

**ARIZONA COURT OF APPEALS
DIVISION TWO**

JUAN PICASO and MARIBEL PICASO,
husband and wife, individually and as
surviving parents of BENJAMIN PICASO,
deceased,

Plaintiffs/Appellants,

vs.

TUCSON UNIFIED SCHOOL DISTRICT,

Defendant/Appellee.

NO. 2 CA-CV 2005-174

Pima County Superior Court
No. C 20022430

DEFENDANT/APPELLEE'S ANSWERING BRIEF

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I. INTRODUCTION

¶1 Neither the jury instructions nor the trial court's decision to preclude Maribel Picaso from denying the essential allegations of her guilty plea should result in this Court reversing the jury's defense verdict.

¶2 Plaintiffs stipulated to the preliminary instruction at issue. Plaintiffs did not object to and, therefore, waived any issue about the trial court allegedly misreading a word in final instruction #15. Even if Plaintiffs did not waive their right to complain on appeal about the two jury instructions at issue, the jury was told that the final instructions governed their deliberations, and those instructions do not violate Article 18, § 5 of the Arizona Constitution because they place the burden of proof on Defendant to prove that Maribel was at fault and give the jury "sole discretion" to decide whether any such fault should reduce Plaintiffs' damages.

¶3 The trial court did not abuse its discretion in precluding Maribel from denying the essential allegations of her guilty plea. This decision is in accordance with the well established doctrine of defensive collateral estoppel. In addition, this decision was well within the trial court's discretion to preclude evidence on collateral issues.

¶4 Regardless, even if this Court believed that the trial court's decision to

preclude Maribel from denying the essential allegations of her guilty plea or the instructions at issue here were an error, it still could not reverse the jury's verdict. Plaintiffs did not make an offer of proof about any denial or explanation of the guilty plea. In addition, considering all of the evidence presented at trial about Maribel's conduct on the morning at issue and the jury instructions that gave the jury sole discretion to decide and apportion fault, any error here was harmless.

II. STATEMENT OF THE CASE

¶5 The Statement of the Case in Appellants' Opening Brief ("AOB") is correct. That Statement is, however, woefully incomplete and omits material information. The fair, thorough and accurate Statement of the Case is as follows.

¶6 On 5/16/02, Plaintiffs filed their Complaint against Taide Roman ("Roman") and TUSD. (IOR¹ 2.) The basis of this lawsuit was that on 9/24/01 Roman negligently operated a motor vehicle that struck and killed Benjamin Picaso. (*Id.* at ¶2; attachment to IOR 47, ¶2 & IOR 49, ¶2.) On 7/17/02, Roman and TUSD filed an Answer alleging that Plaintiffs were at fault. (IOR 6 at ¶III.)

¶7 On 12/6/02, the parties filed a "Stipulation to Place Case on Inactive Calendar." (IOR 9.) Therein, the parties agreed to place this case on the inactive calendar for six months because "Plaintiffs' are defendants in a criminal case...**arising out of the same facts that give rise to the wrongful death claims in this civil litigation.** Because of Fifth Amendment considerations and other issues, justice would be best served if the criminal case were finalized prior to actively continuing with this case." (*Id.* at p. 1, ll. 19-22.) (Emphasis added.) In accordance, on 12/10/02 the trial court ordered this case placed on the inactive calendar. (IOR 10 & 11.)

¹The "Index of Record" from the trial court is cited to herein as "IOR ___."

¶8 On 4/19/04, the parties stipulated to dismiss Roman and Plaintiffs proceeded only against TUSD. (IOR 40, 42, 43, 47, 49-50.)

¶9 On 7/9/04, TUSD filed a “Motion in Limine Precluding Maribel Picaso From Denying the Essential Allegations of Her Guilty Plea.” (IOR 54; Appendix [“App.”] 1.) That Motion was primarily premised on A.R.S. §13-807, but also mentioned **collateral estoppel**. (IOR 54 & App. 1, p. 3, ll. 11-14.) (Emphasis added.)

¶10 On 1/3/05, Plaintiffs filed motions in limine to preclude evidence that 1) they had empty ground pool in their backyard, with possible areas that children could obtain access to the pool, and a pool gate that did not have a return spring lock/latch that would prevent children from obtaining access to the pool area; 2) their children frequently played in the street and they were warned that this was a danger to their children; 3) Maribel Picaso and her daughter, Isabel, lived illegally in the United States; and 4) references the prior criminal proceeding against Maribel that resulted in her plea of guilty to criminal negligence, or the investigation of the incident at issue by Child Protective Services. (IOR 65-69.)

On 1/7/05, Defendant responded to Plaintiffs’ motion in limine to preclude references to the prior criminal proceeding against Maribel or the investigation of the incident at issue by Child Protective Services. (IOR 70; App. 2.) On 1/10/05,

Defendant responded to Plaintiffs' motion in limine to preclude evidence that their children frequently played in the street, and that Plaintiffs were warned this was a danger. (IOR 72.) That Response stated that Defendant "does not intend to present evidence of children playing in the street or the testimony of Patricia Verdugo if the court grants TUSD's Motion in Limine to Preclude Maribel Picaso From Denying the Essential Allegations of her Guilty Plea." (IOR 72, p. 1, ll. 18-22.) Defendant stipulated to the trial court granting Plaintiffs' motion in limine regarding evidence that 1) Plaintiffs had an empty ground pool in their backyard, areas that children could obtain access to the pool, and a pool gate without a return spring lock/latch; and 2) Maribel and Isabel Picaso lived in the United States illegally. (IOR 73, p. 2; 1/10/05 TR² & App. 3, p. 28, ll. 13-25; p. 29, ll. 1-3.)

¶11 On 1/10/05, the trial court heard oral argument on the parties' motions in limine. (1/10/05 TR; App. 3.) At oral argument on Defendant's "Motion in Limine Precluding Maribel Picaso from Denying the Essential Allegations of Her Guilty Plea," defense counsel told the trial court that "what we're talking about here is an issue of **collateral estoppel**. I don't think the Felder case or any other case that you can run into, Your Honor, stands for the proposition that a person can actually plead guilty to a charge, in a specific charge in which she later brings a civil

²Trial court transcripts are cited to herein as "[date] TR".

lawsuit from, and at the same time walk in and deny it. I think she is **collaterally estopped** from doing that.” (1/10/05 TR & App. 3, p. 7, ll. 20-25; p. 8, ll. 1-3.)

(Emphasis added.) Defense counsel advised the trial court that, “if we get into this business of the [criminal] defense counsel coming in and explaining things [as to Maribel Picaso’s guilty plea to criminal negligence], I can tell the Court the county prosecutor and others will also be called in to explain what actually happened.”

(1/10/05 TR & App. 3, p. 18, ll. 3-12; *see also* p. 16, ll. 16-21 [“the only way we can counter what he says is to try a **collateral issue**. We’ll bring in the County Attorney if he brings in his [criminal] defense counsel, because she’ll tell you what she was ready to do.”])

¶12 The trial court ruled at the 1/10/05 oral argument that Maribel’s guilty plea was an admission against interest and that it was admissible. (IOR 73 & App. 4; 1/10/05 TR & App. 3, p. 18, ll. 3-5.) The trial court also denied Plaintiffs’ cross-motion to preclude Maribel’s guilty plea, stating that “Rule 609, Arizona Rules of Evidence, does not apply in the instant case.” (IOR 73 & App. 4, p. 3.) Thereafter, the trial court ruled “that Maribel Picaso can testify about **anything other than** that she had care and custody, that she was a cause of the child’s death and that she allowed the child to be placed where the child’s health and safety were endangered.” (IOR 73 & App. 4, p. 1-2.) The trial court ruled that “**Maribel**

Picaso shall be precluded from denying the essential allegations of her guilty plea at trial. **This ruling shall not prevent the Plaintiffs from discussing factual details leading to the unfortunate death of their son in any other regard.**

However, Plaintiff **Maribel Picaso** cannot deny that she negligently permitted her son to be placed in a situation where his person was endangered, nor that such negligence was a cause of the victim's death." (IOR 73 & App. 4, p. 3.) (Emphasis added.)

¶13 The parties' 1/19/05 Joint Pretrial Statement agreed that TUSD and/or Taide Roman's negligence were at issue. (IOR 75 at ¶II.)

¶14 On 2/4/05, Plaintiffs filed a Motion for Clarification that asked the trial court to allow them to inform the jury about "the language used in the dialogue between the Judge and Maribel Picaso" on 6/9/03 when she plead guilty to A.R.S. §13-3623(B)(3) child abuse. (IOR 87, first exhibit attached thereto; App. 6.)

Defendant opposed that motion. (IOR 84; App. 5.) Therein, Defendant noted that "[a]s for Plaintiffs' pending motions in limine to preclude testimony of neighbors and police re: children in the street, the Defendant does not intend to call any such witnesses unless the Plaintiffs are allowed to present the testimony of Ralph

Ellinwood³ and others in an attempt to explain away the guilty plea entered by Ms. Picaso.” (IOR 84 & App. 5, p. 2, ll. 19-22, p. 3, ll. 1-2.) On 2/4/05, the trial court ruled that Defendant was precluded from using the term “child abuse” and noted that with regard to the term “criminal negligence,” that “[c]ounsel will meet and provide the Court with a stipulated jury instruction on this issue.” (IOR 90.)

¶15 After a jury was chosen, the trial court read preliminary jury instructions. (IOR 101 & App. 8; 2/8/05 TR, p. 102, l. 5-p. 111, l. 17.) Those preliminary instructions were all standard, except one about Maribel’s guilty plea that was *stipulated to* by counsel for the parties. (*Id.*; IOR 92, p. 1; IOR 107 & App. 9; 2/8/05 TR, p. 3, ll. 24-25; p. 4, ll. 1-10.)

¶16 At trial, Plaintiffs presented detailed testimony from multiple witnesses about what occurred on the date at issue. (AOB, “Statement of Facts” §A & B, p. 3-5; §C at p. 7, ¶ 1; §III.G., *below*.) Plaintiffs’ counsel previewed this evidence in his opening statement, and argued in his closing statement that Roman was “the cause” of the accident and that the jury could find Maribel 0% at fault. (§III.E., F. & I., *below*.)

¶17 The trial court read and provided copies of final instructions to the jury.

³ Ralph Ellinwood was Maribel’s attorney in the criminal case against her. (IOR 87 & App. 6 first exhibit attached thereto.)

(IOR 100 & App. 7; IOR 109, p. 2; 2/16/05 TR, p. 145, l. 25-p.154, l. 8.) Those instructions required Defendant to prove that Maribel was at fault, and gave the jury “sole discretion” to determine if any of her fault, including her admitted criminal neglect, should reduce Plaintiffs’ full damages. (IOR 100 & App. 7, Instructions #13-17; IOR 131 & App. 14; 2/16/05 TR, p. 150, ll. 7-25; p. 151, ll. 1-25.) The jury was given three forms of verdict, one of which applied “if You Find for Plaintiffs and DO NOT Apply Comparative Fault.” (IOR 105.)

¶18 The jury unanimously found in Defendant’s favor. (IOR 104, 109; 2/16/05 TR, p. 158, ll. 7-25.) On 3/21/05, the trial court entered judgment in Defendant’s favor. (IOR 115, 116.)

¶19 On 4/4/05, Plaintiffs filed a Motion for New Trial. (IOR 117, p. 1, ll. 16-17.) On 4/11/05 and 4/18/05, Defendant responded to and opposed this motion. (IOR 118, App. 10; IOR 119, App. 11.) On 5/3/05, Plaintiffs replied to Defendant’s Response. (IOR 120.)

¶20 On 6/27/05, the trial court held oral argument on Plaintiffs’ motion for new trial. (6/27/05 TR, App. 12.) At that hearing, Defendant again discussed collateral estoppel. (6/27/05 TR & App. 12, p. 9, ll. 2-25.)

¶21 At this 6/27/05 hearing, the trial court ordered additional briefing regarding the legislative history of A.R.S. §13-807. (6/27/05 TR, p. 15; IOR 126.) On

8/4/05, Defendant filed its Supplemental Brief. (IOR 128; App. 13.) On 8/5/05, Plaintiffs filed their Supplemental Brief. (IOR 130.)

¶22 On 8/16/05, the trial court denied Plaintiffs' Motion for New Trial. (IOR 131; App. 14.) That ruling stated:

Whether the Court's evidentiary ruling was characterized as the application of A.R.S. §13-807 or simply the application of collateral estoppel, **the effect of the ruling was to properly focus the jury's attention upon the relative actions for the parties and assess degrees of fault for those actions.** Plaintiff Mirabel Picaso's guilty plea to the charge of child abuse was admissible as an admission against interest. **The Court structured final jury instructions to allow the jury to decide if the contributory (comparative) negligence of Plaintiff Mirabel Picaso would or would not preclude or reduce a recovery** based upon Plaintiff's contentions about the defendants' alleged negligent acts. The decision by this Court to limit explanatory evidence as to **why Plaintiff chose to plead guilty to the criminal charge prevented a waste of time or confusion of the issues for the jury and was well within the Court's discretion.** (*Id.*) (Emphasis added.)

¶23 On 9/14/05, Plaintiffs timely filed their Notice of Appeal. (IOR 132, 136, 137.) That Notice states that Plaintiffs appeal the trial court's 3/18/05 Judgment in Defendant's favor and its 8/16/05 denial of the Motion for New Trial. (IOR 115, 116, 131, 132, 136, 137.)

III. STATEMENT OF THE FACTS

¶24 The facts in the AOB are noteworthy for what they omit and invent with no support in the record. For example, Plaintiffs hide from this Court one of the most important facts in this case that is fatal to their complaint on appeal about jury instructions—they **stipulated** to the preliminary instruction about Maribel’s guilty plea that was read to the jury per counsels’ **joint request**. (§III.C., *below*.)

Plaintiffs also do not tell this Court that, as to the trial court allegedly misstating “the cause” instead of “a cause” in the final jury instruction #15, they never objected to or otherwise raised this issue so that it could be corrected despite the trial court specifically asking counsel if there were “any additions or corrections to the instructions as read.” (§III.H., *below*.) Plaintiffs falsely assert that “there was no evidence at all regarding Maribel’s fault” when the truth is that Plaintiffs presented all of their evidence at trial about Maribel’s conduct on the date at issue.

(AOB, p. 21, ¶1; §III.E., G. & I., *below*.) Finally, Plaintiffs do not tell this Court that there is no evidence in the record as to what Maribel would say if she were allowed to deny the elements of or explain her guilty plea. (§IV.D.1., *below*.)

Plaintiffs concocted an explanation for Maribel’s guilty plea that is neither cited to or supported in the record. (AOB, p. 7, ¶2.) This Court is obligated to disregard this unsupported assertion. *Pioneer Annuity Life Ins. Co. v. Rich*, 179 Ariz. 462,

468, 880 P.2d 682, 688 (App. 1994)(appellate court considers only evidence presented to trial court); *Ness v. Western Sec. Life Ins. Co.*, 174 Ariz. 497, 500, 851 P.2d 122, 125 (App. 1992)(appellate court cannot consider evidence not in the record.)

¶25 The relevant, accurate and supported facts are as follows.

A. The 9/24/01 Incident At Issue

¶26 Sections A, B & G in the “Statement of Facts” of the AOB are relevant only to show that Plaintiffs were not precluded from presenting, and did present, all of their evidence about Maribel’s conduct on the date at issue and their liability claim against Defendant. (§III.E., G & I., *below.*) However, insofar as this Court is obligated to view the evidence and reasonable conclusions in the light most favorable to upholding the jury verdict (§V.A., *below*), the facts about the 9/24/01 incident at issue are as follows.

¶27 On 9/24/01 at approximately 6:55 a.m., Roman drove a TUSD school bus east on W. Paseo de las Aves. (IOR 75, ¶I.) Fourteen-month-old Benjamin Picaso was across the street from his home at 2918 West Paseo de las Aves. (*Id.*) Benjamin attempted to cross the street to return home and was struck and killed by the bus driven by Roman. (*Id.*) Roman was a TUSD employee. (*Id.*) Benjamin’s 13-year-old sister, Isabel, witnessed the accident. (*Id.*)

¶28 Benjamin exited his home through a door with no door handle, but only a dead bolt that was unlocked. (IOR 139, Plaintiffs' trial exhibit 31; 2/9/05 TR, p. 191, ll. 2-20.) Everyone was busy inside the house and Benjamin wandered out and crossed the street. (*Id.*)

¶29 Roman acted reasonably while driving the bus. (2/15/05 TR, p. 26, ll. 21-25; p. 27, l. 1.) No one was distracting him. (2/9/05 TR, p. 119, ll. 1-14; p. 145, ll. 2-3.) He was traveling on the correct side of the road. (2/9/05 TR, p. 35, ll. 16-22.) He was on time and not in a hurry. (2/15/05 TR, p. 97, ll. 4-10.) He was not speeding. (2/9/05 TR, p. 25, ll. 19-23, p. 101, l. 3-11; p. 144, ll. 13-19.) In fact, Plaintiffs' own expert testified that Roman was traveling 8 miles an hour less than the 25 m.p.h speed limit. (*Id.*; 2/10/05 TR, p. 134, ll. 6-16.) Roman was looking ahead, but never saw Benjamin in the road. (2/15/05 TR, p. 105, ll. 2-5.) Roman did not have any drugs or alcohol his system. (2/9/05 TR, p. 108, ll. 16-23; 2/15/05 TR, p. 102, ll. 7-19.)

¶30 Benjamin ran in front of the bus. (2/9/05 TR, p. 33, ll. 19-21; p. 171, ll. 5-10; 2/10/05 TR, p. 119, ll. 21-24; 2/16/05 TR, p. 19, l. 1; p. 20, ll. 1-7; p. 85, ll. 4-22.) No one waived at the bus or yelled or made a sound toward the bus before impact. (2/9/05 TR, p. 145, ll. 8-17; 2/15/05 TR, p. 5-25; p. 100, ll. 1-3.) In fact, Isabel Picaso admitted at trial that she did not start yelling or waiving at the bus

until after it struck Benjamin. (2/10/05 TR, p. 185, ll. 2-18.) Roman had less than .3 of a second to avoid striking Benjamin. (2/10/05 TR, p. 128, ll. 21-25; p. 130, ll. 2-25; p. 131, ll. 1-9; p. 132, ll. 5-19.)

¶31 The sun was a problem for Roman and played a part in this accident. (2/9/05 TR, p. 26, l. 9-11; 2/10/05 TR, p. 138, ll. 1-5.) The position of the sun and the 4% incline of the road would blind any person for that particular stretch of roadway. (2/16/05 TR, p. 13, ll. 2-21.)

¶32 Blind spots around the bus and Benjamin's small height also played a part in the accident. (2/16/05 TR, p. 15, ll. 16-25; p. 16, ll. 1-22.)

B. Maribel Picaso's 6/9/03 Guilty Plea to Criminal Child Abuse that Caused Benjamin's Death

¶33 On 6/9/03, Maribel Picaso pled guilty to child abuse that caused Benjamin's death. (Exhibit A to IOR 54 & App. 1.) Attorney Ralph Ellinwood represented Maribel in this criminal matter. (First exhibit to IOR 87 & App. 6; 2/15/05 TR, p. 67, ll. 1-3; p. 68, ll. 6-12.) The Plea Agreement reads:

On or about the 24th day of September 2001, Maribel Picaso-Atilano, having care and custody of Benjamin Picaso, committed child abuse by criminally negligently causing or permitting him, a child less than eighteen years of age, to be placed in a situation where his person or health was endangered, to wit: resulting in death of the victim, in violation of A.R.S. §§13-3623(B)(3), 13-603, 13-701, 13-702, 13-801, 13-804 and 13-811.

(Exhibit A to IOR 54 & App. 1.)

¶34 At the 6/9/03 hearing about Maribel Picaso's guilty plea, the judge stated that "[o]ne of the things that you're concerned about, I guess, is that when the Immigration people learned that you've been convicted of a misdemeanor, you don't want to have to go back to Mexico." (IOR 87 & first exhibit attached thereto, p. 4, ll. 6-9; App. 6.) Maribel admitted that no one was forcing her or threatening her to plead guilty. (*Id.* at p. 4, ll. 18-20.) She admitted that she wanted to give up her trial rights and plead guilty. (*Id.* at p. 5, ll. 2-23.) Before pleading guilty, Maribel told the judge that "I am culpable for not being with my son because I was taking care of another." (*Id.* at p. 6, ll. 5-12.) Maribel admitted that on 9/24/01 she was at home attending to some of the other children when Benjamin walked out of the house and she did not notice that he was gone. (*Id.* at p. 6, ll. 15-23.) Maribel admitted that Benjamin was in the street by himself. (*Id.* at p. 7, ll. 3-11.) Maribel admitted that this is when the school bus hit Benjamin and that, as a result, he died. (*Id.* at p. 7, ll. 12-14.) After making these admissions, the judge stated that he "[f]inds the defendant's plea is knowingly, intelligently and voluntarily made; there's a factual basis for it. The plea's (sic) accepted, it's entered of record." (*Id.* at p. 7, ll. 15-18.)

C. Standard Preliminary Jury Instructions Were Read to the Jury

Along with a Stipulated Instruction About Maribel Picaso's Guilty Plea Per Counsels' Joint Request

¶35 Before the jury was chosen, the trial court announced that counsel for the parties “came up with a **stipulation** that reads as follows.... On June 9, 2003, Maribel Picaso pled guilty to a misdemeanor criminal offence for her actions that resulted in the death of Benjamin Picaso. Therefore, it is already established in this case that Maribel Picaso negligently permitted her son, Benjamin, to be placed in a situation where his person or health was endangered, and that such negligence was the cause⁴ of Benjamin’s death.” (2/8/05 TR, p. 3, ll. 24-25; p. 4, ll. 1-10; IOR 92, p. 1; IOR 107; App. 9.) (Emphasis added.) The trial court advised that “counsel could, at least on one occasion, negate any consideration that the matter was a felony, but counsel should not go into any discussion about potential sentence or actual sentence rendered, as a result of that plea.” (2/8/06 TR, p. 4, ll. 11-15.)

Then, the following dialogue occurred:

Counsel, anything else that you think we need to put on the record?

MR. DAVIS: No, your honor.

MR. COPPLE: No, your honor.

⁴The phrase “the cause” in the transcript when the trial court read counsel’s stipulation, out of the jury’s presence, is likely a typographical error by the court reporter. First, the written copy of the stipulation uses the phrase “a cause.” (IOR 107; App. 9.) Second, the trial court said “a cause” when this stipulated instruction was actually read to the jury. (2/8/05 TR, p. 111, ll. 3-11.)

THE COURT: All right.
Counsel, when do you propose that I read this
stipulation to the jury?

**MR. COPPLE: Probably should do it with the
preliminary instruction.**

MR DAVIS: I agree, Your Honor, as soon as possible.
(2/8/05 TR, p. 4, ll. 1-25; p. 5, l. 1)(Emphasis added.)

¶36 After the jurors were chosen, the trial court read standard preliminary jury instructions to the jury, along with the aforementioned **stipulation**.⁵ (IOR 107; App. 9; 2/8/05 TR, p. 102-111.)

¶37 The first preliminary instruction states that “[a]t the end of the trial, I will give you more detailed instructions, and those instructions will control your deliberations.” (IOR 101 & App. 8, #1; 2/8/05 TR, p. 102, ll. 11-25.) This is consistent with the fourteenth preliminary instruction which states in relevant part:

...The final instructions I give you at the end of the trial may differ from these preliminary instructions based upon the evidence presented at trial. The preliminary jury instructions will be replaced by the final jury instructions I will give you at the end of the trial. The final instructions will govern your deliberations.” (IOR 101 & App. 8, #14; 2/8/05 TR, p. 110, ll. 8-25; p. 111, ll. 1-2.)

¶38 The ninth preliminary instruction explained that jurors should “not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence, the closing arguments of counsel and the final

⁵See footnote 4, *above*. The trial court stated “a cause” when it read this instruction the jury.

instructions I will give you on the law. Obviously, it would be unfair and unwise to reach a decision until you have heard all these things. Keep an open mind during the trial. Form your final opinions only after you have had an opportunity to discuss the case with each other in the jury room at the end of the trial.” (IOR 101 & App. 8, #9; 2/8/05 TR, p. 98, ll. 7-25; p. 99, ll. 1-25; p. 100, ll. 1-6; p. 107, ll. 16-18.) This “Admonition,” the jury was told, “applies at all times during the trial.” (*Id.*) The trial court reminded the jury of the “Admonition” at least 11 times during trial. (2/8/05 TR, p. 142, l. 14; p. 143, l. 6; 2/9/05 TR, p. 79, ll. 12-13; p. 199, l. 20; 2/10/05 TR, p. 155, ll. 8-11; p. 197, ll. 22-24; 2/11/05 TR, p. 3, ll. 1-2; 2/15/05 TR, p. 61, ll. 17-18; p. 148, ll. 1-5; 2/16/05 TR, p. 38, ll. 7-9; p. 94, l. 17.)

¶39 After reading these standard preliminary instructions, the trial court read the aforementioned stipulated instruction about Maribel’s guilty plea.⁶ (2/8/05 TR, p. 3, ll. 24-25; p. 4, ll. 1-10; p. 111, ll. 3-11; IOR 92, p. 1; IOR 107; App. 9.) This stipulation was not included in the packet of preliminary instructions, and a copy of such was not given to the jury. (2/15/05 TR, p. 153, ll. 2-5; IOR 101; App. 8.)

D. Plaintiffs’ Counsel Told the Jury in Opening Statement About Maribel’s Conduct on the Morning At Issue

¶40 Plaintiffs’ counsel, in his opening statement, told the jury in detail about

⁶See footnotes 4 and 5, *above*.

Maribel's conduct on the morning at issue. (2/8/05 TR, p. 117, ll. 15-25; p. 118, ll. 1-25; p. 119, ll. 1-17; App. 15.)

E. Counsel for Both Parties Told the Jury During Their Respective Opening Statements that TUSD's Fault was at Issue

¶41 Plaintiffs' counsel told the jury during his opening statement that "the issue is the responsibility of the school district and its bus driver for this accident."

(2/8/05 TR, p. 128, ll. 5-6.) Plaintiffs' counsel concluded his opening statement by telling the jury that Roman was "the cause," responsible for Benjamin's death and that "under the instructions that the Court will give you, you'll have to make a decision—if you agree that fault lies with the school district—how you allocate that fault between Maribel, Juan and the school district." (2/8/05 TR, p. 128, ll. 5-6; p. 130, l. 25; p. 131, ll. 1-3.)

¶42 Defense counsel told the jury in his opening statement that "[T]he Picaso's are here to try to convince you that we were negligent. We disagree. The Picasos were negligent. And one of the first things you're going to have to do is answer one question: Who's responsible for this accident...Who is responsible for this accident? Was it Taide Roman? Was it the Picachos (sic), or this lady?" (2/8/05 TR, p. 131, ll. 17-22.)

F. Plaintiffs Were Not Limited in Presenting, and Did Present, All Evidence at Trial About Maribel's Conduct on the Morning At

Issue

¶43 Sections A., B. & C, ¶2 from the “Statement of Facts” in the AOB illustrates that Plaintiffs presented at trial all of their evidence about Maribel’s conduct on the morning at issue. To sum, Plaintiffs presented evidence at trial that: 1) Juan left the home to go to work shortly after Maribel returned home, and locked the door behind him when he left; 2) Maribel was the sole adult in the home responsible for her five minor children and getting three of those children ready for school; 3) Maribel was in the bathroom with her 3-year-old son when Benjamin got out of the house; 4) Benjamin was only 14-months-old and had recently learned how to walk⁷; and 5) neither Juan nor Maribel know how their front door was opened or how Benjamin got out of the house alone and made it across the street to their neighbor’s house.

¶44 Lest there be any doubt that Plaintiffs presented all evidence at trial about Maribel’s conduct on the morning at issue, this Court can simply review the testimony of Isabel, Juan and Maribel. (2/10/05 TR, pp. 168-197; 2/15/05 TR, pp. 51-70; 2/15/05 TR, pp. 71-85.) Key testimony from those three witnesses is as follows.

⁷Plaintiffs presented evidence from a witness that Benjamin was not a proficient walker. (2/10/05 TR, p. 159, l. 25; p. 160, ll. 1-18.)

¶45 Maribel testified that, during this timeframe when her children were getting ready for school, the solid door was sometimes open, and sometimes closed. (2/15/05 TR, p. 73, ll. 18-24.) On the morning at issue, she did not check whether the solid door was shut “because that was his [Juan’s] job and the family always had that door closed.” (2/15/05 TR, p. 74, ll. 7-11.) Maribel did not know if the solid door was open or closed after Juan left on the morning of the accident. (2/15/05 TR, p. 74, ll. 7-25; p. 75, ll. 1-2.) Maribel explained that a typical morning during the timeframe of the accident at issue was “I’d start working around the house. There are a lot of us in the house and I’d have to work at it. While everybody would do what they were to do, what they had to do, bathe, or get dressed, or changed, or whatever accordingly.” (2/15/05 TR, p. 75, ll. 3-10.) After Benjamin woke up and ate in the kitchen, he generally hung around his brothers and sisters while they were getting ready for school. (2/15/05 TR, p. 76, ll. 18-25; p. 77, ll. 1-8.) Maribel explained that she needed to be in the bathroom with Harry because “he would get everything dirty.” (2/15/05 TR, p. 78, ll. 1-2.) Prior to coming out of the bathroom after taking care of Harry, Maribel was not aware that the screen door had been unlocked and open. (2/15/05 TR, p. 78, ll. 11-14.) To this day, Maribel does not know who unlocked and opened that door. (2/15/05 TR, p. 78, ll. 15-17.)

¶46 Juan testified that he locked the screen door before leaving for work. (2/15/05 TR, p. 53, ll. 16-21.) Juan's regular practice was to lock the door before leaving after shutting the screen door. (2/15/05 TR, p. 55, ll. 1-4.) Juan did not know how the door got unlocked on the morning at issue. (2/15/05 TR, p. 55, ll. 9-11.)

¶47 Isabel testified that, generally, both doors were always closed and she did not know who opened the main door and screen door. (2/10/05 TR, p. 176, ll. 16-25; p. 177, ll. 1-6.) Benjamin did not know how to open either the main door or the screen door. (2/10/05 TR, p. 177, ll. 7-12.) Isabel did not think that Harry opened the door. (2/10/05 TR, p. 177, ll. 13-14.) Isabel testified that Hazel could open the front door, but that she used to have trouble with the screen door. (2/10/05 TR, p. 177, ll. 15-17.) Isabel testified that Junior could open the door and to get in and out. (2/10/05 TR, p. 177, ll. 24-25.) When Isabel noticed that both doors were open, she told her sister, Hazel, to close the door. (2/10/05 TR, p. 178, ll. 5-20.)

G. Final Jury Instructions and Forms of Verdict

¶48 At the end of the fifth trial day, the trial court announced that "this is the time that we were going to allow counsel to make a record as to instructions or anything else." (2/15/05 TR, p. 148, ll. 10-25; 149, ll. 1-10.) In response,

Plaintiffs' counsel moved for a mistrial. (2/15/05 TR, p. 149, ll. 11-25; p. 150, ll. 1-25; p. 151, ll. 1-14; IOR 107; App. 9.) Plaintiffs' counsel stated "[W]e don't have any objections to any of the instructions given. Given the fact that you have granted the motion in limine and instructed the jury at the beginning about Maribel's plea agreement. We do have a motion for mistrial on the basis of that instruction. But under the law of the case, instruction number 15 that the Court proposes to give, we don't have any problem with the language that's used in there, but for our motion for directed verdict⁸ and issues relating to that." (2/15/05 TR, p. 149, ll. 11-20.) Plaintiffs' counsel inaccurately asserted that "before the jury was impaneled, the Court had, with the help of counsel, constructed or had prepared an instructions (sic) to be given. And I believe at that time it was over my objection that any instruction be given. But, the language that was proposed I had some problems with, because it constituted a directed verdict." (2/15/05 TR, p. 150, ll. 7-15.) This assertion is patently false because, as detailed in §C, *above*, the record clearly indicates that counsel **stipulated** to this instruction. Plaintiffs' counsel asserted that final instruction #15 was "a more appropriate wording," but

⁸Plaintiffs' counsel made a motion for directed verdict—more appropriately called a Rule 50, Ariz.R.Civ.P. "Judgment As a Matter of Law"—the next day on the issue of Defendant's negligence. (IOR 109, p. 2; 2/16/05 TR, p. 95, ll. 4-24.) The trial court denied this motion. (*Id.*) That decision is not at issue on appeal.

complained that “doesn’t in any way attempt to tell the jury that the first instruction was inappropriate. And that it’s this instruction that they should go by.” (2/15/05 TR, p. 151, ll. 4-11.)

¶49 The trial court, in denying Plaintiffs’ oral motion for a mistrial, noted that final instruction #15 gave the jury discretion to apportion fault, the preliminary instruction about Maribel’s guilty plea “was counsel’s agreement as to the way to present it,” and the jury was told that it is the final instructions that control their deliberations. (2/15/05 TR, p. 152, ll. 2-25; p. 153, ll. 1-22; IOR 108, p. 3.)

¶50 Final Instructions were physically given and read to the jury. (IOR 100; App.7; 2/16/05 TR, p. 145, l. 25-p.154, l. 8.) After these instructions were read to the jury, the trial court stated “Counsel, any additions or corrections to the instructions as read?”, and counsel for both parties responded “No, Your Honor.” (2/16/05 TR, p. 154, ll. 4-8.) The trial court judge explained that he had a cold and nasal tone that day. (2/16/05 TR, p. 146, ll. 2-5.)

¶51 Final instruction #1 advised the jury that:

“I will now tell you the rules you must follow to decide this case. I will instruct you on the law. It is your duty to follow the law whether you agree with it or not. It is also your duty to determine the facts...You must take into account all of my instructions on the law. You are not to pick out one instruction, or part of one, and disregard the others....Decide the case by applying the law in these instructions to the facts. (IOR 100 & App. 7, #1; 2/16/05 TR, p. 146, ll. 6-22.)

¶52 Final instruction #13 told the jury that “Defendant must prove: (1) Maribel Picaso was at fault.” (IOR 100 & App. 7, #13.)

¶53 Final instruction #15 stated:

As you were previously instructed, on June 9, 2003, Maribel Picaso pled guilty to a misdemeanor criminal offense for her actions that resulted in the death of Benjamin Picaso. Therefore, it is already established in this case that Maribel Picaso has admitted negligently permitting her son Benjamin to be placed in a situation where his person or health was endangered, and had admitted that such negligence was a cause of Benjamin’s death. Whether such admissions should be applied to find Maribel Picaso at fault, and whether such fault should reduce her full damages, is left in your discretion.” (IOR 100 & App. 7, #15; 2/16/05 TR, p. 150, ll. 21-25; p. 151, ll. 1-6.)

¶54 Final instruction #16 stated:

On defendant’s claim that plaintiff Maribel Picaso was at fault, you must decide whether defendant has proved that plaintiff Maribel Picaso was at fault and, under all the circumstances of this case, whether any such fault should reduce plaintiffs’ full damages. These decisions are left to your sole discretion. If you decide that plaintiff Maribel Picaso’s fault should reduce plaintiffs’ full damages, the Court will later reduce those damages by the percentage of fault you have assigned to plaintiff Maribel Picaso. (IOR 100 & App. 7, #16; 2/16/05 TR, p. 151, ll. 7-16.)

¶55 Final instruction #17 stated that:

If you decide that plaintiff Maribel Picaso’s fault should reduce plaintiffs’ damages, you must then determine the relative degrees of fault of all those whom you find to have been at fault. The relative degrees of fault are to be entered on the verdict form as percentages of the total fault for plaintiffs’ injuries. The fault of one person may