IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

CASE NO. 2018-G-0000

JANE DOE, et al.,

Plaintiffs-Appellants,

vs.

JOHN SMITH, et al.,

Defendants-Appellees.

Commented [A1]: App.R. 19(A) sets forth the pertinent information required for the cover page of a brief.

ASSIGNMENTS OF ERROR AND BRIEF OF JANE DOE AND MARY DOE, PLAINTIFFS-APPELLANTS

ORAL ARGUMENT REQUESTED

Commented [A2]: Loc.R. 11.1(E), 11.2(A)(3), 11.3(E) and 21(A) require requests for oral argument be designated on the cover page of the brief.

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TABLE OF CONTENTS AND ASSIGNMENTS OF ERROR

Commented [A3]: App.R. 16(A)(1) and Loc.R. 16(C)(1)

Commented [A4]: App.R. 16(A)(3) and Loc.R. 16(C)(1)

The trial court committed prejudicial error in granting defendants-appellees', JOHN SMITH and JANE SMITH's, motion for summary judgment based upon its opinion that R.C. 3109.10 (strict liability of parents for assaults by their children) is a "principal offender" only statute, finding complicity does not suffice, where appellees' minor child, M.S., was convicted of aggravated murder and robbery, attempted aggravated murder with a firearm specification, and two specifications of aggravating circumstances of aiding and abetting (T.d. 104, paragraph 3).

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1. Did the trial court err in determining that complicity did not suffice and that R.C. 3109.10 is a "principal offender" only statute in granting defendants-appellees' motion for summary judgment, where appellees' child was an integral part of the common plan of three actors to rob and shoot (kill) the minor plaintiff and her friend and where appellees' child was inside the gas station but did not actually pull the trigger, although she was part of the plan to do so, including the robbery, shooting and getaway?

AUTHORITIES

The trial court committed prejudicial error in granting defendants-appellees' motion for summary judgment, finding that the facts do not support a conclusion of negligent supervision where appellees failed to exercise reasonable control over their child, M.S., when they had the ability to control but acquiesced as to her known one and one-half year long standing relationship with a known violent man engaged in criminal activity, which required a jury determination as to the foreseeable consequence of appellees' negligence (T.d. 104, paragraph 4).

TABLE OF CONTENTS AND ASSIGNMENTS OF ERROR (cont'd)

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STATEMENT OF THE CASE

PROCEDURAL POSTURE

This case originated in the Common Pleas Court of Geauga County, Ohio. The complaint alleged negligence and/or willful, wanton, and/or reckless misconduct of several defendants as well as the intentional assault of the perpetrators which caused the personal injuries to plaintiff, Jane Doe, and also set forth the infliction of emotional distress and loss of service claims of her mother, Mary Doe, arising out of the robbery and shooting which occurred at the Clark Oil station in Chesterland, Ohio, on February 18, 2000. (T.d. 1) Appellants' complaint further alleged that defendants-appellees, John Smith and Jane Smith, were the parents and natural guardians of one of the criminals, M.S., a minor, and that these parents had custody and control of their minor daughter.

In their answer, the Smiths admitted that at the time and place alleged, defendant, M.S., was a minor and that they were the parents and natural guardians of the minor child and as such had custody and control of her. (T.d. 2) The Smiths denied all other allegations contained in counts four and five of appellants' complaint.

The Smiths filed a motion for summary judgment asserting that they bear no statutory responsibility because the assault (shooting) was committed by co-defendant, a minor, D.D., not M.S., and that any claim of negligent supervision must fall upon the claimed intervening or superseding criminal act of defendant, D.D. (T.d. 15)

Appellants filed their brief in opposition to the Smiths' motion for summary judgment, which was supported by an affidavit, the verdict forms in M.S.'s criminal trial, the transcripts of proceedings in the Geauga County Juvenile Court regarding M.S., as well as depositions of co-defendant, D.D., and his foster parents, Herb Wilson and Erma Wilson. (T.d. 16)

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Commented [A8]: Double spacing – App.R. 19(A) and Loc.R. 16(A)

Commented [A9]: App.R. 16(D) and Loc.R. 16(A)(1) require reference to the place in the trial court record where each document is found as designated by the docket number assigned by the clerk of courts. T.d. is a suggested abbreviation referring to the transcript of docket and journal entries.

On June 3, 2003, the trial court issued its opinion granting the Smiths' motion for summary judgment, (T.d. 20) and on July 3, 2003, appellants timely filed their Notice of Appeal in the Court of Appeals, seeking to have the decision of the trial court reversed and the case remanded for further proceedings. (T.d. 21)

STATEMENT OF FACTS

There is no dispute that on February 18, 2000, at about 11:05 p.m., plaintiff, Jane Doe, a patron/invitee in the Clark station/store in Chesterland, witnessed the defendant, D.D., shoot and kill her friend, Judy Bishop, the lone clerk at the station, and then shoot her in the head with one bullet and attempt to fire two more shots when there were no bullets left in the gun. (T.p. 10).

Defendants, D.D., Wesley Wilson, and M.S., came to the station with the intention of robbing the store and killing the clerk and any persons within the store to avoid any witnesses, as alleged in appellants' complaint. *Id*. There is no dispute that all three perpetrators of the crime did intentionally, willfully, wantonly, maliciously, and without provocation assault and attempt to kill the plaintiff, Jane Doe, and execute her friend, Judy Bishop, in front of her. (T.d. 1, 17, 63).

It must be noted from the partial transcript of the criminal trial in the matter of the *State v. Smith*, Geauga C.P. No. 00 CR 00135, before Judge Jones that when D.D. and Wilson hesitated about robbing the convenience store that night before the Clark station robbery, M.S. stated, "Are we gonna do this or not?", (T.p. 92) and that before entering the Clark station the plan was for Smith to stall until the Clark station was closed, run out at the sound of the "first shot," open the car doors and "let the seat forward so [D.D.] could jump in," and then drive the getaway car. (T.d. 94, Davis T.p. 121, 127).

Commented [A10]: App.R. 16(A)(6) and Loc.R. 16(C)(3)

Commented [A11]: App.R. 16(A)(6) and (D) and Loc.R. 16(A)(1) and (C)(3) require reference to the place in the trial transcript as designated by the page number. T.p. is a suggested abbreviation referring to the transcript of proceedings. Please note that in cases where no transcript is available, no reference needs to be made.

D.D. testified that after the shootings, he saw M.S. holding the door and the seat open so he could jump in as she was instructed to do by Wesley Wilson. (T.p. 92)

At a hearing in this case, there was testimony that M.S. was aware of the criminal record of both Wilson and D.D. (T.p. 523)

LAW AND ARGUMENT

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FIRST ASSIGNMENT OF ERROR

The trial court committed prejudicial error in granting defendants-appellees', JOHN SMITH and JANE SMITH's, motion for summary judgment based upon its opinion that R.C. 3109.10 (strict liability of parents for assaults by their children), is a "principal offender" only statute, finding complicity does not suffice, where appellees' child, M.S., was convicted of aggravated murder and robbery, attempted aggravated murder with a firearm specification and two specifications of aggravating circumstances of aiding and abetting (T.d. 104, paragraph 3).

Commented [A13]: App.R. 16(A)(3) and Loc.R. 16(C)(4) require reference to the place in the record where each error is reflected.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

1. Did the trial court err in determining that complicity did not suffice and that R.C. 3109.10 is a "principal offender" only statute in granting defendants-appellees' motion for summary judgment, where appellees' child was an integral part of the common plan of three actors to rob and shoot (kill) the minor plaintiff and her friend and where appellees' child was inside the gas station but did not actually pull the trigger, although she was part of the plan to do so, including the robbery, shooting and getaway?

Ohio's parental responsibility statutes, R.C. 3109.09 and 3109.10, provide "compensatory damages" to innocent victims of minor delinquents against the parents having custody and control of a minor who willfully damages the property of another and with respect to the latter statute, if the child "willfully and maliciously assaults" a person by means or force likely to produce great bodily harm. A finding of willful and malicious assault is not dependent upon a prior finding that the child is a delinquent child.

The objective of compensating innocent victims caused by the willful misconduct of minors is substantially furthered by imposing civil liability on the parents having custody and control of the minors, as herein. See *Rudney v. Corbett*, 53 Ohio App.2d 311, 315 (8th Dist.1977).

There is no language in the statute which would provide for non-liability for one of several actors in a *common* plan to intentionally harm another. In giving effect to the words used in the statutes, the court may not delete any words nor insert any words not used. *State v. Jordan*, 89 Ohio St.3d 488, 492 (2000). In addition, R.C. 1.49 sets forth factors for statutory construction if a statute is ambiguous that include the object sought to be obtained, the circumstances under which the statute was enacted, the common law and the consequences of a particular construction.

SECOND ASSIGNMENT OF ERROR

The trial court committed prejudicial error in granting defendants-appellees' motion for summary judgment, finding that the facts do not support a conclusion of negligent supervision where appellees failed to exercise reasonable control over their child, M.S., when they had the ability to control but acquiesced as to her known one and one-half year long standing relationship with a known violent man engaged in criminal activity, which required a jury determination as to the foreseeable consequence of appellees' negligence (T.d. 104, paragraph 4).

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

1. Did the trial court err in granting summary judgment, where the appellees knew and acquiesced to their minor daughter's long standing (one and one-half year) boyfriend/girlfriend relationship with a known violent man engaged in criminal activity, thus knowing that they needed to exercise control over her, had the ability to exercise control, but did not, and where they knew or should have known that the acts of their child were likely to result in foreseeable harm to someone?

A jury issue is presented in a negligent supervision case where "(1) the parents knew of their child's particular reckless or negligent tendencies (thus they knew they needed to exercise control over him); (2) the parents had the *ability* to exercise control; and (3) the parents did not exercise that control." (Emphasis added.) *Shupe v. Childers*, 5th Dist. Fairfield No. 2003CA0068, 2004-Ohio-1767, ¶ 15, citing *D'Amico v. Burns*, 13 Ohio App.3d 325, 327 (8th Dist.1994) and *Nearor v. Davis,*118 Ohio App.3d 806, 813 (1st Dist.1997).

Parents of minor children have a duty to exercise reasonable control over their children to prevent harm to third persons, when the parents have the ability to control the child and they know, or should know, that injury to another is a probable consequence. (Citation omitted.) *Cashman v. Reider's Stop-N-Shop Supermarket,* 29 Ohio App.3d 142, 144 (8th Dist.1986). *See also Haefele v. Phillips*, 10th Dist. Franklin No. 90AP-1331, 1991 Ohio App. LEXIS 2038, *3-4 (Apr. 23, 1991). It is well-established in Ohio that an action for negligent supervision can be brought against parents.

The Supreme Court of Ohio in *Huston v. Konieczny*, 52 Ohio St.3d 214 (1990), emphasized the existence of a duty to another depends primarily on foreseeability of the injury.

"Parents of minor children have a duty to exercise reasonable control over their children in order to prevent harm to third persons, when the parents have the ability to control the child and they know, or should know, that injury to another is a probable consequence." *Haefele* at *3, citing *Huston* supra.

CONCLUSION

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Where the minor child, M.S., *combined* with the two other now convicted murderers/robbers to willfully and maliciously assault and produce bodily harm to the plaintiff, Jane Doe, the relevant cases under the companion statute (R.C. 3109.09) reasonably establish that her parents are responsible, jointly and severally liable, for the amount set forth in such strict liability statute, R.C. 3109.10.

It was a jury issue to determine whether the parents were negligent in failing to exercise reasonable control, foreseeability, and proximate cause under the particular circumstances of this case. It is not necessary that the defendants should have anticipated the particular injury done in this case and it certainly should not have been

decided as a matter of law based on the trial judge's opinion, where the defendants had the burden of proof, providing evidentiary materials affirmatively demonstrating the absence of genuine issues of material facts of the non-moving party's claims pursuant to *Dresher v. Burt*, 75 Ohio St.3d 280 (1996). *See also Gregory v. Abdul-Aal*, 11th Dist. Trumbull No. 2002-T-0176, 2004-Ohio-1703, ¶ 22, and *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 10.

Respectfully submitted,
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