IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 132048

TABITHA LASLEY, A MINOR, BY JUANITA LASLEY, HER NEXT FRIEND, AND JUANITA LASLEY, INDIVIDUALLY AND AS NATURAL PARENT, GUARDIAN AND NEXT FRIEND OF TABITHA LASLEY, A MINOR,

Appellants,

v.

DANIEL HYLTON,

Appellee.

REPLY BRIEF OF APPELLANTS

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ARGUMENT

If one accepts Appellee's argument and, consequently, the trial court's ruling, then Virginia's rule of law will permit any person to commit acts of simple and gross negligence on a child as long as the child's parent gives permission to that person to engage in such acts, whether or not the parent appreciated the dangers of the acts and whether or not, by law, the parent's permission waives his child's right to pursue a cause of action to obtain compensation from the person who caused the child's injury. This is a dangerous, irresponsible argument and holding by the trial court that is contrary to long-standing, established Virginia tort law and to the core principles, values, and public policy of negligence law in Virginia and in America.

In this case, the Botetourt County Circuit Court granted Appellee's Motion to Strike and entered summary judgment in Appellee's favor basing its decision on Ingle v. Clinchfield, 169 Va. 131, 192 S.E. 782 (1937). It entered its Final Order dated October 4, 2013, to which Appellants objected as stated in oral argument and as preserved on the record. From this Final Order, Appellants have appealed, and this Court has granted review.

A. Discussion of the Black Letter Law of Negligence in Virginia and in America

"Tort" comes from the Latin word "twisted" and the French word for wrong or injustice. See Oxford English Dictionary. It is defined as a civil wrong. Tort law provides a means of redress to right this civil wrong – for the wronged, injured individual to obtain compensation from those who have caused them injury or damage. Prosser & Keeton on the Law of Torts at p.2 (West 5th ed., 1984).

Our modern day tort law can be traced to the 19th Century; however, Justice Benjamin Cardozo and the New York Court of Appeals are credited with expanding tort liability in a number of areas, including motor vehicle tort-related issues. In Martin v. Herzog, 228 N.Y. 164, 167-8, 125 N.E. 814, 815 (1920), Justice Cardozo, commenting on the issue of whether a jury may relax the duty of a traveler who violated the statutory duty, held that a jury does not have the power to relax the duty that one traveler on the highway owes under a statute to another on the same highway. "To omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform." Id. at 168, 125. N.E. at 815.

In our case, what is our standard of diligence to which we expect our citizens to conform? Do we, as an organized society, desire a rule of law that permits a person, who knows that an activity is dangerous and actively places a child in harm's way, to commit acts of negligence on a child simply because the parent grants the child "permission" to engage in such activity, even when the parent is unaware that the activity is dangerous and places the child in harm's way? If such were the case, Justice Cardozo's *black letter law* of negligence would be abolished.

Professor William Lloyd Prosser has been an influential scholar regarding tort law and its development to present day. Professor Prosser viewed the underlying purpose of tort law as to compensate injured parties and to deter antisocial conduct. William L. Prosser, Prosser & Keeton on Torts, p. 15-20 (5th ed. 1984). A duty recognized by the law, requires a person to conform to a certain standard of conduct for the protection of others against unreasonable risk. Id. at § 30. Abolishing the legal duty of a citizen, thereby permitting that citizen to commit an act of negligence on a child when a parent gives permission for the child to engage in that dangerous act, whether or not the danger was appreciated by the parent, is not supported by our long-standing principles and the very purpose and foundation of tort law -- that is to deter conduct that does not conform to

accepted behavioral standards. There is no *black letter law* and no carved-out exception that permits anyone to commit acts of negligence and gross negligence on a child under the facts of this case. There is no Virginia case law or statute that permits Appellee to exercise *unreasonable* care, to violate basic tort law, to violate the warnings on his ATV, and to violate Tabitha's right not to be placed in harm's way and that eliminates Appellants' cause of action and right to redress against the wrongdoer who negligently caused Tabitha's injury.

In the Restatement of the Law, Torts 2d, § 284, "negligent conduct" is defined as:

> (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or
>
> (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

In our case, Appellee was aware of the danger of placing Tabitha on his ATV – to do so would expose her to the risk of severe injury or death. By virtue of his ownership and control, he had the choice to deny Tabitha's request to ride his ATV. He chose, instead, to place her in harm's way. Appellee's *act of negligence is permitting Tabitha to ride his ATV* – no reasonable person would permit a child under twelve to ride an ATV with

the warning, "NEVER permit children under age 12 to operate this ATV." And more broadly, a reasonable person would never choose to needlessly expose a child to danger that could result in severe injury or death. Our law would never permit, and does not permit, a person to needlessly expose a child to such danger.

In the Restatement of the Law, Torts 2d, § 289, a defendant who has "superior attention, perception, memory, knowledge, intelligence, and judgment" is held to a higher standard than an ordinary person. If a defendant has in fact more than the minimum of those qualities of perception, knowledge, and judgment, he is required to exercise those superior qualities in a manner reasonable under the circumstances. Id. at comment *m*.

In this case, Appellee owned the ATV, had knowledge of the ATV warnings, operated ATVs himself, and possessed the Owner's Manual. Conversely, Tabitha was *eight*, she and her father had no experience with ATVs, no knowledge of ATV's, and no knowledge of anything regarding the ATV. The black letter law required Appellee to exercise the *superior qualities* that he possessed in a manner reasonable under the circumstances. Under this case's facts, the jury could have concluded that Appellee's permission to Tabitha to ride his ATV was unreasonable under

the circumstances especially considering his superior knowledge of his ATV and Tabitha's tender age.

The Restatement of the Law, Torts 2d, § 291-298, addresses the balancing of risk of harm and benefit to society. Some conduct or acts are unreasonably dangerous even if done carefully, while other acts "are dangerous only because of the improper manner in which they are done." Id. § 297, comment *a*. "The care required is always reasonable care. This standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act, and is proportionate to it. The greater the danger, the greater the care which must be exercised." Id. at § 298, comment *b*. The Restatement comments on "firearms, explosives, . . . and electricity," which require the exercise of the closest attention and the most careful precautions. Id.

In this case, Appellee, an adult, was required to exercise *greater care* considering the inherent and explicit dangers of a child under twelve riding his ATV and considering Tabitha's tender years. The risk of harm in permitting Tabitha to ride Appellee's ATV, or such similar acts, does not provide any social value and benefit to our society. In fact, it is such very conduct, such *antisocial conduct* mentioned by Justice Cardozo, that we, as a society, wish to discourage.

B. Appellee Misquotes the Record

Appellee misquotes the Appendix and his "Addendum" that was not part of the Joint Appendix in several places, which are important to raise.

On page 7 of Appellee's Brief, Appellee states that "Moseley gave Tabitha permission to ride the green ATV around the property." A. 336. Appellee conveniently omits that a teenage boy was operating the green ATV and that Appellee was present and offered Tabitha to ride with the boy. Appellee attempts to lead this Court to conclude that Tabitha *herself* drove the green ATV, which is untrue and not before the jury. A. 335-6.

On page 8, Appellee quotes the father, Gene Moseley, as saying "I think she can handle that type of thing." This is inaccurate and an attempt to mislead this Court. Moseley never testified to that at trial. Appellee is quoting from *his own* testimony as to what he guessed Moseley said. The full quote is: "I think she can handle that type of thing. I don't remember exact words or anything like that, but I do vaguely remember something." Add. 140.

On page 10, Appellee denied that he gave permission to Tabitha to ride his ATV. This is another blatant misstatement of the Record. On page 316 of the Appendix, Appellee testified at trial:

> Q. Right. In our particular fact situation, Tabitha came to you first.

A. Yes.

Q. And asked if she could ride it?

A. Correct.

Q. And we have already covered that. I think you said yes, but go ask your father?

A. Correct.

Q. And at that point before you said go ask your dad, you could have said no?

A. Yes.

C. Appellee's Assertion that Appellee Changed the Assignment of Error is Substantively Incorrect

The Assignments of Error are the same with the exception of minor word choice changes. Appellants certainly did not intend and did not change the errors of the trial court that were initially presented in Appellants' Petition. They remain intact and substantively the same.

Appellants' First Assignment of Error does certainly identify the trial court's error when it decided as a matter of law that Appellee owed no duty to Appellants and thereby took this case from the jury. The finding of no duty as a matter of law is summary judgment by definition. Appellants added the "Motion to Strike" in their Brief First Assignment of Error as a point of clarification – but the trial court's finding, and therefore error, is the same, which is the trial court erred when it found as a matter of law that

Appellee had no duty to Appellants. That finding, and error, formed the basis of the granting of the Motion to Strike, and then this appeal, which was granted by this Court. The same is true of the Second Assignment of Error – it is substantively the same. Appellants' appealed from this Court's Final Order granting summary judgment to Appellee. From the trial transcript, the trial court relied on Ingle v. Clinchfield, 169 Va. 131, 192 S.E. 782 (1937), in granting summary judgment. Appellants' Assignment is based upon the trial court's error in relying on this case to support its holding.

D. Appellee's Assertion that the Duty to Supervise a Child Belongs to the Parent Unless Appellee Agrees Otherwise Ignores Appellee's Independent Duty of Care.

Appellee's "black letter law" argument on page 16 does not include a single Virginia citation. While it may be interesting to examine the holdings of Alabama and Arkansas courts, this is an exercise that has no relevance to this case. As Appellants argued in their Response to Hylton's Memorandum, this case is not about parental supervision or transfer of duty. A. 74-225. This case concerns issues of simple and gross negligence, and Appellee's own independent duty to exercise reasonable care. Moreover, the parent has no authority under Virginia law to waive his child's right to redress under tort law for the compensation of injuries

sustained due to the negligence of another. This case has nothing to do with the supervision of Tabitha. Tabitha did nothing wrong, and did not place herself in harm's way. Appellee actively and consciously placed Tabitha in harm's way. Appellee *alone* knew of the risk of injury to Tabitha and of the dangers presented if she operated the ATV. The parent certainly has the duty to exercise reasonable care in supervising his child, as Appellee asserts; however, Appellee also has the independent duty to exercise reasonable care. A parent's legal duty does not relieve and immunize another from his own legal, independent duty.

E. Appellee's Assertion that Appellee had No Independent Duty of Care is Erroneous.

On pages 25-6 of Appellee's Brief, Appellee misstates the Record and Appellants' argument. Appellee gave Tabitha permission to ride first. Appellee's permission was not "passive." Without Appellee's permission (and instruction), Tabitha could not have ridden his ATV. If Appellee had followed the ATV warnings, exercised reasonable care, and chosen not to place Tabitha in harm's way, the father would have never been asked to grant or to deny his permission. Appellee should have said no, and this event would not have occurred. The big red elephant in the room is the red ATV – Appellee had complete authority and control over the ATV, had

exclusive, independent, and superior knowledge of the ATV, and knew that the ATV was dangerous, specifically to children under twelve.

During the course of the argument, Appellee merely restates his argument on parental supervision, and never addresses whether or not Appellee has an independent legal duty to Tabitha. Appellee did recognize that he "engaged in [his] own ordinary, instinctual supervision" of Tabitha on page 28 of his brief. Yet he failed to recognize his independent duty to exercise reasonable care when he engaged in that "instinctual supervision." Appellee proceeds to argue *ad nauseum* "no mutual consent to transfer supervision" when the issue is Appellee's independent duty to exercise reasonable care, which is not dependent on or has anything to do with a transfer of supervision.

F. <u>Final Points Regarding the Recreational Use Statute.</u>

Risking redundancy, this case had nothing to do with Appellee's property and the use of his property. What is relevant in this case is Appellee's *ownership of the ATV*, not where the ATV wreck took place. Operating a gas powered, 70cc ATV that is a motor vehicle while the ATV owner is present, and who gives his requisite permission to operate his ATV to a child who was not age appropriate to operate his ATV, is <u>not</u> comparable to a landowner opening up his or her land to others for hiking,

camping, hunting, fishing, boating, cutting and removing firewood, etc. Homeowners do not get a free pass under the Recreational Use Statute for all injuries that happen to occur on their land because an activity could be deemed recreational by some. (In this case, this activity was far from *recreational*; but it was dangerous and reckless). Appellee, and the forces that propel him, want this Court to adopt a global expansion of the Statute by adding ATV riding, no matter the fact situation and no matter if the owner of the ATV (not necessarily the owner of the property) commits active simple and gross negligence on a child, to the list of recreational activities. The Statute, nor the applicable case law, permits such a global expansion. And neither does Virginia public policy.

CONCLUSION

For the foregoing reasons, Appellants request that this Court reverse the trial court's decision to grant Appellee's Motion to Strike Appellants' Evidence and remand this case to the trial court for a retrial on the issues of simple and gross negligence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Reply Brief of Appellants, and one electronic copy (via email or CD) have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies, and one electronic copy, have been mailed postage prepaid and/or hand-delivered on this 10th day of July, 2014, to the following:

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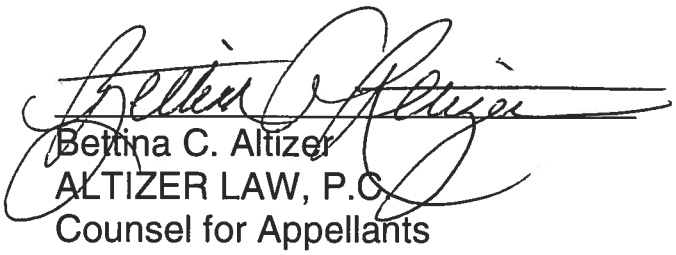
I also certify compliance with the word count in that this brief complies with the number of words permitted by the Supreme Court of Virginia, exclusive of those parts that by rule do not count toward the word limit.



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