CV-20-492

IN THE ARKANSAS SUPREME COURT

SAMANTHA EDWARDS, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM BOBBY WRAY EDWARDS, DECEASED, AND ARLIEGH GRAYCE EDWARDS, DECEASED; AND AS PARENT AND NEXT FRIEND FOR PEYTON HILL, A MINOR — **APPELLANT**

vs.

ERIC JAMES CORNELL THOMAS AND McELROY TRUCK LINES, INC. — **APPELLEES**

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, CHIEF JUDGE SUSAN O. HICKEY PRESIDING

APPELLANT'S REPLY BRIEF

Brian G. Brooks, 94209
Brian G. Brooks, Attorney at Law, PLLC
P.O. Box 605
Greenbrier, Arkansas 72058
(501) 733-3457
bgbrooks1@me.com

Denise Reid Hoggard, 84072
Jeremy McNabb, 2003083
RAINWATER, HOLT & SEXTON, P.A.
P.O. Box 17250
Little Rock, AR 72222
Telephone: (501) 868-2500
Telefax: (501) 868-2508
hoggard@rainfirm.com
mcnabb@rainfirm.com

Attorneys for Appellant

TABLE OF CONTENTS

POINT ON APPEAL

1. Under the facts of this case, whether Ark. Code Ann. § 27-34-106(a) violates the separation-of-powers doctrine under article 4, section 2, and Amendment 80, section 3, of the Arkansas Constitution.

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Constitutional Provisions

Other

ARGUMENT

Defendants want to shift some or all of the blame for Arleigh Edwards' death onto her father by having the jury compare Defendant Thomas's fault in causing the collision that killed Arleigh with fault they allege Arleigh's father committed when he failed to strap Arleigh into a child safety seat. **Add. 1, 28-19.** The question for the Court is does Ark. Code Ann. § 27-34-106(a)'s language forbidding that comparison offend separation of powers? Interestingly enough, both sides agree on bedrock principles guiding the answer to the question. If the statute establishes substantive law, it is perfectly within the legislature's prerogative and survives. If it is merely a rule of evidence, it falls outside the legislature's authority and fails. Those are the principles established by Ark. Const. Amend. 80, § 3 and cases applying it like *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135 (2009), *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, 490 S.W.3d 298 (2016), and *Broussard v. St. Edward Mercy Health Sys.*, 2012 Ark. 14, 386 S.W.3d 385 (2012), principles with which no party quarrels. Thus, finely put, the sole question before the Court reduces down to whether Ark. Code Ann. § 27-34-106(a) is a substantive rule of the law of negligence and comparative fault.

Plaintiff's opening brief adequately staked out her position. Separation of powers is not offended by the statute because the statute is a legislative declaration of the substantive law of comparative fault and negligence in which the legislature declared failure to utilize a child safety seat is not negligent. This reply primarily focuses on rebutting the overall premise of Defendants' response, namely that the statute fails because it forbids any admission of evidence of failure to use a child safety seat, thus it must be an invalid legislative rule of evidence.

1. Defendants' Position with Respect to the Statute.

Defendants' position with respect to what the statute does is absolute, stark, and clear in their briefing. They claim the statute eliminates from a case like this case any proof that a child safety seat was not utilized. They stake this ground in the opening portion of their argument and carry that theme throughout their brief.

Defendants, to their credit, don't mince words. In the very first paragraph, Defendants posit that the statute is invalid because it "limits evidence that may be introduced and thereby dictates admissibility…." Defendants' brief at Argument 1. A page later, they claim the statute "absolutely forecloses the trial court's ability to allow use of certain proof."

Defendants' brief at Argument 2. Later, they write the statute "*obliterates* any step" to having a right judicially enforced by completely excluding proof of child safety seat non-use. Defendants' brief at Argument 14-15, n.3 (italics in original).

This is the foundation on which Defendants' argument is built. The statute, they say, completely excludes from the trial of the case any evidence that a child safety seat was not utilized. This absolute exclusion is, they say, what makes it a rule of evidence. Thus, testing that proposition is critical and will reveal its invalidity. And as that proposition falls, so does the entirety of Defendants' argument.

2. Defendants' Position does not Hold Up.

The place to begin with testing Defendants' proposition is with the words of the statute. It reads,

> The failure to provide or use a child passenger safety seat shall not be considered, under any circumstances, as evidence of comparative or contributory negligence, nor shall failure be admissible as evidence in the trial of any civil action with regard to negligence.

Ark. Code Ann. § 27-34-106(a).

Ark. Code Ann. § 27-34-106(a) ***does not***, in Defendants' words, "absolutely foreclose[] the trial court's ability to allow the use of certain

proof," namely proof that a child safety seat was not utilized. To the contrary, the statute "dictates," again using Defendants' word, the purposes for which that evidence may be used. It may not be used for purposes of "***comparative or contributory negligence***" or "***with regard to negligence***."

But any statute touching on the elements of a cause of action or defenses to a cause of action guides the purposes for which the evidence may be used. See the discussion in Plaintiff's opening brief at 10-17. Indeed, that the statute touches on the purposes for which the evidence may be used is a primary reason why Ark. Code Ann. § 27-34-106(a) is substantive law. Its pronouncement that failing to use a child safety seat is not negligent makes non-use irrelevant to the negligence question.

Statutory control over the purposes for which evidence may be used does not mean the evidence of non-use is not admissible at all or "foreclosed" or "obliterated." Non-use is, in fact, admissible for any other purpose relevant to an issue in the case (unless, of course, it is excluded by some other Rule of Evidence). Both the Arkansas and Federal Rules of Evidence specifically contemplate evidence being admitted for one purpose but not another. Ark. R. Evid. 105; Fed. R. Evid. 105. Those Rules go so far

as to counsel trial judges to instruct juries as to the correct use and scope of the evidence when it is admissible for one purpose and not another. *Ibid.* Thus, while non-use cannot inform the negligence or comparative-fault questions, it may still be admitted into evidence for other purposes, with an instruction to the jury that the evidence may not be considered to establish comparative fault or negligence.

Interestingly, Defendants acknowledged this concept before the federal district court when they contended they could use the non-use evidence as proof of failure to mitigate or to support the doctrine of avoidable consequences. **Add. 56.** Defendants had the concept right but its application wrong. Failure to mitigate and the doctrine of avoidable consequences are but other ways to establish comparative fault, a proposition to which non-use is not relevant because non-use is legislatively deemed not to be negligent.

Further, the notion that proof of non-use will not be admitted in the trial of this case is simply incorrect. The jury will be required to be told that Arleigh was ejected from the vehicle and through the window. But the jury will also have to be instructed that the non-use cannot be used to establish comparative fault, or any negligence, on the part of her father. That

instruction is not the result of a legislative rule of evidence. The evidence will have been admitted. It is the result of the legislature's pronouncement that non-use is simply not negligent and can't be used to place fault on her father.

Interestingly enough, this result is consistent with the legislative purpose for the Child Passenger Protection Act, Ark. Code Ann. §§ 27-34-101, *et seq.*, of which Ark. Code Ann. § 27-34-106(a) is a part. That purpose is not to place an absolute obligation on vehicle drivers to use child safety seats. It is to encourage and promote use. The legislature clearly stated that purpose:

> It is the legislative intent that all state, university, county, and local law enforcement agencies, as well as all physicians and hospitals, in recognition of the problems, including death and serious injury, associated with unrestrained children in motor vehicles, conduct a continuing safety and public awareness campaign so as to encourage and promote the use of child passenger safety seats.

Ark. Code Ann. § 27-34-102. In keeping with that legislative purpose of encouragement and promotion, the legislature declared that non-use is not negligence for either civil or criminal purposes. Ark. Code Ann. § 27-34-106(a) and (b). Had the legislature intended to create an absolute obligation

to utilize child safety seats, it would have stated an intent much more forceful than encouragement and promotion.

Defendants encourage the Court to examine this statute by construing it just as it reads, giving the words their usually accepted meaning. Defendants' brief at Argument 11 (citing and quoting *Johnson*, 2009 Ark. 241, at 5, 308 S.W.3d at 139). They further encourage the Court to construe the statute so that no word is left void, superfluous, or insignificant, and to give meaning to every word if possible. Defendants' brief at Argument 11-12 (citing and quoting *Arkansas Dept. of Human Services v. Howard*, 367 Ark. 55, 62, 238 S.W.3d 1 (2006)). Plaintiff joins in that encouragement because construing the statute in that manner makes Plaintiff's point and defeats Defendants'. The statute simply does not "absolutely foreclose[] the trial court's ability to allow the use of certain proof," as Defendants contend. Like any pronouncement of the substantive law, it simply guides the purposes for which the proof may be used.

3. *Mendoza* Undercuts Defendants' Position.

Mendoza v. WIS Int'l, Inc., 2016 Ark. 157, 490 S.W.3d 298 (2016), differentiates a statute that actually does foreclose any use of certain evidence from this statute, which does not. That point was thoroughly

explained in Plaintiff's opening brief. All that needs to be reiterated here is the critical difference in wording between the seatbelt use statute struck down in *Mendoza* and the child safety seat statute at issue here. The former excludes seatbelt non-use completely, while, as explained above, the latter does not.

This is how the seatbelt use statute reads:

> The failure of an occupant to wear a properly adjusted and fastened seat belt shall not be admissible into evidence in a civil action.

Ark. Code Ann. § 27-37-703(a)(1). These words, as Defendants would put it, "absolutely foreclose[] the trial court's ability to allow use of certain proof." This Court so held and struck the statute down.

The words of the safety seat non-use statute are markedly different. Again, those words are,

> The failure to provide or use a child passenger safety seat shall not be considered, under any circumstances, as evidence of comparative or contributory negligence, nor shall failure be admissible as evidence in the trial of any civil action with regard to negligence.

Ark. Code Ann. § 27-34-106(a). These words do not exclude any evidence for any purpose. They guide the purposes for which the evidence may be used.

Mendoza relied on that wording difference to conclude the seatbelt statute was a rule of evidence not a rule of substantive law. *Mendoza*, 2016 Ark. 157, at 7, 490 S.W.3d at 302. This wording difference makes the two statutes "distinguishable from" one another. *Ibid.* This distinction was bolstered by the fact that the seatbelt statute was amended to remove language similar to that contained in the child safety seat statute. *Ibid* (citing 1995 Ark. Acts 1118).

This difference in wording is everything. *Mendoza* indicates it is the difference between a rule of evidence and a rule of substantive law. And it is a critical difference undermining the very foundation on which Defendants' argument is built.

4. *Potts v. Benjamin* is Legitimate Persuasive Authority.

One final point of rebuttal must be made regarding *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989), which was also thoroughly discussed in Plaintiff's opening brief. Put simply, that case employed an *Erie* doctrine analysis to hold the child safety seat non-use statute is a pronouncement of Arkansas' substantive law of comparative fault. *Id.* at 1324.

To rebut *Potts*, Defendants spend a great deal of energy explaining that "substantive" for *Erie* doctrine purposes may be different from

"substantive" for separation-of-powers purposes. Defendants ignore that the analysis of what is substantive under the *Erie* analysis informs what is substantive for purposes like separation of powers under the Arkansas cases. See, *e.g.,* Note, *Marching to Service*, 64 Ark. L. Rev. 523, 525-526 (2011) (noting for separation-of-powers purposes under Arkansas law "it is instructive to note how substance and procedure are defined, especially in the federal courts in the context of the *Erie* doctrine.") It is instructive because essentially the same standard is used. *Ibid.*

No, *Potts* is not the final word on the question and Plaintiff never contended it was. It's a federal case not a precedent of this Court. But it is persuasive authority this Court can employ to answer the question before it, which is the final word. That was the point of Plaintiffs' citation to it.

CONCLUSION

This Court should answer the certified question "No." Ark. Code Ann. § 27-34-106(a) is a substantive rule of law declaring that failing to utilize a child safety seat is not negligent and is therefore irrelevant to comparative fault. This Court should so state.

Respectfully submitted,

/s/ Brian G. Brooks

Brian G. Brooks, No. 94209
Brian G. Brooks, Attorney at Law, PLLC
P.O. Box 605
Greenbrier, AR 72058
(501) 733-3457
bgbrooks1@me.com

Denise Reid Hoggard (Ark. Bar No. 84072)
Jeremy McNabb (Ark. Bar No. 2003083)
RAINWATER, HOLT & SEXTON, P.A.
P.O. Box 17250
Little Rock, AR 72222
Telephone: (501) 868-2500
Telefax: (501) 868-2508
hoggard@rainfirm.com
mcnabb@rainfirm.com

CERTIFICATE OF SERVICE

I certify that the forgoing was submitted for filing electronically under the eFlex filing system and served upon counsel of record on the 17th day of December, 2020:

Todd Wooten
DOVER DIXON HORNE PLLC
425 West Capitol Ave., Suite 3700
Little Rock, AR 72201
twooten@ddh.law

Gregory T. Jones
Kristen Moyers
WRIGHT LINDSEY & JENNINGS LLP
200 West Capitol Ave., Suite 2300
Little Rock, AR 72201-3699
gjones@wlj.com
kmoyers@wlj.com

/s/ Brian G. Brooks