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 APPELLEE

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Appellee, Billy Bradley Evans, II ("Evans"), submits this the following brief, and for the reasons set forth below, asks this Court to affirm the order of the trial court sustaining his demurrer to the amended complaint filed by Appellant, Hannah Leigh Evans ("Hannah"), an infant who sues by her mother, natural guardian and next friend, Cynthia Kay Stevens ("Stevens").

Statement of the Case

Evans concurs with Stevens' statement of the nature of the case and the material proceedings in the trial court.[1]

Question Presented

I. Whether the Amended Complaint Sets Forth a Legally Cognizable Cause of Action against Evans.

Statement of Facts

On December 24, 2005, Evans placed Hannah, who was then four years old, in an unsecured foam seat on the floorboard of his pick-up truck underneath the dash. As Evans was driving the truck in a southerly direction on Route 619 in Bedford County, it was involved

[1]In her statement of the case, Stevens selectively quotes statements made by the trial court during the hearing on Evans' demurrer to the amended complaint. While this quotation appears to be accurate, it does not represent the full basis of the trial court's conclusion that Stevens' had failed to allege a viable cause of action. The full basis is set forth in the trial court's order and the full transcript, which speak for themselves.

in a head-on collision with a motor vehicle operated by Justin Jarman, who is not a party to this action. (App. 138.) As a result of the collision, Hannah sustained severe injuries. (*See id.* at 38-39.)

Stevens alleges that Evans' conduct in placing Hannah in an unsecured foam seat on the floorboard of the truck underneath the dash constituted simple, gross, and willful and wanton negligence. (App. at 140.) Stevens does not allege that Evans negligently operated his truck or engaged any other negligent conduct. (*Id.*)

Principles of Law, Argument, and Authorities

The trial court dismissed Stevens' amended complaint upon Evans' demurrer. The principles applicable to the consideration of a demurrer are familiar. The purpose of a demurrer is to determine whether a complaint sets forth a legally cognizable cause of action upon which relief may be granted. "A demurrer admits the truth of all properly pleaded material facts. 'All reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading.'" *Ward's Equipment, Inc. v. New Holland N. America, Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997) (quoting *Fox v. Custis*, 236 Va. 69, 71, 372 S.E.2d 373, 374 (1988)). A demurrer, however, does admit the correctness of the conclusions of

law. *Tronfeld v. Nationwide Mutual Ins. Co.*, 272 Va. 709, 713, 636 S.E.2d 447, 450 (2006).

The issue before the trial court upon Evans' demurrer was a pure question of law; that is, the interpretation of Code § 46.2-1095. Under principles of statutory construction, a court must consider the ordinary and plain meaning of statutory terms, *Hale v. Board of Zoning Appeals*, 277 Va. 250, 269, 673 S.E.2d 170, 179 (2009), and interpret the law as written in the Code and in accordance with the intent of the legislature, *Winborne v. Virginia State Lottery*, 278 Va. 142, 148, 677 S.E.2d 304, 306 (2009).

The trial court correctly applied the foregoing legal principles to the amended complaint and appropriately sustained Evans' demurrer on the ground that under § 46.2-1095.C, the conduct Stevens alleged could not constitute negligence, whether characterized as simple, gross, or willful and wanton.

I. Stevens' Amended Complaint Did Not Set Forth a Legally Cognizable Cause of Action against Evans.

A. Section 46.2-1095 provides that the failure to appropriately secure a child in child restraint device does not constitute negligence.

Section 46.2-1095 provided in pertinent part:

> A. Any person who drives on the highways of Virginia any motor vehicle manufactured after January 1, 1968, shall ensure that any child, through age five, whom he transports therein is provided with and properly secured in a child restraint device of a type which meets the standards adopted by the United States Department of Transportation.
>
> B. Any person transporting any child less than sixteen years old, except for those required pursuant to subsection A to be secured in a child restraint device, shall ensure that such child is provided with and properly secured by an appropriate safety belt system when driving on the highways of Virginia in any motor vehicle manufactured after January 1, 1968, equipped or required by the provisions of this title to be equipped with a safety belt system, consisting of lap belts, shoulder harnesses, combinations thereof or similar devices.
>
> C. *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).[2]

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[2] Since the date of the accident, § 46.2-1095 has been amended.

The amended complaint, while it makes no mention of § 46.2-1095, alleges conduct that violates the statute; that is, Evans failed to properly secure Hannah in his truck by placing her on the floorboard underneath the dash. The statute, however, plainly states that such conduct shall not constitute negligence. Accordingly, Stevens' putative cause of action is expressly foreclosed by § 46.2-1095.C.

The fact that the amended complaint omitts any reference to § 46.2-1095 is of no moment. Indeed, in *Brager v. Fee*, the court dismissed an amended claim against a parent on the ground that it was barred by Illinois' Child Passenger Protection Act, which is similar to § 44.6-1095, even though the claim made no mention of the Illinois statute or that the parent had failed to secure his child in a child restraint device. 750 F. Supp. 364, 365 (C.D. Ill. 1990). There, the claimant alleged the parent had failed to secure the child "by means of locking the rear car doors and closing the rear windows in the 'up' position so that [the child] would not be ejected therefrom in the event of a collision" and by failing to secure the child. *Id.* The *Brager* court had previously dismissed the original claim, which had explicitly alleged that the parent had failed to use a child restraint device, on the ground that such conduct was not, pursuant to the

Child Passenger Protection Act, negligent as a matter of law. *Id.* The court dismissed the amended claim on the same grounds, even though the amended claim made no mention of the statute or that a child restraint device had not been used. *Id.* at 366.

The trial court's ruling below is consistent with the ruling in *Brager v. Fee* and in cases from other jurisdictions interpreting statutes similar to § 46.2-1095. *See State Farm Mut. Ins. Co. v. Holland*, 380 S.E.2d 100, 106 (1989); *Smith v. Kinsey*, 858 N.Y.S.2d 495, 498 (N.Y. App. Div. 2008); *Verni v. Harry M. Stevens, Inc.*, 903 A.2d 475, 506 (N.J. Super. Ct. App. Div. 2006). For example, in *State Farm Mut. Ins. Co. v. Holland*, a 3-month-old child who was not secured in a child restraint device died of injuries sustained in a motor vehicle accident. The failure to properly secure the child was in violation of N.C. Gen. Stat. § 20.137.1. That statute, however, similar to § 46.2-1095, provided that a violation of its provisions did not constitute primary or contributory negligence per se and could not be used as evidence of primary or contributory negligence. The Supreme Court of North Carolina ruled that, under § 20.137.1, the failure of a parent to restrain a child in a child restraint device did not constitute actionable negligence. 380 S.E.2d at 106.

Further, the cases cited by Stevens as support for her position are not to the contrary. In *Chaney v. Young*, the parents of a deceased infant brought an action against the driver of a motor vehicle who collided with their car, causing the accident that resulted in the death of their 10-month-old son. 468 S.E.2d 837, 838 (N.C. Ct. App. 1996). The defendant attempted to introduce evidence that plaintiff-mother was seated in the front seat of her car with her son in her lap when the collision occurred; however, the trial court excluded "any evidence relative to the failure of the plaintiffs to secure the minor decedent in a child restraint system as required by [N.C. Gen. Stat. § 20-137.1]," which provided that the failure to properly secure a child did not constitute negligence or contributory negligence per se or evidence of negligence or contributory negligence per se. *Id.* at 262, 468 S.E.2d at 838-39.

On appeal, the defendant argued that the statute was inapplicable and contended, as Stevens does here, that the issue was, *inter alia*, the positioning of the decedent in the car. Relying on the holding in *Holland*, the Court of Appeals of North Carolina, however, found this argument unpersuasive. The court found that the crux of the defendant's position was that the decedent had not been

properly restrained, and the court held that the statute in question prohibited evidence of such conduct. 468 S.E.2d at 839-40.

Thus, *Chaney* does not support Stevens' interpretation of § 46.2-1095. Indeed, the case actually supports the trial court's interpretation of the statute.

Stevens also relies on the case of *Reed v. Phillips*, 452 S.E.2d 708 (W.Va. S. Ct. 1994), as support for her argument that § 46.2-1095 does not foreclose her claim against Evans. Her reliance is misplaced.

Reed involved the interplay of a West Virginia statute and administrative regulations that required the placement of smoke detectors in leased dwellings. The statute provided that a violation of its terms did not constitute evidence of negligence in a civil action for damages; the regulations, however, contained no such prohibition. The landlords argued that the statute prevented evidence that they had failed to comply with either the statute or the regulations, while the plaintiff contended that she did not assert a violation of the statute and that the statute's evidentiary prohibition was inapplicable to a claim based on the regulations. *Id.* at 711. The Supreme Court of West Virginia found the plaintiff's argument persuasive, and held that

the West Virginia legislature had not intended for the statutory prohibition to apply to a claim based on the regulations. *Id.* at 714.

Reed is distinguishable. First, it involved issues of landlord-tenant law not applicable here. Second, it involved a cause of action for negligence per se based upon administrative regulations. Indeed, the *Reed* court's holding was specifically based upon the finding that statutory prohibition did not apply to a claim based upon the regulations. Here, Stevens has not alleged the violation of any regulations.

B. "Violation" as used in § 46.2-1095 means conduct that is contrary to the provisions of the statute.

Relying on the unpublished decision of the United States Court of Appeals for the Fourth Circuit in *Brown v. Ford Motor Co.*, No. 99-2513, 2001 U.S. App. LEXIS 4539 (4th Cir. Mar. 23, 2001), Stevens argues that the term "violation" as used in § 46.2-1094.D means "any official determination of non-compliance" instead of the underlying conduct, and because there has been no "official determination of non-compliance" here, the statute is inapplicable. Her argument is unavailing.

First, this argument was not advanced before the trial court and cannot be asserted for the first time before this Court. Rule 5:25; *see*

also McDonald v. Commonwealth, 274 Va. 249, 255, 645 S.E.2d 918, 921 (2007) ("the arguments of the parties on appeal . . . must be limited to issues preserved in the trial court."). Second, while the majority in *Brown* did hold that "violation" as used in § 46.2-1094.D referred not to the underlying conduct but instead to an "official determination that the provision has been violated," 2001 U.S. App. LEXIS 4539, at **7-8, this holding violates Virginia's well-established rules of statutory construction.

The plain meaning of violation is "an act or conduct that is contrary to law." *Richardson v. United States*, 526 U.S. 813, 818 (1999) (citing Black's Law Dictionary 1570 (6th ed. 1990)), *cited in* 2001 U.S. App. 4539, at ** 14 (Williams, J., dissenting). When the language of a statute is clear, courts are bound by that language and cannot add words the legislature has not seen fit to include. *See*, *e.g.*, *Simon v. Forer*, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003). The *Brown* court's interpretation of § 46.2-1094.D amounted to a rewriting of that statute to include the language "an official determination that the provision has been violated." This Court should decline Stevens' invitation to engage in such impermissible judicial legislation with respect to § 46.2-1095.

C. Stevens does not have a cause of action against Evans based upon gross negligence or willful and wanton negligence.

Stevens argues that § 46.2-1095.C's dictate that a violation of its provisions "shall not constitute negligence" does not mean that a violation cannot constitute gross or willful and wanton negligence. This argument is without merit.

First, while Virginia law recognizes three levels of negligence – simple, gross, and wanton and willful – § 46.2-1095.C does not limit the term "negligence" to simple negligence. Second, gross and willful and wanton negligence require conduct more egregious than simple negligence. *Cowan v. Hospice Support Care*, 268 Va. 482, 487, 603 S.E.2d 916, 918 (2004). If conduct cannot constitute negligence, such conduct cannot, perforce, constitute gross or willful and wanton negligence. Thus, if a violation of § 46.2-1095 shall not constitute negligence, such a violation shall not, as a matter of law, constitute gross or willful and wanton negligence.

D. The trial court's interpretation of § 46.2-1095 does not does not lead to an absurd result.

Stevens' argument that the trial court's interpretation of § 46.2-1095 leads to an absurd result is nothing more than an assertion that the General Assembly did not mean what it actually

said when it provided that the failure to secure a child in a child restraint device shall not constitute negligence. She simply asserts that immunizing a parent for failing to properly secure his child is absurd. While the wisdom of § 46.2-1095.C may be debatable, immunizing a parent from tort liability for claims brought on behalf of his child is hardly absurd. Indeed, prior to this Court's decision in *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971), Stevens' claim would have been barred under the intra-family immunity doctrine. While *Kauffman* carved out an exception to this doctrine based upon "very high incidence" of motor vehicle liability insurance, 212 Va. at 185, 183 S.E.2d at 194, *Kauffman* does not stand for the proposition that the notion of intra-family immunity, including parental immunity, is absurd. Indeed, in *Pavlick v. Pavlick*, this Court stated that the intra-family immunity doctrine was "alive and well in Virginia." 254 Va. 176, 181, 491 S.E.2d 602, 605 (1997).

In the end, Stevens' arguments regarding the "absurdity" of the trial court's ruling amount to nothing more than an attack on the wisdom and propriety of § 46.2-1095. This Court, however, steadfastly adheres to the principle that "[t]he wisdom and propriety of [a] statute come within the province of the legislature," *City of*

Newport News v. Elizabeth City County, 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949); *see also Pulliam v. Coastal Emergency Servs., Inc.*, 257 Va. 1, 9, 509 S.E.2d 307, 312 (1999); *Supinger v. Stakes*, 255 Va. 198, 202, 495 S.E.2d 813, 815 (1998). This Court will not construe plain statutory language in a manner that amounts to a holding that the legislature did not mean what it said. *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003); *Abbott v. Willey*, 253 Va. 88, 91, 479 S.E.2d 528, 529 (1997); *Weinberg v. Given*, 252 Va. 221, 225, 476 S.E.2d 502, 504 (1996); *Dominion Trust Co. v. Kenbridge Constr. Co*., 248 Va. 393, 396, 448 S.E.2d 659, 660 (1994); *Barr v. Town & Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990); *Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934).

The language of § 46.2-1095.C unambiguously provides that conduct in violation of the statute's provisions does not constitute negligence and is not admissible in evidence in an action for damages. While fair-minded men may debate the wisdom of this

provision, such questions were committed to the legislature and have been settled by the General Assembly.[3]

Moreover, the statute does not deprive Hannah or other minors of access to the courts and does not violate principles of equal protection. Indeed, while the legislature had the power to deprive Hannah of any remedy for her injuries, *Phipps v. Sutherland*, 201 Va. 448, 452, 111 S.E.2d 422, 425 (1959) ("[T]he legislature has the power to provide, modify, or repeal a remedy."), it did not do so in § 46.2-1095. Stevens could have sued Justin Jarman or Evans for negligence in the operation of their respective motor vehicles, but she did not. Instead, she sued Evans alone and alleged as the only basis for her claim Evans' conduct in failing to properly secure Hannah.

With respect to Stevens' equal protection argument, § 46.2-1095.C does not involve a fundamental right and Hannah was not a member of a suspect class. Accordingly, the statute does not violate

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[3] As support for her argument that the trial court reached an absurd result, Stevens contends the amended complaint states an identically valid claim for negligence as "if [it] 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)." (Br. of Appellant at 14.) Stevens, however, has made no such claim on behalf of Hannah and the hypothetical question of the validity of such a claim is not before this Court.

equal protection provided it passes muster under the "rational basis" test. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988); *see also Hess v. Snyder Hunt Corp.*, 240 Va. 49, 55, 392 S.E.2d 817, 821 (1990). Under this test, the statute is afforded a strong presumption of validity, *Heller v. Doe*, 509 U.S. 312, 318-21 (1993), and the legislature need not have articulated any purpose or rationale undergirding the statute, *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Instead, Stevens, as the party challenging the statute, bears the burden "to negat[e] every conceivable basis which might support" the statute. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). Stevens has failed to carry this weighty burden, and her equal protection argument should be rejected.

E. The trial court's ruling is not contrary to Code § 46.2-1098.

Section 46.2-1098 provides, in pertinent 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 or recovery of medical expenses for injuries sustained in any motor vehicle accident.

Stevens argues this language prevents Evans from contending that a violation of § 46.2-1095 does not constitute negligence. Her argument

is misplaced. First, Evans does not contend that a violation of § 46.2-1095 is a defense to Stevens' claim for damages; instead, Evans contends that Stevens has no cause of action in the first place.

Second, when §§ 46.2-1095 and -1098 are read *in pari materia*, the meaning of the language at issue in § 46.2-1098 is clear; it is intended to prevent a defendant from arguing that a violation of § 46.2-1095 constitutes contributory negligence or should be considered in mitigation of damages. The language of §§ 46.2-1095 and -1098 does not conflict, and nothing in § 46.2-1098 prevents Evans from arguing that Stevens has no cause of action based upon the conduct alleged in the amended complaint.

Conclusion

For the reasons stated, this Court should affirm the ruling of the trial court dismissing the Amended Complaint with prejudice.

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Certificate of Service

Pursuant to Rule 5:26(d), I hereby certify as follows:

That on this 5th day of January, 2010, fifteen of true and accurate paper copies and one electronic copy on CD of this Brief of Appellee have been hand-filed with the Supreme Court of Virginia, and three paper copies have been sent via U.S. Mail, postage prepaid, to counsel for appellant:

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