

73825-9

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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.

BRIEF OF APPELLANT

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I. INTRODUCTION

In this case, a group of eighth-grade boys repeatedly hurt and humiliated appellant L.Q. and other girls while riding home on their Bellevue School District bus. L.Q., then 13, expected the pattern of abuse to stop once she reported that her friend was sexually assaulted on the school bus. Tragically, it only got worse.

Throughout her eighth grade year, L.Q. was tripped, taunted and hit with paper “hornets” which left welts on her arms and neck. In one incident similar to her friend’s assault, two boys took L.Q.’s bag and inappropriately touched her bottom when she tried to retrieve it. The bus became so oppressive that L.Q. would ride home “totally clenched up” in fear. She lost the ability to eat, sleep, go to school and enjoy life, and nearly died.

L.Q. and her parents sued the Bellevue School District for negligence. Pointing to the pattern of school bus harassment throughout L.Q.’s eighth grade year, they alleged that: 1) the School District breached its special duty to anticipate, and protect students from, reasonably foreseeable dangers; and 2) in operating the bus, the School District breached its heightened duty as a common carrier to protect its passengers. However, the trial court improperly prevented the appellants from presenting their negligence theories to the jury, and delivered instructions

that invited a defense verdict. The jury was told that the School District had merely a duty of ordinary care, and that it was not obligated to prevent bullying or harassment unless it had reason to know that a particular student was targeted for particular kinds of intentional harm enumerated in a bullying prevention statute.

The trial court effectively ruled that children have less protection on school buses than adults have on city buses. The lack of a common carrier instruction contradicted decades of case law holding that a school bus owes student passengers at least the same heightened care – if not more – as trains, planes, taxis and other carriers must provide to their passengers. The court’s instructions failed to account for the increased vulnerability that children face when the only supervision available is from a bus driver distracted by traffic and when there is no escape from threatening situations. As this case illustrates, a school bus can be like a torture chamber on wheels.

The trial court’s rulings also created a gaping hole in the special protective duty that Washington schools owe to children in their care. This Court has always held that schools must protect against the general field of danger reasonably to be anticipated, and not just known threats posed by specific people. Yet the trial court decided that the special protective duty does not apply to student-on-student harassment, despite the serious

physical and emotional damage it can cause. Because the jury instructions misstated the law and deprived L.Q. and her parents of a fair trial, this Court should vacate the judgment and order a new trial with proper instructions.

II. ISSUES AND ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred by giving incomplete and incorrect instructions to the jury.
2. The trial court erred by granting judgment on the verdict to the defendant Bellevue School District.

Issues Pertaining to Error

1. Does a school district act as a common carrier when it operates a school bus, in accordance with *Yurkovich v. Rose*?
2. Does a school district owe students a higher duty of care on a school bus than in a school building, when the movement of the bus impairs both adult supervision and the students' ability to escape danger?
3. Does a school district's special protective duty apply to harassment on a school bus, when the district knows about a general problem of misbehavior as well as a specific serious incident on the bus, and when it is aware that students generally are more vulnerable on a bus than in a school building?

4. Does a trial court err by instructing a jury that a school's duty to prevent student-on-student harassment depends on knowledge that a particular student is suffering from particular types of intentional harm, when Washington courts have consistently held that schools must protect students from any harms within a general field of danger reasonably to be anticipated?

5. Does a trial court err by including a statutory definition of bullying and harassment in a jury instruction on the duty of care, when there is no authority for doing so and the action is based on negligence rather than statute?

III. STATEMENT OF THE CASE

A. The Chinook Middle School Bus Was a "War Zone" In 2010-11.

1. The Trouble Started in Eighth Grade.

During middle school, L.Q. lived in Bellevue's Woodridge neighborhood near her male classmates S.T., H.E., Y.W. and J.N. and female friends B.T. and E.S. VRP 349, 1119-20. These students regularly rode the bus together to and from Chinook Middle School. VRP 351-52.

In their sixth grade year, the bus driver regularly used the "PA system" to stop any rule-breaking. VRP 355. In seventh grade, a different bus driver similarly made the students feel they "couldn't get away with

things.” VRP 356. But in the eighth grade, a new driver, Airika Aviles,¹ rarely talked on the PA system and “didn’t seem to give us discipline,” according to H.E., one of the boys who rode the bus with L.Q. VRP 360. H.E. could not recall any time in eighth grade when the driver yelled or stopped the school bus in order to “get someone in line.” *Id.*

Eighth-graders traditionally sat in the back of the bus, where it was harder for the bus driver to see them. VRP 361, 1127-28. In the fall of 2010, the Chinook boys began to test the limits of what they could get away with in the back of the bus. VRP 362. At first, they teased the girls and called them names such as “dumb blonde.” VRP 1128. They took the girls’ bags and stole things out of them or slid the bags out of reach, and also pushed the girls into aisles and seats, “squishing them as far as they can into a corner.” VRP 362-63.

S.T. was the “ringleader” of the bus trouble. VRP 362. L.Q. and her friends B.T., E.S., S.F. and A.A. took the brunt of it. VRP 364, 1129.

2. L.Q. Witnessed An Assault On the Bus.

One day in December 2010, there was a substitute bus driver. VRP 707. The boys took B.T.’s backpack and pulled out her personal items - including tampons - “flaunting” them to embarrass her. VRP 364-65. The

¹ Ms. Aviles drove the bus at issue from October 2010 to April 2011. VRP 724.

bus was “very crowded,” and B.T. was “sandwiched into the seat” by S.T.

and two other boys, Y.W. and H.E. VRP 1131. L.Q. testified:

And I knew something was wrong. I knew something weird was happening. And as we kept driving, her – like, she just kind of completely went below the seat.... As we kept driving – a lot of things went through my mind. I – at that age, I didn’t really know what rape was....The boys started calling out that they were raping her...

I tried really hard to get to her.... [J.N.] was pushing me back into my seat and keeping me down. I couldn’t stand up. I couldn’t get to her. And that lasted the entire bus ride home. They had her backpack at one point and they were tossing it around the bus. Her tampons were falling out everywhere. They had her shoe. Her shoe got passed around to me and passed up to the front of the bus. [S.T.] started yelling that he was, like, grabbing her boob. The boys were all just screaming that....

And when – the time we got to her bus stop.... She got her shoe on the way out from the bus.... And her shirt was hanging off her shoulder and her hair was all messed up. And she didn’t look at me when she left. She looked really upset.

VRP 1132-33. *See also* Trial Exhibit 1 (Chinook Incident Statement).

. That night, L.Q.’s mother, J.Q., noticed that L.Q. “looked different.”

VRP 867. L.Q. told her, “Something scary happened on the school bus,”

but she couldn’t talk about it. *Id.* J.Q. encouraged her to report the incident,

and the next day she asked the Chinook principal to send her L.Q.’s report.

Id. and Trial Exhibit 26. J.Q. told the principal “this bus needs a set of adult eyes on it.” Trial Exhibit 26.

The word quickly got around that L.Q. and S.F. planned to report the attack to the school. VRP 366, 1135. One boy, J.N., followed the girls to the office and tried to stop them from reporting what happened, saying “let it go.” VRP 1135. At the school office, the girls made written statements, but later that day the dean of students told them “that it wasn’t a big deal, that this was boys being boys.” VRP 1137.

B.T., the main target of the December 2010 incident, also made a report. She said the boys on the bus first took her backpack and looked through it, then jumped around and switched seats. Trial Exhibit 122.

[S.T.] sat by me and started trying to touch my breasts. I kept yelling at him to stop, but he wouldn’t. And all of the rest of the boys kept laughing. That went on until I got off the bus. The bus driver didn’t even notice, or he didn’t care what was going on.

Id.

3. The One Boy Who Was Punished Soon Returned to the Bus.

Only one student, S.T., was disciplined for the December 2010 incident. VRP 622. S.T. was suspended from school for less than two days, even though he had two prior incidents of misconduct. VRP 623; Trial Exhibit 8 (showing similar suspensions in 2009 when he “pulled the back of his pants down” and, on a separate occasion, “sat on another student on the bus and bounced up & down” and spat on his face). Chinook Assistant

Principal Joseph Kempisty, who investigated the December 2010 incident, testified that the prior incidents did not affect S.T.'s discipline because they happened in a different school year. VRP 627.

Kempisty said that, although S.T. admitted touching B.T.'s breast,² Kempisty believed it constituted "inappropriate touching" rather than a "sexual assault" because the boy's hand did not go beneath the girl's clothing. VRP 584-85. He also believed it was up to B.T.'s parents to file a police report. VRP 614-15.

Mr. Kempisty told the boys to stop the routine harassment of B.T., but he did not tell the boys to leave L.Q. alone or take any steps to prevent retaliation against her. VRP 588, 597-98. Neither Mr. Kempisty nor Chinook Principal Maria Frieboes-Gee spoke to L.Q. in the wake of the incident. VRP 537, 592, 598. S.T. was supposed to move to the front of the bus for the rest of the school year, but that precautionary measure lasted only two weeks. VRP 541.

4. Harassment on the Bus Intensified.

After L.Q. reported the incident, the harassment on the Chinook bus "got much, much worse." VRP 1139. L.Q. said the boys "were able to just

² Mr. Kempisty interpreted as an admission S.T.'s statement that "people told me to touch her breast and I moved my hand, but I felt like I didn't." VRP 596.

do whatever they wanted,” including shooting “hornets” made of paper at L.Q. and other girls. VRP 1140. “So hornets became, like, a big part of what they did.” *Id.* L.Q. had welts from hornets about twice a week. VRP 1197. Also, the name-calling on the bus got much worse. *Id.* L.Q. was called “bitch,” “slut,” “fat,” and “stupid,” among other things. VRP 1141.

L.Q. testified that the increased abuse felt like retaliation for reporting the assault. VRP 1142. While some details were a blur, she remembered being “totally clenched up” in fear each day. VRP 1143. She did not report the ongoing abuse because she felt “ashamed” and the District “just discarded” her earlier report. VRP 1240.

H.E. attested that “a lot more physical attacking” occurred on the bus after the 2010-11 winter break. VRP 396. He said L.Q., B.T. and E.S. were the “top three” to be hit with hornets. VRP 411. The hornets left visible bruises. VRP 410. Sometimes the boys used “stingers,” which were hornets with staples or paper clips added to “cause more pain.” VRP 408.

H.E. said he saw L.Q. shoved onto a bus seat once or twice that year as part of a pattern of harassment. VRP 509-10. More often, she was tripped on the bus. VRP 509. The tripping of L.Q. happened “consistently,” probably at least once every two weeks, and “was done intentionally,”

according to H.E. VRP 509. In general, he said, the Chinook school bus became “a war zone” in eighth grade. VRP 357, 363.

Another boy, S.J., also remembered L.Q. being hit with hornets and called names on the bus during eighth grade. VRP 1258. He participated in the hornet shooting on the bus because he “thought it was fun.” VRP 1259. He said it “wouldn’t be difficult” for the bus driver to see the hornets because they were fired into the air. VRP 1262. Similarly, L.Q.’s younger sister, F.Q., saw boys target L.Q. on the bus and “didn’t notice much discipline” happening in general. VRP 819, 823, 843.

Towards the end of the 2010-11 school year, H.E. witnessed L.Q. experience something similar to the December 2010 assault on B.T. VRP 415-17. He saw other boys take L.Q.’s bag and pass it around, and when she tried to retrieve it, S.T. and Y.W. touched her bottom in a sexual manner. *Id.* and 426. H.E. said she “curled up into the fetal position afterwards.” VRP 426.

B. L.Q. Became Fearful, Withdrawn and Dangerously Ill.

After the winter break of the 2010-11 school year, L.Q. began struggling with school work, stayed home more, and seemed to physically hunch over, according to her mother. VRP 875. Traditionally an “A”

student, L.Q. was referred to an academic assistance program at the end of eighth grade – a “shock” to her parents. VRP 877.

F.Q. recalled that after eighth grade, L.Q. stopped eating and sleeping, often cried at night, and shut everyone out. VRP 826. L.Q. became “very skinny” and her eyes appeared sunken. VRP 840. L.Q. had vivid nightmares and began sleeping in her parents’ room. VRP 899, 917.

L.Q. was afraid to attend Bellevue High School, where many of the Chinook boys went, and barely managed to attend for only a couple of weeks in the fall of 2011. VRP 880, 883, 931. Her mother recalled L.Q. sitting on her lap at the high school’s counseling office, trembling and crying. VRP 887. By mid-October 2011, “she couldn’t function.” VRP 890. Her parents withdrew her from school on October 25, 2011. VRP 931.

Around the third weekend of October 2011, her parents took L.Q. to the emergency room at Seattle Children’s Hospital because she would not eat at all. VRP 891. Her weight had dropped from 130 to about 100 pounds. VRP 893. The following weekend, L.Q. was hospitalized for four days. VRP 894. Her heart rate dropped to a dangerous 4 beats per minute. *Id.*

L.Q. testified that she stopped eating “to kind of numb everything that I felt.” VRP 1146. She also jumped off a balcony to hurt herself. *Id.*

The eating disorder lasted until at least the spring of 2012. VRP 1151. It relapsed when L.Q. briefly tried going back to Bellevue High School. VRP 1192. The nightmares and sleeplessness continued. VRP 917.

The School District's medical expert, Russ Vandenbelt, M.D., opined that the School District did not cause L.Q.'s eating disorder, anxiety and depression. VRP 761-62. He dismissed the bulimia as probably genetic. VRP 799. But he acknowledged that L.Q. had never been treated for mental health problems before eighth grade. VRP 787.

C. The School District Knew About Bus Misbehavior.

When Ms. Frieboes-Gee became principal of Chinook in 2008, she heard that the Chinook buses were rowdier and noisier than other middle school buses. VRP 527, 542. In the 2009-10 school year, at the request of a bus driver, she twice came out to a bus to talk to students about misbehavior. VRP 543. Mr. Kempisty, who was responsible for working with Chinook's bus drivers, also knew as of 2008 that Chinook "had more bus incidents than other schools." VRP 542, 604.

According to a summary of bus discipline tickets, unsafe or threatening incidents occurring on Chinook Middle School buses prior to L.Q.'s eighth grade year included the following: a) students threw things – such as a backpack and a water bottle – on at least four occasions; b) on

October 23, 2009, a student was observed “climbing over seats” and shouting; c) on November 20, 2009, a student hit another student and, in a separate incident, a student hit, pushed and grabbed someone; d) on December 15, 2009, a student used obscene language and “threatened other students”; e) on May 11, 2010, a student “pinched another student in a caressing manner” constituting “unwanted touching”; f) on June 2, 2010, a student threatened other students with harm despite being “warned to stop many times”; and g) on June 9, 2010, a student “punched another student multiple times even after instructed not to.” Trial Exhibit 10. There were also many incidents of students defying drivers’ warnings and instructions. *Id.* A month before the December 2010 incident involving B.T., a student suffered a bloody nose when attacked on a Chinook bus. *Id.*, p. 3.

D. Bus Drivers Were Supposed to Prevent Bullying and Harassment.

Bellevue School District Policy 1601 prohibited harassment and bullying of students and required all employees (including bus drivers) “to correct or report” violations. Trial Exhibit 20, p. 1. The bus driver’s job included being aware of what students are doing. VRP 545. Drivers had authority to reassign seats or even ban students from riding. *Id.*

For the 2010-11 school year, Bellevue’s school bus drivers received training called “Putting the Brakes on Harassment” describing

how to recognize student harassment and convey to children reporting it that “you have taken them seriously.” Trial Exhibit 24, pp. 1-2. The training materials said:

Harassment in connection with school transportation can make students feel like they want to avoid riding the school bus. The Office for Civil Rights, a branch of the U.S. Department of Education, has said that the particular characteristics of the school bus experience can make unwelcome behavior which occurs on the bus even worse for a student victim than when it takes place elsewhere in school settings. The driver’s primary focus must be on driving which may make students feel like there’s no one watching....

Drivers have the primary responsibility to act when they see or hear harassing behaviors.

Id., p. 2. The materials also noted that harassment 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,” they fear retaliation or criticism, or they “already have low self-esteem and think they deserve it.” *Id.*, p. 3. The materials concluded:

More than just bullying, harassment can be a barrier to learning as well as a serious safety issue on the school bus...Harassment of students is a major concern because of the profound educational, emotional and physical consequences for the targeted students.

Trial Exhibit 24, p. 5.

Ms. Aviles, who drove the afternoon bus for most of L.Q.'s eighth grade year, testified that it's "up to driver discretion" whether to write discipline tickets and she personally believed that other drivers issued more tickets than necessary. VRP 725. Ms. Aviles (whose former last name was Balmer) wrote only two tickets from 2009 to 2011 and *none during L.Q.'s eighth grade year*. Trial Exhibit 10.

E. The Trial Court Narrowed L.Q.'s Claims to Negligently Allowing Harassment on the Bus in Eighth Grade.

The Complaint, filed in February 2014, alleged that the Bellevue School District harmed L.Q. and her parents by breaching various duties including the special duty to protect students from reasonably anticipated dangers and the separate duty to "make school bus travel safe." CP 6. The trial court dismissed a claim of negligent infliction of emotional distress, stating that it was based on L.Q. "viewing the assault of her friend on the school bus" and that a bystander to a traumatic event must be the victim's family member in order to bring such a claim. CP 99-101 (Order). Shortly before trial, the trial court also granted the School District's motion to dismiss "any claims for damages arising from conduct of students after [L.Q.] was no longer attending Chinook Middle School," stating there was no evidence that the School District had any notice of L.Q.'s harassment "other than on the school bus while she was an eighth grader at Chinook

Middle School.” CP 834, 837. The pre-trial rulings limited the scope of the case to whether the School District was negligent in not preventing the alleged physical assault and harassment of L.Q. “on the bus in her 8th grade year.” CP 834-35.

In accordance with these rulings, the trial court excluded evidence concerning harassment after eighth grade or on school grounds. CP 837. The trial court also excluded expert testimony as to any damages not reasonably certain to be unrelated to L.Q. witnessing B.T.’s assault. CP 628, 837. The School District argued that the latter exclusion was necessary because, with the emotional distress claim dismissed, it could not be held liable for damages L.Q. suffered as a bystander. CP 542.

F. The Trial Court Declined to Instruct the Jury on the Special Protective Duty or the Common Carrier Duty.

Relevant to duty, appellants originally proposed Washington Pattern Instructions 10.01 and 10.02, as well as the following two jury instructions:

- In addition to the duty to exercise ordinary care, when a student is on a school bus a school district and the bus driver owe that student a duty of the highest degree of care consistent with the practical operation of the bus.

CP 751-753, citing *Yurkovich v. Rose*, 68 Wn.App. 643, 648 (1993) and *Webb v. City of Seattle*, 22 Wn.2d 596, 602 (1945).

- Defendant, as a school district, owes to its students a duty to anticipate reasonably foreseeable dangers and take

precautions to protect its students from such dangers, including the harmful actions of other students. This duty only extends to wrongful activities that are foreseeable. Activities will be foreseeable if the school district knew or should have known of the risk that resulted in their occurrence. In determining foreseeability the inquiry is not whether the school district knew or in the exercise of reasonable care should have known of the specific harm or action that occurred, but rather the inquiry is whether the general field of danger should have been anticipated by the school district.³

After the trial court limited L.Q.'s claims to what happened on the bus and allowed the School District to add contributory negligence as an affirmative defense, L.Q. presented supplemental jury instructions which clarified how different standards of care applied to the case. CP 996-98.

The proposed supplemental instructions said:

Negligence is the failure to exercise the duty of care applicable to a person or entity. In this case, different duties of care apply in plaintiffs' negligence claim against the defendant and in defendant's contributory negligence claim against plaintiff [L.Q.]. The duty of care that applies in the plaintiffs' negligence claim against the defendant is the highest degree of care. The duty of care that applies in defendant's contributory negligence claim against plaintiff [L.Q.] is ordinary care. Both of these duties of care will be explained further in other instructions.⁴

³ CP 754, citing *J.N. v. Bellingham School Dist.*, 74 Wn.App. 49, 56-60 (1967), *McLeod v. Grant County School Dist.*, 42 Wn.2d 316, 318-22 (1953), *Christensen v. Royal School Dist.*, 156 Wn.2d 62, 70 (2005), and *Carabba v. Anacortes School Dist.*, 72 Wn.2d 939, 955 (1967).

⁴ CP 996, citing WPI 10.01 and *Coyle v. Munic. of Metropolitan Seattle*, 32 Wn.App. 741 (1982).

When a student is on a school bus a school district and the bus driver owe that student a duty of the highest degree of care consistent with the practical operation of the bus. Any failure of a school district or a bus driver to exercise such care is negligence.⁵

L.Q. and her parents argued that once their case was limited to school bus matters, “the applicable duty of care is not ‘ordinary care’ but rather the ‘highest degree of care,’ ” consistent with Washington case law treating school bus operators as common carriers. CP 932. The School District argued that a school bus is not a common carrier because it does not serve the general public or charge fares. CP 900-02 (citing cases from Tennessee and Texas). The trial court rejected the common carrier instruction for a different reason, stating:

I didn’t see any case...exactly in this context, and I am troubled by the notion that if the same exact things happened in the lunchroom, the school district would have a different standard of care. So that’s why I’m not doing it in the absence of any binding authority.

VRP 1368-69.

L.Q.’s counsel objected to the omission of the common carrier instruction. VRP 1368. L.Q.’s counsel also objected to the trial court not

⁵ CP 998, citing *Yurkovich, Webb, Leach v. School Dist. No. 322 of Thurston Co.*, 197 Wn.2d 384 (1938), *Philips v. Hargrove*, 161 Wn. 121, 296 (1931), and WPI 100.01 (Common Carrier – Duty to Passengers).

instructing the jury that the School District has a duty to anticipate reasonably foreseeable dangers and to protect students from those dangers.

VRP 1359.

Ultimately, the jury was instructed as follows regarding duty:

Jury Instruction No. 10. *Negligence is the failure to exercise ordinary care.* It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

CP 1024 (italics added).

Instruction No. 15. 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.*

Harassment, intimidation or bullying means 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.

CP 1029 (italics added).

The latter instruction used language from RCW 28A.300.285, a statute which requires school districts to adopt, distribute and implement

bullying and harassment prevention policies. The School District had quoted the statute in arguing that L.Q.'s case must be governed by "school harassment law" and not "a general theory of negligence." CP 656. The trial court used the statute's definition of harassment, instead of the "reasonably foreseeable" standard urged by appellants, in defining the district's duty of ordinary care. CP 1029.

After receiving the instructions, on July 2, 2015, the jury answered "no" to the question on the Special Verdict Form: "Was the Bellevue School District negligent?" CP 1037. It did not reach questions of proximate cause and damages. *Id.*

IV. ARGUMENT

A. Standard of Review.

This Court reviews de novo the alleged errors of law in a trial court's instructions to the jury. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266, 96 P.3d 386 (2004), citing *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). A court's omission of a proposed statement of the governing law will be "reversible error where it prejudices a party." *Barrett* at 267, quoting *Hue*, 127 Wn.2d at 92.

Existence of a duty is a question of law reviewed de novo. *Parrilla v. King County*, 138 Wn.App. 427, 432 (Div. 1, 2007); *Christensen v. Royal*

School Dist., 156 Wn.2d 62, 67 (2005). The existence of a legal duty is to be determined by reference to considerations of public policy. *Parilla* at 432. Existence of a duty “depends on mixed considerations of logic, common sense, justice, policy and precedent.” *Christensen* at 67.

B. The School District Had a Heightened Duty As a Bus Operator

In declining to recognize the School District’s duty as a common carrier, the trial court erroneously stated that there is no binding authority. In fact, this Court’s decision in *Yurkovich*, cited in the trial court by L.Q., is controlling here.

In *Yurkovich*, a girl was killed in an accident after a school bus driver dropped her off on a highway without activating the “stop” bar or warning lights, and without ensuring that she crossed in front of the bus instead of behind it, as regulations required. 68 Wn.App. at 646. Affirming a directed verdict of negligence, this Court said: “Under the common law, **school bus operators owe child passengers a duty of the highest degree of care** consistent with the practical operation of the bus.” *Id.* at 648 (bold added), citing *Webb v. City of Seattle*, 22 Wn.2d 596, 602 (1945). That heightened duty applied to the two school districts which operated the bus as well as the bus driver. *Id.*

In *Yurkovich*, the school districts argued that the student’s maturity and familiarity with the area should have limited the “quantum of care” required, citing *Benjamin v. Seattle*, 74 Wn.2d 832 (1968), a case unrelated to schools. *Id.* at 651. Rejecting that argument, this Court said in part:

Benjamin represents the rule applied generally to a common carrier. School buses are a specialized type of carrier with specific duties **above those of a common carrier.**

Id. at 652 (bold added). Thus, contrary to the trial court’s reasoning in this case, an *even higher standard of care* is required for a school bus than for other carriers. *Id.*

The duty applies regardless of the fact that a school’s action or inaction may have different consequences in a classroom than in a school bus. In fact, the two settings should be treated differently because they are appreciably different. As the Bellevue School District’s own training materials noted, a bus driver must pay attention to the road and cannot watch students as closely as a teacher in a classroom can. Also, if a student is threatened with harm in a classroom, she can walk away, but a student on a moving vehicle is captive until it stops and lets her out. Here, for example, L.Q. was trapped on the bus and could not escape the boys’

tripping, shoving, hornet-stinging and touching by simply walking away. Moreover, the boys consciously took advantage of the bus driver's limited ability to see what was going on, stepping up harassment once they realized how easy it was. Under these circumstances, considerations of public policy weigh heavily in favor of imposing a common carrier duty on the school bus.

In fact, school buses have been treated as common carriers in this state for more than 75 years. *Leach v. School Dist. No. 322 of Thurston Co.*, 197 Wn.2d 384, 386 (1938), *Philips v. Hargrove*, 161 Wn. 121, 296 (1931). Common sense dictates affording children at least the same level of protection as adults. In sum, based on established precedent as well as policy considerations, this Court should reverse the trial court and hold that the School District owed a heightened duty of care to L.Q.

C. The Trial Court's Jury Instructions Warrant Reversal.

Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. *Barrett*, 152 Wn.2d at 266, citing *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). Reversal of jury instructions is appropriate when instructions as a whole allow the jury to misapply the law. *Falk v. Keene Corp.*, 113 Wn.2d 645, 656, 782 P.2d 974 (1989). Parties preserve objections to jury

instructions for appellate review if they object and the trial court understands the substance of the objection. *Crossen v. Skagit County*, 100 Wn.2d 355, 359, 669 P.2d 1244 (1983).

“The jury should be instructed in accordance with the facts.” *Allison v. Dept. of Labor and Industries*, 66 Wn.2d 263, 267, 401 P.2d 982 (1965). “A party is entitled to have the jury instructed on his or her theory of the case as long as there is evidence to support the theory.” *Ramey v. Knorr*, 130 Wn.App. 672, 688, 124 P.3d 314 (2005). “Where there is substantial evidence to support a theory, a trial court *must* instruct the jury on that theory.” *Id.* (emphasis added). Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error. *Barrett* at 266-67, citing *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

1. Evidence Supported L.Q.'s Negligence Theories.

Here, there was ample evidence to support L.Q.'s theory that the School District breached its duties to protect her. The risk on the bus was apparent from the numerous tickets issued for violent and threatening behavior and defiance on the Chinook bus routes prior to her eighth grade year. Also, Chinook's principal and assistant principal both admitted knowing as of 2008 that Chinook's school buses were unusually rowdy.

Most obviously, the December 2010 attack on B.T. should have alerted the School District to pay much closer attention to the boys involved. S.T., the ringleader, had a history of incidents warranting particular caution. There was notice, too, from the welts that frequently appeared on the arms and necks of L.Q. and her friends as a result of abuse on the bus. Finally, the district's own training materials demonstrated an awareness that a school bus generally has less supervision than a classroom and therefore poses a greater risk of harassment. Based on these warning signs, and the extensive testimony about actual harm to L.Q. as a result of the School District's inaction, she had sufficient evidence to present her negligence theories to the jury. *Ramey*, 130 Wn.App. at 688.

2. The Trial Court Failed to Permit L.Q. to Present Her Theories.

The trial court's instructions completely prevented L.Q. from presenting a negligence case to the jury. Not only did the trial court erroneously conclude that the School District could not be a negligent as a common carrier, it also declined to instruct the jury about the negligence standard based on a special relationship between a school and its students. The jury was asked to determine if the School District knew of some specific, intentional bullying or harassment meeting the definition in RCW 28A.300.285(2), which is simply not a question that L.Q. and her parents

raised in their lawsuit. (They could not have done so, as the statute does not authorize a lawsuit based on a student behaving in the defined manner.)

In fact, in proposing to instruct the jury about the harassment statute, the School District drew a distinction between “school harassment law” and “a general theory of negligence” and argued that only the former should apply. By granting the requested instruction, the trial court essentially took the case out of the negligence realm and transformed the essence of the action as the trial was ending. Because L.Q. was unable to present her negligence theory despite evidence supporting it, she is entitled to a new trial. *Barrett* at 266-67.

3. The Trial Court Misstated the Law.

The jury instructions misstated the law by stating that only “ordinary care” is owed on a school bus, where the “highest care” is owed. They also misstated the law regarding school negligence, which does not require proof of a known specific threat in order to trigger a protective duty. A special protective duty “arises where one party is entrusted with the well being of another.” *Niece v. Elmview Group Home*, 131 Wn.2d 39, 50, 929 P.2d 420 (1997). It is based on a defendant’s “assumption of responsibility for the safety of another.” *Id.* at 46. The rationale for the caretaker’s duty is that, when a vulnerable person is placed in a

defendant's care, that person loses the ability to protect himself from harm. *Niece* at 44. In such a situation, "a special relation exists between the defendant and the other which gives the other a right to protection." *Id.* at 43. "Many special relationships give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties." *Id.* at 44. For example, a school must protect students in its care from reasonably anticipated dangers, an innkeeper must protect guests, and a hospital or nursing home must protect patients. *Id.*

The trial court's Instruction No. 15 required L.Q. to prove that the School District knew or should have known that **a specific student** was targeted by another student's **specific conduct** meeting the statutory definition of bullying, harassment or intimidation. But Washington courts have rejected similar arguments. For example, in *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn.App. 517, 522, 307 P.3d 730 (2013), the plaintiff was molested at age 12 by a volunteer leader of a church-sponsored Boy Scout group. The Court said:

The defendants contend none of them owed N.K. a duty of protection because they did not possess prior specific knowledge that Hall posed a threat to boys.... But the existence of a duty predicated on a protective relationship requires knowledge only of the "general field of danger" within which the harm occurred. *McLeod v. Grant County*

School Dist. No. 128, 42 Wn.2d 316, 321, 255 P.2d 360 (1953).

N.K., 175 Wn.App. at 526. Thus, to establish the Bellevue School District's duty arising from a special protective relationship, L.Q. need *not* prove the District knew she was targeted by particular boys posing particular harms enumerated in RCW 28A.300.285(2). *Id.*

In *McLeod*, the plaintiff was raped by older students during a school recess in a dark unlocked room beneath school bleachers. 42 Wn.2d at 318. The Court held that the victim's suit against the school district could go forward even though school officials were unaware of the "vicious propensities" of the older students. *Id.* at 321. Because a child is compelled to attend school and has an involuntary relationship with the school district, the district has a duty "to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers." *Id.* at 319-320. "The pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a **general field of danger** which should have been anticipated." *Id.* at 321 (bold added). *Accord, J.N. v. Bellingham School Dist.*, 74 Wn.App. 49, 58-59, 871 P.2d 1106 (1994) (summary judgment was improper, even though the school district did not know that the student who assaulted the

plaintiff posed a danger, because an assault in unsupervised restrooms was reasonably foreseeable). See also *Christensen*, 156 Wn.2d at 69 (referring to “the well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care”).

Here, the abuse that L.Q. endured on the bus was within the general field of danger which the Bellevue School District should have anticipated based on prior incidents and its own training materials, as discussed above. But the jury was not told that the general field of danger even mattered. Instead, the jury was told that the School District lacked a duty to prevent L.Q.’s harassment unless it had reason to know that L.Q. herself or another specific student was suffering intentional bullying or harassment causing particular kinds of harm. In effect, this instruction shifted the responsibility for anticipating harm from the School District to students, stripping them of protection unless they had the courage to speak out. By telling the jury that ordinary care was bounded by RCW 28A.300.285(2) rather than reasonable foreseeability, the trial court misstated the law pertaining to the breach of protective duty alleged in this case. For that additional reason, reversal is warranted. *Falk*, 113 Wn.2d at 656.

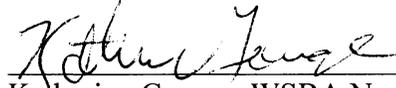
V. CONCLUSION

In sum, the trial court prevented appellants from arguing their theory of the case by rejecting jury instructions on the special protective duty and the common carrier duty applicable to school buses. The instructions contradicted this Court's precedents and deprived L.Q. and her parents of a fair trial. For the foregoing reasons, this Court should reverse the jury verdict, vacate the judgment and order a new trial applying the correct standard of care.

Dated this 15th day of January, 2016.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on January 16, 2016, I caused delivery of a copy of the foregoing Brief of Appellant by e-mail, per agreement, to the following:

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