error

1. Was the evidentiary ruling, if erroneous, harmless?

2. If the evidence that OSD contends was improperly admitted had been excluded, would the trial evidence have been sufficient to support the jury's liability findings?

3. Were plaintiffs' liability theory and damages claims both based on hearsay evidence as to how frequently Shafer rode NL's bus before molesting her, such that, if a new trial is the proper remedy for the trial court's errors, damages, as well as liability, should be retried?

IV. STATEMENT OF THE CASE

A. NL, a Kindergartener, Tells Her Mother at the End of December 2010 that “Gary,” a “Helper” on Her Kindergarten School Bus, Touched Her Inappropriately in November.

NL was born December 10, 2004. RP 1056. On September 1, 2010, at age five years and almost ten months, she started afternoon kindergarten at Centennial Elementary School in the Olympia School District (OSD) RP 410-12, 1058-59; Ex. 127. Starting on the second day of the school year, RP 1060, NL rode the bus to school every day, and was driven home by her mother, Abigail Gutierrez, RP 73-74, 1058-59. Mario Paz was NL’s bus driver. RP 57-58, 1059. Paz had been driving school buses for OSD for about 16 years. RP 55, 73.

Gutierrez waited for the bus with NL every day until winter break began on December 18. RP 1090-91; Ex. 127. The first day NL rode the bus, Gutierrez crossed the street with her and watched her get on the bus. RP 1090-91. Thereafter, Gutierrez waited while NL crossed the street, got on the bus, sat behind Paz, and waved to her. RP 58, 83, 92, 125, 1061, 1091. A classmate, VMV, who got on the bus after NL, usually sat with NL. RP 122-23, 1060-61, 1092-93. OSD’s schedule called for the bus to pick NL up at 11:53 a.m., make its last pickup at 12:38 p.m., and arrive at Centennial Elementary at 12:40 p.m., Ex. 221; RP 94, 125-26, but the trip

could take as few as 20 minutes, depending on how many children were picked up, RP 94.

On December 30, 2010, a Friday, NL told her mother “Gary,” a helper on her bus, had touched her inappropriately. RP 1064. The circumstances were not disclosed to the jury, but NL told her mother during a discussion that followed a family member’s molestation of NL’s older sister. CP 21 (¶2); 5/2012 RP at 32-34. Gutierrez called 911. RP 1064-65. The next day, the Sheriff’s office called, obtained more information, and told Gutierrez the matter was being referred to a detective. RP 1065.

B. Gary Shafer Is Identified as the Molester and Is Arrested.

Detective Cheryl Stines called Gutierrez and arranged to interview NL on January 4, 2011. RP 191, 1065. According to Stines, N told her she had been touched by a “grown-up boy named Gary” who was a “helper” on the bus. RP 194. To try to identify “Gary,” Stines called OSD’s transportation department director, Fred Stanley. RP 195. Stines told Stanley she was investigating an accusation of inappropriate touching by a helper named Gary on a kindergarten bus route for Centennial Elementary. RP 196, 495. When Stines told him NL said “Gary” wore glasses, Stanley had a copy of Shafer’s driver’s license photo faxed to Stines. RP 196, 495-96. NL identified the picture as that of the “Gary” who had ridden on the bus. RP 195. Stines so advised Stanley. RP 495.

Stanley put Shafer on leave. RP 499-501. Shafer resigned on January 19, RP 573, 605, and was arrested on January 28, 2011. RP 265.

NL completed the 2010-11 year at Centennial Elementary. RP 1082. Gutierrez took NL to a counselor when NL began seeming upset about a month to six weeks after disclosing her molestation. RP 1068-69, 1071, 1075. NL saw Maile Bay weekly in mid-2011. RP 1075. After three or four months, Bay told Gutierrez that NL did not need more counseling, and it was discontinued in August 2011, RP 1077, 1086-87.

NL attended first grade in a different school district, and did well. RP 1089. NL's counseling with Ms. Bay was resumed for two or three months in early 2012. RP 1077. NL was riding a bus to and from second grade at the time of trial in the fall of 2012. RP 1093.

C. NL's Mother Sues OSD, Claiming It Supervised Gary Shafer Negligently.

In April 2012, on behalf of NL and herself, Gutierrez filed this lawsuit against OSD, but not against Shafer or any other individuals. CP 10-16. Gutierrez claimed that OSD breached a duty to protect NL from foreseeable sexual assault. *E.g.*, CP 413, 425 (Trial Brief). As explained below, the central liability issue at trial was whether OSD transportation department officials should have known Gary Shafer presented a child molestation risk before he molested NL in November 2010.

D. How OSD's Transportation Department Operated Was Not Disputed.

The OSD transportation department served three high schools, four middle schools, and nine elementary schools. RP 1268-69. OSD employed 46 regular and 15 substitute bus drivers and had about 50 buses. RP 1269. Regular school bus drivers, those with the most seniority, were assigned to drive the same route every day. RP 1269, 1271.¹ Most regular routes had morning and afternoon segments. Starting at about 7 a.m., the driver would pick up high school and/or middle school students, take them to school, then make an elementary school pickup run, and then clock out at about 9:30. RP 1269-71. At about 2 p.m., the driver would take high school and/or middle school students home, then make an elementary school take-home run. RP 1271-72. The two segments provided a total of about four and a half to five hours of paid work a day. RP 1170.

Some regular drivers had "mid-day" routes. RP 1269. Most mid-day routes transported kindergarteners to or from their half-day classes. RP 1273. There also was a mid-day "skills route" that drove high school students to the New Market Vocational Center in Tumwater and back, RP 547, 583, 1272, and some mid-day routes that shuttled special education students between schools, RP 1273. Substitute bus drivers were on call to drive if a regular driver was absent. RP 1270-71.

¹ OSD school bus drivers worked under a union contract. RP 501, 1271.

Bus routes could change from year to year and during a year. RP 69-20, 1232, 1239. On kindergarten routes, all the children changed every year, so the bus stops changed. RP 73, 619. Bus routes were updated almost weekly. RP 108. Drivers carried a route sheet, listing all the left and right-hand turns, where to stop, who to drop off or pick up at each stop, the time at which the bus should reach each stop, and whether a child was a “crosser” (of the street). RP 113, 116-118, 628; Ex. 221. Exhibit 221 is a route sheet for the bus route NL rode to school in the fall of 2010.

In the fall of 2010, Shafer was the regular driver on OSD’s Washington Middle School bus route. RP 75.²

Between morning and afternoon runs, regular bus drivers could go home, and some did. RP 1273. Alternatively, they could remain at OSD’s “bus barn” near South Puget Sound Community College, RP 82, and “bid” on, and perhaps drive, a mid-day route that needed a driver, which meant at least two hours of extra pay, RP 527-29, 533-34, 538-39, 583, 1129, 1170. Ten to a dozen OSD drivers, including Shafer, bid to drive mid-day routes often or even daily. RP 585, 621, 1170, 1274. Drivers who were not driving a mid-day route could “ride along,” unpaid, to learn a route or help the driver. RP 108, 1153-54, 1170, 1233, 1274-75. It usually takes

² OSD hired Shafer in August 2005 after he was interviewed and passed a criminal history background check. RP 520, 527, 576, 1149-50, 1157, 1196-98. Plaintiff neither offered evidence that Shafer’s record had warranted rejection of his employment application nor sought a jury instruction on a “negligent hiring” claim. *See* CP 1087.

two ride-alongs, but sometimes more, to learn to drive a route. RP 109-10, 628, 1231-32.

E. OSD Encouraged Bus Route “Ride Alongs”.

To “ride along” on a route, a driver needed Fred Stanley’s permission. RP 591, 1155, 1234, 1279. Stanley encouraged and readily granted ride-along requests. RP 502-03, 533, 562, 572, 589-91. Riding along was not unusual in Washington school districts, and Stanley considered it consistent with a team atmosphere. RP 589-92, 1235, 1277-79. OSD kept no record of driver ride-alongs, RP 546, 553, 1183, 1304,³ but Stanley knew in the fall of 2010 that Shafer had ridden along on at least half a dozen different mid-day routes. RP 570. Other OSD bus drivers would have had similar histories. RP 584. Shafer got Stanley’s permission to ride along on Paz’s bus three times over a period of months during the fall of 2010. RP 1295. Until Stines called him, Stanley had never received a complaint about a bus route on which Shafer had ridden along. RP 592.

F. OSD Sought Pretrial Evidentiary Rulings with Mixed Results.

OSD moved in limine to preclude reference to statements and ER 404(b) “other bad acts” by Shafer.⁴ OSD also moved to bar “questions suggesting that Shafer had been riding on Mario Paz’s bus for months

³ OSD did keep records of the routes driven. A tally of the routes Shafer drove is Ex. 43.

⁴ CP 58 (¶4), 62 (¶24), 63 (¶26), 64-66 (¶29), 67-68 (¶¶35-36), 69 (¶40), 70-71 (¶¶44-46); 9/5/2012 RP 71-76, 82-83.

without some evidence to establish the truth of that claim.” CP 69-70 (¶41). OSD also moved to exclude the opinions of plaintiff’s purported school safety experts, Chris McGoey and Judith Billings, as incompetent, not based on specialized knowledge or industry rules or standards, and as gratuitous parrotings of plaintiff’s negligence theory. CP 1250-59.

Opposing those motions, plaintiff’s counsel characterized the case as being about “the district’s knowledge or what they should have known about Gary Shafer and Shafer’s prosecution and Shafer’s ambitions,” 9/5/2012 RP 33, because “if you’ve got a grown man playing around with kindergarten girls, that is a red flag.” *Id.* at 85. The court mostly reserved formal ruling on OSD’s motions concerning Shafer’s statements and other bad acts, CP 82-84, but told counsel that it would exclude statements that a psychosexual evaluation (Ex. 4) and presentence report (Ex. 5) attributed to Shafer, as well as evidence of his conduct, and would allow the jury to learn only of Shafer’s convictions and sentence. 9/10/2012 RP 11-15; Ex. 12. The court also told counsel that McGoey and Billings could not refer to statements attributed to or by Shafer. 9/10/2012 RP 31-37.

G. The Main Issue at Trial Was How Frequently Shafer “Rode Along” on NL’s Bus Before He Molested Her.

1. Mario Paz and other OSD bus drivers testified that they saw nothing suspicious in Shafer’s behavior.

Plaintiff’s counsel called Paz as his first trial witness because Paz’s deposition testimony was problematic for OSD as trial evidence.⁵ Paz had testified in his deposition that OSD had a rule that adults are not to sit with children on buses, and that he had violated those rules by allowing Shafer to sit with NL and VMV in the seat behind him on the third occasion when Shafer rode along on his Centennial Elementary mid-day route in the fall of 2010. RP 60-62, 65-68, 76, 78-79, 85-86. Paz had been mistaken, as he testified at trial. RP 103-04, 122, 124, 151. OSD has had no such rules or policies and no other Washington district ever has, either.⁶ Plaintiff’s school safety expert, Chris McGoey, admittedly was not aware of any school district that has had such rules or policies. RP 714-15, 723-26.

In addition to Mario Paz, seven OSD bus drivers testified about ride-alongs and Shafer. All denied having seen anything unusual in

⁵ English is Paz’s second language, RP 100, and he has more difficulty understanding questions than answering them. The trial court belatedly perceived that, and suggested the lawyers summarize his testimony and ask him “Is this what you mean?” RP 114.

⁶ RP 576-78 and 609-10 (OSD transportation director Stanley), 1161-64 (department training coordinator Barbara Greer); RP 860-65 (retired OSD superintendent William Lahmann); RP 1101-02 (Hansen Elementary School principal Ernie Rascon); RP 1456-63 (Janet Barry, Ph.D., former superintendent in the Issaquah and Central Kitsap districts); RP 1575-89 (Vancouver district transportation coordinator Daniel Payne); RP 293 (retired OSD bus driver Dale Thompson); RP 385-86 (OSD bus driver Thomas Engle); RP 1247 (OSD bus driver Jim Wall); RP 1121-22 (OSD bus driver John Bakewell); RP 1317-21 (OSD bus driver Mai Skillman).

Shafer's ride-along frequency or behavior. RP 240-94, 315-33 (Dale Thompson)⁷; RP 334-59 (Thomas Reeves); RP 362-92 (Thomas Engle); RP 1105-15 (Kelly Cooper); RP 1115-30 (John Bakewell); RP 1240-63 (Jim Wall); RP 1311-30 (Mai Skillman).

Paz insisted Shafer had ridden along on his bus no more than three times in the fall of 2010, RP 89-93, 107. Paz testified that Shafer had ridden along on his route the first time to learn the route, that no children were on the bus that time, RP 93, and that it takes two or three rides to learn the route, RP 109-10. The second time, Paz testified, Shafer sat by himself in the right front seat. RP 93, 107. For the first two ride-alongs, Shafer had a route sheet. RP 119. On the third ride-along, Shafer sat in the seat behind Paz, RP 94, which is the seat NL sat in, RP 58-59. Shafer was sitting in that seat when NL and then VMV got on the bus. RP 111. In his rearview mirror Paz could see no lower than Shafer's head. RP 77; *see* Ex. 65. Paz did not hear Shafer interacting with the girls. RP 79.⁸

2. A videotape of what NL told Detective Stines on January 4, 2011 was shown to the jury without objection by OSD.

NL was not called to testify at trial in person or by deposition.

⁷ Thompson, who retired in 2013 after driving an OSD bus for 18 years, RP 240, drove the Hansen Elementary School mid-day kindergarten route, on which Shafer rode seven to ten times a year. RP 241, 256, 264. The route was the largest in the district, RP 259, and as many as 15 to 30 drivers – not just Shafer – would ride along to help him. RP 264, 291-92, 316, 322, 326, 328. Shafer loved being around children, but, Thompson testified, “we all did,” and this “was the most fun of all the jobs I’ve had.”

⁸ The bus was an 82 passenger bus, RP 72, with high-backed seats. RP 77, 1163.

An excerpt from a videotape of Detective Stines interviewing NL on January 4, 2011, was shown to the jury. RP 198-204; Ex. 97A. In the tape, NL says “a grown-up boy,” not the driver, “went in my panties,” RP 198-99, on the ride to school, RP 200. NL says she was “sitting on Gary’s lap,” in the front of the bus, and Gary “went in my pants and underwear” with his hand, RP 201, and touched “my private,” and “kept tickling me,” RP 202. Asked by Stines “how many times did this happen?”, NL answers “one,” RP 202, and says it was after Halloween and before Thanksgiving, RP 204. Asked by Stines “has Gary been on your bus every day?”, NL answers “some days,” and “some days there’s a different guy. Some days there’s no one.” RP 204. NL says no one besides Gary has done anything like that to her. RP 204.

Stines agreed in her trial testimony that the video tape shows pretty much the sum and substance of what NL reported to her. RP 233.

Stines also gave testimony, related below, about her investigation. Stines did not testify as an expert.

3. Over OSD's relevance objections, the court admitted other evidence about Stines' investigation of, and Shafer's conviction for, sex crimes against other girls.

a. The jury was informed of Shafer's conviction and sentence for sex crimes not involving NL.

Over OSD's objections that the evidence was not relevant, was unfairly prejudicial, and was not admissible under ER 404(b),⁹ the jury was informed that, in May 2011, Det. Stines began investigating charges that Shafer had molested a girl on a different OSD kindergarten bus, RP 225-26, 228, and that he was convicted in June 2011 of molesting NL and two other kindergarten girls on OSD buses and of possessing child pornography¹⁰ and is serving 14½ years to life. Ex. 12, RP 229-30.

b. The court admitted testimony by Stines relating statements made to her by VMV, and Stines' opinion as to what conclusion she drew from them about Shafer's interactions with NL.

Over hearsay objection by OSD, RP 205-16, the court permitted Stines to relate statements VMV had made to her concerning what had happened on Paz's bus, ruling that it "goes to the circumstantial evidence related to the relationship that apparently he [Shafer] cultivated with these two girls." RP 213. Stines (who had testified that her videotape of NL shows pretty much the sum and substance of what NL reported to her, RP

⁹ CP 58 (¶4), CP 62 (¶24), CP 64-65 (¶29), CP 67 (¶35), 9/10/2012 RP 15.

¹⁰ On his home computer. See CP 63 (¶26), 9/05/2012 RP 120 and unadmitted Ex. 4, bottom of page 2.

233) testified that she learned *from VMV* that Shafer tickled NL and VMV and told knock-knock jokes. RP 216-17. Stines testified that she considered that to be grooming. RP 217. Prompted, Stines testified said she learned from VMV that Shafer had scratched the girls' backs and that VMV considered him her friend, RP 218-19.

After the court sustained objections by OSD's counsel to questions asking Stines whether it had been "the type of evidence of a relationship that you would expect to see based on a 20-25 or even a 45-minutes bus ride," RP 221, and whether there had been one bus ride in which Shafer "accomplished all of the grooming and molestation that you learned [of] during your investigation," RP 221-22, Stines testified that her report (not in evidence) was describing "more than one" back scratch and lap sitting on "more than one" ride and "multiple" days of telling knock-knock jokes. RP 222. Stines acknowledged, however, that VMV never said that what she remembered involved more than one bus ride. RP 233-36.

4. The court refused plaintiff's renewed request to be permitted to have witnesses relate statements by Shafer to prove that Shafer rode NL's kindergarten bus many more than three times in the fall of 2010.

After Det. Stines was excused, plaintiff's counsel renewed his request to permit his expert(s) to refer to statements attributed to Shafer, RP 296-99, to prove various propositions, including that Shafer molested

many children, RP 297, and rode Paz's bus many times in the fall of 2010, RP 298. Noting that plaintiff's counsel had neither deposed Shafer nor listed him as a trial witness, RP 296, 301, 308, 311, the trial court re-balanced the probativeness of "other bad acts evidence" against ER 403 considerations and adhered to its prior rulings, RP 303-07, 314, and stated that "[ER] 703 is not the gate" that allows in evidence that the court had decided should be excluded, RP 307.

5. The court permitted plaintiff's safety expert to testify and cite a hearsay statement by NL as the basis for his opinion that Shafer had "definitely" ridden along on NL's bus many more than three times, such that policies OSD should have had would have alerted a vigilant school district to the child-molestation risk Shafer presented.

Plaintiff's counsel called Chris McGoey, a security systems consultant, and two psychologists, Jon Conte, Ph.D., and Mark Whitehill, Ph.D., in that order, as expert witnesses. OSD objected before and during trial to the court admitting any of the opinions plaintiff had disclosed for McGoey (as well as another expert, Judith Billings, whom plaintiff's counsel ultimately chose not to call), about what OSD should have done but failed to do to protect NL from Shafer. CP 1250-59; RP 633-41. OSD pointed out that McGoey had no school or transportation industry expertise, and that his opinions were not based on real-world standards or practices and simply parroted plaintiff's negligent supervision arguments.

CP 1250-59; RP 638-41. The court ruled without explanation that it found McGoey qualified and that he could opine about how OSD should have trained its bus drivers, and that OSD should have restricted where on a bus an adult male nondriver may sit. RP 645-46.

In direct examination, McGoey was asked if he had reviewed Mario Paz's testimony; McGoey answered yes.

Q. Okay. You understand his testimony was that he remembers only three times that Gary Shafer rode along, right? On this midday kindergarten route for Centennial.

A. Yes.

Q. What evidence have you reviewed is contrary to that?

[OSD COUNSEL]: Objection, Your Honor. That's improper.

Q. This is –

THE COURT: Rephrase.

Q. Is there evidence in the record that shows Gary Shafer actually rode up to twenty times with Mario Paz?

[OSD COUNSEL]: Objection, Your Honor. We may need to approach on this one.

RP 667. The jury was excused. OSD counsel objected that plaintiff was seeking to “backdoor” information the court had excluded. RP 667. The

court expressed uncertainty as to “what information . . . we’re talking about.” RP 667. Plaintiff’s counsel responded:

We’re talking about [NL]’s interview by her psychologist where he asked her – Dr. Whitehill’s assistant asked how many times did Gary Shafer ride on the bus and she said twenty. That is not what’s been excluded. Only Gary Shafer’s admissions has [sic] been excluded. . . . What Mr. McGoey has reviewed is Whitehill’s report, and it says she indicated twenty times. That evidence is admissible. It is routinely relied on by experts in their review, and it is admissible.

RP 667-68. OSD counsel responded:

Your Honor, it’s hearsay to start with[, and i]t’s not the kind of evidence that is traditionally relied upon by experts. It’s just an attempt for this witness to recite hearsay to this jury. And . . . we saw [NL]’s testimony [*i.e.*, Ex. 97A, Detective Stines’ January 4, 2011 interview]. She testified [sic] about the times that she recalled, and she said one event. . . . It’s rank hearsay, Your Honor.

RP 668-69. Plaintiff’s counsel replied with the bald assertion that “it’s ER 703 evidence that’s routinely relied on by experts.” RP 669.¹¹ The court ruled that it would “allow limited [inquiry],” RP 669, and instructed counsel to ask McGoey “if this will help explain his opinion and the basis. He’ll respond by saying yes, and then let’s just go into it.” RP 670.¹²

The court read the jury a limiting instruction that “evidence . . . regarding an interview that he [McGoey] reviewed. . . is not offered for

¹¹ Counsel made no distinction between psychologists examining and treating patients and psychologists making evaluations in order to give testimony as experts at trial, and the court’s ruling did not reflect acknowledgment of any such distinction.

¹² It is unclear what opinion of McGoey’s the court was referring to.

the truth of the matter asserted but is offered to explain this witness's testimony to you." RP 671-72. Questioning of McGoey resumed:

Q. Okay. And did you get a chance to look at in this case testimony by Mario Paz?

A. Yes.

Q. Okay. You got a chance to look at other evidence about the number of ride-alongs that Gary Shafer did with Paz, right?

A. Yes.

Q. Okay. And so I was asking you what evidence did you see that would – would provide a differing estimation of the number of ride-alongs that Shafer did with Paz?

A. [NL] said that Gary Shafer rode 20 times on the bus.

Q. We had a chance to look at the video of the interview Detective Stines did with [NL], and in that one she said he rode sometimes and he didn't ride other times. Where was the information you saw about the twenty times?

A. It was in the report through the psychologist.

Q. Okay. All right. And did you draw conclusions at all after weighing the evidence about what the likely amount of time was that Gary Shafer rode along with Mario Paz?

A. Yes.

Q. Tell us about that.

A. Well, definitely more than three times, two or three times, multiple times. I have to accept the evidence I see on its face, twenty times or – but, you know, definitely more than three times.

RP 672-73. McGoey went on to opine that:

-- OSD had trusted its drivers and criminal background checks too much, which is “not enough” to protect children from being molested, because “the jails and prisons are full of those that . . . turned out to be criminals,” RP 674-76;

-- an employer must “establish policies and procedures that set a normal routine that all the supervisors can observe,” so that deviation, “like riding on a bus twenty times,” will be obvious, suspicious, reported, and investigated, RP 676-79; and

-- “a reasonable policy and procedure” is to require men to have permission to ride along on school buses, have a designated seat they must sit in, and allow men to sit with children only where they can be seen but not to play with or touch children, and not to let children sit with men who have already ridden along on their bus twice, RP 680-81.

McGoey told the jury that 97-98% of child molesters are men (but not that a significant, or any, percentage of men are child molesters), RP 688-89, and opined that schools should have policies requiring the reporting of suspicions or concerns about men who are around young children “so it can be looked into,” and caught “at its infancy when it’s just a thought in someone’s head because sometimes criminals will test a policy or procedure,” and “they’ll sometimes find drivers or workers that are lax in reporting and they’ll choose them [because t]hey know they won’t report it.” RP 690-91.¹³ McGoey did not testify, and plaintiff’s

¹³ Janet Barry, Ph.D., a former Issaquah and Central Kitsap schools superintendent was among OSD’s expert witnesses. RP 1429-1511. Barry testified that one can train employees to spot inappropriate behavior, but not child molesters, RP 1437-38, and that OSD had met the standard of care with respect to bus driver supervision. RP 1439. Barry explained that it would create a “toxic” environment for a school district to treat employees as potential child molesters when there is no evidence they are. RP 1461-63.

counsel did not argue, that the three ride-alongs by Shafer on NL's bus that OSD acknowledged were numerous enough to put OSD on notice of "red flag" interest on Shafer's part in young girls.

6. The court allowed plaintiff to show the jury a videotape of NL saying on October 21, 2011, that Shafer rode her bus 20 times.

Jon Conte, Ph.D., a psychologist, testified that even though NL is asymptomatic, she is more at risk of having mental, physical, and social problems in the future than is someone who does not experience sexual abuse as a child. RP 916-941. During Conte's testimony, plaintiff's counsel attempted for the third time to persuade the court to let Conte testify to statements attributed to Shafer, RP 948-54, arguing that they related "to liability issues about how many times he [Shafer] rode the bus" and "impeached" testimony by Paz and other "district people saying it was only three times." RP 950. The court adhered to its earlier rulings that the jury would learn of Shafer's convictions and sentence, but not about statements attributed to Shafer or that he made. RP 952.

Thereafter, plaintiff's counsel sought to prove that Shafer had rode NL's bus much more frequently than three times via the statement (to which McGoey had referred over OSD's objections, RP 672-73) that NL had made in an interview videotaped by plaintiff's expert Mark Whitehill, Ph.D. Whitehill, a psychologist, followed Conte on the witness stand.

Plaintiff's counsel had retained Whitehill to evaluate NL. Whitehill had videotaped a female colleague interviewing NL for 30 minutes on October 21, 2011. RP 978, 984-85.

Before Whitehill took the stand, OSD counsel advised the court that OSD continued to object to NL's hearsay interview statement being admitted in evidence at all, but also specifically objected to the videotape of NL making the statement being shown:

Your Honor, there's a matter we should take up now. Counsel wants to show a clip from an interview deposition [sic¹⁴] of [NL] on an issue that I object to in terms of showing the clip. It goes to the issue of her response to one of the office persons at Dr. Whitehill's office about how many times Gary was on the bus. . . [T]he court has ruled that the expert can say that's – you know, "Based on information I have that that's what I was told," and I think that's the proper way to have this evidence, if it comes in at all, because I still object to it, that it come in. I don't think it's appropriate to show a clip from the videotape interview at this point, and I object to that.

RP 973-74. Plaintiff's counsel argued that Whitehill should be permitted to show and testify about NL's statement "[p]articularly in light of the court's exclusion of Gary Shafer's admission about how many times he rode the bus. . ." RP 974.

The court ruled that plaintiff's counsel could show the jury Whitehill's videotape clip because "it's [NL] talking, and it's Dr. White-

¹⁴ NL's statement had not been made in a deposition with lawyers and a court reporter present, and she was not under oath or subject to cross examination.

head [sic], a psychologist, for his purposes, and it's very limited [time-wise] you say," and "because it was referenced by" Conte [sic, McGoey]." RP 975. The record does not indicate that the court previewed the clip. The court made no determination that NL understood and had committed to telling the truth, that the number 20 had not been suggested to her, and that NL meant to estimate the number of times Shafer had ridden her bus before, rather than after, the November 2010 ride when he molested her. (To the extent Shafer rode NL's bus *after* he molested her in November, such ride-alongs could not have been offered as evidence that OSD had been on "notice," in time to prevent NL's molestation, of what McGoey opined were suspiciously frequent ride-alongs by Shafer.)

Once Whitehill had related his qualifications and what he had done, plaintiff's counsel went right to the videotape clip:

Doctor, before I talk to you about your conclusions, I want to take a look at a piece of videotape from the evaluation, the interview that [Whitehill's colleague] did and for which you were present.

RP 988. The court instructed the jury that the evidence was being admitted "as part of the basis for the opinion of Dr. Whitehill, but may not be considered for other purposes," and that "you may not consider this testimony as proof that the testimony relied on is true," and "may use the

testimony only for the purpose of deciding what credibility or weight to give Dr. Whitehill's opinion." RP 989.

On the tape NL says "twenty" and holds up ten fingers twice; a woman's voice says: "so you think twenty times. So a lot of times he was on that bus too." Ex. 139; RP 990. Whitehill testified that NL had said "twenty" in response to being asked how many times Shafer was on the bus. RP 990. Plaintiff's counsel asked Whitehill what the significance of that was "in terms of you evaluating what happened to [NL]." Whitehill replied "that there were multiple opportunities for interaction between [Shafer and NL]," and that the fact that Shafer had ridden the bus 20 times made his offense possible and provided "sufficient opportunities for this process of grooming to have occurred." RP 990-91.¹⁵

Overruling a renewed objection by OSD, RP 992-94, the court ruled that, under ER 803(a)(3) (the "statement of existing state of mind" exception to the hearsay rule), Whitehill could testify about "the nature of the relationship Shafer had with these victims." RP 1000. Plaintiff's counsel then argued that Whitehill should be allowed to testify to Shafer's interactions with NL and VMV as related in *Stines*' previous hearsay testimony (RP 997-1000) because "[s]exual grooming is part of the damages," and that grooming "becomes a part of their realization later in life

¹⁵ Whitehill did not opine that three bus rides were insufficient time for Shafer to have groomed NL

that . . . they were manipulated and that has an impact on their psyche and on their emotional condition.” RP 1002. OSD counsel countered that “it’s actually offered for an entirely different purpose than damages,” whereupon the court told plaintiff’s counsel “I’m going to have you tie it to damages. . . what it means for purposes of explaining the basis of your opinion regarding [NL]’s damages.” RP 1003. Whitehill then referred to Stines’ (hearsay) testimony about Shafer scratching NL’s back and sitting on Shafer’s lap, and told the jury that grooming itself had a “very damaging dimension.” RP 1004-05.

Whitehill concluded his opinion testimony by describing health care NL might need over the next 70-plus years because Shafer molested her in 2010, RP 1014-20, estimating it could cost \$329,400, RP 1021.

The court then asked Whitehill questions submitted by jurors. One was “[h]ow reliable is the information gathered from a five- to six- year old child?” RP 1035. Whitehill responded that it “depends on the nature of the information and whether there is any kind of corroboration,” and that some young children are highly suggestible . . . and not accurate or reliable,” but that some children are “able to reliably provide information.” RP 1035. Plaintiff’s asked Whitehill whether the information gathered from NL in his colleague’s October 21, 2011 interview had been reliable,

and Whitehill responded “we saw that little clip with the twenty . . . and that seemed to be factually correct information.” RP 1046.

7. The court admitted hearsay testimony by NL’s mother.

Over OSD’s hearsay objection, RP 1073, Gutierrez testified that NL had told her, during “a conversation” at some unspecified time, that “Gary” rode the bus with her “two times a week for a while,” and “always rode the bus.” RP 1073-75.

8. The court denied OSD’s motion for directed verdict.

When plaintiff rested her case in chief, OSD moved for a directed verdict on the ground that there was no admissible evidence that OSD knew or should have known Shafer was a molestation danger. RP 1097. The court denied the motion. RP 1097.

H. Judgment Was Entered for Plaintiff Based on a Jury Verdict Awarding \$1,425,000 and the Trial Court Denied OSD’s Motion for New Trial or Remittitur.

The jury found OSD negligent and awarded NL \$1,275,000 and Gutierrez \$150,000. CP 1106-07. The court entered judgment on the verdict. CP 1108-10. The trial court denied OSD’s motion for a new trial or remittitur. CP 1112-26, 1211-12. OSD timely appealed. CP 1213-23.

V. STANDARD OF REVIEW

A trial court has broad discretion in ruling on evidentiary matters. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997). When a trial court applies the wrong legal standard or bases its ruling on an erroneous view of the law it abuses its discretion. *Id.*; *Kelley v. Centennial Contractors Enters., Inc.*, 169 Wn.2d 381, 386, 236 P.3d 197 (2010); *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). Although “[i]n general, the admission or refusal of evidence lies within the sound discretion of the trial court,” [such] discretion [is] abused where the court’s reason for exclu[ding] evidence [is] contrary to law.” *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 202 (1995). An evidentiary error requires reversal if it results in prejudice, *i.e.*, if the trial outcome “would have been materially affected had the error not occurred.” *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 905, 151 P.3d 219 (2007), *rev. denied*, 162 Wn.2d 1009 (2008).

Insofar as this appeal is from the denial of a motion for new trial:

We review orders granting or denying a new trial for abuse of discretion. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). If, however, the trial court’s reasons are based on issues of law, our review is *de novo*. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 750 P.2d 1257 (1988).

Smith v. Orthopedics Int’l, Ltd., 170 Wn.2d 659, 664, 244 P.3d 939 (2010).

VI. ARGUMENT

A. As the Trial Court Instructed the Jury, OSD Was Subject to Liability for Shafer's Molestation of NL Only if It Knew or Should Have Known Shafer Was a Molestation Risk.

An employer may not be held strictly liable or vicariously liable for its employee's sex crime because sexual misconduct is not within the scope of employment. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P. 2d 1054 (1993). An institution that serves, and thus has a "special relationship" with, children is not an insurer against harm that its employees inflict intentionally "simply because the work situation fortuitously provides an opportunity to perpetrate the harm." *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 727, 985 P. 2d 262 (1999). "Vicarious liability for intentional or criminal actions of employees would be incompatible with recent Washington cases rejecting vicarious liability for sexual assault, *even in cases involving recognized protective special relationships.*" *Niece v. Elmview Group Home*, 131 Wn. 2d 39, 48, 52-58, 929 P. 2d 420 (1997) (italics added).

CJC held that the defendant church could be liable for a child's sexual molestation, and that summary dismissal of the plaintiffs' claims had been error, because:

. . . a jury could reasonably find Wilson's [the alleged molester's] position in the Church was a causal factor in the resulting harm. Wilson was a prominent member of the Church, placed into positions of trust over children. This

position not only brought him into close connection with the children of the congregation, it allegedly inspired confidence to place the plaintiffs into his care. In addition, there is evidence that Wilson baby-sat the victims in order that their father could travel on Church business and that the Church was aware of this arrangement. ***Given the Church's specific and superior knowledge of the facts, a jury could reasonably find the Church knew or should have known the children of its congregation, and specifically these particular plaintiffs, were exposed to an unreasonable risk of harm at the hands of Wilson.***

CJC, 138 Wn.2d at 725-26 (emphasis added). The court then went on to explain that the reason *why* a jury could find that the church should have known children were “exposed to an unreasonable risk of harm at the hands of Wilson” when left alone with him is that “the Church had prior warning of Wilson’s alleged propensity to molest children.” *Id.* at 726, n. 14. There was evidence that, a year before Wilson allegedly molested the plaintiffs a church elder had been told that Wilson had engaged in sexual conduct toward a young girl. *Id.*, 138 Wn.2d at 720.

The important point is that an employer must be shown to have had prior *employee-specific* notice in order to be found negligent in supervising an employee who committed a sexual assault. That principle applies to schools as well as churches. In *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108, *rev. denied*, 120 Wn.2d 1005 (1992), a school librarian, Siau, had assaulted a student. The Supreme Court held the school not liable as a matter of law even though one of its teachers had been told

earlier that Siau had made advances on a student, because the teacher had not passed that information on to school officials and his knowledge was not imputable to the school because he did not supervise Siau. The key liability instruction in this case, Court's Instruction 12, expressing the holding of *Peck v. Siau*, told the jury that:

The Olympia School District and its employees have a legal duty to exercise reasonable care to protect a student in its custody from reasonably foreseeable dangers. The Olympia School District has a legal duty to exercise reasonable care in supervising and training its employees. A student is in the custody of the school district while riding on a school bus.

Harm is reasonably foreseeable if the Olympia School District knew or should have known of the risk that resulted in the harm to plaintiffs. It is not necessary that the exact sequence of events be anticipated.

It is only necessary that the actual harm fell within a general field of danger which should have been anticipated.

With regards to the criminal actions of any employee of the District, these actions are reasonably foreseeable only if the District and its employees knew or in the exercise of reasonable care should have known that the employee was a risk to harm a student.

CP 1095 (emphases added). Thus, the jury was instructed that Shafer's molestation of NL could be found "reasonably foreseeable only if the District and its employees knew or in the exercise of reasonable care should have known that ***the employee*** [*i.e.*, Gary Shafer] was a risk to harm a student [emphasis added]."

Although OSD had never received any report of inappropriate or questionable behavior by Shafer toward any child before NL told her mother on December 30, 2010 of her molestation in November, the jury found OSD causally negligent. As explained below, the jury could have made such a finding only because the trial court made several reversibly erroneous evidentiary rulings.

B. Plaintiff Decided to Argue that OSD Should Have Known Shafer Was Up to No Good Because He Rode Along on NL's Mid-Day Kindergarten Bus Far More Often than OSD Admitted He Did, and So Frequently for a Man that OSD Should Have Recognized a "Red Flag" that He Was Grooming Girls for Molestation.

Even plaintiff will admit that no evidence was presented that OSD *knew* Shafer posed a risk of sexual assault on children before he molested NL in November 2010. Nor was there evidence that OSD had been *told* anything suggesting that Shafer posed a child molestation risk before January 4, 2011. The only strategy open to plaintiff thus was to argue that OSD *should have suspected* Shafer was a child-molestation risk based on how he acted. Plaintiff's counsel argued that OSD ought to have suspected something amiss because Shafer rode along, unpaid, on mid-day kindergarten bus routes. Under plaintiff's theory, the more frequently Shafer could be shown to have ridden along specifically on Mario Paz's mid-day kindergarten bus route, the more careless it had been for OSD not to realize that repeated ride-alongs by male drivers are a "red flag" and not

stop Shafer before he molested NL. Plaintiff thus needed to refute Paz's and Stanley's testimony that Shafer rode NL's bus two times to learn the route plus a third time, when he was sitting in the seat behind Paz when NL, and then VMV, got on the bus.

The court did not allow plaintiff's counsel to apprise the jury of (hearsay) statements attributed to Shafer himself, so counsel used his experts to "rely" on – and even play for the jury a videotape of – NL saying "twenty [times]." NL's mother testified that NL had told her in "a conversation" that Shafer rode her bus "always" and "twice a week." Detective Stines related statements by VMV and opined, based on them, that Shafer had groomed NL on "multiple" rides.

As explained below, all that evidence was inadmissible hearsay, was admitted over OSD's objections, and deprived OSD of a fair trial.

C. It Was Reversible Error to Let the Jury See, or Even Hear of, NL's Unsworn out of Court Statement that Shafer Had Ridden Along on Her School Bus Twenty Times, and the Court's Limiting Instructions Were Inadequate to Protect OSD under the Circumstances of This Trial.

1. NL's statement was hearsay, and the court abused its discretion by ruling that ER 803(a)(3) permitted plaintiff's experts to relate it.

NL's October 21, 2011 "twenty" statement to Whitehill was made out of court. Plaintiff's counsel did not show or argue that NL was unavailable to testify at trial (such that NL's statement could be admitted

under ER 804(b)). Plaintiff's counsel offered NL's statement to Whitehill under ER 703 to "explain" his experts' opinions (McGoey's opinion that OSD failed to appreciate that a man riding along frequently on a kindergarten bus is unusual and suspicious; Whitehill's opinion that grooming of NL over the course of 20 rides caused more harm than a one-time molestation would have caused). RP 669.

Although plaintiff's counsel did not offer NL's "twenty" statement under an ER 803(a) exception, the trial court cited ER 803(a)(3) as its basis for allowing Whitehill to show NL making the statement. RP 1000. ER 803(a)(3) was inapplicable. It excepts from the hearsay rule:

[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

NL's October 2011 statement was one of memory or belief, not of her then-existing state of mind, emotion, sensation, or physical condition, so it was not admissible under ER 803(a)(3) and the court abused its discretion to the extent it relied on that rule in admitting the hearsay statement. The statement ostensibly was offered under ER 703 to explain the basis for Whitehill's damages opinion testimony, but really was offered "to prove the fact remembered," which also is not permissible under ER 803(a)(3).

2. The court lacked discretion to admit NL's hearsay statement under ER 703 during McGoey's or Whitehill's direct examination because it had not balanced the statement's probative value against its risk of prejudice and confusion.

ER 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ER 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

That ER 703 permits an expert to *rely* on evidence that is inadmissible does not mean the party calling the expert has the automatic right to have the expert *say* he relied on it. The general principles underlying ER 703 are well established and make sense:

Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. ***It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert.*** While it was once the practice for an expert who based an opinion on assumed facts to testify in the form of an answer to a hypothetical question, ***modern practice*** does not demand this formality and, ***in appropriate cases, permits an expert to explain the facts on which his or her opinion is based without testifying to the truth of those facts.***

Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221, 2228, 183 L. Ed.2d 189 (2012) (emphases added).

OSD's counsel was unable to persuade the trial court that ER 703 and 705 allow an expert to express an opinion that is *based* on "facts or data" that are not admissible in evidence, but that neither rule makes such evidence automatically admissible.¹⁶ For the court to have had the discretion to allow McGoey and Whitehill to refer to the "twenty" statement during direct examination, it would first have had to weigh, under ER 403, the statement's probative value against its prejudicial or potential misleading effects, which in this trial were colossal.

Although the trial court may allow disclosure of underlying facts or data, "courts have been reluctant to allow the use of ER 705 as a mechanism for admitting otherwise inadmissible evidence as an explanation of the expert's opinion." *State v. Anderson*, 44 Wn. App. 644, 652, 723 P.2d 464 (1986), *rev. dismissed*, 109 Wn.2d 1015 (1987). ***The trial court should determine under ER 403 whether to allow disclosure of inadmissible underlying facts*** based upon whether the probative value of this information outweighs its prejudicial or possibly misleading effects. Laird C. Kirkpatrick, *Oregon Evidence*, at 311 (1982). Moreover,

While Rule 703 permits an expert witness to take into account matters which are unadmitted and inadmissible, it does not follow that such a witness may simply report such matters to the trier of fact: The Rule was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence

¹⁶ RP 307, 667-69, 973-74, 992-94, 1003.

3 David Louisell & Christopher Mueller, *Federal Evidence* § 389, at 663 (1979). (Emphasis added).

State v. Martinez, 78 Wn. App. 870, 879-80, 899 P.2d 1302 (1995), *rev. denied*, 128 Wn.2d 1017 (1996). *See also Roth v. Amtrak*, 1999 U.S. Dist. LEXIS 20173 *3 (N.D. Ill. Dec. 29, 1999) (“[Fed. R. Evid.] 703 . . . says . . . an expert witness may rely on inadmissible evidence in reaching his or her opinions, but not that the base metal (such inadmissible evidence) is thereby transmuted into gold (admissible evidence)”).

The trial court committed reversible error by accepting at face value plaintiff’s counsel’s assertion that NL’s “twenty” statement was one McGoey and Whitehill could both rely on and repeat simply because NL said it and they were being called as experts. RP 975. Because the court conducted no ER 403 weighing, it applied the wrong legal standard and lacked discretion, or abused any discretion it otherwise had when it allowed McGoey and Whitehill to relate NL’s hearsay statement in their direct testimony. *Sintra*, 131 Wn.2d at 662-63; *Kelley*, 169 Wn.2d at 386; *Cox*, 141 Wn.2d at 439.¹⁷

Moreover, because NL’s hearsay statement went to the key liability issue in the case – whether Shafer had ridden her bus three times or

¹⁷ McGoey’s and Whitehill’s professed reliance on NL’s hearsay statement was admissible only at OSD’s option, under ER 705, on cross-examination. *See State v. Nation*, 110 Wn. App. 651, 661, 41 P.3d 1204 (2002), *rev. denied*, 148 Wn.2d 1001 (2003 (ER 705 cannot be used by the party calling the expert to make hearsay admissible); *State v. Anderson*, 44 Wn. App. 644, 652, 723 P.2d 464 (1986) (same).

many more than three times before he molested her in November 2010 – it was naive to think the jury could weigh McGoey’s and/or Whitehill’s opinions without assessing the credibility of NL’s statement. Both McGoey’s negligent supervision opinion and Whitehill’s grooming-damage opinion depended on NL’s “twenty” estimate being credible. McGoey and Whitehill did nothing more than accept that Shafer had ridden along on NL’s bus many more than three times because NL *said* he rode it 20 times. McGoey “relied” on NL’s statement explicitly for the purpose of opining that Shafer rode NL’s bus because “I have to accept the evidence I see on its face, twenty times or – but, you know, definitely more than three times,” RP 672-73, and McGoey’s key opinion was that a man “riding on a bus twenty times” is suspicious and should be investigated, RP 676-79. Whitehill’s opinion – that NL suffered more harm because she was groomed before being molested than she would have if she had been molested but not groomed first, RP 1004-07 – likewise depended on NL’s “twenty” statement being true.¹⁸

¹⁸ Both McGoey and Whitehill seem to have assumed that, if indeed NL *was* on the bus with Shafer 20 times, she sat with Shafer each time and that the rides all preceded her November molestation, even though NL did not say that and was not asked it.

3. Even if it would not have been reversible error to allow McGoey or Whitehill to cite NL's statement as the basis for their opinions, it was reversible error to show the jury the videotape of NL saying "twenty".

Being six years old does not make a child incompetent to testify, but appellate decisions have imposed procedural safeguards to protect parties against whom child testimony is offered:

A young child is competent to testify if she (1) understands the obligation to speak the truth on the witness stand; (2) has the mental capacity, at the time of the occurrence concerning which she is to testify, to receive an accurate impression of it; (3) has a memory sufficient to retain an independent recollection of the occurrence; (4) has the capacity to express in words her memory of the occurrence; and (5) has the capacity to understand simple questions about the occurrence

State v. Woods, 154 Wn.2d 613, 618, 114 P.3d 1174 (2005). "The competency of a youthful witness is not easily reflected in a written record, and [an appellate court] must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence." *Id.* at 617. *Woods* involved an issue of abuse of discretion in admitting an out of court statement by a six year old girl in a criminal prosecution for molesting her. *See also State v. Kennealy*, 151 Wn. App. 861, 214 P.3d 200 (2009), *rev. denied*, 168 Wn.2d 1012 (2010) (applying same rule to testimony of boy, S.J., who had been six years old – older than NL was – at time of the alleged molestation). These rules apply in civil and criminal cases, and to children under ten. *Jenkins v. Snohomish*

County Pub. Util. Dist. No. 1, 105 Wn.2d 99, 101, 713 P.2d 79 (1986). The trial court here did not see NL or observe her manner or assess NL's capacity and intelligence either before or after showing the jury Whitehill's videotape clip.

Watching Whitehill's October 21, 2011, videotape, the court saw NL utter just the word "twenty" once and the word "ten" twice, and heard Whitehill's colleague say "you think twenty times, [s]o a lot of times he was on that bus too." RP 990. In the videotape Det. Stines made on January 4, 2011, NL, expressing herself, had been precise about some things but not about how frequently Shafer rode her bus. Asked "how many times did this [the molestation] happen?", NL answers "one," RP 202, and that it occurred after Halloween and before Thanksgiving, RP 204. Asked "has Gary been on your bus every day?", NL answers "some days," and "some days there's a different guy. Some days there's no one." RP 204. The marked difference between what NL said on January 4 and October 21 raise an obvious question of whether a number had been suggested to NL during the time between interviews. Suggestion was not something OSD could explore with NL at trial, because she did not testify.

Under *Woods* and *Jenkins*, the trial court had no basis for making a determination that NL would have been competent to testify as a trial witness under the prescribed criteria. Nor did the trial court even purport to

make such a determination. Moreover, if NL had testified as a sworn trial witness in September 2012 based on a determination by the court that she was competent to testify, OSD would have some opportunity to test NL's recall, the extent to which her estimate was the product of suggestion, and whether any "twenty" estimate referred to the number of times Shafer rode her bus before molesting her in November 2010 or after he molested her but before she told her mother about it on December 30. Because plaintiff was allowed to present NL's statement by videotape, OSD had no such opportunity. By *showing* NL making the statement, as well as allowing other witnesses to relate it, the court gave plaintiff the benefit of what, bereft of context not subject to cross-examination, seems to have struck the jury as a credible estimate. That was unfair to OSD.

4. Once the trial court had let plaintiff's experts relate and show NL's hearsay statement, both experts compounded the prejudice to OSD by vouching for its truth.

If it had been within the court's discretion to allow Whitehill to cite NL's statement as a basis for his harm-from-grooming opinion, what plaintiff's counsel *could* have done was ask Whitehill:

I want you to assume, hypothetically, that there will be testimony that Shafer rode along on Paz's school bus more than ten and as many as 20 times during the first three months of the 2010/11 school year and that NL was on the bus each of those times. Assuming there is or will be such testimony and it's true how, if at all, would that affect your

assessment of what mental health issues NL is at risk for going forward into the future?

As the Tegland treatise explains, that is the proper way to elicit such testimony.

When asking an expert witness to express an opinion based upon the testimony of other witnesses, counsel will normally state that the expert should, for purposes of answering the question, assume the testimony of the other witnesses to be true. *This procedure* avoids any suggestion [or] *avoids any implication that the expert personally believes the testimony of the other witnesses, or vouches for the credibility of the other witnesses.* [Emphasis added.]

Karl B. Tegland, *Wash. Prac.: Evidence Law and Practice*, Vol. 5B (5th ed. 2012), §703.3, p. 228.¹⁹ In this case, however, plaintiff’s counsel had Whitehill *provide* the hearsay statement – indeed show NL making it – under the pretext of “explaining” his opinion as a evaluating psychologist, which implicitly vouched for the statement, *and then explicitly vouch for the statement*: “we saw that little clip with the twenty . . . and that seemed to be factually correct information.” RP 1046.

The same holds true for McGoey’s testimony. If it had been proper to let McGoey refer to NL’s “twenty” statement, McGoey could have been asked a question that did not invite him to vouch for the statement.

¹⁹ See also *State v. Jackson*, 721 P.2d 232, 238 (Kan. Supr. Ct. 1986) (an expert’s opinion is admissible up to the point where an expression of opinion would require the expert to pass upon the credibility of witnesses or the weight of disputed evidence, but venturing beyond that point usurps the jury’s function).

But McGoey wasn't asked such a question, and he vouched for NL's statement. RP 672-73 ("I have to accept the evidence I see on its face, twenty times or – but, you know, definitely more than three times").²⁰

5. Limiting instructions likely did not protect OSD against jury misuse of NL's "twenty" statement.

As the court explained in *State v. Martinez*, 78 Wn. App. at 879-80, ER 403 is automatically implicated when an issue arises as to whether the evidence rules allow the proponent of expert testimony to elicit evidence that is otherwise inadmissible to explain the expert's opinion.

The Official Comment to ER 403 explains in pertinent part that:

In deciding whether to exclude evidence on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.

The unfair-prejudice inquiry necessarily includes consideration of whether a limiting instruction would be effective to "neutralize the prejudicial effect of the evidence." Tegland, *Wash. Prac.: Evidence Law and Practice*, Vol. 5 (5th ed., 2012), §105.3, p. 142. Although Washington courts routinely express confidence in the effectiveness of limiting instructions, Washington jurisprudence calls for evaluation of the

²⁰ Compare *State v. Bailey*, 87 P.3d 1032, 1037 (Mont. Supr. Ct. 2004) (not abuse of discretion to admit physician's opinion that, based on his physical exam and oral history obtained from two girls, both girls had been sexually abused where, although physician had relied on the girls' statements relating sexual abuse, physician did not repeat those statements in his testimony).

effectiveness of limiting instructions “on a case-by-case basis, taking into account all of the facts and circumstances presented.” *Id. at p. 143.*

Limiting instructions thus do not *ipso facto* prevent unfair prejudice from the admission of hearsay evidence ostensibly for the limited purpose of proving or disproving something other than liability. An example of a case so acknowledging is *Bertsch v. Brewer*, 97 Wn.2d 83, 87-88, 640 P.2d 711 (1982). In that medical malpractice case, the trial court admitted into evidence a psychological personality inventory uncomplimentary of the plaintiff. The jury found the defendant not liable. The Supreme Court, holding that it had been reversible error under ER 403 to admit the personality inventory in evidence, rejected the defendant’s argument that the error was harmless because the inventory related solely to the issue of damages, which the jury did not reach. The court explained that “[e]rror relating *solely* to the issue of damages is harmless when a proper verdict reflects nonliability [*italics by the court*],” but that:

In the present case, it is unrealistic to conclude the jurors related the contents of the personality profile solely to the damages issue, especially in the absence of instruction to that effect. . . . The derogatory description of Bertsch undoubtedly prejudiced the jurors as to Bertsch’s credibility, which reflected directly on many crucial issues, including informed consent, the causal relationship between Bertsch’s treatment and Bertsch’s recurring symptoms, and contributory negligence. *To assume that the jurors could relate the description of Bertsch solely to the issue of damages, even if a limiting instruction had*

been given, is naïve and unrealistic. The admission of such a personality profile into evidence constituted prejudicial error, necessitating a new trial.

Bertsch, 97 Wn.2d at 88 (emphasis added). In this case, it was just as (indeed, much more) unrealistic to think jurors could avoid considering references to NL's "twenty" statement for a purpose other than deciding how frequently Shafer had ridden her bus before he molested her in November 2010. Thus, as in *Bertsch*, it is "naïve and unrealistic" to think limiting instructions protected OSD from jury misuse of the statement.

In *State v. Justesen*, 121 Wn. App. 83, 86 P.3d 1259, *rev. denied*, 152 Wn.2d 1033 (2004), the court addressed a similar problem. *Justesen* was appealing her conviction for custodial interference. Her defense had been that she believed her daughter's father was sexually molesting the girl. The trial court allowed the jury to hear that *Justesen* had known the father had passed a polygraph, but gave the jury limiting instruction that it could consider the polygraph test with respect to the reasonableness of *Justesen*'s professed belief, and not as evidence that the father had not abused the child. The court of appeals held that "[t]he limiting instruction was not effective," because "[t]he jury's evaluation of the reasonableness of *Justesen*'s belief. . . depended in large part on their evaluation of whether [the father] was credible when he denied [in the polygraph exam] having sexual contact with his daughter." *Justesen*, 121 Wn. App. at 94-

95.²¹ In this case, the purpose for which the NL statement was ostensibly offered and allowed in evidence was congruent with the purpose for which the court told the jury the statement could not be considered. The weight of the McGoey and Whitehill opinions that plaintiff's counsel purported to offer the statement to support depended on the credibility of the statement itself. The error in not only allowing *references* to NL's unsworn statement, but in allowing Whitehill to *show* NL making the statement, for which he then vouched, requires at least a new trial.

D. By Admitting Gutierrez's Hearsay Testimony and Stines' Hearsay-Based Lay Opinion that Shafer Groomed NL on "Multiple" Bus Rides, the Court Committed Error that Is Reversible Even if the Jury Heeded the Limiting Instructions Given with Respect to McGoey's and Whitehill's References to NL's Hearsay "Twenty" Statement.

Ordinarily, a jury is presumed to have obeyed a trial court's limiting instruction. *E.g., In re Det. of Coe*, 175 Wn.2d 482, 513-14, 286 P.3d 29 (2012). It is unlikely, as argued above, that the jury in this case was able to heed the limiting instructions the court gave during McGoey's and Whitehill's expert testimony. But, if the jury *did* heed those limiting instructions, that means there had to be some *other* admissible evidence to

²¹ See also *Hiser v. Bell Helicopter Textron, Inc.*, 4 Cal. Rptr. 3d 249, 262 (2003) ("Ordinarily, the use of a limiting instruction that matters on which an expert based his opinion are admitted only to show the basis of the opinion and not for the truth of the matter cures any hearsay problem involved, but in aggravated situations, where hearsay evidence is recited in detail, a limiting instruction may not remedy the problem) (*quoting Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 369 (Cal. Ct. App. 1981)).

support plaintiff's "many more than three ride-alongs" theory and, pursuant to Court's Instruction 12, CP 1095, the requisite jury finding that OSD should have known Shafer was a molestation risk. In other words, there had to be admissible evidence other than what McGoey and Whitehill said, and other than the videotape Whitehill played for the jury (Ex. 139), that Shafer rode NL's bus many more than three times and was therefore able to groom and finally molest her in November 2010.

The problem is that the only other evidence supporting plaintiff's "many more than three rides" theory of negligent supervision – Gutierrez's testimony and Stines' testimony – consisted of hearsay and a lay opinion based on hearsay, respectively and was admissible under no exception to the hearsay rule. The jury should not have heard any such testimony. Without Gutierrez's and Stines' hearsay testimony, plaintiff's proof of causal negligence failed. An evidentiary error requires reversal if it results in prejudice, *i.e.*, if the trial outcome would likely have been materially affected had the error not occurred. *Lutz Tile*, 136 Wn. App. at 905. Here, if the trial court had excluded the hearsay statements by NL and VMV and opinions predicated on them, there would have been no evidence of, and the jury could not have found, causal negligence on the part of OSD.

1. It was reversible error to allow NL's mother to testify that NL told her Shafer rode her bus "always" and "twice a week".

The statements that Gutierrez attributed to NL – that “Gary” rode the bus with her “two times a week for a while,” and “always rode the bus,” RP 1073-75 – were made out of court. Plaintiff’s counsel did not offer any “limited purpose” pretext for offering NL’s statement to her mother, as he had when he offered NL’s “20 times” statement through his experts McGoey and Whitehill. The testimony was not – and could not have been – admitted subject to a limiting instruction, because it was offered solely for its truth. It was hearsay, ER 801, and was inadmissible pursuant to ER 802. OSD objected to the testimony *as* hearsay. RP 1073.

Plaintiff’s counsel did not even attempt to lay an ER 803(a)(2) excited-utterance or other ER 803(a) foundation for the statements, and Gutierrez testified that NL made the statements in “a conversation” at an unspecified time, RP 1073, not that NL made it excitedly or soon after the event. Because the court applied the wrong legal standard in admitting NL’s statement to her mother – “I’m going to allow it,” in response to plaintiff’s counsel’s bare assertion that “[i]t’s not hearsay,” RP 1073 – the court abused the discretion courts ordinarily have with respect to evidentiary rulings. *Sintra*, 131 Wn.2d at 662-63.

The error in admitting NL's hearsay statements to her mother was not harmless because the statements were offered with respect to the pivotal notice-of-risk issue, *see* RP 950. The error requires at least a new trial.

2. It was reversible error to allow plaintiff to elicit, from Det. Stines, hearsay statements by VMV based on which Stines opined that Shafer had groomed NL on "multiple" rides.

Statements Stines attributed to VMV concerning how Shafer had interacted on the bus with her and NL were made out of court. They were offered for their truth, not for some limited other purpose. Plaintiff's counsel did not attempt to lay an ER 803(a) foundation for the VMV statements. Plaintiff did not offer Stines' testimony relating VMV's statements as ER 703 "explanation of opinion" testimony. Nor was Stines' opinion that, in light of what VMV told her, Shafer had groomed NL on "multiple" bus rides admissible. Stines was not called as and was not testifying as an expert, and her opinion had no admissible evidentiary basis other than the hearsay. There was no proper purpose for admitting Stines' testimony relating what VMV said to her. The error in admitting Stines' hearsay testimony and opinion compounded the court's other hearsay evidence errors and was not harmless even considered in isolation.

E. It Was Reversible Error to Admit, Against OSD, Evidence that Shafer Molested other Kindergarten Girls on OSD School Buses and Possessed Child Pornography.

OSD objected to the admission of Ex. 12 (the record of Shafer's conviction and sentence of molesting NL and two other girls and of possessing child pornography) and Stines' testimony relating Shafer's criminal conviction and sentence as irrelevant, unfairly prejudicial under ER 403, and inadmissible under ER 404(b).²² There was no proper purpose for admitting such evidence against OSD. It was not relevant to whether OSD should have known before Shafer molested NL that he presented a molestation risk. The evidence could only have confused the jury as to what was proper "notice" evidence, so the effect of admitting it was solely to prejudice OSD's right to a fair trial.

ER 404(b) did not provide a basis for admitting "other Shafer wrongs" evidence, either. ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This was a tort lawsuit against OSD seeking damages for NL's molestation and there was no dispute that Shafer molested NL. What

²² CP 58 (¶4), 62 (¶24), 63 (¶26), 64-66 (¶29), 67-68 (¶¶35-36), 69 (¶40), 70-71 (¶¶44-46); 9/5/2012 74, 82; 9/10/2012 RP 15, RP 71-76, 82-83; RP 178-79, 205, 208-10, 226.

Shafer's motive or intent was, whether he had an opportunity to molest NL, and all of the other kinds of facts listed in the second sentence of ER 404(b) were immaterial.

Ex. 12 and Stines' testimony to Shafer's 2011 conviction and sentence were not probative of whether OSD had been on notice of Shafer's criminal proclivities before November 200 because suspicion that Shafer had molested VMV arose only after NL's complaint was reported, and the complaint concerning TMC surfaced in *May 2011*, after Shafer's January resignation and arrest. RP 225-26, 228.²³ The trial court had no basis for admitting the "other Shafer wrongs" evidence, and thus abused its discretion in doing so.

F. Remand for Dismissal of the Complaint is Called for Because the Trial Court Erred in Finding McGoey Qualified to Testify as a Safety Expert and His Opinions Were Insufficient to Support the Jury's Liability Findings Because Plaintiff Failed to Prove the Predicate for Them – that Shafer Had Ridden NL's Bus Suspiciously Often and "Definitely" More than Three Times – Through Admissible Evidence Independent of McGoey's Testimony.

McGoey's opinions amounted to nothing more than gratuitous, retrospectively conceived rules that would have kept Shafer away from NL after October 2010, based on an unsupportable theory that male

²³ Moreover, plaintiff's negligent supervision theory was that OSD failed to notice how often Shafer was *riding along* on kindergarten bus routes. The evidence that Shafer molested TMC was not probative for the additional reason that Shafer molested TMC while *driving* TMC's bus. *See* Ex. 12, p. 3 (last full paragraph). That Shafer molested TMC while driving her bus as a substitute was not disclosed to the jury.

employees who choose the company of young children have to be considered child molestation risks, culminating in the fatuous assertions that schools should have (and OSD lacked) policies requiring the reporting of suspicions or concerns about men who are around young children “so it can be looked into,” and caught “at its infancy when it’s just a thought in someone’s head because sometimes criminals will test a policy or procedure,” and “they’ll sometimes find drivers or workers that are lax in reporting and they’ll choose them [because t]hey know they won’t report it.” RP 690-91. McGoey admittedly was not aware of any school district that has had the kinds of policies he advocated. RP 714-15, 723-26. OSD had moved to exclude McGoey’s opinions, CP 1250-59; RP 633-41, and the court erred in denying OSD’s motions.

Even if McGoey – plaintiff’s sole standard of care expert – *had* been qualified and *had* expressed legitimate expert opinions helpful to a trier of fact, however, everything McGoey told the jury was predicated on NL’s “twenty” statement to Whitehill being true.²⁴ But, under the trial court’s limiting instructions, RP 671-72, RP 989, the jury could not find the statement to *be* true based on what *McGoey* said, or based on Whitehill’s testimony and/or the videotape, Ex. 139, either. For the jury to find that Shafer rode NL’s bus often enough to validate McGoey’s expert

²⁴ McGoey did not rely on the hearsay testimony Gutierrez gave after he testified.

opinion testimony, there had to be some admissible substantive evidence, offered through *another* trial witness or witnesses, to support such a finding. Otherwise, McGoey expressed no opinion that could have helped the jury decide whether NL was molested because of some deficiency in OSD's supervision of Shafer, and his opinion evaporates as support for the jury's liability findings. *State v. Nation*, 110 Wn. App. 651, 666, 41 P.3d 1204 (2002), *rev. denied*, 148 Wn.2d 1001 (2003) (reversing conviction and remanding for dismissal of charges where, without expert's testimony, State had not produced evidence from which a rational trier of fact could find each element of the crimes charged); *In re Det. of Marshall*, 156 Wn.2d 150, 163, 125 P.3d 111 (2005) (so recognizing by implication, but holding that verdict could be sustained because facts an expert assumed based on inadmissible evidence were separately proven); and Tegland, Vol. 5B, §703.2, p. 227 (“[a]n opinion may have an adequate basis as far as Rule 703 is concerned, thus making it admissible, and yet the opinion, alone, may not satisfy the burden of proving the elements of a claim or defense”).

It is, or should be, axiomatic that the erroneous admission of unsworn out-of-court statements attributed to six year olds to prove that the main factual proposition on which a plaintiff's negligence theory depends is true, which cannot be termed harmless error because the evidence was

not cumulative of *admissible* evidence proving the same fact, necessarily is reversible error if the jury returned a plaintiff's verdict. Although our appellate courts "overturn a jury's verdict only . . . when . . . there was no substantial evidence upon which the jury could have rested its verdict," *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 657, 717 P.2d 1371 (1986),²⁵ a verdict cannot be founded on mere theory or speculation. *Ethridge v. Hwang*, 105 Wn. App. 447, 457-458, 20 P.3d 958 (2001). To sustain a verdict, there must be substantial (as distinguished from a "mere scintilla") evidence to support the verdict, *i.e.*, to "convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *Id.* (quoting *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)). Because not even a scintilla of admissible evidence supports the negligence and causation findings in the verdict in this case, this Court should remand for dismissal of plaintiff's complaint.

G. Damages, as Well as Liability, Should Be Retried If the Court Orders a New Trial.

If the Court decides dismissal is unwarranted, both damages and liability should be retried because plaintiff's liability and damages theories went hand in hand. The more times Shafer rode along on NL's bus before he molested her, (a) the more opportunity, according to McGoey, OSD had been given to notice his unusual attention to NL's bus, and (b) the

²⁵ Quoting *State v. O'Connell*, 83 Wn.2d 797, 839, 523 P.2d 872 (1974).

more opportunity, according to Whitehill, Shafer had been afforded to “groom” NL and worsen the harm he inflicted. Plaintiff’s counsel urged the jury to accept both the “many ride-alongs” theory, RP 1669, 1672, 1676, 1678, and to find “extensive grooming,” RP 1679. The damages award must fall along with the liability finding.

VII. CONCLUSION

To hold OSD liable for NL’s molestation by Gary Shafer, plaintiff had to present evidence that OSD was on notice of facts indicating that Shafer, specifically, was a child molestation risk. *Peck*, 65 Wn. App. 285. Plaintiff chose to argue that OSD had such notice because, contrary to what OSD witnesses with actual knowledge testified, Shafer rode along on NL’s school bus many more than three times to groom her before he molested her in November 2010. All evidence admitted at trial that was probative on the pivotal “number of ride-alongs” issue was hearsay that the jury was instructed it could not consider (but likely did consider) on the question of how many times Shafer had ridden along on NL’s bus, or was hearsay that the court erred by allowing the jury to hear at all.

A remand for dismissal is called for because the verdict for plaintiff could not stand without the erroneously admitted hearsay evidence. If the Court decides dismissal is unwarranted, both damages and liability should be retried.

RESPECTFULLY SUBMITTED this 28th day of June, 2013.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 27th day of June, 2013, I caused a true and correct copy of the foregoing document, "Brief of Appellant," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 27th day of June, 2013, at Seattle, Washington.



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