

COURT OF APPEALS NO.: A08-0612

STATE OF MINNESOTA

OFFICE OF
APPELLATE COURTS

IN COURT OF APPEALS

JUN 19 2008

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JW on behalf of BRW, minor child, Appellants,

vs.

Independent School District # 271, et. al., Respondents.

APPELLANTS' REPLY BRIEF

PHILIP G. VILLAUME

Attorney at Law
Atty. Reg. No. 112859

VILLAUME & SCHIEK, P.A.
2051 Killebrew Drive
Suite 611
Bloomington, MN 55425
952-851-9500

ATTORNEY FOR APPELLANTS

SCOTT BALLOU

Attorney at Law
Atty. Reg. No. 4364

BROWNSON & BALLOU
225 South Sixth Street
Suite 4800
Minneapolis, MN 55402
612-332-4020

ATTORNEY FOR RESPONDENT,
INTERMEDIATE DISTRICT 287

EHRICH L. KOCH

Attorney at Law
Atty. Reg. No. 159670

LOMMEN, ABDO, COLE, KING &
STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
612-339-8131

ATTORNEY FOR RESPONDENT, ISD
271

JUDITH MLINAR SEEBERGER

Attorney at Law
Atty. Reg. No. 269670

REDING & PILNEY
8661 Eagle Point Blvd.
Lake Elmo, MN 55042
651-702-1414

ATTORNEY FOR RESPONDENT, ADAM
SERVICES, INC.

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STATEMENT OF THE CASE

On or about December 4, 2006, the Appellants, JW, mother of BRW, minor child, sued Independent School District # 271 (a/k/a "Bloomington Public Schools" or "Transportation Center for Independent School District 271" or "Bloomington"), 287 Intermediate District (a/k/a "Hosterman" or the "STRIVE program") and Adam Services, Inc. (a/k/a "Adam Services"), for Negligence, Negligent Supervision, Respondeat Superior, and Joint Venture/Joint Enterprise for inappropriate sexual conduct relating to two students, CR, minor child, and BRW.

All Respondents essentially denied the allegations and brought motions for summary judgment in January of 2008. Also in January of 2008, Appellants brought a motion to amend the Complaint to seek punitive damages against Adam Services.

On March 7, 2008, the district court granted both School Districts' motions for summary judgment based on immunity, however, the district court denied Adam Services' (not a school district) motion to dismiss stating that there was a cause of action for negligence and respondeat superior. The district court also denied Appellants' motion to seek punitive damages against Adam Services.

In May of 2008, Appellants filed their brief with the Court of Appeals and sought relief on three¹ (3) issues, which were ultimately dismissed by the district court. In April of 2008, Adam Services timely filed a notice of review.

¹Immunity against both School Districts and Punitive Damages against Adam Services.

In June of 2008, all Respondents filed briefs in response to Appellants' brief submitted in May of 2008. This is Appellants' response to all of the Respondents' Briefs.

LEGAL ISSUES

- I. Whether the district court erred in denying Adam Services' motion for summary judgment when the district court determined that the abuse between the two students was foreseeable under a negligence theory.

The district court stated that the question of whether or not the harm to BRW was foreseeable was a disputed issue of material facts because CR was approximately 13 years old at the time, the bus driver was instructed that CR sit alone in the front seat and CR had been diagnosed with Emotional Behavior Disorder.

Bjerke v. Johnson, 742 N.W.2d 660 (Minn. 2007); Connolly v. Nicollet Hotel, 254 Minn. 373, 95 N.W.2d 657 (Minn. 1959); K.L. v. Riverside Medical Center, 524 N.W.2d 300 (Minn. Ct. App. 1994), review denied; Whiteford ex rel. Whiteford v. Yamaha Motor Corp., 582 N.W.2d 916 (Minn. 1998).

- II. Whether Bloomington, under a negligence theory, had a legal duty to protect BRW from the sexual assaults that occurred between CR and BRW.

The district court did not address this issue directly.

See Issue I.

- III. Whether Hosterman, under a negligence theory, had a legal duty to protect BRW from the sexual assaults that occurred between CR and BRW.

The district court did not address this issue directly.

See Issue I.

- IV. Whether Bloomington and Hosterman would be vicariously liable for the acts of their agents when all conduct occurred within work related time and place.

The district court did not address this issue directly.

Edgewater Motels Inc. v. Gatzke, 277 N.W.2d 11 (Minn. 1979).

STATEMENT OF FACTS

The facts of this case have been argued extensively by all parties involved.

Appellants state that all Respondents have argued issues that are disputed or ignored facts that are relevant, and for the purposes of summary judgment the Court of Appeals must accept the facts in the light most favorable to the Appellants, and in particular the facts that CR stated in his deposition that he inappropriately touched BRW on a daily basis, that the bus aides fell asleep and generally did not pay attention on bus # 219 and bus # 419, and lastly that CR could sit wherever he wanted on bus # 219 and bus # 419 when the emergency forms mandated that CR sit alone in the front seat of the bus. It is the position of Appellants that CR is the most objective witness in this case because he is not a party to the lawsuit and he has already plead guilty to sexually assaulting BRW in Juvenile Court.

Appellants, in their reply brief, first argue that the sexual abuse between BRW and CR was foreseeable to Adam Services and thus the district court did not error in denying Adam Services' motion for summary judgment. (Adam Services' Brief, p. 19 - 27). Appellants also rely on their original brief regarding the issue of punitive damages against Adam Services and will not address the punitive damages issue against Adam Services in their reply brief. (See Appellants' Brief, p. 48 - 52).

Secondly, Appellants will respond in this reply brief to the fact that both Bloomington and Hosterman did have legal duties, under a negligence theory, to protect

BRW from assaultive conduct by CR. (Bloomington's Brief, p. 41 - 43; Hosterman's Brief, p. 8 - 13). Appellants also rely on their original brief regarding the issue of immunity² against both Bloomington and Hosterman and will not address the issue of immunity against Bloomington and Hosterman in their reply brief. (Appellants' Brief, p. 37 - 47). Although, the district court's Order and Memorandum did not directly address the issues of negligence and vicarious liability in regards to the two School Districts, these legal issues were litigated between the parties, and because of the nature of the legal issues, the Appellants respectfully request that the Court of Appeals consider and determine whether the Appellants can prove negligence and vicarious liability against the two School Districts in this appeal.

STANDARD OF REVIEW AND LEGAL ARGUMENTS

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment rule applies to all actions whether legal or equitable. Slezak v. Ousdigian, 260 Minn. 303, 110 N.W.2d 1 (Minn. 1961). Summary judgment is ordinarily denied when issues of material fact are outstanding or when issues of law run against moving party. F. & H. Investment Co. v. Sachman-Gilliland Corp., 305 Minn. 155, 232 N.W.2d 769 (Minn. 1975). A material fact is one that will affect the result or outcome of the case. Zappa v. Fahey, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (Minn. 1976).

²Appellants also rely on Adam Services' argument outlined in their brief that Bloomington and Hosterman are not entitled to immunity. (Adam Services' Brief, p. 27 - 36).

The existence of a duty is a question of law the reviewing court decides de novo. Larson v. Larson, 373 N.W.2d 287, 289 (Minn. 1985). The general common law rule is that a person does not have a duty to give aid or protection to another or to warn or protect others from harm caused by a third party's conduct. Delgado v. Lohmar, 289 N.W.2d 479, 483-84 (Minn. 1979). An exception to this general rule arises when the harm is foreseeable and a special relationship exists between the actor and the person seeking protection. Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168-69 (Minn. 1989).

I. WHEN VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE APPELLANTS, ADAM SERVICES' CONDUCT WAS REASONABLY FORESEEABLE BECAUSE THE BUS DRIVER HAD KNOWLEDGE THAT CR HAD TO SIT IN THE FRONT SEAT OF THE BUS AND THE BUS DRIVER, BY HIS OWN ADMISSIONS, DID NOT ENFORCE THE RULE THAT CR SIT IN THE FRONT OF THE BUS AND THERE IS SUBSTANTIAL EVIDENCE THAT THE BUS AIDES WERE FALLING ASLEEP ON THE BUS AND/OR WEARING HEADPHONES AND IN GENERAL WERE NOT PAYING ATTENTION TO STUDENTS WITH SPECIAL NEEDS.

The basic elements of a negligence claim are: (1) existence of a duty of care; (2) breach of that duty; (3) proximate causation; and (4) injury. Bjerke v. Johnson, 742 N.W.2d 660, 664 (Minn. 2007); citing, Schmanski v. Church of St. Casimir of Wells, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (Minn. 1954). The question of whether a legal duty exists is a question of law for the court. Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 924 (Minn. 1986). The existence of a legal duty is a basic element necessary to maintain a claim for negligence. Schmanski v. Church of St. Casimir of Wells, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (Minn. 1954). Whether a legal duty exists is generally a

question of law to be determined by the court. Larson v. Larson, 373 N.W.2d 287, 289 (Minn. 1985). Generally, **negligence is an issue of fact not appropriate for summary judgment.** Otto v. City of St. Paul, 460 N.W.2d 359, 361 (Minn. Ct. App. 1990) (emphasis added).

“Duty” is defined as “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” Minneapolis Employees Retirement Fund v. Allison-Williams Co., 519 N.W.2d 176, 182 (Minn. 1994) (citing Rasmussen v. Prudential Ins. Co., 277 Minn. 266, 268-9, 152 N.W.2d 359, 362 (Minn. 1967)).

Under Minnesota law, an act or omission is not negligent unless the actor has knowledge that it involves harm to others. McDonald v. Fryberger, 46 N.W.2d 260, 263 (Minn. 1951). Knowledge is an essential element of negligence, and while knowledge may, in some circumstances, be imputed, such imputation will only occur when a party should have known that harm should be anticipated. Rue v. Wenland, 33 N.W.2d 593, 595 (Minn. 1948); Despatch Oven Co. v. Rauenhorst, 40 N.W.2d 73, 81 (Minn. 1949); M.M.D. v. B.L.G., 467 N.W.2d 645, 647 (Minn. Ct. App. 1991).

A. When viewing the facts in the light most favorable to BRW, the harm caused to BRW was foreseeable to Adam Services.

A duty is imposed if the resulting injury was reasonably foreseeable. Bjerke v. Johnson, 742 N.W.2d 660, 667 (Minn. 2007). It is not necessary that a defendant have notice of the exact method in which injury will occur “if the possibility of an accident was

clear to the person of ordinary prudence.” Connolly v. Nicollet Hotel, 254 Minn. 373, 381-82, 95 N.W.2d 657, 664 (Minn. 1959); see also Bjerke, supra. A duty to prevent a wrongful act by a third party will be imposed where those wrongful acts can be reasonably anticipated. K.L. v. Riverside Medical Center, 524 N.W.2d 300, 302 (Minn. Ct. App. 1994); see also Sylester v. Northwestern Hosp. of Mpls., 236 Minn. 384, 53 N.W.2d 17 (Minn. 1952); Roettger v. United Hospitals of St. Paul, Inc., 380 N.W.2d 856 (Minn. Ct. App. 1986)

When it is clear whether an incident was foreseeable, the courts decide the issue as a matter of law, **but in close cases, foreseeability is reserved for the jury.** Whiteford ex rel. Whiteford v. Yamaha Motor Corp., 582 N.W.2d 916, 918 (Minn. 1998) (emphasis added); see also Bjerke, supra.

Adam Services did not address the issue of whether or not a special relationship existed between BRW and Adam Services in their brief. (Adam Services’ Brief, p. 19 - 27). It seems clear that a special relationship did exist between the parties. (See App., p. 768 - 775).

The district court stated the following regarding foreseeability as it relates to Adam Services: “A.S. [Adam Services] requests summary judgment based on the contention that the sexual abuse was not foreseeable because A.S. had not been informed of any prior history of sexual abuse. The Court is unpersuaded that A.S. could not have foreseen the abuse because : 1) C.R. was approximately 13 years old at the time; 2) the bus driver was

instructed that C.R. must sit alone in the front seat; and 3) C.R. had been diagnosed with Emotional Behavioral Disorder. Accordingly, the question of whether or not the harm was foreseeable is a disputed issue of material fact.” (App. p. 1531).

The possibility of sexual misconduct between CR and BRW would be clear to a person of ordinary prudence because when a bus aide falls asleep on a bus or wears headphones on a bus it is foreseeable that sexual misconduct would occur, especially on a special needs bus. Although stated by Adam Services that Baggett only worked April 6 (Wednesday), 7, 8, 11, 12, and 13, there was evidence that Baggett was an aide for the first 2 to 3 weeks that CR rode on bus # 219. (See Adam Services’ Brief, p. 6; see also Bloomington’s Brief, p. 11). Prior to April 6, 2005, Adam Services had reprimanded Baggett twice for failing asleep on the bus, however, management at Adam Services did not terminate Baggett. Sauer testified that from March 31, 2005 through April 13, 2005, that Baggett fell asleep on the bus at least three times and that she wore headphones during that time frame at least five times. The fact that Baggett fell asleep on bus # 219 and that the fact that she would wear headphones while she was a bus aide on bus # 219 is unrebutted.

Sauer and Lehman (a person in a managerial position for Adam Services) stated that sleeping on the bus and having headphones on the bus would be a dereliction of a bus aides’ duties. CR stated in his deposition (and through other statements) that the bus aide would also fall asleep on bus # 219, and when the bus aide fell asleep, that is when he

would touch BRW sexually inappropriately. CR stated in his deposition that he touched BRW inappropriately sexually on a regular basis while he was on bus # 219. CR also stated in his deposition that the bus driver and bus aide(s) did not pay attention. Evidence that CR touched BRW sexually inappropriately while on bus # 219 is overwhelming.

Based on this evidence alone, a reasonable person could foresee that sexual misconduct would occur and that the wrongful acts committed by CR could be reasonably anticipated.

In addition, Adam Services had knowledge that special needs students require more attention, assistance, patience, and caring than their peers. Adam Services knew that CR was diagnosed with Emotional Behavioral Disorder³ (a/k/a “EBD”). Students with EBD have a propensity to act out more on the bus than their peer students, thus making the sexual misconduct between CR and BRW more foreseeable.

Further, it is undisputed that Sauer was verbally instructed by someone at the group home on the first or second day CR rode the bus that CR was to sit in the front seat alone. (Adam Services’ Brief, p. 22; see also Bloomington’s Brief, p. 11). Because Sauer was instructed to have CR sit in the front of the bus it makes it more foreseeable, that if CR did not sit in the front of the bus inappropriate sexual contact would occur between CR and BRW. It is Appellants’ position that there is no difference between Sauer being instructed to have CR sit in the front of the bus by his surrogate parent or

³For a definition of EBD please see Minn. R. 3525.1329.

whether he had been provided that information on the emergency form. In either situation, pursuant to Lehman's deposition testimony, Sauer would be required to have CR sit in the front of the bus even if he was not told the reason why CR had to sit in the front of the bus.

Lehman stated that Sauer would not have any discretion⁴ to allow CR to sit any place but in the front of the bus. Obviously, this instruction was not followed. It is also important to note that Sauer never relayed to the bus aides that CR should sit in the front of the bus alone, which constitutes more negligent conduct on the part of Adam Services. (App. p. 87).

Bloomington stated the following regarding the instruction Sauer received on the first or second day CR started to ride on bus # 219:

⁴Lehman stated the following regarding receiving instructions from a parent or a coordinator from a group home, such as Margaret Nelson:

Attorney Koch: If a driver is told by a parent or guardian whoever is responsible for that child to have the child sit alone behind the driver, would you expect that instruction to be followed?

Answer Lehman: Yes.

Attorney Koch: So asking you to assume that if the director of Cody's [referencing CR] group home told Sid Sauer that Cody should sit up front alone, you would expect this to be followed?

Answer Lehman: Yes.

Attorney Koch: And the driver wouldn't need to know why that was the request, right?

Answer Lehman: No.

Attorney Koch: And you wouldn't expect him to exercise any discretion and decide later to sit the child anywhere he wanted?

Answer Lehman: No.

(App. p. 944).

Mr. Sauer recalled that on the first or second day that C.R. rode Bus 219, Mr. Sauer was informed by Margaret Nelson, C.R.'s surrogate parent, that C.R. was to sit up front in one of the front seats. (*Id.* at 27; A. 86) Mr. Sauer testified: Q. Tell me how that discussion came about? A. She brought [C.R.] out to the bus and basically told me that. Q. What did she tell you again? A. That [C.R.] should sit in one of the front seats. (*Id.*) Mr. Sauer did not ask her why C.R. was to sit in the front seat. (*Id.*) Mr. Sauer never relayed to the bus aides that C.R. should sit in the front of the bus. (*Id.* at 29; A. 87.) Mr. Sauer admitted that he allowed C.R. to sit in other seats of the bus after he received that instruction [sit alone in the front of the bus]. (*Id.* at 27; A. 86). Mr. Sauer did not continue to follow the instruction to have C.R. sit up in front because '[C.R.] did nothing wrong on the bus and I felt it was punishment.' (*Id.* at 49; A. 92). Adam⁵ expects, however, that if a parent or guardian tells its driver to have a child sit alone in the front, this instruction will be followed. (Lehman Depo. pp. 58-59; A. 112). The driver need not know why this request was made, but should follow the parent's directive. (*Id.* at 59; A. 112).

(Bloomington's Brief, p. 11 - 12).

Moreover, there is evidence that the bus aides did not have proper training and that at least one bus aide was blind in one eye and had difficulty moving around the bus because he had a bad back and shoulder (Bentley). Bentley had not received any training since 1976 regarding special needs students. Bentley also stated that he did not receive any training from Adam Services, thus because Adam Services did not provide training to Bentley there is a per se violation of law. Minn. R. 7470.1700, subp. 3 states that bus aides must receive training regarding special needs students.

It is also the position of the Appellants' that it is unclear whether the amended emergency form, dated January 24, 2005, stating that CR should sit in the front seat alone,

⁵This issue is in dispute because Adam Services stated in their brief the following, "A driver is not necessarily obligated to comply with a verbal request received from someone at the bus stop." Adam Services' Brief, p. 12.

was ever received by Adam Services. Adam Services has denied that they ever received an emergency form indicating that CR should sit alone in the front seat of the bus, however, it is possible that they received the emergency form stating that CR should sit alone in the front of the bus. Engstrom stated he thought that he or a person from his office faxed over the amended emergency form regarding CR dated January 24, 2005 to Adam Services before Summer school began in 2005.

Bloomington stated the following regarding the two emergency forms and whether they were both forwarded to Adam Services:

Darwin Hauser is the transportation clerk at Bloomington School District # 271 who does the routing for special education students. (Hauser Depo. p. 7; A. 169). When Mr. Hauser receives the fax from Ms. Verplank containing the student information, he enters the student information into the routing software program and makes whatever changes are necessary for the routing of the student. (*Id.* at 10; A. 170). This database contains the names, the emergency contact information, and any specific instructions regarding the student. (*Id.* at 11; A. 170). With regard to C.R., the information would state the nature of C.R.'s disability as EBD **and contain the instruction that C.R. was to 'sit behind driver alone in the seat.'** (*Id.*). Mr. Hauser's responsibility was to transmit either by facsimile or by hard copy, the information form to Adam. (*Id.* at 20; A. 172). The bus drivers can be informed of information on a student orally or they can be informed by way of the emergency form. (Engstrom Depo. P. 28, A. 468). **It was Mr. Engstrom's recollection that Adam was specifically informed that C.R. was to sit in the front seat alone.** (*Id.* at 76; A. 480.)

(Bloomington's Brief, p. 9) (emphasis added).

Adam Services admits more negligent conduct in their brief by stating that "neither Mr. Sauer nor Adam Services was ever notified of the basis for this request, that they were advised for how long CR was to sit in the front seat alone, or that they were made

aware of the harm the instruction was meant to prevent.” (Adam Services’ Brief, p. 22). Adam Services’ actions of not following up with regards to why CR was mandated to sit in the front seat alone is further evidence of their negligent conduct, it does not support their position that they were not negligent. Sauer never advised his supervisors of the rule that CR sit alone in the front of the bus, Sauer never asked why CR had to sit alone in the front of the bus, nor did Sauer ever follow the rule that CR sit alone in the bus. Certainly the verbal instruction would have alerted Sauer that CR could act out inappropriately toward other students.

It is the Appellants’ position that it is clear that the sexual misconduct between CR and BRW was foreseeable based on the reasons stated above, however, even if the Court of Appeals determines that foreseeability is a close case, then that issue is then reserved for the trier of fact.

The Appellants, for the purposes of summary judgment, have established sufficient facts to establish that the inappropriate sexual contact between CR and BRW was reasonably foreseeable. Therefore, the Appellants respectfully requests that the Court of Appeals’ affirm the district court’s Order and Memorandum and not dismiss this action against Adam Services.

II. WHEN VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE APPELLANTS, APPELLANTS HAVE ESTABLISHED PRIMA FACIE EVIDENCE THAT BLOOMINGTON WAS NEGLIGENT.

The duty of care with respect to transporting a school child extends until the safe deposit of the child at their scheduled destinations in a manner designed to allow their safe crossing of streets after they get off the school bus. Anderson v. Shaughnessy, 526 N.W.2d 625, 626 (Minn. 1995); see also Restatement (Second) of Torts § 314A cmt. c (1965). The foreseeability of a sexual assault usually hinges on whether the defendant was aware of the similar prior behavior by the third party involved. K.L. v. Riverside Med. Ctr., 524 N.W.2d 300, 302 (Minn. Ct. App. 1994), review denied.

The basic elements of a negligence claim⁶ are: (1) existence of a duty of care; (2) breach of that duty; (3) proximate causation; and (4) injury. Bjerke v. Johnson, 742 N.W.2d 660, 664 (Minn. 2007).

School Districts are liable for sudden, foreseeable misconduct which probably could have been prevented by the exercise of ordinary care. Raleigh v. Independent School District No. 625, 275 Minn. 572, 575 (Minn. 1978) (Supreme Court affirmed a jury award against the School District for negligent supervision of a mother and her child while they were on school grounds); see also Sheehan v. St. Peter's Catholic School, 291 Minn. 1, 3, 188 N.W.2d 868, 870 (Minn. 1971). In other words, School Districts can be negligent for sudden foreseeable misconduct. Id.

⁶For a more detailed analysis of the elements of negligence please refer to Section I.

A. When viewing the facts in the light most favorable to the Appellants, the claim of negligence should survive against Bloomington.

A duty is imposed if the resulting injury was reasonably foreseeable. Bjerke v. Johnson, 742 N.W.2d 660, 667 (Minn. 2007). Bloomington did not address the issue of whether or not a special relationship existed between BRW and Bloomington in their brief. (Bloomington' Brief, p. 1 - 45). It seems clear that a special relationship did exist between the parties. (See App., p. 682 - 684).

It is not necessary that a defendant have notice of the exact method in which injury will occur "if the possibility of an accident was clear to the person of ordinary prudence." Connolly v. Nicollet Hotel, 254 Minn. 373, 381-82, 95 N.W.2d 657, 664 (Minn. 1959); see also Bjerke, supra. A duty to prevent a wrongful act by a third party will be imposed where those wrongful acts can be reasonably anticipated. K.L. v. Riverside Medical Center, 524 N.W.2d 300, 302 (Minn. Ct. App. 1994).

When it is clear whether an incident was foreseeable, the courts decide the issue as a matter of law, **but in close cases, foreseeability is reserved for the jury.** Whiteford ex rel. Whiteford v. Yamaha Motor Corp., 582 N.W.2d 916, 918 (Minn. 1998) (emphasis added); see also Bjerke, supra.

Bloomington argued in their Brief that just because inappropriate sexual conduct occurred between CR and BRW it does not support a finding of negligence. (Bloomington's Brief, p. 41 - 43). Bloomington stated that there were "no facts presented to indicate that C.R. was at risk to engage in sexually inappropriate conduct

while being supervised by two adults....They saw nothing, as did all the adults who supervised B.R.W. and C.R....Given the undisputed facts of record, there is no evidence to suggest that the alleged sexual assaults were reasonably foreseeable given the present of the adult bus driver and bus aide who were always present to supervise B.R.W. and C.R.” (Bloomington’s Brief, p. 43). However, CR stated that the bus aide on bus # 419 fell asleep and even demonstrated at his deposition how he fell asleep. This sole fact alone, demonstrates that the sexual misconduct between CR and BRW was in fact reasonably foreseeable. Bloomington ignores this fact issue, where CR stated that the bus aide on bus # 419 fell asleep and did not pay attention to monitoring the students while they were on the bus. The possibility of sexual misconduct between CR and BRW (given what school officials new) would be clear to a person of ordinary prudence because when a bus aide falls asleep on a bus it is foreseeable that sexual misconduct would occur, especially on a special needs bus.

CR also stated in his deposition that the bus driver and bus aide(s) did not pay attention. Based on this evidence alone, a reasonable person could foresee that sexual misconduct would occur and that the wrongful acts committed by CR could be reasonably anticipated.

In addition, Bloomington had notice that CR had a history of acting out sexually and that he should not be around children under the age of 12. The emergency forms specifically instructed the bus driver and bus aide that CR must sit in the front seat alone.

However, this instruction, according to CR's and BRW's testimony was not followed. CR and BRW both stated they could basically sit wherever they wanted on bus # 419. Because Johnson was instructed to have CR sit in the front of the bus it makes it more foreseeable, that if CR did not sit in the front of the bus inappropriate sexual contact would occur between CR and BRW. Bloomington had knowledge that CR had a propensity to act out sexually, and thus CR's conduct toward BRW was more foreseeable to Bloomington.

Moreover, Bloomington's own manual describes the difficulty of transporting student with special needs, in particular students with EBD.

It is the Appellants' position that it is clear that the sexual misconduct between CR and BRW was foreseeable based on the reasons stated above, however, even if the Court of Appeals determines that foreseeability is a close case, that issue is then reserved for the trier of fact.

The Appellants, for the purposes of summary judgment, have established sufficient facts to establish that CR's conduct was reasonably foreseeable. Therefore, the Appellants respectfully requests that the Court of Appeals not dismiss this action against Bloomington.

III. WHEN VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE APPELLANTS, APPELLANTS HAVE ESTABLISHED PRIMA FACIE EVIDENCE THAT HOSTERMAN'S CONDUCT WAS NEGLIGENT BECAUSE THE SCHOOL STAFF AT HOSTERMAN HAD KNOWLEDGE THAT CR HAD A PROPENSITY TO ACT OUT SEXUALLY TOWARD OTHER STUDENTS, HOSTERMAN STAFF KNEW THAT CR HAD A HISTORY OF BEING AGGRESSIVE AND INTIMIDATING TOWARD OTHER STUDENTS, THAT CR SHOULD NOT BE AROUND CHILDREN UNDER THE AGE OF TWELVE UNSUPERVISED (CONSTANT SUPERVISION), HOSTERMAN STAFF KNEW THAT CR NEEDED MAXIMUM SUPERVISION, HOSTERMAN STAFF RECOMMENDED IN CR'S IEP THAT SPECIAL SEATING SHOULD BE GIVEN ON HIS BUS ROUTE, AND HOSTERMAN STAFF KNEW THAT BRW'S IEP STATED THAT HE NEEDED ADDITIONAL ASSISTANCE ON THE BUS ROUTE.

For more detailed analysis of negligence regarding school districts please refer to Section II.

Hosterman challenged the negligence claim on the issue that a special relationship did not exist between Hosterman and BRW because Hosterman relinquished custody and control of BRW and CR once they boarded the bus **and** on the issue of foreseeability. (Hosterman's Brief, p. 13 - 21) (emphasis added).

A. When viewing the facts in the light most favorable to BRW, a special relationship existed between BRW and Hosterman while BRW was on the school buses.

The Supreme Court of Minnesota stated the following regarding special relationships between parties:

The first prerequisite to a finding of a duty to protect another from harm is the existence of a special relationship between the parties...The first arises from the status of the parties, such as “parents and children, masters and servants, possessors of land and licensees, [and] common carriers and their customers.” Delgado, 289 N.W.2d at 483-84; Restatement (Second) of Torts §§ 314A, 315 (1965). The second arises when an individual, whether voluntarily or as required by law, has “custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection.” Harper v. Herman, 499 N.W.2d 472, 474 (Minn.1993); Restatement (Second) of Torts § 314A (1965). The third arises when an individual assumes responsibility for a duty that is owed by another individual to a third party.

Bjerke, 742 N.W.2d at 665.

Hosterman stated the following regarding BRW’s special relationship with Hosterman, “Although a special relationship may have existed between Hosterman, BRW and CR while they were attending the STRIVE Program at the Hosterman Education Center, that special relationship ceased when Hosterman relinquished custody and control of BRW and CR when they boarded the bus for transportation to and from Hosterman Education Center.” (Hosterman’s Brief, p. 15 - 16). Hosterman has admitted that there was a special relationship between CR, BRW and Hosterman, however, Hosterman stated that the special relationship between CR, BRW and Hosterman ended as soon as the students boarded the buses.

Hosterman essentially argued that they did not exercise any control over CR’s conduct or BRW’s conduct once they boarded the bus for transportation to and from Hosterman.

It is Appellants' position that Hosterman had a special relationship with BRW because they had control of CR's conduct because of CR's IEPs, and additional information regarding CR's propensity to act out sexual toward other students. Hosterman also had control over what happened to BRW because of BRW's IEP. Hosterman was responsible to make sure that every special needs students boarded the bus safely. Additionally, because BRW was a special needs student he was vulnerable thus creating a higher duty on Hosterman. Hosterman, when viewing the facts in the light most favorable to BRW, had a special relationship with BRW which extended to the school buses.

The failure to provide supervision by Hosterman increased the risk of harm to BRW. Hosterman undertook a duty owed by another to BRW. BRW relied on the undertaking of Hosterman. Therefore, there was a special relationship between Hosterman and BRW.

When viewing the facts in the light most favorable to the Appellants, Hosterman was responsible for providing safe transportation of their students while they rode on the bus because they had specific input on what controls should be used when students were traveling on the school buses to and from Hosterman. Safety of students while they were transported on the school buses was a collaborative effort between Hosterman, Bloomington, and Adam Services. The information regarding safely transporting students was discussed at CR's IEPs and BRW's IEP. Hosterman took no responsibility

to make sure that the bus drivers or bus aides were informed that CR had a propensity to act out sexually toward other students. There was a special relationship between BRW and Hosterman. Transportation issues were discussed regarding the safety of students and Hosterman provided recommendations as they related to the safe transportation of students, including CR and BRW.

Hosterman stated that the facts of this case are analogous to the facts in Carlson. Carlson v. Independent School District # 281, 5784 (Minn. Ct. App. 1996) (unpublished) (attached to Hosterman's Brief.); (see also Hosterman's Brief, p. 16). It is Appellants' position that Carlson is completely inapposite to the present case.

First, in Carlson the Court of Appeals dismissed Carlson's negligent maintenance claim against the School District based on immunity. Carlson, supra.; see also Minn. Stat. § 466.03. The Carlson opinion does not even state the words "special relationship" or alike in the opinion and does not address the elements of negligence in any fashion, the Carlson opinion only addresses immunity. Id.

Secondly, Carlson stated that statutory immunity applied to the School District because the School District was not responsible for maintaining the park where the accident occurred. Id. However, when viewing the facts in the light most favorable to the Appellants, Hosterman was responsible for providing safe transportation of their students while they rode on the bus because they had specific input on what controls should be used when students were traveling on the school buses to and from Hosterman.

regarding safely transporting students was discussed at CR's IEPs and BW's IEP.

Hosterman took no responsibility to make sure that the bus drivers or bus aides were informed that CR had a propensity to act out sexually toward other students.

The Appellants, for the purposes of summary judgment, have established sufficient facts to establish that Hosterman had a special relationship with BRW. Therefore, the Appellants respectfully requests that the Court of Appeals not dismiss the negligence action against Hosterman.

B. When viewing the facts in the light most favorable to BRW, the harm caused to BRW was foreseeable to Hosterman.

A duty is imposed if the resulting injury was reasonably foreseeable. Bjerke v. Johnson, 742 N.W.2d 660, 667 (Minn. 2007). For a more detailed analysis of foreseeability of school districts please refer to Section II, A.

The possibility of sexual misconduct between CR and BRW would be clear to a person of ordinary prudence because Hosterman had prior knowledge of CR's propensity to act out sexually toward other students. Moreover, Hosterman was well aware that CR needed special supervision while he was on bus # 219 and bus # 419. However, Hosterman took absolutely no steps to ensure that the bus drivers or bus aides were instructed that CR should sit in the front seat alone. Hosterman had every opportunity at the IEP meetings to make sure the bus drivers or bus aides were informed that CR should sit alone in the front seat or even to inform them that CR had a propensity to act out sexually toward other students.

Staff at Hosterman were responsible to ensure that all the students were on the buses safely, and the Hosterman staff did have daily contact with the bus drivers and bus aides in question. Hosterman could have made sure that when CR boarded bus # 219 or # 419 that he be required to sit in the front seat alone. Information discussing CR's IEPs was discussed openly between staff at Hosterman and staff at Bloomington. Moreover, Hosterman was aware of BRW's IEP.

A reevaluation of CR was conducted by CR's IEP (form from Hosterman) team on April 30, 2005, which stated, among other things, "Cody has presenting concerns of acting out inappropriately in a sexual way. He is extremely impulsive. He misreads social cues and interactions...**He is still at high risk for inappropriate sexual behavior and needs to be monitored at all time.....**Cody is quick to get frustrated or angry. He will swear or become aggressive when angry and confronted. **He has a history of sexual misconduct and needs constant staff supervision.** Cody's guardian feels that getting into other peoples business is the main concern. **The guardian wants to make sure Cody is watched at all times to minimize any possibility of sexual misconduct.**" (Emphasis added).

Hosterman was also well aware that all the students attending the STRIVE program were students with special needs, thus Hosterman had a heightened duty to make sure that none of the special needs students (more vulnerable than their peers) were taken advantage of by other students with special needs. Hosterman had a duty to provided for

the health, safety and welfare of BRW. Hosterman staff had input on CR's IEPs and the staff at Hosterman recommended that CR have special supervision while on the school buses. Hosterman staff had input on BRW's IEP and the staff at Hosterman recommended that BRW have special supervision while on the school buses.

It is the Appellants' position that it is clear that the sexual misconduct between CR and BRW was foreseeable based on the reasons stated above, however, even if the Court of Appeals determines that foreseeability is a close case, that issue is then reserved for the trier of fact. Appellants' position is that at all times Hosterman had a duty to ensure the safe passage of BRW the entire time he was on the buses. Hosterman had knowledge that CR had a propensity to act out sexually, and thus CR's conduct toward BRW was foreseeable to Hosterman.

The Appellants, for the purposes of summary judgment, have established sufficient facts to establish that CR's conduct was reasonably foreseeable to Hosterman. Therefore, the Appellants respectfully requests that the Court of Appeals not dismiss this action against Hosterman.

IV. When viewing the facts in the light most favorable to BRW, Bloomington and Hosterman would be vicariously liable for the acts of their agents.

Under the “well established principle” of respondeat superior, “an employer is vicariously liable for the torts of an employee committed within the course and scope of employment.” Schneider v. Buckman, 433 N.W.2d 98, 101 (Minn. 1988).

Respondeat superior or vicarious liability is a principle whereby responsibility is imposed on the master who is not directly at fault. Lange v. National Biscuit Co., 297 Minn. 399, 403, 211 N.W.2d 783, 785 (Minn. 1973). This justification holds that an employer, knowing that he is liable for the torts of his servants, can and should consider this liability as a cost of his business. Id. The master may then avoid the cost by insuring against such contingencies, or by adjusting his prices so that his patrons must bear part of the burden of insurance. Id. In this way, losses are spread and the shock of the accident is dispersed. Id. A secondary consideration lies in the fact an employer, knowing that he is responsible, will be alert to prevent the occurrence of such injuries. Id.

It is clear, under the doctrine of respondeat superior that Bloomington and Hosterman can be bound by the actions of their agent, i.e. the staff at Bloomington and Hosterman.

The Courts have made a distinction between intentional acts and negligent acts as to whether or not a master can be liable for the acts of his/her agents.

The Court stated in Edgewater, that there is no hard and fast rule when determining whether an employer can be vicariously liable for an employee, regarding

negligent claims. Edgewater Motels Inc. v. Gatzke, 277 N.W.2d 11, 15 (Minn. 1979) (Court reinstated the jury verdict, thus overruling the trial court's determination of a judgment notwithstanding the jury verdict, because it was reasonable for the jury to find that the agent was acting within the scope of his employment at the time of his negligent act.). The Court look at whether the negligent act committed by the employee was within his scope of employment. Id. The Court held that an employer can be held vicariously liable for an employee's negligence so long as the employee was acting within the scope of his employment at the time of the negligent act. Id.

The negligent conduct took place within work-related limits of time and place. The Court of Appeals should find that the staff at Bloomington and Hosterman were acting within the scope of their employment.

The Appellants, for the purposes of summary judgment, have established sufficient facts to establish vicarious liability regarding the negligent claims against both School Districts. Therefore, the Appellants respectfully requests that the Court of Appeals not dismiss this action against Bloomington or Hosterman.

CONCLUSION

For all of the foregoing reasons and conclusions, the Appellants request the Court of Appeals to reverse the district court's decision regarding immunity (discussed in Appellants' original brief) against the two School Districts and allow the negligence claims and respondeat superior claims to survive. The Appellants also request that they be allowed to pursue their claim of punitive damages (discussed in Appellants' original brief) against Adam Services.

In addition, Appellants request that the actions on the part of Adam Services were reasonably foreseeable and thus the negligent claim against Adam Services should remain. Lastly, the Appellant has established negligent claims against both School Districts and that the School Districts' agents were acting within the scope of their employment and thus the negligent claims and vicarious liability claims should remain against both School Districts.

Respectfully Submitted,

Dated: June 18, 2008

VILLAUME & SCHIEK, P.A.

A handwritten signature in cursive script, appearing to read "Philip G. Villaume", is written over a horizontal line.

Philip G. Villaume (#112859)
Jeffrey D. Schiek (#0305455)
Attorneys for Appellants
2051 Killebrew Drive, Suite 611
Bloomington, MN 55425
(952) 851-9500

COURT OF APPEALS NO.: A08-0612

STATE OF MINNESOTA
IN COURT OF APPEALS

JW on behalf of BRW, minor child,

Appellant

vs.

**CERTIFICATE OF REPLY
BRIEF LENGTH**

287 Intermediate District, and

Independent School District 271,

a/k/a "Bloomington Public Schools",

a/k/a "Transportation Center for

Independent School District 271",

and Adam Services, Inc.,

Respondents.

I hereby certify that this brief conforms to the requirement of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this reply brief is 6,996 words. This brief was prepared using Corel WordPerfect, Times New Roman font face size 13.

Dated: June 18, 2008



Philip G. Villaume (# 112859)

Jeffrey D. Schiek (#0305455)

Attorneys for Appellant

BLN Office Park

2051 Killebrew Drive, Suite 611

Bloomington, MN 55425

Phone: (952) 851-9500