COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-1100

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

TIMOTHY T. LLEWELLYN, A MINOR,
BY HIS GUARDIAN AD LITEM,
DON C. PRACHTHAUSER AND TIMOTHY E.
LLEWELLYN AND CHERYL L. LLEWELLYN,

PLAINTIFFS-APPELLANTS,

BLUE CROSS & BLUE SHIELD OF ILLINOIS,
A FOREIGN INSURANCE CORPORATION,

INVOLUNTARY-PLAINTIFF,

V.

M&S TRANSPORTATION, INC.,
A WISCONSIN CORPORATION,
STEVEN C. CHOINSKI AND
UNITED STATES FIRE INS. CO.,
A FOREIGN INSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS,

LESLIE HUFFMAN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: LOUISE M. TESMER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Timothy T. Llewellyn (Terry), by his guardian ad litem, and his parents, appeal from the trial court's judgment dismissing their personal injury suit after a jury found Terry more causally negligent than the respondents. Terry was seriously injured after he exited his school bus, ran into the street and was struck by a car driven by Leslie Huffman (Huffman). The appellants argue that the trial court erred by: (1) failing to grant their request for a new trial because the jury apportionment of negligence was "grossly disproportionate"; (2) improperly instructing the jury; (3) erroneously exercising its discretion in its evidentiary rulings; and (4) failing to grant a mistrial. The appellants also argue that this court should grant a new trial in the interests of justice. We affirm because the jury apportionment of negligence was not "grossly disproportionate"; the jury was properly instructed on the rules of law to be applied to the facts; the trial court properly exercised its discretion in its evidentiary rulings; and the trial court's refusal to grant a mistrial was reasonable because there was no prejudice to the appellants. Further, we decline to exercise our discretionary power to reverse pursuant to § 752.35, STATS.

I. BACKGROUND.

On May 20, 1993, Terry, age seven years ten months, exited an M&S Transportation (M&S) school bus which was bringing him home from the Heritage Christian School where he was a second grader. The bus was being driven by a substitute driver, Steve Choinski. After exiting the bus, Terry ran in front of it out into the street where a car driven by Huffman struck him, resulting

in "severe and permanent neurological injuries." Although Terry had previously been instructed by the bus driver to wait until the bus pulled away from the curb before crossing the street, on the day of the accident the substitute driver failed to give him any instructions. Terry had also been instructed by his parents to take his older brother's hand before crossing the street.

Terry's guardian ad litem and his parents commenced suit against Huffman, M&S, Choinski, and Heritage Christian School.[1] During the trial, the appellants objected to several of the trial court's evidentiary rulings, which they claim were prejudicial to them. At the jury instruction conference, the trial court gave several instructions opposed by the appellants and refused to give a jury instruction sought by the appellants. The appellants argue that the jury instructions they opposed resulted in the jury being misinformed about the law. During the three-week jury trial, Huffman never appeared nor was he represented by counsel. In his closing argument, defense counsel referred to Huffman as "the uninsured driver," prompting the appellants to move for a mistrial, which the trial court denied.

The jury returned a verdict finding Terry 55% causally negligent; M&S 30% causally negligent; and Choinski 15% causally negligent. The jury found no negligence on the part of Terry's parents or Huffman. The jury also awarded over five million dollars in damages. The appellants brought a motion after verdict seeking a new trial on liability only, which was denied. The respondents brought a motion for judgment of dismissal, which the trial court granted. This appeal follows.

[1] Heritage Christian School was dismissed prior to trial and that dismissal is not on appeal.

II. DISCUSSION.

A. Jury apportionment of negligence.

Standard of Review

The court reviews the evidence in a light most favorable to the jury verdict. *See* ***Mikaelian v. Woyak***, 121 Wis.2d 581, 585, 360 N.W.2d 706, 708 (Ct. App. 1984). The apportionment of negligence is generally a question for the jury. ***Stewart v. Wulf***, 85 Wis.2d 461, 471, 271 N.W.2d 79, 84 (1978). "A jury's apportionment may, however, be set aside if it is grossly disproportionate, if the plaintiff's negligence is greater than the defendant's or if there is such a complete failure of proof the apportionment must be based on speculation." ***Id.*** (citing ***Jagmin v. Simonds Abrasive Co.***, 61 Wis.2d 60, 211 N.W.2d 810 (1973)). However, "[a] jury's apportionment of negligence will be sustained if there is any credible evidence which supports the verdict and sufficiently removes the question from the realm of conjecture." ***Burch v. American Family Mut. Ins. Co.***, 198 Wis.2d 465, 474, 543 N.W.2d 277, 280-81 (1996).

The appellants claim that the jury's apportionment of negligence was grossly disproportionate under the law and the facts of the case. They seek a new trial on liability only. They argue that the jury's apportionment of negligence reflects the jury's decision to ignore the disparate standards of care involved in this case. The appellants contend that since the respondents had "superior knowledge, position, and opportunity to act," this fact "requir[ed] a conclusion that their conduct was the dominant cause of Terry's accident and injuries." The appellants note that the standard of care for Terry only "required [him] to use the degree of care which is ordinarily exercised by a child of the same age, intelligence, discretion, knowledge, and experience under the same or similar

circumstances," WIS J I—CIVIL 1010. In contrast, the respondents, M&S and Choinski, labored under the highest standard of care, which obligated them to "exercise the highest degree of care for [the passenger's] safety … that can be reasonably exercised by persons of vigilance and foresight when acting under the same or similar circumstances, taking into consideration the type of transportation used …." WIS J I—CIVIL 1025. The appellants argue that in comparing the standards of care, Terry could not have been more causally negligent than the respondents. Thus, they claim the apportionment was "grossly disproportionate." We disagree.

Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 83-84, 211 N.W.2d 810, 822 (1973), instructs, "[t]he apportionment of negligence is peculiarly within the province of the jury and only in an unusual case will the court upset the jury's apportionment …." The appellants fail to apply the correct test. Their argument is premised mainly on speculation and in divining the motives and reasons behind the jury's decision. The correct test under the law requires a search of the record to see if the verdict is supported by any credible evidence. *See* ***Burch***, 198 Wis.2d at 474, 543 N.W.2d at 280-81. We conclude that there is credible evidence which supports the jury's verdict and apportionment of negligence.

First, we note that the claims of negligence against the bus driver and the bus company are not similar to the claims of negligence by Terry. Choinski's alleged negligence consisted of his failure to remind Terry and the other exiting students of the proper procedure when disembarking from the bus and his failure to check traffic when pulling over to the curb. Additional allegations against the bus company consisted of the improper training of drivers on the procedures to use when dropping off students, poor route selection, and a failure of the regular bus driver to report Terry's earlier episodes of running into

the street. On the other hand, the record indicates Terry's negligence consisted of his disregarding the school bus rules upon leaving the bus, disobeying his parents' directives to take his brother's hand when crossing the street, and running into the street. The jury was told that Terry had taken the bus for most of the school year, had previously been instructed on the proper procedure for exiting the bus, and had been instructed many times to take his brother's hand before crossing the street. In considering all of the alleged negligent acts lodged against the parties and the different standards of care, it was reasonable for the jury to conclude that Terry's behavior was the dominant cause of the accident. This is so because the jury could have believed that even if the bus driver and the bus company had not been negligent, it was conceivable that Terry would have run into the street anyway. Although the bus company was charged with the highest standard of care, under the facts presented here, the jury was not obligated to find the bus company and the driver more negligent than Terry. Thus, the claim of "grossly disproportionate" apportionment of negligence is not supported by the record.

We also are not persuaded by the case law cited by the appellants. These cases refused to affirm jury verdicts that attributed more negligence to a child than an adult. They are distinguishable because they all predate the passage of § 891.44, STATS.,[2] which determined as a matter of law that a child under seven years of age could not be held negligent, and the child in each of those cases was under the age of seven. Consequently, those cases offer little support to the

[2] Section 891.44, STATS., provides: "**Presumption of lack of contributory negligence for infant minor.** It shall be conclusively presumed that an infant minor who has not reached the age of 7 shall be incapable of being guilty of contributory negligence or of any negligence whatsoever."

appellants' position because Terry was seven years ten months at the time of the accident.

B. Trial Court's Instructions.

The appellants argue that the trial court erroneously exercised its discretion when it instructed the jury on a version of WIS J I—CIVIL 1255, and when it gave the jury WIS J I—CIVIL 1230. Further, they claim the trial court erred in failing to give their proposed modified version of WIS J I—CIVIL 1025, containing language from ***Lempke v. Cummings***, 253 Wis. 570, 573, 34 N.W.2d 673, 674 (1948), which addressed the duty of a bus operator to anticipate the tendencies of young children while transporting them.

Standard of Review

In utilizing our standard of review, we recognize the discretion of the trial court:

> A trial court has wide discretion as to the instructions it will give to a jury in any particular case. Instructions must fully and fairly inform the jury as to the applicable principles of law. As long as the instructions adequately advise the jury as to the law it is to apply, the court has the discretion to decline to give other instructions even though they may properly state the law to be applied.

Anderson v. Alfa-Laval Agri, Inc., 209 Wis.2d 337, 344-45, 564 N.W.2d 788, 792 (Ct. App. 1997) (citations omitted). If an instruction is erroneous or the trial court erroneously refused to give a proper instruction, a new trial will not be ordered unless the trial court's error was prejudicial. *See* ***id.*** at 345, 564 N.W.2d at 792. "An error is prejudicial only if it appears that the result would have been different had the error not occurred." ***Id.***

The court of appeals "must consider the [jury] instructions as a whole to determine whether the challenged instruction or part of an instruction is erroneous. The instructions are not erroneous if, as a whole, they adequately and properly informed the jury." ***Nowatske v. Osterloh***, 198 Wis.2d 419, 429, 543 N.W.2d 265, 268 (1996).

The trial court, over the appellants' objections, gave a version of WIS J I—CIVIL 1255, which instructed the jury about the safety statute found in § 346.24(2), STATS.[3] The appellants objected to a portion of the instruction which reads: "No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is difficult for the operator of the vehicle to yield the right-of-way." The version of the instruction given implied that children were included under the heading of pedestrians because Terry's name was included in the instruction. The appellants first contend that the version of the instruction given was improperly modified and, second, that M&S was allowed to have the benefit of a legal standard that did not apply to it because the instruction deals with moving vehicles, and it was undisputed that the bus was stopped at the time of the accident. As a result, the appellants argue, the jury was led to wrongly conclude that the instruction applied to the bus and not to Huffman's car. Finally, the appellants also argue that there was no basis for the instruction because there was no evidence that Terry was aware of the close proximity of the car. Further, they claim that Terry was never in a "place of safety" due to the negligence of the bus driver.

[3] The appellants mistakenly refer to this jury instruction as WIS J I—CIVIL 1225 in their briefs.

The respondents argue that although the appellants originally objected to the instruction, they waived their objection to it when they agreed that the instruction could go to the jury. With respect to the trial court's reading of WIS J I—CIVIL 1255, the respondents argue that the instruction properly included children under the heading of pedestrians.

Although we conclude that the appellants did not waive their right to challenge the jury instruction, we are satisfied that the instruction was appropriate as it correctly recites the law and there is ample support for it in the record. The version of WIS J I—CIVIL 1255 used by the trial court reads:

> A safety statute provides that "At an intersection or crosswalk where traffic is not controlled by traffic control signals or by a traffic officer, the operator of a vehicle shall yield the right of way to a pedestrian who is crossing the highway within a marked or unmarked crosswalk."
>
> The statute defines right-of-way as the privilege of the immediate use of the roadway.
>
> The statute further provides that "No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is difficult for the operator of the vehicle to yield the right-of-way."
>
> If you find that Terry Llewellyn did so run, then Leslie Huffman did not have a duty to yield the right-of-way; but if you find that Terry Llewellyn did not so run, then it became the duty of Leslie Huffman to yield the right-of-way to Terry Llewellyn.

The trial court properly read the instruction to reflect that Terry, although a child, was included in the term "pedestrian." *See* ***Shaw v. Wuttke***, 28 Wis.2d 448, 460, 137 N.W.2d 649, 655 (1965) ("The legal effect of a violation of a safety statute is visited upon adults and minors alike and there is no limiting or conditional application to a child of 7-and-1/2 years."). We conclude that the instruction was appropriate as it advised the jury of the duty Terry owed to

Huffman if the jury concluded that Huffman's "vehicle [was] so close [to Terry] that it [was] difficult for the operator of the vehicle to yield the right-of-way." At trial, the parties disagreed on Terry's location just prior to the accident. The appellants believed that Terry was in the crosswalk when struck, while the respondents argued that he was not in the crosswalk. The trial court correctly determined that if the jury concluded that Terry was in the crosswalk and suddenly darted into the roadway, the jury was entitled to know the law concerning the right-of-way between a moving vehicle and a pedestrian who suddenly enters a crosswalk.

We further determine that the appellants' argument that M&S obtained the benefit of a standard not applicable to them is not borne out by the record. The instruction clearly dealt with Terry's duty as a pedestrian and Huffman's duty as a driver of a moving vehicle. Consequently, the jury was not misled into thinking that the instruction applied to the bus. Additionally, we note that whether Terry was aware of the car and whether he was ever in a "place of safety" were factual findings for the jury to decide.

We next consider WIS J I—CIVIL 1230, which encompasses the duty set forth in § 346.25, STATS., concerning pedestrians walking outside the crosswalk. The appellants argue that this instruction, which provides that "every pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right-of-way to all vehicles upon the roadway," WIS J I—CIVIL 1230, should not have been given because "there was insufficient evidence to support the possibility that Terry was outside a crosswalk at the time of the accident." They argue that since there was insufficient evidence to support a finding that Terry was outside the crosswalk when the accident

occurred, that this instruction was likely to have confused and misled the jury. We disagree.

Circumstantial evidence admitted at trial allowed the jury to conclude that Terry was outside the crosswalk when he was struck by Huffman's car. First, the investigating officer testified that, in reconstructing the facts, he concluded that the point of impact occurred outside the crosswalk. Further, a picture of the scene admitted as a trial exhibit showed that the bus was located behind the crosswalk at the time of the accident, and that fact, coupled with the testimony of two eyewitnesses that Terry was so close to the bus when he ran in front of it that he could have touched it, permitted the jury to consider whether Terry was outside the crosswalk. Thus, we conclude the trial court properly gave this instruction to the jury.

The third instruction involved in this appeal is WIS J I—CIVIL 1025. The appellants argue that the trial court erred by not giving their proposed modified version of it. The appellants urged the trial court to modify the instruction to reflect that M&S was charged with a higher duty than that of the average common carrier because it transported children. The appellants wanted the trial court to include language from ***Lempke*** to the effect that bus drivers must "anticipate from plaintiff only the exercise of that degree of care for [his] own safety as would children of like age exercise under the conditions then and there existing." ***Lempke***, 253 Wis. at 573, 34 N.W.2d at 674. Appellants posit that the failure to so instruct "constitutes prejudicial error." In declining to modify it, the trial court determined that "[WIS J I—CIVIL] 1025 is adequate to cover the facts in this case." We agree.

The trial court's failure to give a requested instruction is not an erroneous exercise of discretion "if the instructions given adequately cover the law, even if the proposed instruction is correct." *See* ***Frayer v. Lovell***, 190 Wis.2d 794, 807, 529 N.W.2d 236, 242 (Ct. App. 1995). WIS J I—CIVIL 1025 reads:

> NEGLIGENCE OF A COMMON CARRIER.
>
> In this case, ([M&S Transportation, Inc.]) is a common carrier. A common carrier is not required to guarantee the safety of its passengers. However, in order to discharge the duty that it owes to its passengers, a common carrier must exercise the highest degree of care for their safety. The care required is the highest that can be reasonably exercised by persons of vigilance and foresight when acting under the same or similar circumstances, taking into consideration the type of transportation used and the practical operation of its business as a common carrier.
>
> A failure to exercise the highest degree of care on the part of ([M&S Transportation]) [or its agents and employees] is negligence.

This instruction informed the jury that the bus company was charged with the "highest degree of care for [its passengers'] safety." The court further advised the jury that they should consider that the "care required is the highest that can be reasonably exercised by persons of vigilance and foresight when acting under the same or similar circumstances." In addition to WIS J I—CIVIL 1025, the trial court gave WIS J I—CIVIL 1010, which discusses the negligence of children:

> As a child, ([Terry Llewellyn]) was required to use the degree of care which is ordinarily exercised by a child of the same age, intelligence, discretion, knowledge, and experience under the same or similar circumstances.
>
> In determining whether ([Terry Llewellyn]) exercised this degree of care, you should consider the child's instincts and impulses with respect to dangerous acts, since a child may not have the prudence, discretion, or thoughtfulness of an adult.

The court also gave a version of WIS J I—CIVIL 1582:[4]

> COMPARATIVE NEGLIGENCE: ADULT AND CHILD
>
> If you are to answer … question [ ] 11-D, you should consider that Terry Llewellyn was a minor and that all other parties were adults and consider and weigh the credible evidence bearing on the inquiries presented, in the light of the difference in the rules … to which you were previously instructed to apply in determining whether the conduct of the parties was negligent.

This combination of instructions correctly informed the jury that the bus company and its driver were charged with a higher degree of care than was Terry, who was required only to use ordinary care. The jury was also told in these instructions to consider the differences in the standards of care. The trial court is not obligated to give a proposed modified instruction when the trial court's selection of jury instructions adequately informs the jury of the legal duties imposed on the parties. Thus, we conclude that the trial court properly exercised its discretion in refusing to give a modified version of WIS J I—CIVIL 1025. *See* ***Nowatske***, 198 Wis.2d at 429, 543 N.W.2d at 268.

C. The trial court's evidentiary rulings.

The appellants contend that the trial court made several improper evidentiary rulings that "minimized the duty of care the defendants owed to [the plaintiff]." They claim the trial court erred in: refusing to allow appellants'

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[4] WIS J I—CIVIL 1582 reads:

> If you are to answer question _____, you should consider that _____ was an adult and _____ was a child and consider and weigh the credible evidence bearing on the inquiries presented, in the light of the difference in the rules which you were previously instructed to apply in determining whether the conduct of the parties was negligent.

attorney to question the owner of M&S on his failure to purchase bus driver training material found in a Wisconsin School Bus Association catalog; excluding from testimony any reference to a videotape found in the catalog entitled "Children in Traffic"; and permitting respondent's attorney to introduce a portion of the Heritage Christian School's Code of Conduct.

Standard of Review

Admission or exclusion of evidence is a discretionary act. *See* ***Sullivan v. Waukesha County***, 218 Wis.2d 458, 470, 578 N.W.2d 596, 600-01 (1998). A trial court's discretionary order will be affirmed if there is any reasonable basis for it. ***Littmann v. Littmann***, 57 Wis.2d 238, 250, 203 N.W.2d 901, 907 (1973).

During the trial, the appellants questioned Fred Ristow, the owner of M&S, about the amount and type of training that M&S provided its drivers. The trial court refused to permit counsel to question the witness about catalog training materials not purchased by Ristow. The trial court ruled that "the prejudice far outweighs the probative value that these [materials] might have," and later elaborated, "[i]t isn't relevant whether he ordered a particular tape or not …. [w]hat training did he give him, not whether or not they [sic] bought a videotape …." The trial court's ruling was reasonable. The trial court expressed concern that the jury could have believed Ristow was negligent for improperly training his drivers by failing to buy every training videotape available. We agree with the trial court's reasoning and conclude that the trial court properly exercised its discretion in prohibiting this line of questioning.

The trial court also refused to permit appellants to introduce a videotape called "Children in Traffic." This videotape, described by the

appellants as "specifically directed at children's behavior in a traffic situation," explained the ability of children to discern danger, to judge speed or distance, and other similar cognitive attributes of children. The appellants argue that the videotape was "relevant to whether M&S adequately trained its drivers." Alternatively, the appellants attempted to introduce the videotape as a learned treatise pursuant to § 908.03(18), STATS.[5]

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[5] Section 908.03(18), STATS., provides:

> **Hearsay exceptions; availability of declarant immaterial.**
> ….
> **(18)** LEARNED TREATISES. A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert in the subject.
>
> (a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.
>
> (b) No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice described in par. (a), serve notice similar to that provided in par. (a) upon counsel who has served the original notice. The party shall deliver with the notice a copy of the document or of the portion thereof to be offered.
>
> (c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

The trial court reiterated its ruling, based upon relevancy grounds, which prohibited the appellants from asking about training materials not purchased by Ristow. Additionally, the trial court ruled that the videotape contained inadmissible hearsay expert testimony. Finally, the trial court ruled that the videotape was not a learned treatise, but that, assuming *arguendo*, that videotapes fell within the statute, the appellants clearly failed to give the required notice set out in the statute.

Again, the trial court's ruling was reasonable. The videotape was not relevant to determining whether M&S complied with its duty to provide sufficient training to its drivers. Further, the trial court correctly noted that the videotape contained inadmissible psychiatric testimony about children. We will assume without deciding that tapes and videotapes fall within the learned treatise statute. Having done so, we note that the appellants failed to give the requisite notice required by § 908.03(18)(a), STATS., and had the videotape been admitted without advance notice, the admission of expert testimony in the videotape would have constituted a "manifest injustice." Thus, the trial court did not erroneously exercise its discretion in its refusal to admit the videotape as evidence.

The appellants also complain that the trial court's evidentiary ruling admitting a portion of the Heritage Christian School's Code of Conduct into evidence was improper. The portion of the code of conduct read to the jury states:

> Number one: Respect for God, for authority, for one another, for oneself.
>
> Number two: Reverence for God, for God's house, church, chapel, for God's property, school.
>
> Number three: Obedience to God's Word, to parents, to teachers and leaders.
>
> Number four: Integrity of life, to be committed to honesty, purity, truth and fairness.

> Number five: Responsibility for one's actions and accepting the consequences of those actions.

The appellants claim that the admission of this evidence was error because "Wisconsin law prohibits the introduction of private codes of conduct into evidence because they have the capacity to improperly influence the jury as to the proper standard of care." The appellants cite ***Marolla v. American Family Mutual Insurance Co.***, 38 Wis.2d 539, 157 N.W.2d 674 (1968), and ***Otto v. Milwaukee Northern Railway Co.***, 148 Wis. 54, 138 N.W. 157 (1912), as cases supporting their position.

The respondents counter that the code of conduct read to the jury "did not establish any standard of care for children when crossing the street" and that it was only introduced to respond to testimony given by Terry's father about why he sent his sons to this school. They also argue that the two cases cited in support of the appellants' position are distinguishable. We agree.

The contents of the code of conduct read to the jurors did not conflict with the legal standards of care as the code only discusses the expectations of a student at the school. The jury was properly advised of the standard of care applicable to Terry in WIS J I—CIVIL 1010 and WIS J I—CIVIL 1582. Further, the cases relied upon by the appellants are clearly distinguishable. In both cases, the evidence conflicted with the standard of care in operation at the time of the accident. In ***Marolla***, 38 Wis.2d at 545, 157 N.W.2d at 677, the safety rule of the railroad company directly conflicted with the standard of care found in the jury instruction, and in ***Otto***, 148 Wis. at 59-60, 38 N.W. at 159-60, a company rule requiring the employees to exercise the highest degree of care was contrary to the legal test of ordinary care. Here, none of the parts of the code of conduct read to the jury conflict with the legal standard in operation at the time of the accident.

Accordingly, the trial court properly exercised its discretion in allowing this evidence into the record.

D. Motion for mistrial.

The appellants' next argument centers on the trial court's refusal to declare a mistrial after the respondents' attorney, in closing argument, referred to Leslie Huffman as "the uninsured driver." The appellants complain that the trial court's refusal was error. The appellants argue that, although the trial court found that the remark was inadvertent, nonetheless, they were entitled to a mistrial because the remark was prejudicial. Appellants theorize that, upon discovering that the driver was uninsured, the jury must have decided that the reason the Llewellyns were suing the bus company was because the bus company had insurance (and the driver did not), or that the jury must have declined to assess any negligence against the uninsured driver assuming that he would be "personally liable for a judgment obtained against him." We disagree. An improper reference is not cause for a mistrial unless the party claiming prejudice sets forth affirmative evidence proving prejudice. ***Caldwell v. Piggly-Wiggly Madison Co.***, 32 Wis.2d 447, 457, 145 N.W.2d 745, 750 (1966).

First, we address the appellants' suggestion that perhaps the remark was not inadvertent, but was a calculated risk taken by experienced defense counsel. We accept, as we must, the factual findings of the trial court that trial counsel's remark was "inadvertent" because this finding is not clearly erroneous. *See* § 805.17(2), STATS. Moreover, the respondents point out that they would have no motivation to reveal to the jury that Huffman was uninsured as it was in their interest to have the jury conclude that Huffman was causally negligent. This is so because any percentage of negligence charged to Huffman would reduce the

total amount of money due from the other respondents. This result would have occurred because the appellants settled with their insurance carrier under their uninsured motorist provisions for Huffman's negligence and any amounts due from the other respondents would have been reduced by a finding of causal negligence against Huffman.

Next, we note that the appellants' principal argument is based on speculation. It was equally plausible, as noted by the respondents, that the jury, upon hearing that Huffman was uninsured, could have decided to assess all of Huffman's negligence against the bus company. The appellants failed to prove they were actually prejudiced by the remark. Moreover, we believe it unreasonable to think that "three words out of a three-week trial" were a cause for the jury's apportionment of 55% causal negligence to Terry. Finally, we note that the trial court remedied the problem created by the unintentional remark by giving the following curative instruction found in WIS J I—CIVIL 125:

> COUNSEL'S REFERENCE TO INSURANCE COMPANY
>
> References to an insurance company have been made in this case. The title to this case included an insurance company as a defendant. There is no question as to insurance in the special verdict, however. This is because no dispute of fact concerning insurance is involved in this case. In addition, the liability or nonliability of (defendant) for the damages claimed is exactly the same, whether (defendant) is or is not covered by insurance. Under your oath as jurors, you are duty bound to be impartial toward all the parties to this case. So, you should answer the questions in the verdict just as you would if there were no insurance company in the case.

Jurors are presumed to follow the trial court's instructions. *See* ***State v. Chambers***, 173 Wis.2d 237, 259, 496 N.W.2d 191, 199 (Ct. App. 1992). We thus

conclude that the trial court's decision not to declare a mistrial was proper. *See* ***Caldwell***, 32 Wis.2d at 457, 145 N.W.2d at 750.

E. Interests of Justice.

The appellants urge this court to exercise its ability to grant a discretionary reversal pursuant to § 752.35, STATS.:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

We decline to do so. After a review of the record, we conclude that this is not a case where the "real controversy has not been fully tried," nor is it "probable that justice has for any reason miscarried." While we are mindful that this was a tragic accident that resulted in terrible injuries to the child, the record does not support a finding that the parties failed to present the real controversy to the jury or that justice was miscarried. There were legitimate disputes concerning the negligence of all the parties, including Terry. They were resolved by the jury. Further, there is support for the jury's decision in the voluminous record. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.