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.

OPENING BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

I. The trial court erred in granting Appellee's Motion to Strike when it determined as a matter of law that Appellee owed no duty of reasonable care to eight-year-old Appellant, Tabitha Lasley, thereby precluding the jury from deciding the issue of whether Appellee had committed simple and/or gross negligence when Appellee gave his necessary permission to Appellant, Tabitha Lasley, to ride his ATV and then actively participated in her attempted operation of his ATV that was labeled, "NEVER permit a child under 12 to operate this ATV." A. 361.

II. The trial court erred in granting Appellee's Motion to Strike when it held that current law regarding parental supervision shielded Appellee from liability for his own independent acts of negligence, simple and gross, as Ingle v. Clinchfield R. Co., 169 Va. 131, 192 S.E. 782 (1937), addressed the supervision of a child's behavior whereas this case involves Appellee's own conduct in permitting and assisting Appellant, Tabitha Lasley, an eight-year-old child, to engage in the dangerous activity of riding Appellee's ATV. A. 361.

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

In this case, Appellants, Tabitha Lasley, a minor, and her mother, Juanita Lasley (hereinafter "Appellants") brought this personal injury claim

against Appellee, Daniel Hylton, (hereinafter "Appellee") asserting that Appellee violated simple and gross negligence law when he permitted an eight-year-old child, Tabitha, to ride his all-terrain vehicle (hereinafter "ATV") that was clearly and prominently labeled, "NEVER permit children under age 12 to operate this ATV." A. 315, 368, 371, 391, 601. While riding the ATV, Tabitha wrecked the ATV, and was injured. A. 332-3; 347.

Months prior to trial, Appellee filed a brief arguing that Appellants' case should be dismissed as a matter of law and in support presented two arguments: 1) the Virginia Recreational Use Statute, Va. Code Ann. § 29.1-509(B) (2010) (hereinafter "the Statute"), immunized Appellee from liability; and 2) because Tabitha was supervised by her father who gave permission to her to ride the ATV, Appellee had no duty of any care to Tabitha. A. 13-73. Appellants filed a responsive brief arguing that the Statue is not applicable as this incident did not pertain to the ownership, use or condition of land, but did pertain to an ATV owner permitting an eight-year-old child to operate his ATV, which had clear warnings that no child under age 12 should operate the ATV. A. 74-225. Secondly, Appellants argued that even with a father's permission and supervision, no one is permitted under Virginia law to commit independent acts of simple and/or gross negligence on a child. On February 7, 2013, the briefs were

argued before the Honorable Malfourd W. Trumbo. Both parties informed Judge Trumbo that this matter would likely be appealed by the losing party because of the issues of law. Judge Trumbo deferred his decision until trial, but then appointed retired Judge Larry Kirksey to preside at trial. Appellants filed a supplemental brief at trial with additional law and argument on the issue of parental supervision and general negligence law. A. 264-275.

The trial commenced on September 13, 2013, in the Circuit Court for Botetourt County. After the conclusion of Appellants' case, Appellee moved to strike, arguing that he owed no duty to Appellants because Tabitha's father gave his permission to Tabitha, an eight-year-old child, to ride Appellee's ATV and that because "the father did not see the peril in her using the ATV, [and] it is asking too much, in the words of the Supreme Court, to require [Appellee] to look out for that peril." A. 356. Counsel for Appellee relied upon Ingle, 169 Va. 131, 192 S.E. 782, (hereinafter "Ingle") in support of his argument, contending that Ingle was factually similar to this case.

Appellants' counsel argued that Appellee did have a duty to Appellants as he was not permitted by his own negligent acts to place a child in needless danger. A. 353. Further, despite the father's permission,

Appellee had an independent duty not to commit negligent acts on Tabitha. A. 353. Further, the issue of parental supervision is irrelevant in this case. The issue is whether or not Appellee breached his independent duty of reasonable care. A. 354.

After hearing oral argument from counsel, the trial court granted Appellee's motion to strike Appellants' case only on the issue of parental permission/supervision, ruling that when the child is accompanied by a parent, it is the duty of that parent to watch for the welfare of that child, and therefore, no one else has any duty at all to that child. A. 350. The trial court mirrored Appellee's argument and relied upon Ingle when it stated:

> 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. Accordingly, the motion to strike is sustained.

A. 361.

By dismissing the case, the trial court decided that the issue of gross negligence should not go to the jury, apparently accepting the argument of Appellee's counsel, though not explicitly ruling as such. When the trial court inquired as to the issue of gross negligence, Appellee's counsel

stated, "The gross negligence claim only comes into play if Your Honor denies my motion to strike." A. 356-57. There was no further discussion or formal decision on the issue of gross negligence. Further, the trial court did not address or decide whether the Statute was applicable in this case. A. 360-1. The court's decision was based solely upon the issue of parental supervision and upon the Ingle case. A. 360-1. The trial court struck and then dismissed Appellants' case as a matter of law. A. 361.

Appellants now appeal from the trial court's order granting Appellee's motion to strike and dismissing Appellants' case.

The trial court entered the Final Order on October 4, 2013, to which Appellants objected. A. 363. Appellants filed their notice of appeal on October 30, 2013. A. 365.

STATEMENT OF FACTS

On August 31, 2008, Appellee had a social gathering at his property in Botetourt County, Virginia. Appellant, Tabitha Lasley (hereinafter "Tabitha") her sister, and her father were among Appellee's guests.

Appellee owned a Honda TRX ATV, on which there were four pertinent warnings:

> **NEVER permit children under age 12 to operate this ATV.**

Operation of this ATV by children under the age of 12 increases the risk of severe injury or death.

READ the Owner's Manual

Follow All instructions and warnings.

A. 295, 368, 371, 382, 390-1. These warnings also appeared in the Owner's Manual.

Appellee testified that he saw these warnings on the ATV at the time of the purchase of the ATV. A. 293, 294, 296. Appellee was aware that his ATV explicitly warned that children under twelve must never ride his ATV. A. 293. Specifically, Appellee was aware of the warnings that stated: *Operation of this ATV by children under the age of 12 increases the risk of severe injury or death* and *Never permit a child under age 12 to operate this ATV*. A. 295. Appellee was aware of and familiar with the ATV warnings before Tabitha's crash. A. 293-4. Appellee was aware that Tabitha was around eight years old. A. 314. Despite his knowledge and awareness, Appellee permitted Tabitha to ride his ATV and assisted her in riding his ATV. A. 295, 314-5, 319, 338-9.

At trial, the father of Tabitha, Gene Moseley, testified that he had no experience with ATVs that he had never driven an ATV, and that Tabitha had never ridden an ATV. A. 329. Appellee was not familiar with whether or not the father had experience operating ATVs. A. 299. Appellee

testified that he did not advise the father of the various warning labels on the ATV. A. 304-5, 307. Appellee specifically never told the father that one should "Never permit a child under 12 to operate this ATV." A. 283, 294, 304.

Appellee did not review any risks of operating this ATV with Tabitha or her father. A. 304, 307. Appellee did not review the warnings or safety precautions listed on the ATV or in the Owner's Manual with the father or with Tabitha. A. 304-5, 307. There was no evidence presented at trial to show that Tabitha's father knew, directly or by reasonable inference, anything about Appellee's ATV, including its warnings, its dangers, and the risk for severe injury and death to children under age twelve.

Appellee admitted that he possessed superior knowledge of his ATV as compared to anyone else. A. 313. Tabitha's father did not have the benefit of being familiar with the warnings on the ATV and the ATV's Owner's Manual. A. 313.

Appellee testified that he owned the ATV, which gave him the right to tell Tabitha that she could not ride his ATV. A. 314. Appellee agreed that he had the exclusive and absolute right to say who could ride the ATV and who could not. A. 314-5. Appellee testified that when Tabitha came to

Appellee and asked him to ride his ATV, Appellee could have said "no" to Tabitha. A. 301, 314, 316.

Appellee's only consideration and basis for his decision to permit Tabitha to ride his ATV was that she had permission from her father. A. 306. He stated that his only safety consideration is that the child wears a helmet and shoes. A. 302-3.

Appellee agreed that he violated Honda's warning, **"Never permit a child under 12 to operate this ATV."** A. 315, 371, 391, 601. Appellee further agreed that he violated this manufacturer's warning when he knew that allowing Tabitha to ride the ATV increased the risk of severe injury or death to Tabitha. A. 315, 371, 391. Appellee agreed that to say "no" to Tabitha would have been in compliance with the manufacturer's repeated warnings to never permit a child under 12 to operate this ATV (A. 316) and that by telling Tabitha "no," he would have reduced the risk of injury and death to Tabitha. A. 317. Appellee agreed that if he had said "no" to Tabitha, Tabitha would not have been hurt. A. 317.

Almost immediately after Appellee permitted eight-year-old Tabitha to take off on the ATV, and she began to ride, Tabitha lost control, swerving for about 200 feet, until she made a sharp right and then crashed. A. 325, 341. As a result, Tabitha sustained personal injuries.

ARGUMENT

I. The trial court erred in granting Appellee's Motion to Strike when it determined as a matter of law that Appellee owed no duty of ordinary care to eight-year-old Appellant, Tabitha Lasley, thereby precluding the jury from deciding the issue of whether Appellee had committed simple and/or gross negligence when Appellee gave his necessary permission to Appellant, Tabitha Lasley, to ride his ATV and then actively participated in her attempted operation of his ATV that was labeled, "NEVER permit a child under 12 to operate this ATV." A. 361.

When granting Appellee's motion to strike Appellants' case, the trial court never considered or decided the issue of whether, as a matter of law, Appellee had or had not committed negligence. Instead, the trial court ruled that as a matter of law, Appellee had no duty whatsoever to Tabitha. A. 360-1. This was in error.

When a trial court is considering a motion to strike after the introduction of all the evidence, the principles governing consideration of evidence upon a motion to set aside a verdict as contrary to the evidence are applied. In Matney v. Cedar Land Farms, Inc., 216 Va. 932, 934, 224 S.E.2d 162, 163 (1976), the Court, quoting Walton v. Walton, 168 Va. 418, 422, 191 S.E. 768, 770 (1937), stated:

> [W]e examine the evidence to determine whether or not a verdict in behalf of the losing party can be sustained. That is, upon a careful consideration of all the evidence, if we are of opinion that reasonable men may differ on the conclusion to be reached, then it is our duty to hold that the trial court committed error in striking the evidence." In viewing the evidence we give

> the plaintiffs "the benefit of all substantial conflict in the evidence, and all fair inferences that may be drawn therefrom.

Hadeed v. Medic-24, Ltd, 237 Va. 277, 280, 377 S.E.2d 589, 590 (1989). In granting a defendant's motion to strike, a court must accept as true all the evidence favorable to the plaintiff as well as any reasonable inference a jury may draw there from which would sustain the plaintiff's cause of action. Green v. Ingram, 269 Va. 281, 290, 608 S.E.2d 917, 922 (2005), citing Upper Occoquan Sewage Auth. v. Blake Constr. Co., 266 Va. 582, 590 n.6, 587 S.E.2d 721, 725 n.6 (2003) (citing Austin v. Shoney's, Inc., 254 Va. 134, 138, 486 S.E.2d 285, 287 (1997)). A motion to strike is a severe ruling and one that should be cautiously used. "When the sufficiency of a plaintiff's evidence is challenged upon a motion to strike the evidence at the conclusion of the plaintiff's case-in-chief, the trial court should in every case overrule the motion where there is any doubt on the question." Brown v. Koulizakis, 229 Va. 524, 531, 331 S.E.2d 440, 445 (1985), quoting Williams v. Vaughan, 214 Va. 307, 309, 199 S.E.2d 515, 517 (1973). In Brown, the Court further noted that the granting of a motion to strike "should be confined and applied only to those cases in which it is conclusively apparent that plaintiff has proven no cause of action against defendant." Id., Williams v. Vaughan, 214 Va. 307, 309, 199 S.E.2d 515, 517 (1973)

(quoting from Leath v. Richmond, F. & P.R. Co., 162 Va. 705, 710, 174 S.E. 678, 680 (1934)).

On appeal, the standard of review of the trial court's decision to grant a party's motion to strike requires that the facts, and all fair inferences from those facts, be considered in the light most favorable to the plaintiff. Green, 269 Va. at 290, 608 S.E.2d at 920, citing Perdieu v. Blackstone Family Practice Ctr., 264 Va. 408, 411, 568 S.E.2d 703, 704 (2002).

In this case, the trial court erred when it failed to apply these long-standing principles concerning a motion to strike. Appellants' evidence established that Appellee owed a duty of reasonable care to Tabitha. The issue of whether Appellee breached that duty, thereby committing simple and gross negligence, was a question for the jury. Philip Morris Inc., v. Emerson, 235 Va. 380, 397, 368 S.E.2d 268, 277 (1988); Great Atl. & Pac. Tea Co. v. Berry, 203 Va. 913, 128 S.E.2d 311 (1962).

Common law and basic principles of negligence law govern this case. The Supreme Court of Virginia has stated that "negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under existing circumstances." Moore v. Virginia Transit Co., 188 Va. 493, 498, 50 S.E.2d 268, 271 (1948).

The first of the four elements of negligence is duty. Before a plaintiff can recover, she must prove that the defendant owed a duty to her. Bartlett v. Roberts Recapping, Inc., 207 Va. 789, 153 S.E.2d 193 (1967); Austin v. Consolidation Coal Co., 256 Va. 78, 501 S.E.2d 161 (1998). An action for negligence lies where there has been a failure to perform some legal duty that the defendant owes to the injured party. Balderson v. Robertson, 203 Va. 484, 487, 125 S.E.2d 180, 183 (1962).

There is a general duty not to injure others negligently. This duty arises whenever a defendant's conduct creates a risk of harm to others by failing to exercise reasonable care. The Court in S. States Grain Mktg. Coop. v. Garber, 205 Va. 757, 761, 139 S.E.2d 793, 796 (1965) stated:

> [W]henever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or the property of the other, a duty arises to use ordinary care and skill to avoid such injury.

See also Steward v. Holland Family Props., LLC, 284 Va. 282, 726 S.E.2d 251 (2012).

Appellee owed a duty of reasonable care to Tabitha. What constitutes reasonable care regarding duties owed to people and specifically to children will vary according to the circumstances. In a high

risk situation, greater caution must be exercised. Virginia Ry. & Power Co. v. Smith, 117 Va. 418, 422, 84 S.E. 641, 642 (1915)

As a point of comparison, these principles are frequently stated in cases involving motor vehicle injuries to children. The duty of care is "proportionate to the apparent ability of the child, in view of his age, maturity and intelligence, to foresee and avoid the perils which may be encountered. . . . The younger the child and the less able he is to look out for himself, the greater the care which may reasonably be expected of the driver of a motor vehicle to avoid injuring him." Conrad v. Taylor, 197 Va. 188, 191, 80 S.E.2d 40, 42 (1955). Whether the defendant exercised the proper degree of care is usually a question for the jury. Endicott v. Rich, 232 Va. 150, 348 S.E.2d 275 (1986). Taking the evidence in the light most favorable to Appellants, Appellee failed to exercise reasonable care and was, at a minimum, negligent.

Appellants also asserted a gross negligence claim against Appellee. Appellee admitted that giving explicit permission to Tabitha to ride his ATV violated the manufacturer's explicit warnings posted on the ATV and in the Owner's Manual. A. 306, 315-6. Appellee admitted that he exposed Tabitha to the risk of severe injury or death by doing so. A. 316-7.

Appellee knew that children under age twelve should never ride his ATV per Honda's warnings. A. 295-6, 315. Appellee knew that children under 12 who rode the ATV risked severe injury and death. A. 295-6, 315, 368, 371. He had the Owner's Manual, although he chose not to read it. A. 298. He had the title – and should have known the ATV was a motor vehicle under Virginia law. A. 370. Appellee had superior knowledge of his ATV compared to anyone else. A. 313-5. Appellee had the rights and power of ownership – he could say who rode it and who could not. A. 314-5. He knew that Tabitha was about eight years old. A. 314. Appellee knew that permitting Tabitha to ride the ATV increased her risk for severe injury or death. A. 315. Appellee did not tell the father about the ATV warnings or advise him of the risk of severe injury or death. A. 304. Appellee did not ask or know whether the father was aware of the warnings and the increased risk of injury to children under age twelve. A. 304-5, 307 Appellee gave his necessary permission for Tabitha to ride his ATV, without which Tabitha would not have ridden the ATV. A. 301, 314, 316.

Furthermore, Appellee actively assisted Tabitha with riding Appellee's ATV. He gave Tabitha a helmet and adjusted her chin strap. He showed her the basic controls, including the gas pedal and brakes, and permitted her to drive his ATV—knowing that it was dangerous and prohibited for a

child under twelve to do so. To state the obvious, Appellee actively participated in this child riding his ATV. But for Appellee's permission, this child would not have ridden Appellee's ATV and, therefore, would not have been injured. A. 317. Appellee's permission and active conduct was *independent* from any permission, supervision, or conduct of Tabitha and/or her father, and was the proximate cause of Tabitha's ATV crash and subsequent injuries.

It was the duty of Appellee to use reasonable care in his own conduct toward Tabitha. The standard is what a reasonably prudent person in Appellee's position would have done under the circumstances and considering that a child is involved. Virginia law does not permit Appellee to fail to exercise reasonable care by placing Tabitha in danger or in a circumstance that would cause injury or death to Tabitha. Taking the evidence in the most favorable light for Appellants, Appellee breached this duty and as a result, he caused injury to Tabitha.

Consequently, the Court erred when it struck Appellants' case. The trial court's ruling took away from the jury its rightful power of deciding whether Appellee committed acts of simple and gross negligence when he gave permission to Tabitha to ride his ATV that warned against such an act, and then actively participated in readying her for her very short,

dangerous ride that ended with her injury. The jury should have been given the opportunity to hear the evidence and to decide the issue of whether Appellee committed simple and gross negligence.

II. The trial court erred in granting Appellee's Motion to Strike when it held that current law regarding parental supervision shielded Appellee from liability for his own independent acts of negligence, simple and gross, as Ingle v. Clinchfield R. Co., 169 Va. 131, 192 S.E. 782 (1937), addressed the supervision of a child's behavior whereas this case involves Appellee's own conduct in permitting and assisting Appellant, Tabitha Lasley, an eight-year-old child, to engage in the dangerous activity of riding Appellee's ATV. A. 361.

The Court did not determine whether, as a matter of law, Appellee's conduct was in and of itself negligent. Instead, in reliance on Ingle, 169 Va. 131, 192 S.E. 782, the Court ruled that Appellee owed no duty at all to Tabitha – whether or not Appellee's conduct constituted failure to exercise reasonable care -- since her father gave permission for Tabitha to ride Appellee's ATV. Even though Appellee owned the ATV, had exclusive control and possession of the ATV, knew that children under 12 should never operate the ATV, knew that a child under 12 was exposed to severe injury and death if they rode the ATV, could determine who could and could not ride his ATV, had superior knowledge about his ATV, had knowledge of the warning labels, and possessed the Honda Owner's Manual, the Court said that it would be "demanding too much" of Appellee to foresee the possible peril to Tabitha.

The rule of law promulgated by the trial court is this: a person may commit simple and gross negligent acts on a child – expose a child to severe injury and death -- as long as the parent gives permission to the child to engage in that dangerous activity, whether the parent knew the activity was dangerous or not. In effect, it decided that because the father allowed Tabitha to engage in the dangerous activity (whether he appreciated the danger or not), Appellee had NO duty whatsoever to Tabitha and could commit acts of simple AND gross negligence on Tabitha.

This is a reckless, dangerous rule of law – one that is absurd on its face and renounces the safety and welfare of our children. To remove the complete responsibility of a third party to exercise reasonable care, only because the parent gives permission to his child to engage in the dangerous activity, which the third party knows is not an age appropriate activity and is dangerous -- whether the parent appreciates the danger or not -- undermines the very basic foundation of negligence law. This trial court ruling contravenes logic, rationality, and Virginia law.

The Ingle court did not hold that a person does not owe a duty of reasonable care to a child when a parent is present to supervise the child. In Ingle, a young child was killed by a train when she suddenly darted in front of the train as she walked alongside the railroad tracks with her

mother. The plaintiff argued that the defendant should have noticed the child near the track, given a warning, and anticipated the child's irresponsible act of walking on the track in front of a moving train. *After* determining that the conductor did all he could to save the child after going on the track and that the child did not indicate that she might go on the track, the Ingle court commented that parents generally have the best possible knowledge of their children's habits and therefore the best possible knowledge of the likelihood of injury to the children. Id. at 139-40, 192 S.E. 782, 785. The conductor did not have a duty to predict the erratic behavior of a child, because the parent knew the child better and could better assess how the child might react. Ingle held that 1) the decedent child was not an invitee, but, at most, a licensee; 2) there was no conduct of decedent that would indicate that she would leave the place of safety and go on the track, until it was too late; 3) the doctrine of last clear chance had no application in this case as the trainman did all he could to save the decedent after he saw her go on the track; 4) and, consequently, the trial court properly sustained the demurrer. What the Ingle case did not hold is that the defendant owed no duty to the child -- in fact, it held that the conductor did all he could to save the child.

Ingle is in no way controlling in this case. The first Ingle holding, regarding status as a licensee or invitee, is irrelevant to this case. Appellee's duty lies in his own active and direct commission of negligence on Tabitha, and his own actions that placed Tabitha in peril. That is not so for the Ingle defendant -- the conductor did not place the decedent child in peril. Likewise, predicting Tabitha's erratic behavior was not an issue. Appellee actively placed Tabitha in harm's way. Only Appellee had the knowledge and appreciation of the ATV's danger and possessed the exclusive control and authority to choose not to place Tabitha in peril. The *last clear chance* doctrine also has no relevance to this case. However, Appellee did not do all he could to save Tabitha from danger and peril, unlike the conductor. When Tabitha asked Appellee to ride his ATV, a simple "no" and heeding Honda's safety warnings would have saved the day. The trial court's ruling in this case is that Appellee, and all other persons who choose to place a child in danger, have no duty to say no, and in fact, can actively place that child in danger, as long as they have permission from a parent. The Ingle court did not render such a ruling.

Taking the evidence in the light most favorable to Appellants, Tabitha's father certainly did not have the knowledge of the likelihood of injury to Tabitha from riding the ATV. The father was present, but there

was no evidence at trial that he was aware of the risks of severe injury and death to his daughter if she rode this ATV. The father knew nothing about ATVs or riding an ATV. He had never ridden any ATV; and he had no understanding of the physical strength needed to operate and control the ATV. The father knew nothing about the multiple warnings on the ATV, specifically stating that no child under the age of twelve should ever ride the ATV. The father did not have the opportunity to read the Honda Owner's Manual. Although it can be inferred that the father was aware of the proclivities of his daughter, the father was completely unaware of the perils of riding this gas-powered motor vehicle; therefore, he could not predict the danger that she would encounter riding such ATV.

In contrast to the father's lack of knowledge and control of the ATV, Appellee possessed complete knowledge and control of the ATV. Appellee had the exclusive authority to say who could and could not ride his ATV; he controlled what equipment was required before the child could ride; and he controlled and determined his own rules for riding his ATV. Appellee's only rules, which were *his* rules, for riding his ATV were that the child, no matter what age, must have the parent's permission (whether the parent was present or not) and that the child must wear a helmet and shoes. Only Appellee was in a unique position to assess the potential danger to Tabitha

because he was the owner, possessed the Owner's Manual, and was familiar with all of the ATV warnings, precautions, and dangers. The exposure of Tabitha to this dangerous situation began and should have *ended* with Appellee's exclusive authority to deny permission to Tabitha to ride his ATV.

In the Ingle case, the defendant had no such knowledge, authority, and control. The defendant did not know who may be walking near the train tracks or who may jump in front of a moving train.

This case is not about a child's proclivity for jumping in front of a train, or commandeering an ATV or engaging in other erratic behavior. It is about an ATV adult owner who had complete control over a potentially dangerous situation. And instead of choosing to keep Tabitha safe, Appellee chose to place Tabitha in harm's way. The Ingle conductor did not place the child in danger. This is not about a child's actions – this is about an adult who *knowingly* acts in total disregard of the ATV safety warnings, knows this child's age, and knows the foreseeable consequences of doing so. Appellee's permission to ride is an absolute *requisite* for danger. Without his violation of the safety rules and without his permission, there would be no danger. These are not the facts or issues of Ingle.

Additionally, Appellee cannot use the presence of Tabitha's father to excuse his own negligent conduct in permitting Tabitha to ride his ATV. Ingle addressed only the duty to supervise a child to make sure that the child's own behavior does not put the child at risk of injury. Tabitha was not injured because her father was not watching her carefully enough; Tabitha was injured because Appellee actively and intentionally placed her in a dangerous situation on a dangerous vehicle that should never be operated by a child under age twelve. Tabitha's father did not give permission to Tabitha to be placed in peril by the hands of another's simple or gross negligence, nor did he have that right, even if he had appreciated the danger of allowing Tabitha to ride Appellee's ATV. Appellee owed a common law duty to Tabitha to exercise reasonable care to avoid injury to Tabitha. Appellee breached this duty and as a result, he caused injury to Tabitha.

Lastly, Tabitha has the right of civil recourse when she suffered injuries due to Appellee's negligent acts. The Virginia Supreme Court has long recognized that there are certain rights that belong to a child, **not** to the parent of that child. This law is frequently stated in child support matters, where it has been repeatedly held that the right of support from a parent belongs to the child, and cannot be contracted away or waived by

the other parent. See Kelley v. Kelley, 248 Va. 295, 298, 449 S.E.2d 55, 56 (1994); Shoup v. Shoup, 37 Va. App. 240, 556 S.E.2d 783, 788 (2001).

The right of recovery for a personal injury also belongs to the child, not to the parent. Herndon v. St. Mary's Hosp., 266 Va. 472, 476, 587 S.E.2d 567, 570 (2003); Kirby v. Gilliam, 182 Va. 111, 116, 28 S.E.2d 40, 43 (1943). The parent's negligent actions are, therefore, irrelevant to the child's right. As far back as 1926, the court has held that in an action filed by a child to recover for damages from a personal injury, the negligence of the child's parent is not imputed to the child and does not bar the child from recovering. Tugman v. Riverside & Dan River Cotton Mills, 144 Va. 473, 481, 132 S.E. 179, 181 (1926); Shelton v. Mullins, 207 Va. 17, 147 S.E.2d 754 (1966).

The Court addressed this issue again in the much more recent case of Evans v. Evans, 280 Va. 76, 695 S.E.2d 173, 178 (2010), where the Court found that a child had the right to recover from her father for injuries incurred in a motor vehicle collision. Her father had placed the four-year-old child in a portable foam seat in the floorboard of the truck he was driving. This appeal involved an issue of statutory construction, and the matter was remanded for retrial. However, the Court reminded the trial

court that the negligence of a parent cannot be imputed to a child to bar a recovery.

If a parent cannot contract away the right of a child, and the negligence of a parent cannot be imputed to bar the right of a child, how then can a parent's permission to allow the child to be put into danger, whether known to the parent or not, bar a child's right of recovery from a third party? By logical conclusion, it cannot. One has to assume that in the Evans case, the father gave permission for the child to ride in the floorboard, and yet the child's right to recover stood. Likewise, Tabitha's right to recover from those whose negligence injured her should not be barred by her father's granting of permission for her to ride the ATV, even if one assumes that the permission was a negligent act. If Appellee were permitted to escape responsibility based on the father's permission, assuming it to be negligently given, he would, in fact, be imputing the father's contributory negligence to bar a child's right of recovery. This is simply not permitted by Virginia law.

III. The Recreational Use Statute is inapplicable to this case and provides no immunity to Appellee.

In his Brief in Opposition to Appellants' Petition, Appellee claims that he is immune from liability regarding Appellants' simple negligence claim pursuant to the Statute. In its decision to strike Appellants' case as a

matter of law, the trial court did not address the Statute, did not rule upon it, did not decide facts applicable to it, and did not rely upon it to render its decision. Appellants also asserted a claim for gross negligence against Appellee, and the Statute does not immunize landowners from gross negligence.

Appellee attempts to seek relief based upon the Statute on the doctrine of "right for the wrong reason" as defined in Lynnhaven Dunes Condo. Ass'n v. City of Va. Beach, 284 Va. 661, 670, 733 S.E.2d 911, 915 (2012). However, the "right for the wrong reason" doctrine is inapplicable to the present case. In Lynnhaven Dunes Condo. Ass'n, 284 Va. at 670, 733 S.E.2d 911, 915, the Court cited Rives v. Commonwealth, 284 Va. 1, 2-3, 726 S.E.2d 248, 250 (2012) and stated:

> We have limited application of the "right for the wrong reason" doctrine to those cases where the right reason is supported by the record, no further development of the facts is necessary to support it and the appellant was "on notice in the trial court that he might be required to present evidence to rebut it."

In this case, the record does not support the reasoning that the Statute applies to the facts of this case. This case does not concern the condition or ownership of the land or concern the usage of private land for public enjoyment. This case does not concern the use of private land for personal recreation, like hunting, sightseeing, trapping, camping, boating,

racing, bicycle riding, or swimming in a lake. This ATV wreck could have occurred on a road, at a park, on a public road, school yard, or in the neighbor's front yard, and Appellants' causes of action would be identical. The condition or the ownership of the land where this ATV wreck took place are irrelevant facts as Appellants made no claim that Appellee's property was defective or that the ownership or condition of Appellee's property caused Tabitha's injuries. Additionally, the Statute's public policy – and the very purpose of its adoption – was to encourage private owners to open their land for recreational use. This policy is not supported by the facts in this case. We, as a society, do not need to encourage individuals to invite their friends and family over to their homes for social gatherings.

In support of his assertion of the doctrine of *right for the wrong reason*, Appellee relies on the Statute, which is contained in Article 1, General Provisions of Chapter 5, entitled *Wildlife and Fish Laws* and is cited in part below (emphasis added):

> 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 . . . .
>
> 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, rock climb, hang glide, skydive, sightsee, engage in races, to collect, gather, cut or remove forest products . . . *does not* thereby:
>
> 1. *Impliedly or expressly represent that the premises are safe for such purposes*; or . . .
>
> D. Nothing contained in this section . . . shall limit the liability of a landowner . . . of his gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity . . . .

The remainder of Chapter 5, includes Articles entitled, Hunting and Trapping; *Fishing Laws; Possession, Transportation, and Sale of Game and Fish*; *Endangered Species*; and lastly, *Nonindigenous Aquatic Nuisance Species Act.*

The Statute's plain language protects the landowner by waiving any representation that *the premises are safe* for the purpose of "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." Id. The plain language does *not* include a landowner's personal direct acts of negligence that happen to be committed on his property.

Most states, including Virginia, have adopted some version of the Model Statute proposed by the Council of State Governments. *See The*

Council of State Governments Suggested State Legislation, Vol. 24, p. 150 (1965) ("Model Act"). Callahan v. Fairfax Cnty. Park Auth., 32 Va. Cir. 212, 213, No. (Law) 125618, 1993 Va. Cir. LEXIS 761, at *2 (Va. Cir. Ct. Nov. 2, 1993). The general purpose of these statutes and acts, in light of the shrinking usability of our public lands, is to encourage private landowners to make their land accessible for the public's recreational use. In exchange for this accessibility, states have provided landowners immunity from liability from simple negligence. See Terence J. Centner, Revising State Recreational Use Statutes to Assist Private Property Owners and Providers of Outdoor Recreational Activities, 9 Buff. Envtl. L.J. 1, 24-27 (2001). A. 203.

Under the Statute, a public or private landowner, who makes its property freely available to the public for recreational purposes, including "sightseeing," has no liability except for "gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, or structure, or activity." Va. Code Ann. § 29.1-509(B), (D); Lutfi v. United States, 527 F. App'x 236, 240 (4th Cir. 2013); Callahan, 32 Va. Cir. at 213.

Nothing in this Statute addresses the liability and the duty of an ATV owner who chooses to permit an eight-year-old child to ride the owner's ATV, which should never be ridden by children under age twelve. There

have been no cases decided in Virginia that apply the Statute or any other statute so as to immunize and thereby permit a homeowner, or any individual, to commit direct and active negligence on a child.

Appellee is asking this Court to extend the Statute's application to immunize all owners of land, and specifically in this case, to immunize a homeowner, who directly and actively committed negligence on a child and to extend the Statute whether or not Appellee's negligence pertains to the usage and condition of his property and whether or not his property was limited to private or public use. According to Appellee's interpretation of the Statute, the only requirement for *any* landowner to be immunized by the Statute is that the injured party be injured while participating in a "recreational" activity while on that landowner's property. If this interpretation of the Statute becomes the law, the homeowner insurance companies would surely rejoice as they reap the benefits of this new rule, and the safety of children would just as surely be sacrificed.

In our case, Appellee was a homeowner who invited friends and family to his property. The occasion was a social gathering. Appellee did not invite the public. There was no evidence that his property was open to the public for recreational use then or at any time. There is no evidence that Appellee provided his ATV to the public for the public's recreational

use. Tabitha and her family were invitees of Appellee. Appellee knew of the warnings on the ATV. Appellee's property was not defective, nor claimed to be. Nothing about Appellee's property caused this ATV wreck.

The evidence at trial was that permitting Tabitha to ride this inherently dangerous ATV caused this wreck. Appellee admitted that if he had chosen to not permit Tabitha to ride his ATV, which he had the absolute authority to so chose, she would not have been hurt. This is a case of an adult ATV owner who encouraged, assisted, and permitted an eight-year-old child to operate his ATV that should never be operated by children under age twelve. None of these facts compel the invocation of the protection of the Statute.

Additionally, Appellee assumes that permitting a child under age twelve to ride an ATV motor vehicle that is not to be ridden by children under age twelve is "recreational." A better description of this activity is "inherently dangerous." If an activity is inherently dangerous to a child of tender years, it would be reckless and inaccurate to describe such activity as "recreational." To choose to expose a child to needless harm that could result in severe injury or death is not recreational, but is reckless and done so in conscious disregard for the child's safety. "Recreational" means fun, entertaining, and enjoyable. "Recreational" can never mean placing an

eight-year-old child in needless danger and exposing her to severe injury or death.

In his Brief in Opposition to Appellants' Petition, Appellee cites several cases to support his argument that the Statute provides a simple negligence immunity shield to Appellee. However, none of the cases cited are applicable to the facts of this case and provide no guidance on the issues presented.

Appellee relies upon City of Va. Beach v. Flippen, 251 Va. 358, 362, 467 S.E.2d 471, 474 (1996). In affirmatively finding that municipal corporations were included under the immunity protections of the Statute, the Virginia Supreme Court stated that "the clear legislative intent of Va. Code Ann. § 29.1-509 is to encourage the opening of private land to public recreational use." Id.

In Flippen, the City of Virginia Beach provided and maintained access via stairways to private beaches that were made public for recreational use by the public. The plaintiff fell on one of these stairways, which he claimed was defective. The Court concluded that the legislature intended a broad interpretation of the definition of the term "landowner" contained therein. Id. The Court held, ". . . that the City is a 'person in control of [the] land or premises' as contemplated by the Statute and is entitled to the immunity

extended by that statute for the activities it undertook to provide public access to the beach adjacent to the stairway." Id.

Unlike the present case, Flippen involved an injury resulting from land use and its condition. In the present case, there is no evidence that Appellee permitted the public to use and enjoy his ATV or his land. It is stating the obvious, but an ATV is not land. The Statute is directed to opening up land for recreational use by the public.

Appellee then cites several trial court decisions addressing the issue of whether counties and municipalities can be immune under the Statute (*see* Sheppard v. Fairfax Cnty. Park Auth., 51 Va. Cir. 152 (Fairfax Co. 1999), and Callahan, 32 Va. Cir. at 213-14) or what constitutes a fee under the Statute. See Hall v. United States, No. 2:02CV00096, 2003 U.S. Dist. LEXIS 6162 (W.D. Va. Apr. 15, 2003), and Morgan v. Commonwealth, 34 Va. Cir. 462 (Albemarle Co. 1994). All of these cases involve land being opened to the public for recreational uses and a party being injured on that land due to a condition of that land. These facts and issues are not analogous to the present case. In the case before this Court, there is no public use of land; there is no defect of land; and there is no usage of land that caused injury.

Hiett v. Barcroft Beach, Inc., 18 Va. Cir. 315 (Fairfax Co. 1989) is the last Circuit Court opinion cited by Appellee (in his Brief in Opposition). The plaintiff was a triathlon runner who broke his neck when he pushed off the bottom of the lake. Defendants included the race sponsor, the legal title holder of the land, the "person in control" of the lake, and the race chairman. The court looked to the Statute regarding several of the defendants. The court found that defendants' opening of the use of their land to host the triathlon came under the ambit of the Statute. Again, this case concerns a defect of the land and the usage of the land. It also goes to the heart of why the General Assembly promulgated the Statute – to encourage landowners to make their property available to public users for recreational purposes.

There is no controlling precedent that invokes the Statute to facts similar to the case before this Court, and for good reason. If applied, Appellee's argument would grossly and unjustly expand the immunity power of the Statute to include all negligent acts that occur on a person's property as long as the act involves "recreation." This leads to the absurd conclusion that no matter the condition of the land and whether or not the condition of the land is even at issue – all persons injured by a landowner's commission of "active" negligence will have no remedy at law, as long as

the injury was caused as a result of doing something "fun." The Statute was never promulgated to take away an injured person's rightful claim against another person who actively and directly, by his own hand, failed to exercise reasonable care, thereby causing him or her injury and who happened to be injured on that person's land.

Finally, Appellee asserts (in their Brief in Opposition) that he was not grossly negligent. The trial court did not permit this case to go to the jury on the issue of whether Appellee committed gross negligence. The trial court did not rule that Appellee was not grossly negligent as a matter of law. The trial court made no ruling whatsoever regarding the issue of gross negligence (as its ruling relied solely on Ingle), with the exception of declaring that Appellee had no duty whatsoever to Tabitha. The facts are in dispute on this issue. Appellee claims that by putting a helmet on Tabitha that he redeemed himself from the clear warnings on the ATV and from his knowledge that Tabitha could suffer severe injury or death from riding the ATV, with a helmet or without a helmet.

Ordinarily, the question of whether gross negligence has been established is a matter of fact to be decided by a jury. Cmty. Motor Bus Co. v. Windley, 224 Va. 687, 689, 299 S.E.2d 367, 369 (1983); Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987). "'Gross

negligence" is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another. It is a heedless and palpable violation of legal duty respecting the rights of others.'" Id., citing Big Stone Gap v. Johnson, 184 Va. 375, 378, 35 S.E.2d 71, 73 (1945). Gross negligence amounts to the absence of slight diligence, or the want of even scant care. Id.

The facts and issue of whether Appellee committed acts of gross negligence in this case were certainly in dispute. A reasonable jury could have decided that Appellee was grossly negligent when he placed an eight-year-old child on an ATV motor vehicle in total disregard to Honda's safety warnings and with the knowledge what Tabitha could have been severely injured or killed. A jury could have reasonably decided that Appellee's actions in permitting Tabitha to ride his ATV were in and of themselves gross negligence. Neither the Statute nor any other statute or case law affords Appellee immunity for acts of gross negligence committed on a child. The trial court erred in taking this issue of whether Appellee committed gross negligence from the jury.

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 Opening 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 2nd day of June, 2014, to the following:

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I also certify compliance with the word count in that this brief contains 8356 words, exclusive of those parts that by rule do not count toward the word limit.

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