In The

Supreme Court of Virginia

RECORD NO. 091469

HANNAH LEIGH EVANS, an infant who sues by her mother, natural guardian and next friend, Cynthia Kay Stevens,

Appellant,

v.

BILLY BRADLEY EVANS, II,

Appellee.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

The trial court erred in the following regards:

1. The Circuit Court erred because it failed to view the Amended Complaint in the light most favorable to the Plaintiff and, in doing so, failed to recognize that a jury could reasonably find that the placement of a four-year old child on the floorboard of a 1972 truck was in and of itself a separate and identifiable act of negligence, without reference to the statute.

2. The Circuit Court erred in failing to recognize that Va. Code § 46.2-1095(C) refers only to "negligence" and does regulate claims for "gross negligence" which are distinct and separate causes of action, commonly referred to as claims for punitive damages.

3. The Circuit Court erred when it construed Va. Code § 46.2-1095(C) other than according to its plain meaning and in such a way as to create the absurd result of immunizing a wrongdoer for any degree of negligence in transporting a child in a motor vehicle.

4. The Circuit Court erred in failing to construe Va. Code §§ 46.2-1095 and 46.2-1098 conjunctively, given the language of Va. Code § 46.2-1095 which specifically states in part that "... nor shall violation of this article constitute a defense to any claim for personal injuries to a child or

the recovery of medical expenses for injuries sustained in any motor vehicle accident."

STATEMENT OF THE NATURE OF THE CASE AND OF THE MATERIAL PROCEEDINGS IN THE TRIAL COURT

The Appellant, Hannah Leigh Evans, ("Hannah" or "Plaintiff") an infant who sues by her mother, natural guardian and next friend, Cynthia Kay Stevens, filed a Complaint on July 23, 2008, in the Circuit Court of Bedford County against the Appellee Billy Bradley Evans, II, (herein also "Mr. Evans" or "Father") for injuries sustained by Hannah, as a result of an automobile accident, which occurred on December 24, 2005. (App. 2-5) Said action was initially based upon the absence of the use of a child restraint seat as well as the inappropriate positioning of Hannah on the floorboard of the 1972 truck that he was operating. (App. 2-4)

Mr. Evans filed a Demurrer to the referenced Complaint on August 14, 2008, based upon the language of Va. Code § 46.2-1095(C), 1950 as amended, which states: "A violation of this section shall not constitute negligence, be considered in mitigation of damages of whatever nature, be admissible in evidence or be the subject of comment by counsel in any action for the recovery of damages in a civil action." (App. 31-34) The Demurrer was heard on November 24, 2008, (App. 118-127) by the Judge

of the Circuit Court who directed from the bench that the demurrer was sustained, but that Hannah could amend her Complaint to cure its defect. (App. 125) On December 10, 2008, a formal Order was entered allowing amendment of the Complaint (App. 135); and the Amended Complaint was filed and served on December 12, 2008. (App. 138-142) It specifically deleted all references to Va. Code § 46.2-1095, but described the same events as were described in the original Complaint. (App. 138-141) Thereafter, Mr. Evans filed his demurrer to the Amended Complaint. (App. 2-5) Memoranda were submitted by Mr. Evans on October 29, 2008, (App. 55-64) and December 29, 2008, (App. 148-157) and by Hannah on November 18, 2008, (App. 66-117) and January 20, 2009. (App. 162-167) The matter was again heard on February 5, 2009, for final consideration of the demurrer. (App. 168-207)

At that hearing, the Circuit Court of Bedford County sustained Mr. Evans' Demurrer on the basis that Va. Code § 46.2-1095 would govern, concluding that:

> [I]n my view it would be impossible to try this case without it somehow coming up either explicitly, or even the jury is thinking about it, that reference would be made to this statute.
>
> And if counsel for the Plaintiff were arguing the father failed to exercise reasonable care in properly restraining his child, that the jury would look at this and say, Yeah, we know

> he didn't. He is required by the statute to put that child in a child restraint seat and he didn't do it.
>
> Even if no judge, no lawyer or anybody else made any reference to it, I just think it is so inextricably intertwined that what Mr. Trost proposes to do, I think, as a practical matter in today's time is impossible.

(App. 205, lines 2-20)

Thereafter, Hannah's objections, exceptions and bases therefor were preserved at a hearing, on April 30, 2009 (App. 221-230); and the resulting Order was entered that day, including Hannah's "Attachment A Objections/Exceptions to Demurrer Ruling. (App. 232-237) Hannah filed a timely Notice of Appeal to the trial court's ruling on May 26, 2009. (App. 239)

QUESTIONS PRESENTED

1. Did the Circuit Court fail to view the Amended Complaint in the light most favorable to Hannah (given the deletion of any reference to the Va. Code § 46.2-1095(C) requirement for a properly secured child restraint device)? (App. 66-72; 138-142; 162-167; 173-188; 253) (See Assignment of Error 1)

2. Did Mr. Evans' actions sink to the level of gross negligence which is distinct and separate from ordinary negligence, and not included in §

46.2-1095(C), commonly referred to as a claim for punitive damages? (App. 66-72; 138-142; 162-167; 173-188; 253) (See Assignment of Error 2)

3. Can Mr. Evans's act of placing Hannah on the floorboard under the dashboard, be construed to be a proximate cause of her injuries, separate and apart from his act of noncompliance with Va. Code §§ 46.2-1095(C) and 46.2-1098? (App. 66-72; 138-142; 162-167; 173-188; 253) (See Assignment of Error 3)

4. Did the Court err in failing to construe Va. Code §§ 46.2-1095 and 46.2-1098 conjunctively and *in pari materia*? (App. 66-72; 138-142; 162-167; 173-188; 253) (See Assignment of Error 4)

STATEMENT OF FACTS

Mr. Evans judicially admitted the following facts, (App. 36-40) which are also alleged in the Amended Complaint (App. 138-142): On the date of the accident, December 24, 2005, Hannah was a 4 year-old passenger in a 1972 Ford pick-up truck operated by her father, Mr. Evans. (App. 36-37) Hannah was placed in a foam seat on the floorboard of the truck, underneath the dash. (App. 37) Mr. Evans was operating his truck in a southerly direction on Route No. 619, just east of Route No. 635, in Bedford County, Virginia, when it was involved in a head-on collision with a

1993 Chrysler motor vehicle, operated by Caleb Justin Jarman (not a party to this action). (App. 37; 138) The Evans vehicle was struck head-on and then traveled off the roadway and hit a fence. As a result of the collision, Hannah sustained multiple facial contusions; a skull fracture; cerebral edema; subarachnoid hemorrhage; a ruptured bladder; a left acetabular fracture (hip joint); a pubic rami fracture (part of the pelvis), requiring several months of hospitalization. (App. 38-39)

In response to the Complaint, counsel for Mr. Evans filed a Demurrer stating that the Appellant's claims are barred in their entirety, by Va. Code § 46.2-1095(C). (App. 31-34) As a result of that Demurrer and the associated hearing, an Amended Complaint, with amended language, was filed on Hannah's behalf on December 12, 2008. (App. 138-142) The Amended Complaint alleged that Mr. Evans carelessly, recklessly, willfully, wantonly, grossly, negligently and grossly negligently, permitted his infant daughter to be left in an unsafe and unreasonably dangerous seating location on the floorboard, where she was subject to being tossed about and trapped under the dashboard of the vehicle in the event of a motor vehicle accident. (App. 138-142) It was alleged that such behavior on the part of Mr. Evans constituted not only simple negligence but also gross

negligence. (App. 140-141) It alleged that Mr. Evans placed his infant daughter in a loose foam seat in an area surrounded by sharp/hard objects, in the form of undercarriage structure, wires and front seat support metal rods and metal bars of a 33-year-old truck which was as inherently dangerous as having placed her in the cargo bed of the truck. (App. 140) This placement was in an extremely injury-risk location knowing that such placement would be catastrophic to the infant should any foreseeable motor vehicle accident occur. (App. 140)

Mr. Evans ignored his duty of care to assure that his infant daughter/passenger was safe and free from being tossed about in the confined area between the truck floorboard and the underside of the dashboard. (App. 140) He failed to exercise any care or precaution whatsoever for Hannah's safety. (App. 139) Mr. Evans' willful and wanton negligence evidenced a conscious disregard for Hannah's rights and safety and a reckless indifference to the probability that his actions would expose her to not only undue risk but also to the likely potential for severe bodily trauma/injury in the event of a reasonably foreseeable motor vehicle accident. (App. 139-140) Mr. Evans owed a duty of care both as an

operator of the truck and as Hannah's father, to assure that Hannah was as safe and secure as possible in the event of an accident. (App. 140)

The Amended Complaint alleged that the actions on the part of Mr. Evans constituted negligence in and of itself, which sank to a level of gross negligence, given the foreseeable danger to an infant who is placed on a floorboard of a moving vehicle and specifically within the danger zone of the undercarriage equipment of a 1972 truck. (App. 138-142) The statute in question was not mentioned.

Mr. Evans filed a second Demurrer in response to the Amended Complaint. (App. 144-147) On February 5, 2008, the Court heard the merits of the Demurrer to the Amended Complaint. (App. 168-207) At the hearing, the Hon. James W. Updike explained how he reached his conclusion of law, granting of the Demurrer:

> [I]n my view it would be impossible to try this case without it somehow coming up either explicitly, or even the jury is thinking about it, that reference would be made to this statute.
>
> And if counsel for the Plaintiff were arguing the father failed to exercise reasonable care in properly restraining his child, that the jury would look at this and say, Yeah, we know he didn't. He is required by the statute to put that child in a child restraint seat and he didn't do it.
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> Even if no judge, no lawyer or anybody else made any reference to it, I just think it is so inextricably intertwined that

> what Mr. Trost proposes to do, I think, as a practical matter in today's time is impossible.

(App. 205, lines 2-20)

After moving to rehear (App. 216-217), Hannah's objections, exceptions and bases therefor were noted at a hearing, on April 30, 2009 (App. 221-230); and the resulting Order was entered that day, including Hannah's "Attachment A" Objections/Exceptions to Demurrer Ruling. (App. 232-237) Hannah filed a timely Notice of Appeal to the trial court's ruling on May 26, 2009. (App. 239)

SUMMARY OF ARGUMENT

On the basis of the facts expressly alleged in the Amended Complaint, and those impliedly alleged or reasonably inferred, Hannah stated a valid claim for relief, for negligence, gross negligence and willful and wanton disregard of her safety. She alleged that these levels of negligence were reached when her father, who owed her a duty of care, transported her in his pick-up truck, on the floor of the cab, under the dash. A foreseeable collision occurred, and Hannah was horribly injured. She alleged that damages had been incurred, and would continue to be incurred, for the resulting medical care and pain and suffering. These are all of the necessary elements described in this Court's many

pronouncements, including its most recent: *Kellermann v. McDonough*, __ Va. __, __ S.E.2d __ 2009 WL 3644770 (Va., 2009).

Kellerman, *supra*, also considered the duty of care owed by one in a "special" relationship with another, to protect that other from the conduct of third persons (such as the driver of the vehicle which, foreseeably, collided with Hannah's father's truck):

> We have consistently held that "generally a person does not have a duty to protect another from the conduct of third persons." However, this general rule does not apply when a special relationship exists between a defendant and a plaintiff that gives rise to a right to protection to the plaintiff or between the defendant and third persons that imposes a duty upon the defendant to control the conduct of the third person causing reasonably foreseeable danger to the plaintiff.

Kellermann, *supra* (internal citations omitted). Mr. Evans' relationship to Hannah, as her father, is just such a "special" relationship, and his duty was to protect her from the foreseeable harm which befell her.

The statutes requiring the use of a child safety restraint for Hannah (§ 46.2-1095(a)), but determining that "violation" of the statute is not negligence and is not admissible in a civil action (§ 46.2-1095(C) and § 46.2-1098), cannot logically, or constitutionally, be construed to mean that children who are injured as a result of a failure to comply are selected out by the Virginia Legislature for the purpose of depriving them of redress for

their injuries. But, that is the effect of the trial Court's demurrer, granted in this case. The trial Court's ruling construes the statutes so as to reach an absurd result, completely contrary to the obvious purpose of their enactment – to protect children from harm in motor vehicles by requiring that they be transported in child safety devices.

This construction of the statutes also violates the rules of statutory construction: "The plain, obvious, and rational meaning of a statute is always preferred to any curious, narrow or strained construction." *Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 424 (1992). "Statutory interpretation is a question of law which we review *de novo*, and we determine the legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result." *Wright v. Com*., __ Va. __, __ S.E.2d, 2009 WL 3644349 (Va., 2009).

This is a case of first impression in Virginia. Other States have considered similar statutes and have reached results which vary, but none of them has upheld the dismissal of an otherwise valid cause of action, where the Complaint makes no mention of the "violation".

Notably, the trial Court considered much more than whether the Amended Complaint sufficiently stated a claim for relief, but also considered whether Hannah can actually prove her case, without mention of the "violation". And the trial Court concluded that, even if no one in the courtroom mentioned the statute, such a trial would nevertheless result in the jury "thinking about...the statute". But "[a] demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." *Glazebrook v. Board of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). Thus, the trial Court exceeded the scope of the demurrer hearing and misconstrued the statutes raised as Mr. Evans' defense.

Virginia has a significant state interest in the wellbeing of its children. The only way to construe the statutes in question so as to further this interest and fulfill the obvious intentions of the Legislature, while following the rules of construction and protecting children's rights to equal access to the courts, is to interpret the term "violation" as meaning an official determination via citation or a judicial finding "guilty of violating" the statute.

It is requested that this Honorable Court construe the statutes rationally, and in line with legislative intent, and reverse the Order of the trial Court.

ARGUMENT

1. The Amended Complaint Is Sufficient To Withstand Demurrer Because It Properly Alleges Facts (Without Reference To The Use Or Non-Use Of A Child Restraint Seat) From Which A Reasonable Jury Can Find That The Placement Of The Child On The Truck's Floorboard Constitutes Negligence And/Or Gross Negligence.

A demurrer tests the legal sufficiency of a pleading and can be sustained only if the pleading, considered in the light most favorable to the plaintiff (Hannah), fails to state a valid cause of action. An appellate Court considers as admitted the facts expressly alleged and those which fairly can be viewed as impliedly alleged or reasonably inferred from the facts alleged. *Kitchen v. City of Newport News*, 275 Va. 378, 385, 657 S.E.2d 132, 136 (2008).

The Amended Complaint bases Mr. Evans' negligence on the placement of a four-year old child on the floorboard underneath the dash. (App. 138-142) It properly alleged duty, breach, causation and damages, after deleting all reference to noncompliance with § 46.2-1095(a). In *Ogunde v. Prison Health Servs., Inc., et al.*, 274 Va. 55, 645 S.E.2d 520 (2007), the Court noted ". . .the trial court must consider the pleadings in the light most favorable to the plaintiff. . .". The trial Court's decision as to

the Demurrer is a pure question of law, reviewed *de novo*. *Glazebrook v. Board of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003).

Thus, the question is whether the Amended Complaint states a valid claim for negligence as to Mr. Evans. Plaintiff contends that her claim passes this test, just as it would if the Amended Complaint had claimed Hannah was transported on the hood of the truck, on the running board, in the bed of the truck, or in any other negligent or grossly negligent fashion, without reference to noncompliance with § 46.2-1095(a). This statute, relied upon by Mr. Evans, should not "be construed so that it leads to absurd results." *Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 424 (1992). Such is the result when this safety statute is construed so as to civilly immunize one who *may have* violated it.

The trial court tellingly misstated the law, as the transcript demonstrates, when it stated that "a violation of this section shall not constitute evidence, *shall not be considered*, shall not be admissible..." (App. 205-206) (Emphasis added)

Instead, Va. Code § 46.2-1095(C), 1950 as amended, states: "A violation of this section **shall not** constitute negligence, **be considered in mitigation of damages** of whatever nature**,** be admissible in evidence or

be the subject of comment by counsel in any action for the recovery of damages in a civil action." (emphasis added) It pointedly does not state that facts amounting to a violation of the statute mandate dismissal of a civil action for negligence.

Importantly, this statute has not been construed in any appellate decision. Its adult counterpart statute was considered by the Fourth Circuit Court of Appeals in a decision worthy of consideration:

> Under Virginia law, statutes in derogation of the common law must be strictly construed. *Sabre Construction Corporation v. County of Fairfax*, 256 Va. 68, 501 S.E.2d 144, 147 (1998) (holding that the Public Procurement Act constituted a waiver of sovereign immunity in derogation of the common law, and thus it must be strictly construed) (citation omitted). Although prior to the enactment of § 46.2-1094(D) common law in Virginia had proscribed the admission of evidence of failure to wear a seatbelt to demonstrate the injured party's negligence in automobile cases, such evidence was admissible to reduce defendant's damages. See *Wilson v. Volkswagen of America*, 445 F. Supp. 1368, 1372-74 (E.D. Va.1978). Furthermore, § 46.2-1094(D) deviates from current Virginia common law, which provides that violation of a statute, such as the law requiring the use of seatbelts, ordinarily is negligence per se. Section 46.2-1094(D) is also in derogation of Virginia's current public policy of encouraging seatbelt use. Thus § 46.2-1094(D) is in derogation of state common law, and it must be strictly construed.

Brown v. Ford Motor Co., 67 F. Supp. 2d 581, 585-585 (E.D. Va. 1999); affirmed in an unpublished disposition by 10 Fed. Appx. 39 (4th Cir. 2001).

There is no dispute that the statutes in question here are also “safety statutes”; and there can be no doubt that the purpose in enactment of the child safety restraint requirement was to encourage the use of child safety restraints, rather than to create a new cause of action for their non-use, nor to create a defense for tortfeasors when plaintiffs’ caregivers are guilty of non-use.

In the case at bar, Mr. Evans’ responsive pleading and answers to requests for admissions judicially admit that his infant daughter did not contribute to her own injuries; that Mr. Evans failed to assure that his infant passenger was as safe and secure as possible in the event of an accident; that, while Hannah was riding on the floorboard, the truck was involved in a head-on collision; that Hannah suffered numerous and catastrophic injuries and required several months of hospitalization and rehabilitation. (App. 36-40)

Mr. Evans denies *only* the legal conclusion that the transportation of his child on the floorboard of the pick-up truck was negligence, gross negligence and willful and wanton conduct. For the purpose of demurrer all allegations contained in the Amended Complaint are taken as true. As is shown below, a conclusion of negligence is a matter for the jury unless the

facts alleged are so clearly in Mr. Evans' favor that no reasonable jury could find negligence. That is simply not the case here. Not only might a jury find that placing a child on the floorboard and under the dash of a truck is negligence but also that it is *gross* negligence.

> The elements of an action in negligence are a legal duty on the part of the defendant, breach of that duty, and a showing that such breach was the proximate cause of injury, resulting in damage to the plaintiff. *Trimyer v. Norfolk Tallow Co.*, 192 Va. 776, 780, 66 S.E.2d 441, 443 (1951). "The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred." *Beale v. Jones*, 210 Va. 519, 522, 171 S.E.2d 851, 853 (1970). The evidence tending to show causal connection must be sufficient to take the question out of the realm of mere conjecture, or speculation, and into the realm of legitimate inference, before a question of fact for submission to the jury has been made out. Id. "It is incumbent on the plaintiff who alleges negligence to show why and how the accident happened, and if that is left to conjecture, guess or random judgment, he cannot recover." *Weddle v. Draper*, 204 Va. 319, 322, 130 S.E.2d 462, 465 (1963).

Blue Ridge Service Corp. of Virginia v. Saxon Shoes, Inc., 271 Va. 206, 218, 624 S.E.2d 55, 62 (2006).

Mr. Evans' pleadings admit the adequacy of the statements of fact as to how the accident and injuries occurred. He cannot contend that the Amended Complaint leaves these issues to "conjecture, guess or random judgment." Thus, it is clear that the level of negligence on Mr. Evans' part

is a question of fact for the jury in this matter; and the Demurrer should not have been sustained.

2. Comparable Statutes Around The Country Are Construed So As To Preserve The Cause Of Action Existing Prior To Enactment, While Fulfilling Statutory Purpose And Legislative Intent.

Many other jurisdictions have construed similar statutes containing pronouncements that their "violation" is not negligence and may not be "evidence" of negligence. These decisions, examined below, do not deprive an injured plaintiff of his right to redress for his otherwise compensable loss. Some determine that such a construction would be not only absurd, but an unconstitutional taking of rights to access to the courts and a deprivation of equal protection under the law. Others rely upon their state's specific legislative history. Typically, they emphasize the facts of the specific case in point. Still others conclude simply that the prohibition exists in order to preclude creation of a new cause of action for a merely technical failure (negligence *per se*). Some, including the Fourth Circuit, allow evidence of the facts amounting to noncompliance with the statute, having determined that "violation" is a term meaning an "official determination" such as is made by law enforcement, that the provision has been violated.

Not a single decision has been found which construes a safety statute and its concomitant evidentiary prohibition the way the trial court did in this action -- as dissolving the underlying (and previously actionable) tort.

For example, the Supreme Court of West Virginia explained its landlord-smoke detector statute and counterpart prohibition of evidence of violation in civil actions, as follows:

> To establish a cause of action in negligence, it must first be shown that the alleged tortfeasor was under a legal duty or obligation requiring the person to conform to a certain standard of conduct. See *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988). Where there is no legal duty to take care, there can be no actionable negligence. See *Poling v. Ohio River R. Co*., 38 W.Va. 645, 18 S.E. 782 (1893); *Woolwine's Adm'r v. Chesapeake & O.R. Co.*, 36 W.Va. 329, 15 S.E. 81 (1892); *Washington v. Baltimore & O.R.R. Co*., 17 W.Va. 190 (1880).
>
> In Prosser and Keeton on Torts, it is stated:
>
> The standard of conduct required of a reasonable person may be prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate. The same may be true of municipal ordinances and regulations of administrative bodies. The fact that such legislation is usually penal in character, and carries with it a criminal penalty, will not prevent its use in imposing civil liability, and may even be a prerequisite thereto.
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> W. Page Keeton et al., Prosser and Keeton on Torts § 36 at 220 (5th ed. 1984) (footnotes omitted). Thus, the violation of a statute adopted for the safety of the public is prima facie

negligence in that it is the failure to exercise that standard of care prescribed by the legislature.

West Virginia Code § 29-3-16a(f) provides that a violation of subsection (a) is a misdemeanor warranting a monetary fine. West Virginia Code § 29-3-16a(g) states that "[a] violation of this section shall not be deemed by virtue of such violation to constitute evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages." (emphasis added). **In enacting West Virginia Code § 29-3-16a, the West Virginia Legislature intended to require landlords to place smoke detectors in one-and two-family dwellings and to establish a criminal sanction for violation of the section. By virtue of subsection (g), the Legislature clearly did not intend to create a duty actionable in tort for such violation. That subsection specifically excludes civil liability which might otherwise result from a violation of the statute.**

There are other examples of legislative enactments which impose duties and penalties for failure to comply, but specifically exclude evidence of violations of such statutes as evidence in civil cases. See, e.g., W.Va. Code § 17C-15-46 (1991) (failure to use child seat belt not admissible as evidence of negligence in any civil action); W.Va. Code § 17C-15-49(d) (1994 Supp.) (violation of adult seat belt statute is not admissible as evidence of negligence in any civil action or in mitigation of damages; however, violation may provide basis for 5% reduction in medical damages).

Rule 402 of the West Virginia Rules of Evidence provides, in part, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of West Virginia, these rules, or other rules adopted by the Supreme Court of Appeals."In *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994), we found "it is clear that a legislative enactment which is substantially contrary to provisions in our Rules of Evidence would be invalid." Id. at 726, 441 S.E.2d at 743. In *Williams v. Cummings*, 191 W.Va. 370, 445 S.E.2d 757 (1994) we held a statute providing that venue may be obtained in an adjoining county if a

> judge of the circuit is interested in the case conflicts with and is superseded by Trial Court Rule XVII which addresses the disqualification and temporary assignment of judges.
>
> Our examination of West Virginia Code § 29-3-16a leads us to conclude that West Virginia Code § 29-3-16a(g) is not an evidentiary bar in derogation of Rule 402 of the West Virginia Rules of Evidence, but instead manifests the intent of the Legislature to create substantive law that there not be civil liability for violation of this particular section.

Reed v. Phillips, 192 W.Va. 392, 397, 452 S.E.2d 708, 713 (W.Va. 1994).

Thus, under *Reed*, failure to install a smoke detector is not a new, discreet tort; but, death resulting from a fire in an apartment without a smoke detector is still actionable. From *Reed*, parallels can be drawn to the facts before the Court. Had the West Virginia Supreme Court determined that its statute immunized landlords from civil liability for damages to tenants resulting from fires in tenements without smoke detectors, it would have reached an absurd result – immunization of noncompliant landlords. This would obviously not be a result intended by its legislature – but it would be perfectly in line with the analysis of the trial Court in the present case.

The North Carolina Court of Appeals considered its legislature's intent as to the North Carolina statute, including language nearly identical

to ours, excluding evidence that an infant, who had been killed in a motor vehicle accident, had not been properly restrained:

> The intent of the legislature is to prevent tortfeasors from using evidence of a failure to use or the improper use of a seat belt in any civil action or proceeding. The statutory provisions explicitly state that the "failure to wear a seat belt shall not be admissible in any ... civil trial, action, or proceeding[,]" N.C. Gen. Stat. § 20-135.2A(d) "nor shall a violation constitute negligence per se or contributory negligence per se[,] nor shall it be evidence of negligence or contributory negligence." N.C. Gen. Stat. § 20.137.1(d). Hence, the trial court properly granted the motion in limine.

Chaney v. Young, 122 N.C. App. 260, 264, 468 S.E.2d 837, 839-840 (N.C. App. 1996).

In *Chaney*, even though jury was not informed as to any evidence about the child's safety restraint or lack thereof, the cause of action for the child's death was preserved. And, the absurdity of a determination that the child's death was not compensable was never a consideration.

The 4th Circuit Court of Appeals considered the adult safety belt statutes, and has construed them logically, giving effect to every word, without reaching an absurd result:

> The only question before us is whether "[a] violation of [section 46.2-1094]" was impermissibly "admi[tted] in evidence" or allowed to be "the subject of comment by counsel" within the meaning of section 46.2-1094(D) when the district court allowed Ford to introduce its contested evidence of Brown's seat belt

> nonuse. Although we, like the district court, are without reported cases construing section 46.2-1094 from the Commonwealth to aid in our interpretation, we are satisfied that it was not.
>
> We acknowledge that the phrase "[a] violation of [section 46.2-1094]" in section 46.2-1094(D) may plausibly be construed to refer to the underlying conduct that is proscribed by section 46.2-1094-namely, the nonuse of a seat belt while a motor vehicle is in motion. That is, we do not think it unreasonable to read section 46.2-1094(D) as prohibiting admission or comment by counsel upon mere evidence of seat belt nonuse, as appellant argues the section should be read. On balance, however, **we are convinced that the better interpretation of this phrase is as a reference to an official determination that the provision has been violated, such as a law enforcement officer's citation for seat belt nonuse (or at least his conclusion to that effect) or a formal administrative or judicial finding of nonuse. We therefore believe that section 46.2-1094(D) as a whole is most appropriately understood as forbidding only the admission into evidence or comment upon such an official determination that the section was violated,** and at most as forbidding admission of or comment upon evidence that would be sufficient to establish all of the elements of a violation of the section.

Brown v. Ford Motor Co., *Unpublished Disposition*, 10 Fed. Appx. 39, 42-44 (4th Cir. 2001).

This analysis is compelling, with regard to the statutes in question here. Of particular importance is the preliminary language of § 46.2-1098, which tends to support the construction of "violation" as an "official determination". That statute begins:

> "Any person, including those subject to jurisdiction of a juvenile and domestic relations district court, **found guilty of violating this <u>article</u>** shall be subject to a civil penalty..."

§ 46.2-1098 (emphasis added). The "article" to which it refers, is Virginia Code Ann. Chapter 10, Article 13, which begins with § 46.2-1095 (Child Restraints) – the statute invoked by Mr. Evans in this case. § 46.2-1098 continues at some length detailing penalties for "violation" and it concludes with language parallel to that of § 46.2-1095(C):

> Violations of this **article** shall not constitute negligence per se; nor shall violation of this **article** constitute a defense to any claim for personal injuries to a child or recovery of medical expenses for injuries sustained in any motor vehicle accident.

§ 46.2-1098 (emphasis added). Thus, in the above section "violation" means "found guilty of violating". When read in pari materia, these statutes' uses of "violation" must be construed as equating with an 'official determination of noncompliance' either in the form of law enforcement's citation ("A violation of this section may be charged on the uniform traffic summons form" as in § 46.2-1095(D)) – or as a judicial determination ("found guilty of violating this article..." as in § 46.2-1098).

Any broader interpretation defies logic and is absurd. For example, "no court costs shall be assessed for violation of § 46.2-1095" (§ 46.2-1098) cannot possibly refer merely to 'facts amounting to noncompliance',

without an official determination of guilt. To construe it as such makes this portion of the statute "useless baggage [serving] no purpose." *Gallagher v. Commonwealth*, 205 Va. 666, 669, 139 S.E.2d 37, 39 (1964). "Such a construction would run counter to the principle that 'every provision in or part of a statute shall be given effect if possible.'" *Waller v. Com*., __ Va. __, __ S.E.2d __, 2009 WL 3644777 (Va. 2009) (quoting *Tilton v. Commonwealth*, 196 Va. 774, 784, 85 S.E.2d 368, 374 (1955)).

3. The Trial Court's Construction Of Va. Code § 46.2-1095(C) Immunizes Tortfeasors For Failure To Comply With This Safety Statute And Unconstitutionally Deprives Injured Children Of Equal Access To The Courts.

The Amended Complaint makes no reference to the child restraint law, nor to its "violation". Instead, it alleges injury directly resulting from the grossly negligent manner in which Mr. Evans transported his daughter. As such, Hannah's cause of action must survive demurrer; and evidence of where and how the child was placed must be admitted. The trial Court's *speculation* as to whether the jury might consider the child safety restraint law during its deliberations *is not a proper basis for sustaining demurrer*. If it is a question at all, it is a question for the trial stage, to be answered upon motion at that time.

Va. Code § 46.2-1095(C) was not intended to insulate parent tortfeasors from damages actions, for grossly negligent acts different from, but in conjunction with, failing to restrain their children. Rather it is meant to encourage use of life saving child safety devices. “The plain, obvious, and rational meaning of a statute is always preferred to any curious, narrow or strained construction.” *Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 424 (1992). In addition, a statute should not “be construed so that it leads to absurd results” *Id*. And see, *Meeks v. Com*., 274 Va. 798, 651 S.E.2d 637 (2007).

Immunizing a driver from responsibility for the consequences of transporting his infant child on the floorboard of his truck is absurd and utterly without justification in the law. Such an expanded statutory construction promotes child-care recklessness rather than child-care protection. According to the trial court’s construction, demurrer would be sustained where a complaint alleges that the child was placed on the hood of a vehicle; on the roof; in the bed of a truck or on the dashboard; and any number of equally reckless scenarios – obviously not the intended result of the Legislature in creating this safety statute.

The trial Court's construction of the statute unconstitutionally deprives Hannah, and other small children injured as a result of noncompliance with the safety statutes, of their right to equal access to the courts. See, for example, the discussion of the U.S. Constitution's 14th Amendment prohibition of "unreasoned distinctions that can only impede open and equal access to the courts." *Williams v. Oklahoma City*, 395 U.S. 458, 459, 89 S. Ct. 1818, 1819, 23 L. Ed. 2d 440 (1969) (citations omitted). In this way, the trial Court's construction does not meet the rational basis test enunciated by this Court in *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 94, 376 S.E.2d 525, 528 (1989):

> The rational basis test is satisfied 'if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose.'

Id. at 104, 376 S.E.2d at 534 (Internal quotations and citations omitted). The trial Court heard this argument (App. 185-186) and apparently rejected it.

4. Even Using Mr. Evans' Proposed Statutory Construction, Va. Code § 46.2-1095(C) Makes No Reference To "Gross Negligence" Or "Willful And Wanton Conduct".

Mr. Evans' gross negligence in placing his child on the floorboard under the dashboard is a separate and distinct act of negligence, without

reference to Va. Code § 46.2-1095(C) and 46.2-1098. Hannah's claim alleges gross negligence arising from Mr. Evans's placement of his child on the floor of his truck, without reference to the statute, nor to the existence or non-existence of any safety device.

> ...There may be more than one proximate cause of an event. *Panousos v. Allen*, 245 Va. 60, 65, 425 S.E.2d 496, 499 (1993). A subsequent proximate cause may or may not relieve defendant of liability for his negligence. 'In order to relieve a defendant of liability for his negligent act, the negligence intervening between the defendant's negligent act and the injury must so entirely supersede the operation of the defendant's negligence that it alone, without any contributing negligence by the defendant in the slightest degree, causes the injury.'
>
> *Atkinson v. Scheer*, 256 Va. 448, 454, 508 S.E.2d 68, 71 (1998) (quoting *Jenkins v. Payne*, 251 Va. 122, 128-29, 465 S.E.2d 795, 799 (1996).

Williams v. Le, 276 Va. 161, 662 S.E.2d 73 (2008).

Under the *Williams*, *supra*, analysis, whether Mr. Evans' placement of Hannah on the floor of his truck, under the dash was <u>one</u> proximate cause of her injuries; and whether he acted grossly negligently are questions of fact to be proved and determined by the jury at trial. The statutes in question simply do not address proof of gross negligence or willful and wanton conduct, and can have no impact on those claims.

At the hearing on this matter, Hannah's counsel argued by analogy (App. 176) to demonstrate that even if some of the relevant facts of this crash are inadmissible at trial, other relevant facts alleged survive, and are more than enough to state a claim for gross negligence here. The analogy bears repeating: If a drunk driver, runs a red light, at 90 miles per hour, and causes a collision, his negligence is three-fold. If, for some reason his intoxication is inadmissible, his injured Plaintiff's causes of action for negligence, and gross negligence, are not dismissed on demurrer. That Plaintiff still may prove that he ran the red light and that he did so at 90 miles per hour.

Hannah has argued, above, her contentions as to the "plain, obvious and rational" meaning of the statutes in question. But, even accepting, *arguendo*, Mr. Evans' proposed construction, neither gross negligence nor willful and wanton conduct is mentioned in either statute. Accordingly, those terms should not have been read into Va. Code § 46.2-1095(C) by the trial Court, which dismissed Hannah's actions for gross negligence and willful and wanton conduct, simply on the basis of this statute. (App. 194-207; 232-233)

"Courts cannot 'add language to the statute the General Assembly has not seen fit to include.'" *Washington v. Commonwealth*, 272 Va. 449, 459, 634 S.E.2d 310, 316 (2006) (quoting *Holsapple v. Commonwealth*, 266 Va. 593, 599, 587 S.E.2d 561, 564-65 (2003)). "[N]or are they permitted to accomplish the same result by judicial interpretation." *Id*. (quoting *Burlile v. Commonwealth*, 261 Va. 501, 511, 544 S.E.2d 360, 365 (2001) (internal quotation marks omitted)).

In this case, it is the act of placing Hannah on the floor with wires, sharp objects and metal rods surrounding her (App. 140) which endangered Hannah, when the foreseeable crash occurred. Whether this is gross negligence must remain for the jury to decide. For these reasons, even if Hannah is precluded *at trial* from making any reference to noncompliance with the child restraint law; and, even if noncompliance does not amount to negligence, the demurrer was improper.

5. Va. Code § 46.2-1098 Mandates That A Violation Of Va. Code § 46.2-1095 Shall Not Be Used By Mr. Evans As A Defense To This Claim For Personal Injuries.

Va. Code § 46.2-1095 and § 46.2-1098 must be read *in pari materia*.

> It is the object of the courts to construe all statutes in pari materia "in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation." *Lucy v. County of*

> *Albemarle*, 258 Va. 118, 129-130, 516 S.E.2d 480, 485 (1999)(quoting *Tyson v. Scott*, 116 Va. 243, 253, 81 S.E. 57, 61 (1914)).

Waller, *supra.*

Va. Code § 46.2-1095(C) states, in part, "A violation of this section shall not constitute negligence... [nor] be admissible in evidence...in a civil action." Va. Code § 46.2-1098 states, in part, "Violations of this article shall not constitute *negligence* per se, *nor shall violation of this article constitute a defense to* ***any*** *claim* for personal injuries to a child for recovery of medical expenses for injuries sustained in any motor vehicle accident." *Id*. (Emphasis added)

The language of § 46.2-1098 necessarily implies that personal injury claims for damages resulting during an event of noncompliance must continue to be available, but, that a violation cannot be used by a defendant thereto as a defense. Hannah contends that Mr. Evans' own construction of these statutes (that facts amounting to noncompliance equates to "violation") forbids his own opportunistic use of his noncompliance as his defense to this action. This conundrum offers additional support for Hannah's argument, above, that "violation" cannot be equated with 'facts amounting to noncompliance', and must only be

construed as equating with an ‘official determination of noncompliance’ either in the form of law enforcement’s citation “A violation of this section may be charged on the uniform traffic summons form” as in § 46.2-1095(D) – or as a judicial determination “found guilty of violating this article...” as in § 46.2-1098.

Also as argued above, both statutes leave open the door to claims based upon conduct other than negligence, including gross negligence and/or willful and wanton conduct, which are not addressed by Va. Code § 46.2-1095. Because the statutes are silent on these topics, they can have no impact, and Mr. Evans’ statutory defense, raised in demurrer, should not have been allowed.

STATEMENT REGARDING ORAL ARGUMENT

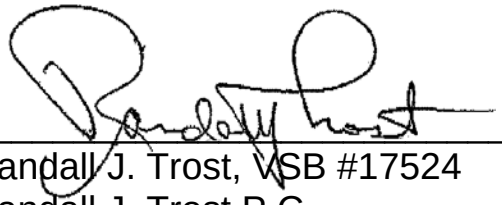
Appellant respectfully requests the opportunity for oral argument before this Honorable Court in this important matter of great significance to the people of Virginia.

CONCLUSION

On the basis of all of the above and foregoing, Hannah respectfully requests that this Honorable Court construe the statutes in question according to their plain meaning, in support of their obvious legislative

purpose as safety statutes, while preserving Hannah's right to equal access to the Courts; and that it reverse the decision of the trial court and declare that the Amended Complaint states causes of action upon which relief may be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Virginia Supreme Court Rule 5:26(d) the undersigned hereby certifies that:

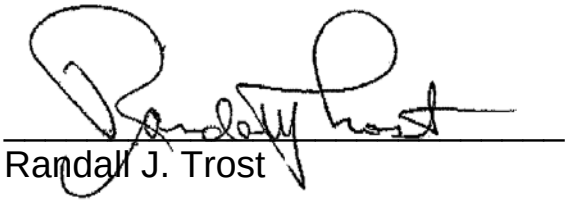
1. The Appellant is Hannah Leigh Evans, an infant who sues by her mother, natural guardian and next friend, Cynthia Kay Stevens, whose attorney is Randall J. Trost, Esq. (VSB # 17524), Randall J. Trost, P.C., Bank of America Building, 801 Main Street - 10th Floor, Lynchburg, Virginia 24504, Telephone: (434) 528-4222;

2. The Appellee is Billy Bradley Evans, II, whose attorneys are Sean C. Workowski, Esq. (VSB # 36120), Wade T. Anderson, Esq. (VSB # 48051), and Carolyn Dietz, Esq. (VSB # 75254), Frith, Anderson & Peake, P.C., 29 Franklin Road, S.W., Post Office Box 1240, Roanoke, Virginia 24006,Telephone: (540) 772-4600;

3. Counsel for the Appellant was privately retained.

4. Counsel for the Appellant has complied with the provisions of Rule 5:26(d) in that fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellant and Appendix have been hand- filed with the Clerk of the Supreme Court of Virginia on this the 11th day of December, 2009.

5. Three paper copies of the foregoing Brief of Appellant and Appendix were served, via U.S. Mail, postage prepaid, this 11th day of December, 2009, to Sean C. Workowski, Esq. (VSB # 36120), Wade T. Anderson, Esq. (VSB #48051), and Carolyn Dietz, Esq. (VSB # 75254), Frith, Anderson & Peake, P.C., 29 Franklin Road, S.W., Post Office Box 1240, Roanoke, Virginia 24006, Attorneys for the Appellee.



Randall J. Trost