

STATE OF MICHIGAN
COURT OF APPEALS

ROSE GAGGO, Individually, and as Next Friend
of ANDREW GAGGO,

UNPUBLISHED
July 22, 2008

Plaintiff-Appellee,

v

No. 278607
Oakland Circuit Court
LC No. 2006-074637-NI

MCKINLEY KENNEDY aka KEN KENNEDY,
and KIM JACOBS-KENNEDY aka KIM JACOBS
aka KIM KENNEDY, as Parents of KEENAN
KENNEDY,

Defendants-Appellants,

and

LISA HINCHMAN,

Defendant.

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's judgment in plaintiffs' favor, entered following a bench trial, in this case brought under the Motor Vehicle Code's civil liability act, MCL 257.401. We affirm.

I

The facts as found by the trial court are set forth in its opinion and order:

This case arises out of a collision which occurred on April 2, 2004 in Farmington Hills, Michigan. On that date, Andrew Gaggo ("Andrew") was a passenger on a moped being driven by his friend, Defendant Keenan Kennedy ("Keenan").

Andrew was 13 years of age at the time and Keenan was 14 years of age^[1]. The subject moped was owned by Keenan's parents, Defendants Kim Jacobs-Kennedy and McKinley Kennedy ("Defendant parents").

Keenan arrived home from school at approximately 2:30 in the afternoon^[2]. He was alone in his home as both of his parents were away from the house at that time. Keenan took a key to his parents' moped and drove it to the home of Andrew.

Testimony from Defendant parents indicated that they had instructed their son in the past that he is not allowed to ride the moped without obtaining their permission first. He is also restricted from riding the moped outside of their subdivision. Defendant McKinley Kennedy indicated that he instructed his son that he should not ride the moped other than instructions [sic] from his father.

Defendant parents acknowledge that although their son was not old enough to obtain a license to ride a moped, he was allowed to operate it under certain circumstances. It is also undisputed that on the day in question the moped was not locked or secured in any manner.

Keenan drove the moped to Andrew's home. Keenan and Andrew then left subdivision [sic] and traveled towards Speedway Gas Station to obtain gas for the moped. On the way to the gas station they were traveling on a bike path/sidewalk, which at one point became a wooden bridge. That wooden bridge had four-foot high railings on each side and was surrounded by wetlands and vegetation. The bridge ended at the driveway of the CVS Pharmacy located at Fourteen Mile and Haggerty Roads. Due to the elevation of the bridge and the presence of vegetation, drivers leaving CVS to enter Fourteen Mile Road were prevented from seeing objects traveling off the bridge and into the drive area.

When Keenan entered the driveway of CVS he admits that he did not brake or stop. As he entered the driveway area the moped was struck by a vehicle that was exiting CVS. That vehicle was driven by Lisa Hinchman. Although originally a defendant in this matter, the claims against her and her husband have been resolved. They are no longer defendants in this lawsuit.

As a result of the collision both Keenan and Andrew were thrown from the moped. They were taken by ambulance to Providence Hospital where they were seen in the emergency room.

¹ McKinley Kennedy, Keenan's father, testified at trial that Keenan was 13 years old on the date of the accident, and Keenan testified he thought he was 13 at the time. However, defendants' motion for directed verdict stated Keenan was 14 years old at the time of the accident.

² The testimony was that Keenan usually got home from school around 3:00 or 3:30 p.m. The accident occurred at 4:42 p.m.

Andrew was treated for a swollen and bruised left knee. A CT-scan was performed and he was prescribed a knee immobilizer, crutches and Tylenol 3. He then followed up with his Pediatrician who referred him to an Orthopedic Surgeon, Dr. Thomas Ditkoff.

Dr. Ditkoff ordered an MRI of the left knee which showed a Salter type 2 fracture of his left knee. Andrew was casted and was required to use crutches while wearing the long-leg non-walking cast. He remained in a cast from October 6, 2004 until November 3, 2004. Once the cast was removed he underwent physical therapy.

Andrew followed up with Dr. Ditkoff and as of January 5, 2005 he was feeling quite well and found to be having a good recovery. He next returned to Dr. Ditkoff in June of 2005. At that time x-rays revealed the left distal growth plate had closed compared with the right side.

Due to the fact that this condition could lead to Plaintiff developing a significant difference in leg lengths, Dr. Ditkoff was concerned. A CT-scan verified there was already a 5 mm leg length difference. Because the left femoral growth plate was clearly closed and would not be growing any further, the doctor was of the opinion that a progressive leg length difference would develop.

On July 7, 2005 Dr. Ditkoff performed surgery at William Beaumont Hospital in Royal Oak. He performed a procedure to stop the growth in the distal femoral growth plate on the right leg. The surgery was successful and Andrew was discharged with a knee immobilizer.

Andrew's activities were limited for another several weeks and he attended a second set of physical therapy treatments. Dr. Ditkoff last saw Andrew on September 7, 2005. At that time Andrew was doing [sic] well and the doctor was of the opinion that he would return to all of his past activities including sports within a short time period. It was Dr. Ditkoff's opinion that due to the growth plate surgery, Andrew would be one inch shorter than he would have otherwise been.

The trial court concluded that Keenan was negligent in the operation of the moped, that Andrew was 20% comparatively negligent, and that defendant parents failed to provide strong, positive and credible evidence that Keenan drove the moped without their consent:

Here, Keenan admittedly did not stop the vehicle at the intersection of the bike path and the CVS driveway. He not only did not stop, but he failed to brake in any manner.

MCL 257.660(6)^[3] indicates that a moped will not be operated on a sidewalk constructed for the use of pedestrians. MCL 750.419^[4] prohibits a person operating a moped to travel upon a bicycle path or sidewalk regularly laid out and contrasted [sic] for the use of pedestrians. Both of those statutes were violated by Keenan's use of the moped on the sidewalk/bicycle path. Further, MCL 257.312(a)(2)^[5] prohibits a person from operating a moped upon a highway unless they have a valid operator's license or chauffeurs [sic] license. A special restricted license to operate a moped maybe [sic] issued to a person fifteen years of age or older if that person has satisfied the Secretary of State he is competent to operate a moped with safety. In this matter, Keenan had not yet reached the age at which he would have become eligible for the special restricted license. Clearly this statute was violated by his operation of the moped on the date in question.

The issue then becomes whether or not Keenan used the vehicle without his parent's [sic] consent or permission. According to the law, such consent or permission is presumed pursuant to MCL 257.401. To overcome both the statutory and common law presumption that the driver of a vehicle causing injury was driving without [sic] the owner's knowledge or consent, the challenging party must provide positive, strong and credible evidence that the vehicle was not driven with the owners [sic] knowledge and consent. Reed v Bretten [sic Breton] 264 Mich App 363, 691 NW2d 779 (2004)^[6].

³ MCL 257.660(6) provides:

A moped or low-speed vehicle shall not be operated on a sidewalk constructed for the use of pedestrians.

⁴ MCL 750.419 provides:

Sec. 419. A person who operates or rides a motorcycle, moped, or other motor vehicle, excepting motorized wheelchairs upon a bicycle path or a sidewalk regularly laid out and constructed for the use of pedestrians, not including a crosswalk or driveway, is guilty of a misdemeanor.

⁵ MCL 257.312a provides in pertinent part:

(2) A person, before operating a moped upon a highway shall procure a special restricted license to operate a moped unless the person has a valid operator's or chauffeur's license. A special restricted license to operate a moped may be issued to a person 15 years of age or older if the person satisfies the secretary of state that he is competent to operate a moped with safety. The secretary of state shall not require a road test before issuance of a special restricted license to operate a moped.

⁶ rev'd on other grounds, 475 Mich 531; 718 NW2d 770 (2006).

Here, the evidence is clear that Keenan's parents allowed their son, who was under age and not eligible for a special license, to operate their moped. Although they did place some restrictions on him in that he was required to seek permission each time he rode the moped and wasn't allowed to have a second person ride with him without their permission, this appears to be the extent of their restrictions.

The evidence also indicates that Defendant parents left a key accessible to Keenan in their kitchen and that the moped wasn't secured or locked in any manner. Defendant parents knew that their son arrived home on a bus around 3:30 p.m. on school days and that on occasion no one would be home. The Court further notes that the Defendant parents often let their son drive although legally he was not entitled to drive the moped. The Court finds that the parents have failed to provide strong, positive and credible evidence that the moped was not driven with their consent.

Further, the statutory liability of an automobile owner for damages arising from the negligent operation of the automobile by another is not avoided where the owner's [sic] instructs that the vehicle be operated in a certain way or when driving it alone, are disobeyed. Sweeney v Hartman, 296 Mich 343 (1941). Here, although Keenan may have failed to follow the specific instructions of his parents, in general they allowed their son to operate the moped despite his young age.

The Court finds that Plaintiff did in fact prove by a preponderance of the evidence that Defendant parents are liable for the negligence of their son in this matter pursuant to MCL 257.401. Moreover, the Court finds that the accident in question was the proximate cause of Andrew's Salter Two type fracture and the resulting surgery and residuals.

* * *

Andrew does not deny that Defendant McKinley Kennedy had advised him on at least one occasion not to ride on the moped with his son. It is also clear that had Plaintiff followed this instruction he would not have been injured. The Court would find 20% Comparative Negligence would apply in this matter. Therefore, the Court finds as follows: Judgment should enter in favor of Plaintiff for pain and suffering in the amount of \$40,000 plus \$12,736.68 for unpaid medical bills.

II

The civil liability act of the Motor Vehicle Code, MCL 257.401, provides in pertinent part:

Sec. 401. (1) This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligent operation

consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate family member.

MCL 257.33 of the Motor Vehicle Code, defines “Motor Vehicle”:

Sec. 33. “Motor vehicle” means every vehicle that is self-propelled Motor vehicle does not include an electric personal assistive mobility device.

MCL 257.32b defines “Moped”:

Sec 32b. “Moped” means a 2- or 3-wheeled vehicle which is equipped with a motor that does not exceed 50 cubic centimeters piston displacement, produces 2.0 brake horsepower or less, and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface. The power drive system shall not require the operator to shift gears.

The Supreme Court has held that a moped is a motor vehicle within the ambit of the Motor Vehicle Code. *Farm Bureau Mut Ins Co of Michigan v Stark*, 437 Mich 175, 183; 468 NW2d 498 (1991), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999).

A

Defendants, who proceeded in propria persona below and do so on appeal as well, assert that they clearly rebutted the statutory presumption, contained in MCL 257.401(1), that the moped owned by them was driven with their express or implied consent or knowledge.

We review the trial court’s factual findings following a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Pursuant to the owner’s liability statute, also known as the family car doctrine, when a vehicle causing injury is driven by someone other than the owner, “It shall be presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her father, mother, brother, sister, son, daughter, or other immediate member of the family.” If the driver is not an immediate family member, there exists a common-law presumption that the owner has knowledge or consented to the driver’s use. To overcome both the statutory and common-law presumptions, the challenging party must provide “positive, unequivocal, strong and credible evidence” that the car was not driven with the owner’s knowledge or consent. [*Reed v Breton*, 264 Mich App 363, 373; 691 NW2d 779 (2004), rev’d on other grounds 475 Mich 531 (2006).]

Trial testimony supported that defendant parents placed restrictions on Keenan's use of the moped, including that he was not allowed to take passengers and was not allowed to take the moped out of the subdivision. However, testimony also supported that defendants permitted Keenan to drive the moped, despite his young age, and that defendants left the keys to the moped, and the moped itself, readily accessible to Keenan. Keenan testified that the keys to the moped were kept in the kitchen, and that the moped was in the garage. Neither the keys to the moped nor the moped itself were locked. Keenan testified that prior to the accident, plaintiff had been a passenger on the Kennedy's moped on more than one occasion. Regarding the accident, Keenan testified he guessed he was at fault, and that even if he had applied the brakes, the vehicle would still have hit his moped.

Officer Jeff Shade testified that he was called to the scene of the accident, interviewed the driver of the car that struck the moped, as well as two witnesses to the accident, and that although he did not issue a ticket, he concluded that Keenan Kennedy was at fault for the accident and had been carelessly or negligently driving.⁷ Officer Shade testified that he did not speak to either of the boys at the accident scene because they were injured, and that he based his opinion that Keenan was driving negligently on the witnesses' testimony regarding the speed that the moped was traveling on the sidewalk.

We conclude the trial court's findings were adequately supported by the evidence and find no error in the trial court's conclusion that defendant parents did not rebut the statutory presumption that Keenan operated the moped with their knowledge and consent. *Alan Custom Homes, Inc, supra*.

B

Defendants also assert that recklessness is the proper standard for a minor defendant where, as in this case, the minors were participants in a recreational activity.

Plaintiff contends that defendants did not raise this issue below. Defendants, who proceeded in propria persona, first raised this issue in a motion for directed verdict, filed post-trial.⁸ Assuming the issue was properly preserved, we conclude it has no merit. Defendants rely

⁷ Officer Shade testified that Michigan law prohibits riding a moped on a sidewalk, regardless of whether one is licensed to drive the moped or not, and that you have to be 15 years or older to seek a license for a moped.

⁸ The bench trial occurred on April 2, 2007. Defendants filed their motion for directed verdict on April 16, 2007.

MCR 2.515 provides that "A party may move for a directed verdict at the close of the evidence offered by an opponent. . . ." Defendants did not timely move for a directed verdict. However, it appears that the trial court considered defendants' motion for directed verdict, as its opinion and order entered on May 21, 2007, addressed some of the issues defendants raised in their motion, including that plaintiff did not meet the serious impairment threshold of the no-fault act.

The trial court had requested at the conclusion of the bench trial that the parties submit proposed findings of fact and conclusions of law; plaintiff did so, defendants did not. The trial court
(continued...)

on *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999), in which the plaintiff, while ice-skating at a public rink, was injured and brought suit against the 12-year-old who had run into her on the rink and caused her to fall, the City of Berkley, and an ice arena employee. The employee and ice arena were dismissed by stipulation. The circuit court granted summary disposition in the remaining defendant's favor, concluding that an ice rink was inherently dangerous and that the defendant, who had been skating backwards when he collided with the plaintiff, had not acted outside the rules governing skating. A panel of this Court reversed, concluding that an "ordinary care" standard applied and that a genuine issue of fact existed whether the defendant was negligent. The Supreme Court reversed:

In developing the common law in this area, we must recognize the everyday reality of participation in recreational activities. A person who engages in a recreational activity is temporarily adopting a set of rules that define that particular pastime or sport. In many instances, the person is also suspending the rules that normally govern everyday life. For example, it would be a breach of etiquette, and possibly the law, to battle with other shoppers for a particularly juicy orange in the grocery store, while it is quite within the rules of basketball to battle for a rebound. Some might find certain sports, such as boxing or football, too rough for their own tastes. However, our society recognizes that there are benefits to recreational activity, and we permit individuals to agree to rules and conduct that would otherwise be prohibited.

There are myriad ways to describe the legal effect of voluntarily participating in a recreational activity. The act of stepping onto the field of play may be described as "consent to the inherent risks of the activity," or a participant's knowledge of the rules of a game may be described as "notice" sufficient to discharge the other participants' duty of care. Similarly, participants' mutual agreement to play a game may be described as an "implied contract" between all the participants, or a voluntary participant could be described as "assuming the risks" inherent in the sport. No matter what terms are used, the basic premise is the same: When people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity. When one of those risks results in injury, the participant has no ground for complaint

* * *

[W]e join the majority of jurisdictions and adopt reckless misconduct as the minimum standard of care for participants in recreational activities. We believe that this standard most accurately reflects the actual expectations of participants in recreational activities.

(...continued)

apparently considered defendants' motion for directed verdict in lieu of proposed findings of fact and conclusions of law.

The range of activities described by the *Ritchie-Gamester* Court included contact or team sports, non-contact sports and individual recreational activities such as amusement park rides. 461 Mich at 87-88. In a footnote, the Supreme Court added:

We recognize that we have stated this standard broadly as applying to all “recreational activities.” However, the precise scope of this rule is best established by allowing it to emerge on a case-by-case basis, so that we might carefully consider the application of the recklessness standard in various factual contexts. [461 Mich at 89 n 9.]

Defendants cite no authority to support that driving a moped, a motor vehicle, on a public sidewalk and/or bicycle path is a recreational activity properly governed by a recklessness standard, nor have we found any. Although the Supreme Court has not addressed that question, this Court in *VanGuilder v Collier*, 248 Mich App 633; 650 NW2d 340 (2001), held that the Michigan Vehicle Code’s civil liability provision and negligence standard of care applied to the operation of off-road vehicles (ORVs). This Court distinguished the operation of motor vehicles from the kinds of recreational activities the Supreme Court considered in *Ritchie-Gamester*:

The instant case, however, is distinguishable from *Ritchie-Gamester*. In that case, the Court primarily focused its analysis on injuries sustained during the course of recreational activities that typically or foreseeably involve physical contact between coparticipants. To the contrary, a person operating a motorized recreation vehicle does not reasonably expect or anticipate the risk of physical contact, nor is such risk an obvious or necessary danger inherent to its normal operation. The *Ritchie-Gamester* Court did not contemplate injuries that occur as a result of physical contact between two such vehicles. This distinction is dispositive. We decline to adopt defendants’ speculative conclusion that our Supreme Court intended that a recklessness standard of care apply with regard to the operation of motorized recreation vehicles simply because they are usually used for recreational purposes. The operation of motor vehicles, including ORVs, is not governed by the “rules of the game,” but by the law. [*VanGuilder*, 248 Mich App at 636-637.]

We conclude for the same reasons as articulated in *VanGuilder* that the instant case is governed by the Motor Vehicle Code, and that *Ritchie-Gamester* does not apply.

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Kurtis T. Wilder