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.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Mr. Evans fails to support his arguments with pertinent authorities. He relies upon the 20 year old decision of an Illinois trial level court, which interpreted Illinois' child safety statute. (Brief of Appellee, p. 5) The statute, importantly, does not make *violation* inadmissible, as our statute does. Instead, the Illinois statute states:

> In no event shall a parent or guardian's **failure to secure** a child under six years of age in an approved child restraint system or properly secure such child in an approved system constitute contributory negligence or be admissible as evidence in the trial of any civil action.

Brager v. Fee, 750 F. Supp. 364, 366 (C.D. Ill., 1990).

Obviously, this decision has no relevance to the case at bar, where the determinative questions revolve around the meaning of the specific language of our statute, and the legislative intent in choosing that specific language.

Mr. Evans next relies upon an even older decision from North Carolina:

> [W]e now address the issue of whether defendant's failure to fasten her child in a child restraint system as required by N.C.G.S. § 20-137.1, as it existed at the time of the accident, constituted actionable negligence. We hold that it did not.

State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 474, 380 S.E.2d 100, 105 (1989).

This decision does not reveal whether the *violation* alleged was actually an *official determination* such as is made by law enforcement, or, whether it was merely noncompliant acts. Either way, the meaning of the term "violation" was not addressed in the decision.

In the case at bar, the meaning of that term, as intended by our legislature, is determinative of the outcome. And, that meaning must be determined by this Court, following 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*., 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009).

Mr. Evans also attempts to mislead this Court as to the North Carolina decision *Chaney v. Young*, 122 N.C. App. 260, 264, 468 S.E.2d 837, 839-840 (N.C. App. 1996). (Brief of Appellee, p. 7) In that case, the North Carolina Court of Appeals considered its legislature's intent as to language nearly identical to ours. The Court excluded 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.

Id., 122 N.C. App. at 264, 468 S.E.2d at 839-840.

In *Chaney*, although the meaning of the term "violation" was, again, not addressed by the court, the statute itself explicitly made *noncompliant conduct* inadmissible. And, <u>the cause of action for the child's death was preserved</u>. The absurdity of a determination that the child's death was not compensable was never a possibility.

Mr. Evans next distinguishes the West Virginia decision, offered by Hannah, in *Reed v. Phillips*, 192 W.Va. 392, 397, 452 S.E.2d 708, 713 (1994). (Brief of Appellee, pp. 8-9) *Reed*, determined that failure to install a smoke detector (mandated by statute) is not a new, discreet tort; but, that death resulting from a fire in an apartment without a smoke detector is still actionable. And, in doing so, it considered child and adult safety device statutes as analogous.

Of course, *Reed* is distinguishable, but the rational, logical analysis of its statutory construction parallels the question before this 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 meaning of the term "violation", as it is used in the statute in question, must be determined in the context of all the language of the statute; and in harmony with the legislative intent. The question is whether our legislature intended to immunize tortfeasors who unsafely transport children, when foreseeable collisions occur and the children are hurt or killed. The trial court ruled – essentially – that the legislature did intend to immunize them.

Mr. Evans claims that this error was not preserved for appeal. (Brief of Appellee, p. 10) The applicable Rule states:

> Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of

> the ruling, except for good cause shown or to enable this Court to attain the ends of justice.

Sup. Ct. Rules, Rule 5:25.

The erroneous construction of the statute in question was raised at every step of this litigation, by Hannah. See, the transcript of the first hearing on Demurrer, November 24, 2008, (App. 118-127); memoranda of law submitted by Hannah on November 18, 2008, (App. 66-117) and January 20, 2009 (App. 162-167); and the trial court's resulting Order, including Hannah's "Attachment A Objections/Exceptions to Demurrer Ruling. (App. 232-237)

Hannah has, thus, preserved her statement of this issue for appeal.

Mr. Evans states, without support, that the 4th Circuit's construction of Virginia's adult counterpart statute violates the rules of statutory construction in *Brown v. Ford Motor Co*., Unpublished Disposition, 10 Fed. Appx. 39, 42-44 (4th Cir. 2001). (Brief of Appellee, p. 10) This decision gave effect to every word of the statute, in context, while preserving legislative intent.

Now, as to the child safety statute (crafted by the same legislature) nothing must be added or deleted from it in order to construe it according to the plain meaning of the words chosen by the legislature -- while still preserving Virginia's significant state interest in the wellbeing of its children.

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 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.

The only way to construe the statutes in question so as to avoid an absurd result, is to interpret the term "violation" as meaning an official determination via citation or a judicial finding of "guilty of violating" the statute.

Mr. Evans, on the other hand, does not show how depriving injured children of their common law causes of action in tort could possibly be rational, logical or intended by the legislature. He claims that immunizing a *parent* is hardly absurd. (Brief of Appellee, p. 12) However, the statute does not address parents. As construed by the trial court, the statute immunizes any person who fails to comply with its safety requirements. This absurd result is prohibited. *Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 424 (1992).

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 non-compliant acts are immune from suit.

Mr. Evans does not dispute that the statutes in question are "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. Thus, it is absurd to construe them as having immunized anyone who may have violated them – it is a construction which utterly defeats the purpose of the statutory scheme.

Of particular importance to this scheme 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" plainly and obviously 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).

Mr. Evans does not attempt to refute the absurd result of any broader construction of the rest of statute: 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*., 278 Va. 731, 736, 685 S.E.2d 48, 50 (2009) (quoting *Tilton v. Commonwealth*, 196 Va. 774, 784, 85 S.E.2d 368, 374 (1955)).

"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)).

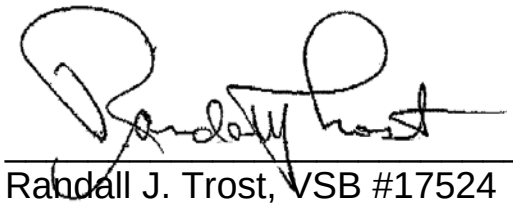
STATEMENT REGARDING ORAL ARGUMENT

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 common law cause of action for damages; 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:

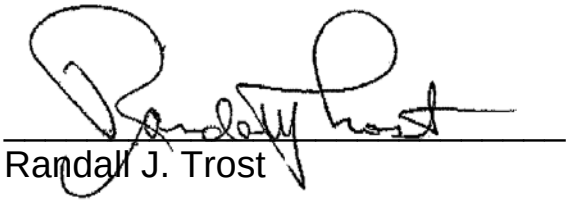
1. The Appellant is Hannah Leigh Evans, an infant who sues by her mother, natural guardian and next friend, Cynthia Kay Stevens, whose attorney is Randall J. Trost, Esq. (VSB # 17524), Randall J. Trost, P.C., Bank of America Building, 801 Main Street - 10th Floor, Lynchburg, Virginia 24504, Telephone: (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 Reply Brief of Appellant have been hand-filed with the Clerk of the Supreme Court of Virginia on this the 19th day of January, 2010.

5. Three paper copies of the foregoing Reply Brief of Appellant were served, via U.S. Mail, postage prepaid, this 19th day of January, 2010, 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.



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