08/01/90 DONNA RAE MOFFETT v. EDWARD J. ZITVOGEL

1990 | Cited 0 times | Superior Court of Delaware | August 1, 1990

MEMORANDUM OPINION

This lawsuit involves, in part, a wrongful death action by plaintiff, Donna Rae Moffett ("Moffett") on behalf of her daughter, Tara Rae Moffett ("Tara Rae"). Tara Rae was killed while a passenger in a car driven by Moffett. The death occurred as a result of a collision between Moffett's automobile and a car driven by defendant, Edward J. Zitvogel, Jr. ("Zitvogel"). [1] Moffett seeks damages in tort from Zitvogel in connection with the death of Tara Rae.

In their answer, defendants raised three affirmative defenses: that the proximate and/or contributing cause of Tara Rae's injuries and death was the fact that she was not properly secured in a child restraint seat at the time of the accident; that the failure to secure Tara Rae in a child restraint seat was a superseding or intervening cause of her death; and that Moffett negligently entrusted Tara Rae to plaintiff, Christopher G. Warnick ("Warnick") prior to the accident and that this negligence was the proximate cause of Tara Rae's death. Warnick is Moffett's son and was a passenger in the Moffett vehicle at the time of the accident. He is alleged to have been holding Tara Rae on his lap at the time of the collision. At her death, Tara Rae was 20 months old and required to be secured in a child restraint seat pursuant to 21 Del.C. § 4199C(a). [2]

The plaintiffs have moved to strike all three affirmative defenses. [3] This is my decision upon those motions.

THE FIRST AND SECOND AFFIRMATIVE DEFENSES

Motions to Strike come under Superior Court Civil Rule 12(f), which provides that a Court may strike from any pleadings "any insufficient defense". See Fowler v. Mumford, Del Super., 102 A.2d 535 (1954). The plaintiffs argue that the defendants' first two affirmative defenses are invalid and thus, "insufficient" under Rule 12(f), in that no evidence can be introduced to support them pursuant to 21 Del.C. § 4199C(d) which provides:

"Failure to wear a child passenger restraint system shall not be considered as evidence of either comparative or contributory negligence in any civil suit arising out of any motor vehicle accident in which a child under four is injured, nor shall failure to wear a child passenger restraint system be admissible as evidence in the trial of any civil action."

Plaintiffs correctly assert that, if the statute applies to bar evidence of failure to use a child restraint

system in this case, the defendants will be unable to prove their first two affirmative defenses, and thus, these defenses are irrelevant to this action and should be struck. With that point the defendants appear to be in agreement. The defendants contend, however, either that § 4199C(d) does not bar them from submitting evidence on failure to use a child restraint system, or that § 4199C(d) is invalid as violative of the Fourteenth Amendment of the United States Constitution. I shall discuss these two contentions in turn.

The defendants first claim that § 4199C(d) prohibits only the introduction of evidence of failure to use child restraints for purposes of demonstrating comparative or contributory negligence. Defendants claim that they seek to introduce this evidence for a different purpose: that of demonstrating "avoidable consequences" or "mitigation of damages". The distinction, according to the defendants, is that the negligence the defendants allege on the part of Moffett contributed only to the extent of the damage, but not to the cause of the accident. There are a number of fatal flaws in this theory, however. First, the affirmative defenses in question do not mention avoidable consequences/mitigation of damages. The defenses deal with the proximate, contributing superseding or intervening causes of Tara Rae's physical injuries and resulting death. These defenses would seem to encompass a contributory/comparative negligence claim. Next, even assuming that the first and second affirmative defenses attempt to raise mitigation of damages/avoidable consequences, it is not clear that those doctrines can apply to the instant situation. Such doctrines are typically used to apportion damages where the plaintiff's own negligence subsequent to the negligence of the defendant has caused or increased the plaintiff's injury. The doctrine would not appear to be applicable to a case involving failure to use seat belts or child restraints, where the plaintiff's negligence is necessarily antecedent to the defendant's negligence. Lipscomb v. Diamiani, Del. Super., 226 A.2d 914 (1967). Next, even if the doctrine of avoidable consequences can apply in the instant situation, there is scholarly debate as to whether the doctrine is distinct in any meaningful way from comparative negligence. See Prosser and Keeton on Torts, 5th Ed. § 65. That is, it would seem an artificial distinction in this case to say that the defendants' negligence caused the accident but Moffett's negligence caused Tara Rae's injuries and death, where with respect to Tara Rae the "accident" was the collision between her body and the front portion of the passenger compartment of the Moffett automobile which, under defendants' version of the facts, would appear to have been caused by a combination of both Zitvogel's and Moffett's negligence. Viewed in this light, Moffett's failure to secure Tara Rae with a child safety device is comparative negligence, and no matter which name is applied, the resulting apportionment of damages would be the same.

More important than any of the considerations recited above, however, is that the statute does not stop at prohibiting the introduction of evidence of failure to use a child restraint in cases of comparative and contributory negligence. Subsection (d) concludes:

The defendants argue that because the statute mentions the inadmissibility of failure to use a child restraint with respect to allegations of comparative and contributory negligence specifically, the general prohibition against submission of this evidence has no meaning and should be regarded as a

nullity. Apparently, defendants would have this Court apply the analysis represented by the maxim "expressio unius est exclusio alterius"; that is, that express mention of one thing implies exclusion of all others. That analysis might have some bearing in this situation if the statute merely stopped after excluding evidence in connection with allegations of contributory or comparative negligence. It is fatal with respect to this argument of defendants, however, that the statute goes on to include the general prohibition of the failure to use child restraints in all civil actions. The maxim referred to, of course, is only an aid in determining Legislative intent and can never be used to override the clear manifestation of that intent. See Allstate Insurance Company v. Malec, N. J. Supr., 514 A.2d 832 (1986); Taylor v. Mayor and City Council of Baltimore, Md. App., 443 A.2d 657 (1982). In fact, defendants attempt to have this Court interpret 21 Del.C. § 4199C(d) at all is misplaced. There is judicial discretion to construe a statute where the language used is obscure or ambiguous, "but where no ambiguity exists and the intent is clear from the language of the statute, there is no room for statutory interpretation or construction". Giuricich v. Emtrol Corp. Del.Supr., 449 A.2d 232 (1982). The statute in question, 21 Del.C. § 4199C(d) and its application to the instant situation could hardly be clearer or less ambiguous if the statute mentioned the defendants by name. The Legislature in § 4199C(d) specifically forbids the introduction of evidence on failure to use a child restraint in connection with allegations of contributory and comparative negligence, apparently its main concern, and then goes on to deliver a blanket prohibition against the submission of such evidence in any civil case. To put it simply, the defendants cannot introduce evidence in this lawsuit concerning Tara Rae's failure to be restrained in an approved child passenger restraint system. The cases from other jurisdictions cited by defendants, theoretically to the contrary, do not involve the general prohibition against the admission of child restraint evidence or are otherwise inapposite.

Notwithstanding the prohibition contained in § 4199C(d), defendants argue that they should be allowed to submit evidence of Tara Rae's failure to wear a child restraint because the statute is unconstitutional as violative of the equal protection clause of the Fourteenth Amendment. The defendants' argument on this issue is likewise unfounded. If a law creates classifications under which individuals are treated differently, it must bear some rational relationship to a legitimate state purpose in order to pass constitutional muster. City of Dallas v. Stanglin U.S. , 109 Supreme Court 1591, 104 L.Ed.2nd 18 (1989); Lacy v. Green, Del.Super., 428 A.2d 1171 (1981). [4] The classification must rest upon "some ground of difference having a fair and substantial relation to the object of the Legislation . . .". M v. M, Del.Supr., 321 A.2d 115, 117 (1974) (citing Reed v. Reed, 404 U.S. 71 (1971); Royster Guano Co v. Virginia, 253 U.S. 412 (1920)). The defendants argue that the privileged class in this situation consists of children not secured in child restraint systems and that the burdened class is composed of those children whose guardians comply with the law and use the systems. Obviously, however, these are not classes which are treated differently; neither of these supposed classes can have lack of child restraint use proved against them. [5] Without speculating further as to what privileged and burdened classifications the statute might create, however, suffice it to say that even if such classifications were shown, a legitimate purpose is readily apparent from the statute. The Legislature apparently wanted to insure that children under the age of four injured in collisions caused by the tortious conduct of others were not prevented from recovering against those

tortfeasors by the additional negligence of their parents or those otherwise charged with their care at the time of the accident in not placing the child in a restraint system. [6] In short, the prohibition contained in § 4199C(d) bears ample rational relationship to a legitimate state purpose so as to withstand constitutional scrutiny under the Fourteenth Amendment Equal Protection Clause. City of Dallas v. Stanglin, supra ; San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). Since the statute is thus valid, and since it prohibits any introduction of evidence to show the failure of Tara Rae to utilize a child restraint system, defendants' first and second affirmative defenses are insufficient and it is appropriate that plaintiffs' motion to strike these defenses be granted.

The Third Affirmative Defense

I now turn to the defendants third affirmative defense, which provides:

"Plaintiff, Donna Rae Moffett, negligently entrusted her 20-month old daughter, Tara R. Moffett, to Christopher G. Warnick prior to the August 21, 1989 automobile accident and Donna Rae Moffett's negligence was the proximate cause of Tara R. Moffett's injuries and resulting death".

I need not examine plaintiffs' arguments that this affirmative defense be struck, since the defendants now concede that the doctrine of negligent entrustment is applicable to personal property rather than human beings. See Restatement (Second) Torts, § 390 (1965). By way of their "Memorandum of Law in Opposition to Plaintiff's Motion to Strike Defendant's Second, Third and Fourth Defenses", defendants have informed the Court that they "wish to amend their answer at this time by inserting in place of negligent entrustment the defense of negligent supervision by Donna R. Moffett." This is, of course, a completely different theory than the so-called "negligent entrustment" count which appeared to allege that Moffett was negligent in entrusting the care of Tara Rae to her son, Warnick. This Court has an established procedure whereby parties may seek leave to amend pleadings, and mention of the desire to amend in a brief in opposition to a motion to strike is not that procedure. I will not speculate as to what the specifics of any "negligent supervision" claim by the defendants might be. Negligence, of course, must be pled with particularity, a condition notably lacking in defendants' original "negligent entrustment" averment. Superior Court Civil Rule 9(b). Should defendants wish to seek leave to amend their answer to state an affirmative defense of negligent supervision by Moffett, they are, of course, free to do so by the conventional means. In the interest of judicial economy, however, I will mention that a defense of negligent supervision introduced for purposes of contributory negligence or mitigation of damages and relying on Moffett's failure to place Tara Rae in a child protective restraint will necessarily achieve a result consistent with this opinion.

For the foregoing reasons, plaintiffs' Motion to Strike Defendants' First, Second and Third Affirmative Defenses (denominated in the Answer "Second Defense", "Third Defense", and "Fourth Defense") is hereby granted.

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IT IS SO ORDERED.

1. The additional defendants are the parents of Zitvogel and the owners of the automobile which Zitvogel was driving at the time of the accident. At that time, Zitvogel was a minor.

2. That statute provides that "every person shall be responsible, when transporting a child under the age of four years and weighing less than forty pounds in a motor vehicle operated on the roadways, streets or highways of this State for providing for the protection of the child by properly using a child passenger restraint system meeting Federal motor vehicle safety standards. . . ."

3. The additional plaintiffs are Warnick and Moffett's husband, John W. Moffett.

4. Of course, if the law creates "suspect" classifications, based on race, alienage, national origin or sex, or infringes upon Constitutionally protected rights, strict scrutiny of the rationale behind the classification is called for. City of Dallas v. Stanglin, supra ; San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). The "strict scrutiny" test is not called for in the instant situation, however. See Household Finance Corp. v. Johnson, Del.Super., 346 A.2d 177 (1975).

5. It is doubtful whether defendants would have standing to assert that the statute arbitrarily burdens children whose guardians comply with the statute.

6. I also note that the statute merely prevents the doctrine of negligence per se from defeating the common law prohibition against the introduction, for purposes of demonstrating either contributory negligence or avoidable consequences, of the failure to use passenger restraint systems with respect to adults or children. This prohibition has exited in express form in Delaware since 1967. Lipscomb v. Diamiani, (supra) . This common law prohibition rests in part upon concerns that any apportionment of damages in this situation would be the result of pure speculation on the part of the jury, and upon the conflict possible with other established tort doctrines, including, among others, the doctrine that the failure to anticipate another's negligence is not negligence such as to defeat recovery for injuries sustained, and that the defendant must take the plaintiff as he finds him. Lipscomb v. Diamiani, supra, at 917-918.