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No. 73825-9

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

A.Q. and J.Q., individually and as parents and guardians on behalf of
L.Q., a minor,

Appellants,

v.

BELLEVUE SCHOOL DISTRICT,

Respondent.

REPLY OF APPELLANTS

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I. INTRODUCTION

The Bellevue School District now concedes that it has a heightened duty of care when transporting students on a bus. But it makes the novel argument that on a school bus, unlike on a city bus, extraordinary safety efforts are required only for “traffic” and not for misconduct on the bus. Under this reasoning, children have less protection riding to school than adults have commuting to work. This has never been, and should not be, the policy of Washington. Our courts have long recognized that children need the highest level of protection when they are taken away from the watchful eyes of their parents and transported to school.

In this case, the District knew about a pattern of misconduct on Chinook Middle School buses, but failed to prevent a group of boys from bullying and harassing L.Q. on bus rides throughout eighth grade. Rather than taking responsibility for the serious harm suffered by L.Q. when she was just 13, the District blames the victim. It is *her fault*, the District suggests, because she spoke out only once - when the ringleader of the group sexually assaulted her friend on the bus while other boys laughed - and did not speak up for herself in the face of escalating harassment. Washington courts have never embraced such harsh reasoning.

The District claims that acting as a common carrier and supervising students are two different things, and therefore the District has no heightened duty to protect students from foreseeable bullying and harassment on a bus. This is factually and legally wrong. The District trained its bus drivers to prevent harassment, and also empowered them to discipline unruly students and even ban them from riding. Thus, supervision is part of a bus driver's employment. But even if it wasn't, it would not matter because the District misunderstands the law. The courts have never limited a common carrier's heightened duty to safety threats outside the bus. Protection from threats inside the bus is equally important, especially for children who cannot protect themselves.

Contrary to the District's assertions, the trial court misstated the law, causing prejudice to L.Q. The jury was told that L.Q. was owed only "ordinary care" to prevent harassment and bullying on the school bus, contradicting decades of case law holding school-bus operators to the highest standard of care. Moreover, under Instruction No. 15, even ordinary care was not required unless the District knew or should have known that "a student is the subject of" another student's intentional act which causes physical or educational damage as defined in a bullying prevention statute. In other words, unless a school district has actual or constructive notice that

“a student” suffered one of the *specific harms* enumerated by statute, the district has *no duty at all* to prevent bullying or harassment. This is a dramatic departure from the utmost duty of care that should have been explained to the jury. It also contradicts the long-established rule that a school district owes all students a special duty to anticipate and guard against the “general field of danger” that is reasonably to be anticipated, regardless of whether the particular harm to the plaintiff was foreseeable.

The district failed to show, and could not have shown, that the court’s misstatement of law was harmless. L.Q. never got to present her theories that, by failing to protect her from harassment on the bus, the District breached both the heightened duty owed to bus passengers against any avoidable harm and the special protective duty owed to all students against a general field of danger. L.Q. was constrained to arguing about “ordinary care” within a tiny window of foreseeability tied to specific harms. Because the instructions were erroneous and prejudicial, and not shown to be harmless, a new trial is required.

II. REBUTTAL OF FACT STATEMENT

The District’s 4-page Statement of the Case omits all of the extensive evidence at trial that the Chinook Middle School bus was out of control, and that L.Q. was a primary target of pervasive bullying and harassment by a

group of eighth-grade boys.¹ The few facts recited by the District are mostly designed to discredit L.Q. *See, e.g.*, Resp., p. 3 (“L.Q. never reported to anyone about her alleged HIB on a school bus”); p. 4 (“she did not show alleged ‘welts’...to the bus driver or to any teacher or school administrator”); p. 5 (“L.Q.’s version matched no one else’s”). This approach is consistent with the District’s claim of contributory negligence, blaming a child for her own injuries, even though the District’s own training materials acknowledged that harassment on a school bus may “rob a victim of his or her voice” and that students may not report it because “they don’t think anything will be done,” fear retaliation or criticism, or “already have low self-esteem and think they deserve it.” Trial Ex. 24.

The District crossed the line into misrepresentation when asserting that “L.Q. herself admitted under oath that her claims that she saw a student grab another student’s breasts and butt were false” because “she could not see it if it had happened.” Resp., p. 6, citing VRP 1212-13. L.Q. made no such admission, nor were her claims false.

The District was referring to L.Q.’s December 15, 2010 Chinook Incident Statement, attached as Appendix B to its brief. The statement called for L.Q. to “describe the situation you witnessed or in which you

¹ Compare Resp., pp. 3-7 with Brief of App., pp. 4-10 and 12-13.

were involved” and to “[a]dd details you actually saw, heard or the words as spoken by another individual.” Resp., App. B. In response, L.Q. wrote:

Yesterday on the bus something terrible happened to my friend [B.T.] We were riding home on Bus 30 in the afternoon and we didn't have our usual bus driver. My friend [B.T.] has always been picked on by the boys on our bus - they take her backpack and her phone a lot and the bus driver never seems to care. She is kind of a shy person and doesn't do much about these things. Yesterday though boys on the bus went a little too far. I was sitting next to [B.T.] but I forgot something and when I came back [Y.W.] and [H.E.] were sitting next to her when there was room so that they didn't need to sit 3 to a seat. I had to sit in the back of the bus. The boys started by taking [B.T.]'s backpack and they took her tampons from her... [S]omehow they got a hold of her foot and took her shoe. At one point there were four boys on the seat next to her. They were [illegible] on top of her and [S.T.] (the third boy) was grabbing her boobs. [Y.W.] grabbed her butt. It was really sick to watch and I felt helpless b/c I couldn't get to her b/c I was in the back....

Id. A handwritten note on the side said that another girl, S.F., “said she saw [Y.W.] grabbing [B.T.]'s butt.” Thus, contrary to the District's assertions, L.Q. described not just what she saw *but what she heard*, consistent with the instructions. She expressly attributed the butt-grabbing detail to S.F.

When asked about the incident statement at trial, this is what L.Q. said:

Q. Okay. And in this statement you said...that [S.T.], quote, Was grabbing her boobs during – unquote. You said that in the statement, didn't you?

A. Yes.

Q. ...But in later reflection, you agree that you never saw [S.T.] touch her boobs, isn't that correct?

A. What I meant to say was that I heard them saying that they had touched her boob.

Q. Okay. In your statement you said that [S.T.] was grabbing her boobs.

A. Right.

Q. And that was –

A. That was an assumption that I made, though.

Q. An assumption?

A. *I didn't say that I directly saw it.*

VRP 1212-13 (italics added). Thus, L.Q. clarified that when reporting the touching of her friend's breast, she described what the boys said was happening at the time. *Id.* She certainly did not admit making false claims.

In fact, her claims were accurate. The victim, B.T., gave a written statement that confirmed L.Q.'s account (Trial Exhibit 122) and the District disciplined S.T. for what it deemed inappropriate touching. VRP 623. In sum, it is not true that L.Q. made, nor admitted making, false claims about B.T.'s assault. This Court should disregard the attempt to discredit L.Q.

III. DISCUSSION

A. The District's "Employment" Argument Is Unavailing.

The District claims it has a heightened duty to protect bus passengers as a common carrier but "not as a supervisor of students." Resp., p. 18. According to the District, school bus drivers owe their passengers the highest duty of care when focusing on "safe driving, traffic, signals, etc.," but owe the same students only ordinary care when supervising behavior on

the bus. Resp., pp. 17, 20. Following this logic, a riot on the bus would require less care from the driver than a riot on the street – an absurd result.

The District attributes its novel argument to *Phillips v. Hardgrove*, 161 Wn. 121 (1931), which involved the death of a 6-year-old girl hit by a car after a school bus driver let her out on the side of a highway. Resp., pp. 18, 20. However, *Phillips* does not support the District.

In *Phillips*, the jury was instructed that the school district and bus driver had a duty of ordinary care, but after the jury held only the car’s driver responsible, the trial court determined the jury was wrongly instructed and granted a new trial. *Phillips*, 161 Wn. at 121-23. The Washington Supreme Court affirmed that decision, stating:

If the rule of the highest degree of care arises, as all the authorities say, from the nature of the employment and on the grounds of public policy, there is no reason why it should not be applied to a school district *the same as any other passenger carrier*. Certainly, school children are entitled to the same degree of care as adults.

Phillips at 126 (emphasis added). Thus, *Phillips* established that a school district is like “any other passenger carrier” for purposes of duty.

The District seizes upon the term “nature of the employment,” suggesting that supervising students is of a different nature than carrying passengers and therefore falls outside the heightened duty of care. But nothing in *Phillips* suggests that the carrier’s heightened duty does not apply

to supervising passengers for safety purposes. On the contrary, *Phillips* explains that when being carried, “the passenger has not the same opportunity to protect himself as in other situations where the rule of ordinary care is applied.” 161 Wn. at 126. This rationale for heightened care applies as much to threats inside the bus as to hazards from outside. Indeed, Washington Pattern Instruction 100.03 states the accepted rule that a common carrier’s duty includes protecting passengers “from harm resulting from the misconduct of others, when such conduct is known or could reasonably be foreseen and prevented by the exercise of the care required of a common carrier.”

There is no policy reason for giving school children less protection than adults from foreseeable harm. As an Illinois court said in *Green v. Carlinville Community Unit School Dist. No. 1*, 381 Ill.App.3d 207, 213 (2008): “a student on a school bus cannot ensure his or her own personal safety but must rely on the school district to provide fit employees to do so....To hold that adults on public transportation buses are entitled to more protection than the most vulnerable members of our society – namely, children on a school bus – is ludicrous.”

The District misunderstands the term “nature of the employment” in *Phillips*. It refers generally to carrying passengers, and encompasses any

and all “agencies and means” used by carriers. *Id.* at 124. It was drawn from *Northern Pac. R. Co. v. Hess*, 2 Wn. 383, 26 P. 866 (1891), which says:

It is a fundamental principle of the law pertaining to passenger carriers that those thus engaged are under an obligation, arising out of the nature of their employment, and on grounds of public policy, to provide for the safety of passengers whom they have assumed for hire to carry from one place to another. Public policy and safety require that they be held to the greatest care and diligence in order that the personal safety of passengers be not left to chance or the negligence of careless agents; that, although the carrier does not warrant the safety of passengers against all events, yet his undertaking and liability as to them go to the extent that he, or his agents...shall, so far as human care and foresight can go, transport them safely, and observe the utmost caution characteristic of careful, prudent men; that he is responsible for injuries received by passengers in the course of transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, and this caution must necessarily be extended to all agencies or means employed by the carrier in the transportation of passengers.

Phillips, 161 Wn. at 124, quoting *Northern Pac.*, 26 P. at 867. This highly protective language does not support the District’s argument that, to the extent school bus drivers are employed to supervise students, “their duty is ordinary care.” Resp., p. 20. The District’s own training and policies show that bus drivers are supposed to prevent harassment as part of their jobs, and tying the heightened duty to the nature of a carrier’s employment does not help the District. In sum, under *Phillips* and subsequent cases, including

Yurkovich v. Rose, 68 Wn.App. 643, 648 (1993) and *Webb v. City of Seattle*, 22 Wn.2d 596, 602 (1945), the District owed L.Q. a heightened duty of protection against bullying and harassment on the bus just as all carriers must guard against foreseeable misconduct. The argument for an exception applicable only to school bus drivers is unavailing.²

B. Instruction No. 15 Is Not Supported by Case Law.

The District argues that Instruction No. 15 is legally correct because the first paragraph is based on case law and because, in exercising discretion as to wording of the second paragraph, “The Judge simply believed that the jury would benefit from knowing the legal definition of HIB.” Resp., pp. 12, 16. More specifically, the District claims the instruction is based on *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 318-22 (1953), *J.N. v. Bellingham School Dist.*, 74 Wn.App. 49, 56-60 (1994), and *Peck v. Siau*, 65 Wn.App. 285, 292 (1992).

Peck is inapposite because it involved claims not at issue here, the negligent hiring, retention and supervision of a teacher, and did not involve a claim of breaching the special protective duty owed to students. 65 Wn.App. at 287; *Niece v. Elmview Group Home*, 131 Wn.2d 39, 49 (1997)

² It is worth noting that L.Q. sued only the District, not individual drivers, which makes much of the District’s “employment” analysis inapplicable even if plausible.

(explaining that the negligent supervision standard in *Peck* “is based on the special relationship between employer and employee,” and does not define the duty of care in a special protective relationship such as between a school and its students). Thus, if Instruction No. 15 is indeed based on *Peck* as the District asserts, it is legally erroneous and grounds for reversal. *Id.*

On the other hand, *McLeod* and *J.N.* are applicable here, as L.Q. argued at trial. But Instruction No. 15 does not comport with those cases as the District claims. The instruction begins:

A school district has a duty to take ordinary care to prevent harassment, intimidation and bullying of one student by another *if it knows or has reason to know that a student is the subject of harassment, intimidation or bullying by another student.*

CP 1029. Under this language, L.Q. had to show the District knew or should have known that “a student” suffered the *same kind of harm* alleged to be the actual harm in this case - harassment or bullying. There are serious problems with this.

First, under *McLeod*, “The pertinent inquiry is **not** whether the actual harm” – harassment and bullying of L.Q. – “was of a particular kind which was expectable.” 42 Wn.2d at 321 (bold added). “Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.” *Id. Accord, J.N.*, 74 Wn.App. at 58-

59 (assault in unsupervised restrooms was within the general field of danger that was reasonably foreseeable, even though no specific threat was known); *Travis v. Bohannon*, 128 Wn.App. 231, 240 (Div. 3 2005) (“actual knowledge of the particular danger is not required”). If the jury had been properly instructed according to *McLeod* and *J.N.*, it would not have mattered whether the District knew or should have known that “a student is the subject of harassment, intimidation or bullying by another student.” Rather, if the harassment and bullying of L.Q. was within the general field of danger which the District should have anticipated, the District breached its duty under *McLeod* and *J.N.* L.Q. never got to argue that theory, which made the instruction prejudicial and reversible error.

The requirement to prove notice of a specific type of harm is especially problematic here because of the narrow way in which the requisite harm was defined. The second part of Instruction No. 15 used the statutory definition of harassment, intimidation and bullying to indicate *precisely what kind of past harm* had to be known to the District before it had any duty to protect L.Q. from similar harm in the future. CP 1029. The court told the jury a school district need not prevent harassment or bullying unless it knows or should know “that a student is the subject of harassment, intimidation or bullying by another student,” and then defined that as:

any intentionally written or verbal or physical act when the intentional electronic, written, verbal or physical act:

- a) Physically harms a student or damages the student's property; or
- b) Has the effect of substantially interfering with a student's education; or
- c) Is so severe, persistent or pervasive that it creates an intimidating or threatening educational environment; or
- d) Has the effect of substantially disrupting the orderly operation of the school.

Id.; VRP 1378-79.

As explained previously, this made it virtually impossible for L.Q. to win. She had to show the District knew or should have known that some child ("a student") was subject to another student's intentional act resulting in one of the five kinds of harms enumerated (i.e., physical injury, substantial disruption of the orderly operation of a school). By conditioning the duty upon notice of specific harms, the trial court wiped out any consideration of the many warning signs that Chinook Middle School buses were out of control generally, including numerous incidents of fighting and insubordination. It made irrelevant the fact that bus drivers cannot see students in the back of the bus, although similar unsupervised conditions in *McLeod* were a prime consideration. *McLeod*, 42 Wn.2d at 322 ("we believe that here the general field of danger was that the darkened room under the bleachers might be utilized during periods of unsupervised play for acts of indecency between school boys and girls"). Even the assault of B.T. was

cast into doubt as a duty-triggering event, because a boy touching a girl's breast causes distress but not necessarily "physical" harm, and it is hard to show that any incident on a bus affects "education" or the "educational environment" or the "orderly operation of the school." A bus is a mode of transportation, not a learning environment. The jury essentially had to find that the B.T. incident, or some other intentional act against a student, caused physical or educational harms that spilled over from the bus into the classroom in order to find the District liable.

In addition, the jury had to find the District knew or should have known about such specific harms. This wipes out the District's duty to *anticipate* foreseeable harms and not just react. *McLeod*, 42 Wn.2d at 320. ("the duty of a school district...is to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from dangers reasonably to be anticipated"); *see also, Travis*, 128 Wn.App. at 238.

Instruction No. 15 was not merely misleading. It misstated the law. As this Court said in *J.N.*, the question is whether the actual harm "fell within the general ambit of hazards which should have been anticipated by the District." *J.N.*, 74 Wn.App. at 60. Contrary to the District's arguments, this was not the same question posed by Instruction No. 15, nor even close

to it. Accordingly, this Court should require a new trial so that the jury may be properly instructed.

C. Prejudice Was Established.

The District contends that L.Q. did not show, and cannot show, the requisite prejudice from the court's instructional errors. Resp., pp. 1, 25. This is wrong.

1. The District Misstates the Rule.

In arguing a lack of prejudice, the District cites *Anfinson v. FedEx Ground Package Sys. Inc.*, 174 Wn.2d 851, 876-77 (2012) for the proposition that “the appellant must show that an incorrect interpretation was urged upon the jury in closing arguments.” Resp., p. 25. That is not what *Anfinson* says. Rather, *Anfinson* states the rule that a clear misstatement of law is “presumptively prejudicial.” 174 Wn.2d at 872. Only if an instruction was merely misleading, rather than erroneous, must the challenging party show actual prejudice. *Id.* at 876. In *Anfinson*, “the prejudice occurred during closing argument,” but *Anfinson* does not say a closing argument is the only source of prejudice that can overturn a verdict. *Id.* Rather, it says “no greater showing of prejudice...is possible without impermissibly impeaching a jury's verdict.” *Id.* at 876-77.

In this case, the applicable rule is presumptive prejudice because, as explained above, Instruction No. 15 was a clear misstatement of law. As this Court stated in *Crittenden v. Fibreboard Corp.*, 58 Wn.App. 649, 659 (1990): “An erroneous instruction given on behalf of the party who received a favorable verdict is presumed prejudicial and is grounds for reversal unless it is harmless.” *Accord, Payne v. Paugh*, 190 Wn.App. 383, 403 (2015) (“If the instruction contains a clear misstatement of law, prejudice is presumed and is grounds for reversal unless it can be shown that the error was harmless”). A harmless error is “a trivial error which is no way affected the outcome of the case.” *Crittenden*, 58 Wn.App. at 659.

In *Crittenden*, because the jury verdict form did not indicate the reason for the jury’s finding, the Court said “we cannot determine that the erroneous instruction did not prejudice Fibreboard,” and reversed the judgment. *Id.* at 660. The same reasoning applies here, where the jury was misinformed about the District’s duty of care and the Special Verdict Form shed no light on the reason for the verdict. The jury simply answered “no” to the question: “Was the Bellevue School District negligent?” CP 1037. The misstatement of law is presumptively the reason for the verdict. The District cannot (and did not) show that the jury would have reached the same conclusion if it had known that the highest standard of care applied or if it

had assessed the “general field” of foreseeable danger instead of the narrow field outlined by the court. Accordingly, the District’s argument fails.

2. L.Q. Has Shown Prejudice.

Assuming for the sake of argument that Instruction No. 15 was merely misleading, and that L.Q. had to show actual prejudice, she already did so. Her opening brief explained that she was unable to argue her theories of the case because the trial court would not instruct the jury on the heightened duty or the special protective duty, which she claimed were breached, and because Instruction No. 15 misstated the law. Brief of App., pp. 24-26. As argued previously, where there is evidence to support a plaintiff’s theory, “a trial court *must* instruct the jury on that theory” and failure to do so is reversible error. *Ramey v. Knorr*, 130 Wn.App. 672, 688 (2005); *State v. Williams*, 132 Wn.2d 248, 259–60 (1997). Such error occurred here.

There was ample evidence to support L.Q.’s theories that the District breached its heightened duty to protect the safety of bus passengers and its special protective duty to protect all students from reasonably foreseeable harm. Brief of App., pp. 24-25. But the only theory allowed by the court’s instructions was that the District knew or should have known about bullying and harassment as defined by statute and breached a duty of ordinary care

to prevent it. That is simply not the same thing and, as explained above, it misstated the District's duty.

The District quotes various closing arguments in an attempt to show the jury heard L.Q.'s theory of the case. Resp., p. 6. In fact, her closing arguments did not present either the common carrier or special protective theories that were supported by the evidence. VRP 1383-1405. L.Q. could not argue those theories because the jury was not instructed on them.

Similar cases illustrate the prejudicial impact of the court's instructions. In *Coyle v. Munic. of Metropolitan Seattle ("Metro")*, 32 Wn.App. 741 (Div. 1 1982), a passenger was injured on a Metro bus and brought a negligence suit. The trial court instructed the jury that Metro is a common carrier, but gave inconsistent instructions alternately defining negligence as failure to exercise ordinary care and as breaching a carrier's duty to exercise the highest degree of care. 32 Wn.App. at 743. This Court reversed, stating that inconsistent instructions on a material point are presumed prejudicial because it is impossible to know how they affected the verdict. *Id.* This Court further held that, because the instruction on ordinary care was an erroneous statement of law, the "fact that the Coyles may have been able to argue their theory of the case to the jury is immaterial." *Id.* at 747. Applying that reasoning here, instructing the jury that a school bus

operator had a duty of “ordinary care” was erroneous and prejudicial, requiring reversal.

McDonald v. Irby, 74 Wn.2d 431 (1968), also is instructive. In that case, the parties disputed whether a parking lot owner, which charged for parking and shuttled passengers to and from the airport for free, was a common carrier. 74 Wn.2d at 435. The Supreme Court held that it was, and ordered a new trial because the trial court refused to instruct the jury on the common carrier’s heightened duty and instead proclaimed a duty of ordinary care. 74 Wn.2d at 437. In explaining the significance of the error, the Court said:

A finding that he was not chargeable with ordinary negligence does not preclude the possibility that he failed to exercise the higher degree of care applicable to common carriers. This is a factual question, and the trier of facts should have been permitted to resolve it under proper instruction.

Id. This reasoning applies equally here, where the jury was not permitted to determine if the District failed to use the highest degree of care. In sum, based on *McDonald*, *Coyle*, *Ramey* and *Crittenden*, L.Q. made the necessary showing that the court’s instructions were prejudicial.³

³ See also *Hunt v. Clarendon National Insurance Service, Inc.*, 278 Wis. 2d 439, 452 (2004) (in a case involving sexual abuse of a child by a school bus driver, “We conclude that the absence of the common carrier instruction, and the use of a general negligence instruction...misstated the applicable law and hence were erroneous,” requiring a new trial because of the “significant” difference in degrees of care).

D. Instructional Errors Were Preserved.

The District suggests that L.Q. failed to preserve the issues raised on appeal. Resp., p. 1 (“many...objections were not preserved”); p. 2 (“Should this Court refuse to consider new instructional challenges raised for the first time on appeal?”) In fact, L.Q. made the same objections at trial that she raises on appeal:

- Instruction No. 15 is not the correct legal standard because it states a duty of “ordinary care” and does not explain a school’s duty to anticipate and guard against reasonably foreseeable harm in accordance with *J.N.*, 74 Wn.App. 49, and *McLeod*, 42 Wn.2d 316, and because “it’s unnecessary to put forth the definition of HIB” when “[i]t’s a negligence case, not an HIB case;”⁴
- The trial court erred by not giving L.Q.’s proposed instruction on foreseeability based on *J.N.* and *McLeod*;⁵ and
- The trial court erred by not giving L.Q.’s proposed instruction on a school bus operator’s heightened duty of care.⁶

Thus, all of the issues on appeal were preserved at trial.

⁴ VRP 1359-60; *see also* Brief of App., pp. 25-29.

⁵ VRP 1368; CP 754 (proposed instruction) and 1012-1036 (court’s instructions); Brief of App., pp. 25-29.

⁶ VRP 1368 (taking exception because “we still think that it should be – heightened standard of care”); CP 753, 996 and 998 (proposed instructions); Brief of App., pp. 21-26.

The District makes only one specific allegation of an instructional error not preserved. Resp., p. 25. The District asserts that L.Q. did not object at trial that Instruction No. 15 incorrectly required proof of a specific threat to a specific student in order to trigger a protective duty. Resp., pp. 24-25. The District is wrong. L.Q.'s trial attorney did object to using the specific statutory definition of harassment, intimidation and bullying in an instruction on school negligence because "it's a negligence case, not an HIB case" and because it "can confuse the jury" about the duty owed to L.Q. VRP 1359-60. The attorney explained that the District's duty is "to anticipate reasonably foreseeable dangers and take precautions to protect its students from such dangers, including the harmful actions of other students." VRP 1360. The attorney also handed to the court two alternative instructions – including Defendant's Proposed Instruction No. 27 – stating the correct rule on foreseeability that was missing from the court's Instruction No. 15. VRP 1361. Thus, L.Q. preserved the issue that Instruction No. 15 set an incorrect standard for school negligence by stating that a duty to prevent harassment and bullying arises only when a school district has notice that a student is the subject of HIB as defined by statute, and by failing to state that a school district must anticipate and guard against *any* reasonably foreseeable harm.

An instructional issue is preserved when there is an “ongoing discussion between the judge and the attorneys” about it, such that the judge was aware of the objections and legal arguments. *Crittenden*, 58 Wn.App. at 656. Here, after an extended discussion about L.Q.’s objections to Instruction No. 15, the court said “I understand your exception” and overruled it. VRP 1361. Thus, L.Q. preserved the issue that Instruction No. 15 was erroneous.

E. L.Q. Proposed Correct Alternatives.

The District vaguely contends that L.Q. waived the instructional issue by failing to propose correct alternatives. Resp., p. 26. This is curious, because one of the alternatives proposed by L.Q. was the District’s own Instruction No. 27. VRP 1361, CP 717. Having submitted that instruction to the court, the District cannot now complain that it is legally incorrect.

The District discounts L.Q.’s proposed Instruction No. 13, taken from *McLeod*, as “duplicative” of the court’s Instruction No. 15. Resp., p. 21, citing CP 754. First, as explained above, Instruction No 15 contradicts and does not duplicate the language of *McLeod*. Second, even if L.Q.’s proposed language was duplicative, that would not make it incorrect. In fact, *McLeod* should have defined the District’s duty in this case.

As for the carrier issue, as explained above, L.Q.’s proposed instruction on the duty of care was not only correct but required by

Yurkovich, Webb, Phillips, and WPI 100.03. CP 753, 998. L.Q. proposed to use the exact language from case law – stating that “the highest degree of care consistent with the practical operation of the bus” is owed to students on a school bus. *Id.*; *Yurkovich*, 68 Wn.App. at 648. The District’s contention lacks merit.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the judgment and order a new trial applying the correct standard of care.

Dated this 4th day of May, 2016.

RESPECTFULLY SUBMITTED,

HARRISON-BENIS LLP



Katherine George, WSBA No. 36288
Attorney for appellants

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on May 4, 2016, I caused delivery of a copy of the foregoing Reply of Appellants by e-mail, per agreement, to the following:

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KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Doe v. Jewish Child and Family Services.

Ill.App. 1 Dist., December 27, 2011

381 Ill.App.3d 207
Appellate Court of Illinois,
Fourth District.

Misty GREEN, Plaintiff–Appellant,

v.

CARLINVILLE COMMUNITY UNIT SCHOOL
DISTRICT NO. 1, Defendant–Appellee,
and
Lucille Mansfield, Defendant.

No. 4–07–0297.

|

March 28, 2008.

Synopsis

Background: Student sued school bus driver, who allegedly sexually abused student, and school district, alleging that district engaged in intentional infliction of emotional distress, committed assault and battery, was negligent per se, and negligently hired driver. The Circuit Court, Macoupin County, Roger W. Holmes, J., granted the district's motion for summary judgment, and student appealed.

Holdings: The Appellate Court, Steigmann, J., held that:

[1] school district was not acting as a “common carrier,” who could be held liable for the intentional acts of its employees, when transporting student; and

[2] school districts that operate school buses owe their students the highest degree of care to the same extent common carriers owe their passengers the highest degree of care.

Affirmed in part and reversed in part; cause remanded with directions.

Cook, J., filed dissenting opinion.

West Headnotes (8)

[1] Education

By teachers or other employees

School district was not acting as a “common carrier,” who could be held liable for the intentional acts of its employees, when transporting student, who was allegedly sexually abused by school bus driver; student did not allege that the district advertised its bus services to members of the general public or transported all members of the general public in a indiscriminate manner, and district only transported its students to and from school and school-related activities.

2 Cases that cite this headnote

[2] Labor and Employment

Scope of Employment

Ordinarily, employers are not liable for the acts of their employees if the employee's acts were not committed within the scope of his or her employment.

3 Cases that cite this headnote

[3] Labor and Employment

Assault and Battery

Labor and Employment

Act by Employee on Employee's Behalf

In the context of respondeat superior liability, the term “scope of employment” excludes conduct by an employee that is solely for the benefit of the employee, and generally, acts of sexual assault are outside the scope of employment.

1 Cases that cite this headnote

[4] Carriers

Acts or Omissions of Carrier's Employees

A common carrier can be liable for the intentional acts of its employees, even if the intentional act is outside the employee's scope of employment and does not benefit the employer.

3 Cases that cite this headnote

[5] **Carriers**

☞ Assault or personal violence

A common carrier can be liable for the sexual assault of one of its passengers by one of its employees.

2 Cases that cite this headnote

[6] **Carriers**

☞ Who Are Carriers

Carriers

☞ Care to persons under disability; children

A school district that operates buses to transport its students is not a “common carrier,” but it is performing the same basic function, transporting individuals, and like a passenger on a common carrier, a student on a school bus cannot ensure his or her own personal safety, but, rather, must rely on the school district to provide fit employees to do so, and accordingly, school districts that operate school buses owe their students the highest degree of care to the same extent common carriers owe their passengers the highest degree of care.

4 Cases that cite this headnote

[7] **Judgment**

☞ Public officers and employees, cases involving

Material issue of fact as to whether school district hired school bus driver before enactment of statute, providing that applicants for employment with school district are required as a condition of employment to authorize fingerprint-based criminal history records check to determine if such applicants have been convicted of criminal or drug offenses, precluded grant of summary judgment to school district on student's claims that the district negligently and carelessly failed to perform proper criminal investigations of bus driver, who allegedly sexually abused student and negligently hired bus driver. S.H.A. 105 ILCS 5/34–18.5.

2 Cases that cite this headnote

[8] **Education**

☞ By teachers or other employees

School district was not operating as a common carrier when transporting student, who was allegedly sexually abused by school bus driver, and even if the district was so operating, this only created a heightened duty of care for its passengers, not a separate cause of action based merely on that status.

3 Cases that cite this headnote

Opinion

Attorneys and Law Firms

****452** Michael P. Glisson (argued), of Williamson, Webster, Falb & Glisson, of Alton, for appellant.

Karen L. Kendall (argued), of Heyl, Royster, Voelker & Allen, of Peoria, and Frederick P. Velde, of Heyl, Royster, Voelker & Allen, of Springfield, for appellee.

Justice STEIGMANN delivered the opinion of the court:

209 ***308** In February 2005, plaintiff, Misty **309 **453** Green, sued defendants Carlinville Community Unit School District No. 1 (District) and Lucille Mansfield, based on Green's allegation that Mansfield sexually abused her when Green was a minor. In July 2006, the District moved for summary judgment, and in November 2006, the trial court granted the District's motion.

Green appeals, arguing that the trial court erred by granting the District's motion for summary judgment. We affirm in part and reverse and remand in part with directions.

I. BACKGROUND

From August 1991 through May 1992, Green attended kindergarten at North Elementary, which was operated by the District. Green rode the District's school bus to and from school. In September 1991, Green told her mother that

Mansfield, a school bus driver employed by the District, had sexually molested her. In May 1992, Mansfield was convicted of three counts of child abuse and sentenced to four years in prison.

In September 1992, Green's parents, along with six other families, collectively filed a complaint in federal district court against the District (case No. 92–3238). Their complaint alleged that over the course of several months, Mansfield sexually abused and assaulted their children. The District filed a motion to dismiss, arguing in part that it was not liable for the intentional torts of Mansfield because the District was not a common carrier. In July 1993, the federal court denied the District's motion upon determining that Illinois courts had previously held that school districts that transport children by bus must be held to the same standard of care as common carriers. *Hammann v. Carlinville Community Unit School District No. 1*, No. 92–3238 (C.D.Ill. July 8, 1993). However, prior to trial, Green's parents voluntarily withdrew their complaint, and the federal court dismissed their case without prejudice. *Hammann v. Carlinville Community Unit School District No. 1*, No. 92–3238 (C.D. Ill. April 8, 1994).

In February 2005, Green filed a complaint against the District and Mansfield. Green alleged that the District (1) engaged in intentional infliction of emotional distress (count I), (2) committed assault and battery (count III), (3) was negligent *per se* (count V), (4) negligently hired Mansfield (count VI), (5) engaged in negligent supervision (count VII), and (6) was a common carrier (count VIII). All of the counts against the District were primarily premised on count VIII's allegation that the District was a common carrier and, thus, “had a nondel[e]gable duty of care towards its passengers, with such duty to retain *210 direct and primary responsibility for operating the bus with the highest degree of care.” However, during the course of the trial court proceedings, Green also argued that the District owed its student bus passengers the highest degree of care, regardless of whether it was a common carrier.

In April 2005, the District filed a motion to dismiss Green's complaint arguing, in part that (1) it was not a common carrier and (2) the complaint placed a greater duty on the District than that imposed by law.

Following an August 2005 hearing, the trial court denied the District's motion upon determining that the 1992 federal court ruling denying the District's motion to dismiss should be given great weight since Green was a party to the federal

action at the time of the federal court's ruling. The court also found that the District's standard of care, rather than its status as a common carrier, governed the court's review of the complaint.

In December 2005, the case was reassigned to another trial judge. In July 2006, prior to any District representative being deposed, the District filed a motion ***310 **454 for summary judgment, arguing that (1) the District was not operating as a common carrier; (2) Mansfield was not acting within the scope of her employment when the alleged conduct occurred; (3) the statute mandating that school districts perform criminal-background checks before hiring an employee (105 ILCS 5/34–18.5 (West 2006)), which Green relied on in count V of her complaint, was not in effect when the District hired Mansfield; (4) the District had immunity over its hiring decisions, pursuant to section 2–201 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2–201 (West 2006)); and (5) no factual support existed that the District negligently supervised Mansfield when she was acting within the scope of her employment. The District's affidavit in support of its motion stated that the purpose of the District's buses was to transport registered District students to and from school and school-related activities.

In November 2006, the trial court granted the District's motion for summary judgment. In so doing, the court determined that (1) each of Green's counts against the District was premised on the allegation that the District was a common carrier, which imposes a heightened duty of care, (2) the District was not a common carrier, and (3) Green's negligence *per se* allegations against the District failed because the statute Green relied on was not in effect when the District hired Mansfield. The court later found that no just reason existed to delay either enforcement or appeal of its ruling (210 Ill.2d R. 304(a)).

This appeal followed.

*211 II. ANALYSIS

A. Standard of Review

We review *de novo* a trial court's decision to grant a motion for summary judgment. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill.2d 278, 291, 246 Ill.Dec. 654, 730 N.E.2d 1119, 1127 (2000). A party is entitled to summary judgment if the

pleadings, depositions, and admissions on file, together with any affidavits, show that no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law (735 ILCS 5/2-1005 (West 2006)).

B. The Trial Court's Grant of Summary Judgment as to Counts I, III, and VII

Green first argues that the trial court erred by granting summary judgment as to count I (intentional infliction of emotional distress), count III (assault and battery), and count VII (negligent supervision). Specifically, she contends that (1) the court erred by determining that the District was not acting as a common carrier, which imposes a heightened duty of care; and (2) even if the District was not acting as a common carrier, it should be held to the same standard as a common carrier. We agree with Green's second contention.

1. *The Trial Court's Determination That the District Was Not Acting as a Common Carrier*

[1] In *Doe v. Rockdale School District No. 84*, 287 Ill.App.3d 791, 793-94, 223 Ill.Dec. 320, 679 N.E.2d 771, 773 (1997), the Third District discussed the distinction between common and private carriers, as follows:

“Long-standing authority in Illinois has held that a common carrier is ‘one who undertakes for the public to transport from place to place such persons or the goods of such as choose to employ him for hire.’ [Citations.] A common carrier ‘undertakes for hire to carry all persons indifferently who may apply for passage so long as there is room and ***311 **455 there is no legal excuse for refusal.’ [Citation.] Moreover, a common carrier may be liable for an unexcused refusal to carry all who apply. [Citation.] The definitive test to be employed to determine if a carrier is a common carrier is whether the carrier serves all of the public alike. [Citations.]

A private carrier, by contrast, undertakes by special agreement, in a particular instance only, to transport persons or property from one place to another either gratuitously or for hire. [Citation.] A private carrier makes no public profession to carry all who apply for carriage, transports only by special agreement, and is not bound to serve every person who may apply.”

In *Doe*, the plaintiff sued the Rockdale School District, alleging that another student sexually assaulted her son on a

school bus while *212 traveling to school. After denying the Rockdale School District's motion to dismiss, the trial court presented the following certified question to the appellate court: “whether the defendant providing transportation to students to and from special[-]education classes out of county pursuant to contract with Crawford Bus Service, Inc. (Crawford), is operating as a common carrier.” *Doe*, 287 Ill.App.3d at 793, 223 Ill.Dec. 320, 679 N.E.2d at 772.

The Third District concluded that the contract between the Rockdale School District and Crawford did not provide for the transportation of any additional passengers or cargo by Crawford other than the school district's special-education students. Accordingly, the court stated the following:

“Given the total absence of any allegation that Crawford either held itself out to, or in fact did, serve the general public or any members thereof except those students it contracted to carry, we are compelled to agree that Crawford, and by extension any principal of Crawford [*i.e.*, Rockdale], was acting as a private carrier [and not a common carrier] when the alleged injury occurred.” *Doe*, 287 Ill.App.3d at 795, 223 Ill.Dec. 320, 679 N.E.2d at 774.

In this case, Green did not allege that the District (1) advertised its bus services to members of the general public or (2) transported all members of the general public in a indiscriminate manner. Further, according to the District's un rebutted affidavit, the District only transported its students to and from school and school-related activities. Thus, we conclude that the trial court did not err by determining that the District was not acting as a common carrier.

2. *Green's Claim That the District Should Be Held to the Same Standard of Care as a Common Carrier*

[2] [3] Besides not being a common carrier, the District argues that Green cannot overcome the fact that under Illinois law an employer is not vicariously liable for acts of its employees that were not within the scope of their employment or performed for their employer's benefit. Ordinarily, employers are not liable for the acts of their employees if the employee's acts were not committed within the scope of his or her employment. *Pyne v. Witmer*, 129 Ill.2d 351, 359, 135 Ill.Dec. 557, 543 N.E.2d 1304, 1308 (1989). “In the context of *respondeat superior* liability, the term ‘scope of employment’ excludes conduct by an employee that is solely for the benefit of the employee.” *Deloney v. Board of Education of Thornton Township*, 281 Ill.App.3d 775, 784, 217 Ill.Dec. 123, 666 N.E.2d 792, 798 (1996). “[G]enerally,

acts of sexual assault are outside the scope of employment.” *Deloney*, 281 Ill.App.3d at 783, 217 Ill.Dec. 123, 666 N.E.2d at 798.

****456 ***312 [4] [5]** Exceptions to this general rule do exist, and one such exception involves common-carrier liability. Our supreme court has long held ***213** that if an employee of a common carrier intentionally injures a passenger, the common carrier is liable for the passenger's injuries, even if the employee's actions were not in his actual or apparent scope of authority. *Chicago & Eastern R.R. Co. v. Flexman*, 103 Ill. 546, 552 (1882). Thus, a common carrier can be liable for the intentional acts of its employees even if the intentional act is outside the employee's scope of employment and does not benefit the employer. Under this long-standing Supreme Court of Illinois precedent, a common carrier could be liable for the sexual assault of one of its passengers by one of its employees.

[6] As we previously stated, a school district that operates buses to transport its students is not a common carrier. However, it is performing the same basic function, transporting individuals. Like a passenger on a common carrier, a student on a school bus cannot ensure his or her own personal safety but must rely on the school district to provide fit employees to do so. Accordingly, we conclude that school districts that operate school buses owe their students the highest degree of care to the same extent common carriers owe their passengers the highest degree of care. To hold that adults on public transportation buses are entitled to more protection than the most vulnerable members of our society—namely, children on a school bus—is ludicrous. In fact, holding a school district that buses children to such a high standard is more compelling than holding a common carrier to the same standard.

We are not the first Illinois court to hold that a school district that transports its students by bus owes the student passengers the highest degree of care. In *Garrett v. Grant School District No. 124*, 139 Ill.App.3d 569, 575, 93 Ill.Dec. 874, 487 N.E.2d 699, 702 (1985), the Second District held that a school district that transports its students by bus should be held “to the same standards of care as that imposed on a private party operating as a common carrier.”

The District suggests that this court should not follow *Garrett* because (1) *Doe* somehow overruled *Garrett* and (2) *Garrett* dealt with a negligent act, not an intentional one, as in this case. We are unpersuaded.

We first note that we would have reached the same decision based on the reasons stated above even if *Garrett* had never been decided. Further, we are not persuaded that *Doe* overruled *Garrett*. The sole question answered in *Doe* was whether a school district that provided transportation to and from classes was a common carrier (*Doe*, 287 Ill.App.3d at 793, 223 Ill.Dec. 320, 679 N.E.2d at 772), not what *standard of care applies* to a school district operating a bus for its students. In addition, whether the school bus passenger suffered his injury as a result of negligence or an intentional act is irrelevant.

***214** The District also contends that it should be treated differently than a private party because it is a public, governmental entity. In this regard, the District points out that the duty it owes to students being transported on its school buses is a public-policy decision better left to the Illinois General Assembly.

While common-law rules may not impose liability on a public entity where the Tort Immunity Act applies (*Floyd v. Rockford Park District*, 355 Ill.App.3d 695, 704, 291 Ill.Dec. 418, 823 N.E.2d 1004, 1012 (2005)), that is not the issue before us. Here, this court has a duty to determine what common-law duty a school district owes to its *****313 **457** student passengers when they are being transported on the school district's bus.

Defendant is free to argue on remand that it has immunity as a public body, regardless of its common-law duty, or to lobby the General Assembly, the policymaking body of the State, to specifically make school districts immune from future claims of this type. The legislature may determine, for sound policy reasons, that school districts should not be held to this standard of care. However, as we decide the case before us, we must do so in the context of the law as it now stands, not as policymakers may change it.

We thus conclude that the trial court erred by granting summary judgment on count I (intentional infliction of emotional distress), count III (assault and battery), and count VII (negligent supervision), based on its determination that because the District was not a common carrier, it did not owe Green the highest degree of care that a common carrier would have owed her.

3. Scope of Our Holding on This Issue

Our holding on this issue is limited to the common-law duty school districts owe student passengers while the students are being transported on a school bus. It neither enhances nor weakens the duties school districts already owe their students in other circumstances.

C. The Trial Court's Rulings on Counts V, VI, and VIII

1. Count V—Negligence Per Se

[7] Green also argues that the trial court erred by granting summary judgment as to count V. We agree.

Count V alleged that the District negligently and carelessly failed to perform proper criminal, child abuse, and neglect investigations of Mansfield, pursuant to section 34–18.5 of the School Code (105 ILCS 5/34–18.5 (West 2002)). In its memorandum in support of its motion for summary judgment, the District argued that Mansfield was hired in 1987 before this statute took effect. However, the trial court stated the District hired Mansfield many years before the statute *215 became effective in 1985. Thus, a question of fact remains regarding when the District hired Mansfield—before 1985 or in 1987.

2. Count VI—Negligent Hiring

Green also argues that the trial court erred by granting summary judgment as to count VI (negligent hiring). The District responds that it has immunity under section 2–201 of the Tort Immunity Act (745 ILCS 10/2–201 (West 2006)). We agree with Green.

Section 2–201 provides as follows:

“Except as otherwise provided by [s]tatute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.” 745 ILCS 10/2–201 (West 2006).

The District claims that because its decision to hire Mansfield was discretionary, it has immunity under section 2–201. See *Johnson v. Mers*, 279 Ill.App.3d 372, 380, 216 Ill.Dec. 31, 664 N.E.2d 668, 675 (1996) (village's decision to hire a police officer was discretionary).

Green cites *Mueller v. Community Consolidated School District 54*, 287 Ill.App.3d 337, 222 Ill.Dec. 788, 678 N.E.2d 660 (1997), for the proposition the Tort Immunity Act does not apply to the negligent hiring claim alleged in count VI. In *Mueller*, the First District stated as follows:

“[S]ection 2–201 gives government entities immunity from liability for injuries resulting from exercise of discretionary ***314 **458 authority. Here the School District's discretion is fettered by the criminalbackground-check statute. The statute provides that the School District ‘shall not knowingly employ a person for whom a criminal background investigation has not been initiated.’ 105 ILCS 5/34–18.5(d) (West 1994). Given the statute's mandatory language, we find that it requires the School District to at least commence an investigation of employment applicants before it is vested with the discretionary authority to hire. We therefore conclude that the School District's failure to comply with the statutorily imposed condition precedent vitiates any immunity it might otherwise have enjoyed under section 2–201 of the Tort Immunity Act for hiring [its employee].” *Mueller*, 287 Ill.App.3d at 346, 222 Ill.Dec. 788, 678 N.E.2d at 666.

We agree with *Mueller*. However, as stated earlier, a question of fact remains as to when the District hired Mansfield. Thus, we cannot determine whether the District would have immunity under the Tort Immunity Act. Accordingly, we conclude that the trial court erred by granting the District's motion for summary judgment as to count VI.

3. Count VIII—Common Carrier

Last, Green argues that the trial court erred by granting summary judgment as to count VIII. We disagree.

[8] *216 The trial court did not err by granting summary judgment as to this count, in which Green alleged a separate cause of action based on the District's status. First, as earlier discussed, the District was not operating as a common carrier. Second, even if the District was so operating, this only created a heightened duty of care for its passengers, not a separate cause of action based merely on that status.

III. CONCLUSION

For the reasons stated above, we affirm the trial court's judgment as to count VIII, reverse as to counts I, III, V, VI, and VII, and remand for further proceedings. We also direct the trial court to allow Green to amend her complaint, eliminating all references to the District being a common carrier.

Affirmed in part and reversed in part; cause remanded with directions.

KNECHT, J., concurs.

COOK, J., dissents.

JUSTICE COOK, dissenting:

I respectfully dissent. I would affirm the decision of the trial court, granting summary judgment on counts I, III, V, VI, VII, and VIII.

A. Vicarious Liability—Counts I (Intentional Infliction of Emotional Distress) and III (Assault and Battery)

The majority concludes that the District, in the operation of its school bus program, was not acting as a common carrier because it did not hold itself out to serve or, in fact, serve the general public. The majority goes on, however, to create a new “common carrier” rule that would apply to school districts. One problem with that approach is that even common carriers are not vicariously liable for the intentional or criminal acts of their employees unless those acts are within the scope of employment, clearly not the case here. Common carriers, unlike other actors, have a duty to come to the aid or protection of others, but that duty is not the same as vicarious liability. The majority improperly equates the vicarious liability of employers with common-carrier liability.

Under the theory of *respondeat superior*, an employer can be vicariously liable ***315 **459 for the torts of an employee, but only for those torts that are committed within the scope of employment. The employer's vicarious liability extends even to the intentional or criminal acts of its employees when such acts are committed within the scope of employment. *Bagent v. Blessing Care Corp.*, 224 Ill.2d 154, 163–64, 308 Ill.Dec. 782, 862 N.E.2d 985, 991 (2007). Conduct is within the scope of employment *217 only

if it is actuated, at least in part, by a purpose to serve the master. Restatement (Second) of Agency § 228, at 504 (1958). Summary judgment was appropriate in *Bagent* where no reasonable person could conclude that an employee was acting within the scope of employment. *Bagent*, 224 Ill.2d at 170–71, 308 Ill.Dec. 782, 862 N.E.2d at 995 (hospital employee disclosed medical information to patient's sister in a tavern).

Common carriers have duties that others do not have. Generally speaking, Illinois law does not impose a duty to protect another from a criminal attack by a third person unless the attack is reasonably foreseeable and the parties stand in one of four “special relationships,” namely: (1) common carrier and passenger, (2) innkeeper and guest, (3) business invitor and invitee, and (4) voluntary custodian and protectee. *Hernandez v. Rapid Bus Co.*, 267 Ill.App.3d 519, 524, 204 Ill.Dec. 456, 641 N.E.2d 886, 890 (1994), citing Restatement (Second) of Torts § 314A (1965). In *Hernandez*, a student was raped by a special[-]education student as she walked unescorted from a bus to the school. The First District reversed summary judgment for the bus company because the company may have been aware that some of the special[]education students riding its bus with this student had propensities toward violent and criminal behavior. The common-carrier relationship did not apply in *Hernandez* because the student had exited the bus safely, but the court applied a similar rule that applied to voluntary undertakings. *Hernandez*, 267 Ill.App.3d at 524–25, 204 Ill.Dec. 456, 641 N.E.2d at 890–91.

The majority cites an 1882 case, *Flexman*, for the proposition that an employer is vicariously liable for the intentional acts of its employees outside the scope of employment, if the employer is a common carrier. Op. 381 Ill.App.3d at 212–13, 320 Ill.Dec. at 312, 887 N.E.2d at 456. The employee in *Flexman* may have been acting within the scope of employment, helping a passenger look for his watch, when an altercation developed. *Flexman*, 103 Ill. at 548–49. Even intentional torts may be so reasonably connected with the employment as to be within its “scope.” W. Keeton, Prosser & Keeton on Torts § 70, at 505 (5th ed.1984). An employer will be held liable where his bus driver crowds a competitor's bus into a ditch or assaults a trespasser to eject him from the bus. A railway ticket agent who assaults, arrests, or slanders a passenger, in the belief that he has been given a counterfeit bill for a ticket, is within the scope of his employment. But if the employee acts from purely personal motives, he is considered in the ordinary case to have departed from his

employment, and the master is not liable. W. Keeton, Prosser & Keeton on Torts § 70, at 506 (5th ed.1984). Whatever the holding in *Flexman*, Illinois now follows the Restatement, which would not impose vicarious liability for acts outside the scope of employment. *Bagent*, 224 Ill.2d at 163–65, 308 Ill.Dec. 782, 862 N.E.2d at 991–92.

*218 The majority cites *Garrett*, which stated that a school district engaged in the transportation of students by bus would be held to the same standard of care as that imposed on a private party operating as a common carrier. *Garrett*, 139 Ill.App.3d at 575, 93 Ill.Dec. 874, 487 N.E.2d at 702. *Garrett* did not, however, address the vicarious liability of a school district for the ***316 **460 actions of its driver. *Garrett* instead addressed the carrier's duty to protect passengers, despite the general rule that there is no duty to act for the protection of others, a duty which does not terminate until the passenger has had a reasonable opportunity to reach a place of safety. *Garrett*, 139 Ill.App.3d at 575–78, 93 Ill.Dec. 874, 487 N.E.2d at 702–05; see Restatement (Second) of Torts § 314A (1)(a) (1965). The complaint in *Garrett* was that the bus driver had dropped the student off near a railroad track, where she eventually fell. The question did not concern the actions of the bus driver but the actions of the district, which had a duty to select a discharge point that did not “ ‘needlessly expose the pupils to any serious hazards to safety exceeding those which normally attend school bus operations.’ ” *Garrett*, 139 Ill.App.3d at 576, 93 Ill.Dec. 874, 487 N.E.2d at 703, quoting *Posteher v. Pana Community Unit School District No. 8*, 96 Ill.App.3d 709, 713, 52 Ill.Dec. 186, 421 N.E.2d 1049, 1052 (1981).

The trial court properly entered summary judgment on counts I and III. Even assuming the District was a common carrier, the District could only be held liable for acts of its employee that were within the scope of employment. No reasonable person could conclude the acts here were within the scope of employment.

B. Direct Liability—Counts VI (Negligent Hiring) and VII (Negligent Supervision)

Apart from vicarious liability, the school district may be responsible for its own negligence if it knew or should have known of the necessity and opportunity for controlling its servant to prevent the servant from intentionally harming others. *Hills v. Bridgeview Little League Ass'n*, 195 Ill.2d 210, 229, 253 Ill.Dec. 632, 745 N.E.2d 1166, 1179 (2000), quoting

Restatement (Second) of Torts § 317 (1965). To establish this claim of direct negligence, plaintiffs do not have to show that the attack was committed within the scope of employment. Plaintiffs must show, however, that the employer knew or had reason to know of the need to control the servant and negligently failed to act on that information. *Hills*, 195 Ill.2d at 231–32, 253 Ill.Dec. 632, 745 N.E.2d at 1180. “Under a theory of negligent hiring or retention, the proximate cause of the plaintiff's injury is the employer's negligence in hiring or retaining the employee, rather than the employee's wrongful act.” *Van Horne v. Muller*, 185 Ill.2d 299, 311, 235 Ill.Dec. 715, 705 N.E.2d 898, 905 (1998). In a case where a *219 kindergarten student was sexually abused by a school bus driver, a directed verdict in favor of the bus company was affirmed where there was no evidence the company knew or should have known the hiring would create a danger of harm to third persons. *Giraldi v. Community Consolidated School District No. 62*, 279 Ill.App.3d 679, 692, 216 Ill.Dec. 272, 665 N.E.2d 332, 340 (1996) (First District).

The trial court here properly dismissed counts VI and VII because there are no allegations that the District had any knowledge that the bus driver had any propensity to commit these acts or that there was a danger of harm to students.

C. Negligence per se—Count V

Count V alleges negligence as a matter of law arising from a statutory violation. Count V alleges that the District failed to perform a criminal background investigation as required by section 34–18.5. However, that section does not apply to the District. The section is contained within article 34 of the School Code, which only applies to cities of over 500,000 inhabitants (105 ILCS 5/34–1 through 34–129 (West 2006)). The section that does apply to the District, section 10–21.9(a), excepts school bus driver applicants, at least after its 1995 amendment. 105 ILCS 5/10–21.9(a) (West 2006). Another paragraph, section ***317 **461 10–21.9(f), was amended effective January 1, 1990, to add the following words:

“After January 1, 1990[,] the provisions of this Section shall apply to all employees of persons or firms holding contracts with any school district including, but not limited to, food service workers, school bus drivers and other transportation employees, who have direct, daily contact with the pupils of any school in such district.” Pub. Act 86–411, § 1, eff. January 1, 1990 (1990 Ill. Laws 2549, 2552).

Section 10–21.9(a) was then amended, effective July 1, 1995, to add the words “except school bus driver applicants.” Pub. Act 88–612, § 5, eff. July 1, 1995 (1995 Ill. Laws 1325, 1326).

In any event, even though there is no question there has been a breach of duty in a negligence *per se* action, a plaintiff must still show that the defendant's violation of the statute proximately caused the injury. *Price v. Hickory Point Bank & Trust*, 362 Ill.App.3d 1211, 1216–17, 299 Ill.Dec. 352, 841 N.E.2d 1084, 1089 (2006). No evidence in this case suggests that a criminal background check of the bus driver would have disclosed any information that would have placed the District on notice. *See Browne v. SCR Medical*

Transportation Services, Inc., 356 Ill.App.3d 642, 649, 292 Ill.Dec. 594, 826 N.E.2d 1030, 1036 (2005) (even if the transportation company had complied with the statute, the company would not have learned of the driver's prior arrests); *220 *Giraldi*, 279 Ill.App.3d at 692, 216 Ill.Dec. 272, 665 N.E.2d at 340 (only thing which could have been known was that driver had a tendency to be late; failure to investigate not a proximate cause of sexual attack on a student).

All Citations

381 Ill.App.3d 207, 887 N.E.2d 451, 320 Ill.Dec. 307, 233 Ed. Law Rep. 425

278 Wis.2d 439
Court of Appeals of Wisconsin.

Clairene D. HUNT, a minor, by her
Guardian ad Litem, James J. GENDE II
and Maxcine Hunt, Plaintiffs–Appellants,
Aetna U.S. Healthcare and GEICO
Insurance Co., Involuntary–Plaintiffs,
v.
CLARENDON NATIONAL INSURANCE
SERVICE, INC., a foreign insurance
corporation, Johnson School Bus Service,
Inc., a Wisconsin corporation, and Joseph
Brackmann, Defendants–Respondents. †

No. 03–3522.

Oral Argument Nov. 9, 2004.

Opinion Filed Dec. 14, 2004.

Synopsis

Background: Student and parent brought action against school bus company, driver, and company's uninsured motorist (UM) carrier to recover for injuries caused by motorist after student exited bus. The Circuit Court, Milwaukee County, Jeffrey A. Kremers, J., entered judgment on jury verdict for defendants. Student and parent appealed.

Holdings: The Court of Appeals, Kessler, J., held that:

[1] company was a “common carrier” with a duty to exercise highest degree of care for safety of passengers;

[2] failure to instruct on school bus company's duty as common carrier and error in using the general negligence instruction required reversal;

[3] evidence of safety procedures that company could have employed should have been admitted; and

[4] student was “occupying” bus and, therefore, was insured under UM coverage.

Reversed and remanded.

West Headnotes (24)

[1] Trial

☞ Authority to instruct jury in general

A trial court has broad discretion in deciding whether to give a particular jury instruction, and the court must exercise its discretion to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.

Cases that cite this headnote

[2] Appeal and Error

☞ Review of questions of pleading and practice

The Court of Appeals will independently review whether a jury instruction is appropriate under the specific facts of a given case.

Cases that cite this headnote

[3] Appeal and Error

☞ Prejudicial Effect

If a jury instruction is erroneous and probably misleads the jury, the Court of Appeals will reverse because the misstatement constitutes prejudicial error.

1 Cases that cite this headnote

[4] New Trial

☞ Instructions or failure or refusal to instruct

A new trial is warranted when an erroneous instruction is prejudicial.

Cases that cite this headnote

[5] Carriers

☞ Who are carriers

Carriers

☞ Who Are Carriers

A “carrier” is an enterprise in the business of publicly transporting persons or goods.

Cases that cite this headnote

[6] **Carriers**

☞ Who are common carriers

Carriers

☞ Who Are Carriers

The following factors characterize a carrier as a “common carrier”: (1) the service is for hire; (2) the carrier holds itself out to the public; (3) the operator controls the manner of transportation; and (4) the passenger places himself in the operator's care.

Cases that cite this headnote

[7] **Education**

☞ Transportation

School bus company was a “common carrier” with a duty to exercise highest degree of care for safety of passengers; company made itself available to public school districts, offered to transport students to various locations at various times, and received payment from the school district, and the passengers were in the care of the operator.

Cases that cite this headnote

[8] **Carriers**

☞ Who Are Carriers

Carriers

☞ Care Required and Liability of Carrier in General

The common law classification of a carrier as a common carrier, rather than the definition in a regulatory scheme, controls the applicable standard of care in a negligence case.

Cases that cite this headnote

[9] **Appeal and Error**

☞ Failure or refusal to charge

Erroneous failure to instruct on school bus company's duty as common carrier and error in using the general negligence instruction to analyze the actions of company and driver were

prejudicial and, therefore, required reversal and remand for a new trial in action arising out of car's collision with student after exiting bus; the errors probably misled the jury.

1 Cases that cite this headnote

[10] **Education**

☞ Duties and liabilities in general

Education

☞ Transportation

Public Employment

☞ Particular torts

Duty of care that school bus company and driver owed to student as common carrier was not the standard of care governing conduct of student and car driver who struck student; bus driver and company were required to exercise a very high degree of care.

Cases that cite this headnote

[11] **Carriers**

☞ Care Required and Liability of Carrier in General

Common carriers must exercise ordinary care for the safety of their passengers; but to constitute ordinary care, the care exercised must be of a very high degree.

Cases that cite this headnote

[12] **Education**

☞ Transportation

Evidence of safety procedures that school bus company could have employed in urban area other than flashing red lights and stop sign should have been admitted in suit by student and parent to recover for injuries caused by student's collision with car while crossing street behind bus; student and parent should have been allowed to present evidence to dispute the “drop and go” urban stop discharge procedure employed by the company.

Cases that cite this headnote

[13] **Trial**

☞ Admission of evidence in general

The admissibility of evidence is a matter within the trial court's discretion.

Cases that cite this headnote

[14] **Appeal and Error**

☞ Rulings on admissibility of evidence in general

A trial court's discretionary evidentiary ruling will not be upset on appeal if the court had a reasonable basis and it was made in accordance with accepted legal standards and in accordance with the facts of record.

Cases that cite this headnote

[15] **Education**

☞ Duties and liabilities in general

Education

☞ Transportation

Public Employment

☞ Particular torts

Compliance of school bus company and driver with requirements of chapter on Motor Vehicle Transportation and the adoption of school bus safety recommendations published by the Department of Public Instruction did not create a safe harbor insulating company and driver from liability as common carriers for injuries to student who was struck by car after exiting bus; company and driver were obligated to exercise very high degree of care for student's safety. W.S.A. 194.01 et seq.

Cases that cite this headnote

[16] **Appeal and Error**

☞ Cases Triable in Appellate Court

The interpretation of an insurance contract is a question of law that Court of Appeals reviews de novo.

Cases that cite this headnote

[17] **Insurance**

☞ Occupancy of Vehicle

A person need not have physical contact with an automobile before that person can be labeled an occupant under an automobile insurance policy.

Cases that cite this headnote

[18] **Insurance**

☞ Uninsured or underinsured motorist coverage

The test for determining whether a person is "occupying" a vehicle so as to be entitled to uninsured motorist (UM) coverage is whether the party was vehicle-oriented or highway-oriented at the time of the injury.

Cases that cite this headnote

[19] **Insurance**

☞ Uninsured or underinsured motorist coverage

The "vehicle-oriented" test for determining whether an accident victim is occupying a vehicle and is entitled to uninsured motorist (UM) benefits considers the nature of the act engaged in at the time of the injury and the intent of the person injured; an additional inquiry is whether the victim was within the reasonable geographical perimeter of the vehicle.

Cases that cite this headnote

[20] **Insurance**

☞ Uninsured or underinsured motorist coverage

Student was "occupying" school bus when hit by car as she crossed street behind bus and, therefore, was insured under uninsured motorist (UM) coverage in bus company's policy, even though student had stepped onto sidewalk after exiting bus and bus had moved into intersection to turn left; student was within ten feet of bus, and the bus blocked her view of on-coming traffic.

Cases that cite this headnote

[21] **Insurance**

☛ Intention

A court's objective in interpreting and construing an insurance policy is to carry out the true intentions of the parties.

Cases that cite this headnote

[22] **Insurance**

☛ Reasonable persons

The test used in construing an insurance policy is what a reasonable person in the position of the insured would have understood the words to mean.

Cases that cite this headnote

[23] **Insurance**

☛ Favoring coverage or indemnity; disfavoring forfeiture

The interpretation of an insurance policy should further the insured's expectations of coverage.

Cases that cite this headnote

[24] **Trial**

☛ Negligence, Issues as to

Although a special verdict question in respect to the negligence of an individual who is not a party may be included in the verdict, it is necessary that there be evidence of conduct which, if believed by the jury, would constitute negligence on the part of the person or other legal entity inquired about.

Cases that cite this headnote

Attorneys and Law Firms

****906 *444** On behalf of the plaintiffs-appellants, the cause was submitted on the brief of ****907** Edward E. Robinson and Charles David Schmidt of Cannon & Dunphy, S.C. of Brookfield. There was oral argument by Charles David Schmidt.

On behalf of the defendants-respondents, the cause was submitted on the brief of Timothy J. Strattner and Laurie E. Meyer of Borgelt, Powell, Peterson & Frauen, S.C. of Milwaukee. There was oral argument by Timothy J. Strattner.

Before WEDEMEYER, P.J., FINE and KESSLER, JJ.

Opinion

¶ 1 KESSLER, J.

Clairene and Maxcine Hunt (collectively, "the Hunts") appeal from a judgment entered on a jury verdict finding that Joseph Brackmann, Johnson School Bus Service, Inc. (Johnson) and Johnson's insurer, Clarendon National Insurance Service, Inc., (collectively, "defendants"), were not liable for injuries Clairene suffered when she was hit by a car shortly after exiting her school bus.¹ The Hunts argue that they are entitled to a new trial because the trial court: (1) erroneously refused to instruct the jury using the "common carrier" jury instruction that addresses ***445** duty of care; (2) erroneously exercised its discretion by barring evidence that Johnson's "drop and go" urban stop discharge procedure was negligently deficient and inherently unsafe; and (3) erroneously exercised its discretion by including the driver of the vehicle, which struck Clairene, on the special verdict. The Hunts also seek a new trial in the interest of justice. Finally, they argue that the trial court erroneously concluded that Clairene is not entitled to uninsured motorist benefits under the insurance policy covering the bus.

¶ 2 We conclude that Johnson is a common carrier and, therefore, the common carrier jury instruction should have been given. We conclude that the Hunts should have been allowed to present evidence to dispute the "drop and go" urban stop discharge procedure employed by the defendants. We further conclude that these were prejudicial errors entitling the Hunts to a new trial.

¶ 3 We do not decide whether the driver of the oncoming vehicle should be included in the special verdict on retrial because there may be evidence adduced, which was not available in this trial, from which a reasonable jury could conclude that she was negligent. However, we note that there was no evidence in this record of the speed, lookout or management and control of the driver of the car that struck Clairene.

¶ 4 Finally, we conclude that in the event the oncoming driver is again found to be negligent, Clairene is entitled to uninsured motorist benefits under the insurance policy covering the school bus because she was still vehicle-oriented in relation to the school bus at the time she was struck.

*446 BACKGROUND

¶ 5 The background facts are undisputed. Clairene, who was ten years old at the time, suffered personal injuries when she was hit by a car while crossing the street after being discharged from her school bus in the City of Milwaukee. The bus **908 dropped her off at the corner of an uncontrolled intersection² and proceeded to enter the intersection to turn left. Clairene began to cross the street by walking behind the bus while it was waiting to turn. She was struck within ten feet of the rear of the bus by an oncoming car driven by Shalonda Briggs, who is not a party to this action.

¶ 6 The Hunts sued the driver of the bus, Joseph Brackmann, alleging negligence. They also sued Johnson, alleging that Johnson was vicariously liable for Brackmann's negligence and that Johnson was negligent in its training, instruction and supervision of bus drivers. The Hunts subsequently amended their complaint and added a claim for uninsured motorist coverage under Johnson's insurance policy from Clarendon on grounds that Clairene was "occupying" a "covered auto" at the time of the injury.

¶ 7 The trial court granted defendants' motion for declaratory judgment holding that the insurance policy does not afford uninsured motorist coverage to Clairene for her injuries. The trial court denied defendants' motion for summary judgment on the negligence *447 claims.³ The negligence claims were tried to a jury, which returned a verdict finding that only Briggs and Clairene were causally negligent with respect to Clairene's injuries. The trial court denied the Hunts' motion for a new trial and entered judgment for defendants.⁴ This appeal followed.

DISCUSSION

I. Alleged trial errors

A. Common carrier instruction

¶ 8 The Hunts argue that the trial court erroneously refused to instruct the jury using WIS JI—CIVIL 1025, "Negligence of a Common Carrier," which would have instructed the jury that in order to discharge the duty owed to passengers, a common carrier "must exercise the highest degree of care for their safety." *See id.*

[1] [2] [3] [4] ¶ 9 A trial court has broad discretion in deciding whether to give a particular jury instruction and the court must exercise its discretion "to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." *State v. Coleman*, 206 Wis.2d 199, 212, 556 N.W.2d 701 (1996) (citation omitted). However, we *448 will independently review whether a jury instruction is appropriate under the specific facts of a given case. *State v. Groth*, 2002 WI App 299, ¶ 8, 258 Wis.2d 889, 655 N.W.2d 163. If a jury instruction "is erroneous and probably misleads the jury, we will reverse because the misstatement constitutes prejudicial error." *Young v. Professionals Ins. Co.*, 154 Wis.2d 742, 746, 454 N.W.2d 24 (Ct.App.1990). "A new trial is warranted when an erroneous instruction is prejudicial." *Id.*

¶ 10 Prior to trial, the trial court specifically considered whether Johnson was a **909 "common carrier" in response to defendants' motion *in limine* that sought to preclude the Hunts from presenting any evidence or arguments that Johnson and Brackmann owed Clairene the "highest degree of care" required of a common carrier. The trial court granted defendants' motion and later denied the Hunts' request at the close of trial to instruct the jurors using WIS JI—CIVIL 1025, the instruction defining a common carrier's duty of care. The trial court's ruling was based on its conclusion of law that Johnson was not a common carrier.

[5] [6] [7] ¶ 11 We first consider whether Johnson is a common carrier. "A carrier is an enterprise in the business of publicly transporting persons or goods." *Brockway v. Travelers Ins. Co.*, 107 Wis.2d 636, 638, 321 N.W.2d 332 (Ct.App.1982). "Two elements characterize a carrier as a common carrier: (1) The service is for hire, and (2) the carrier holds itself out to the public." *Id.* (footnote omitted). In *Brockway*, the court also recognized two additional factors that the Wisconsin Supreme Court considered in *Anderson v. Yellow Cab Co.*, 179 Wis. 300, 191 N.W. 748 (1923): whether the operator controlled the manner of transportation and whether the passenger places himself in the operator's care. *449 *Brockway*, 107 Wis.2d at 638 n. 2, 321 N.W.2d

332 (citing *Anderson*, 179 Wis. at 304–06, 191 N.W. 748). Here, Johnson School Bus Service makes itself available to public school districts, offers to transport persons identified by the district to various locations at various times (also identified by the district), and receives payment from the district for those services. Clearly, the service is for hire. The part of the public attending the particular public school is served. The passengers are in the care of the operator while traveling from place to place. Johnson School Bus Service satisfies all common law characteristics of a common carrier.

¶ 12 The parties devote much of their arguments to discussing whether school buses operated by for-profit entities are “common motor carriers” as that term is defined in WIS. STAT. § 194.01(1) (2001–02).⁵ We do *450 not believe the statutory definition **910 is necessary to the outcome of this case, although it may be read to support our conclusion that Johnson is a common carrier. Chapter 194, titled “Motor Vehicle Transportation,” deals generally with licensure, the physical condition of motor vehicles to be operated on Wisconsin highways and with the regulatory powers of the Wisconsin Department of Transportation. It makes no mention of tort liability or standards of care required of drivers.

[8] ¶ 13 The common law classification, rather than the definition in a regulatory scheme, controls the applicable standard of care in a negligence case. For instance, although taxicabs are specifically excluded from the definition of “common motor carrier” found in WIS. STAT. § 194.01(1), in a negligence context “[t]he common-law duty as to common carriers applies equally to taxicabs.” Comment, WIS JI—CIVIL 1025. The comment further explains, “Wis. Stat. § 194.01(5) is a *451 regulatory statute and, hence ... is inapplicable to a taxicab company's negligence.” *Id.*

¶ 14 We conclude that Johnson is a common carrier and that the jury should have been instructed accordingly. We are guided by *Lempke v. Cummings*, 253 Wis. 570, 34 N.W.2d 673 (1948), which discussed a private school bus company that provided transportation of school children in the context of its role as a common carrier. *Id.* at 571–74, 34 N.W.2d 673. In that context, the court held that “[t]he duty of a common carrier of passengers includes an obligation to furnish them a safe place in which to alight ... and that duty is only satisfied if it exercises the highest degree of care and skill which reasonably may be expected of intelligent and prudent persons engaged in such a business...” *Id.* at 573, 34 N.W.2d 673 (internal quotations and citation omitted). This

expression of the degree of care that must be exercised is consistent with that identified in WIS JI—CIVIL 1025 and with numerous cases decided since *Lempke*.⁶

¶ 15 Because Johnson is a common carrier as that term is used in negligence law, the trial court should have instructed the jury consistent with WIS JI—CIVIL 1025, which provides:

In this case, (defendant) is a common carrier. A common carrier is not required to guarantee the safety of its passengers. However, in order to discharge the duty that it owes to its passengers, a common carrier must exercise the highest degree of care for their safety. The care required is the highest that can be reasonably exercised by persons of vigilance and foresight when acting under the same or similar circumstances, taking *452 into consideration the type of transportation used and the practical operation of its business as a common carrier.

Instead, the trial court gave the jury WIS JI—CIVIL 1005, the general negligence instruction. It provides:

A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does **911 something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

[9] ¶ 16 We conclude that the absence of the common carrier instruction, and the use of the general negligence instruction to analyze the actions of Johnson and Brackmann, misstated the applicable law and hence were erroneous. Because these errors probably misled the jury, we conclude that these errors were prejudicial and, therefore, reverse and remand for a new trial. *See Young*, 154 Wis.2d at 746, 454 N.W.2d 24.

[10] [11] ¶ 17 The jury was probably misled because it was instructed that Johnson and Brackmann were required to exercise precisely the same standard of care as Clairene and Briggs. That is not correct. As common carriers, “ordinary care” for Johnson and Brackmann is “a very high degree” of care. See *Ruka v. Zierer*, 195 Wis. 285, 292, 218 N.W. 358 (1928).⁷ In *Ruka*, the court *453 explained, “Common carriers must exercise ordinary care for the safety of their passengers. But to constitute ordinary care, the care exercised must be of a very high degree.” *Id.* The difference in degrees of ordinary care for ordinary persons and for common carriers is significant. It recognizes the greater responsibility assumed, and hence the greater obligation owed, by those who transport the public to those who trust them to do so safely and with a high degree of ordinary care. Therefore, we conclude that not giving the common carrier instruction misled the jury because it misstated the applicable law. This error requires reversal.

B. Evidence concerning Johnson's “drop-and-go” procedure

[12] ¶ 18 The Hunts argue that the trial court erroneously excluded evidence of the discharge procedures Johnson used in rural areas, which the Hunts hoped to use to show that Johnson's “drop-and-go” urban discharge procedures were deficient and inherently unsafe. They further argue that the trial court compounded the error by erroneously allowing defendants to introduce evidence suggesting that Wisconsin law actually requires the “drop-and-go”⁸ practice in urban areas when no such requirement exists.

[13] [14] ¶ 19 The admissibility of evidence is a matter within the trial court's discretion. *454 *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983). Consequently, a trial court's evidentiary ruling will not be upset on appeal if the court had “a reasonable basis” and it was made “in accordance with accepted legal standards and in accordance with the facts of record.” *Id.* (citations omitted).

¶ 20 We note our concern with the exclusion of evidence concerning defendants' discharge procedures used in rural areas, and the types of areas classified as rural in Johnson's written policy on stop procedures. Because the record here is incomplete **912 in that the hearing on defendants' motion *in limine* is not part of the record, we are unable to tell whether the limitation applied only to Johnson's rural discharge policies or whether it applied to any other discharge policies or practices. The Hunts sought to introduce

evidence concerning safety procedures employed in rural areas in order to show that Johnson's Milwaukee stop procedures were inherently dangerous. The Hunts intended to show that Johnson employed reasonable and safer discharge alternatives in other parts of the metropolitan area classified by Johnson as “rural.” Johnson, they assert, could have employed safer discharge methods here. For instance, the Hunts suggest drivers could remain at the point of discharge and assist the children crossing in front of the bus by signaling to them when it is safe to cross, or by having drivers honk the horn to warn discharged children of approaching traffic.

¶ 21 Defendants argue that evidence of rural stop procedures is irrelevant because under state law, school buses in urban areas are not allowed to use flashing red lights or extend attached “stop” signs. However, just because red flashing lights and sign extensions are not allowed within the City of Milwaukee, *455 it does not follow that school bus drivers within the city cannot assist students in crossing the street in urban areas. By way of example, one easy way to assist would be to require the children to cross in front of the bus. We conclude that the Hunts were entitled to introduce evidence of other safety procedures that could have been employed because the failure to do so probably misled the jury to the prejudice of the Hunts.

[15] ¶ 22 At oral argument, defendants candidly admitted that no law requires only the “drop-and-go” policy they employ. However, they emphasized their compliance with certain requirements of WIS. STAT. ch. 194 and their adoption of certain school bus safety recommendations published by the Wisconsin Department of Public Instruction. Apparently, defendants viewed following these provisions as creating a sort of safe harbor, which would insulate them from liability in civil litigation if they followed these provisions. We disagree. Defendants are common carriers, obligated as a matter of ordinary care to exercise “a very high degree” of care for the safety of their passengers.⁹ See *Ruka*, 195 Wis. at 292, 218 N.W. 358.

II. Uninsured motorist coverage

¶ 23 The Hunts challenge the trial court's declaratory judgment that Clairene should not be allowed to collect under the uninsured motorist (“UM”) insurance policy that Clarendon issued to Johnson. Although we do not yet know if Briggs will be found partially liable for Clairene's injuries, we are able to review the trial court's declaratory judgment with respect to the potential applicability of the policy.

[16] *456 ¶ 24 The interpretation of an insurance contract is a question of law that this court reviews *de novo*. *Lambert v. Wrensch*, 135 Wis.2d 105, 115, 399 N.W.2d 369 (1987). The parties agree that the specific issue is whether Clairene was “occupying” the bus at the time she was injured. The parties also agreed at oral argument that Clairene was within a ten-foot perimeter of the bus at the time she was struck, and that the ten-foot zone is acknowledged in the industry as a recognized zone of danger to passengers. The Clarendon policy defines “occupying” as “getting in, on, out or off.”

**913 [17] [18] [19] ¶ 25 Wisconsin courts do not require “that an individual have physical contact with an automobile before that person can be labeled an occupant under an automobile insurance policy.” *Kreuser v. Heritage Mut. Ins. Co.*, 158 Wis.2d 166, 172, 461 N.W.2d 806 (Ct.App.1990). Rather, as the court recognized in *Kreuser*, the test for determining whether a person is “occupying” a vehicle so as to be entitled to uninsured motorist coverage is whether the party was vehicle-oriented or highway-oriented at the time of the injury. *Id.* at 173, 461 N.W.2d 806. The “vehicle-oriented” test “considers the nature of the act engaged in at the time of the injury and the intent of the person injured.” *Id.* *Kreuser* added one additional inquiry: whether the party was “within the reasonable geographical perimeter of the vehicle.” *Id.*

¶ 26 Applying the vehicle-oriented test prior to *Kreuser*, this court in *Sentry Ins. Co. v. Providence Wash. Ins. Co.*, 91 Wis.2d 457, 458–459, 283 N.W.2d 455 (Ct.App.1979), considered whether a man was “occupying” a vehicle when he exited the vehicle and crossed in front of the vehicle to reach the sidewalk. As the man was walking, a second vehicle hit the vehicle that the *457 man had just exited, causing the first vehicle to hit the man and pin him to a third car. *Id.* We held that the man was occupying the vehicle, because he

had not ceased occupancy of the car, nor had he severed his connection with the car, at the time of the accident. He was “vehicle oriented” at all times, from the moment he exited the automobile until the time he was injured by the uninsured motorist. He had not completed his act of alighting from the car.

Id. at 460–61, 283 N.W.2d 455.

¶ 27 Similarly, in *Kreuser*, we concluded that a woman named Nancy Kreuser was “occupying” a vehicle at the time she was injured, even when she had not yet entered the vehicle. 158 Wis.2d at 173, 461 N.W.2d 806. Kreuser was waiting on the side of the road for her co-worker to pick her up in his vehicle. *Id.* at 169, 461 N.W.2d 806. As the vehicle approached, a motorcycle struck the vehicle from behind and then struck Kreuser, injuring her. *Id.* We applied the three-part test discussed above and concluded that she was “occupying” her co-worker’s vehicle. *Id.* at 173–74, 461 N.W.2d 806. We reasoned:

Kreuser was within ten feet of [the] vehicle and she was beginning to turn to prepare to enter the vehicle when she was struck by the motorcycle. There is no doubt that both her intent and [her co-worker’s] intent was to have Kreuser occupy the automobile. Kreuser had ridden with [the co-worker] in the past and [the co-worker] regularly picked her up at this ... intersection.

We are satisfied that an ordinary lay person would expect that people preparing to board an automobile come within the definition of occupying and would be afforded coverage if injured during the boarding process. If we were to say that the boarding person had to *458 have actual physical contact with the insured vehicle we would unduly restrict coverage.

Id.

[20] ¶ 28 Applying the *Kreuser* test here, we conclude that Clairene was “occupying” the bus at the time of her injury. In all of the cases discussed above, the vehicle in question played some significant role in the ultimate injury. The accident occurred just after Clairene exited the bus and started to walk behind it (as she had been instructed to do) to cross the street. It is undisputed that although the bus was **914 pulling into the intersection and waiting to turn left, Clairene was still within the ten-foot danger zone at the time she was struck. Because Clairene was behind the bus, the bus blocked Clairene from the view of on-coming traffic until she was in the on-coming traffic lane. Just as the injured man in *Sentry* was still “occupying” his vehicle when he crossed in front of it to get to the sidewalk, Clairene was still “occupying” the bus when she walked behind the bus within the zone of danger to cross the street. *See id.*, 91 Wis.2d at 460–61, 283 N.W.2d 455.

¶ 29 Defendants argue that unlike the injured persons in *Sentry* and *Kreuser*, Clairene was not “occupying” the bus

at the time of injury. They contend that unlike the man in *Sentry*, Clairene had finished “occupying” the bus because she stepped onto the sidewalk, next to the bus, before she stepped off the sidewalk in order to cross the street. In addition, the man in *Sentry* was within arm's reach of the vehicle, while Clairene was not. Finally, the vehicle in *Sentry* had not moved after the man exited, but here the bus had moved into the intersection. Similarly, defendants argue that Clairene was not “vehicle-oriented” like *Kreuser*, because she did not intend to re-board the bus.

[21] [22] [23] *459 ¶ 30 We are not persuaded by defendants' arguments. Although the facts of Clairene's case vary somewhat from those in *Sentry* and *Kreuser*, defendants' attempt to distinguish the cases is not consistent with the policy and rationale underlying those cases. “Our objective in interpreting and construing the insurance policy is to carry out the true intentions of the parties.” *Kreuser*, 158 Wis.2d at 171–72, 461 N.W.2d 806. “The test used in construing an insurance policy is what a reasonable person in the position of the insured would have understood the words to mean.” *Id.* at 172, 461 N.W.2d 806. “The interpretation of the policy should further the insured's expectations of coverage.” *Id.* We conclude that an insured, purchasing coverage for a school bus, would expect that a child exiting a school bus and immediately walking behind the bus to cross the street would come within the definition of occupying and would be afforded coverage if injured during that process. Therefore, we reverse the declaratory judgment and hold that Clairene is entitled to coverage under the uninsured motorist provisions of Clarendon's policy.

III. Inclusion of Briggs on the jury verdict form

[24] ¶ 31 At the conclusion of the trial, the Hunts moved for a directed verdict, asking that Briggs, the driver of the oncoming car, not be included on the special verdict because there was no evidence that she was negligent. In *Gierach v. Snap-On Tools Corp.*, 79 Wis.2d 47, 55, 255 N.W.2d 465 (1977), the Wisconsin Supreme Court discussed the propriety of including non-parties on special verdict forms. The court stated:

Although ... a special verdict question in respect to the negligence of an individual who is not a party may be included in the verdict, it is necessary that there be *460 “evidence of conduct which, if believed by the jury, would constitute negligence on the part of the person or other legal entity inquired about.”

Id. at 55–56, 255 N.W.2d 465 (citation omitted). While we have been unable to find evidence of Briggs' conduct in the current record, we are confident that the trial court will apply the facts that are developed on retrial to the law the supreme court has established with respect to the negligence of a non-party.

**915 Judgment reversed and cause remanded for further proceedings.

All Citations

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Footnotes

† Petition for review dismissed.

1 Aetna U.S. Healthcare and GEICO Insurance Company are involuntary plaintiffs and did not participate in this appeal.

2 There were no traffic lights or stop signs on any portion of the intersection. There was a “yield” sign on the north-south street. Clairene had to cross the east-west street in an unmarked and uncontrolled crosswalk.

3 Defendants filed with this court a petition for leave to appeal the non-final order denying their motion for summary judgment. We denied that petition in *Hunt v. Clarendon Nat'l Ins.*, No. 01–3496–LV, order (WI App Feb. 13, 2002).

4 The Honorable David Hansher decided the motion for summary judgment. The Honorable Jeffrey Kremers decided the motion for declaratory judgment and presided over the trial and post-trial proceedings.

5 WISCONSIN STAT. § 194.01(1) provides:

“Common motor carrier” means any person who holds himself or herself out to the public as willing to undertake for hire to transport passengers by motor vehicle between fixed end points or over a regular route upon the public highways or property over regular or irregular routes upon the public highways. The transportation of passengers in taxicab service or in commuter car pool or van pool vehicles with a passenger-carrying capacity of less than 16 persons or in a school bus under s. 120.13(27) shall not be construed as being that of a common motor carrier.

School buses falling within the definition of WIS. STAT. § 120.13(27) are excluded from the definition of common motor carrier. See § 194.01(1). Section 120.13 provides in relevant part:

120.13 School board powers.

....

(27) TRANSPORTATION OF PERSONS WHO ARE NOT PUPILS. (a) Subject to par. (b), the school board may use or allow the use of school buses owned and operated by the school district to transport persons who are not pupils of the school district. School buses may be used by persons who are not pupils of the school district during school hours if such use does not interfere with the transportation of pupils of the school district. The school board shall charge a fee for use of the school buses under this subsection. The fee shall be an amount equal to the actual cost of transportation under this subsection, including but not limited to costs for depreciation, maintenance, insurance, fuel and compensation of vehicle operators. If the school board denies a written request for use of the school buses, the school board shall provide the requester a written statement of the basis for the denial within 14 days after the denial.

(b) No school bus may be used to provide transportation under this subsection unless the vehicle is insured by a policy providing property damage coverage and bodily injury liability coverage for such transportation in the amounts specified in s. 121.53(1).

6 See Comment, WIS JI—CIVIL 1025.

7 Although it may seem incongruous to require that common carriers exercise a “very high degree” of “ordinary care,” this is the terminology employed in *Ruka v. Zierer*, 195 Wis. 285, 292, 218 N.W. 358 (1928). Put more simply, the ordinary care that is required of common carriers requires a more heightened degree of care than the ordinary care that is required of others.

8 The phrase “drop-and-go” appears to refer to the procedure of dropping the student at the curb and then continuing on, without waiting for the student to cross the street.

9 See Footnote 7.