

COURT OF APPEALS NO.: A08-0612

STATE OF MINNESOTA

IN COURT OF APPEALS

JW on behalf of BRW, minor child, Appellants,

vs.

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

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	PAGE(S)
Table of Contents	i.
Index to Appendix	i. - iv.
Table of Authorities	v. - vii.
Statement of the Case	1
Legal Issues	2
Statement of the Facts	3 - 35
Standard of Review	36
Legal Arguments	37 - 52
Conclusion	53
Certificate of Brief Length	Attached

Appendix (Attached separately, Volumes I, II, III, IV and V)

VOLUME I

	APPENDIX PAGE(S)
1.) Complaint	1 - 28
2.) Answer of Defendant ISD # 271 and Crossclaim	29 - 32
3.) Answer of Defendant Intermediate School District 287 and Crossclaim	33 - 39
4.) Answer of Defendant Adam Services, Inc. and Crossclaim	40 - 45
5.) Scheduling Order	46 - 48
6.) Revised Scheduling Order	49 - 52

7.)	ISD # 271's Notice of Motion and Motion for Summary Judgment	53 - 54
8.)	ISD # 271's Memorandum of Law in Support of Summary Judgment along with Exhibits	55 - 204
9.)	ISD # 271's Statement of Undisputed Facts in Support of Summary Judgment	205 - 212
10.)	287 Intermediate District's Notice of Motion and Motion for Summary Judgment	213 - 214
11.)	287 Intermediate District's Memorandum of Law in Support of Summary Judgment along with Exhibits	215 - 356
12.)	287 Intermediate District's Statement of Undisputed Facts in Support of Summary Judgment	357 - 364

**ATTACHED SEPARATELY
VOLUME II**

13.)	Adam Services, Inc.'s Notice of Motion and Motion for Summary Judgment	365 - 366
14.)	Adam Services, Inc.'s Memorandum of Law in Support of Summary Judgment along with Exhibits	367 - 635
15.)	Adam Services, Inc.'s Statement of Undisputed Facts in Support of Summary Judgment	636 - 643

**ATTACHED SEPARATELY
VOLUME III**

16.)	Plaintiffs' Memorandum of Law in Opposition to ISD # 271's Motion for Summary Judgment along with Exhibits* (See Appendix pgs. 957 - 1469 for Exhibits)	644 - 691
17.)	Plaintiffs' Response to ISD # 271's Statement of Undisputed Facts	692 - 701

- | | | |
|------|---|-----------|
| 18.) | Plaintiffs' Memorandum of Law in Opposition to 287 Intermediate District's Motion for Summary Judgment along with Exhibits* (See Appendix pgs. 957 - 1469 for Exhibits) | 702 - 736 |
| 19.) | Plaintiffs' Response to 287 Intermediate District's Statement of Undisputed Facts | 737 - 739 |
| 20.) | Plaintiffs' Memorandum of Law in Opposition to Adam Services, Inc.'s Motion for Summary Judgment along with Exhibits* (See Appendix pgs. 957 - 1469 for Exhibits) | 740 - 786 |
| 21.) | Plaintiffs' Response to Adam Services, Inc.'s Statement of Undisputed Facts | 787 - 796 |
| 22.) | ISD # 271's Memorandum of Law in Reply to Plaintiffs' Opposition to Motion for Summary Judgment | 797 - 913 |

**ATTACHED SEPARATELY
VOLUME IV**

- | | | |
|------|---|------------|
| 23.) | 287 Intermediate District's Memorandum of Law in Reply to Plaintiffs' Opposition to Motion for Summary Judgment | 914 - 919 |
| 24.) | Adam Services, Inc.'s Memorandum of Law in Reply to Plaintiffs' Opposition to Motion for Summary Judgment | 920 - 924 |
| 25.) | Plaintiffs' Notice of Motion and Motion to Amend the Complaint to Assert Punitive Damages | 925 - 926 |
| 26.) | Plaintiffs' Memorandum of Law in Support of their Motion to Amend the Complaint to Assert a Claim for Punitive Damages along with Exhibits* (See Appendix pgs. 957 - 1469 for Exhibits) | 927 - 956 |
| 27.) | Plaintiffs' Master Exhibit List for ALL Memorandums submitted by Plaintiffs* | 957 - 1218 |

**ATTACHED SEPARATELY
VOLUME V**

- | | | |
|------|--|-------------|
| 28.) | Plaintiffs' Master Exhibit List for ALL Memorandums submitted by Plaintiffs* | 1219 - 1473 |
| 29.) | Letter from Philip G. Villaume to Judge McGunnigle dated 2/11/08 along with a copy of the full Deposition of Ashley Baggett, marked "Exhibit PP" | 1474 - 1508 |
| 30.) | Defendant Adam Services, Inc's Response to Plaintiffs' Motion to Amend Complaint to Assert a Claim for Punitive Damages | 1509 - 1521 |
| 31.) | Judge McGunnigle's Order and Memorandum dated March 7, 2008 | 1522 - 1533 |
| 32.) | Letter from Judith Mlinar Seeberger to Judge McGunnigle dated March 13, 2008 regarding a Motion to Reconsider the Summary Judgment decision | 1534 - 1535 |
| 33.) | Letter from Philip G. Villaume to Judge McGunnigle dated March 13, 2008 regarding Adam Services, Inc.'s Motion to Reconsider the Summary Judgment decision | 1536 |
| 34.) | Order from Judge McGunnigle dated March 18, 2008 regarding denial of Motion for Reconsideration | 1537 |
| 35.) | Amended Order from Judge McGunnigle dated April 1, 2008 | 1538 |
| 36.) | Notice of Appeal to Court of Appeals dated April 7, 2008 | 1539 - 1541 |
| 36.) | Plaintiffs' Statement of the Case dated April 7, 2008 | 1542 - 1546 |
| 37.) | Respondent Adam Services, Inc.'s Notice of Review dated April 14, 2008 | 1547 - 1548 |

TABLE OF AUTHORITIES

Minnesota Case Law	Page Number
<u>Anderson v. Anoka</u> , 678 N.W.2d 651 (Minn. 2004)	2, 42
<u>Conlin v. City of St. Paul</u> , 605 N.W.2d 396 (Minn. 2000)	39
<u>F. & H. Investment Co. v. Sachman-Gilliland Corp.</u> , 305 Minn. 155, 232 N.W.2d 769 (Minn. 1975)	36
<u>Gerber v. Neveaux</u> , 578 N.W.2d 399 (Minn. Ct. App. 1998)	38
<u>Gleason v. Metropolitan Council Transit Operations</u> , 563 N.W.2d 309 (Minn. Ct. App. 1997)	38
<u>Holmquist v. State of Minnesota</u> , 425 N.W.2d 230 (Minn. 1988)	39
<u>Johnson v. County of Nicollet</u> , 387 N.W.2d 209 (Minn. Ct. App. 1986)	37
<u>Johnson v. State</u> , 553 N.W.2d 40 (Minn. 1996)	38
<u>Kay v. Peter Motor Co., Inc.</u> , 483 N.W.2d 481 (Minn. 1992)	2, 48
<u>Landview Landscaping, Inc. v. Minnehaha Creek Watershed Dist.</u> , 569 N.W.2d 237 (Minn. Ct. App. 1997)	37
<u>Larson v. Independent Sch. Dist. No. 314</u> , 289 N.W.2d 112 (Minn. 1980)	2, 37
<u>LeDoux v. N.W. Publ'g, Inc.</u> , 521 N.W.2d 59 (Minn. Ct. App. 1994)	36
<u>McKenzie v. Northern States Power Co.</u> , 440 N.W.2d 183 (Minn. Ct. App. 1989)	48
<u>Moses v. Minn. Pub. Schools</u> , WL 846546 (Minn. Ct. App. 1998) (Unpublished) (Attached to Appendix)	2, 44, 45
<u>Rico v. State</u> , 472 N.W.2d 100 (Minn. 1991)	39

<u>Schroeder v. St. Louis County</u> , 708 N.W.2d 497 (Minn. 2006)	2, 39, 42
<u>Slezak v. Ousdigian</u> , 260 Minn. 303, 110 N.W.2d 1 (Minn. 1961)	36
<u>Snyder v. City of Minneapolis</u> , 441 N.W.2d 781 Minn. 1989)	36
<u>Swanlund v. Shimano Industrial Corp. Ltd.</u> , 459 N.W.2d 151 (Minn. Ct. App. 1990)	48
<u>Watson by Hanson v. Metropolitan Transit Com'n</u> , 553 N.W.2d 406 (Minn. 1996)	37, 40
<u>Wiederholt v. City of Minneapolis</u> , 581 N.W.2d 312 (Minn. 1998)	42
<u>Zappa v. Fahey</u> , 310 Minn. 555, 245 N.W.2d 258 (Minn. 1976)	36
Minnesota Statutes	
Minn. Stat. § 466.02	37, 38, 39
Minn. Stat. § 466.03	2, 37
Minn. Stat. § 466.04	1
Minn. Stat. § 549.20	2, 48
Minn. Stat. § 549.191	48
Minn. Stat. § 645.44	30, 43
Federal Cases	
<u>Aslakson v. United States</u> , 790 F.2d 688 (8th Cir. 1986)	39
<u>Griffin v. United States</u> , 500 F.2d 1059 (3d. Cir. 1974)	39

Secondary Sources

Stevenson v. State Dep't of Transp., 290 Or. 3, 619 P.2d 247
(1980)

39

Minn. R. 7470.1000

8, 15, 30, 43

Minn. R. 7470.1700

8, 30, 50

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") (a/k/a "Transportation Center for Independent School District 271") (a/k/a "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 Complaint¹ to seek punitive damages against Adam Services, Inc.

On March 7, 2008, the district court granted both School District's 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.

Appellants now seek relief on three (3) issues, discussed below, which were ultimately dismissed by the district court.

¹It should be noted that the only reason why Appellants' did not bring a motion to amend for punitive damages against Bloomington or Hosterman is that Minn. Stat. § 466.04, subd. 1 (b) does not allow for punitive damages against School Districts.

LEGAL ISSUES

- I. Whether, the district court erred when it dismissed the claims filed by the Appellants based on statutory and official immunity against Bloomington, thus allowing the negligent and respondeat superior claims against Bloomington to survive.

The district court granted Bloomington's motion for summary judgment on this issue.

Larson v. Independent Sch. Dist. No. 314, 289 N.W.2d 112 (Minn. 1980); Anderson v. Anoka, 678 N.W.2d 651 (Minn. 2004); Schroeder v. St. Louis County, 708 N.W.2d 497, 503 (Minn. 2006); Moses v. Minn. Pub. Schools, WL 846546 (Minn. Ct. App. 1998) (Unpublished); Minn. Stat. § 466.03.

- II. Whether, the district court erred when it dismissed the claims filed by the Appellants based on statutory and official immunity against Hosterman, thus allowing the negligent and respondent superior claims against Hosterman to survive.

The district court granted Hosterman's motion for summary judgment on this issue.

Larson v. Independent Sch. Dist. No. 314, 289 N.W.2d 112 (Minn. 1980); Anderson v. Anoka, 678 N.W.2d 651 (Minn. 2004); Schroeder v. St. Louis County, 708 N.W.2d 497, 503 (Minn. 2006); Moses v. Minn. Pub. Schools, WL 846546 (Minn. Ct. App. 1998) (Unpublished); Minn. Stat. § 466.03.

- III. Whether, the district court abused its discretion when it did not allow the Appellants to amend the complaint to add punitive damages against Adam Services, Inc.

The district court denied Appellants' motion to amend the complaint to add punitive damages against Adam Services.

Kay v. Peter Motor Co., Inc., 483 N.W.2d 481 (Minn. 1992); Minn. Stat. § 549.20.

FACTS

A. Introduction.

Bus # 219 (owned and operated by Adam Services, Inc.) and # 419 (owned and operated by Bloomington) drove students with special needs to and from home to Hosterman. (App. p. 1172 - 1173). CR² started to ride bus # 219 on April 6, 2005. (App. p. 964). BRW was already riding on bus # 219 on April 6, 2005. (App. p. 973 - 980). All the students on bus # 219 and # 419 were special needs students, which was also a specialty of Adam Services, Inc. (App. p. 1170); (App. p. 1366 - 1423); (App. p. 1158); (App. 1143 - 1155).

Hosterman, during the School year, was open from approximately 7:30 a.m to 3:00 p.m., Monday through Friday. (App. 1200).

Bus # 219 started in the morning around 7:00 a.m. and Sid Sauer³ (a/k/a "Sauer") (bus driver for # 219) would pick up BRW second and then Sauer would pick up CR third. (App. p. 1172 - 1173). After Sauer picked up BRW and CR, the two of them would ride the bus during the morning route for approximately 30 - 45 minutes before

²In 2005, CR (who was 13 years old at the time) was taller and larger in stature compared to BRW, and CR had a more muscular tone than BRW. (App. p. 1241). In 2005, BRW (who was 10 years old) was meek and short. (App. p. 1241); (App. p. 1190). CR was born on January 23, 1992 and BRW was born on February 17, 1995. (App. p. 1075); (App. p. 973 - 980).

³Sauer stated that it is part of his job duties and responsibilities and part of the job duties and responsibilities of the bus aides to make sure that the students on the bus are safe and secure. (App. p. 1176 - 1178) (issue of negligence). Bentley also stated it was part of his duties as a bus aide to make sure that the kids are safe and secure. (App. p. 1184).

Sauer would drop the students off at Hosterman. (App. p. 1172). The afternoon route started on bus # 219 at approximately 2:00 p.m. and it would take approximately thirty to forty minutes before Sauer would drop off BRW and CR, so they would be on the bus at the same time for approximately thirty to forty minutes before CR would be dropped off. (App. p. 1173). Therefore, every school day CR and BRW would be on bus # 219 for approximately 60 to 90 minutes total. There were approximately 40 school days from April 6, 2005 through June of 2005.

During all relevant times two bus aides rode on bus # 219 named Ashley Bagget (a/k/a "Bagget") and Richard Bentley (a/k/a "Bentley"). (App. p. 1174); (App. p. 1129 - 1133); (App. p. 1163) (App. p. 1474 - 1508).

In the Summer of 2005, Hosterman was open from approximately 8:00 a.m. to 12:30 p.m., Monday through Thursday. (App. p. 1200). Eric Johnson⁴ (a/k/a "Johnson") (bus driver for # 419) stated that bus # 419 started on or about June 20, 2005, and that while CR and BRW were on the bus together, the bus ride in the morning lasted approximately 30 - 45 minutes. (App. p. 1438). Johnson also stated that while CR and

⁴Johnson stated that it was part of Johnson's job duties and responsibilities to provide for the safety of the students while they were on the bus. (App. p. 1432) (issue of negligence). Johnson also stated that it was part of the bus aide's job duties and responsibilities to provide for the safety of the students while they were on the bus. (App. p. 1432) Johnson stated that his job and part of the bus aide's job was also to supervise the students while they rode the bus. (App. p. 1435) Johnson had been trained by the Training Manual used by Bloomington. (App. p. 1432). The training manual also states that it is the job duties and responsibilities of the bus drivers and bus aide to provide for the safety of the students while the students ride the bus. (App. p. 1366 - 1423).

BRW were on the bus together, the bus ride in the afternoon lasted approximately 30 - 45 minutes. (App. p. 1438). The last day that BRW rode bus # 419 was July 18, 2005, when Hosterman discovered that there was inappropriate sexual conduct occurring between CR and BRW. (App. p. 1215). From June 20, 2005 through July 18, 2005 there were approximately 17 days that CR and BRW rode on the bus together. Therefore, every school day CR and BRW would be on bus # 419 for approximately 60 to 90 minutes total. There were approximately 17 school days from June 20, 2005 through July 18, 2005.

During all relevant times one bus aide rode on bus # 419 named Andrew (a/k/a "Drew") Boone (a/k/a "Boone"). (App. p. 1339); (App. p. 1272 - 1274).

During all periods in question CR lived at Mount Olivet in Bloomington, which was a group home and Margaret (a/k/a "Margy") Nelson was the housing coordinator at Mount Olivet. (App. p. 1076). On March 30, 2005, Margaret Nelson was appointed CR's surrogate parent, thus entitling her to the same rights and responsibilities as a regular parent when making decisions relating to CR's special educational needs. (App. p. 1247).

While CR and BRW were riding on bus # 219 and bus # 419 CR repeatedly sexually assaulted BRW. (See below).

B. BLOOMINGTON'S FACTS.

I. Bloomington's knowledge of CR's history.

Bloomington and Hosterman first learned that CR touched BRW inappropriately on the school buses on or about July 18, 2005.

Deirdra Yarbro (a/k/a "Yarbro") was a licensed School Social Worker for Bloomington during the 2004/2005 school year. (App. p. 1249 - 1250). Yarbro has special training in setting up Individualized Education Programs (a/k/a "IEP⁵"). (App. p. 1252). During the 2004/2005 school year Yarbro was responsible for evaluating students who were in group homes and was responsible for placing CR into a school that satisfied his special needs, i.e. Hosterman. (App. p. 1251).

Prior to filling out the Supplemental Referral Form for CR, Yarbro reviewed CR's discharge summary that she received from Lutheran Social Services. (App. p. 1253). The discharge summary, dated January 19, 2005, regarding CR stated, "Cody began acting out sexually shortly after placement. Cody was higher functioning than the victims he chose were and he would often plan out the contact....cody consistently struggled with sexual behavior and physical aggression while he was at Home....Recommendations at Discharge 1. Cody should not be allowed around children under the age of twelve

⁵"An IEP describes the student's present levels of performance academically, socially, emotionally, and behaviorally; describes the student's needs; sets forth the goals and objectives for the student's education and how these will be met; and describes the accommodations and modifications which will be provide the student with appropriate education in the least restrictive learning environment." (App. p. 210).

unsupervised. 2. Cody should have constant supervision. 3. Cody should be in a structured environment. 4. Cody should continue in individual therapy. 5. Cody's treatment program should involve education in and access to healthy touch and boundaries. 6. Cody should be enrolled in Special Education courses in school. 7. Cody should continue under the care of an urologist. 8. Cody should not be placed with younger or vulnerable children. 9. Cody should be under the care of a psychiatrist for medication reviews." (App. p. 1269 - 1270) (App. p. 1459 - 1461).

On February 11, 2005, Yarbro filled out a Supplemental Referral Form, supplied by Hosterman, regarding CR indicating the following, CR had a history of mood problems, CR had a history of anxiety-related problems, CR had a history of attention inattentiveness, CR had a history of intimidating/assaultive behavior, CR had a history of sexual inappropriateness, and that CR should not be around children under 12 unsupervised and that CR needed constant adult supervision. (App. p. 960 - 963).

Yarbro testified that there were two IEPs conducted on CR, one in February of 2005 and one in March of 2005. (App. p. 1253); (App. p. 967 - 972); (App. p. 1308 - 1323). There were people from Hosterman and Bloomington at the IEP meeting on March 30, 2005, and thus the information regarding CR's IEP was discussed freely between staff members of Bloomington and Hosterman. (App. p. 967 - 972).

At the IEP meeting regarding CR on March 30, 2005, Yarbro discussed the fact

that CR had a history⁶ of acting out sexually inappropriately and that staff members from Hosterman and Bloomington did attend this IEP. (App. p. 1254 - 1256). At the IEP meeting the fact that CR was required to sit alone in the front of the bus was also discussed. (App. p. 1257 - 1259). Yarbrow indicated, at the IEP meeting, that CR could be aggressive. (App. 1253 - 1258). However, the fact that CR acted out sexually inappropriately and the fact that he should not be around kids under the age of 12 unsupervised was never stated on the IEP form. (App. 1264).

CR's IEP⁷ recommended the following, "Provide maximum supervision of the student...Special seating will be given to Cody on the bus, if needed a bus assistant will be present to help with behavioral issues." (App. p. 967 - 972).

As a result of the IEP meetings Bloomington, filled out three emergency forms⁸

⁶Merrilee Bengston (a/k/a "Bengston") was the Hennepin County Social Worker for CR and Yarbrow indicated that at the IEP meeting Bengston brought up her concern that CR had acted out sexually toward other children. (App. p. 1268).

⁷BRW had an IEP meeting conducted on February 23, 2005, and the IEP recommended the following, "Team recommends the use of a Bus assistant to help maintain the safety of students and help minimized excess stimuli that overloads B's sensory input." (App. p. 973 - 980).

⁸Minn. R. 7470.1000, states: "DRIVERS AND AIDES FOR PUPILS WITH DISABILITY. Subpart 1. **Drivers generally.** Each driver of a vehicle for pupils with a disability shall be carefully selected to assure the driver can perform the requirements of the job. Drivers must be assigned to each route on a regular basis whenever possible. Subp. 2. **Information necessary.** Each aide assigned to a vehicle transporting pupils with a disability, or driver if no aide is assigned, or both, shall have available to them in the vehicle a typewritten card indicating...:

Thus, Minn. R. 7470.1700, Subp. 2, mandates that a bus driver dealing with special needs students must keep an emergency form on the bus with basic information regarding each individual student.

regarding CR which stated; 1.) Emergency form dated January 24, 2005, which stated in the Special Transportation Instructions, "EBD" (a/k/a "Emotional Behavior Disorder") and that CR should "Sit in Front Seat Alone"; 2.) Another emergency form dated January 24, 2005, which stated nothing in the Special Transportation Instructions, except "EBD"; and 3.) Another emergency form dated May 20, 2005, which stated in the Special Transportation Instruction "EBD" and with a star placed next to stating CR should, "SIT BEHIND DRIVER, ALONE IN THE SEAT!". (App. p. 964 - 966). Pursuant to the emergency cards, Johnson stated that it was a mandatory requirement that CR sit up front alone. (App. p. 1437).

On March 30, 2005, Judy Verplank (a/k/a "Verplank", secretary for Bloomington) stated that Yarbro brought her the original emergency form and that she filled out CR's original emergency form on March 30, 2005, however later on that same day she amended the original emergency card to include that CR "Sit in Front Seat Alone". (App. p. 1450 - 1451); (App. p. 964 - 966). Verplank stated that she received the amended emergency form regarding CR on March 30, 2005, and was instructed by Yarbro, over the phone, to write in the language "Sit in front Seat Alone". (App. p. 1448 - 1456). Verplank also stated that she whited out something in the Special Transportation Instruction section of CR's amended emergency card, however, she could not recall what she whited out. (App. p. 1449). Verplank faxed the amended form to the Transportation Department within Bloomington.

The emergency form dated May 20, 2005, was typed in by Verplank and in the Special Instructions sections she typed, "SIT BEHIND DRIVER, ALONE IN THE SEAT!" and then Verplank faxed this emergency form to the Transportation Department within Bloomington. (App. 1263); (App. p. 1390); (App. 966) (there is also a star by the Special Instruction).

Yarbro indicated that she did not relay the information that CR had a history of acting out sexually in the past or that CR should not be around kids under the age of 12 unsupervised to Verplank. (App. p. 1260). Yarbro stated that she did not relay the information to Verplank that CR had a history of acting out sexual with other students or that CR should not be around kids under the age of 12 unsupervised for confidentiality reasons. (App. p. 1260). However, Verplank stated that on March 30, 2005, Yarbro told her that CR had acted out sexually inappropriately. (App. p. 1464) (Question Villaume: Did Deirdra Yarbro mention anything to you in passing about Cody CR being sexually inappropriate? Answer Verplank: I believe so.).

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." (App. p. 654); (App. p. 1309 - 1329) (emphasis added).

Patrick Geraghty (a/k/a "Geraghty") was the Executive Director of Student Services for Bloomington. (App. p. 654). On August 17, 2005, Geraghty wrote a letter to Monica Brennan, an investigator for the Minnesota Department of Education, outlining the information Bloomington had regarding what transpired between CR and BRW. (App. 654). The letter dated August 17, 2005, stated that, "He [referencing CR] has a history of sexual misconduct and requires close supervision. Cody [referencing CR] has an educational diagnosis of an emotional behavioral disorder. Cody was enrolled in the same self-contained special education program as A and B on April 6, 2005. His IEP stipulates he will receive special seating on the bus, and if needed, a bus assistant will be present to help with behavioral concerns. His transportation form for the regular school year and extended school year stipulate he is to sit alone in a front seat on the bus." (App. p. 654).

- ii. **All the information contained in any emergency form was considered confidential to all staff at Bloomington, including the secretaries, bus drivers and bus aides. The emergency forms were also considered confidential by Adam Services and Hosterman.**

Yarbro considered the emergency forms to be confidential⁹. (App. p. 654) (“I consider them [referencing emergency cards] confidential.”).

The Training manual¹⁰ for Bloomington¹¹ regarding bus drivers and bus aides states the following regarding the confidentiality of emergency forms:

A significant amount of information is developed and maintained regarding the evaluation, placement, transportation, health needs, and performance of students with disabilities. It is essential that these records be accurate and up-to-date. **Just as important is the requirement that this information remain strictly confidential.** School staff and the school bus team must ensure that the privacy rights of students with disabilities are protected. At no time (except in case of an emergency or “need to know”) may a school official or a school bus team member identify, or provide information about a student to any individual other than a parent or legal guardian.

(App. p. 1366 - 1423) (emphasis added). As stated, the bus drivers and bus aides are

⁹Thus, any information on the emergency forms would be considered confidential, so the secretary or the bus driver or bus aide could not share that information.

¹⁰The Training Manual states that “Bus drivers and attendants are service providers to the same extent as psychologists, therapists, teachers and other professionals involved in the education process. As a professional, it is important to be familiar with the law.” (App. 1366 - 1422).

¹¹Jim Engstrom (a/k/a “Engstrom”) was the Transportation Director for Bloomington in 2005. (App. p. 655). As Transportation Director Engstrom was in charge of coordinating bus routes and administering contracts. (App. p. 655). During the 2004/2005 school year Bloomington used the “Special Needs Driver’s Training Manual” (a/k/a “Training Manual”). (App. p. 655). The Training Manual states that Bloomington has a duty to provide a safe and enjoyable ride to all students with special needs. (App. p. 655).

instructed that the emergency forms are confidential and thus any information should not be discussed on the emergency forms unless there is an emergency or a need to know. (App. 1366 - 1423). In other words, if an emergency form had on it information relating to a student the bus driver or bus aide would not be able to discuss that matter unless it was an emergency or there was a need to know.

Verplank also stated that the information contained on the emergency forms is confidential. (App. p. 656) (Answer Verplank: Well it's just a red flag that, you know – **we are taught to be – keep things confidential for all students.**) (Emphasis added).

Tom Patterson (a/k/a “Patterson”), in 2004/2005, was the training coordinator for the Transportation Department for Bloomington. (App. p. 656). Patterson stated that the information given to the bus driver contained in the emergency forms are confidential. (App. p. 656).

Renee Lehman (a/k/a Lehman), office manager at Adam Services, stated that the emergency forms are considered confidential. (App. p. 656).

It is the position of the Appellants' that all emergency forms would be considered confidential information so there are no restrictions on who Bloomington can disclose this information to as long as they are employed by Bloomington. The emergency forms are also considered confidential to Adam Services and to Hosterman so Bloomington could relay any information to Adam Services or Hosterman. Clearly, the information contained in the emergency forms would not be accessible to the general public.

iii. Johnson and Boone were instructed by management and by the emergency forms that CR was to sit alone in the front seat and therefore Johnson and Boone had no discretion were CR could be seated, except in the front seat alone. CR's deposition testimony discussed in detail below contradicts Johnson and Boone's deposition testimony that CR always sat in the front seat alone.

It is the Appellants' position that the focus of the discretionary act for Bloomington is on the fact that Johnson¹² and Boone allowed CR¹³ to sit wherever he wanted and also allowed CR and BRW to sit together when they were on bus # 419. (App. p. 657). Pursuant to the emergency form and management, Johnson and Boone were instructed that CR was to sit alone in the front seat of the bus and that instruction was not followed by Johnson or Boone. Bloomington focuses on whether Yarbrow could disclose the fact that CR had a history of acting out sexually and that he should not be around children under the age of 12 unsupervised on the emergency form.

Moreover, all the information contained in the emergency form would be considered confidential (even by staff, school drivers or bus aides) so there is no reason why Yarbrow could not relay the fact that CR had a history of acting out sexually in the past to the bus driver or bus aides. In fact, the training manual given to bus drivers and bus aides specifically states that the information contained on the emergency form should

¹²Johnson stated that CR always sat in the front seat directly behind him. (App. p. 657).

¹³This is clearly an issue of fact, Johnson and Boone stated that they always made CR sit alone in the front of the bus, however, CR stated specifically that he could sit wherever he wanted and that the bus driver and bus aide did not pay attention (fall asleep or read a book) to him or BRW while they rode on bus # 419. (App. p. 657).

not be disclosed to outside personnel.

The emergency form dated May 20, 2005, stated in the Special Transportation Instruction “EBD” and with a star placed next to it CR should, “SIT BEHIND DRIVER, ALONE IN THE SEAT!”. (App. p. 966). Boone¹⁴ never reviewed any emergency cards, however, he was instructed by management that CR and BRW could not sit together. (App. p. 658).

Johnson had reviewed CR’s emergency form dated May 20, 2005, thus instructing him that CR must sit alone in the front seat in June of 2005. (App. p. 658). However, Johnson did not receive the emergency form¹⁵ dated May 20, 2005, until two weeks **after** CR and BRW started to ride on bus # 419. (App. p. 658). Engstrom told Johnson directly from the first day that CR got on bus # 419 that CR and BRW (named him specifically) could not sit together. (App. p. 658).

Before receiving the emergency form dated May 20, 2005, Johnson stated that Engstrom informed him that there was some “unorthodox activity” between CR and BRW, happening in the school [referencing Hosterman] “that could possibly happen on the bus”, and that Johnson was then asked to make sure CR and BRW be separated. (App. 658 - 659) (Question Villaume: And what did he [referencing Engstrom] tell you?

¹⁴Boone does not ever recall CR or BRW sitting together on bus # 419. (App. p. 658).

¹⁵Per se violation of Bloomington’s Training Manual and a per se violation of Minn. R. 7470.1000 which states the bus driver shall have available to them **in the vehicle** an emergency card for all students with special needs. (App. p. 1366 -1422) (emphasis added).

Answer Johnson: He [referencing Engstrom] told me that there was some sexual activity going on. He wouldn't go into details. That there was some sort of sexual activity going on between these two children in school. Attorney Villaume: When did he tell you this?

Answer Johnson: He told me two weeks into the program, before I started driving. You know, when I started driving the route, two weeks into the program is when he told me.

Attorney Villaume: So the middle of June 2005? Answer: Correct.). Based on of Johnson's deposition testimony, it is the Appellants' position that Bloomington had knowledge that CR and BRW had inappropriate sexual contact prior to June of 2005, however, they did not report the inappropriate sexual contact between CR and BRW.

Engstrom stated that if a bus driver were to receive an emergency form that stated that the student "Sit behind driver alone in the seat", that he would be required (no discretion) to follow that instruction and not deviate from that instruction. (App. p. 659) (Question Villaume: "Now, based on the content of bates 14, the emergency information form [referencing CR's emergency form], the driver had no discretion not to follow the guideline, that is sit behind driver alone in the seat? Answer Engstrom: Right. The driver should of followed that guideline."). If the driver received an instruction that a student should sit behind the driver alone in the front seat, it would be a violation if the driver allowed a student to sit any place else on the bus. (App. p. 659). Johnson also stated that it was a mandatory requirement that CR sit up front alone. (App. p. 659).

- iv. **CR admitted on numerous occasions that he could sit wherever he wanted on bus # 419, thus putting the facts that Johnson and Boone always made CR sit in the front seat alone into question, which makes that determination to be decided by a trier of fact. CR also stated in his deposition testimony that the bus aide on bus # 419 would fall asleep and that the bus aide would read a book.**

Bret Domstrand (a/k/a "Domstrand") started to work for Hosterman as a paraprofessional in January 2005 and did work during the Summer of 2005. (App. p. 660).

On July 18, 2005, in the morning, Domstrand spoke with CR¹⁶ regarding whether he touched BRW inappropriately sexually. (App. p. 660). On July 18, 2005, CR admitted to Domstrand that he had touched BRW sexually inappropriately while they rode on the school buses. (App. p. 660). Domstrand stated that he believed that CR had touched BRW inappropriately sexually. (App. p. 660).

On July 18, 2005, after Domstrand spoke with CR, Domstrand spoke with Detective John Elder¹⁷ (a/k/a "Elder") regarding sexual contact¹⁸ between CR and BRW because he received information that there had been inappropriate sexual contact between

¹⁶Domstrand received information through a mandatory reporter that CR had touched BRW inappropriately sexually on July 18, 2005. (App. p. 660).

¹⁷In the 2004/2005 School year Detective John Elder was a detective with the New Hope Police Department and worked as the School Resource Officer for Hosterman. (App. p. 660). Detective Elder has been a licensed Police Officer since 1993. (App. p. 660). During Detective Elder's career he has investigated approximately 100 sex abuse cases. (App. p. 660).

¹⁸Elder stated that after the incident between CR and BRW came to light, that the bus drivers were hostile toward him and one of the bus drivers (believed to be Johnson) stated, "Now I might lose my job." (App. p. 660). Elder indicated that the bus driver, was angry because Elder was conducting an investigation of sexual contact between CR and BRW. (App. p. 660).

CR and BRW. (App. p. 660). Domstrand was concerned that CR had touched BRW inappropriately sexually because of his conversation he had with CR, and because approximately 6 months prior he had been informed by Hosterman that CR had a history of acting out sexually toward other students. (App. p. 660 - 661).

On July 20, 2005, at 8:30 a.m., Judith Weigman (a/k/a "Weigman") interviewed BRW at Cornerhouse¹⁹. (App. p. 661); (App. 1033 - 1034) (Cornerhouse Interview Synopsis by Weigman²⁰); (App. p. 1035 - 1073) (transcribed copy of videotaped interview of BRW by Weigman).

Weigman has worked at Cornerhouse for over 18 years and is a specialist in the area of child abuse and has been involved with approximately 3,500 child abuse cases. (App. p. 660).

On July 20, 2005, BRW stated to Weigman that CR had fondled his penis (masturbation), and that CR performed oral sex on BRW and that BRW performed oral sex on CR. (App. p. 661); (App. 1033 - 1034) (Cornerhouse Interview Synopsis by Weigman); (App. p. 1035 - 1073) (transcribed copy of videotaped interview of BRW by Weigman). BRW indicated to Weigman that sexual contact between CR and BRW occurred on bus # 219 and on bus # 419. (App. 661) (Cornerhouse Interview Synopsis by

¹⁹Cornerhouse is non-profit agency that takes referrals from law enforcement and then Cornerhouse conducts independent forensic videotaped interviews of allegations of child abuse. (App. p. 661).

²⁰Weigman completed her synopsis regarding CR on July 21, 2005. (App. p. 661).

Weigman); (App. p. 1035 - 1073) (transcribed copy of videotaped interview of BRW by Weigman).

After the interview with BRW was over, and based on Weigman's training and experience, she concluded that BRW was sexually abused by CR while he was riding on the school buses. (App. p. 661).

On July 21, 2005, Elder²¹ had a tape recorded interview with CR. (App. p. 662) (App. 1010 - 1015). On July 21, 2005, CR admitted to Elder that he had inappropriate sexual contact²² with BRW on bus # 219 and bus # 419, including oral sex (fellatio) and also stated that the sexual contact occurred on "most days". (App. p. 662). CR indicated that he selected BRW because he was younger, smaller in size, and CR felt that BRW would be afraid to speak out to any person regarding the sexual contact. (App. p. 662).

Upon interviewing CR and observing BRW during the Cornerhouse (discussed above) interview with Weigman, Elder based on his training and experience, determined that inappropriate sexual contact occurred between CR and BRW while they were on the school buses. (App. p. 662). Elder also determined, based on his training and experience, that on July 21, 2005, CR was telling the truth about the sexual contact that occurred between CR and BRW. (App. p. 662).

²¹On July 19, 2005, Elder had a conversation with JW regarding the inappropriate sexual contact between CR and BRW and she was very upset about the situation. (App. p. 662).

²²Elder stated that from his training and experience as a law enforcement officer, any penetration, constitutes criminal sexual contact in the first degree. (App. p. 662).

Some time in 2005, Monica Brennan (a/k/a “Brennan” or “Monica Rasmussen”) interviewed CR regarding the sexual contact between CR and BRW. (App. p. 662). Brennan worked for the Minnesota Department of Education. (App. p. 662). CR again admitted to Brennan that sexual contact occurred on bus # 219 and bus #419 between CR and BRW. (App. p. 662). CR also stated that he would sometimes sit with BRW and that he could basically sit in any seat he wanted. (App. p. 662 - 663) (“So the bus driver and the aide knew B _____, couldn’t sit by me and I was supposed to sit by myself. He still let B _____ sit by me. So, I think, I feel that the bus driver and the aide were setting me up.”). CR stated that he would touch BRW sexually “Every day”. (App. p. 663).

In February of 2006, CR was found guilty by the Honorable Philip D. Bush of Criminal Sexual Conduct in the 2nd Degree. (App. p. 663). In February of 2006, CR executed an Application to Enter a Guilty Plea in a Juvenile delinquency case, thus knowingly and voluntarily waiving his constitutional rights to the charges. (App. p. 663). Also in February of 2006, CR stated under oath that he had touched BRW in an inappropriate sexual manner²³ while on the school buses and plead guilty to an amended charge of Criminal Sexual Conduct in the 2nd Degree. (App. p. 663).

CR’s deposition was taken on January 10, 2008. (App. p. 663). CR stated that in

²³Attorney Connor: “...I need to – we need to make it clear to the Court that when this occurred between you and B _____ that this was not accidental; this was intentional contact, is that correct? Answer CR: That’s correct. Attorney Connor: And it was – it was sexual contact; it was – the contact was done for a sexual purpose, is that correct? Answer CR: That’s correct.” (App. p. 1001).

the summer of 2005 he rode on bus # 419, and that "Eric" was the bus driver and that there was a bus aide on the bus. (App. p. 663). CR stated the following in his deposition regarding where he sat on bus # 419, "Same way I was told to sit, in the front seat, but I normally sat either the second seat back from the front or tried to sit in the third seat where BRW sat....So I normally followed where BRW would sit." (App. p. 663) (CR stated that BRW would sit together on bus # 419). **CR stated that the bus aide would fall asleep on bus # 419.** (App. p. 663) (emphasis added). CR stated that while on bus # 419, that he would touch BRW's private areas while the bus aide was asleep on the back of the bus. (App. p. 664). CR also stated that the bus aide on bus # 419 would read a book while he was on the bus. (App. p. 664).

CR stated that he kept touching BRW's private areas (including masturbating him) when he rode on bus # 419. (App. p. 664). CR further stated that the touching escalated to include oral sex. (App. p. 664). CR stated that he would perform oral sex on BRW and that BRW would perform oral sex on him on bus # 419. (App. p. 1091 - 1092); (App. p. 1035 - 1073) (this is consistent with BRW's statement to Judy Weigman on July 20, 2005).

CR also stated the following when asked if he felt he was being set up by the bus driver and the bus aide, "**Because nobody was paying attention,** and I thought it [referencing BRW] was an easy target." (App. p. 1095) (emphasis added).

CR also stated in his deposition that he plead guilty to Second Degree Criminal

Sexual Conduct before Judge Bush on February 3, 2006 because he was in fact guilty of inappropriately touching BRW on the buses. (App. p. 1096 - 1099).

C. HOSTERMAN'S FACTS.

i. Hosterman's knowledge of CR's history and Hosterman's knowledge of BRW's history.

Yarbro testified that there were two IEPs conducted on CR, one in February of 2005 and one in March of 2005. (App. p. 1253); (App. p. 967 - 972); (App. p. 1309 - 1329). There were people from Hosterman and Bloomington at the IEP meeting on March 30, 2005, and thus the information regarding CR's IEP was discussed freely between staff members of Bloomington and Hosterman. (App. p. 967 - 972).

At the IEP meeting regarding CR on March 30, 2005, Yarbro discussed the fact that CR had a history of acting out sexually inappropriately and that staff members from Hosterman and Bloomington did attend this IEP. (App. p. 708). At the IEP meeting the fact that CR was required to sit alone in the front of the bus was also discussed. (App. p. 708). Yarbro indicated, at the IEP meeting, that CR could be aggressive. (App. 708). However, the fact that CR acted out sexually inappropriately and the fact that he should not be around kids under the age of 12 unsupervised was never stated on the IEP form. (App. 708).

CR's IEP recommended the following, "Provide maximum supervision of the student...Special seating will be given to cody on the bus, if needed a bus assistant will be present to help with behavioral issues." (App. p. 967 - 972). Hosterman had control over

where CR and BRW could sit on the buses.

Kayleen Taffe (a/k/a "Taffe") was a teacher at Hosterman in the 2004/2005 school year and specialized in the area of IEPs. (App. p. 709). On March 30, 2005, Taffe attended the IEP meeting regarding CR. (App. p. 709); (App. p. 967 - 972). The Supplemental Referral Form, dated February 11, 2005, regarding CR was also discussed at the IEP on March 30, 2005. (App. p. 709 - 710). Taffe stated that at the IEP the fact that CR could be aggressive (assaultive behavior toward other students) and the fact that CR had acted out sexually in the past was discussed and that he should sit alone in the front of the bus. (App. p. 710).

Taffe stated that Hosterman did not take any steps to inform Adam Services' bus drivers or bus aides that CR should sit alone in the front seat of the bus, nor did Hosterman take any steps to inform Bloomington' bus drivers or bus aides that CR should sit alone in the front seat of the bus. (App. p. 710). Taffe was not aware of any reason why Hosterman could not have informed Adam Services' bus drivers or bus aides that CR should sit alone in the front seat of the bus, she was also not aware of any reason why Hosterman could not have informed Bloomington' bus drivers or bus aides that CR should sit alone in the front seat of the bus. (App. p. 710).

CR's educational team (listed on IEP) have access to CR's IEP. (App. p. 710). Taffe typed up CR's IEP. (App. p. 710).

Kimberly Mackenzie (a/k/a "Mackenzie") was Hosterman's due process facilitator

and was one of the representatives from Hosterman that was at CR's IEP meeting dated March 30, 2005 and also had knowledge of the Supplemental Referral Form dated February 11, 2005. (App. p. 710).

A reevaluation of CR was conducted by CR's IEP (form from Hosterman) team on April 30, 2005. (App. p. 710); (App. p. 1309 - 1329).

BRW had an IEP meeting conducted on February 23, 2005, at Hosterman and the IEP recommended the following, "Team recommends the use of a Bus assistant to help maintain the safety of students and help minimized excess stimuli that overloads B sensory input." (App. p. 973 - 980). Staff members from Hosterman attended BRW's IEP conducted on February 23, 2005 and Taffe typed up BRW's IEP dated February 23, 2005. (App. p. 710).

In addition to BRW's IEP there was a Conference Summary Report regarding BRW, where JW informed the IEP team that she was concerned that there was insufficient supervision on BRW's bus. (App. p. 710). Again, the Conference Summary Report was supplied by Hosterman. (App. 1330 - 1331).

The Conference Summary Report stated the following, "Bus issue review of - 8 kids No Aid on bus - need more support on bus - either an aide or split up kids. [sic] adding another bus - District Rep. will investigate this issue through contact with Adam Services to get bus reports. Bus # 219". (App. p. 1330 - 1331).

In April of 2005, there was a teaming meeting at Hosterman where 12 to 13 staff

were present where the fact that CR acted out sexually in the past was addressed. (App. p. 712). In April of 2005, staff at Hosterman were advised that CR needed to be with a staff member at all times. (App. p. 712). Julie Stender, an employee at Hosterman, relayed the fact that CR had a propensity to act out sexually at the April 2005 staff meeting. (App. p. 712).

Hosterman did not take any steps to inform the bus drivers or bus aides that CR had a history of acting out sexually in the past. (App. p. 712).

Bret Domstrand (a/k/a "Domstrand") stated that he has a degree in Emotional Behavior Disorder (a/k/a "EBD") and considers himself an expert in the area of EBD. (App. p. 712). Domstrand stated that kids with EBD have a propensity to act out in class more than normal students. (App. p. 712).

D. ADAM SERVICES' FACTS.

I. CR and BRW stated that inappropriate conduct occurred on bus # 219.

CR stated in his deposition regarding where he sat on bus # 219, "Sometimes I was told to sit behind the bus driver, and sometimes I just sat wherever I wanted." (App. p. 1078 - 1082) (CR stated that he would sit together with BRW on bus # 219). CR stated that he normally sat by BRW. (App. p. 1079). **CR stated that the bus aide would fall asleep on bus # 219.** (App. p. 1083 and 1093) (emphasis added). CR stated that he would touch BRW in his "private area" when the bus aide was falling asleep. (App. p. 1085 - 1086). When CR was asked how many times he touched BRW's "private area" on

bus # 219 he stated, "A lot". (App. p. 1087) (consistent with what CR told Brennan and Elder and what BRW told Weigman).

CR also stated that Sauer, during the beginning of the 2005 school year, told CR that CR had to sit in the front seat alone and even though Sauer told CR that he had to sit in the front sit alone, CR would sit wherever he wanted on bus # 219, and that Sauer did not enforce the rule that CR had to sit alone in the front seat. (App. p. 1094 and 1099).

CR also stated the following when asked if he felt he was being set up by the bus driver and the bus aide, "**Because nobody was paying attention**, and I thought it [referencing BRW] was an easy target." (App. p. 1095) (emphasis added).

ii. Conduct of employees at Adam Services.

Sauer stated that Ashley Bagget (a/k/a "Bagget") was a bus aide on bus # 219 from at least March 31, 2005 (Thursday) through April 13²⁴, 2005 (Wednesday). (App. p. 938). CR started riding bus # 219 on April 6, 2005, so Bagget was a bus aide for at least 6 school days when CR and BRW were on bus # 219. (App. p. 939). Sauer stated that Bagget was a bus aide on bus # 219 for approximately 2 to 3 weeks. (App. p. 919).

Sauer testified that from March 31, 2005 through April 13, 2005, that Bagget feel asleep on the bus at least 3 times and that she wore headphones during that time frame at least 5 times. (App. p. 919). Bagget was thereafter terminated because she was sleeping on the bus and for wearing headphones on the bus. (App. p. 919). Sauer stated in his

²⁴While employed at Adam Services as a bus aide on bus # 219, Bagget executed three Incident Forms on behalf of Adam Services. (App. p. 938 - 939); (App. p. 1243 - 146).

deposition that sleeping on the bus and having headphones on the bus would be a dereliction of a bus aides' duties. (App. p. 939) (Sauer's answer, "Well, they are not supposed to do that. Their [referring to bus aides] main goal is to watch the students, and with headphones and the sleeping you aren't doing your job.").

On April 6 or 7, 2005, Sauer testified that a person from CR's residence, who he believed to be Margaret Nelson²⁵, instructed him that CR should sit in the front seat of the bus. (App. p. 939). Sauer never asked the person why CR had to sit in the front seat of the bus nor did Sauer ever relay that information to any person at Adam Services, including the bus aides. (App. p. 939). This instruction from Margaret Nelson, that CR sit in the front seat, is critical because the person in charge at Adam Services stated that if this were the case, that a bus driver would not have any discretion as to where that student should sit. (See Dep. of Lehman, discussed in detail below).

Sauer stated that he did not relay the information that CR should sit in the front of the bus to any bus aides. (App. p. 940). Sauer stated that he did not enforce the instruction that CR sit in the front seat of the bus and at some point in time CR and BRW sat together in the middle or back of bus # 219. (App. p. 940) (After the first week of CR being on bus # 219, Sauer stated that CR could sit wherever he wanted to sit and that it was no big deal where the students sat). Sauer stated in his deposition that none of the

²⁵Margaret Nelson was the housing coordinator at Mount Olivet where CR resided in 2005 and was also considered CR's surrogate parent.

bus aides enforced the instruction that CR sit in the front of the bus. (App. p. 940). Sauer also stated in his deposition, that the bus seats would obstruct his view to some degree. (App. p. 940).

Sauer stated that it was possible that inappropriate sexual contact occurred between CR and BRW while they were on bus # 219. (App. p. 940).

Bentley (bus aided) stated in his deposition that he worked for Adam Services from April of 2005 through June of 2005 as a bus aide on bus # 219, and Sauer was the bus driver and that he replaced Bagget. (App. p. 940). Currently, Bentley is not working for Adam Services, and he is collecting social security disability. (App. p. 940). The nature of Bentley's disability is that he is blind in one eye and he has back problems and shoulder problems. (App. p. 940). Bentley was aware that all the students on bus # 219 were special needs students. (App. p. 940).

Bentley stated in his deposition that Sauer, the bus driver for bus # 219, never showed CR's emergency card to Bentley. (App. p. 941). Bentley stated that CR and BRW would sit in the back of the bus and would sit together, basically any place they wanted to sit. (App. p. 941). Prior to Bentley being on bus # 219, CR was instructed to sit in the front of the bus, however, later that instruction was lifted and CR and BRW could sit basically any place on the bus they wanted. (App. p. 941).

The following was stated regarding where Bentley would sit in relationship to CR and BRW while on bus # 219:

Attorney Schiek: What seat [referencing where did Bentley sit] was that?

Answer Bentley: The seat, one seat from the back.

Attorney Schiek: And then would B and Cody sit directly behind you?

Answer Bentley: Not all the time.

Attorney Schiek: But some of the time?

Answer Bentley: Maybe once or twice. Maybe three times.

Attorney Schiek: And they would also sit where, in front of you and in the back left?

Answer Bentley: On the side and in the back.

Attorney Schiek: And there was no instruction or rules that Cody and B could not sit together; correct?

Answer Bentley: Not that I heard.

(App. p. 941).

The following question was asked to Bentley regarding his²⁶ training at Adam Services:

Attorney Schiek: Did you ever receive any special training from Adam Bus Services regarding special needs kids?

Answer Bentley: No.

(App. p. 942²⁷). It is the Appellants' position that Adam Services violated the law by not

²⁶The last time that Bentley received any training for special needs was in 1976. (App. p. 1185). This is also contrary to Lehman's deposition where she indicated that she trained all the bus aides regarding special needs kids. (Dep. Lehman's, discussed below).

²⁷Attorney Schiek: Did anybody train you in at Adams Bus Services? Answer Bentley: No, sir...(App. p. 942).

providing Bentley with any training because Minn. R. 7470.1700, subp. 3 (B) states, “Each driver and aide [Bentley] assigned to a vehicle transporting pupils with a disability must²⁸: B. within one month after the effective date of assignment, participate in a program of in-service training on the proper methods for dealing with the specific needs and problems of pupils with disabilities.” According to Bentley’s deposition testimony he had no training within one month of his assignment to bus # 219. (App. p. 942). By not providing Bentley with in-service training on the proper methods for dealing with specific needs and problems of students with disabilities, Adam Services’ actions would be considered a per se violation of the law.

Renee Lehman (a/k/a “Lehman”) worked for Adam Services and in April of 2005 up to and including the present, she was the office manager and had the authority to terminate people who worked at Adam Services. (App. p. 943). In April of 2005, Lehman stated in her deposition that she was responsible for disciplining bus drivers and bus aides. (App. p. 943). In April of 2005, Lehman oversaw 50 - 60 bus drivers and bus aides, and would also train the bus drivers and bus aides. (App. p. 943).

Lehman stated that bus drivers and bus aides are both trained on student safety and are trained on special needs children. (App. p. 943). However, as stated above, Bentley stated that he never received any training for special needs children or for that matter any

²⁸Minn. Stat. § 645.44, subd. 1 and 15a, states in relevant part, “The following words, terms, and phrases used in Minnesota Statutes or any legislative act shall have the meanings given them in this section, unless another intention clearly appears.... ‘Must’ is mandatory.”

training at all from Adam Services.

Lehman stated that Adam Services' guide for special needs states, "As the term 'special needs' implies, the children you transport are special in that they **require more attention, assistance, patience, and caring.**" (App. p. 943) (emphasis added).

Lehman stated in her deposition that if a bus driver or bus aide is instructed by a parent or guardian or housing coordinator that a student should sit in a certain place²⁹ that a driver would be obligated to make sure that the student sits in that particular location. (App. p. 943). Lehman 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

²⁹Sauer stated in his deposition that on the first or second day (April 6 or 7, 2005) that when CR got on the bus he was instructed by Margaret Nelson, CR's group home coordinator, that CR was to sit in the front seat of the bus.

later to sit the child anywhere he wanted?

Answer Lehman: No.

(App. p. 944).

Lehman stated that it is the responsibility of the bus driver and bus aide to provide for the safety of the children while the children are on the bus. (App. p. 944).

Lehman stated in her deposition that in 2005 the emergency forms were faxed from Bloomington School District to Adam Services. (App. p. 944). Lehman stated that her contact person regarding the emergency forms from Bloomington School District was Darwin Hauser. (App. p. 944). The emergency form would then be placed in a file at Adam Services and a copy would go to the bus driver. (App. p. 944). Lehman denied ever receiving an emergency form from Bloomington that CR was to sit alone in the front seat. (App. p. 944). However, Lehman did acknowledge that Adam Services received an emergency form regarding CR that indicated that CR had been diagnosed as an "EBD" student. (App. p. 944 - 945).

Lehman stated that the emergency forms are considered confidential. (App. p. 945).

Lehman stated that she received complaints³⁰ that Bagget was falling asleep on bus # 219 and that she was also wearing headphones. (App. p. 945) ("She [referencing Bagget] was incapable of I guess staying awake and concentrating on what she needed to

³⁰Lehman stated that she also received other complaints about Bagget from a separate bus driver than Sauer. (App. p. 945).

do.”). Lehman stated specifically that Bagget was a bus aide³¹ when CR and BRW rode on the bus # 219. (App. p. 945).

Lehman stated that prior to terminating Bagget she warned Bagget twice for falling asleep on bus # 219. (App. p. 945). Lehman terminated Bagget because she was falling asleep on the job and because she was wearing headphones on the bus. (App. p. 945). Lehman received complaints from Sauer (which is consistent with Sauer’s deposition) that Bagget was falling asleep on the bus and that Lehman believed that the information that Bagget was falling asleep on the bus was in fact true. (App. p. 945).

Joseph Regan (a/k/a “Regan”) started Adam Services and is the owner and general manager. (App. p. 945 - 946). Adam Services focuses on transporting students with special needs. (App. p. 946).

Regan stated that Sauer was the bus driver and that Bagget and Bentley were the bus aides on bus # 219. (App. p. 946). Regan stated that Lehman terminated Bagget for inattentiveness and for falling asleep. (App. p. 946).

Regan stated that bus aides are required to go through training through Adam Services in order to deal with special needs students. (App. p. 946). However, as stated above, Bentley stated that he never received any training for special needs children or for that matter any training at all. (App. p. 946).

Regan stated that it is the responsibility of the bus driver and the bus aide to ensure

³¹Lehman stated that Bagget and Bentley were bus aides on bus # 219. (App. p. 945). Lehman stated that Sauer was the only bus driver who drove bus # 219. (App. p. 945).

the safety and welfare of the students on the bus. (App. p. 946). Regan specifically stated that it is the “duty” of the bus driver and bus aide to provide for the safety of the children while they are on the bus. (App. p. 946).

Regan also stated that if there was an instruction that a student should sit in the front seat, it would be a “big red flag.” (App. p. 946). Regan indicated that receiving an instruction that a student sit in the front seat was not normal. (App. p. 946).

Regan stated that normally given the dates on the two emergency forms that Adam Services would have received the two emergency forms during the school year. (App. p. 946).

It is also the position of the Appellants’ that it is unclear whether the emergency form, dated January 24, 2005, stating that CR should sit in the front seat alone, 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 and then misplaced that form.

Jim Engstrom (a/k/a “Engstrom”) was the Transportation Director for Bloomington in 2005. (App. p. 1331). 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. (App. p. 1335 - 1363) (Question Seeberger: Did you ever communicate to Adams Services that Cody was to sit in the front

seat alone? Answer Engstrom: I believe they were notified, yes...Question Seeberger:

What makes you think that Adams Services was contacted and advised that Cody should

sit in the front seat alone? Answer Engstrom: Because the information is on the form

[referencing CR's amended emergency form, marked as Ex. B]...Question Seeberger:

You indicated that you believe Adams Services was notified that Cody needed to sit alone

in the front seat; is that your testimony? Answer Engstrom: I believe they were, yes.

Question Seeberger: And is that belief based strictly on the fact that number 16

[referencing CR's amended emergency form, marked as Ex. B] reflects the instruction,

"sit in the front seat alone"? Answer Engstrom: No, it's just my recollection that at some

point we were made aware of that, and that we made Adams Services aware of

that...Question Seeberger: Well, certainly if you came into that information, [that CR sit

alone in the front seat of the bus] for example, during the school year while Adams

Services was transporting Cody, you would expect that you would communicate that to

Adams Services, true? Answer Engstrom: Yes. Question Seeberger: I mean, that would

be the kind of information that you think would be important for bus drivers and bus aids

to know? Answer Engstrom: It would be very important for them to know that.).

Engstrom stated that the instruction that CR sit alone in the front seat of the bus alone

would normally be conveyed to Lehman and that this information would have been

conveyed to Lehman as soon as Bloomington was made aware that CR was to sit alone in

the front sit of the bus. (App. p. 1359 - 1360).

STANDARD OF REVIEW AND LEGAL ARGUMENTS

STANDARD OF REVIEW FOR IMMUNITY AND PUNITIVE DAMAGES

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).

Whether government entities and public officials are protected by statutory immunity and official immunity is a legal question which the court reviews de novo. Snyder v. City of Minneapolis, 441 N.W.2d 781, 786 (Minn. 1989).

An appellate court may not reverse a district court's denial of a motion to add a claim for punitive damages absent an abuse of discretion. LeDoux v. N.W. Publ'g, Inc., 521 N.W.2d 59, 69 (Minn. Ct. App. 1994), review denied.

LEGAL ARGUMENTS

I. When viewing the evidence in the light most favorable to the Appellants, the district court erred when it dismissed the claims filed by the Appellants based on statutory and official immunity against the Bloomington School District, because the decisions of the employees at Bloomington School District were operational level and would also be considered ministerial conduct thus allowing the negligent and respondeat superior claims against Bloomington School District to survive.

Tort claims generally allow governmental entities to be held liable for their torts subject to certain exceptions and limitations. Watson by Hanson v. Metropolitan Transit Com'n, 553 N.W.2d 406 (Minn. 1996), rehearing denied.

It is important to note at the outset that the governmental entity bears the burden of establishing that its conduct is immune. Landview Landscaping, Inc. v. Minnehaha Creek Watershed Dist., 569 N.W.2d 237 (Minn. Ct. App. 1997), review denied. Moreover, because both forms of immunity are exceptions to the general rule of liability, both are construed narrowly. Johnson v. County of Nicollet, 387 N.W.2d 209, 211 (Minn. Ct. App. 1986) (statutory immunity); Larson v. Independent Sch. Dist. No. 314, 289 N.W.2d 112, 121 (Minn. 1980) (official immunity).

A. Statutory Immunity.

Subject to the limitations of sections 466.01 to 466.15, every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function. Minn. Stat. § 466.02. However, Minn. Stat. § 466.03, subd. 1 and

6, state “Section 466.02 does not apply to any claim enumerated in this section. As to any such claim every municipality shall be liable only in accordance with the applicable statute and where there is no such statute, every municipality shall be immune from liability...Any claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.”

Statutory immunity protects state and counties from liability on the basis of policy-making activities that are legislative or executive in nature; policy-making activities at planning level are protected, while conduct at operational level generally are unprotected. Johnson v. State, 553 N.W.2d 40 (Minn. 1996). For purposes of statutory immunity, the court distinguishes between “planning level” activity, which is within immunity, and “operational level” activity, which is not within immunity, and in making this determination the crucial question is whether conduct involves balancing of public policy considerations in the formulation of policy. Gleason v. Metropolitan Council Transit Operations, 563 N.W.2d 309 (Minn. Ct. App. 1997), review granted, affirmed in part 582 N.W.2d 216.

State or municipal activity is operational-level unprotected by statutory immunity if it is one which relates to the ordinary, day-to-day operation of government. Gerber v. Neveaux, 578 N.W.2d 399 (Minn. Ct. App. 1998), review denied.

Most important, while the implementation of a government policy sometimes requires policymaking, more often than not, implementation simply involves applying an

established policy to a particular fact situation and is, therefore, unprotected operational level conduct--albeit conduct which calls for the special knowledge and expertise of government employees and requires the exercise of professional judgment. Aslakson v. United States, 790 F.2d 688, 692-94 (8th Cir. 1986); Griffin v. United States, 500 F.2d 1059, 1066 (3d. Cir. 1974); Stevenson v. State Dep't of Transp., 290 Or. 3, 15-16, 619 P.2d 247, 254-55 (1980); citing, Holmquist v. State of Minnesota, 425 N.W.2d 230, 234 (Minn. 1988). Generally, the mere implementation of policy is considered operational level conduct unprotected by statutory immunity. Rico v. State, 472 N.W.2d 100, 104 (Minn. 1991).

“[M]unicipalities are generally liable for the torts of their employees if the tort is committed within the scope of employment.” Schroeder v. St. Louis County, 708 N.W.2d 497, 503 (Minn. 2006); see Minn. Stat. § 466.02 (2007). “The purpose of statutory immunity is to protect the legislative and executive branches from judicial second-guessing of certain policy-making activities through the medium of tort actions.” Id. at 503.

A court’s first step in determining whether conduct is protected by statutory immunity is to “identify the conduct at issue.” Conlin v. City of St. Paul, 605 N.W.2d 396, 400 (Minn. 2000).

The district court stated in this case that, “[t]he decision at issue here on the part of both districts was the decision of whether to disclose C.R.’s history of sexual misconduct

on his Transportation Emergency Form. That decision required district employees to consider safety issues, confidentiality issues, and possible legal consequences of both disclosure and non-disclosure. Under *Watson*, it is not the role of this Court to second-guess such decisions.” (App. p. 1526).

It is first Appellants’ position that this is not the protected conduct at issue and that the appropriate conduct at issue is the conduct of allowing CR to sit anywhere he wanted to, even though his emergency forms stated that he must sit alone in the front of the bus.

The instruction on the emergency form, stated specifically, “SIT BEHIND DRIVER, ALONE IN THE SEAT!” (Not altered) (with a star by it). The instruction is critical because the bus driver and bus aide for Bloomington would not have any discretion as to where CR was suppose to sit. Attorney Koch noted that a driver would not have discretion as to where the child should sit in the deposition of Lehman:

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.

(emphasis added).

It is the Appellants' position that having a child sit alone in the front of a bus is an ordinary, day to day operation of government that is not protected by immunity. In other words, it is operational level and therefore immunity does not apply. It is Appellants' position that it is completely irrelevant whether the School District was going to disclose C.R.'s history of sexual misconduct on his emergency forms, a decision was made that C.R. must sit alone in the front sit of the bus, however, that decision was not followed.

The bus driver and bus aide had zero discretion where C.R. was suppose to sit, however, C.R. and BRW stated that while they rode on bus # 419 they could sit wherever they wanted. The instruction that CR sit alone in the front seat was absolute and certain and only involved the execution of a specific duty from fixed and designated facts. The facts of the case do not involve policy level discretion.

Appellants state that all the emergency forms in question where considered confidential in nature and because the emergency forms are considered confidential school districts should be encouraged to include on the emergency form the exact reasons for why the person must sit alone in the front sit, i.e., the student has a history of sexual misconduct. School districts should not be encouraged to limit this information on the emergency form. There were no political, social or economic considerations given as to

where CR should sit.

B. Official Immunity and Vicarious Immunity.

Official immunity, and therefore vicarious official immunity, do not extend to officials “charged with the execution of ministerial, rather than discretionary, functions....” Anderson v. Anoka, 678 N.W.2d 651, 655 (Minn. 2004). The primary focus must be on “the nature of the act at issue,” and official and vicarious immunity do not apply “(1) when a ministerial duty is either not performed or is performed negligently, or (2) when a willful or malicious wrong is committed.” Schroeder, 708 N.W.2d at 505. A duty need not be imposed by law in order for it to be construed as ministerial. Anderson, 678 N.W.2d at 659.

A duty is discretionary if it involves “individual professional judgment that necessarily reflects the professional goal and factors of a situation.” Wiederholt v. City of Minneapolis, 581 N.W.2d 312, 315 (Minn. 1998). And a duty is ministerial if it is “absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts” and “dictate[s] the scope of the employee's conduct.” Anderson, 678 N.W.2d at 659.

Generally, if a public official is immune from suit under the doctrine of official immunity, his or her employer will enjoy vicarious official immunity and the converse is also true. Anderson, 678 N.W.2d at 663-64.

First, it is the position the Appellants’ that Bloomington is guilty of wilful or

malicious behavior because Johnson stated that Engstrom, in June of 2005, informed him that CR and BRW had inappropriate sexual relations while on Hosterman grounds, however, Engstrom did not report that behavior. Besides telling Johnson, Engstrom did not inform any other person.

Further, Bloomington violated their own policy on having emergency forms on the bus. Bloomington policy states that emergency forms are required by the State Department of Public Safety rules to be on each bus a student rides. For at least two weeks Johnson did not have an emergency form on bus # 419 regarding CR. Not having an emergency form on a bus with special needs is also a per se violation of Minn. R. 7470.1000 which states the bus driver **shall**³² have available to them **in the vehicle** an emergency card for all students with special needs. (emphasis added). Johnson stated that he did not have in his possession the May 20, 2005, emergency form regarding CR until after two weeks of the summer school had expired.

Moreover, there is substantial evidence that CR could sit wherever he wanted on bus # 419 and that the bus aide would fall asleep on the bus and would read a book.

Further, there was a specific instruction, that was not followed, that CR sit alone in the front of the bus.

Clearly, there is substantial evidence that Bloomington knew about CR's

³²Minn. Stat. § 645.44, subd. 1 and 15a, states in relevant part, "The following words, terms, and phrases used in Minnesota Statutes or any legislative act shall have the meanings given them in this section, unless another intention clearly appears.... 'Must' is mandatory."

propensity to act out sexually toward other students.

Therefore, official immunity and vicarious official immunity do not apply because the conduct of Bloomington rises to the level of wilful or malicious behavior. The Appellants have established sufficient facts to establish that Bloomington's conduct is not immune.

If the Court of Appeals determines that Bloomington did not act in a wilful or malicious manner then it is still Appellants' position that official immunity and vicarious official immunity do not apply because the conduct was ministerial.

In *Moses*, a mother brought a suit on behalf of her minor son, against Minneapolis Public Schools for negligence. *Moses v. Minn. Pub. Schools*, WL 846546 (Minn. Ct. App. 1998) (Unpublished) (App. p. 1471 - 1473). The minor child had a condition known as congenital myopathy, which causes weakening of the muscles. Id. Minneapolis Public Schools was aware of the condition and agreed to an IEP to provide him with special services. Id. The IEP recommended use of a helmet during gym class, provide for an aide on the playground and during gym class, and provide consultation with a physical therapist. Id. During a fire drill, the minor child fell on his face and injured his mouth. Id. The Court of Appeals held that given the school district's **knowledge** of the minor son's condition and **given the recommendation of the IEP**, fact issues existed as to whether the teacher's conduct was reasonable and whether that conduct caused the minor son's injury. Id. (Emphasis added).

The minor child's negligence claim was based on the teacher's conduct and the vicarious liability of the school district. Id. at 2. The school district alleged official immunity as a defense. Id. The Court of Appeals did not allow for official immunity because the IEP made specific recommendations and provided guidelines for dealing with the minor child's condition, thus the teacher's conduct during the fire drill involved the exercise of a ministerial duty not protected by official immunity. Id. In other words, because the teacher did not follow the recommendations of the IEP, the school district would not be allowed out of the lawsuit based on official immunity. In essence, the IEP created a higher duty.

Like, *Moses*, where the Court of Appeals did not allow statutory, official or vicarious immunity as a defense because the teacher negligently did not follow the recommendations of the IEP, Bloomington should not be allowed to use statutory, official or vicarious immunity as a defense because Bloomington had specific knowledge regarding CR's propensity to act out sexually discussed at length in his IEP and Bloomington had knowledge that BRW needed additional assistance on the bus.

The IEP, dated March 30, 2005, regarding CR stated, "Special seating will be given to cody on the bus, if needed a bus assistant wil [sic] be present to help with behavioral issues", and the two emergency forms, one dated January 24, 2005, stated "Sit in Front Seat Alone", and one dated May 20, 2005, stated with a star by it, "SIT BEHIND DRIVER, ALONE IN THE SEAT!" Moreover, the Supplemental Referral Form dated

February 11, 2005, executed by Yarbrow stated that CR had a history of acting out sexually and that he should not be around students under the age of 12 unsupervised and that CR needed constant supervision. 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).

The forms stated above basically mandate that CR sit alone in the front seat, however, this mandate was not followed by Bloomington. The conduct would be considered ministerial.

The Appellants have established sufficient facts to establish that Bloomington's conduct is not immune.

Therefore, the negligent and respondeat superior claims survive against Bloomington as outlined in Appellants' Memorandum of Law. See App. p. 679 - 685.

II. When viewing the evidence in the light most favorable to the Appellants, the district court erred when it dismissed the claims filed by the Appellants based on statutory and official immunity against Hosterman, because the decisions of the employees at Hosterman were operational level and would also be considered ministerial conduct thus allowing the negligent and respondeat superior claims against Hosterman to survive.

Appellants' arguments are virtually identical on the issues of statutory and official immunity for Hosterman stated in Section I regarding Bloomington. Appellants rely on the same legal analysis outlined in Section I, thus concluding that Hosterman is not entitled to statutory or official immunity.

Hosterman stated in their Memorandum that, “[i]n the discretion of officials of District # 287 [Hosterman] and Bloomington, these special transportation instructions [CR must sit alone in the front sit] were in their judgment and discretion reasonably appropriate to protect other students from CR during transportation to and from Hosterman.” (App. p. 229). Again, the focus of the conduct should be on whether CR was required to sit alone in the front of the bus. Hosterman assisted in implementing the rule that CR sit alone in the front of the bus and therefore they should not be allowed to claim statutory or official immunity. (See Section I).

Essentially, Hosterman does not have immunity because the instruction (something they assisted in establishing) that CR sit in the front seat of the bus was not followed.

Therefore, the negligent and respondeat superior claims survive against Hosterman as outlined in Appellants' Memorandum of Law. See App. p. 717 - 726.

III. The district court abused its discretion when it did not allow the Appellants to amend the complaint to add punitive damages against Adam Services, Inc. because Adam Services, Inc. acted in deliberate disregard or willful indifference to the rights and safety of BRW.

Under Minn. Stat. § 549.191, a plaintiff must make a motion to amend the complaint to claim punitive damages.

The plaintiff is not required to demonstrate entitlement to punitive damages per se, but only an entitlement to allege such damages. McKenzie v. Northern States Power Co., 440 N.W.2d 183, 184 (Minn. Ct. App. 1989). The court shall grant the motion to amend the pleadings to claim punitive damages if the court finds prima facie evidence in support of the motion. Minn. Stat. § 549.191.

Minnesota Courts have determined that “[p]rima facie evidence is that evidence which, if unrebutted, would support a judgment in that party’s favor.” Swanlund v. Shimano Industrial Corp. Ltd., 459 N.W.2d 151, 154 (Minn. Ct. App. 1990); McKenzie, supra.

Minn. Stat. § 549.20, subdivision 1, provides that punitive damages in civil actions can be recovered “only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.” “Willful indifference,” or “deliberate disregard” are required for an award of punitive damages. Kay v. Peter Motor Co., Inc., 483 N.W.2d 481 (Minn. 1992).

This case is of the type envisioned by the Legislature when it passed the statute permitting the district court to grant punitive damages.

Prior to April 6, 2005, Adam Services had reprimanded Bagget twice for failing asleep on the bus, however, management at Adam Services did not terminate Bagget. Sauer (bus driver on bus # 219) testified that from March 31, 2005 through April 13, 2005, that Bagget feel asleep on the bus at least three times and that she wore headphones during that time frame at least five times. The fact that Bagget feel asleep on bus # 219 and that the fact that she would wore headphones while she was a bus aide on bus # 219 is unrebutted.

Sauer and Lehman (a person in a managerial position) 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 feel asleep, that is when he would touch BRW sexually inappropriately. CR stated in his deposition that he touched BRW on a regular basis while he was on bus # 219. Evidence that CR touched BRW sexually inappropriately while on bus # 219 is overwhelming.

Lehman also stated that if a bus driver was given an instruction (the instruction being that a student sit in the front of the bus) by a coordinator of a housing home, such as Margaret Nelson (surrogate parent), the bus driver would have **no** discretion where that student could sit. (Emphasis added). In other words, the bus driver would be mandated to have the student sit in the front of the bus. Sauer admitted in his deposition that Margaret Nelson, on April 6 or 7, 2005, instructed him that CR should sit in the front of

the bus. Sauer also stated that he never relayed the information that CR sit in the front of the bus to the bus aides. Sauer stated that after awhile he allowed CR to sit wherever he wanted to on the bus and that it was no big deal where CR sat. Sauer allowed BRW and CR to sit together. This is consistent with CR's testimony that he could sit wherever he wanted on bus # 219. Sauer never questioned why CR should sit in the front of the bus.

If Sauer would have followed the procedures of Adam Services, as described by Lehman, i.e., an instruction from a housing coordinator that CR sit in the front of the bus, then the conduct which occurred between CR and BRW would not have occurred.

In addition, Adam Services did not provide Bentley with any training regarding special needs while he was employed at Adam Services. In fact Bentley testified that the last time he received any training regarding special needs students was in 1976. Pursuant to Minn. R. 7470.170, subp. 3 (B), Adam Services' action of not providing training to Bentley was a per se violation of law.

Adam Services employed a bus aide (Bentley) that had a disability, i.e., Bentley was blind in one eye and had difficulty moving around because he had back and shoulder problems.

Sauer also knew that CR was diagnosed with EBD (pursuant to the emergency form) and the bus aides were also aware that every student on bus # 219 had special needs. Adam Services' own guide for special needs states, "As the term 'special needs' implies, the children you transport are special in that they require **more** attention,

assistance, patience, and caring.” (Emphasis added). In other words, Adam Services knew that the students on bus # 219 needed heightened supervision because they were classified as special needs students. However, Adam Services did not provide heightened supervisor for bus # 219, in fact, there is substantial evidence that Adam Services provided less than adequate supervision for students on bus # 219.

Further, the bus driver and bus aide all stated that it is the responsibility of the bus driver and the bus aide to ensure the safety and welfare of the students while the students were on the bus.

It is also the position of the Appellants’ that it is unclear whether the emergency form, dated January 24, 2005, stating that CR should sit in the front seat alone, 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 and then misplaced that form.

Engstrom was the Transportation Director for Bloomington in 2005. 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. Engstrom stated that the instruction that CR sit alone in the front seat of the bus alone would normally be conveyed to Lehman and that this information would have been conveyed to Lehman as soon as Bloomington was made aware that CR was to sit alone in

the front sit of the bus.

It is the position of the Appellants' that Engstrom's deposition testimony puts at issue (facts in dispute) the question of whether or not Adam Services, Inc. did in fact receive the amended emergency form regarding CR stating that CR should sit alone in the front seat of the bus.

It is clear that Adam Services' actions or non-actions show a deliberate disregard or willful indifference toward the rights and safety of BRW. There is a high probability that Adam Services acted with a deliberate disregard for the rights and safety of BRW for the above referenced reasons. It is the Appellants' position, that they have proven by clear and convincing evidence that punitive damages should be allowed against Adam Services, Inc.

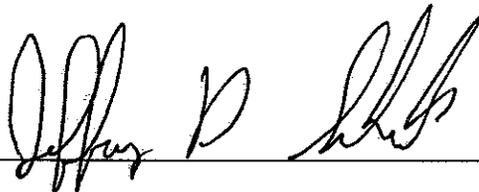
CONCLUSION

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

Respectfully Submitted,

Dated: May 8, 2008

VILLAUME & SCHIEK, P.A.

Handwritten signatures of Philip G. Villaume and Jeffrey D. Schiek, written in black ink over a horizontal line.

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COURT OF APPEALS NO.: A08-0612

STATE OF MINNESOTA
IN COURT OF APPEALS

JW on behalf of BRW, minor child,

Appellant

vs.

**CERTIFICATE OF BRIEF
LENGTH**

287 Intermediate District, and

Independent School District 271,

a/k/a "Bloomington Public Schools",

a/k/a "Transportation Center for

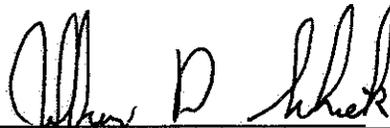
Independent School District 271",

and Adam Services, Inc.,

Respondents.

I hereby certify that this brief conforms to the requirement of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,921 words. This brief was prepared using Corel WordPerfect, Times New Roman font face size 13.

Dated: May 8, 2008


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