STATE OF MICHIGAN

COURT OF APPEALS

KAREN SANDLIN, as Next Friend of AMBER SANDLIN, a Minor,

Plaintiff-Appellee,

v

LARRY MOORE and NORTHEAST MICHIGAN COMMUNITY SERVICE AGENCY, INC.,

Defendants,

and

CLARE COUNTY TRANSIT CORPORATION,

Defendant-Appellee.

UNPUBLISHED
August 1, 2000

No. 214061
Clare Circuit Court
LC No. 97-900433-NO

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment for defendant Clare County Transit Corporation entered following a jury trial, and an order denying plaintiff's motion for new trial,[1] judgment notwithstanding the verdict, or to set aside the verdict. We affirm.

I

Four-year-old plaintiff Amber Sandlin was enrolled in the Harrison Head Start program and was transported to and from the program on a bus owned and operated by Clare County Transit Corporation (CCTC). Former defendant Northeast Michigan Community Service

---

[1] Although the title of plaintiff's motion stated "mistrial" instead of "new trial," plaintiff's written motion sought as relief a new trial. See n 9, *infra*. The trial court's order denying plaintiff's post-trial motions, filed August 11, 1998, stated "mistrial."

Agency, Inc. (NEMSCA),[2] conducted the Harrison Head Start program and, pursuant to a transportation agreement with CCTC, CCTC was responsible for transporting students enrolled in the program. CCTC did so using a public bus in which it also transported "Dial-A-Ride" passengers while transporting the pre-schoolers. CCTC advertised using the words "safely, safety and security" and stated a commitment to assure that children attend their activities safely. On the afternoon of March 23, 1994, former defendant Larry Moore,[3] then twenty-seven years old, boarded the bus and sat in a front seat. At the time, Amber was seated in the rear-most row of seats, next to a window, with her seat-belt buckled. There were no adult passengers on the bus at the time, other than Moore, and there were two children, Amber and another child. While the bus was moving, Moore left his front row seat, and sat next to Amber in the last row. At trial, it was disputed whether the bus driver saw Moore leave his seat and sit next to Amber, or whether she saw Moore once he was already sitting next to Amber. The driver testified that she saw Moore sitting next to Amber, that Amber had a surprised look on her face, and that when her eyes met Moore's he raised his hands in the air. The driver neither said anything to Moore or stopped the bus, and continued driving to the next stop. When Amber got off the bus soon after, she told her mother that the "boy on the bus had hurt her tummy and touched her potty," and was taken to an emergency room, where abrasions from her navel to pubic area were observed. Moore was convicted as a result.

The jury returned a verdict of no cause of action, and the trial court denied plaintiff's post-trial motion seeking a new trial. This appeal ensued.

II

Plaintiff first argues that the trial court abused its discretion by denying her request to give SJI2d 10.07, which requires a defendant to exercise "greater vigilance" when he knows or should have known that children will be in the vicinity. Plaintiff argues that CCTC should have maintained "greater vigilance" of the Head Start children it transported by sitting them up close to the driver or by employing a bus aide. Plaintiff argues that the trial court "disregarded the frozen inaction of a child while she was being approached and assaulted by a man in the back of a bus and disregarded the fact that Amber could not even be seen over the seat in front of her." Plaintiff asserts that the jury instructions on ordinary care, without the additional language of SJI2d 10.07, gave the impression that the law required no more vigilance from CCTC than was required in transporting an adult, and thus misstated Michigan law. Plaintiff argues that the degree of vigilance required of CCTC and its driver was clearly critical to her entire case.

A

SJI2d 10.07 is entitled "Conduct Required for Safety of Child," and states:

---

[2] NEMSCA was dismissed after reaching a settlement agreement with plaintiff on the first day of trial.

[3] Plaintiff voluntarily dismissed Moore on the first day of trial.

> The law recognizes that children act upon childish instincts and impulses. If you find the defendant knew or should have known that a child or children were or were likely to be in the vicinity, then the defendant is required to exercise greater vigilance and this is a circumstance to be considered by you in determining whether reasonable care was used by the defendant.

The "Note on Use" and "Comment" following SJI2d 10.07 state:

> This instruction is to be used in appropriate cases where the plaintiff seeks damages for injury to a minor. If the conduct of a person, e.g., agent, driver, etc., other than defendant was involved in the occurrence, substitute name or other descriptive term in the instruction. This instruction should be given immediately after SJI2d 10.03.
>
> *See Bolser v Davis*, 62 Mich App 731; 233 NW2d 845 (1975), where defendant's knowledge that there were homes along the road on which she was driving was a fact from which a jury could infer that she knew or should have known that a child or children were or were likely to be in the vicinity, and therefore the evidence was sufficient to make this instruction appropriate.
>
> *Comment*
>
> The law recognizes that children, wherever they go, must be expected to act upon childish instincts and impulses. *Powers v Harlow*, 53 Mich 507, 515; 19 NW 257, 260 (1884); *Edgerton v Lynch*, 255 Mich 456, 460; 238 NW 322, 323-324 (1931). Michigan law requires greater vigilance toward children than toward adults, although the degree of care does not change. *See* Comment, SJI2d 10.02.[4]

---

[4] SJI2d 10.02, entitled Negligence of Adult—Definition, states:

> Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful person would use. Therefore, by "negligence," I mean the failure to do something that a reasonably careful person [business] would do, or the doing of something that a reasonably careful person [business] would not do, under the circumstances that you find existed in this case.
>
> The law does not say what a reasonably careful person [business] using ordinary care would or would not do under such circumstances. That is for you to decide.

The *Comment* states in pertinent part:

> Under Michigan law, the standard of conduct required may differ depending on the activity, trade, occupation, or profession, but the degree of care does not change. It is always what a reasonably careful person engaged in a particular activity, trade, occupation or profession would do or refrain from doing under the circumstances then

(continued...)

The jury instructions read included SJI2d 10.02,[5] 10.05[6], 13.08,[7] and 13.09.[8] The trial court denied plaintiff's request for SJI2d 10.07, stating:

> The record should indicate that the Court opted not to give that because it did not feel that it applied in this particular situation. That applies to when the child is likely to do something that an adult would not do, and in this particular situation, all the evidence just simply indicates that the child was sitting in her seat at the time and she wasn't doing anything that children otherwise would not do. That's the reason why the Court did not give that instruction.

Under MCR 2.516(D)(2), a trial court must give a standard jury instruction if: (1) it is applicable, (2) it accurately states the applicable law, and (3) a party requests the instruction. *Pontiac School Dist v Miller Canfield Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997), lv gtd in part on other grounds, 457 Mich 871 (1998). We review a trial court's determination whether an instruction is accurate and applicable based on the characteristics of a case for abuse of discretion. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). An appellate court should vacate a jury verdict "only when the failure to comply with MCR 2.516 amounts to an 'error or defect'

(...continued)

existing.

> The general rule for a child as set forth in *Restatement (Second) of Torts*, § 283A, is that "the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances." However, there is an exception to this rule where the child is engaging in an adult activity. The exception is set forth in comment c to § 283A, which states as follows:
>
> > An exception to the rule stated in this Section may arise where the child engages in an activity which is normally undertaken only by adults, and for which adult qualifications are required. . . .

[5] See n 4, *supra*.

[6] The court stated:

> It was the duty of the Defendant in connection with this occurrence to use ordinary care for the safety of the Plaintiff.

[7] The court stated:

> You must not consider whether there was negligence on the part of Amber Sandlin because under the law a child of her age cannot be charged with negligence.

[8] The court stated:

> You must not consider whether there was negligence on the part of Amber Sandlin's parent or parents because under the law any negligence on the part of the parents cannot affect a claim on behalf of the child.

in the trial so that the failure to set aside the verdict would be 'inconsistent with substantial justice.'" *Johnson v Corbet*, 423 Mich 304, 326; 377 NW2d 713 (1985), quoting from MCR 2.613.

We have found no cases, and plaintiff cites none, in which SJI2d 10.07 has been applied outside the attractive nuisance or sudden impulse settings. See *Laney v Consumers Power Co,* 418 Mich 180, 182-183 n 2; 341 NW2d 106 (1983) (holding in a wrongful death case involving a sixteen-year-old who was electrocuted when he climbed a tree in his front yard and came in contact with a power line, that the trial court did not err by refusing to instruct that "high degree of care" standard was applicable); *Byrne v Schneider's Iron, Inc,* 190 Mich App 176, 182-183; 475 NW2d 854 (1991) (noting in a wrongful death case in which decedent died while playing in sand pit located on defendant's property, that "SJI2d 10.07 represents a statement of existing attractive nuisance precedent and does not contradict or broaden the attractive nuisance instruction."); *Tibitoski v Macomb Disposal Service, Inc,* 136 Mich App 259, 261-262; 356 NW2d 15 (1984) (fourteen-year-old ran past front of truck turning into driveway, tripped, and her leg was run over by truck); *Hunter v Szumlanski,* 124 Mich App 521, 528-529; 335 NW2d 75 (1983), rev'd on other grounds 418 Mich App 958 (1984) (child struck and killed after darting between parked cars into path of defendant's car); *Isom v Farrugia,* 63 Mich App 351, 356; 234 NW2d 520 (1975) (child struck and killed as he ran across road); *Bolser v Davis*, 62 Mich App 731, 734; 233 NW2d 845 (1975) (holding trial court erred in denying request for SJI2d 10.07, where plaintiff's daughters were struck and killed by defendant's car where there was testimony that homes were present in vicinity of accident); and *Ivy v Binger,* 39 Mich App 59, 60; 197 NW2d 133 (1972) (six-year-old struck when he darted into traffic at a school crossing).

Under the circumstance that no Michigan case has applied SJI2d 10.07 outside the attractive nuisance or sudden impulse settings, and that plaintiff did not raise below the argument that the child's frozen response or inaction was a childish instinct or impulse, we are unable to conclude that the trial court's determination that SJI2d 10.07 was not applicable to the instant case was an abuse of discretion, or that the trial court misstated the law by not reading the instruction. The instructions given directed the jury to evaluate defendant's conduct in light of the circumstances of the case, which, the plaintiff stressed in argument, included the age and vulnerability of the child.

III

Plaintiff's second argument is that the trial court abused its discretion by comments it made to the jury, after deliberations had begun, when the jury requested clarification of several instructions. Plaintiff did not object to the challenged comments at the time, but did so in a post-trial motion seeking a new trial.[9]

---

[9] Defendant incorrectly argues that plaintiff did not specifically raise this issue in her post-trial motion. Plaintiff's post-trial motion stated in pertinent part:

> 6. The most egregious manifest error of all was the Judges [sic] unsolicited comments to the Jury wherein he emphatically advised them that all of the evidence relating to the contract was irrelevant.

(continued...)

Because plaintiff did not object to the trial court's comments before the jury returned to deliberate, the issue is not preserved for appellate review. MCR 2.516(C) provides:

> A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict **(or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations)**, stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury. [Emphasis added.]

GCR 1963, 516, the predecessor rule to MCR 2.516, provided that objections to jury instructions made after deliberations had begun could be raised in a motion for new trial: "[w]hile the jury is deliberating the court may in its discretion further instruct the jury, in the presence of or after notice to counsel. Objections thereto shall be made in a motion for new trial." See, e.g., *Seaton v State Farm Life Ins*, 75 Mich App 252, 260; 254 NW2d 858 (1977), citing GCR 1963, 516.4. However, MCR 2.516 omitted the latter provision. See Dean & Longhofer, Michigan Court Rules Practice, Staff Comments to MCR 2.516, p 236.

We review jury instructions in their entirety, rather than piecemeal. *Jennings v Southwood (After Remand)*, 224 Mich App 15, 22; 568 NW2d 125 (1997), vacated in part on other grounds 457 Mich 884 (1998). A trial court may give additional instructions on applicable law not covered by the SJI, but any additional instructions "must be modeled as nearly as practicable after the style of the SJI, and must be concise, understandable, conversational, unslanted, and nonargumentative." MCR 2.516(D)(4); *Jennings, supra* at 22. "While the appellate court should not hesitate to reverse for a violation of Rule 2.516, it should not do so unless it concludes that noncompliance with the rule resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be "inconsistent with substantial justice." *Johnson, supra* at 327.

The challenged remarks by the trial court began a short time after jury deliberations started, when the jury sent the court a note:[10]

(...continued)

> 7. That the Judge's unsolicited comment followed hours of deliberation, when the jury had stated they were divided, after Plaintiff had offered evidence and had extensively argued the presence of the contract to transport minors as circumstances under which to consider negligence in the treatment of minor Amber Sandlin.

The record indicates that plaintiff's counsel contacted the court and advised that he was in trial in Wayne County and would be unable to appear to argue plaintiff's post-trial motions on the date scheduled. Defendant's counsel argued his motion for mediation sanctions, and no argument was heard on plaintiff's post-trial motion. The trial court stated on the record that it had reviewed and was denying plaintiff's motion because it found it to be meritless. See also n 1, *supra*.

[10] The jury was excused to deliberate at 3:23 p.m., and proceedings reconvened at 4:08 p.m. to address the jury's first note.

THE COURT: We have a note from the jurors indicating that they would like to have all of the evidence possible, plus a copy of the Court's instructions, and also a dictionary. I intend to tell them that I'm not going to give them a dictionary. If they have a specific word that they would like defined, I will consider that, number one. Number two, as far as the instructions are concerned, if there's a specific instruction that they want, maybe we'll type that up or have it read to them, and we'll simply give them all of the exhibits.

* * *

THE COURT: Any problem with that procedure?

MS. ROFFMAN [*plaintiff's counsel*]: None, Your Honor.

MR. ALLEN: No, Your Honor.

* * *

(4:10 p.m. - Jury entered the courtroom.)

THE COURT: You may be seated.

Members of the jury, we have this note from you indicating you would like to view all of the pieces of evidence, and I'll have all of the exhibits sent with you back into the jury room with you.

You also have indicated that you would like to have a copy of the instructions that were given to you, and, unfortunately, they have not been typed up in acceptable form. If there is a specific instruction or instructions that you would like to have, I would consider having that typed up, or I would simply reread them to you, whichever you would find to be appropriate.

You have also indicated that you would like to have a dictionary, and I'm not going to give you a dictionary. That's not appropriate. And the reason why is simply that different words have different meanings for different purposes, and we're in court, and so I would have to know what words you would want defined. If you wanted to indicate to the Court what words you wanted defined, then I would consider whether or not that would be appropriate to give you a dictionary.

Okay. So I'm going to ask you just simply to go back into the jury room and decide and tell me what you would like concerning the instructions, and also if there are certain words that you do want to have defined by way of a dictionary.

And, Ms. Green, would you just hand them then the exhibits, also.

THE CLERK: Certainly.

THE COURT: And why don't you just take a moment to do that, and then come back into the courtroom and tell me what you would like to do on those other two matters.

(4:12 p.m. - Jury returned to jury room.)

THE COURT: Well, we're going to recess. I assume that they don't want anything more, and if they knock on the door, then we'll consider it at that point. So if you'll stay in the vicinity.

MR. SILVERMAN: Thank you, Your Honor.

(4:15 p.m. - Recess.)

(5:00 p.m. - Proceedings reconvened.)

THE COURT: All right. Bring in the jury, please.

(Jury returned to the courtroom.)

THE COURT: You may be seated. Members of the jury, you've given us a note, this note indicating, "We would like your instructions reviewed to verify several points."

Which instructions are you –

JUROR ARMENTROUT: We're not certain where it is in the order of your instructions. Um, somewhere near the front half. It's very possible that we can get –

THE COURT: On which subject is it that you wanted?

JUROR GENOW: Your Honor, we are discussing what safely and secure means on the bus. We are at a point where we are – all have an opinion, and which we have listened to the evidence, but it is not –what safe and secure means. Reasonable.

JUROR BOIKE: Well, not, that wasn't in his instructions. Them [sic] are the definitions. As far as –

THE COURT: You have to go one at a time. You can talk all the time you want to when you're back there, but –

JUROR ARMENTROUT: All right. But in the first half somewhere, it states the definition of negligence.

THE COURT: Yes.

JUROR ARMENTROUT: And then it also states something about reasonable. And I believe that was stated in two different spots.

THE COURT: Okay.

JUROR ARMENTROUT: We didn't take good notes the first time around. We felt that we were probably going to have a copy to refer back to.

There was also something, and I can't remember the wording of it at all, that – about ordinary care.

THE COURT: All right. Let me do this. I'm going to read to you these definitions.

JUROR ARMENTROUT: Yes, that would help.

THE COURT: And let's see if this takes care of it. And if it does, great; if it doesn't, then I'll hear what else you have to say. And before I read these definitions, I'm going to say this again. This is a negligence case. The claim in this case is that the Defendant was negligent in some way that caused the –that caused injury to Amber. That's what the claim is in this particular situation. It's not a contract claim. It is not a contract case. This is not some other kind of case. This is a negligence case, and that's what you are to determine, whether or not there was negligence and whether or not this negligence proximately caused injury. Okay, this is the context of what the case is.

So the definitions that are relevant to a negligence claim are as follows:

[court re-instructs on negligence, ordinary care, and proximate cause]]

JUROR ARMENTOURT: Would you read that one again, please?

THE COURT: Sure. When I use the word proximate cause , I mean, first . . . .

[court reads burden of proof instruction and reviews negligence and ordinary care instructions]

And when you use the words like security or safety, they just have ordinary meaning. There's nothing special to them one way or another. It's just what you would use in your common everyday parlance.

Anything else?

JUROR GENOW: I don't believe so.

JUROR BOIKE: I think that cleared it up.

JUROR MANN: Thank you.

JUROR GENOW: Thank you very much.

The jury then returned to deliberate at 5:12 p.m., and at 5:30 p.m. proceedings reconvened after the jury indicated it had reached a verdict.

Plaintiff argues that, contrary to the court's statements, this was a case which involved an important contract. Plaintiff argues that the court supplied its own conceptualization and framework of the case to the jury and told the jury what to emphasize, that the jury had not asked the court whether this was a contract case, that the court did not explain what it meant by "contract case" to the lay panel of jurors, and that this major error occurred a few hours into deliberations and essentially admonished those on the jury then supporting plaintiff's case. Plaintiff argues that the thematic core of her case, articulated in opening statement, was that CCTC had taken on a duty of care to the Head Start children when it made a contract, made statements ensuring "safety and security" and had publicized and advertised their promises of safety, and that the court negated her case with its comments.

A general standard of care - - reasonable conduct under the circumstances - - is law provided by the court in a negligence action, and the specific standard of care is to be decided by the jury. See *Moning v Alfono,* 400 Mich 425, 449 n 27; 254 NW2d 759 (1977):

> The trier of fact decides whether reasonable precautions have been taken and thereby establishes the specific standared [sic] of care:
>
> > "The common formula for the negligence standard is the conduct of a reasonable man under like circumstances. In applying this standard under the instructions of the court, the jury normally is expected to determine what the general standard of conduct would require in the particular case, and so to set a particular standard of its own within the general one. This function is commonly said to be one of the determination of a question of fact, and not of law." [*Id.*, quoting 2 Restatement Torts, 2d, § 328 C, comment on clause (b).]

"The circumstances of the particular case are always to be taken into consideration in determining whether the person sought to be charged with liability for an injury to another. . . has exercised the care which the law requires of him." 65 CJS, Negligence, § 11(3), p 577. "The existence of a contract is ordinarily a relevant factor, competent to be alleged and proved in a negligence action to the extent of showing the relationship of the parties and the nature and extent of the common-law duty on which the tort is based." *Clark v Dalman,* 379 Mich 251, 261; 150 NW2d 755 (1967); see also *Antoon v Community EMS,* 190 Mich App 592, 595; 476 NW2d 479 (1991).

In opening statement,[11] during examination of witnesses, and in closing argument, plaintiff's counsel referred to the contract between CCTC and NEMSCA and to CCTC advertisements, without

[11] Plaintiff's counsel stated in opening statement:

> We're here because four-year-olds cannot be left in public by themselves. And the mother, Karen, did not leave her in public by herself. The bus company made a contract to take infant passengers, children, to and from nursery school. We put our

(continued...)

objection. Several CCTC advertisements admitted as exhibits at trial[12] stated regarding the transport of the Head Start pre-schoolers, "[p]arents with busy schedules know their children will be able to attend their events and activities safely," and "Safety and security. We hire responsible and experienced drivers. Busy parents, bring your children to us. We'll make sure they attend their activities safely." Evidence of the contract was admitted at trial through testimony, including that of the bus driver, who testified that she was aware that CCTC had agreed to act as the transportation system for the preschoolers going to and from Head Start, and that she understood that pursuant to the contract, she had responsibility to the children on the bus for safety. In addition, Karen Sandlin testified that the bus

---

(...continued)

> children on a school bus, and if someone threatens them, we expect that they're supervised by an adult; that someone will do something. That no one will let them be invaded, be assaulted, and be hurt and not stop it. And we expect when we leave children on a bus that if you're gonna [sic] let the common public, who may have any kind of history that we don't know about and we wouldn't trust our children with, if you're going to let them on the bus with her, that you're going to have these children together in an area where you can see them, not mixed in with anybody who wants to prey upon these children.
>
> They made a contract to do that. They made a deal. And by doing that, they said your children will be safe. We can take them to preschool.
>
> There's more than that, though. Clare County Transit Corporation advertised. When Karen Sandlin came to Harrison, she got an advertisement. The advertisement said: "Safety and security. We hire responsible and experienced drivers. Busy parents, bring your children to us. We'll make sure they attend their activities safely."
>
> That's what they advertised.
>
> Now, Karen still never sent Amber alone on the bus until the bus company had made a contract and assured her that these children would be close to the bus driver, watched, and that the bus driver would take care of her. They broke this promise.
>
> * * *
>
> Why did they have a duty to protect Amber? Why was it their responsibility? There are several reasons. Number one, a bus is a common carrier, and a common carrier – a bus, a train, a plane –they undertook a duty to transport the passengers safely and securely. They had a duty based on promises they made and advertisements that your children will attend activities safely if you're too busy to take them there.
>
> They had a duty by contract. Most of all, they had a plain, common-sense duty to use ordinary care to protect a four-year-old in their care.

[12] The exhibits are not before us, but portions of the advertisement were read into the record at trial.

driver had assured her that the children are always placed at the first forward-facing seats behind the driver.

The contract between CCTC and NEMSCA was a circumstance the jury could properly consider when determining the specific standard of care and whether negligence existed in this case. Given that evidence of the contract was admitted at trial without objection, and considering the prominence of the contract in plaintiff's opening statement and closing argument, we consider it unlikely that the jury would have interpreted the trial court's comments during deliberations as an admonition to ignore the contract entirely, rather than consider it as a relevant circumstance, especially since the court's final clarifying instructions were directed to the words "security" and "safety." Although the trial court's comments were unsolicited and perhaps less than prudent, counsel made no objection at the time and sought no curative or explanatory instruction directing the court's attention to the jury's possible interpretation that the contract should be disregarded, and the instructions, read in their entirety, provided an accurate statement of the applicable law to the jury. *Murdock v Higgins,* 454 Mich 46, 60; 559 NW2d 639 (1997). Under these circumstances, we cannot conclude that failure to vacate the jury verdict would be "inconsistent with substantial justice." *Johnson, supra* at 327.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Joel P. Hoekstra