COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0658 Cir. Ct. No. 99-CV-952

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

MONICA FORGUES, A MINOR, BY HER GUARDIAN AD LITEM COLLEEN J. MARTINE, AND NANCY ASHTON,

PLAINTIFFS-CO-APPELLANTS,

PPD PHARMACO AND STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND FAMILY SERVICES,

SUBROGATED-PLAINTIFFS,

PROGRESSIVE NORTHERN INSURANCE COMPANY,

INTERVENING PLAINTIFF,

ALBERT L. ROBERTS AND DEANNA ROBERTS, INDIVIDUALLY AND AS PARENTS FOR MINOR CHILD, MARSHALL ROBERTS,

NECESSARY-PARTIES-APPELLANTS,

ESTATE OF MELINDA L. TURVEY, PHILLIP ELLENBECKER, CRAIG L. FECHTER, ESTATE OF PETER L. CHRISTMAN, PAM CHRISTMAN, STACI M. BECK, NICOLE M. MCDOUGAL, ELAINE MCDOUGAL, ESTATE OF AMBER LETTMAN, JOHN LETTMAN AND BONITA LETTMAN, AND BRANDON M. MCDANIEL AND BRANDY A. MCDANIEL, BY THEIR GUARDIAN AD LITEM, GREGORY R. WRIGHT,

NECESSARY-PARTIES-CO-APPELLANTS,

ESTATE OF JOSEPH D. WILD, DONALD R. WILD AND DIANA H. WILD, ESTATE OF CORY S. HANSON, CHARLES HANSON AND JANET HANSON, SHAWN KELLY-WEIR, AND KAILA B. GILLOCK,

NECESSARY-PARTIES,

V.

HEART OF TEXAS DODGE, INC., UNIVERSAL UNDERWRITERS INSURANCE COMPANY, YES, INC. A/K/A YOUTH EMPLOYMENT SERVICES, INC., CHOAN A. LANE, ALLSTATE INSURANCE COMPANY AND JEREMY HOLMES,

DEFENDANTS,

SUBSCRIPTIONS PLUS, INC. AND KARLEEN HILLERY,

DEFENDANTS-CO-APPELLANTS,

SCOTTSDALE INSURANCE COMPANY, ACCEPTANCE INSURANCE COMPANIES, AND NATIONAL PUBLISHERS EXCHANGE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Dykman, Roggensack and Lundsten, JJ.

¶1 LUNDSTEN, J. This action arises from a single-vehicle van crash that resulted in the deaths of seven young people and serious injury to five others. The driver, Jeremy Holmes, was speeding when a police officer signaled the van to pull over. Holmes attempted to switch places with another passenger, lost control, and the van crashed.

¶2 Holmes and thirteen other young people in the van were employed by Youth Employment Services, Inc. (YES), a company owned by Choan Lane (collectively referred to as YES). YES hired these youths to sell magazine subscriptions. The group was traveling back to Janesville, Wisconsin, after a day and evening of selling magazines door to door in Appleton, Wisconsin.

¶3 This appeal involves most of the plaintiffs and necessary parties listed in the caption (collectively referred to as the plaintiffs). The plaintiffs have sued Jeremy Holmes, Choan Lane, YES, and two other companies that are involved in the sale and processing of magazine subscriptions: Subscriptions Plus, Inc., owned by Karleen Hillery (collectively referred to as Subscriptions Plus), and National Publishers Exchange. Scottsdale Insurance Company and Acceptance Insurance Company (collectively referred to as Scottsdale Insurance, except in the duty-to-defend portion of this opinion)[1] are defendants in this action because they are insurers for Subscriptions Plus.

[1] With the exception of duty to defend, there is no indication in the joint brief submitted by Scottsdale Insurance and Acceptance, nor in any other appellate brief, that there is a need to distinguish between Scottsdale Insurance Company and Acceptance Insurance Company or to distinguish between the two policies of the companies. The Acceptance Insurance policy was issued as an "excess" to the Scottsdale Insurance policy and, as such, the question of whether Acceptance has a duty to indemnify is controlled by resolution of whether Scottsdale has a duty to indemnify.

¶4 Scottsdale Insurance moved for summary judgment dismissing it from the lawsuit on the ground that, under the policy it sold to Subscriptions Plus, none of the claims against Subscriptions Plus create a duty to indemnify or a duty to defend. National Publishers moved for summary judgment dismissing it from the lawsuit on the ground that, in view of undisputed facts, it had no liability for any alleged claims. The circuit court granted both motions and entered an order dismissing Scottsdale Insurance and National Publishers from the action. Subscriptions Plus and the plaintiffs appeal that order.

¶5 We conclude that National Publishers was properly dismissed from the action, that Scottsdale Insurance (but not Acceptance Insurance) has a duty to defend Subscriptions Plus, and that Scottsdale Insurance and Acceptance Insurance have a potential duty to indemnify with respect to several claims against Subscriptions Plus. Accordingly, the order of the circuit court is affirmed in part and reversed in part, and the matter is remanded with directions.

Background

¶6 On March 25, 1999, a single-vehicle van crash occurred at approximately 12:40 a.m. on Interstate 90 near Janesville. The driver of the van, twenty-year-old Jeremy Holmes, was driving in excess of eighty miles per hour. When a police officer signaled the van to pull over, Holmes, who did not have a valid driver's license, lost control of the van as he attempted to switch positions with another passenger. The van went off the road and into a ditch, rolling over several times. At least eleven of the fourteen occupants were thrown from the van.

¶7 Seven of these young people died: Peter Christman, Cory Hanson, Amber Lettman, Crystal McDaniel, Marshall Roberts, Melinda Turvey, and

Joseph Wild. Another five were seriously injured: Staci Beck, Craig Fechter, Monica Forgues, Shawn Kelly-Weir, and Nicole McDougal.

¶8 All fourteen occupants of the van were employees of YES. That night, they were returning to Janesville, Wisconsin, after having spent the day and evening selling magazines door to door in Appleton, Wisconsin. The thirteen passengers were members of a magazine subscription street crew organized by YES. Jeremy Holmes served in a semi-supervisory position over the crew as the "car handler." As a "car handler," Jeremy Holmes was responsible for driving the crew from location to location and was not obligated to sell door to door. In addition, Holmes received compensation for every magazine sold by every member of the crew that he "handled." All magazine order forms and subscription fees collected by the door-to-door street crew were turned over to YES.

¶9 YES operated the magazine subscription street crew at issue in this case. The street crew was sent to various locations, where the individual members would go door to door selling magazine subscriptions. YES would schedule where the crew went and would organize travel and overnight accommodations. YES retained a portion of the subscription fees collected as its own fee and forwarded the remainder of the fees and subscriber information on to Subscriptions Plus.

¶10 Subscriptions Plus, owned and operated by Karleen Hillery, took the hard copy orders procured by the street crew and converted them to electronic data. After taking a cut of the subscription fees, Subscriptions Plus would forward the remaining fees and subscription data to National Publishers.

¶11 National Publishers is a "magazine clearing house." There is no dispute that National Publishers processes magazine subscription orders pursuant

to contractual agreements with magazine publishers and contractual agreements with many magazine-subscription-selling entities. National Publishers and Subscriptions Plus had a written contract. Under that contract, National Publishers would receive the order data and remaining subscription fees from Subscriptions Plus, retain a portion of the subscription fees, and forward the remainder of the fees and order information to the publishers. Subscriptions Plus either did or was free to work with other companies like National Publishers, but here we are only concerned with its relationship with National Publishers. There is evidence that crew members used brochures in their sales activities that day that were produced by National Publishers. This creates the factual inference that the crew was selling subscriptions destined for processing at National Publishers, and supplies the necessary connection to proceed to address the arguments on appeal.

¶12 Following the van crash, much litigation ensued. Jeremy Holmes and Choan Lane were criminally prosecuted and convicted. Holmes was convicted of seven counts of homicide by negligent operation of a vehicle and five counts of causing great bodily harm by reckless driving. Lane was convicted of interference with child custody, conspiracy to obstruct an officer, contributing to the delinquency of a minor, and party to the crime of contributing to truancy.

¶13 Related actions were filed in federal court. They will be discussed as necessary below.

¶14 The plaintiffs filed suit in state court against several entities including National Publishers, Subscriptions Plus, and Scottsdale Insurance. The circuit court, acting on motions filed by National Publishers, Subscriptions Plus, and Scottsdale Insurance, granted summary judgment in favor of National Publishers and Scottsdale Insurance. The circuit court concluded that the

undisputed facts showed that National Publishers had no liability under any claims against it and dismissed the company from the suit. The court also dismissed Scottsdale Insurance from the suit, concluding that Scottsdale had no duty to indemnify and no duty to defend. Although the court dismissed Subscriptions Plus's insurer, Subscriptions Plus itself still faces all claims filed against it. Subscriptions Plus does not appeal the circuit court's denial of its summary judgment motion, but it does appeal the circuit court's orders that Scottsdale Insurance has no duty to defend and no duty to indemnify. The plaintiffs appeal the circuit court's orders that Scottsdale Insurance has no duty to defend and no duty to indemnify, and additionally appeal the order dismissing National Publishers from the action.

Discussion

I. Summary Judgment Analysis

¶15 We review summary judgment decisions *de novo*, applying the same method as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). We do so, independent from the circuit court, but with the benefit of its analysis. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶21, 241 Wis. 2d 804, 623 N.W.2d 751.

> Specifically, a court first examines the pleadings to determine whether a claim for relief is stated and whether a genuine issue of material fact is presented.
>
> If the pleadings state a claim and demonstrate the existence of factual issues, a court considers the moving party's proof to determine whether the moving party has made a prima facie case for summary judgment. If the defendant is the moving party the defendant must establish a defense that defeats the plaintiff's cause of action. If a moving party has made a prima facie defense, the opposing party must show, by affidavit or other proof, the existence of disputed material facts or undisputed material facts from

> which reasonable alternative inferences may be drawn that are sufficient to entitle the opposing party to a trial.
>
> The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party. The court takes evidentiary facts in the record as true if not contradicted by opposing proof.
>
> In order to be entitled to summary judgment, the moving party, here the defendants, must prove that no genuine issue exists as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id., ¶¶21-24 (footnotes omitted).

¶16 On summary judgment, the burden is on the moving party to establish the absence of a genuine disputed issue as to any material fact. ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979). Although the party seeking summary judgment must establish that there is no issue of material fact for trial, the ultimate burden of demonstrating that there is sufficient evidence to go to trial is on the party who has the burden of proof on that issue at trial. *See* ***Kaufman v. State St. Ltd. P'ship***, 187 Wis. 2d 54, 58, 522 N.W.2d 249 (Ct. App. 1994). The court must view the evidence, or the inferences therefrom, in the light most favorable to the party opposing the motion. ***Kraemer Bros.***, 89 Wis. 2d at 567. Any reasonable doubt as to the existence of a factual issue must be resolved against the moving party. ***Maynard v. Port Publ'ns, Inc.***, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980).

¶17 Summary judgment is generally inappropriate when matters of complex factual proof need to be resolved before legal issues can be decided. *See*, *e.g.*, ***Peters v. Holiday Inns, Inc.***, 89 Wis. 2d 115, 129, 278 N.W.2d 208 (1979). It is also inappropriate when difficult legal questions are presented which are

better resolved after a determination of the underlying facts, *see* ***Hilkert v. Zimmer***, 90 Wis. 2d 340, 342-43, 280 N.W.2d 116 (1979), or when the totality of the facts and the circumstances surrounding those facts must be developed before the ultimate issue in the case may be resolved, *see* ***Rollins Burdick Hunter of Wis., Inc. v. Hamilton***, 101 Wis. 2d 460, 471-72, 304 N.W.2d 752 (1981).

II. Issues Relating to National Publishers

¶18 The plaintiffs assert that National Publishers was not entitled to summary judgment, which included dismissal of all claims against National Publishers. The parties direct their arguments to three topics: Whether the plaintiffs have alleged facts showing that National Publishers (1) was engaged in a joint venture with Subscriptions Plus and, therefore, liable for various claims against Subscriptions Plus; (2) may be held absolutely liable for violations of Wisconsin's street trade statutes; and (3) is liable for injuries resulting from violations of Wisconsin's fraudulent labor advertising statute. We address each topic in turn and conclude that National Publishers was properly dismissed from this action.

A. National Publishers - Street Trades[2]

¶19 The plaintiffs seek to hold National Publishers liable under a claim of absolute liability based on a violation of the street trade statutes for deaths and

[2] This street trade section of the opinion does not command a majority. Judge Roggensack concurs with the result only. Judge Dykman dissents from this section, but joins all other sections of the opinion.

injuries sustained by four minor plaintiffs as a result of the van crash.[3] The averments below provide support for the plaintiffs' assertions that they can prove the street trade statutes were violated in connection with the minor plaintiffs in this case, that door-to-door solicitation of magazine subscriptions is one of the most dangerous jobs in the country for teens, that teens employed in these door-to-door sales jobs are frequently forced and pressured to work in violation of applicable safety laws (such as Wisconsin's street trade statutes), and that companies like National Publishers can only remain ignorant of this state of affairs by intentionally ignoring the problem. The question we face here is whether this type of evidence, combined with evidence of National Publishers' relationship with Subscriptions Plus, creates a factual dispute as to whether National Publishers is "absolutely liable" based on a violation of the street trade statutes.

¶20 In ***D.L. v. Huebner***, 110 Wis. 2d 581, 639-41, 329 N.W.2d 890 (1983), and ***Beard v. Lee Enterprises, Inc.***, 225 Wis. 2d 1, 9, 591 N.W.2d 156 (1999), the supreme court explained that, under certain conditions, an entity that violates Wisconsin's child labor laws is absolutely liable for injuries resulting from the violation of such laws. The ***Beard*** court stated that absolute liability is imposed for violations of the street trade statutes "if the plaintiff can prove that: (1) the employer violated the statute at or about the time of the injury; and (2) the injury occurred." ***Beard***, 225 Wis. 2d at 9. In addition, "[t]he injured party must also be within the protected class of people, i.e., the minor, other employees or

[3] There were four minors—Marshall Roberts, Amber Lettman, Monica Forgues, and Nicole McDougal—in the van when it crashed. Roberts and Lettman were killed and Forgues and McDougal suffered serious injuries.

frequenters." ***Id.*** A plaintiff alleging this tort claim need not show causation, and contributory negligence is not a defense. ***D.L.***, 110 Wis. 2d at 640.

¶21 We begin and end with an examination of whether there is an "employer/employee relationship" within the meaning of WIS. STAT. § 103.21 (1997-98).[4] ***Beard***, 225 Wis. 2d at 9-10. This does not necessarily mean that National Publishers must be the minor plaintiffs' "employer," as that term is commonly used. Our review of the statute and the parties' briefs reveals that there are three ways of establishing an employee/employer relationship under the statute. Because we conclude there was no employee/employer relationship under any of these three alternatives, we do not address several other street trade arguments made by the plaintiffs.

¶22 **The first sentence of WIS. STAT. § 103.21(1).** The first sentence of § 103.21(1) covers minors "selling or distributing newspapers or magazines." National Publishers contends that none of the minor plaintiffs were "selling" or "distributing" magazines as those terms have been interpreted by the appellate courts of this state. National Publishers relies on ***Huebner v. Industrial Comm'n***, 234 Wis. 239, 290 N.W. 145 (1940), in which the supreme court construed the same statutory phrase ("selling or distributing") in a related statute, the Worker's Compensation Act. We agree that the Worker's Compensation Act is a related statute and note that, when addressing the street trade statutes, the supreme court has acted under the same assumption. *See* ***Beard***, 225 Wis. 2d at 11.

¶23 In ***Huebner***, the supreme court held:

[4] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

> It is contended that in soliciting subscriptions for a newspaper, the deceased was selling newspapers. We think that construction is so strained as not to be permissible even under the liberal construction which this court has always given the compensation act. *In pursuing the work of soliciting subscriptions, the deceased was not engaged in selling newspapers. That section was undoubtedly enacted to protect newsboys who were engaged in selling newspapers and magazines on the street or from house to house.* There is no evidence that the deceased ever sold a copy of the Voice or distributed a copy of it unless exhibiting a copy to and leaving it with a prospective or new subscriber constitutes a distribution. We are of the opinion that the use of the papers in soliciting does not warrant the conclusion that in so doing the deceased was engaged in selling or distributing newspapers from house to house.

Huebner, 234 Wis. at 246-47 (emphasis added). The language and context are undeniably similar. The ***Huebner*** court addressed whether an adult who solicited subscriptions door to door was an "employee" under worker's compensation law, which includes "'[e]very person selling or distributing newspapers or magazines on the street or from house to house.'" ***Id.*** at 246, quoting WIS. STAT. § 102.07(6) (1937). The question here is whether a minor is an employee under the street trade law, which includes "[e]very minor selling or distributing newspapers or magazines on the streets or other public place, or from house to house." WIS. STAT. § 103.21(1).

¶24 The plaintiffs' only response is that ***Huebner*** is distinguishable because of the greater need to protect minors as compared with adults working in street trades. That argument has merit and, if we were writing on a blank slate, it might persuade us that ambiguous statutory language should be construed in favor of providing the broadest coverage possible to minors engaged in street trades. But we do not write on a blank slate. Rather, our supreme court has interpreted the precise language at issue here, and it has done so in a closely related context.

Absent a persuasive reason why the legislature would have used the very same language in related statutes, but had a different meaning in mind, we must assume the legislature intended the same meaning, *see* ***State v. Leitner***, 2002 WI 77, ¶30, 253 Wis. 2d 449, 646 N.W.2d 341 ("statutes dealing with the same subject matter should be read together and harmonized" (footnote omitted)), and we are bound by the supreme court's construction of the phrase in ***Huebner***.

¶25 The plaintiffs also argue that the coverage for activities by minors under the street trade statutes is broader because WIS. STAT. § 103.21(1) uses the term "street trade." The second sentence of § 103.21(1) begins "[e]very minor engaged in any other street trade," and plaintiffs argue that the legislature's use of the phrase "any other street trade" means, in the plaintiffs' words, "that the activities described in the first sentence also constitute street trade." We fail to understand the plaintiffs' logic. National Publishers does not dispute that "selling or distributing newspapers or magazines on the streets or other public place, or from house to house," is a street trade. Rather, National Publishers asserts that the phrase "selling or distributing newspapers or magazines on the streets or other public place, or from house to house," does not cover soliciting subscriptions. The plaintiffs' argument does not contradict this view.

¶26 We conclude that we are bound by ***Huebner*** and, therefore, the minor plaintiffs were not employees under the first sentence of WIS. STAT. § 103.21(1) because they were not "selling or distributing newspapers or magazines."

¶27 **The second sentence of WIS. STAT. § 103.21(1).** National Publishers next argues that, in light of the undisputed facts, the plaintiffs cannot show an employee/employer relationship under the second sentence of

§ 103.21(1), which reads: "Every minor engaged in any other street trade is in an 'employment' and an 'employe,' and each person furnishing the minor articles for sale or distribution or regularly furnishing the minor material for blacking boots is the minor's 'employer'." National Publishers concedes that this sentence provides an independent basis for finding an employee/employer relationship, but argues that the minor plaintiffs' relationship with National Publishers does not fit the definition in this sentence.

¶28 National Publishers begins with the apparent concession that the minor plaintiffs were engaged in a "street trade" within the meaning of the second sentence in WIS. STAT. § 103.21(1). "Street trade" is defined in § 103.21(6), which reads, in pertinent part, "'Street trade' means ... soliciting for ... newspapers or magazines … on any street or other public place or from house to house." Still, National Publishers contends that, although the minor plaintiffs were engaged in a street trade, National Publishers is not a "person furnishing the minor articles *for sale or distribution*" under § 103.21(1). That is, even if National Publishers supplied materials which were used by the minor plaintiffs when soliciting subscriptions, the Company asserts that such materials were not used "for sale or distribution" because, under ***Huebner***, "sale or distribution" does not encompass solicitation. That is, if ***Huebner*** controls our construction of the phrase "selling or distributing" in the first sentence of § 103.21(1), it likewise controls the meaning of "sale or distribution" in the second sentence of that same statute. *See* ***State v. Polashek***, 2001 WI App 130, ¶25, 246 Wis. 2d 627, 630 N.W.2d 545 (words appearing multiple times in the same statute are given the same meaning unless the context clearly requires a different meaning), *rev'd on other grounds*, 2002 WI 74, 253 Wis. 2d 527, 646 N.W.2d 330.

¶29 We have difficulty discerning whether the plaintiffs have a response to this argument apart from their contention that we should not apply ***Huebner***. The plaintiffs argue that a construction of WIS. STAT. § 103.21(1) excluding from coverage those minors who solicit magazine subscriptions is absurd because it would exclude precisely the sort of working minor the legislature obviously sought to protect. The plaintiffs argue that § 103.21(6) plainly defines "street trade" to include soliciting magazine subscriptions, and excluding the solicitation of subscriptions from § 103.21(1) defeats the obvious purpose of the legislation. However, the exclusion of solicitation activities from § 103.21(1) does not exclude minors engaged in solicitation either from coverage under the street trade statutes or from absolute liability. As discussed below, § 103.21(1g) provides protection to minors engaged in street trades apart from § 103.21(1). Thus, we are not persuaded that our construction of § 103.21(1) leads to an absurd result. As we explained in ***State v. Block***, 222 Wis. 2d 586, 587 N.W.2d 914 (Ct. App. 1998), in the closely related context of an equal protection challenge:

> The legislature is permitted broad discretion in enacting laws that affect some groups differently than others. A law will flunk the rational basis test only if the classification it creates is completely irrelevant to the law's purpose. The legislature need not state the purpose or rationale justifying the classification. As long as there is a plausible explanation for the classification, the reviewing court will look no further. The legislature's underlying assumptions may even be "erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the [legislative] choice from constitutional challenge."

Id. at 592 (citations omitted).

¶30 The plaintiffs argue that a prior legislative expansion of the protected *locations* listed in WIS. STAT. § 103.21(1) leads to the reasonable conclusion that "the legislature's effort to impose an employment relationship

between street traders and intermediate agencies such as [Subscriptions Plus] and [National Publishers] coincided with the emergence of door-to-door trading, the selling activity in this case." We do not find this argument persuasive. The fact that the legislature expanded the covered *locations* does not lead to the conclusion that the legislature intended to expand the *activities* covered, particularly since the language defining the activities remains unaltered.

¶31 Before moving on to a different subsection, we observe that WIS. STAT. § 103.21(1) is confusing and ambiguous in many respects. For example, there is an obvious lack of clarity regarding which entities are deemed employers under the first sentence. Indeed, we note that National Publishers does not argue that it could not be held liable under a state statute; at oral argument, National Publishers conceded it could. Rather, it is National Publishers' argument that our legislature has not done so. We urge the legislature to clarify and broaden the protection afforded by that subsection. That is a job for the legislature, not the courts. Similarly, the supreme court may choose to revisit its interpretation of "selling and distributing," but we must defer to that court when it has spoken so clearly in such a closely related context.

¶32 **House-to-house employer under WIS. STAT. § 103.21(1g).** Section § 103.21(1g) provides: "'House-to-house employer' means an employer who employs minors, either directly or through an agent who need not be an employe of the employer, to conduct street trades from house to house through personal contact with prospective customers." Because the term "street trade" undoubtedly includes soliciting magazine subscriptions, *see* § 103.21(6), the question here is whether National Publishers employed the minor plaintiffs "through an agent."

¶33 National Publishers' appellate brief does not directly address whether it employed the minor plaintiffs through an agent, but it does provide a definition of agency in the context of arguing that it is not the "agent" of a publisher. In this regard, National Publishers relies on ***James W. Thomas Construction Co. v. City of Madison***, 79 Wis. 2d 345, 352, 255 N.W.2d 551 (1977), which, in turn, cites the definition of agency contained in ***Troy Co. v. Perry***, 68 Wis. 2d 170, 228 N.W.2d 169 (1975):

> "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."

Troy Co., 68 Wis. 2d at 174 (quoting RESTATEMENT 2D OF AGENCY § 1(1), at 7). We note that ***Skrupky v. Elbert***, 189 Wis. 2d 31, 526 N.W.2d 264 (Ct. App. 1994), provides a good summary of general agency law:

> "Agency is a consensual, fiduciary relation between two persons, created by law by which one, the principal, has a right to control the conduct of the agent, and the agent has a power to affect the legal relations of the principal." WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 3 at 3 (1964).
>
> Authority can be created in any way in which a person can manifest consent to another; because the words, acts and conduct of the principal are the basis of the authority, manifestation of consent may be proved, as other acts are proved, by any relevant evidence. ***Id.*** § 18, at 32. Manifestation of consent may also be proved by acquiescence. RESTATEMENT (SECOND) OF AGENCY § 7 cmt. c (1958).
>
> Actual authority may be express or implied. ***Select Creations v. Paliafito America***, 830 F. Supp. 1223, 1233 (E.D. Wis. 1993). Actual authority is express when found within the explicit agency agreement itself, that is, the communication or contract between the principal and the agent. ***Id.*** Actual authority is implied when the agent, not the third party, reasonably believes he or she has authority as a result of the action of the principal. ***Id.*** An agent has

> the implied authority to do such acts as are usual, appropriate, necessary or proper to accomplish the purpose and objects of the agency. *See* WIS J I – CIVIL 4010.

Id. at 43-44 (footnote omitted).

¶34 Similarly, the plaintiffs do not discuss directly whether National Publishers employed the minor plaintiffs through an "agent" within the meaning of WIS. STAT. § 103.21(1g), but the plaintiffs do discuss agency in the context of arguing that National Publishers is a "selling agency" under § 103.21(1). In this regard, the plaintiffs point to paragraph 4 of the agreement between National Publishers and Subscriptions Plus which provides, in part, that Subscriptions Plus agrees to comply with governmental laws and "the rules and operating procedures adopted from time to time by [National Publishers] and the publishers affecting the solicitation, sale, clearing or handling of magazine subscription orders."

¶35 Even if we were to construe the plaintiffs' reference to the contract between National Publishers and Subscriptions Plus as an argument that Subscriptions Plus was an "agent" of National Publishers, we would find the argument unavailing. Read in context, the passage does not make Subscriptions Plus an agent of National Publishers for purposes of employing others. Moreover, nothing in this language suggests that Subscriptions Plus has the right to affect the legal obligations of National Publishers.

¶36 In addition, there is a clause in the National Publishers/Subscriptions Plus contract that unambiguously declares that Subscriptions Plus is not an agent of National Publishers. Accordingly, we conclude that nothing in the contract supports the conclusion that National Publishers employed the minor plaintiffs through an agent.

¶37 The plaintiffs also direct our attention to the averments of a National Publishers' employee in which she agreed that the use of the terms "agent" and "subagent" are common in the industry and to a publication produced by the Magazine Publishers of America containing definitions of "agent" and "subagent" that arguably cover both National Publishers' relationship with publishers and National Publishers' relationship with Subscriptions Plus. The plaintiffs contend this evidence supports its statutory construction argument that our legislature meant to impose liability under the street trade statutes on companies like National Publishers. This argument is poorly developed. The plaintiffs make no attempt to show that our legislature was aware of the alleged common usage of these terms. Neither the employee's statements nor the guidelines provide historical context. The employee does not indicate how long the terms have been used in the industry and the guidelines were issued for an "implementation date of July 1998." The plaintiffs' appellate brief provides no information concerning what common terms were in use when our legislature first enacted and later made amendments to the street trade statutes.

¶38 Judge Dykman, writing in dissent, asserts there is sufficient evidence of an employee/employer relationship within the meaning of WIS. STAT. § 103.21(1g) to avoid summary judgment on the street trade claim. The plaintiffs themselves do not rely on § 103.21(1g), but the dissent demonstrates why we have addressed the topic *sua sponte*: because the point is at least arguable. And, there certainly are policy reasons for spreading a wide liability net to protect minors. However, we must construe the *statutory language* before us, and we discern no reasonable construction that leads to the conclusion that National Publishers "employed" any of the minors in this case through Subscriptions Plus acting as its agent. The agency relationship described in subsection (1g) is not agency in the

abstract; it plainly refers to "an employer who employs minors, either directly or through an agent." Thus, there must be evidence in the record that supports a finding that there was at least some sort of express or implied understanding that Subscriptions Plus would employ street crew members on behalf of National Publishers. There is no such evidence. We agree that the legislative drafting instruction relied on by the dissent indicates that, at one point during the legislative process, at least one legislator hoped to amend the street trade statutes in a manner so as to prevent "independent contractor" status to serve as a roadblock to liability. But we find the drafting instruction both ambiguous and divorced from the language of subsection (1g). Moreover, at best, the instruction only indicates a desire to create or amend statutory language so as to deny "independent contractor" status to companies like YES, the direct employer of the minors in this case. The dissent does not explicate its contrary reasonable reading of subsection (1g). Instead, we are left with the vague notion that persons in the chain above may not insulate themselves by deeming themselves "independent contractors." This is a statement of a goal; it is not a contrary reasonable construction of subsection (1g). Under the dissent's view of subsection (1g), would the minors in this case have been in an employee/employer relationship with the publisher of Car and Driver magazine? We are left to wonder.

¶39 Accordingly, the plaintiffs have no cause of action against National Publishers for absolute liability for a violation of the street trade statutes.[5]

[5] The concurring opinion contends that we may dismiss the street trade claims by concluding there is no factual dispute that National Publishers had no "constructive knowledge." However, the difficulty in applying ***Beard***'s constructive knowledge requirement is that the ***Beard*** court did not define the term. The ***Beard*** court states "an employer cannot simply ignore unpermitted minors and claim that because no street trades permit was filed, it had no actual knowledge. Rather, we conclude that [as with the Worker's Compensation Act] constructive knowledge, if proven, may be sufficient as well." ***Beard v. Lee Enters., Inc.***, 225 Wis. 2d 1, 16, 591 N.W.2d 156 (1999). This language indicates that "constructive" knowledge will be inferred when an employer's ignorance is self-imposed. It does not say that someone employed by the employer must have direct or actual knowledge of the minor. Further, the remand language of ***Beard*** is not helpful. The ***Beard*** court indicated it was remanding because the constructive knowledge requirement might be satisfied if an employee of The Tribune was aware that the minor was delivering newspaper bundles. ***Id.*** at 16-17. However, this discussion does not delineate the parameters of constructive knowledge; it merely suggests one way to satisfy the requirement.

The concurrence correctly observes that the discussion in ***Beard*** seemingly contemplates that a violating entity be an employer who must comply with reporting and other requirements of the street trade statutes. Thus, the ***Beard*** court reasoned that some level of knowledge is required. *See* ***id.*** at 12. The trouble is reconciling the ***Beard*** court's apparent assumption with the language of WIS. STAT. § 103.21(1), which plainly includes entities that are not the direct employer of the minor. Thus, the concurrence's conclusion that "the person who is an employer under WIS. STAT. § 103.21 must have some degree of interaction with the child that is sufficient to cause it to be able to affect compliance with the requirements of the child labor laws," Concurrence at ¶145, is subject to dispute.

The plaintiffs direct our attention to several cases supporting their contention that "constructive notice" does not require any actual notice on the part of anyone. *See*, *e.g.*, ***Bump v. Dahl***, 26 Wis. 2d 607, 613, 133 N.W.2d 295 (1965); ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis. 2d 51, 54-55, 150 N.W.2d 361 (1967); ***Kaufman v. State St. Ltd. P'ship***, 187 Wis. 2d 54, 59-63, 522 N.W.2d 249 (Ct. App. 1994). From these and other cases, the plaintiffs assert that "constructive knowledge," for purposes of the street trade statutes, is present when an entity has information such that a person exercising reasonable care would either know or make inquiry regarding the fact at issue. National Publishers does not discuss the constructive notice cases or explain why those cases do not provide guidance in construing "constructive knowledge" for purposes of absolute liability for street trade violations. Instead, National Publishers effectively takes the position that, regardless the precise definition of "constructive knowledge," it must mean more than knowledge of a history of exploitation.

The concurring opinion presents some good arguments, but it does not demonstrate that the ***Beard*** court intended to or actually provided a definition of constructive knowledge.

B. National Publishers - Joint Venture

¶40 The plaintiffs contend that National Publishers is vicariously liable for the negligent acts of Subscriptions Plus because it was engaged in a "joint venture" with Subscriptions Plus. The plaintiffs provide no clear statement delineating the parameters of the alleged joint venture. However, we understand the plaintiffs to be saying the following: that National Publishers and Subscriptions Plus jointly presided over and mutually controlled the sales of magazine subscriptions and the processing of those subscriptions for magazine publishers, with the purpose of receiving payments for subscriptions and, in particular, sharing bonuses paid by publishers for certain magazines, by mutually creating incentives (a "hot list" brochure) for use in the door-to-door soliciting of subscriptions for those particular magazines. For the reasons below, we conclude that National Publishers has pointed to undisputed evidence negating the existence of such a joint venture.

¶41 The plaintiffs and National Publishers agree that the party asserting the existence of a joint venture must prove the following four elements:

1. the "contribution of money or services by each of the parties";
2. "joint proprietorship and mutual control over the subject matter of the venture";
3. "an agreement to share profits"; and
4. "an express or implied contract establishing the relationship."

Ruppa v. American States Ins. Co., 91 Wis. 2d 628, 645, 284 N.W.2d 318 (1979) (citing ***Edlebeck v. Hooten***, 20 Wis. 2d 83, 88, 121 N.W.2d 240 (1963)). ***Edlebeck*** further explains that each party to a joint venture "must agree expressly or impliedly ... to stand in the relation of agent as well as principal to the other

coadventurers ….” ***Edlebeck***, 20 Wis. 2d at 88. We understand this to mean that although one party to a joint venture may hold a more powerful position in the relationship as compared with others, all parties to the venture must have the express or implied agreement of the others to “‘affect the legal relations’” of all parties to the venture. *See* ***Skrupky***, 189 Wis. 2d at 43-44 (quoting WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 3 at 3 (1964)).

¶42 National Publishers, relying on ***Mortgage Associates, Inc. v. Monona Shores, Inc***., 47 Wis. 2d 171, 183, 177 N.W.2d 340 (1970), asserts that a prerequisite to a joint venture is an intention on the part of all of the parties to create such a relationship. However, we are not persuaded that this means that the plaintiffs, as third parties, must show that National Publishers intended to enter into the legal relationship known as a “joint venture.” National Publishers points out that ***Mortgage Associates*** relies on ***Jolin v. Oster***, 44 Wis. 2d 623, 172 N.W.2d 12 (1969). The ***Jolin*** court’s discussion of intent is limited to the following:

> Thus, although the early cases adopted the view that incorporation spelled the end of the joint venture, the later cases consistently have taken the view that where the intention of the parties is clearly expressed to use a corporation as a means of conducting the joint-venture business, the courts will give effect to their expressed intention, so long as the rights of innocent third persons are not prejudiced. We think this is the better rule and we adopt it.

Id. at 633. Accordingly, we conclude that the plaintiffs must show the four elements of a joint venture as set forth in ***Ruppa*** and that there is no distinct requirement that the plaintiffs, as third parties, show that National Publishers intended to enter into the legal relationship known as a “joint venture.”

¶43 Having established the elements the plaintiffs must prove, we turn to a purely legal dispute regarding proof. The parties disagree as to whether the words of the contract between National Publishers and Subscriptions Plus are dispositive as to the existence of a joint venture. National Publishers quotes 46 AM. JUR. 2D *Joint Ventures* § 11, at 32-33 (1994), which states: "A writing is not indispensable to the creation of a joint venture. But when a written contract exists, that document will be controlling as to the parties' intention." (Footnotes omitted.) We are not persuaded. This language from American Jurisprudence is based on a single case addressing a dispute between parties who entered into a contract forming a joint venture. ***Id***. at 33, citing ***McDermott v. Strauss***, 678 S.W.2d 334 (Ark. 1984). Regardless of the desirability of applying contract principles in that context, the situation we face is different. We agree with the plaintiffs that when a third party seeks to hold one member of an alleged joint venture liable for the acts of a co-adventurer, it would be patently unjust to allow the co-adventurer to hide behind the words of a contract if, in substance, the elements of a joint venture are factually present. Thus, we agree with the plaintiffs that a contract between the parties is a factor to consider, that it is only one factor, and, thus, that it is not dispositive as to the existence of a joint venture.

¶44 Therefore, we now address whether there is a factual dispute as to the existence of a joint venture between National Publishers and Subscriptions Plus. Although the plaintiffs have established that a factual dispute exists as to the

first element of a joint venture, there is no factual dispute preventing the conclusion that the second, third, and forth elements are not present.[6]

¶45 **Contribution of money or services by each of the parties**. Our review of the depositions and affidavits persuades us that there are sufficient factual assertions to put in dispute whether both National Publishers and Subscriptions Plus contributed money and services to the "venture." Indeed, National Publishers does not dispute that it expended resources toward the joint venture we describe above. Rather, National Publishers claims that it did so in pursuit of its own goal and not in furtherance of any joint venture.

¶46 **Joint proprietorship and mutual control over the subject matter of the venture**. The plaintiffs argue that National Publishers had joint control with Subscriptions Plus over the subject matter. The plaintiffs assert that National Publishers and Subscriptions Plus had joint proprietorship and mutual control over the selling of magazine subscriptions and the processing of those subscriptions for magazine publishers with the purpose of receiving payments for subscriptions. The plaintiffs also assert that National Publishers and Subscriptions Plus had joint proprietorship and mutual control over the creation of incentives for use in the

[6] We have endeavored to list all of the plaintiffs' legal and factual arguments supporting its joint venture theory of liability, as well as all other topics raised in its 123-page brief-in-chief and 39-page reply brief. However, the structure of plaintiffs' brief-in-chief makes it difficult to be certain we have addressed every argument the plaintiffs make. The plaintiffs' brief-in-chief contains, within its argument portion, a nine-page section entitled "Facts Relating to All Vicarious Liability Theories." This section is a mixture of factual assertions, characterizations, and arguments, often unsupported by record cites. We have attempted to cross-reference this section with other portions of the plaintiffs' briefs, and we hope we have identified all of the significant arguments the plaintiffs make.

door-to-door soliciting of subscriptions for "hot list"[7] magazines as designated by the publishers and over bonuses paid by publishers for selling "hot list" magazines.[8] The plaintiffs assert there is evidence that National Publishers and Subscriptions Plus "controlled not only what magazines were promoted, ... but also set up the bonus-system sales methods used by the crews." The plaintiffs also assert that National Publishers and Subscriptions Plus "established a point system to provide incentives to crewmembers to emphasize the most profitable magazines in their sales pitches to potential customers." More specifically, the plaintiffs say there are averments supporting a finding that National Publishers, working with Subscriptions Plus, developed brochures used as a sales tool by street crew members and developed contests, referenced in these brochures, designed to create incentives for street crew members to push particular magazines. These jointly developed brochures, the plaintiffs assert, are integral to the joint venture because

[7] Neither party directs our attention to a clear explanation of "hot list." We deduce from our reading that a "hot list" is a listing of magazines created by National Publishers indicating the magazine subscriptions for which various publishers are willing to pay a bonus. That is, various publishers inform National Publishers which magazine subscriptions they will pay a premium for and National Publishers puts together a "hot list" reflecting the greater value of some subscriptions. Thus, the brochure in evidence is not a "hot list," but it reflects the hot list by listing varying point values for magazines. This specific description of a "hot list" is not essential to our decision. The only essential fact in this regard is that there is no evidence that National Publishers and Subscriptions Plus jointly or mutually decided which magazines to push or the point values to ascribe to the various magazines. We merely provide this footnote as an explanation of the manner in which we refer to the "hot list" and the brochure.

[8] In the context of their joint venture arguments, both parties spend much time debating what the evidence says about the extent to which National Publishers controlled Subscriptions Plus. We fail to understand why. None of the four joint venture factors speak in terms of *control* by one party over another.

In addition, National Publishers' argument that only eight of its approximately 288 customers were believed to have been involved in door-to-door sales does not fit joint venture analysis. The question is not what percentage of National Publishers' business it conducted with Subscriptions Plus, but rather the nature of its business relationship with Subscriptions Plus.

they are used by street crews and they reflect the incentive to push "hot list" magazines, which, in turn, created profits that are split between National Publishers and Subscriptions Plus.

¶47 National Publishers responds that the plaintiffs offered no evidence that National Publishers had any input into Subscriptions Plus's contests, its hiring practices, its recruiting, or its financial or day-to-day management. National Publishers agrees that it produced, at its own expense and on a biannual basis, a color brochure to be used by persons selling subscriptions. However, National Publishers asserts that, at most, the undisputed evidence supports a finding that National Publishers produced the brochures to pass along information from the magazine publishers to clearinghouses (such as Subscriptions Plus) regarding which magazines to promote. Further, National Publishers asserts that the affidavits and averments show that it was National Publishers practice to include in the brochures information which customers (like Subscriptions Plus) requested be included. When, as here, this extra information pertained to contests, National Publishers did not participate in the development of such contests or their administration and did not contribute toward any cash prizes.

¶48 The plaintiffs have not directed our attention to any evidence contradicting National Publishers' assertions. The plaintiffs point to no evidence indicating that National Publishers and Subscriptions Plus engaged in any *joint* decision-making or *mutual* control regarding development of the contest reflected in the brochure. So far as we can discern, National Publishers, either unilaterally or working in conjunction with publishers, assigned point values to certain magazine subscriptions reflecting the bonuses paid by publishers for subscriptions to those magazines. More to the point, there is no indication that Subscriptions Plus had any input into the assignment of point values. Conversely, though it is

evident that Subscriptions Plus provided contest information it wanted included in brochures, the plaintiffs point to no evidence that National Publishers had any input into this contest information. Therefore, while it is clear that the contest developed by Subscriptions Plus is based on the "hot list" information supplied by National Publishers, the plaintiffs point to no evidence indicating the companies worked *together* to make decisions or develop strategies.

¶49 To further clarify, while it might be the case, as the plaintiffs assert, that a fact finder could find that National Publishers "exerted control over the method and manner the subscriptions were sold by field crews" and had an interest in that operation, the plaintiffs point to no evidence permitting a finding of *mutual* control. Accordingly, we conclude there is no factual dispute as to whether National Publishers and Subscriptions Plus exercised mutual control over the subject matter of the venture.

¶50 **An agreement to share profits**. We conclude that the plaintiffs have failed to provide any evidence that there was an *agreement* to share payments or "profits." Even assuming that the bonus payments provided by the publishers can accurately be characterized as "profit," there is still no evidence of an agreement. The uncontested evidence indicates that National Publishers forwarded some portion of the bonus money it received to Subscriptions Plus for "hot list" subscriptions, but there is no evidence that National Publishers and Subscriptions Plus negotiated this "split." So far as the evidence shows, National Publishers dictated the split. Similarly, just because the government takes a hefty percentage of a multimillion-dollar lottery jackpot, that does not mean that the fortuitous lottery player and the government have an agreement to share profits—the government is simply *taking* its share.

¶51 **An express or implied contract establishing the relationship**. The plaintiffs contend there is a factual dispute as to whether National Publishers and Subscriptions Plus had an express or implied contract to jointly engage in the sale of magazine subscriptions. The plaintiffs acknowledge that National Publishers and Subscriptions Plus had a contract that paints Subscriptions Plus as an independent contractor. The plaintiffs do not suggest that anything in the contract is evidence of a joint venture. Instead, they argue that the contract is only one factor and ask us to look at actual interaction between National Publishers and Subscriptions Plus.

¶52 Naturally, National Publishers points to the provision in its contract with Subscriptions Plus which expressly states that Subscriptions Plus is acting as an independent contractor with respect to National Publishers. That provision states:

> Relationship of Parties. Customer is performing pursuant to this Agreement only as an independent contractor. Customer has the sole obligation to supervise, manage, contract, direct, procure, perform or cause to be performed its obligations as set forth in this Agreement.
>
> Nothing set forth in this Agreement shall be construed to be the relationship of principal and agent or employer and employee between [National Publishers] and the customer. Customer shall not act or represent itself directly or by implication as an agent or employee of [National Publishers] or its affiliates or any publisher or in any manner assume or create any obligation on behalf of or in the name of [National Publishers] or its affiliates or any publisher.

¶53 We conclude that the plaintiffs point to no evidence rebutting the contention that the relationship between National Publishers and Subscriptions Plus was anything other than that described in the contract. Because there is no evidence of an express contract, the plaintiffs must rely on the possibility of an

implied contract. The existence of an implied contract must necessarily be based, at a minimum, on evidence that the parties functioned as if they were in a joint venture. Inasmuch as we have determined that there is no evidence that National Publishers and Subscriptions Plus engaged in the mutual control of a venture or shared profits, we could hardly conclude they were impliedly engaged in a joint venture.

C. National Publishers – Fraudulent Labor Advertising

¶54 Wisconsin's fraudulent labor advertising statute creates a cause of action against "any person, corporation, company or association, directly or indirectly, causing the damage" a worker "sustains in consequence of" certain false or deceptive representations. WIS. STAT. § 103.43. The statute provides in relevant part:

> **(1)**(a) No person may influence, induce, persuade or attempt to influence, induce, persuade or engage a worker to change from one place of employment to another in this state or to accept employment in this state, and no person may bring a worker of any class or calling into this state to work in any department of labor in this state, through or by means of any false or deceptive representations, false advertising or false pretenses concerning or arising from any of the following:
>
> 1. The kind and character of the work to be done.
>
> 2. The amount and character of the compensation to be paid for work.
>
> 3. The sanitary or other conditions of the employment.
>
> ….
>
> (b) Any of the acts described in par. (a) shall be considered a false advertisement or misrepresentation for the purposes of this section.
>
> ….

> **(2)** Any person who, by himself or herself, or by a servant or agent, or as the servant or agent of any other person, or as an officer, director, servant or agent of any firm, corporation, association or organization of any kind, violates sub. (1)(a) shall be fined not more than $2,000 or imprisoned in the county jail for not more than one year or both.
>
> **(3)** Any worker who is influenced, induced or persuaded to engage with any person specified in sub. (1)(a), through or by means of any of the acts prohibited in sub. (1)(a), shall have a right of action for recovery of all damages that the worker sustains in consequence of the false or deceptive representation, false advertising or false pretenses used to induce the worker to change his or her place of employment in this state or to accept employment in this state, against any person, corporation, company or association, directly or indirectly, causing the damage. In addition to all actual damages that the worker may sustain, the worker shall be entitled to recover reasonable attorney fees as determined by the court, to be taxed as costs in any judgment recovered.

¶55 The plaintiffs and National Publishers dispute the meaning of this statute. National Publishers argues that the undisputed facts show it is not liable under WIS. STAT. § 103.43 because the unambiguous language makes liability contingent upon evidence that the defendant engaged in advertising and there is no evidence that National Publishers engaged in or authorized any advertising for labor. In National Publishers' view, a claim based on subsection (3) is expressly contingent upon evidence that the defendant was the party that violated paragraph (1)(a). National Publishers argues that any contrary interpretation would serve no legislative purpose.

¶56 The plaintiffs respond that National Publishers fails to track the statutory formulation for liability. In the plaintiffs' view, there simply is no requirement that the "person, corporation, company or association, directly or indirectly, causing the damage" be the same entity that violated paragraph (1)(a). We agree that National Publishers is wrong when it asserts that § 103.43

unambiguously requires that a subsection (3) claim is contingent on evidence that the defendant was the party that violated paragraph (1)(a).

¶57 Paragraph (1)(a) defines false advertisement or misrepresentation. Subsection (3) first defines *who* has "a right of action for recovery," namely "[a]ny worker who is influenced, induced or persuaded to engage with any person specified in sub. (1)(a), through or by means of any of the acts prohibited in sub. (1)(a)." Stated differently, any worker who is subjected to false advertisement or misrepresentation under paragraph (1)(a) has "a right of action for recovery." WIS. STAT. § 103.43(3).

¶58 The "right of action for recovery" is for "all damages that the worker sustains in consequence of the false or deceptive representation, false advertising or false pretenses used to induce the worker to change his or her place of employment in this state or to accept employment in this state, against any person, corporation, company or association, directly or indirectly, causing the damage." WIS. STAT. § 103.43(3). The plaintiffs correctly state that nothing in this language requires that the "person, corporation, company or association, directly or indirectly, causing the damage" be the same entity that violated paragraph (1)(a).

¶59 We further agree with the plaintiffs that if the legislature had intended to limit liability to violators of paragraph (1)(a), the obvious way to convey that intent would have been to include a limitation like that found in subsection (2), which authorizes the imposition of civil and criminal penalties on violators of paragraph (1)(a). Subsection (2) limits liability to "[a]ny person who, by himself or herself, or by a servant or agent, or as the servant or agent of any other person, or as an officer, director, servant or agent of any firm, corporation, association or organization of any kind, violates sub. (1)(a)."

¶60 Having demonstrated its ability to plainly and expressly limit liability to the party that violates paragraph (1)(a), the legislature's failure to include a similar limitation in subsection (3), at a minimum, creates ambiguity. *See* ***State v. Williquette***, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986) (a statute is ambiguous if reasonable persons could disagree as to its meaning). When statutory language is ambiguous, we examine other construction aids, such as legislative history, context, and subject matter to determine its meaning. ***State v. Waalen***, 130 Wis. 2d 18, 24, 386 N.W.2d 47 (1986).

¶61 The only argument presented by National Publishers which might be construed as addressing ambiguity is its argument that imposing liability for damages a "worker sustains in consequence of" false advertising would, in National Publishers' words, "serve no legislative purpose." However, as the plaintiffs repeatedly argue in their briefs in various contexts, the imposition of liability on members of an industry that profit from the exploitation of workers would create an incentive for the industry to police itself, which would seem to serve the legislative purpose of protecting workers.

¶62 This, however, does not mean that the plaintiffs prevail. Among the remaining inquiries is whether there is a reasonable reading of subsection (3) that requires a trial to determine whether liability should be imposed on National Publishers. It is here that the plaintiffs lose their footing. Rather than provide a workable definition of subsection (3)'s phrase "directly or indirectly, causing the damage," the plaintiffs simply assert that a jury could find that National Publishers directly or indirectly caused the damages because the term "indirect cause" is broader than traditional proximate cause and is, in fact, "'one of the most comprehensive expressions which the language affords'" (quoting ***Jones v.***

Metropolitan Casualty Insurance Co., 144 Wis. 66, 67-68, 128 N.W. 280 (1910)). The lack of guidance afforded by this argument is palpable.

¶63 The plaintiffs' factual argument here is fairly straightforward. In the plaintiffs' view, a jury could find that National Publishers "indirectly" caused the van crash because it is part of, and profits from, an industry that exploits young people, and there is evidence in this case that National Publishers was aware that sales crews advertised in local newspapers. In the plaintiffs' words: "A reasonable jury could find that [National Publishers] 'indirectly' caused the damages, because it profited from sales made by fraudulently induced field-sales crews."

¶64 The problem here is that the plaintiffs have not provided a reasonable interpretation of "directly or indirectly, causing the damage," on the basis of which a jury could be instructed on how to determine whether National Publishers is sufficiently an "indirect" cause. Viewed in the broad manner promoted by the plaintiffs, anyone and everyone involved in the production and distribution of magazines would potentially be liable, including reporters who write for magazines. Our point here is not that there is a danger the plaintiffs will start suing reporters; it is that the plaintiffs suggest no standard for determining the reach of subsection (3) liability. National Publishers would likely take the position that no such definition is possible. We are not so sure. Suffice it to say that nothing before us, and nothing produced by our independent research, produces a workable definition.

¶65 Accordingly, summary judgment against the plaintiffs with respect to the fraudulent labor advertising claim against National Publishers was appropriate.[9]

III. Issues Relating to Subscriptions Plus and Scottsdale Insurance

A. Introduction

¶66 Our review of the briefs and the complaints reveals the following claims against Subscriptions Plus made by the plaintiffs who are parties to this appeal: (1) affirmative acts of negligence; (2) negligent operation of the van; (3) negligent hiring and supervision; (4) negligent entrustment; (5) misrepresentation; (6) absolute liability for violations of the street trade statutes; (7) failure to provide safe transportation; (8) failing to institute safety policies and procedures; (9) fraudulent labor advertising; (10) conspiracy; (11) "disaffirmance of contract by infant"; (12) equitable estoppel; (13) loss of society and companionship; (14) punitive damages; (15) piercing the corporate veil; and (16) joint venture. Obviously, not all of these "claims" are stand-alone claims. For example, the parties' discussion of "joint enterprise" does not suggest that it is anything more than a theory on which to hold National Publishers and Subscriptions Plus liable for otherwise actionable acts of each other, Jeremy Holmes, Choan Lane, and YES.

¶67 In its brief, Scottsdale Insurance concedes there may be disputed factual issues that preclude summary judgment in favor of Subscriptions Plus, but

[9] In light of this conclusion, we need not address National Publishers' argument that subsection (3) requires a causal relationship between the false advertisement and the van crash or the plaintiffs' counter-argument that subsection (3) contains no such causation requirement.

Scottsdale contends that no matter how those factual disputes are resolved, there is no coverage for Subscriptions Plus under the Scottsdale policy and, therefore, summary judgment is appropriate here. However, we conclude that Scottsdale Insurance is precluded by a prior federal court decision from arguing it has no duty to defend. Further, we reject most of the arguments Scottsdale makes regarding duty to indemnify.[10]

B. Oklahoma Insurance Law

¶68 The parties agree that the coverage issues in this case are governed by Oklahoma law. In Oklahoma,

> unambiguous insurance contracts are construed, as are other contracts, according to their terms. The interpretation of an insurance contract and whether it is ambiguous is determined by the court as a matter of law. Insurance contracts are ambiguous only if they are susceptible to two constructions. In interpreting an insurance contract, this Court will not make a better contract by altering a term for a party's benefit. We do not indulge in forced or constrained interpretations to create and then to construe ambiguities in insurance contracts.

Max True Plastering Co. v. United States Fid. & Guar. Co., 912 P.2d 861, 869 (Okla. 1996) (footnotes omitted). Further,

> A policy term is ambiguous under the reasonable expectations doctrine if it is reasonably susceptible to more than one meaning. When defining a term found in an insurance contract, the language is given the meaning understood by a person of ordinary intelligence. The doctrine does not mandate either a pro-insurer or pro-insured result because only reasonable expectations of coverage are warranted.

[10] All parties agree that the circuit court properly dismissed the punitive damages claim with respect to Scottsdale Insurance. We take this as meaning all agree that Scottsdale has no duty to indemnify with respect to the punitive damages claim.

Id. (footnotes omitted).

¶69 Oklahoma insurance policies are treated as contracts of adhesion:

> An adhesion contract is a standardized contract prepared entirely by one party to the transaction for the acceptance of the other. These contracts, because of the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected on a "take it or leave it" basis without opportunity for bargaining—the services contracted for cannot be obtained except by acquiescing to the form agreement. Insurance contracts are contracts of adhesion because of the uneven bargaining positions of the parties.

Id. at 864 (footnotes omitted).

¶70 When construing insurance policies, Oklahoma adheres to the following rules:

> 1) ambiguities are construed most strongly against the insurer; 2) in cases of doubt, words of inclusion are liberally applied in favor of the insured and words of exclusion are strictly construed against the insurer; 3) an interpretation which makes a contract fair and reasonable is selected over that which yields a harsh or unreasonable result; 4) insurance contracts are construed to give effect to the parties' intentions; 5) the scope of an agreement is not determined in a vacuum, but instead with reference to extrinsic circumstances; and 6) words are given effect according to their ordinary or popular meaning.

Id. at 865 (footnotes omitted). In recognition that "these rules of construction are often inadequate because they may fail to recognize the realities of the insurance business and the methods used in modern insurance practice," ***id.*** at 865 (footnote omitted), and because insurance policies are contracts of adhesion, ***id.*** at 864, Oklahoma has adopted the "reasonable expectations doctrine." This doctrine has "evolved as an interpretative tool to aid courts in discerning the intention of the

parties bound by adhesion contracts." ***Id.*** (footnote omitted). Under the doctrine of reasonable expectations:

> if the insurer or its agent creates a reasonable expectation of coverage in the insured which is not supported by policy language, the expectation will prevail over the language of the policy. The doctrine does not negate the importance of policy language. Rather, it is justified by the underlying principle that generally the language of the policy will provide the best indication of the parties' reasonable expectations. The standard under the doctrine is a "reasonable expectation"; and courts must examine the policy language objectively to determine whether an insured could reasonably have expected coverage.

Id. at 864-65 (footnotes omitted). The "reasonable expectations doctrine" only applies when policy language is ambiguous or when "although clear, the policy contains exclusions masked by technical or obscure language or hidden exclusions." ***Id.*** at 870. Finally, the doctrine "is a double-edged sword [because] both parties to the insurance contract may rely upon their reasonable expectations." ***Id.*** at 866.

C. Duty to Defend

¶71 Duty to indemnify and duty to defend are separate topics. We first address whether the federal court decision declaring that Scottsdale Insurance has a duty to defend Subscriptions Plus has preclusive effect here.[11] We conclude that Scottsdale has failed to rebut Subscriptions Plus's argument that the federal court decision should be given preclusive effect.

[11] In this section of our opinion, references to Scottsdale Insurance are references only to Scottsdale Insurance; they do not include Acceptance Insurance Company. There is no dispute that the Acceptance policy does not create a duty to defend.

¶72 Judge Posner, writing for the Seventh Circuit, suggested to Subscriptions Plus that it argue before this court that a November 2000 federal district court decision has preclusive effect with respect to duty to defend. In ***Scottsdale Insurance Co. v. Subscriptions Plus, Inc.***, 299 F.3d 618 (7th Cir. 2002), decided July 15, 2002, Judge Posner wrote:

> But what, finally, of the pendency in the Wisconsin appellate court of the state trial judge's diametrically opposed ruling on Scottsdale's duty to defend? (His grounds, both advanced by Scottsdale in this appeal and rejected by us earlier in this opinion, were that the accident fell within the policy's automobile exclusion and that the van driver's criminal negligence was a superseding cause of the accident.) It is for just such conflicts that the doctrines of [claim preclusion] and [issue preclusion] are designed. The Wisconsin courts will have to decide, on the basis of Wisconsin law, whether the ruling of the district judge here affirmed that Scottsdale had a duty to defend, and therefore owes the insureds the cost of the defense that it should have borne, is entitled to preclusive effect in the Wisconsin litigation.

Id. at 623-24 (citation omitted).[12]

¶73 The state circuit court's decision, concluding that Scottsdale Insurance had no duty to defend, was issued January 25, 2002. Subscriptions Plus asserts that a decision by Judge Barbara Crabb, filed November 13, 2000, precludes Scottsdale Insurance from arguing in state court that it has no duty to defend. The earlier federal district court declaratory judgment was issued pursuant to Scottsdale Insurance's request for "a declaration that it [had] no obligation to defend or indemnify defendants Subscriptions Plus, Inc. and Karleen Hillery in

[12] We have inserted the terms "claim preclusion" and "issue preclusion" because Wisconsin courts use those terms in place of "res judicata" and "collateral estoppel," respectively. *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

connection with claims arising out of a van crash on March 25, 1999." The listed defendants in that action include all of the plaintiffs in this case—no one has suggested otherwise. The federal district court declared that "Scottsdale Insurance Company must defend defendants Subscriptions Plus, Inc. and Karleen Hillery for claims arising out of the March 25, 1999, van crash."

¶74 To provide context for the claim and issue preclusion discussion, we first discuss duty to defend. Once again we look to Oklahoma law. In ***First Bank of Turley v. Fidelity & Deposit Insurance Co. of Maryland***, 928 P.2d 298 (Okla. 1996), the Oklahoma Supreme Court explained:

> A liability insurance policy generally contains two basic duties—the duty to defend and the duty to indemnify its insured. The insurer's primary duty is to provide indemnity for loss or to pay a specified amount upon determinable contingencies. The duty to defend is separate from, and broader than, the duty to indemnify, but the insurer's obligation is not unlimited. The defense duty is measured by the nature and kinds of risks covered by the policy as well as by the *reasonable expectations of the insured*. An insurer has a duty to defend an insured whenever it ascertains the presence of facts that give rise to *the potential of liability* under the policy. The insurer's defense duty is determined *on the basis of information gleaned from the petition (and other pleadings), from the insured and from other sources available to the insurer* at the time the defense is demanded (or tendered) rather than by the outcome of the third-party action.

Id. at 302-04 (footnotes omitted). The Oklahoma court explains: "The broader scope of the insurer's duty to defend is evidenced by the ordinary policy terms that bind the insurer to defend 'even if any of the allegations of the suit are groundless, false, or fraudulent.'" ***Id.*** at 303 n.10, quoting 7C APPLEMAN, INSURANCE LAW & PRACTICE § 4682, at 23. "The phrase 'potentially covered' means that 'the insurer's duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the *possibility of a recovery* under the

policy; there *need not be a probability of recovery*.'" ***First Bank***, 928 P.2d at 303 n.14, quoting 7C APPLEMAN § 4683.01, at 67. Further, the "duty to defend should *focus upon the facts* rather than upon the complaint's allegations, which may or may not control the ultimate determination of liability." ***First Bank***, 928 P.2d at 303 n.13, citing ***Texaco, Inc. v. Hartford Accident and Indem.***, 453 F. Supp. 1109, 1113 (E.D. Okla. 1978).

¶75 With the backdrop of Oklahoma duty-to-defend law, we turn to the topics of claim preclusion and issue preclusion. Subscriptions Plus invokes these doctrines, contending the district court decision has preclusive effect. As to claim preclusion, "'a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings.'" ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994) (quoting ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis. 2d 306, 310, 334 N.W.2d 883 (1983)). For the earlier proceedings to have "claim-preclusive" effect as to the present suit, three factors must be present:

1. "an identity between the parties or their privies in the prior and present suits";
2. "an identity between the causes of action in the two suits"; and
3. "a final judgment on the merits in a court of competent jurisdiction."

Northern States Power Co. v. Bugher, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). Subscriptions Plus goes through each factor and explains why it believes the factor is present here.

¶76 In the alternative, Subscriptions Plus argues issue preclusion. In ***Masko v. City of Madison***, 2003 WI App 124, No. 02-2267, we recently reviewed the doctrine of issue preclusion, explaining:

[T]he doctrine may apply even if the cause of action in the second lawsuit is different from the first. However, the issue must have been "actually litigated" in the prior proceeding and the application of the doctrine must be consistent with fundamental fairness. The party seeking to use issue preclusion bears the burden of demonstrating that the doctrine should be applied.

[The supreme court has] established a two-step analysis for issue preclusion. The first step is whether a litigant is in privity or has sufficient identity of interest with the party to the prior proceeding. Obviously, this is only a question when issue preclusion is used against a nonparty to the former action. Whether privity exists is a question of law and is reviewed de novo.

The second step addresses whether application of issue preclusion is consistent with fundamental fairness. The relevant factors for the court to consider ... are:

> (1) could the party against whom preclusion is sought, as matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Determination of these factors is generally within the trial court's discretion. However, certain of these factors, such as whether the party could have obtained review of the prior judgment, present questions of law and are subject to de novo review. Thus, evaluating whether applying issue preclusion is consistent with fundamental fairness presents a mixed question of fact and law in which legal issues predominate.

Id. at ¶¶4-6 (citations omitted). Subscriptions Plus argues that Scottsdale Insurance's duty to defend was actually litigated in the federal court litigation and that we should apply issue preclusion here.

¶77 Scottsdale Insurance responds that the claim and issue preclusion arguments fail for three reasons. First, the federal district court judge, in Scottsdale's words, "determined that Scottsdale did have a duty to defend *pending outcome of the duty to indemnify issue*" (emphasis added). We do not find language to this effect in the district court's decision and, even if we did, it would be to no avail. First, we would not know what such language means. Does this mean the district court intended to revisit duty to defend? Does this mean the district court believed that if there was no duty to indemnify, there was no duty to defend? Scottsdale Insurance seemingly assumes the latter, but does not develop the argument that if there is no duty to indemnify, there is no duty to defend. Whatever the merits of such an argument under Oklahoma law, Scottsdale Insurance does not make the argument and Judge Crabb's decision does not contain a clear holding to that effect. Furthermore, even if Judge Crabb had made a clear pronouncement to that effect, it is clear that portion of her decision would be reversed by the Seventh Circuit's decision.

¶78 Second, Scottsdale Insurance asserts, without citation to any source, that, after receiving the district court's declaratory ruling, Scottsdale requested that the district court withhold a decision on the duty to indemnify pending the outcome of the liability action in the state court. Scottsdale further asserts, again without citation to any source, that Subscriptions Plus "demanded" that the duty to indemnify issue be resolved in the state court. Scottsdale Insurance notes that, thereafter, the state circuit court judge resolved the duty to indemnify issue against Subscriptions Plus. From these "facts," Scottsdale argues that Subscriptions Plus

"and Hillery got their wish in having that decision made in the state court action. They should not be able to dodge that outcome simply because they lost on the merits." This argument leads to an abrupt dead end.

¶79 Again Scottsdale's argument carries the apparent assumption that a finding that there is no duty to indemnify dictates that there is no duty to defend. Again the assumption is not backed up by legal argument. Under Oklahoma law, the duty to defend is broader than, not coextensive with, the duty to indemnify. *See* ***First Bank***, 928 P.2d at 303. Thus, based on the briefing before us, it appears that a ruling that there is no duty to indemnify does *not* dictate a ruling that there is no duty to defend. As counterintuitive as it may sound, the notion that a court might find no duty to indemnify, yet find a duty to defend, finds support in Oklahoma law and it underpins Judge Posner's suggestion that, regardless of his "frolic" criticizing the state circuit court, claim preclusion or issue preclusion may apply here. ***Scottsdale Insurance Co.***, 299 F.3d at 621. If Scottsdale Insurance means to argue that no duty to indemnify means no duty to defend, it has failed to develop that argument and we decline to resolve this question as a matter of Oklahoma law in the absence of briefing.

¶80 Finally, Scottsdale Insurance argues that duty to defend is a "moving target." Scottsdale points out that, under Oklahoma law, courts look beyond the pleadings to the facts the insurer could reasonably discover and duty to defend may be reassessed as a case progresses and more facts are revealed. Stated differently, we understand Scottsdale Insurance to be arguing that a court might reasonably reject a no duty-to-defend argument early on but later, after additional factual development, conclude there is no duty to defend. We agree with Scottsdale that, in this sense, duty to defend can be characterized as a "moving target." However, having made this reasonable legal argument, Scottsdale merely

asserts that the state circuit court had a "more complete palette from which to paint than did the federal court." Notably absent is mention of a single "color" of consequence added to the "palette" before the state court. Thus, Scottsdale Insurance has completely failed to support its assertion that the target has moved.

¶81 In a footnote in its appellate brief, Scottsdale Insurance states it is "clear" from the Seventh Circuit's decision in ***Scottsdale Insurance Co. v. Subscriptions Plus, Inc.***, that the Seventh Circuit "limited its decision to the duty to defend in the ***Wild*** case that was before Judge Crabb." But this assertion is beside the point. It is the preclusive effect of the *district court* decision that is at issue, not the decision of the Seventh Circuit. And, even if we were to look at the Seventh Circuit's decision, it is readily apparent that court does not share Scottsdale's view that either its decision or the district court decision is limited to plaintiff Wild. As noted above, it was the Seventh Circuit that suggested that claim preclusion or issue preclusion might apply before this court. *See* ***Scottsdale Insurance Co.***, 299 F.3d at 623-24.

¶82 Moreover, the issue here is not whether we agree or disagree with any court's assessment of the interaction of duty to indemnify and duty to defend. At issue here is whether, under Wisconsin claim preclusion or issue preclusion law, the district court decision has preclusive effect here. Thus, we return to Subscriptions Plus's argument that claim preclusion and issue preclusion apply. Scottsdale Insurance has not engaged in any analysis of claim preclusion or issue preclusion. This leaves unrebutted Subscriptions Plus's assertion that the facts here meet each test. Accordingly, we conclude the district court decision holding that Scottsdale Insurance has a duty to defend all claims against Subscriptions Plus and Karleen Hillery arising out of the March 25, 1999, van crash precludes Scottsdale's argument here that it has no duty to defend.

D. Duty to Indemnify

¶83 Scottsdale Insurance asserts that regardless how factual issues in this case are resolved, it has no duty to indemnify.[13] We disagree. There is evidence in the record that Karleen Hillery personally applied pressure to YES street crew members involved in the van crash and this, and other evidence, could support the findings that her conduct was negligent and a causal factor in the van crash. The record further shows that there is a factual dispute as to the business or employment relationships of Subscriptions Plus with Choan Lane and YES and Subscriptions Plus with street crew members. Some of this disputed evidence is as follows.

¶84 Staci Beck, a YES crew member who was in the van when it crashed, gave the following testimony during her deposition:

- Choan Lane and Hillery had verbal contact several times a week and talked about "the sales, about the people on the crews." They also "fed-exed" things back and forth.
- Hillery spoke directly to crew members regarding the customers they had met, offered selling advice, and talked about "the rules." Beck said Hillery "never really did talk about anything but magazines."
- Hillery came to talk to the crew members when business got low "[b]ecause it's her company and she doesn't like low business and she'll go out there and try to increase the business."

[13] We reject Scottsdale Insurance's contention that Subscriptions Plus has conceded there is no coverage for certain claims. In the Subscriptions Plus arguments to which Scottsdale points, Subscriptions Plus did not concede lack of coverage. Rather, Subscriptions Plus was attempting to defeat Scottsdale's summary judgment motion by asserting that there was no case or controversy regarding the claims. That argument is different than conceding lack of coverage. Moreover, as pointed out by Subscriptions Plus, a short time after the pleading to which Scottsdale relies was filed, Subscriptions Plus affirmatively stated to the circuit court that it was not conceding coverage with respect to any claim.

- Hillery "was aggressive" with salespeople. She would "threaten" and "threaten to choke-slam" the members of the street crews. Beck saw Hillery "choke-slam" a crew member.

- Hillery threatened to cut back on how much money the crew members made by threatening "no draws." Hillery told crew members "if you don't get a draw, you don't … eat."

- YES would have morning meetings with other crews that worked for Subscriptions Plus. In a meeting with both the YES crew and another crew, Hillery told crew members that "Choan can't hit a girl, but I can" and "I'm as good a choke-slammer as [Lane] is."

¶85 Jeremy Holmes, the driver of the van, gave the following testimony in his depositions:

- Hillery "snatched me up one time because I had a bad attitude."

- Hillery made visits to locations where the YES crew was staying.

- Sales crews managed by Choan Lane were part of Hillery's business.

¶86 Adam Stehm, a YES crew member who, on the night of the van crash, was in an Iowa jail "for activities related to the sale of magazines," made the following statements in an affidavit:

- He was an employee of "Y.E.S., Subscription[s] Plus, Choan Lane and Kay Hillery" from October 1998 until March 1999.

- "Choan Lane and Kay Hillery chose the drivers. I did not have a driver's license. Choan Lane and Kay Hillery paid tickets I got for driving without a license."

- "Kay Hillery knew that we switched drivers because she paid the tickets and would pay the ticket of the crewmember that switched with either Jeremy or me."

- "One time, I talked Pete Christman [one of the deceased crew members] into switching places with me. I told him to send the ticket to Kay Hillery in Oklahoma and she would pay the ticket. I

know she paid the tickets for any crewmember that ever sent her one."

- "Kay Hillery, did on occasion, stay where we were selling. She would usually stay in the same hotel with the crew. When she was at the hotel she would check people in at the end of the day, review sales from the crewmembers, take care of the paperwork, and handle the bookwork."

¶87 Choan Lane, in a letter written to the parents of one of the deceased crew members, made the following statements:

> "[Hillery] had started a [YES crew] for what was supposed to be me and hers. Well it was only mine when it was convenient for her. Most decisions were made by her. So when we got divorced it split accordingly. I then moved out of town and she sent me my cut every month and I just kinda talked to them on the phone as she had someone out there running things."
>
> "[T]hen we get to the day that [Marshall Roberts, one of the deceased crew members] got brought to the hotel, Miss Karleen Hillery brought him with her son David … [and] said give this guy a job."

¶88 There is evidence contradicting several of the above factual assertions. For example, in an affidavit and in a deposition, Karleen Hillery asserted the following:

- "Neither Subscriptions Plus, Inc. nor I attempted to control, or had the right to control, the manner in which Choan Lane operated Y.E.S.!, Inc."

- "Neither Subscriptions Plus nor I had any involvement whatsoever with the selection, training or supervision of any of the drivers utilized by Mr. Lane's crew."

- Neither Jeremy Holmes nor Choan Lane were employees of Subscriptions Plus in 1999. Subscriptions Plus employed no salespeople whatsoever in 1999.

¶89 With these factual assertions as a backdrop, we turn our attention to the reasons Scottsdale Insurance asserts it has no duty to indemnify.

1. Designated Project

¶90 Scottsdale Insurance argues that even if Karleen Hillery was negligent in her interactions with YES and the street crew members, there still is no coverage under the policy because the policy is limited to the "designated project." The policy limits coverage to "'bodily injury,' 'property damage,' 'personal injury,' 'advertising injury' and medical expenses arising out of ... [t]he project shown." The "project shown" is "PROCESSES MAGAZINE SUBSCRIPTION ORDERS & DOES CUSTOMER SERVICE FOR MAGAZINE ORDERS."

¶91 We first conclude that this policy language is ambiguous. The phrase "arising out of" is a "very broad, general and comprehensive" term under Oklahoma law. *See* ***Penley v. Gulf Ins. Co.***, 414 P.2d 305, 311 (Okla. 1966). The policy language, "arising out of ... [the processing of] MAGAZINE SUBSCRIPTION ORDERS & [doing] CUSTOMER SERVICE FOR MAGAZINE ORDERS," may convey that there is coverage only for data processing activities and customer service activities directly related to data processing. In contrast, this policy language could also be read as covering a range of activities encompassing the interaction of Subscriptions Plus personnel with people or companies that supply magazine orders to Subscriptions Plus, if that interaction is geared toward increasing magazine orders processed through Subscriptions Plus. Read in the latter manner, the "designated project" language covers Karleen Hillery's interactions with Choan Lane, Jeremy Holmes, and other crew members geared toward increasing magazine orders.

¶92 Scottsdale Insurance argues that if the "designated project" language in the policy is ambiguous, we should look to the application form signed by Karleen Hillery, which states that "Subscriptions Plus, Inc. processes orders and does customer service on bulk magazine orders sold by groups, companies and individuals." The application further states: "They DO NOT sell, produce or deliver these magazines. They are a clearing house."

¶93 In light of this language contained in the application, Scottsdale argues that Subscriptions Plus could have no reasonable expectation that it purchased coverage for activities relating to the sale of magazine subscriptions. We agree with Scottsdale that, when policy language is ambiguous, Oklahoma law contemplates review of extrinsic evidence, such as an application, to determine the reasonable expectations of the parties. *See* ***Max True Plastering***, 912 P.2d at 865.

¶94 The plaintiffs also point to extrinsic evidence. They point to Karleen Hillery's testimony about a conversation she had with her insurance agent:

> [Hillery]: I asked Roy Wallace [her insurance agent] to provide me with liability insurance – a blanket policy I believe is what I called it for Subscriptions Plus for in case I ever got sued for anything, it didn't matter to me what it could have possibly been, to make sure I was covered.
>
> [Questioner]: And me, you meant Subscriptions Plus, plus Karleen Hillery.
>
> [Hillery]: You bet.

Scottsdale Insurance does not suggest any reason why we may not consider Hillery's assertions about her conversation with her agent.

¶95 As explained above, there is a substantial factual dispute as to the nature and extent of Karleen Hillery's interaction with crew members. Viewing

this factual dispute, the policy language, and the extrinsic evidence regarding the meaning of the policy language leads us to conclude that Subscriptions Plus, Karleen Hillery, and Scottsdale Insurance could all reasonably expect coverage under some of the possible factual and liability scenarios in this case. For example, if a jury disbelieved that Hillery verbally and physically threatened crew members, but believed that she paid traffic tickets to encourage speedy travel between locations, paying speeding tickets might be considered "customer service" and the jury might find that the action was both negligent and a substantial factor in the van crash. We will not engage in extended speculation on what a jury might find. The point here is that it is at least possible that negligent causal conduct of Subscriptions Plus or Hillery may be "customer service" within the meaning of the policy when that policy is construed in favor of the insured, as required by Oklahoma law. Scottsdale has failed to show the absence of a genuine disputed issue "with such clarity as to leave no room for controversy." *See* ***Kraemer Bros.***, 89 Wis. 2d at 565-66.

2. Lack of an "Occurrence"

¶96 Scottsdale Insurance argues that several claims "are not occurrences" under its policy. Scottsdale asserts:

> that the following claims by definition are not occurrences causing bodily injury as required for coverage:
>
> > Fraudulent advertising in violation of § 103.43, Stats.
> > Child Labor law Violations
> > Breach of Contract
> > Misrepresentation
> > Conspiracy
> > Other alleged acts of SPI concerning employment including threats, pressure to increase sales, intimidation, drugs, and alcohol.

Scottsdale further argues: "The van crash was the occurrence in this case, causing bodily injury. None of the other claimed actions constitute 'occurrences' causing bodily injury and thus are not covered under the policy." Scottsdale goes on to argue: "'The myriad' other actions on the part of [Subscriptions Plus] and/or Hillery such as fraudulent advertising, child labor law violations, misrepresentations, and breach of contract claims are not 'accidents' or 'occurrences' causing injuries."

¶97 Scottsdale's argument comes into focus when we read the primary case the company relies on, ***Farmers Alliance Mutual Insurance Co. v. Salazar***, 77 F.3d 1291 (10th Cir. 1996). Scottsdale's argument is closely related to, but different from, the tort law argument that a superseding cause precludes liability. Here, in the context of arguing policy interpretation, Scottsdale is arguing that only the immediate cause of the injury is an "occurrence" and, in this case, that cause was the negligent act of Jeremy Holmes. We now have entered a realm where insurance policy construction and tort law principles converge.

¶98 The facts in ***Farmers Alliance*** are somewhat analogous to those here, except that the immediate act causing injury was intentional murder with a handgun. ***Id.*** at 1293-94. The shooter was the sixteen-year-old son of a woman with a homeowner's policy. The insurance company argued that the youth's act of firing the bullet must qualify as an "occurrence" within the meaning of the policy for there to be coverage and further argued that firing the bullet was not an "occurrence" because it was not an "accident." The administrator for the estate of the deceased responded that firing the bullet was just one cause of the injury and that the court should "focus [its attention] further up the causal chain to [the mother's] negligent supervision of [her son] and [the son's] negligent entrustment of the murder weapon." ***Id.*** at 1295. The federal court found no Oklahoma law on

point and looked to other jurisdictions as a means of ascertaining what the Oklahoma Supreme Court might hold. ***Id.*** at 1295-96. The federal court predicted that the Oklahoma court would resolve the matter by focusing attention only on the immediate cause of the injury:

> We find that when determining whether a bodily injury was "caused by an occurrence" the question of whether there was an "occurrence" should be resolved by focusing on the injury and its immediately attendant causative circumstances. We reach this conclusion by means of simple deduction. If the time and place of an "occurrence" are determined by the time and place of the injury, then the acts which are said to constitute the "occurrence" must necessarily fall within the same temporal and spatial parameters. Looking at the facts of this case, we know that as a matter of firmly established law the supposed "occurrence" at issue in this case happened when and where [the sixteen-year-old shooter] murdered [the victim]. If we want to know which acts or omissions constituted this supposed "occurrence" we must focus our attention to the same time and place—to the murder itself. Though myriad other events of an earlier time and different place may have contributed to the claimed injury, to determine whether there was an "occurrence" within the meaning of the policy we must focus on those events directly responsible for the injury.

Id. at 1296-97. We think the federal court's analysis badly misses the mark and is in conflict with applicable Wisconsin tort law.

¶99 What the ***Farmers Alliance*** court analyzes as an "occurrence" question is really a question of causation. The "occurrence" in this case causing injury was the van crash. Nothing we find in ***Farmers Alliance*** or any Oklahoma case makes us doubt that a van crash is an "occurrence" under insurance policy construction principles adhered to in Oklahoma. The real question is: What caused the occurrence at issue here?

¶100 Under Wisconsin tort law, it is well established that there may be more than one cause for an accident or an injury and that a cause need not be, to paraphrase ***Farmers Alliance***, an immediate attendant causative circumstance. *See* ***id.*** at 1296. Juries in Wisconsin are typically instructed as follows:

> A question in the special verdict asks about the cause of the accident. This question does not ask about "the cause" but rather "a cause" because an accident may have more than one cause. An accident may be caused by one person's negligence or by the combined negligence of two or more people.
>
> You must decide whether someone's negligence caused the accident. Someone's negligence caused the accident if it was a substantial factor in producing the accident.

See WIS JI—CIVIL 1500. For example, in the recent decision of ***Alvarado v. Sersch***, 2003 WI 55, No. 01-1715, ¶¶2-4, 8, 12, 30, the supreme court held that a jury should decide whether an apartment manager's failure to discover and remove an explosive that looked something like a candle was a negligent act causing injury to a cleaning person two days later, before the courts decide whether public policy factors should limit liability.

¶101 Accordingly, we reject Scottsdale Insurance's argument that any causative negligence or any statutory violations on the part of Subscriptions Plus are irrelevant because none could be an "occurrence" under the policy.

3. Intervening and Superseding Cause

¶102 Scottsdale Insurance does not ask us to find lack of coverage because the acts of either Jeremy Holmes or Choan Lane were intervening or superseding events. However, we will briefly address the topic because the circuit court, relying on a case arising out of the Oklahoma City bombing tragedy,

Gaines-Tabb v. ICI Explosives, USA, Inc., 160 F.3d 613 (10th Cir. 1998), granted summary judgment on this ground.

¶103 The plaintiffs and Subscriptions Plus argue in their appellate briefs that the circuit court's "intervening or superseding" conclusion was erroneous. Scottsdale Insurance does not address the topic in its appellate brief, but at oral argument an attorney for Acceptance Insurance, speaking for both Scottsdale and Acceptance, asserted that Jeremy Holmes's "incredibly negligent decision" to attempt to switch places was the "sole cause" of the van crash. However, nothing during oral argument remotely resembled a developed argument that there was no coverage because of the existence of an "intervening and superseding" cause. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("party may be precluded from raising an issue at oral argument that was not presented in its appeal brief" (footnote omitted)). We will not consider dismissing the insurance companies from the lawsuit based on an argument the companies do not make.[14]

[14] We note that Scottsdale apparently made this argument before the federal courts because the Seventh Circuit rejected the argument, writing:

> Scottsdale further argues … that under conventional principles of tort law (presumably those of Wisconsin ...), the van driver's negligence, being criminal, was a "supervening cause" (more informatively, *superseding* cause ...) of [plaintiff's] death. In that event the insureds, even if they had been the driver's employers, would not be liable ....

Scottsdale Insurance Co. v. Subscriptions Plus, Inc., 299 F.3d 618, 620 (7th Cir. 2000) (citations omitted).

4. Intentional Acts Exclusion

¶104 Scottsdale Insurance argues that the "intentional acts" exclusion in its policy applies to exclude coverage for fraudulent labor advertising claims, street trade claims, conspiracy claims, and "other alleged acts of [Subscriptions Plus] and/or Hillery." We disagree.

¶105 The intentional acts exclusion reads: "This insurance does not apply to ... '[b]odily injury' or 'property damage' expected or intended from the standpoint of the insured." Relying on ***Dayton Hudson Corp. v. American Mutual Liability Insurance Co.***, 621 P.2d 1155, 1159-60 (Okla. 1980), Scottsdale Insurance asserts that "[l]iability insurance does not protect the insured that intentionally inflicts harm on another." Scottsdale asserts: "It was not the intent of the insurers in this case to protect [Subscriptions Plus] and/or Hillery for their alleged wrongful acts intended to inflict harm on the plaintiffs."

¶106 Even if we accept Scottsdale's characterization of the meaning of the intentional acts exclusion, we are not persuaded that the undisputed facts in this case support summary judgment. Scottsdale asserts that "[o]ther allegations concerning employment of these minors including threats and pressure to increase sales, intimidation, drugs, and alcohol" are plainly intentional acts excluded under the policy. However, there is a dispute as to whether Subscriptions Plus or Karleen Hillery intentionally inflicted harm on the deceased and injured crew members.

¶107 Scottsdale Insurance asserts that a claim of fraudulent advertising is not covered because such a claim "requires a material false representation with the intention that it is relied upon and reliance thereon by plaintiff to his injury." Scottsdale reasons that the injury resulting from fraudulent advertising is expected

and, therefore, excluded. We agree with Scottsdale Insurance that the intentional acts exclusion precludes coverage for acts that are intentional and performed with an intent to injure. *See* ***Dayton Hudson Corp.***, 621 P.2d at 1159-60. However, as we explained in section II.C. of this opinion, a false advertisement or misrepresentation claim under WIS. STAT. § 103.43(3) does not require that the defendant be the person who committed "fraud" by violating paragraph (1)(a) of that statute.

¶108 Because Scottsdale Insurance assumes that a claim under WIS. STAT. § 103.43(3) necessarily is an assertion of fraud under paragraph (1)(a) of that same statute, Scottsdale provides no discussion of how it is otherwise entitled to summary judgment with respect to this claim. Unlike the debate between the plaintiffs and National Publishers, the parties provide no discussion as to why § 103.43(3) would or would not apply to Subscriptions Plus or Karleen Hillery. While this omission is understandable under the circumstances, it is nonetheless an omission that precludes summary judgment with respect to this claim.

¶109 We next address Scottsdale's argument that the intentional acts exclusion precludes coverage with respect to absolute liability for street trade violations. Scottsdale Insurance begins with the assumption that the plaintiffs, in their pleadings below, have accurately captured part of this cause of action when the plaintiffs assert that the purpose of child labor laws is to "prohibit acts of a grave and serious nature and to protect persons against bodily injury" and that Wisconsin lawmakers and courts have "targeted child labor law violations as conduct so egregious that it gives rise not only to criminal penalties but also to a species of civil liability." In Scottsdale's view, it necessarily follows that "the injury resulting from an insured ... violating child labor laws [is] 'an act of a grave

and serious nature' which puts a child at risk [and therefore] cannot be considered an accident 'in any sense of the word, legal or colloquial.'"

¶110 However, Scottsdale, in its haste to hoist Subscriptions Plus on its own petard, turns what are essentially legislative intent arguments below into the gravamen of a street trade violation. This approach does not work. While some aspects of absolute liability for street trade violations may be unclear, it is clear that a violator need not intend harm. For example, in ***Beard***, The LaCrosse Tribune was found to be potentially liable for injuries to an adult caused by a minor driving a car. There were no facts in ***Beard*** even hinting that The Tribune intended to harm anyone. Rather, absolute liability was a possibility because of the mere temporal confluence of a street trade violation and injury to the plaintiff occurring in the minor's place of employment, in that case the public street on which the minor was traveling. *See* ***Beard***, 225 Wis. 2d at 16-24. Accordingly, we reject Scottsdale's street trade violation argument.

¶111 Finally, we turn to Scottsdale's argument that the intentional acts exclusion precludes conspiracy claims. In one complaint, plaintiffs Ellenbecker, Christman, and Fechter, and in a separate complaint, plaintiff Roberts, assert "conspiracy." While both complaints appear to target National Publishers in this respect, we will briefly address this topic assuming the claims are also directed at Subscriptions Plus.

¶112 Scottsdale Insurance relies on ***Bruner v. Heritage Cos.***, 225 Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999), for its argument that the intentional acts exclusion precludes coverage for conspiracy claims. The ***Bruner*** court states: "a civil conspiracy entails two or more persons knowingly committing wrongful acts." ***Id.*** at 736. The ***Bruner*** court noted that intent to harm could be inferred

from conspiracy to commit fraud, and it concluded that the same was true of "conspiracy to convert." ***Id.*** at 738-39. Neither the plaintiffs nor Subscriptions Plus respond. In particular, neither explains the nature of the alleged conspiracy or, indeed, whether the conspiracy claim is an independent claim at all. Both complaints use essentially the same wording: "National Publishers Exchange was engaged in a joint venture, enterprise and conspiracy with [Subscriptions Plus]." We conclude that Scottsdale Insurance has made a prima facie case for dismissal on this topic and neither the plaintiffs nor Subscriptions Plus has shown the existence of disputed material facts sufficient to entitle either party to a trial.

5. Independent Contractor or Employee

¶113 Scottsdale Insurance argues that there can be no coverage under the policy because Jeremy Holmes and the other street crew members were either employees of Subscriptions Plus (subject to the exclusive remedy provision of the Worker's Compensation Act) or they worked for an "independent contractor" (subject to the rule that a business is not liable for the acts of an independent contractor).

¶114 We agree with Scottsdale that, if Jeremy Holmes and the plaintiffs were employees, the exclusive remedy clause of the Worker's Compensation Act bars several claims. However, there is a factual dispute as to whether any of these people were employees of Subscriptions Plus under any definition of the word "employee."

¶115 Further, it may be that if Jeremy Holmes and Choan Lane were independent contractors, Subscriptions Plus is not liable for *their* negligent acts. *See* ***Wagner v. Continental Cas. Co.***, 143 Wis. 2d 379, 388, 421 N.W.2d 835 (1988). However, regardless whether Jeremy Holmes or Choan Lane were

"independent contractors," Scottsdale Insurance may have exposure for the acts of Karleen Hillery or other Subscriptions Plus employees.

6. Joint Venture

¶116 Scottsdale Insurance argues that all claims based on a "joint venture" theory of liability should be dismissed. The Scottsdale policy states that an entity is an "insured" if it is "designated in the Declarations as ... [a] partnership or joint venture." The policy further states: "No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations." Scottsdale argues that this language unambiguously precludes coverage for claims based on Subscriptions Plus's and Karleen Hillery's participation in a joint venture. If by this Scottsdale Insurance means that it need not provide coverage for the acts of non-Subscriptions Plus employees arising out of a joint venture, we agree.

¶117 As indicated elsewhere in this opinion, there may be coverage for the acts of Subscriptions Plus and Hillery arising out of activities involving the YES street crew. But our understanding of plaintiffs' joint venture theory is that they seek to hold Subscriptions Plus and Hillery (and in turn, Scottsdale Insurance) liable for the conduct of Jeremy Holmes, Choan Lane, or YES based on the theory that some combination of these entities were engaged in a joint venture. This is exactly the type of unforeseeable liability the exclusion is directed at.

¶118 The plaintiffs concede that neither the joint venture itself, nor Holmes or Lane, are insureds.[15] Instead, the plaintiffs argue that it is Subscriptions Plus and Hillery that are insureds. Because we do not understand this argument, we turn to Scottsdale's interpretation of plaintiffs' argument, which is as follows: "Plaintiffs interpret the exclusion to mean there is no coverage for the conduct of the joint venture but there is coverage when one participant is liable for the other participants' conduct while acting in a joint venture." We agree with Scottsdale that, if this is what plaintiffs mean, their argument would render the exclusion meaningless.

¶119 In addition, we are not persuaded by the federal district court's decision in ***Maryland Casualty Co. v. Turner***, 403 F. Supp. 907 (W.D. Okla. 1975), on which the plaintiffs and Subscriptions Plus rely. First, we agree with Scottsdale Insurance that the federal court's holding with respect to the joint venture exclusion is dicta because the court found there was no joint venture. Second, ***Maryland Casualty*** is a federal court decision, not an Oklahoma decision. As such, it is not Oklahoma law. Third, ***Maryland Casualty*** is easily distinguished.

¶120 In ***Maryland Casualty***, a woman, who was run over by a car at a drive-in theater while a movie played, sought to hold the theater owners liable. The theater owners' insurance company argued that it was not liable because, on the evening of the injury, its insured, the theater, was engaged in a joint venture with a local radio station. Prior to the movie and the injury, the theater owners and the radio station jointly promoted and conducted a concert at the drive-in. ***Id.*** at

[15] Unless, of course, if they are found to be employees of Subscriptions Plus.

910. The federal district court concluded that a joint venture exclusion in the insurance policy did not defeat the reasonable expectation of the drive-in theater owners that their insurance company would provide coverage if a patron was injured while at the theater to attend a movie. In that context, the court held:

> The claimed exclusion is ambiguous, not clear and is not conspicuously set out in the insurance policy and such exclusion cannot stand and cannot be permitted to defeat reasonable expectation of the insured, namely, Ronald Turner and James J. O'Donnell, d/b/a Woodstock Drive-in Theatre as principals under the insurance policy.

Id. at 912. Thus, in ***Maryland Casualty*** the insurer was not forced to provide coverage for liability arising out of the act of a third party or some unexpected joint venture.

¶121 Likewise here, regardless whether Subscriptions Plus or Hillery were engaged in a joint venture with Holmes, Lane, or YES, coverage is still available for acts of Subscriptions Plus and Hillery if those acts fall within the meaning of the "designated project" language and are otherwise covered. On the other hand, plaintiffs may not rely on a joint venture theory to claim coverage under the Scottsdale policy for the acts of Holmes, Lane, or YES.[16]

7. Employment Practices Exclusion

¶122 Scottsdale Insurance argues that the employment practices exclusion precludes coverage. The policy states: "This insurance does not apply to ... [e]mployment-related practices, policies, acts or omissions, such as coercion, ... discipline, ... harassment …." This exclusion further states that it applies

[16] To repeat, this assumes that Holmes and Lane are not employees of Subscriptions Plus, a topic on which there is a factual dispute.

"[w]hether the insured may be liable as an employer or in any other capacity." Scottsdale Insurance contends this exclusion applies to any injury arising out of any employment practice whether the injured party is an employee or not.

¶123 Scottsdale and the plaintiffs disagree as to whether this exclusion applies in the absence of an actual employer/employee relationship. Scottsdale Insurance points to the policy language stating that the exclusion applies "[w]hether the insured may be liable as an employer *or in any other capacity*" (emphasis added). We do not agree that this language unambiguously conveys that there need not be an actual employment relationship. The phrase "or in any other capacity" may simply mean that the exclusion applies even if an employee seeks to hold an employer liable in a capacity other than its "employer" capacity.

¶124 Scottsdale Insurance's reliance on ***International Brotherhood of Electrical Workers v. American International Adjustment Co.***, 955 F. Supp. 1218 (D. Haw. 1997), is misplaced. We agree with the plaintiffs that this case involved an actual employee/employer relationship and that it says nothing about whether the policy language at issue here applies outside such a relationship. In particular, the language of the federal decision quoted by Scottsdale,

> However, the policy at issue in the instant case clearly states "this exclusion applies whether the insured may be held liable as an employer or in any other capacity and to any obligation to share damages with or to repay someone else who must pay damages because of the injury." Accordingly, the court finds Plaintiffs' argument without merit.

id. at 1223 (footnote omitted), merely affirms our reasonable reading here that the phrase "or in any other capacity" indicates that the exclusion applies to lawsuits brought by an employee, even if the employee is suing the employer in a capacity other than its employer status.

¶125 Following the Oklahoma rule that policy language will be liberally construed to provide coverage, we conclude that the "Employment-Related Practices Exclusion" may reasonably be limited to lawsuits brought by current or former employees arising out of an employment relationship. In addition, we observe that the proposition that the language at issue here ("[w]hether the insured may be liable as an employer or in any other capacity") notifies insureds that the exclusion applies outside employment relationships strikes us as the sort of "technical or obscure language or hidden exclusions" problem discussed by the Oklahoma Supreme Court in ***Max True Plastering***. *See* ***Max True Plastering***, 912 P.2d at 870.

8. Automobile Exclusion

¶126 In multiple places in its brief, Scottsdale Insurance argues that it provided no coverage to Subscriptions Plus for automobile accidents and that the "auto" exclusion affirmatively precludes coverage. We are not persuaded.

¶127 Scottsdale Insurance contends that Subscriptions Plus "requested no automobile coverage, paid no premium for auto liability coverage ... and thus, no coverage was given." This argument misses the point that the plaintiffs and Subscriptions Plus are not seeking coverage under any automobile coverage clause. Rather, the plaintiffs and Subscriptions Plus argue that the fact that the immediate cause of the deaths and injuries was a van crash does not mean that Subscriptions Plus does not face potential liability under the various liability theories advanced by the plaintiffs. We agree. It is readily apparent that an automobile crash may have several causes, some of which create liability for parties not directly involved in the crash. Thus, we turn our attention to the "auto" exclusion clause in the Scottsdale policy.

¶128 Scottsdale Insurance argues that there is no coverage under the policy because there is an "explicit exclusion confirming that [Scottsdale Insurance] did not provide coverage for damages related to the use of automobiles." Scottsdale Insurance asserts it "could be no clearer that [the] policy ... would not apply to circumstances such as that presented in this case."

¶129 The plaintiffs and Subscriptions Plus agree that the "auto" exclusion is unambiguous and that Subscriptions Plus did not purchase automobile insurance. Indeed, they go so far as to say that even if Subscriptions Plus had purchased automobile insurance from Scottsdale, the auto policy would *not* provide coverage here. In the view of the plaintiffs and Subscriptions Plus, the "auto" exclusion is a non-issue because, by its unambiguous terms, it acts only to exclude injury arising out of the use or entrustment of an auto that is "owned or operated by or rented or loaned to any insured." The plaintiffs and Subscriptions Plus assert it is, at a minimum, disputed whether an "insured" owned, operated, rented, or loaned the van. A review of the policy language reveals that the plaintiffs and Subscriptions Plus have correctly assessed the situation.

¶130 The Scottsdale policy's "auto" exclusion clause excludes from coverage: "'Bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any ... 'auto' ... owned or operated by or rented or loaned to any insured." As indicated in other parts of this opinion, there is a factual dispute as to whether Subscriptions Plus controlled YES or any street crew members. Thus, the only way Scottsdale Insurance can prevail on summary judgment is if there is no factual dispute that Jeremy Holmes, Choan Lane, or YES were insureds within the meaning of the policy. If that were true, then the exclusion would unambiguously exclude coverage.

¶131 We turn then to the question whether Jeremy Holmes, Choan Lane, or YES was an "insured." We do not find in Scottsdale Insurance's brief any argument that any of these three were an "insured." Nonetheless, we observe that the policy provides at least two definitions of "insured" that might apply here.

¶132 The policy defines an "insured" as "employees" acting "within the scope of their employment ... or while performing duties related to the conduct of your business." However, as is obvious by now, there is a factual dispute as to whether Jeremy Holmes or Choan Lane was an employee of Subscriptions Plus.

¶133 We also conclude that neither Jeremy Holmes nor Choan Lane is an "insured" under the "joint venture" language in the policy. The Scottsdale policy states that an entity is an "insured" if it is "designated in the Declarations as ... [a] partnership or joint venture." The policy further states: "No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations." Neither Jeremy Holmes nor Choan Lane is an insured under this language because neither is listed on the declarations page.

¶134 The circuit court relied on ***Safeco Insurance Co. of America v. Sanders***, 803 P.2d 688 (Okla. 1990), to conclude that the "auto" exclusion clause precluded coverage. We agree with the plaintiffs that ***Safeco*** is inapposite. First, while it is true that the Oklahoma Supreme Court stated "we hold that if the facts establish that a motor vehicle … is the dangerous instrument which starts the chain of events leading to the injury, the injury arises out of the use of the motor vehicle," this language is followed by "as contemplated by 36 O.S.1981, § 3636." ***Id.*** at 692. This is a reference to the Oklahoma statute mandating coverage for uninsured motorists. Second, and more salient, is that ***Safeco*** did not involve an

exclusion arising from the use of an automobile by *an insured*. Scottsdale's problem here is not that the injuries did not arise out of the use of an automobile; they did. But Scottsdale's coverage obligation to Subscriptions Plus is unaffected by the "auto" exclusion because, in the language of the exclusion, the crash did not involve an automobile "owned or operated by or rented or loaned to *any insured* [i.e., Subscriptions Plus]" (emphasis added). In addition, we have reviewed the other decisions cited in Scottsdale's brief on this topic: ***Phillips v. State Farm Fire & Casualty Co.***, 859 P.2d 1101 (Okla. 1993); ***Bankert v. Threshermen's Mutual Insurance Co.***, 110 Wis. 2d 469, 329 N.W.2d 150 (1983); ***Farmers Insurance Group of Oregon v. Nelsen***, 715 P.2d 492 (Or. Ct. App. 1986); and ***Oakley Transport, Inc. v. Zurich Insurance Co.***, 648 N.E.2d 1099 (Ill. App. Ct. 1995). None of the cases involve a lawsuit against a third party for statutory violations or negligence that was part of the causal chain leading to an automobile accident. Rather, they address automobile exclusions to homeowner's, farm owner's, and commercial general liability policies. In each of these four cases, the policyholder was liable for the acts of the person causing the injuries; however, coverage was excluded because the person operating the vehicle involved in the accident was an "insured" within the provisions of the various policies. In contrast, under one possible factual scenario in this case, Subscriptions Plus has liability, but could not have purchased applicable automobile insurance, even had it tried.

¶135 Accordingly, we agree with the plaintiffs that, in light of the disputed facts, neither the lack of automobile coverage nor the "auto" exclusion clause entitles Scottsdale Insurance to summary judgment.

9. Street Trade Violation

¶136 We have earlier rejected Scottsdale Insurance's argument that there is no coverage for any street trade violation because of the intentional acts exclusion. We note here that even if the minor plaintiffs were not employees for other purposes, they may have been in an employee/employer relationship with Subscriptions Plus within the meaning of WIS. STAT. § 103.21(1g).

¶137 We further note that Scottsdale Insurance, unlike National Publishers, does not argue that the exclusive remedy provision of the Worker's Compensation Act, WIS. STAT. § 102.03(2), mandates that when the conditions for an employer's liability exist under Worker's Compensation law, an employee's right to recover under the Worker's Compensation Act is the employee's remedy to the exclusion of absolute liability for child labor law violations. Because Scottsdale Insurance does not make the argument, we do not dwell on the topic. Still, we will make two observations since this topic may be revisited on remand. First, we agree with National Publishers that ***Beard v. Lee Enterprises, Inc.***, 225 Wis. 2d 1, 591 N.W.2d 156 (1999), does not directly address the exclusive remedy question. Second, it is difficult to reconcile the legal conclusion in ***Beard***, that an adult third-party has the benefit of an absolute liability claim based on a street trade violation, with National Publishers' proposition that the same benefit is denied to the very class of persons the absolute liability claim was designed to protect and benefit: minors employed in street trades. The readily apparent assumption of both the majority and the concurring justices in ***Beard***, albeit only an assumption and not a holding, is that an injured minor's claim of absolute liability is not preempted by the exclusive remedy provision of the Worker's Compensation Act.

10. Failure to Provide Safe Transportation

¶138 Plaintiff Roberts asserts that Subscriptions Plus "had a contract to provide transportation for their work crews." The circuit court held:

> One plaintiff has sued [Subscriptions Plus] on the contractual theory of safe transportation. The court determines there is no insurance coverage for that claim. At SIC 17, the Scottsdale policy has a clear contractual liability exclusion. That is, the contract reads "This insurance does not apply to bodily injury … for which the insured is obligated to pay damages by reason of the assumption of liability in a contract …."
>
> Once again, a fact finder might find liability against [Subscriptions Plus] on this theory, but [Subscriptions Plus] is not entitled to coverage of any judgment under either policy.

Subscriptions Plus argues that this conclusion is erroneous. However, the full extent of Subscriptions Plus's argument is its bald assertions that there are no allegations in the underlying lawsuits based on the "assumption of liability in a contract or agreement" and that an alleged breach of an agreement to provide safe transportation to an independent contractor "is not a claim based upon a contract to assume the liabilities of another person or entity."

¶139 Scottsdale Insurance does not respond. More germane here, Scottsdale does not argue that there is no coverage for an alleged breach of a contract to provide transportation. Thus, we will not weigh in on the correctness of the circuit court's conclusion. At the same time, we decline to find no duty to indemnify with respect to this claim because Scottsdale does not argue the point.

Conclusion

¶140 Therefore, we affirm the circuit court order granting summary judgment in favor of National Publishers and dismissing National Publishers from

this action. We reverse the circuit court decision concluding that Scottsdale Insurance Company has no duty to defend. We do not hold that this topic may not be revisited on remand, but only that Scottsdale Insurance did not rebut the argument that claim preclusion and issue preclusion apply and did not provide factual support for its argument that additional factual development has rendered the federal district court decision on this topic obsolete (Scottsdale Insurance's "moving target" argument). Finally, we reverse the circuit court decision finding that Scottsdale Insurance and Acceptance Insurance had no duty to indemnify with respect to any claims against Subscriptions Plus. We conclude that Scottsdale Insurance and Acceptance Insurance have no duty to indemnify with respect to punitive damages, conspiracy claims and all claims based on a joint venture theory of liability that seek coverage for the acts of Jeremy Holmes, Choan Lane, or YES because the latter three were allegedly engaged in a joint venture with Subscriptions Plus and Karleen Hillery. Scottsdale Insurance is not relieved of its duty to indemnify with respect to any other claims.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

¶141 ROGGENSACK, J. (*concurring*). While I agree with the results reached by the lead opinion as it affirms in part and reverses in part the decisions of the circuit court, I do not join it because I would have reasoned through the questions presented either on different bases or on more narrow grounds. Accordingly, I respectfully concur.

Standard of Review.

¶142 All of the issues presented in this summary judgment review are questions of law that we review without deference to the circuit court. ***Guenther v. City of Onalaska***, 223 Wis. 2d 206, 210, 588 N.W.2d 375, 376 (Ct. App. 1998). Statutory construction and the application of a statute to undisputed facts are questions of law. ***DOR v. Caterpillar, Inc.***, 2001 WI App 35, ¶6, 241 Wis. 2d 282, 625 N.W.2d 338. Additionally, whether a joint venture exists under a given set of facts is a legal conclusion that we review *de novo*. *See* ***Spearing v. County of Bayfield***, 133 Wis. 2d 165, 173, 394 N.W.2d 761, 765 (Ct. App. 1986). We also review whether claim or issue preclusion may be applied to a given set of facts as a question of law, to which we apply *de novo* review to the question presented. ***Lindas v. Cady***, 183 Wis. 2d 547, 552, 515 N.W.2d 458, 460 (1994).

Claims Against National Publishers.

1. Street Trades.

¶143 The four minor plaintiffs contend that National Publishers is absolutely liable to them because it was subject to WIS. STAT. § 103.21 (2001-02),[17] the street trades statute, which it violated at the time of the accident. To be liable, National Publishers must have been an employer of the minor plaintiffs. ***Beard v. Lee Enters., Inc.***, 225 Wis. 2d 1, 9, 591 N.W.2d 156, 159 (1999). The lead opinion determines that no employer/employee relationship existed and the dissent determines that one did exist under § 103.21(1g). While I agree there was no employment relationship between the minor employees and National Publishers, I base my decision on ***Beard's*** statutory analysis of § 103.21(1) that I conclude applies to (1g) as well.

¶144 In ***Beard***, the supreme court addressed whether there could be a WIS. STAT. § 103.21(1) employment relationship between a newspaper publisher and a minor who was involved in an automobile accident while delivering bundles of newspapers at an hour of the day when minors are prohibited from working,[18] without some level of knowledge that the young man was delivering its newspapers. ***Beard***, 225 Wis. 2d at 12-13, 591 N.W.2d at 160-61. The court reasoned that WIS. STAT. § 103.27(1) and (2) required an employer of minors to keep records on file for each minor working for it in a street trade and that this

[17] All further references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[18] The case arose on summary judgment dismissing the publisher so only the potential for an employment relationship was reviewed.

requirement seemed to require some level of knowledge. ***Id.*** at 12, 591 N.W.2d at 160. The court also reviewed an earlier supreme court decision interpreting a prior statute as not permitting a defense to liability by showing no constructive or actual knowledge that the minor was performing work. The court concluded that the statutory change made by the legislature overruled its earlier decision so that such a defense was available. ***Id.*** at 13-14, 591 N.W.2d at 161. It also reviewed WIS. STAT. § 102.60, which applies workers compensation benefits to a child illegally employed in the street trades, and § 102.60(7) that allows a defense against the statutorily proscribed damages for those agencies or publishers who had no constructive or actual knowledge of the work of the child. ***Id.*** at 15, 591 N.W.2d at 161-62. The court then concluded the legislature intended that a similar defense be available to other claims made due to illegal child work. ***Id.***

¶145 As the court explained, "[the availability of such a defense] comports with the legislature's desire to protect the minor, other employees and frequenters from the unregulated employ of minors in hazardous occupations … without imposing an impossible burden on the publishers of newspapers." ***Id.***, 591 N.W.2d at 162. Although the court did not specifically describe what it meant by "constructive knowledge," it did so by example when it said:

> [A]n employer cannot simply ignore unpermitted minors and claim that because no street trades permit was filed, it had no actual knowledge.…
>
> In this case, there is conflicting testimony as to the degree of knowledge, if any, that The Tribune had relating to Anthony's distribution of newspapers and newspaper bundles. Anthony stated that on the night of the accident, he talked with the guys at the distribution tower for a while before he received and delivered the bundles. The Tribune however did not have a street trades permit for Anthony on file, nor did it pay Anthony for his work.

Id. at 16, 591 N.W.2d at 162. This description, when combined with the court's interpretation of legislative intent as not placing an impossible burden on a publisher for all work a child performs, shows that the person who is an employer under WIS. STAT. § 103.21 must have some degree of interaction with the child that is sufficient to cause it to be able to affect compliance with the requirements of the child labor laws. In my view, it is this same policy balance that drives all of the § 103.21 determinations of who is an "employer," regardless of whether subsection (1) or (1g) is employed.

¶146 Here, the plaintiff did not submit anything that could reasonably be interpreted to show that National Publishers knew, actually or constructively, any of the individual members of the various street crews who sold magazine subscriptions, let alone whether they were minors. While YES knew its crew members through daily interactions and was in a position to know their ages as well, and Subscriptions Plus could have had such knowledge by virtue of the books it kept and its alleged personal interactions with crew members, there is no such link between the minor plaintiffs and National Publishers. The only reason for National Publishers' inclusion in this lawsuit is its business relationship with Subscriptions Plus and the allegation that it was "common knowledge" that minors worked in these roving street crews selling magazine subscriptions. In my view, "common knowledge" is an insufficient basis for liability because it removes National Publishers' ability to defend against the minor plaintiffs' claims through a showing of a lack of actual or constructive knowledge, a defense that the supreme court concluded the legislature intended to be available. Accordingly, I

conclude that National Publishers is not an employer within the meaning of WIS. STAT. § 103.21.[19]

2. Joint Venture.

¶147 I agree with the lead opinion's conclusion that there was no joint venture between Subscriptions Plus and National Publishers because there was no showing of joint proprietorship and mutual control over the subject matter of the alleged venture, a necessary element to conclude that a joint venture exists. ***Spearing***, 133 Wis. 2d at 173, 394 N.W.2d at 765. Because that determination is sufficient to our decision on this issue, I do not join the remainder of the lead opinion's discussion of joint venture.

3. Fraudulent Labor Advertising.

¶148 The plaintiffs allege they have a claim under WIS. STAT. § 103.43(1)(a), a criminal statute, ***Layton School of Art & Design v. WERC***, 82 Wis. 2d 324, 339 n.11, 262 N.W.2d 218, 225 n.11 (1978), that provides a private right to sue when the statute is contravened. Section 103.43(3). There have been no published appellate cases applying the statute outside of claims based on the importation of workers to break a strike or to assist in a lockout. The lead opinion concludes National Publishers could not be liable under the statute, a conclusion with which I agree. However, because I am not in accord with many of the assertions in the reasoning supporting that conclusion, I write separately.

[19] In light of WIS. STAT. § 102.60, it is curious that the dissent finds an employment relationship under WIS. STAT. § 103.21(1g) and yet agrees with the lead opinion on the coverage issue without addressing Scottsdale's exclusion of all claims to which workers compensation applies.

¶149 As a precursor to the imposition of liability, WIS. STAT. § 103.43(1a) requires that a false advertisement for laborers be made in regard to:

> 1. The kind and character of the work to be done.
>
> 2. The amount and character of the compensation to be paid for work.
>
> 3. The sanitary or other conditions of the employment.
>
> 4. The failure to state in any advertisement, proposal or contract for the employment that there is a strike or lockout at the place of the proposed employment, when a strike or lockout then actually exists in the employment at the proposed place of employment.

¶150 It is undisputed that National Publishers did not advertise for the magazine subscription sales positions held by the plaintiffs. Therefore, the only way that National Publishers could be held liable under WIS. STAT. § 103.43(1a) is if indirect advertising were sufficient to bring it within the statute. Indirect advertising by National Publishers could be achieved through a joint venture with Subscriptions Plus or through the use of Subscriptions Plus as National Publishers' agent to conduct such advertising. However, I conclude it is not necessary to decide whether such indirect action is sufficient under subsection (1a) because, on this record, neither route is available.

¶151 We have earlier decided that the plaintiffs cannot prove that a joint venture existed, so I now turn to a review of whether the plaintiffs submitted any evidence to show that Subscriptions Plus was National Publishers' agent for the purpose of advertising to hire people to sell magazine subscriptions. Agency is a fiduciary relationship that comes into being by showing the consent of one person to another, that the other shall act on the first person's behalf and be subject to his control, and the other person's consent to so act and be controlled. ***Strupp v. Farmers Mut. Auto. Ins. Co.***, 14 Wis. 2d 158, 167, 109 N.W.2d 660, 665 (1961).

The scope of an agency is limited by the tasks the principal asks to be performed. *See* ***Meyers v. Matthews***, 270 Wis. 453, 467, 71 N.W.2d 368, 375 (1955).

¶152 Here, there has been nothing submitted that, under any reasonable construction, could show that National Publishers asked Subscriptions Plus or YES to hire road crews to sell magazine subscriptions for it. National Publishers simply processed *some* of the magazine subscriptions the road crews of YES sold. Additionally, it was Subscriptions Plus that put that interaction into play because it made the choice about which clearinghouse to use for the subscriptions that YES's road crews sold.[20] Therefore, I conclude that National Publishers could not have been the principal of either YES or Subscriptions Plus for the purpose of hiring the road crews. Accordingly, any advertising that either YES or Subscriptions Plus did in that regard cannot be attributed to National Publishers and therefore there is no basis for a claim against National Publishers under WIS. STAT. § 103.43(1a) and (3).

Claims Against Scottsdale and Acceptance.

¶153 The lead opinion concludes in section III that Scottsdale Insurance is precluded by a prior federal court decision from arguing that it has no duty to defend. It also advances a lengthy analysis regarding its determination that Scottsdale and Acceptance Insurance have a potential duty to indemnify with

[20] The undisputed facts show that Subscriptions Plus often processed the magazine subscriptions it sold with other clearinghouses, and that it was Subscriptions Plus who chose which clearinghouse to use.

respect to certain claims against Subscriptions Plus.[21] While I agree with that conclusion, I write separately because I would decide on different grounds.

¶154 I agree that the prior federal court decision has a *claim*-preclusive effect as to Scottsdale's duty to defend.[22] However, I also conclude that under the unique facts presented here, issue preclusion bars re-litigation of whether the Scottsdale and Acceptance policies provide the potential to indemnify Subscriptions Plus for the claims brought by the plaintiffs.

Scottsdale's Duty to Defend.

¶155 Claim preclusion causes a final judgment between the same parties or their privies to be conclusive for all subsequent actions between those same parties, as to all matters that were or that could have been litigated in the proceeding from which the judgment arose. ***Amber J.F. v. Richard B.***, 205 Wis. 2d 510, 516, 557 N.W.2d 84, 86 (Ct. App. 1996). In a declaratory judgment context, claim preclusion is limited to those matters actually litigated. ***National Operating, L.P. v. Mutual Life Ins. Co.***, 2001 WI 87, ¶68, 244 Wis. 2d 839, 630 N.W.2d 116. To be applied, claim preclusion requires: (1) identity of parties or their privies in both actions; (2) a prior final judgment on the merits by a court

[21] The lead opinion states its holding in the converse, specifically, "we reverse the circuit court decision finding that Scottsdale Insurance and Acceptance Insurance had no duty to indemnify with respect to any claims against Subscriptions Plus." Majority at ¶140. The logical underpinning of this holding is that Scottsdale and Acceptance have a *potential* duty to indemnify Subscriptions Plus for certain claims.

[22] Scottsdale and Acceptance moved the federal district court to order that neither company had a duty to defend or to indemnify. Because it is uncontested that Acceptance contractually removed any duty to defend, I address only Scottsdale's duty to defend.

with jurisdiction; and (3) identity of causes of action in the two suits. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723, 728 (1995).

¶156 Scottsdale moved the federal district court for a declaration that it had no obligation to defend or to indemnify Subscriptions Plus or Karleen Hillery. In so doing, Scottsdale advanced two claims: (1) it had no duty to defend; and (2) it had no duty to indemnify. This is consistent with Oklahoma law that considers an insurer's duty to defend and duty to indemnify as individual claims. *See* ***First Bank of Turley v. Fidelity & Deposit Ins. Co. of Maryland****,* 928 P.2d 298, 303 (Okla. 1996). On November 13, 2000, the Federal District Court for the Western District of Wisconsin held that "Scottsdale Insurance Company must defend defendants Subscriptions Plus, Inc. and Karleen Hillery for claims arising out of the March 25, 1999, van crash." In the current case, the parties to the claim for an insurance defense for the March 25 accident are the same: Scottsdale versus Subscriptions Plus and Hillery. Additionally, the claim adjudicated is the same: Scottsdale's assertion that it has no duty to defend Subscriptions Plus and Hillery. Accordingly, because the federal court adjudicated Scottsdale's *claim*, claim preclusion is the proper doctrine to apply to Scottsdale's identical state court claim, and I conclude it prevents re-litigation of its claim that it has no duty to defend, in the context of this lawsuit.

Potential Duty to Indemnify.

¶157 It is important to recognize that there is a duty to defend *only* when there is the *potential* for coverage for liability arising from the claims made. ***First Bank of Turley***, 928 P.2d at 303 ("An insurer has a duty to defend an insured

whenever it ascertains the presence of facts that give rise to *the potential of liability* under the policy" (emphasis in the original)).[23] Therefore, in order for the district court to conclude that Scottsdale had a duty to defend, it first had to decide that Scottsdale did have a potential duty to indemnify. As a matter of law, it could not have concluded that Scottsdale had the duty to defend without finding that there was a potential for indemnification. ***Id.*** Therefore, as explained below, under the unique, undisputed facts presented by this record, I conclude that issue preclusion bars Scottsdale's and Acceptance's assertions that they have no potential duty to indemnify, *i.e.*, potential coverage for the accident that forms the basis of plaintiffs' claims.[24]

¶158 The doctrine of issue preclusion forecloses re-litigation of an issue that was actually litigated and necessarily decided in a previous proceeding. ***Reuter v. Murphy***, 2000 WI App. 276, ¶7, 240 Wis. 2d 110, 622 N.W.2d 464. Preclusion derives from the assumption that there is a point at which litigation involving a particular issue in dispute must end. ***Lindas***, 175 Wis. 2d at 279, 499 N.W.2d at 696. In order to be applied to an issue that was actually litigated and necessarily decided in the prior proceeding, the application of the doctrine must be consistent with fundamental fairness. ***Jensen v. Milwaukee Mut. Ins. Co.***, 204

[23] If any claim has the potential for indemnification under the policy, the insurer has the duty to defend the insured against all claims. *See* ***First Bank of Turley v. Fidelity & Deposit Ins. Co. of Maryland,*** 928 P.2d 298, 303 (Okla. 1996).

[24] I have serious concerns about an appellate court applying issue preclusion, as a matter of law, absent a determination by the circuit court that such application is consistent with fundamental fairness. As we recently explained, a determination of fundamental fairness is generally within the circuit court's discretion. ***Masko v. City of Madison***, 2003 WI App 124, ¶6, No. 02-2267. However, because the federal district court could not have concluded that Scottsdale had a duty to defend without finding that it also had a potential duty to indemnify, this case presents in a unique posture.

Wis. 2d 231, 237, 554 N.W.2d 232, 234 (Ct. App. 1996). There is no question that Scottsdale and Acceptance were parties to the federal court action. Therefore, the relevant inquiries are whether the issue of potential indemnification was actually litigated and necessarily decided and whether it is fundamentally fair to bar re-litigation of the issue of potential coverage.

¶159 In the prior federal court action, Scottsdale and Acceptance moved for a declaration that they had no obligation to defend or to indemnify Subscriptions Plus or Hillery. In examining the potential for indemnification, the district court concluded that, "whether any exclusions apply [to bar coverage] would require the resolution of a key factual question at issue in the underlying liability suits." The district court further explained, "there is a possibility that if the allegations of the complaint are proven, Scottsdale's policy could provide coverage to Subscriptions Plus." Based on the determination that there was a potential duty to indemnify, the court ordered Scottsdale to defend Subscriptions Plus and Hillery. Therefore, the issue of potential indemnification, the identical issue that forms the basis of Scottsdale's current claim that it has no duty to defend, was litigated and necessarily determined adverse to Scottsdale.

¶160 The next inquiry is whether application of issue preclusion is consistent with fundamental fairness. The relevant factors to consider are:

> (1) [C]ould the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate

> opportunity or incentive to obtain a full and fair adjudication in the initial action?

Michelle T. v. Crozier, 173 Wis. 2d 681, 689, 495 N.W.2d 327, 330-31 (1993).

¶161 Scottsdale fails to provide any argument that application of issue preclusion is inconsistent with fundamental fairness and we have discovered none. Issue preclusion requires that "one must have had a fair opportunity procedurally, substantively and evidentially to litigate the issue before a second litigation will be precluded." ***Dane County v. Dane County Union Local 65***, 210 Wis. 2d 267, 278, 565 N.W.2d 540, 545 (Ct. App. 1997). Scottsdale was afforded that opportunity in federal court, including an appeal to the Seventh Circuit Court of Appeals. ***Scottsdale Ins. Co. v. Subscriptions Plus, Inc.***, 299 F.3d 618 (7th Cir. 2002). The interest of judicial efficiency and protecting parties against repetitious litigation, therefore, outweigh Scottsdale's interest in relitigating its potential duty to indemnify Subscriptions Plus. Accordingly, I conclude that application of issue preclusion does not contravene principles of fundamental fairness and therefore it bars Scottsdale's assertion that it has no potential duty to indemnify.

¶162 As a final matter, because the preceding analysis regarding application of issue preclusion is derived from the district court's decision that Scottsdale had a duty to defend, I must address application of issue preclusion to Acceptance's contention that it has no potential duty to indemnify. Acceptance provided excess liability indemnity insurance to Subscriptions Plus. It incorporated parts of Scottsdale's policy into its own:

> To indemnify the insured for the amount of loss which is in excess of the applicable limits of liability of the underlying insurance [Scottsdale Insurance Company] inserted in section II of item in the declarations; provided that this policy shall apply only to those coverages for which a limit of liability is inserted in section I [Combined Single Limit Bodily Injury and/or Property Damage Other

> Than Automobile]; provided further that the limit of the company's liability under this policy shall not exceed the applicable amount inserted in section I.
>
> The provisions of the immediate underlying policy are incorporated as a part of this policy except for any obligation to investigate and defend and pay for costs and expenses incident to the same, the amount of the limits of liability, any "other insurance" provision and any other provisions therein which are inconsistent with the provisions of this policy.

Accordingly, while it has no independent duty to defend, if the claims for damages, excluding punitive damages, have potential coverage under Scottsdale's policy, they will also have potential coverage under Acceptance's policy when the amount of damages exceeds Scottsdale's policy limits.

¶163 The coverage provisions contained in the Acceptance policy mirror those of the Scottsdale policy. The identity of provisions causes Acceptance to stand in the shoes of Scottsdale in regard to whether there is a potential for indemnification. Stated otherwise, it would be nonsensical for the district court to decide that a potential for indemnification existed under the Scottsdale policy and to not decide that the same potential exists for the Acceptance policy, that specifically incorporates Scottsdale's policy provisions. Additionally, a review of the district court's decision shows it treated the potential to indemnify issue the same for both policies:

> I conclude that determining whether any of these exclusions apply would require the resolution of a key factual question at issue in the underlying liability suits. Therefore, the decision on Scottsdale's and Acceptance's duty to indemnify Subscriptions Plus will be stayed until liability has been decided in Wild.

Therefore, because the federal court's decision regarding Scottsdale's potential liability necessarily decides the issue for Acceptance, I conclude that issue

preclusion disposes of the parties' argument regarding Acceptance's potential duty to indemnify. Accordingly, for the reasons stated above, I respectfully concur with the lead opinion and do not join in the dissent.

¶164 DYKMAN, J. (*dissenting*). I disagree with the "Street Trades" sections of my colleagues' opinions.[25] I conclude that WIS. STAT. § 103.21(1g) (2001-02),[26] evinces an intent that persons "up the chain" from direct employers be considered as the employers of minors employed in street trades. That statute reads: "'House-to-house employer' means an employer who employs minors, either directly or through an agent who need not be an employee of the employer, to conduct street trades from house to house through personal contact with prospective customers."

¶165 The question is whether National Publishers indirectly employed the minor plaintiffs through agents who were not employees of National Publishers. I conclude that a jury could find that it did. When the language of a statute is ambiguous, we may resort to its legislative history in order to determine its meaning. ***Beard v. Lee Enterprises, Inc.***, 225 Wis. 2d 1, 10, 591 N.W.2d 156 (1999). I conclude that the word "agent" is ambiguous, as used in WIS. STAT. § 103.21(1g).

¶166 Judges are lawyers, and lawyers tend to view "agency" from the perspective of a long line of cases which discuss the elements of agency. Indeed, the Restatement (Second) of Agency draws its conclusions about the law of

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[25] There is no majority opinion on this issue. Where Judges Lundsten and Judge Roggensack agree, I refer to them as my colleagues. Where they differ, I note them by name.

[26] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

agency from the collective view of its authors who have considered the cases on the subject. But the legislature is not required to view agency in the same way as the judiciary. Indeed, constitutional considerations aside, the legislature is free to determine who is an agent of whom, unencumbered by appellate court opinions. And that is what the legislature did when, in 1989, it enacted what is now WIS. STAT. § 103.21(1g).

¶167 Judge Lundsten views "agency" as being defined by the cases which have discussed this legal concept. He notes: "[t]hus, there must be evidence in the record that supports a finding that there was at least some sort of express or implied understanding that Subscriptions Plus would employ street crew members on behalf of National Publishers. There is no such evidence." Judge Lundsten's opinion at ¶38. If the legislature were bound by courts' definitions of "agency," Judge Lundsten's position would be stronger. But the legislature is not so bound. There is no reason why, absent constitutional constraints, the legislature could not conclude that the problems with minors working in street trades soliciting magazine subscriptions were very significant. Nor is there any reason why the legislature could not find that these problems warranted a requirement that all who benefited from the minors' labor participate in compensating the minors when they were killed or injured as a result of the work they were doing. This is nothing new. Workers' Compensation laws which compensate for injury without consideration of fault have used this concept for decades. Regardless, I believe that there is evidence linking National Publishers with Subscriptions Plus and therefore back to Youth Employment Services.[27]

[27] The question of how much further liability extends is not before us.

¶168 Judge Roggensack focuses on ***Beard***, and concludes that its analysis may be used to determine the meaning of WIS. STAT. § 103.21 (1g). While I agree with Judge Lundsten that the ***Beard*** court did not intend to or actually provide a definition of "constructive knowledge," I conclude that there is no need to consider constructive knowledge to begin with. ***Beard*** interpreted § 103.21(1), a statute enacted in 1937, *see* Laws of 1937 ch. 401. I conclude that a jury could find National Publishers liable to the plaintiffs under § 103.21(1g), a statute enacted in 1989. *See* 1989 Wis. Act 113. In my view, the intent of a legislature in 1937 bears no relationship to the intent of a different legislature in 1989. Thus, ***Beard***'s analysis of the former statute does not assist me in determining what the 1989 legislature intended when it enacted § 103.21(1g).

¶169 WISCONSIN STAT. § 103.21(1g) was part of 1989 Wis. Act 113, § 5, which regulated door-to-door street trades. It was not part of the original draft of the act, but was occasioned by an instruction entitled "Redraft of LRB-1202/1" and found in the drafting record of 1989 Wis. Act 113. The instruction reads:

> **(4) Add clause to the definition of the sales organization that no one will be deemed an "independent contractor" who is employing minors for door-to-door sales.** This provision would not necessarily have to be part of the definition *but there should be a provision that specifically excludes any member of a door-to-door sales organization that employs minors from being an independent contractor.* Be sure that all employers and employees including the minors are included in this exclusion. Newspaper boys and girls and non profits would be excluded.

Redraft of LRB-1202/1 (emphasis added).

¶170 National Publishers's contract with Subscriptions Plus attempts to do exactly what the statute was designed to prohibit. The contract identifies

Subscriptions Plus as independent contractors. If we are to give meaning to the statute, we cannot permit that attempt to succeed.

¶171 It is apparent that the legislature wanted to prevent that which my colleagues have permitted—namely, allowing persons in the chain above the minors to insulate themselves from liability by deeming the persons with whom they contract "independent contractors."[28] Judge Lundsten, citing cases defining "agent," holds that National Publishers is not an agent of Subscriptions Plus. Judge Lundsten's opinion at ¶¶32-37. This is too narrow an interpretation of "agent." The legislature uses the ordinary meaning of words unless a technical meaning is required. ***Hoffman v. Rankin***, 2002 WI App 189, ¶8, 256 Wis. 2d 678, 649 N.W.2d 350. The dictionary tells us the ordinary meaning of words. ***Id.*** While there are several meanings to the word "agent," including the one cited by Judge Lundsten, one meaning is "one that acts or exerts power." WEBSTER'S COLLEGIATE DICTIONARY 22 (10th ed. 1993).

¶172 An agreement between National Publishers and Subscriptions Plus shows that Subscriptions Plus agreed to comply with National Publishers's "rules and operating procedures" affecting the solicitation and sale of magazine subscription orders. A National Publishers employee noted that the term "agent" is common in the magazine selling industry. And a Magazine Publishers's Association publication defines "agent" and "sub-agent" in a way that makes National Publishers an agent of Subscriptions Plus. I conclude that while this is not enough to conclusively show that Subscriptions Plus is National Publishers's

[28] That the contract describes National Publishers as independent contractors is not dispositive. *See* ***Pamperin v. Trinity Mem. Hosp.***, 144 Wis. 2d 188, 201, 424 N.W.2d 848 (1988).

agent, it is enough to permit a jury to so find. And that is all that is necessary to defeat a motion for summary judgment. *See* ***Borneman v. Corwyn Transport, Ltd.***, 212 Wis. 2d 25, 31-32, 567 N.W.2d 887 (Ct. App. 1997) (when facts give rise to competing inferences, it is for the trier of fact to draw the proper inference).

¶173 Because the chain of agency must be intact, I must next consider whether there is evidence from which a jury could conclude that Youth Employment Services, Inc., is an agent of Subscriptions Plus. The record is replete with that evidence. Judge Lundsten has explained Scottsdale Insurance Company's duty to indemnify Subscriptions Plus. Judge Lundsten's opinion at ¶83 et. seq. That explanation shows that Karleen Hillery of Subscriptions Plus was as involved in the operation of Youth Employment Services as was its manager (and her ex-husband) Choan Lane. He testified that Youth Employment Services was his company only when it was convenient for Hillery and that "[m]ost decisions were made by her." A jury could easily find that Youth Employment Services was an agent of Subscriptions Plus.

¶174 I conclude that the legislature intended to extend liability for harm to minors working in street trades to those who profit, directly or indirectly, from the minors' work. That includes Youth Employment Services, Subscriptions Plus and National Publishers. Accordingly, I would reverse the trial court's judgment dismissing the plaintiffs' claims against National Publishers.