IN THE

Supreme Court of Virginia

RECORD NO. 132048

TABITHA LASLEY,
(a minor by Juanita Lasley, her next friend), *et al.*,

Appellants,

v.

DANIEL HYLTON,

Appellee.

BRIEF OF APPELLEE

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INTRODUCTION

Eight-year-old Tabitha Lasley, her older sister, and her father were guests at an outdoor event at Daniel Hyltons' country property. Tabitha was injured when she fell off an ATV her father expressly permitted her operate. Tabitha and her mother ask this Court to hold that Hylton owed Tabitha a duty of care and supervision even though Tabitha's father was present and actively supervising her. Specifically, they contend that Hylton should have overridden the permission Tabitha's father gave her to ride the ATV because the manufacturer thought she was too young to operate the ATV. Tabitha's father, however, knew or should have known of the obvious hazards associated with Tabitha's operation of the ATV, particularly as there were warnings posted right on the ATV.

This appeals asks whether a social host has a duty to care for and supervise the children of guests on their property when the child's parent is present and supervising the child. The answer, as the trial court correctly found, is no, and to hold otherwise would make hosts insurers of the safety of their guests' children even though the parent is present.

The trial court correctly decided that Hylton had no duty of care or supervision of Tabitha. Tabitha remained under the control, care and supervision of her father at all times, and he permitted her to ride the ATV

that resulted in her injury. In fact, he even put her on the ATV. Tabitha's father never transferred his active duty of supervision of Tabitha to Hylton, and Hylton did not assume any duty to care for the child. Further, nothing Hylton did to facilitate Tabitha's ride had anything to do with the accident or her injuries.

Additionally, the trial court's ruling is correct for a different reason. Hylton was entitled to immunity for simple negligence under Virginia's recreational use immunity statute, Code § 29.1-509, and Plaintiffs failed to prove gross negligence. Further, Hylton did not, as a matter of law, breach any duty of care or cause Tabitha's injuries. Therefore, there is an alternative basis to affirm the trial court's decision under the "right result, wrong reason" doctrine.

STATEMENT OF THE CASE

Tabitha and her mother Juanita Lasley filed a personal injury action in Botetourt County Circuit Court against three defendants: Daniel Hylton, his wife Bridget Hylton, and Tabitha's father Gene Moseley. (JA 1). The Lasleys later non-suited Mrs. Hylton, (JA 226), and dismissed Moseley. (JA 244). In their Second Amended Complaint, the Plaintiffs proceeded solely against Daniel Hylton. (JA 244). The suit sought compensatory

damages for injuries Tabitha sustained while operating a four-wheel all-terrain vehicle ("ATV") on the Hyltons' property. (JA 248).

Plaintiffs alleged that Hylton was negligent and grossly negligent because he allowed her to ride the ATV. (*E.g.,* JA 291). They claimed that he negligently allowed and actively assisted Tabitha, who was eight-years-old, in operating an ATV that contained a manufacturer's label stating: "NEVER permit children under age 12 to operate this ATV" and "Operation of this ATV by children under the age of 12 increases the risk of serious injury or death." They alleged that the owner's manual contained similar warnings. The claim of "active assistance" was based on Hylton's "providing a helmet to [Tabitha] and by giving her basic instruction on how to operate the four-wheeler." The claim of passive negligence was in allowing Tabitha to do what her father allowed her to do. (JA 244-249).

This Complaint did not allege any defect in Hylton's instructions, the helmet, the ATV, or the property that caused the accident. Rather, the crux of the claim against Hylton was his allowing Tabitha to operate the ATV, and not overriding her father's permission to do so. (JA 244-249). Further, the Complaint did not allege, and Plaintiffs do not contend now, that this is a premises liability case. (*See, e.g.,* Opening Br., p.19). Thus, they do not contend that Hylton had any duty of care to Tabitha as a premises owner or

licensee. (Id.) Rather, Plaintiffs' claim is that Hylton had a duty to say no to Tabitha. (JA 314-315).

Hylton denied simple and gross negligence, (JA 261), and alleged that Tabitha's father owed a duty to care and supervise Tabitha, and those duties were not relinquished or passed on to him. (JA 262). Further, Hylton affirmatively alleged that the claims of simple negligence are barred by Virginia's recreational use immunity statute, Code § 29.1-509. (JA 262).

The parties briefed the issues of parental supervision and recreational use immunity. (JA 13, 74, 264). Before trial, they discussed these issues in chambers, but the trial court reserved a ruling for trial. (Petition for Appeal, p.3). No transcript or written statement from this hearing was filed.

A jury trial was held on September 13, 2013. (JA 273). Following the close of the Plaintiffs' case, the defense moved to strike the Plaintiffs' evidence and grant Hylton summary judgment. (JA 349). Defendant argued that he owed no duty to Tabitha because she remained under the control and supervision of her father, who expressly authorized and permitted her operation of the ATV, and Hylton never consented to assuming Tabitha's care. (JA 350-351). In response, the Plaintiffs argued that Hylton assumed a supervisory role: "We do believe in this case Mr.

Hylton making his ATV's available to these kids, providing the helmets, helping put them on there and watching them did in fact take on that supervisory [parental] role." (JA 353). They further argued that, even if Hylton did not assume a supervisory duty, he had an independent duty to use ordinary care. (*Id*.)

After noting that there were "very few" factual disputes in the evidence, and that those disputes were not germane to the Defendant's motion, the trial court sustained the motion to strike. (JA 359). It explained:

> It is clear that Tabitha Lasley was under the supervision of her father at the time this took place and that's not disputed.
>
> It is clear that the Defendant inquired of the supervising parent with regard to the activity that was requested.
>
> It is clear and not disputed that the supervising parent gave his permission. I think it's clear under Virginia Law that if a child is supervised by a parent and that the parent sees no peril in the child's activity, that it would be demanding too much of the Defendant to foresee the peril in the situation.
>
> Absence [sic] shifting as a result of ordinary circumstances of the burden, acceptance of that or a special relationship existing. The evidence in this case is absent of such.

(JA 360-361). Plaintiffs objected, (JA 361), but did not make any post-trial motions. The Final Order was entered on October 4, 2013. (JA 363).

STATEMENT OF FACTS

The parties

On August 30, 2008, Gene Moseley took his two daughters, Tabitha and Casey, to an outdoor party at the property of Daniel and Bridget Hylton. (JA 276-278, 289, 328). At that time, Tabitha was 8 and Casey was 12 or 13. (JA 276-278, 334). Gene Moseley, an EMT, was divorced from the girls' mother, but had visitation rights. (JA 287, 330-331, 348). Moseley's friend Jessica was also present. (JA 279, 335).

Gene Moseley had gone to school with Daniel Hylton, and Moseley was related to one of Hylton's neighbors. (JA 298). Hylton, however, did not know Moseley's children. (JA 299). Mosely came to the cookout because Jessica asked Hylton if Mosely could come. (JA 324).

The outdoor party

The outdoor party took place at the Hyltons' country property -- called Daniel's Acre -- in Botetourt County. (Add., p.142) [1]. The Hyltons regularly opened their property to friends and others for outdoor activities including horseback riding, swimming in the creek, and riding ATVs. (JA 320-321). Hylton does not operate the property for a profit, and does not charge a fee. (JA 324-325, 327). On August 30, 2008, the Hyltons invited friends,

[1] An addendum to this brief contains several pages of the trial transcript not included in the Joint Appendix. References to the Addendum will be denoted "(Add., p.___)."

family, neighbors and “whoever shows up” to their property for a day of outdoor activities and a cookout. (JA 298, 324).

The ATVs

Hylton had two ATVs, one green and one red. (JA 291-292). He bought the red Honda ATV for his young son; it has an engine size of more than 70 cc. (JA 289-290, 292-293, 308). Hylton’s six-year-old son was physically able to operate the ATV, and Tabitha was larger than his son. (Add., p.140).

Hylton required ATV riders to wear a helmet and shoes, (JA 302-303; Add., p.139), and children must have a parent’s permission to ride. (Add., p.134). Hylton was aware of the safety warnings on the ATV, (JA 293), and considered them to be a recommendation. (JA 294-297). He thought those warnings were his responsibility as it related to his child, but not as to children who are given permission by their parents to ride because a parent knows his child best. (JA 309-312). Because Hylton did not know Tabitha or her experience with ATVs, he relied upon her father to determine whether she should ride. (JA 312).

When Casey and Tabitha arrived at the Hylton property, other children were riding the ATVs. (JA 300). Moseley gave Tabitha permission to ride the green ATV around the property. (JA 336).

Casey rides the ATV

Hylton then asked Casey if she wanted to ride the red ATV. (JA 280). Casey secured her father's permission to ride the ATV. (JA 301-302). Casey got onto the ATV herself, (JA 281), and her father put the helmet on her that Hylton had made available. (JA 281, 302, 337). After Hylton showed Casey where the controls were, she rode off. (JA 337).

Tabitha rides the red ATV with parental permission

While Casey was riding the red ATV, Tabitha asked Hylton several times if she could ride it. (JA 281, 305, 337). Hylton told her to ask her father for permission (JA 305-306, 316, 337, 344). Tabitha asked her father for permission and he gave it. (JA 281, 337, 344; Add., p.139). Hylton then asked Moseley, "You sure?" In response, Moseley said, "I think she can handle that type of thing." (JA 340, 344; Add., p.140).

Tabitha's father called Casey back and said that it was Tabitha's turn. (JA 282). Based upon her father's instruction, Casey drove the ATV back for her sister. (JA 282). Because she didn't know where the brakes were, Casey couldn't bring the ATV to a stop, and she hit her father, who got mad. (JA 282-283). Casey saw the notice on the ATV instructing that children under 12 should not ride, but she did not warn Tabitha. (JA 288).

Hylton did not tell Tabitha or her father about the warnings on the ATV or in the owner's manual. (JA 306-307, 315, 339).

Moseley lifted Tabitha onto the red ATV. (JA 284, 338-339, 344-345). As he did so, he was standing right by the warning label on the ATV. (JA 320). The warning label about children operators under the age of 12 was plainly visible on the ATV. (JA 368, 371). Jessica put the helmet on Tabitha. (JA 284, 338-339). Hylton showed her the gas, clutch and brakes. (JA 285, 338-339).

Tabitha was operating the ATV at five to ten miles per hour on a lap around the field. (Add., p.143). After about 15 feet, she started swerving after seeing a truck coming down a road toward her, and her father started yelling for her to stop. (JA 285, 322, 341, 346). Tabitha had only traveled 60 to 90 feet before the ATV fell over and she fractured her shoulder. (JA 322-323, 332).

When Tabitha wrecked, her father ran to her, picked her up, and got medical assistance. (JA 286, 342). Tabitha wanted her father with her in the rescue squad that transported her to the hospital. (JA 343). She testified to what happened when the rescue squad personnel told her that her father would be traveling separately to the hospital. "I started crying, saying no, because they told me that [Moseley] was going to travel behind

us. I said, No, because he's riding with me, because he shouldn't be away from me." (JA 343).

Hylton thought that Tabitha's father should make the decision whether she was capable of riding the ATV. (JA 318; Add., p.139). Hylton agreed that he allowed Tabitha the opportunity to ride the ATV, but denied that he gave her permission to ride the ATV. (JA 314-316). That permission was given by her father, as Casey and Tabitha testified. (JA 281, 337).

Hylton did not consent to take over the duty of supervision of Tabitha at any time. (Add., p.140). That duty remained with her father. (Add., p.141). There was no evidence that Moseley asked Hylton to supervise Tabitha or assume her care.

STANDARD OF REVIEW

The existence of a legal duty in tort is a question of law that this Court reviews *de novo*. *Commonwealth v. Peterson*, 286 Va. 349, 356 (2013). Whether a legal duty exists is a pure question for the trial court; whether the duty has been breached is a question for the jury. *Id.* at 357; *Acme Markets, Inc. v. Remschel*, 181 Va. 171, 178 (1943) ("what duty rests upon the defendant, is a law question and, whether or not the duty was properly performed is a purely factual matter for the jury"). Therefore, the trial court

properly addressed whether Defendant Hylton owed a legal duty to the Plaintiff. It was only if such a duty existed that the jury could determine whether it had been breached.

This appeal arises from the trial court's ruling sustaining Hylton's motion to strike Plaintiffs' evidence at trial. On appeal, this Court will review a trial court's judgment striking the evidence considering the facts in the light most favorable to the plaintiff, and drawing all reasonable inferences in her favor. *Green v. Ingram*, 269 Va. 281, 290 (2005); *Austin v. Shoney's, Inc.*, 254 Va. 134, 138 (1997).

ARGUMENT

1. TABITHA IMPERMISSIBLY CHANGED THE ASSIGNMENTS OF ERROR GRANTED BY THIS COURT.

It is improper for an appellant to make substantive changes to the wording of an assignment of error granted by this Court. *E.g.*, *Northam v. Va. State Bar*, 285 Va. 429, 434, n.* (2013); *Dowdy v. Commonwealth*, 278 Va. 577, 590, n.14 (2009); *Allstate Ins. Co. v. Gauthier*, 273 Va. 416, 418, n.* (2007). Thus, "[i]t is well established that the Court will not consider assignments of error as modified by an appellant's opening brief, but only as granted by the Court." *Northam*, 285 Va. at 434, n.* (citing *White v. Commonwealth*, 267 Va. 96, 102-103 (2004)).

Here, Plaintiffs substantively changed the wording of the assignments of error granted by this Court. *Compare* JA 367 to Opening Br., p.1. Specifically, Plaintiffs changed both assignments of error to add language stating that the trial court erred in granting Hylton's motion to strike. This change is a substantive and material alteration of the granted assignments of error.

The first assignment of error granted by the Court does not actually challenge the trial court's motion to strike. Rather, it merely challenges the trial court's action in deciding the issue of duty as a matter of law. It challenges the trial court deciding as a matter of law that the defendant had no duty, and precluding the jury from deciding whether Hylton was negligent. As granted by this Court, the first assignment of error states:

> The Trial Court erred when it determined as a matter of law that Appellee-Defendant owed no duty of ordinary[2] care to minor Appellants-Plaintiffs, thereby precluding the jury from deciding the issue of whether Defendant had committed simple and/or gross negligence when Defendant gave his necessary permission for the child to ride his ATV, and then actively participated in the child's attempted operation of the ATV that was labeled, "NEVER permit a child under 12 to operate this ATV."

(JA 367).

[2] Plaintiffs also modified this assignment of error in their Opening Brief by changing the word "ordinary" to "reasonable." (Opening Br., p.1).

This assignment does not allege any error. The existence of a duty is unquestionably an issue of law for the trial court, and not an issue for the jury. *Peterson*, 286 Va. at 356. Thus, it was entirely proper for the trial court to decide – as a question of law – whether Hylton owed Tabitha a duty of care. Because the trial court properly decided the legal question of the existence of a duty, the first assignment of error plainly does not assign error at all.

Plaintiffs also materially altered the second assignment of error. As granted, that assignment of error challenges only the trial court's interpretation of the decision in *Ingle v. Clinchfield R.R. Co.*, 169 Va. 131 (1937):

> The court erred when it held that current law regarding parental supervision shielded Appellee-Defendant from liability for his own independent acts of negligence, simple and gross, as *Ingle v. Clinchfield R.R. Co.*, 169 Va. 131 (1937), addressed the supervision of a child's behavior whereas this case involves Appellee-Defendant's own conduct in allowing[3] and assisting an eight-year old child to engage in the potentially[4] dangerous activity of riding Defendant's ATV.

(JA 367). The new assignment of error challenges the trial court's granting of Hylton's motion to strike. As modified in the opening brief to challenge

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[3] Plaintiffs also modified this assignment of error in their Opening Brief by changing the word "allowing" to "permitting." (Opening Br., p.1).

[4] In their Opening Brief, Plaintiffs deleted the word "potentially" from the assignment of error. (Opening Br., p.1).

the trial court's action in granting the motion to strike, this assignment of error now asks the Court to decide an issue not covered by the assignment of error it granted.

Plaintiffs have changed the substance of their two assignments of error. Because the Plaintiffs made substantive changes to the assignments of error granted by this Court, review is limited to the original assignments of error, and this Court may not reach the new issues raised in the Opening Brief. *See Northam*, 285 Va. at 434, n.*. Further, as the first assignment of error as granted by this Court did not actually assign error at all, it is insufficient and presents no actual question for this Court to decide.

Therefore, the only issue before the Court is the issue presented in granted assignment of error 2 – whether the trial court erred in interpreting *Ingle v. Clinchfield R.R. Co.* to shield Hylton from his independent acts of negligence.[5] (JA 367). This assignment of error does not challenge the trial court's determination of duty. For the reasons discussed later, under established law, including *Ingle*, Hylton had no duty to Tabitha. And, even if the Court's interpretation of *Ingle* is wrong, there is no reversible error if

[5] Although Hylton believes that the assignments of error are defective or insufficient, he argues all the assignments of error without waiving those objections.

the record supports other grounds for affirming the trial court's decision, which it plainly does.

2. THE TRIAL COURT CORRECTLY HELD THAT THE DEFENDANT DID NOT OWE A DUTY OF CARE TO TABITHA.

The issue on appeal is whether Hylton owed Tabitha a duty of care and supervision. If the Court reaches the assignments of error, there are two questions: (1) whether Hylton's passive act of allowing or permitting Tabitha to ride the ATV with her father's permission created a legal duty for Hylton to care for Tabitha, and (2) whether providing Tabitha a helmet and basic instructions about the ATV's controls created a legal duty for Hylton to care for Tabitha. The answer to both questions is no.

"An action for negligence only lies where there has been a failure to perform some legal duty which the defendant owes to the party injured." *Balderson v. Robertson*, 203 Va. 484, 487 (1962). Because the trial court correctly found that Hylton had no duty of care or supervision of Tabitha, the decision should be affirmed.

A. The duty to care for and supervise a child belongs to the parent unless the parent and the defendant agree for that duty to be transferred.

It is black letter law that social hosts do not have a duty to supervise or warn child guests of obvious hazards when a parent or guardian is present and knows or should know the obvious danger. *E.g.*, *Horace v. Braggs*, 726 So.2d 635, 636-639 (Ala. 1998) (child drowned in swimming pool); *Bradley v. Welch*, 228 S.W.3d 559, 565 (Ark. 2006) (child drowned in a pool party); *Moses v. Bridgeman*, 139 S.W.3d 503, 509-510 (Ark. 2003) (child drowned in swimming pool); *Padilla v. Rodas*, 160 Cal. App. 4th 742, 748-749 (2008) (child drowned in a swimming pool); *Wilson v. Urquhart*, 2010 Del. Super. LEXIS 279, *21 (2010), *aff'd*, 19 A.3d 302 (Del. 2011) (child drowned at pool party); *Englund v. Englund*, 615 N.E.2d 861, 866-867 (Ill. 1993) (child drowned in swimming pool); *Androusky v. Walter*, 970 N.E.2d 687, 695-696 (Ind. 2012) (child drowned in swimming pool); *Laser v. Wilson*, 473 A.2d 523, 529 (Md. 1984) (two-year-old who fell down a stairway where the handrail and guardrail were removed); *Vares v. Vares*, 571 S.E.2d 612, 616 (N.C. 2002) (child injured when a tree was felled and hit him). When a parent is present, the responsibility to provide for the child's care and safety rests with the parent. *E.g.*, *Andrushchenko v. Silchuk*, 744 N.W.2d 850, 859 (S.D. 2008).

Similarly, where a child's parents have observed no harm in their child's activity, there is no duty on the host or homeowner "to warn of

dangers which were not regarded as such by [the] parents." *E.g.*, *Keller v. Mols*, 472 N.E.2d 161, 164 (Ill. 1984) (where parents could observe son playing floor hockey with friends at a neighbor's house and knew he had played in the past and did not prohibit the activity, the neighbor had no duty for the child's safety).

Considering the importance of the parent's duty, it may not be imposed upon or assumed by another without mutual consent. *Laser*, 473 A.2d at 445; *see also Kellermann v. McDonough*, 278 Va. 478, 487 (2009) (to transfer the parental duty of care from the parent to the defendant, there must be mutual consent). Absent mutual consent, imposing a duty of care on a social host or homeowner "would make them insurers of the safety of their guests' children's safety, even when the parents are also present on the premises, a burden that is beyond all reasonable expectations of both homeowners and their guests." *Padilla*, 160 Cal. App.4th at 748. Thus, a social host does not have a duty of care to a child guest who is supervised by his parent unless the parent transfers that duty the host, and the host agrees to assume that duty.[6]

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[6] Some states that have adopted this rule speak of it in terms of breach or causation, instead of duty, where premises liability theories are involved. For example, in *Androusky*, 970 N.E.2d at 696, a premises liability case, the court held that a landowner's duty to a child guest is not eliminated by the presence of the child's parent, but the landowner "should not generally

This rule is consistent with Virginia law. The relationship of parent and child is a special one which is protected by the Constitution. *L.F. v. Breit*, 285 Va. 163, 182 (2013) ("the relationship between a parent and child is a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment"); *Wyatt v. McDermott*, 283 Va. 685, 692 (2012) (recognizing a cause of action for tortious interference with parental rights). A parent has a duty to exercise ordinary care for his child's safety. *See Chapman v. City of Virginia Beach*, 252 Va. 186, 193 (1996) (citing *City of Danville v. Howard*, 156 Va. 32, 36 (1931)); *Wagman v. Boccheciampe*, 206 Va. 412, 418 (1965). Thus, a parent is charged with the legal and moral duty to supervise and safeguard the welfare of his child.

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be found to have breached the duty owed to the child." *Id.* The court concluded as a matter of law that the landowner did not breach his duty and that the sole proximate cause of the child's death was the parent's lack of supervision. *Id.* This distinction is of no moment here. First, this is not a premises liability case. Second, as most other states have held, this rule applies to the question whether there is a duty of care. Finally, this Court can still conclude under the right result wrong reason rule that Hylton did not breach any duty and was not a proximate cause of Tabitha's injury as a matter of law. Plaintiff put on her entire case, there are no disputed issues of material fact. Whether viewed in terms of duty, breach or causation, the record is sufficient to permit this Court's final determination. See footnote 18 for further discussion.

This Court has also recognized the parent's special relationship with his child and the legal duties that flow from that relationship in determining a third party's liability for injury or death to the child. *E.g.*, *Kellermann*, 278 Va. at 488 (an adult who agrees to supervise and care for a child has a duty in tort to exercise reasonable care in the supervision of the child); *Wagman*, 206 Va. at 418 (defendant had no duty to warn parents that child playing in a dangerous place); *Ingle v. Clinchfield R.R. Co.*, 169 Va. 131, 139-140 (1937) (defendant not required to see risk in a child's behavior that a supervising parent does not see).

The reasons for the parental supervision rule are compelling, and recognize and balance the societal expectations of parents and hosts. The parental duty of supervision "is not a perfunctory one not be performed only at the voluntary pleasure or whimsical desire of the parent." *Laser*, 473 A.2d at 445; *Wilson*, 2010 Del. Super. LEXIS 279, *31 (parental duty of supervision is a "profoundly important and weighty duty"). Hosts of child guests who are supervised by their parents can reasonably expect the parent to exercise this important duty to protect their children from obvious dangers, just as Hylton did here. *See Laser*, 473 A.2d at 445. *Wilson*, 2010 Del. Super. LEXIS 279, *31 (in determining what duty a social host owes a child guest, the reasonable expectations of both hosts and their

guests must be considered). As one court noted, imposing a duty of care and supervision on social hosts will probably result in children being excluded from "the social lives of their communities and families as hosts decline to take the risk that they may be held accountable as insurers of their child guests' safety." *Id.* The imposition of a social host duty for the protection of children of guests also "would unreasonably burden social and family relationships, requiring homeowners to provide babysitting services for their guests' young children when the children's parents also were on the premises." *Padilla*, 160 Cal. App.4th at 748. Thus, Virginia should apply this rule here. Therefore, the parental supervision rule is good public policy.

B. The duty to care for and supervise Tabitha remained with her father.

a. Hylton did not assume a duty of care or supervision for Tabitha.

Plaintiffs argue that Hylton assumed a duty of care for Tabitha by allowing her to ride the ATV. This is both legally and factually incorrect.

It is true as a legal proposition that "an adult who agrees to supervise and care for a minor has a duty in tort to exercise reasonable care in the supervision of that minor." *Kellermann v. McDonough*, 278 Va. 478, 488 (2009). For that duty to transfer from the parent to the defendant, however,

there must be mutual consent. *See id.* at 487 ("We hold that when a parent relinquishes the supervision and care of a child to an adult who agrees to supervise and care for that child, the supervising adult must discharge that duty with reasonable care."); 62 Am. Jur.2d *Premises Liability* § 231 ("The parental duty to guard children from danger may not be imposed upon, or assumed by, another person without mutual consent."). Indeed, in *Kellermann*, this Court refused to find that Mr. McDonough assumed a duty to supervise the Kellermann's daughter when he was not even present when his wife promised to take good care of the child. 278 Va. at 490.

As a factual matter, there is absolutely no evidence that Hylton was asked or agreed to assume any duty of care or supervision of Tabitha. In fact, the uncontradicted evidence showed that Moseley did not ask, and Hylton did not agree, to take care of Tabitha. (Add., p.140-141). Moseley gave his permission for Tabitha to ride the ATV, he put her on the ATV, he supervised her while she was riding, called out instructions for her to stop the ATV when she began swerving, and provided care for her when she wrecked. (JA 282, 284-286, 322, 337-339, 342-343). In short, Moseley kept Tabitha under his close personal supervision and never asked Hylton to assume that duty. Therefore, nothing in the record shows that Moseley transferred his duty of care and supervision of Tabitha to Hylton.

Further, Tabitha's father was actively supervising her at all times, and never transferred that duty to Hylton. Hylton relied upon, and deferred to, Moseley's understanding of his daughter and her abilities with regard to the ATV. (JA 309-310, 312, 318; Add., p.139). His passive assent to Tabitha's father's wishes was legally insufficient to transfer that duty.

b. Moseley actively supervised Tabitha and decided she could ride the ATV.

Moseley was fully engaged in Tabitha's care and supervision at all times. After having an opportunity to observe other children riding the ATV, (JA 300), Moseley decided that both his daughters could ride an ATV. (JA 336, 340, 344). He observed his older daughter Casey operate the ATV. (JA 282). Even though Casey couldn't bring the vehicle to a stop and actually hit him, Moseley still decided that his younger daughter could ride. (JA 282-283). When asked whether he was sure he wanted Tabitha to ride the ATV, Moseley responded: "I think she can handle that type of thing." (JA 340, 344; Add., p.140). He even directed Casey to let Tabitha have a turn on the ATV. (JA 282).

Moseley also actively supervised Tabitha while she was operating the ATV. He actually lifted Tabitha onto the ATV, and supervised her riding preparations. (JA 284, 338-339, 344-345). He closely watched Tabitha operate the vehicle and, when she began having difficulty, shouted

instructions to her to stop. (JA 285, 322, 341, 346). When Tabitha wrecked the ATV, Moseley ran to her, comforted her, and arranged for medical assistance. (JA 286, 342). Therefore, he was actively supervising Tabitha and her operation of the ATV, and never relinquished his supervision or parental duty of care to Hylton.

c. Tabitha's father knew or should have known of the risks associated with Tabitha's operation of the ATV, and the dangers were obvious.

The hazards associated with the ATV were open and obvious. As Plaintiffs point out, it is a motorized vehicle. In their second assignment of error, the Plaintiffs describe the activity of riding the ATV as "potentially dangerous," (JA 367), and describe the ATV itself as "inherently dangerous." (Opening Br., p.30).

Moseley had an opportunity to see these dangers as he observed Casey have difficultly operating the vehicle. Indeed, Casey hit her father with the ATV because she didn't know where the brakes were. (JA 282-283). And if this were not enough, a warning label was prominently displayed on the ATV itself in full view of Moseley and others. (JA 368, 371). In fact, Moseley was standing right in front of it when he put Tabitha on the ATV. (JA 320). Casey, who was only 12-13 years old, saw and appreciated the warning label. (JA 288). As an experienced fire and

rescue EMT, (JA 330-331), Moseley was uniquely positioned to appreciate the hazards that accompany a child's operation of a motor vehicle. Consequently, the hazards of permitting a child to operate the ATV were obvious. *See, e.g., Bridgeman*, 139 S.W.3d at 472 (a "swimming pool is an open and obvious danger for children and adults" and is not a latent or obscure hazard).

As a parent, Moseley was in the best position to evaluate the ability of his daughters to operate the vehicle, understand their strengths and dispositions, assess the size of the ATV relative to his daughters' sizes, and supervise their operation of the ATVs. Hylton's reliance on Moseley's knowledge of his children was reasonable.

d. Finding that Hylton had no duty to Tabitha does not impute any negligence by Moseley to Tabitha.

Application of the parental supervision rule does not impute any negligence by Moseley to his daughter. Instead, all it does is recognize that, while Tabitha is under her father's care, custody and supervision, he has a duty for her supervision and welfare unless that duty has been transferred to another party who has accepted the responsibility. *See Laser*, 473 A.2d at 444-445 (where child social guest injured in defendant's home while under the care of his parents, court rejects the argument that the parent's negligence was imputed to the child). The principle that a

parent's negligence may not be imputed to the child "was not intended to relieve parents from all supervision of a child." *Id.* Indeed, there is no allegation that Moseley *or* Tabitha were negligent. All that application of the parental supervision rule does is acknowledge that the decision whether Tabitha should operate the ATV belonged to her father, who was actively supervising her, and able to assess the open and obvious risks of that activity.

In short, the parental supervision rule applies here. Tabitha remained under the supervision and care of her father at all times. This was not a social event where parents dropped off their children and left them in the host's custody. Rather, Moseley kept a close watch on Tabitha's activities, and Hylton never agreed to assume Tabitha's care and supervision. Moseley knew or should have known the obvious hazards associated with operation of the ATV by children, as the warning label that Plaintiffs mention repeatedly was in his plain view. Thus, Hylton had no duty to Tabitha.

3. THERE IS NO INDEPENDENT DUTY OF CARE ARISING FROM ANY ACTIVE PARTICIPATION BY HYLTON.

Plaintiffs incorrectly argue that Hylton had a duty – independent from any parental duty of supervision – by virtue of his active participation in the

operation of the ATV. To the contrary, Hylton had no independent duty to care for Tabitha because (1) the allegation of negligence in this case is that Hylton should have forbidden Tabitha to do something her father said she could do; (2) Hylton did not assume any duty from Tabitha's father because mutual consent was lacking; and (3) any assistance Hylton provided to Tabitha had nothing to do with the accident or her injuries.

First, the complaint in this case is that Hylton should have done what Tabitha's father did not – tell Tabitha she could not ride the ATV. That, according to the Plaintiffs, would have avoided the accident. (Opening Br., p.30: "Appellee admitted that if he had chosen to not permit Tabitha to ride his ATV . . . she would not have been hurt.") Their claim is that Hylton should have overridden the determination by Tabitha's father that she could ride the ATV. This, at its heart, is an allegation of parental supervision, and cannot create a duty for Moseley to care for Tabitha. Plaintiffs' efforts to make this case about anything more than parental supervision fail.

Second, for reasons discussed earlier, Hylton did not assume any duty of care from Tabitha's father, and his limited role in pointing out the controls on the ATV after Moseley granted Tabitha permission to ride the ATV did not transfer that duty. As mutual consent was missing, nothing

about Hylton's actions constituted an assumption of Tabitha's care. *See Kellermann*, 278 Va. at 487.

Third, providing Tabitha a helmet and showing her where the controls were did not create a duty for Hylton to care for or supervise Tabitha or to override her father's permission to ride the ATV. It is undisputed that Hylton merely made the helmet available, and someone else (Jessica) put the helmet on Tabitha. (JA 284, 338-339). The fact that Hylton provided the helmet for riders – an act to promote safety, not to create risk of harm – does not create a duty.

Under the circumstances, Hylton merely engaged "in the ordinary, instinctual supervision [of the children operating the ATVs] that most adults undertake when they are around children." *See Bradley*, 228 S.W.3d at 180 (child drowned at swimming pool party with many adults and coaches around); *see also Wilson*, 2010 Del. Super. LEXIS 279, *25-26 (hostess did not assume a duty to supervise a child in the pool where she displayed safety devices, had one for her child, and suggested that children who were gripping the pool walls use pool "noodles," and that duty rested with the parent); *Moses*, 139 S.W.3d at 510 (where host provided life jackets for children in pool, the supervising parent had the duty to ensure the child did not remove the jacket); *Bridgeman*, 139 S.W.3d at 508-511 (host owed no

duty of care to a child who drowned in pool without a life jacket, even though she asked the child and his parent if he could swim, insisted that the child wear the life vest, and told him where to stay in the pool). As long as Hylton did not agree to assume Tabitha's care and supervision, he did not assume the parental duty simply by doing what a reasonable adult in the same situation would do.

Nor was a duty assumed by showing Tabitha where the ATV's controls were located. That conduct was not an affirmative act that signified Hylton's assumption of a duty of care to Tabitha. It was only by mutual consent that the parental duty of supervision could pass to Hylton. Hylton simply provided information about where the controls were located. (JA 285, 338-339). Thus, he did not assume any duty for Tabitha's care.

Equally important, those instructions had nothing to do with the accident. There has been no allegation that these instructions were dangerous or unreasonable. Nor did Plaintiffs allege that these pointers had anything to do with the accident or Tabitha's injury. *Compare Southern States Grain Mktg. Coop. v. Garber*, 205 Va. 757, 761 (1965) (legal duty found where defendant's employee helped plaintiff unload a truck, but in the process told plaintiff to hold a cable, and then moved the cable causing plaintiff's fingers to be caught in the cable). Instead, Plaintiffs' argument is

that Hylton should not have permitted Tabitha to ride in the first place, not that he did anything wrong by providing basic instructions.

4. VIRGINIA CASE LAW, INCLUDING *INGLE V. CLINCHFIELD R.R. CO.,* SUPPORTS THE TRIAL COURT'S DECISION THAT HYLTON HAD NO DUTY OF CARE TO TABITHA.

Plaintiffs' second assignment of error challenges only the trial court's reliance on *Ingle v. Clinchfield R.R. Co.*, 169 Va. 131 (1937). That assignment states that *Ingle* "addressed the supervision of a child's behavior whereas this case involves Appellee-Defendant's own conduct in allowing and assisting an eight-year old child to engage in the potentially dangerous activity of riding Defendant's ATV." (JA 367). Again, the question whether Hylton "allowing" Tabitha to ride the ATV created a duty of care has been answered-–because Moseley did not transfer a duty of supervision, Hylton did not have a duty to Tabitha. Merely permitting what Tabitha's father had already allowed did not create a duty that burdened Hylton with Tabitha's supervision. Nor did Hylton's action in "assisting" Tabitha by providing basic instructions and a helmet create an independent duty absent some nexus to the accident.

Even so, *Ingle* supports the trial court's decision. In that case, a child had been walking along train tracks under her mother's supervision when

the child stepped in front of the train. 169 Va. at 135. The train sounded the whistle and applied its brakes, but could not stop, and the child was killed. *Id.* In affirming the trial court's ruling striking the case after the close of the evidence, this Court observed that "it would be demanding too much of the railroad company to require that it should have, though its agents, foreseen peril in the situation." *Id.* at 140. Rather, the child's mother "because of her superior knowledge of the propensities and habits of her children was in a better position [than the defendant] to judge whether" she was in danger by walking near the train tracks. *Id.* at 139-140.

This Court took a similar view of parental supervision in *Wagman v. Boccheciampe*, 206 Va. 412 (1965). In that landlord-tenant case, a tenant's child was playing on a handrail in an outside staircase when she fell and broke her arm. *Id.* at 415. The landlord had previously warned the child and her friends not to play there. *Id.* In rejecting the plaintiff's contention that the landlord was negligent in failing to notify the child's parents that she was playing in a dangerous place, this Court noted that there was no rule of law "which required the defendants to notify the parents that their child was doing something she ought not to be doing." *Id.* at 418. Rather, this Court held that supervision of the child was the parents' duty:

> It was the duty of the parents, both at law and under the terms of the lease, to provide that surveillance of their child's activities which they now seek to impose as an obligation upon the defendants. The parents will not be permitted to shift that burden to the defendants.

Id. Like the landlord in *Wagman*, Hylton had no duty to notify Moseley that his child was doing something "she ought not to be doing." *Id.*

Application of the principles in *Ingle* and *Wagman* do not, as Plaintiffs contend, attempt to impute Moseley's negligence to Tabitha. Instead, it simply recognizes the legal principle that controls the outcome of this case – that no transfer of the parental duty of care and supervision occurred. In short, there is no recognized cause of action in Virginia for failure to supervise a child under these facts.

5. THERE ARE ALTERNATIVE GROUNDS TO AFFIRM THE TRIAL COURT'S DECISION THAT HYLTON DID NOT OWE TABITHA A DUTY OF CARE OR SUPERVISION.

There is an alternative basis for affirming the trial court's decision. The parties fully briefed and argued the question of recreational use immunity, as set forth in Code § 29.1-509. Although Hylton moved to strike on grounds of recreational use immunity as a "back up position," (JA 357), the trial court did not explicitly rule on this motion because it was not necessary. (JA 359-361). Because Hylton was entitled to statutory

immunity for simple negligence and he was not grossly negligent, there is an additional reason why Plaintiffs failed to establish Hylton's negligence. The trial court's decision, then, should be affirmed on this alternative basis.

A. Hylton is entitled to immunity for simple negligence under Virginia's recreational use immunity statute.

1. The recreational use immunity statute has broad application to achieve its purpose of opening land to public recreational use.

In Virginia, as in most states, a landowner has immunity for simple negligence arising from the recreational use of his property, unless he charges a fee for that use. *Callahan v. Fairfax County Park Auth.*, 32 Va. Cir. 212, 213 (Fairfax Co. 1993) (most states, like Virginia, have adopted some form of the Model Recreational Use Statute). "The intent of recreational statutes was to limit the liability of private landowners." Centner, T., *Revising State Recreational Use Statutes to Assist Private Property Owners and Providers of Outdoor Recreational Activities*, 9 Buff. Envt'l L.J. 1, 2 (2001), found at JA 204. "The clear legislative intent of Code § 29.1-509 is to encourage the opening of private land to public recreational use." *City of Virginia Beach v. Flippen*, 251 Va. 358, 362 (1996). This statute has broad application to achieve its purpose. *Id.* It applies here to immunize Hylton from Tabitha's claims arising out of the recreational use of his property.

Virginia's recreational use statute provides, in pertinent part:

> A landowner shall owe no duty of care to keep land or premises safe for entry or use by others for hunting, fishing, trapping, camping, participation in water sports, boating, hiking, rock climbing, sightseeing, hang gliding, skydiving, horseback riding, foxhunting, racing, bicycle riding or collecting, gathering, cutting or removing firewood, for any other recreational use, or for use of an easement. . . . No landowner shall be required to give any warning of hazardous conditions or uses of, structures on, or activities on such land or premises to any person entering on the land or premises for such purposes.

Va. Code § 29.1-509(B).[7] The statute further provides:

> Any landowner who gives permission, express or implied, to another person to . . . ride [or] . . . engage in races . . . does not thereby:
>
> 1. Impliedly or expressly represent that the premises are safe for such purposes; or
>
> 2. Constitute the person to whom such permission has been granted an invitee to whom a duty of care is owed; or
>
> 3. Assume responsibility for or incur liability for any intentional or negligent acts of such person or any other person.

Va. Code § 29.1-509(C).

a. The plain language of the recreational use immunity statute applies to the facts of this case.

This statute clearly and unambiguously provides that: 1) a landowner owes no duty of care to keep his land or premises safe for recreational activities; 2) a landowner is not required to give any warning of hazardous

[7] A copy of this statute is attached.

uses of his property or hazardous activities on such premises; and 3) a landowner who has given permission to another person to ride or race on his property makes no representations as to the safety of his property and assumes no duty of care by virtue of giving that permission. Consequently, as it relates to this case, Hylton did not owe Tabitha any duty of care for her recreational use of his property, Tabitha did not become an invitee to whom a duty of care was owed when Hylton allowed her to use the ATV, and Hylton had no duty to warn Tabitha of a hazardous recreational activity or use on his premises. This statute, then, defeats Plaintiffs' simple negligence claims against Hylton.

Plaintiffs first contend that the statute does not apply because this case does not concern the condition or ownership of land or the usage of private land for public enjoyment. (Opening Br., p.25-26). They also contend that ATV riding is not a recreational activity under the statute. (*Id.* at 30-31). Finally, they contend that the opening of land to family and friends for social gatherings does not support the policy of the statute. (*Id.* at 26). These arguments are plainly wrong. They depend upon a narrow construction of the statute that ignores both its plain language and its broad purpose.

i. The statute immunizes landowners for claims arising from the use of their property for recreational purposes.

First, the statute applies to the use of property for recreational purposes, and is not limited to providing immunity for claims relating solely to the condition of the premises. No provision of the statute limits its application to situations where a defect or condition of the property is at issue. Instead, as the statute says, it is the use of the property for recreational activities that triggers immunity. Va. Code § 29.1-509(B) and (C). As the plain language of the statute shows, immunity applies when a landowners' property is used for a recreational purpose, not just when there is a defect in a condition of his property.

Plaintiffs' argument also ignores a critical part of the statutory language in subsection B. The second sentence of subsection B, which was omitted from Plaintiffs' brief, states that: "No landowner shall be required to give any warning of hazardous conditions or uses of, structures on, or activities on such land or premises to any person entering on the land or premises for such purpose." This provision plainly reaches the recreational *activities* engaged in on the land without reference to the condition of the land itself. It also reaches *structures* on the land, again without limiting the immunity to a hazardous condition of the land itself. Thus, Hylton was not required to give any warning of potentially hazardous

recreational *activities* – including ATV riding – that took place on his property.

ii. ATV riding is a recreational activity under the statute.

Plaintiffs next contend that the statute does not apply to ATV riding.

This Court applies the "plain meaning" rule to the interpretation of statutes. *Evans v. Evans*, 280 Va. 76, 82 (2010). The plain meaning of "recreational" means of, or relating to, recreation.[8] The word "recreation" means "(1) refreshment by means of some pastime, agreeable exercise, or the like; (2) a pastime, diversion, exercise, or other resource affording relaxation and enjoyment."[9] Plainly, ATV riding is a recreational activity, just like bike riding, hiking, skiing or motorcycle riding. It is a pastime that enables riders to enjoy the outdoors, relax and have fun.

Although ATV riding is not specifically included in subsection B's list of enumerated recreational activities, it is nevertheless encompassed within that listing as "any other recreational use." The statute applies to the following recreational activities: "hunting, fishing, trapping, camping,

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[8] www.dictionary.reference.com/browse/recreational.

[9] www.dictionary.reference.com/browse/recreation. Plaintiffs argue that "recreational" means "fun, entertaining, and enjoyable." (Opening Br., p.30).

participation in water sports, boating, hiking, rock climbing, sightseeing, hang gliding, skydiving, horseback riding, foxhunting, racing, bicycle riding or collecting, gathering, cutting or removing firewood, *for any other recreational use*." Va. Code § 29.1-509(B) (emphasis added). Under the doctrine *ejusdem generis*, the general phrase "any other recreational use" must look for its meaning to the specific items which precede it. *Martin* v. *Commonwealth,* 224 Va. 298, 301 (1982) (when a particular class of things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words). Thus, the general statutory language, "any other recreational use" must be restricted in its meaning to uses analogous to the specific words used.

All of the specific recreational uses listed in subsection B involve outdoor activities, whether related to exercise, or relaxation and enjoyment. ATV riding is an outdoor activity that allows the rider to appreciate his natural surroundings and have fun. It is analogous to the other recreational activities enumerated in subsection B. In fact, the General Assembly has expressly recognized ATV riding as a "recreational purpose" in a similar context. *See* Va. Code §§ 15.2-6017, 6024 (defining "all-terrain vehicle riding" as one of many "recreational purposes" for which landowners do not

owe a duty of care pursuant to the Southwest Regional Recreation Authority statutes). Therefore, ATV riding is included within the term "any other recreational use."

Nevertheless, ATV riding is also included as a covered activity in subsection C. Code § 29.1-509(C)(2) states that a landowner who gives permission to another person to "ride" or "engage in races" does not owe a duty of care to that other person. Plainly, Tabitha was "riding" the ATV when she was injured.

Plaintiffs, however, argue that ATV riding is "inherently dangerous," and, therefore, not recreational. (Opening Br., p.30). Even if Plaintiffs are correct that ATV riding is "inherently dangerous," subsection B's list of recreational activities includes other potentially dangerous activities that can result in serious injury or death, such as water sports, skydiving, rock climbing, and hang gliding. As there is no "inherently dangerous" exception to the statute, and other potentially dangerous activities are expressly included in the statute, ATV riding is not excluded simply because it may involve some risk of injury.

Contrary to the Plaintiffs' suggestion, recreational use immunity is expansive and applies to a wide variety of "recreational uses." *E.g.*, *Hall v. United States*, No. 2:02CV00096, 2003 U.S. Dist. LEXIS 6162, at *9 n.2

(W.D. Va. Apr. 15, 2003)[10] (observing that recreational use immunity statute would apply to a woman injured while fishing); *Hevener v. Perciline*, No. CL09-2393 (Roanoke City, May 26, 2010)[11] (holding that trampoline use is a recreational activity under the recreational use immunity statute); *Harris v. Moeller*, No. CL98009369-00 (Bedford Co. 1999)[12](finding that recreational use immunity statute applies to death of child who fell from dock at Smith Mountain Lake); *Sheppard v. Fairfax Co. Park Auth.*, 51 Va. Cir. 152, 156 (Fairfax Co. 1999)[13] (recreational use immunity applies to injury when a swing broke); *Morgan v. Commonwealth*, 34 Va. Cir. 462, 464-65 (Albemarle Co. 1994)[14] (applying recreational use immunity to a suit brought by an injured softball player); *Callahan v. Fairfax Co. Park Auth.*, 32 Va. Cir. 212, 215 (Fairfax Co. 1993)[15] (recreational use immunity applies to an injury sustained by a jogger); *Hiett v. Barcroft Beach, Inc.*, 18 Va. Cir. 315, 328-29 (Fairfax Co. 1989)[16] (recreational use immunity applies to injury sustained in triathlon on defendants' property).

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[10] A copy of this case is found at JA 57.
[11] The relevant pleadings are included at JA 61.
[12] This case is included at JA 23.
[13] This case is included at JA 46.
[14] This case is included at JA 40.
[15] This case is included at JA 43.
[16] This case is included at JA 49.

In short, the statute contemplates that landowners have immunity for injuries caused by the recreational activity of ATV riding on their property, provided no fee is charged.

iii. Application of the recreational use immunity statute here advances its purpose.

Finally, Plaintiffs argue that the legislature did not intend the statute to be used to immunize landowners or homeowners for any injury that occurs while someone is engaged in a recreational activity on their property. (Opening Br., p.29). Further, they argue that the statute does not apply to private social gatherings. (*Id.*). Plaintiffs' reading of the statute once again overlooks its plain language and purpose.

The purpose of the statute is to encourage the opening of private lands for public recreational uses, provided that no fee is charged. *Flippen*, 251 Va. at 363. That is what the Hyltons did. They invited friends, family, neighbors and "whoever shows up" to their property. (JA 298, 324). In fact, Moseley ended up at the Hyltons that day because someone else (Jessica) brought him. (JA 324). Clearly, this was not a restricted or private event.

Moreover, the fact that recreational activities took place in the context of a social setting is irrelevant. There is no "social event" exception to this broadly-worded statute. Equally important, this Court must construe

broadly the type of "landowners" who are covered by the statute. *Flippen*, 251 Va. at 362. Landowners entitled to the protection of this statute include "the legal title holder, lessee, occupant or any other person in control of land or premises." Va. Code § 29.1-509(A). Landowners who are hosting social events with recreational activities are not excluded.

In short, Tabitha's ATV riding at the time of her accident was a recreational use of Hylton's property and therefore Hylton did not—and could not—have a duty of ordinary care to her.

B. Hylton was not guilty of gross negligence.

Although recreational use immunity bars only Tabitha's simple negligence claims, she did not prove any negligence by Hylton that rises to the level of gross negligence. Therefore, Tabitha failed to prove either of her negligence claims.

Gross negligence is defined as "a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person. This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness." *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 487 (2004). Gross negligence can be found when there is a complete want of even scant care. *Compare*

City of Lynchburg v. Brown, 270 Va. 166, 170 (2005) (no gross negligence where there was no evidence of a total disregard of precautions relating to a bleacher) *and Volpe v. City of Lexington*, 281 Va. 630, 640 (2011) (gross negligence could be found where city took no safety measures at all for its invitees swimming in its river near a dam that created a risk of downing from a hidden hydraulic). In short, gross negligence is "a form of recklessness or a total disregard of all precautions, an absence of diligence, or lack of even slight care." *Chapman v. City of Virginia Beach*, 252 Va. 186, 191 (1996) (gross negligence found when City failed to fix a broken gate after receiving three complaints about it).

Plaintiffs' evidence did not establish a complete want of care by Hylton. Indeed, Hylton gave Tabitha basic instructions on the use of the ATV, provided a helmet to wear to protect her head, and ensured that her father gave his express permission for her to ride. These facts, even viewed in the light most favorable to Tabitha, cannot establish that Hylton completely neglected Tabitha's safety. Having shown her how to operate the ATV and making a helmet available, Hylton plainly took some precautions, and he is not guilty of utter disregard of Tabitha's safety. Although these actions do not mean that Hylton had assumed a legal duty

for Tabitha's care, they do show that he did not completely disregard her safety. Therefore, he is not grossly negligent.

C. The trial court's decision should be affirmed under the "right result, wrong reason" doctrine.

As discussed, the trial court considered, but did not rule on, Hylton's "back up" recreational use immunity argument. (JA 349, 357-358). That argument, however, provides an alternative basis to affirm the trial court's decision. Therefore, if this Court believes that the trial court erred in sustaining the motion to strike on the basis that it did, the "right result, wrong reason" doctrine applies to affirm that decision on different grounds supported by the record.

This Court has stated: "'[w]e do not hesitate, in a proper case, where the correct conclusion has been reached but the **wrong** reason given, to sustain the **result** and assign the right ground.'" *Banks v. Commonwealth*, 280 Va. 612, 617 (2010) (quoting *Eason v. Eason*, 204 Va. 347, 352 (1963)). Thus, this Court can affirm the decision below on the recreational use immunity statute if the record supports an alternative ground, no further evidence is necessary to support that ground, and the appellant was on notice of the issue in the trial court. *Lynnhaven Dunes Condo. Ass'n. v. City of Virginia Beach*, 284 Va. 661, 670 (2013).

All the evidence necessary for the trial court's resolution of the recreational use issue was before that court.[17] The evidence shows the recreational use of Hylton's property on the day of the accident and in general, (JA 300, 320-321, Add., p.142) that Hylton did not charge a fee for use of his property, (JA 324-325, 327), and that Tabitha was engaging in a recreational use of the property when she was injured. (Add., p.143). No additional facts were needed to determine the applicability of the statute to Tabitha's claims. Further, Plaintiffs were on notice of this issue and had twice briefed and argued the issue to the trial court.

The same analysis applies to the gross negligence claim. Plaintiffs had the burden to prove that Hylton was grossly negligent, they put on their entire case and rested, and the record is complete to determine whether they proved gross negligence.

Therefore, if this Court determines that the trial court should not have sustained the motion to strike on parental supervision grounds, it should nevertheless affirm that decision on the basis of recreational use immunity

[17]The question whether Hylton is entitled to recreational use immunity involves, at least in part, an interpretation of the statute, which presents a question of law. *See Jones v. Williams*, 280 Va. 635, 638 (2010) (statutory interpretation is a question of law for the court). Therefore, a complete evidentiary record is only one part of the legal analysis.

and no gross negligence.[18] *See, e.g., Byler v. Virginia Elec. & Power Co.*, 284 Va. 501, 509 (2013) (applying the "right result, wrong reason" rule to affirm the trial court's decision).

[18] Similarly, the judgment may also be affirmed on grounds that Hylton was not negligent, that any negligence by Hylton was not a proximate cause of Tabitha's injury, or that Moseley's negligence was a superseding cause. *E.g., Gregory v. Hawkins*, 251 Va. 471, 475 (1996) (if reasonable minds could not differ as to the outcome, the issue of proximate cause should be decided by the court, not the jury); *Acme Markets, Inc. v. Remschel*, 181 Va. 171, 179 (1943) (whether a defendant is negligent is a mixed question of fact and law, and where the facts are not controverted, the question of negligence is a question of law). Here, Plaintiffs put on their case and rested, and the facts were largely undisputed.

CONCLUSION

Accordingly, the trial court's decision and judgment should be affirmed, and final judgment entered in favor of Defendant Hylton.

DANIEL HYLTON

By:_____*Monica Taylor Monday*_____

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CERTIFICATE OF SERVICE

I hereby certify as follows:

That on this 27th day of June 2014, the correct number of true and accurate copies of this Brief in Appellee have been mailed expense pre-paid to the Supreme Court of Virginia by certified mail, and the correct number of copies have been served, by first class mail, upon counsel for the appellant: Bettina C. Altizer (VSB No. 31753) and Terri Welch Luzynski (VSB No. 26319), Altizer Law, P.C., 324 Washington Avenue, SW, Roanoke, VA 24016, whose telephone number is 540-345-2000, whose facsimile number is 540-345-4490, and whose email is baltizer@altizerlaw.com and tluzynski@altizerlaw.com. Additionally, one electronic version of the brief has been filed with the Court and served on opposing counsel. This brief complies with the page limits set forth in the Rules of the Supreme Court of Virginia.

_____*Monica Taylor Monday*_____

Attachment

1 Q Do you have rules that apply before
2 those kids can ride?
3 A First of all, like I said, they have to
4 wear a helmet. The number one rule has always been I
5 need the parent's permission.
6 Q Why do you insist upon the parent's
7 permission?
8 A Because I do not know the ability of
9 each child to ride a four-wheeler. I don't know
10 anything about children's capabilities but mine.
11 Q So you rely upon the parent to determine
12 whether his or her child can ride?
13 A Yes.
14 Q When Tabitha came and asked could she
15 ride the red ATV, you told her to get her father's
16 permission, correct?
17 A Yes, referred her to her father.
18 Q And did you hear her ask Gene Moseley
19 for permission?
20 A Yes.
21 Q What did she say?
22 A Dad, can I ride the four-wheeler?
23 Q What did Gene say?
24 A Yes.

1 Q What did you say?
2 A You sure?
3 Q Who did you say that to?
4 A Gene, you all right? Yeah, I think she
5 can handle that type of thing.
6 Q Gene said what?
7 A I think she can handle that type of
8 thing. I don't remember exact words or anything like
9 that, but I do vaguely remember something.
10 Q At the time Tabitha was eight and your
11 son was six?
12 A Correct.
13 Q Was Tabitha larger than your son?
14 A Yes.
15 Q Had you previously made the
16 determination that your son was physically large
17 enough to operate the ATV?
18 A Yes.
19 Q And Tabitha was bigger than he was?
20 A Yes.
21 Q When Tabitha asked for permission to
22 operate the ATV, did you consent to take over the
23 duty of supervision of her?
24 A No, sir.

1 Q Who had that duty?
2 A The parent.
3 Q Who was making the decision as to what
4 was safe and wasn't safe for Tabitha?
5 A Gene Moseley.
6 Q Did Gene indicate to you at any time
7 that he was not capable of carrying out that duty?
8 A He did not.
9 Q How long have you known Gene?
10 A Most of my life.
11 Q Did you go to school with him?
12 A Yes, sir.
13 Q Do you know anything about his history
14 with ATV's?
15 A I have vaguely seen him on ATV's
16 different times in my life.
17 Q Have you ever met Tabitha before in your
18 life?
19 A I did not.
20 Q Let me show you some photographs that I
21 have premarked as exhibits in this case. Number 1,
22 is that your green ATV and Tristan's ATV?
23 A Yes, it is.
24 MR. HARBERT: I move it into evidence.

1 THE COURT: Any objection?
2 MS. ALTIZER: No, sir.
3 THE COURT: Without objection, it is
4 received and marked Defendant's 1.
5
6 (Photograph, was marked
7 Defendants Exhibit Number 1, and was
8 entered into the Proceedings.)
9
10 BY MR. HARBERT:
11 Q And exhibits that I have premarked,
12 Defendants 2, 3, 4, 5, 6, and 7, are these
13 photographs of what I refer to as Daniel's acre?
14 A Where?
15 Q At the bottom?
16 A Yes, that's Daniel's acre at the bottom.
17 Q Is there a hill located anywhere on that
18 property?
19 A There is not.
20 MR. HARBERT: Your Honor, I move
21 Defendant's Exhibits 2 through 7 into
22 evidence.
23 THE COURT: Any objection?
24 MS. ALTIZER: No, sir.

1 THE COURT: Without objection, these
2 documents are received and marked individually
3 as Defendant's 2, 3, 4, 5, 6 and 7.
4
5 (Photographs are marked
6 Defendants Exhibit Number 2-7, and are
7 entered into the Proceedings.)
8
9 BY MR. HARBERT:
10 Q When Casey rode the ATV on the lap
11 around the field, how fast did she go?
12 A Ten miles an hour.
13 Q When Tabitha took off on the ATV, how
14 fast did she go?
15 A Five to ten miles an hour, similarly
16 back and forth.
17 Q You were asked a number of questions
18 about why you didn't inquire of Gene what Tabitha's
19 experience with ATV's was or talk to Gene about
20 warnings on the ATV or talk to Gene about
21 instructions as to how to operate the ATV. How come
22 you didn't make those inquiries?
23 A I assumed that Gene understood his
24 daughter's ability to ride.

1 Q Did he ever indicate to you that she was
2 not capable of riding?
3 A He did not.
4 Q When Tabitha asked Gene if she could
5 ride and Gene said yes and you all had your exchange
6 of words, where was Gene?
7 A Six foot from the four-wheeler, six
8 to eight foot, somewheres around there.
9 Q And then Tabitha came over to the
10 four-wheeler?
11 A Yes.
12 Q What did Gene do then?
13 A I don't remember, but I believe he put
14 his daughter on the four-wheeler.
15 Q Did you put Tabitha on the four-wheeler?
16 A I did not.
17 Q Who put the helmet on Tabitha?
18 A I believe I gave her the helmet and
19 assisted some.
20 Q When you did that, where was Gene
21 standing?
22 A I believe he was on the other side
23 helping with the helmet.
24 Q On the other side of the ATV?

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Citation: **VA. CODE ANN. 29.1-509**

Va. Code Ann. § 29.1-509

CODE OF VIRGINIA
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*** Current through the 2014 Regular Session and Acts 2014, Sp. Sess. I, c. 1, of the General Assembly. ***
*** Annotations current through April 3, 2014. ***

TITLE 29.1. GAME, INLAND FISHERIES AND BOATING
CHAPTER 5. WILDLIFE AND FISH LAWS
ARTICLE 1. GENERAL PROVISIONS

GO TO CODE OF VIRGINIA ARCHIVE DIRECTORY

Va. Code Ann. § 29.1-509 (2014)

§ 29.1-509. Duty of care and liability for damages of landowners to hunters, fishermen, sightseers, etc

A. For the purpose of this section:

"Fee" means any payment or payments of money to a landowner for use of the premises or in order to engage in any activity described in subsections B and C, but does not include license fees, insurance fees, handling fees, transaction fees, administrative fees, rentals or similar fees received by a landowner from governmental, not-for-profit, or private sources, or payments received by a landowner for rights of ingress and egress or from incidental sales of forest products to an individual for his personal use, or any action taken by another to improve the land or access to the land for the purposes set forth in subsections B and C or remedying damage caused by such uses.

"Land" or *"premises"* means real property or right-of-way, whether rural or urban, waters, boats, private ways, natural growth, trees, railroad property, railroad right-of-way, utility corridor, and any building or structure which might be located on such real property, waters, boats, private ways and natural growth.

"Landowner" means the legal title holder, any easement holder, lessee, occupant or any other person in control of land or premises, including railroad rights-of-way.

"Low-head dam" means a dam that is built across a river or stream for the purpose of impounding water where the impoundment, at normal flow levels, is completely within the banks, and all flow passes directly over the entire dam structure within the banks, excluding abutments, to a natural channel downstream.

B. A landowner shall owe no duty of care to keep land or premises safe for entry or use by others for hunting, fishing, trapping, camping, participation in water sports, boating, hiking, rock climbing, sightseeing, hang gliding, skydiving, horseback riding, foxhunting, racing, bicycle riding or collecting, gathering, cutting or removing firewood, for any other recreational use, for ingress and egress over such premises to permit passage to other property used for recreational purposes or for use of an easement granted to the Commonwealth or any agency thereof or any not-for-profit organization granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code to permit public passage across such land for access to a public park, historic site, or other public recreational area. No landowner shall be required to give any warning of hazardous conditions or uses of, structures on, or activities on such land or premises to any person entering on the land or premises for such purposes, except as provided in subsection D. The provisions of this subsection apply without regard to whether the landowner has given permission to a person to use their land for recreational purposes.

C. Any landowner who gives permission, express or implied, to another person to hunt, fish, launch and retrieve boats, swim, ride, foxhunt, trap, camp, hike, bicycle, rock climb, hang glide, skydive, sightsee, engage in races, to collect, gather, cut or remove forest products upon land or premises for the personal use of such person, or for the use of an easement or license as set forth in subsection B does not thereby:

1. Impliedly or expressly represent that the premises are safe for such purposes; or

2. Constitute the person to whom such permission has been granted an invitee or licensee to whom a duty of care is owed; or

3. Assume responsibility for or incur liability for any intentional or negligent acts of such person or any other person, except as provided in subsection D.

D. Nothing contained in this section, except as provided in subsection E, shall limit the liability of a landowner which may otherwise arise or exist by reason of his gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. The provisions of this section shall not limit the liability of a landowner which may otherwise arise or exist when the landowner receives a fee for use of the premises or to engage in any activity described in subsections B and C. Nothing contained in this section shall relieve any sponsor or operator of any sporting event or competition including but not limited to a race or triathlon of the duty to exercise ordinary care in such events. Nothing contained in this section shall limit the liability of an owner of a low-head dam who fails to implement safety measures described in subsection F.

E. For purposes of this section, whenever any person enters into an agreement with, or grants an easement or license to, the Commonwealth or any agency thereof, any locality, any not-for-profit organization granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code, or any local or regional authority created by law for public park, historic site or recreational purposes, concerning the use of, or access over, his land by the public for any of the purposes enumerated in subsections B and C, the government, agency locality, not-for-profit organization, or authority with which the agreement is made shall indemnify and hold the landowner harmless from all liability and be responsible for providing, or for paying the cost of, all reasonable legal services required by any person entitled to the benefit of this section as the result of a claim or suit attempting to impose liability. Any action against the Commonwealth, or any agency thereof, for negligence arising out of a use of land or railroad rights-of-way covered by this section shall be subject to the provisions of the Virginia Tort Claims Act (§ 8.01-195.1 et seq.). Any provisions in a lease or other agreement which purports to waive the

benefits of this section shall be invalid, and any action against any county, city, town, or local or regional authority shall be subject to the provisions of § 15.2-1809, where applicable.

F. Any owner of a low-head dam may mark the areas above and below the dam and on the banks immediately adjacent to the dam with signs and buoys of a design and content, in accordance with the regulations of the Board, to warn the swimming, fishing, and boating public of the hazards posed by the dam. Any owner of a low-head dam who marks a low-head dam in accordance with this subsection shall be deemed to have met the duty of care for warning the public of the hazards posed by the dam. Any owner of a low-head dam who fails to mark a low-head dam in accordance with this subsection shall be presumed not to have met the duty of care for warning the public of the hazards posed by the dam.

HISTORY: Code 1950, §§ 8-654.2, 29-130.2; 1962, c. 545; 1964, c. 435; 1977, c. 624; 1979, c. 276; 1980, c. 560; 1982, c. 29; 1983, c. 283; 1987, c. 488; 1988, c. 191; 1989, cc. 26, 500, 505; 1990, cc. 799, 808; 1991, c. 305; 1992, c. 285; 1994, c. 544; 2007, c. 664; 2010, c. 43.

NOTES: EDITOR'S NOTE. --Acts 2007, c. 664, cl. 2, provides: "That, upon passage of this act and prior to its effective date [January 1, 2008], the Department of Game and Inland Fisheries shall work with the Department of Conservation and Recreation to provide notice of this act to all owners of impoundments for which complete contact information is available within the Department of Conservation and Recreation's Dam Safety Inventory Database."

THE 2007 AMENDMENTS. --The 2007 amendment by c. 664, effective January 1, 2008, added the paragraph defining "Low-head dam" in subsection A; added the last sentence in subsection D; and added subsection F.

THE 2010 AMENDMENTS. --The 2010 amendment by c. 43 deleted "of this section" following "subsections B and C" twice in the paragraph defining "Fee" in subsection A and in subsections D and E; in subsection A, inserted "license fees, insurance fees, handling fees, transaction fees, administrative fees," and "not-for-profit, or private" in the paragraph defining "Fee," inserted "or right-of-way" and "railroad property, railroad right-of-way, utility corridor" in the paragraph defining "Land" or "premises," and inserted "any easement holder" and "including railroad rights-of-way" in the paragraph defining "Landowner"; in subsection B, inserted "for ingress and egress over such premises to permit passage to other property used for recreational purposes" and "or any not-for-profit organization granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code" in the first sentence and added the third sentence; in subsection C, inserted "bicycle" and "or license" in the introductory language and "or licensee" in subdivision 2; and in subsection E, substituted "any locality, any not-for-profit organization granted tax-exempt status under 501(c)(3) of the Internal Revenue Code, or any local" for "any county, city, or town or with any local," "agency, locality, not-for-profit organization, or authority" for "agency, county, city, town, or authority," and "shall indemnify and hold the landowner harmless" for "shall hold a person harmless" in the first sentence, and inserted "or railroad rights-of-way" in the third sentence.

RESEARCH REFERENCES. --Friend's Virginia Pleading and Practice (Matthew Bender). Chapter 35 Limitation of Actions: Statute of Limitations; Immunities; Res Judicata and Collateral Estoppel. § 35.02 Immunities. Charles E. Friend.
Virginia Forms (Matthew Bender). No. 16-583 License to Hunt on Property for a Specified Period.

MICHIE'S JURISPRUDENCE REFERENCES. --For related discussion, see 9A M.J. Game and Game Laws, § 1; 13B M.J. Negligence, §§ 17, 18; 14A M.J. Nuisances, § 13.

THIS SECTION SETS UP CERTAIN PREREQUISITES BEFORE IT BECOMES APPLICABLE: (1) the person must come upon the land to hunt, swim, trap, camp, hike, or sightsee; and (2) no consideration must have been paid by the user to the landowner. Hamilton v. United States, 371 F. Supp. 230 (E.D. Va. 1974) (decided under former § 8-654.2).

Existence of the statute's limitation of liability provision must be a landowner's primary motivation for opening its land to the public in order for the statute to apply was incorrect; there was simply nothing in the statute that supported such a requirement. Rather, the only two pre-requisites listed in the statute were the requirement that the landowner not receive a fee in exchange for use of its property and the requirement that the property be used for a recreational purpose; because both of these pre-requisites were met, Virginia's recreational land use statute applied. Lutfi v. United States, 2013 U.S. App. LEXIS 8322 (4th Cir. Apr. 24, 2013).

TAXPAYER WHO PAYS TAXES IS NOT PAYING A CONSIDERATION FOR THE USE OF LAND OWNED BY THE UNITED STATES. Hamilton v. United States, 371 F. Supp. 230 (E.D. Va. 1974) (decided under former § 8-654.2).

THE CITY OF VIRGINIA BEACH WAS A "PERSON" in control of the land in question, as contemplated by this section and was entitled to the immunity extended by it for the activities it undertook to public access to the beach adjacent to the stairway where plaintiff fell. City of Va. Beach v. Flippen, 251 Va. 358, 467 S.E.2d 471 (1996).

DEFINITION OF "SIGHTSEEING." --Visitor's visit to the federal memorial fit within the definition of sightseeing; simply put, the visitor and his relatives were going to see the memorial, a thing regarded as worth seeing. Notwithstanding his laudable objective of imparting American values on his visiting young relative, the visitor's trip to the memorial fit well within the parameters of the term sightseeing -- he went to the memorial to see a sight of interest -- thus, Virginia's recreational land use statute governed. Lutfi v. United States, 2013 U.S. App. LEXIS 8322 (4th Cir. Apr. 24, 2013).

COUNTY WAS NOT JUDICIALLY ESTOPPED. --County was not judicially estopped to deny that a storm water detention easement was for recreational purposes under § 29.1-509 as the county merely accepted the insurer's claims for the purpose of a demurrer. Peerless Ins. Co. v. County of Fairfax, 274 Va. 236, 645 S.E.2d 478, 2007 Va. LEXIS 78 (2007).

NO FINDING OF GROSS NEGLIGENCE. --There was no evidence that the United States made a deliberate decision to ignore the allegedly dangerous conditions that were present in the parking lot, nor was there any evidence that the United States consciously disregarded these conditions; at most, the evidence established that the United States was aware that the lights were out in the parking lot for approximately two weeks before the incident and that the United States had taken some unsuccessful steps to correct the issue. Though this might amount to ordinary negligence, it did not amount to the sort of egregious conduct or utter disregard of prudence necessary to establish gross negligence under Virginia law. Lutfi v. United States, 2013 U.S. App. LEXIS 8322 (4th Cir. Apr. 24, 2013).

OPINIONS OF THE ATTORNEY GENERAL

INDEMNIFICATION OF LANDOWNERS. --Landowners who receive a fee from a political subdivision for the use of their property are covered by the indemnification provisions of subsection E. See opinion of Attorney General to Delegate Charles E. Phillips, 05-008 (3/29/05).

INDEMNIFICATION OF POLITICAL SUBDIVISIONS. --Political subdivisions are not covered by the indemnification provisions of subsection E except when they enter into an arrangement with an agency of the Commonwealth, although political subdivisions which control private property by lease or contract in order to provide free public recreational use are entitled to the benefit of reduced liability under the provisions of subsections B and C. See opinion of Attorney General to Delegate Clarence E. Phillips, 05-008 (3/29/05).

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