STATE OF MICHIGAN

IN THE SUPREME COURT

An appeal from the Michigan Court of Appeals
The Hon. Michael F. Gadola, the Hon. Karen Fort Hood and the Hon. Michael J. Riordan

KENNETH BERTIN,

Plaintiff-Appellee,

v

DOUGLAS MANN,

Defendant-Appellant.
_____/

Supreme Court No. 155266

Court of Appeals No. 328885

Lower Court No. 14-139901 NO

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SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Dated: November 16, 2017

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DID THE COURT OF APPEALS ERR BY DETERMINING THAT A NEGLIGENCE STANDARD FOR LIABILITY APPLIES TO AN INJURY RESULTING FROM THE OPERATION OF A GOLF CART WHILE PLAYING RECREATIONALLY, AS OPPOSED TO A RECKLESS MISCONDUCT STANDARD FOR LIABILITY?

Plaintiff-Appellee says "No."

Defendant-Appellant says "Yes."

The Court of Appeals said "No."

STATEMENT OF FACTS

Introduction

On May 22 or 23, 2013, while Plaintiff and Defendant were engaged in a game of golf, Defendant Douglas Mann accidentally drove a golf cart into Plaintiff, Kenneth Bertin, causing him to fall to the ground. Plaintiff contends that Defendant then ran over his ankle, causing several fractures. Plaintiff sued Defendant, claiming damages for the injuries sustained.

Prior to trial, the trial court ruled that the relevant standard of care was reckless misconduct and not negligence (Tr. 5/13/15, pp 14-15; Appendix, pp 39a-40a). This standard is found in the case of *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 95; 597 NW2d 517 (1999), where the Supreme Court held that "coparticipants in a recreational activity owe each other a duty not to act recklessly."

Following a jury trial, the jury found that Defendant did not engage in reckless misconduct (Tr 7/16/15, pp 78-79; Appendix, pp 111a-112a). Plaintiff appealed to the Michigan Court of Appeals, contending that the proper standard for liability was negligence rather than reckless misconduct. In a published opinion issued December 27, 2016, the Court of Appeals agreed (COA opinion, Appendix, pp 156a-169a). The panel reversed the trial court's finding that reckless misconduct was the applicable standard for liability, vacated the jury's verdict of no cause of action, and remanded to the trial court for further proceedings consistent with its opinion (COA Opinion, p 1; Appendix, p156a). Defendant sought leave to appeal to this Honorable Court, which directed that oral argument be held to determine whether to grant leave or take other action (9/22/17 Order; Appendix, p 170a). In accordance with this Court's Order, Defendant-Appellant submits this Supplemental Brief in Support of his Application for Leave to Appeal.

The Incident

On the date of the incident, May 22 or 23, 2013, Plaintiff and Defendant were paired as partners for a game of golf against two other golfers (Tr 7/14/15, p 167; Appendix, p 50a). Plaintiff, age 69 at the time of trial, had been playing golf for some 43 years, since 1970 (Tr. 7/14/15, pp 160, 162; Appendix, pp 45a, 47a). Defendant, age 88 at the time of trial, had been playing golf since the age of 11 (Tr. 7/14/15, pp 259, 262, 294; Appendix, pp 64a, 67a, 81a). Defendant testified that he played once a week in the current year, but that he had earlier played twice a week (Tr. 7/14/15, pp 294, 295; Appendix, pp 81a, 82a). Whenever he is golfing he drives or rides in a golf cart (Tr. 7/14/15, p 295; Appendix, p 82a).

On the date of the incident, Plaintiff testified, he drove the cart the majority of the time (Tr. 7/14/15, p 167; Appendix, p 50a). Plaintiff and Defendant teed off at the 10th hole, intending to play the back nine first and then the front nine (*Id.*). At the 17th hole, Defendant hit his ball onto the green about three to five feet from the hole, and Plaintiff then hit his ball to the right of the green (Tr. 7/14/15, p 169; Appendix, p 52a). Plaintiff testified that he then drove the cart to the place where his ball was, and parked it in the rough (Tr. 7/14/15, pp 169-170; Appendix, pp 52a-53a). Plaintiff testified that he took his putter and wedge, expecting to hit the ball onto the green with the wedge (Tr. 7/14/15, p 170; Appendix, p 53a). Plaintiff proceeded to hit the ball, went through the green and picked up his putter, then walked about ten to fifteen feet toward his ball (Tr. 7/14/15, pp 171-172; Appendix, pp 54a-55a). Plaintiff testified that as he was doing so, he was suddenly struck in the buttocks area by the golf cart (Tr. 7/14/15, p 172; Appendix, p 55a). Plaintiff did not see the golf cart coming before he felt the impact (Tr. 7/14/15, p 215; Appendix, p 61a). Plaintiff fell to the ground, where according to Plaintiff, the golf cart then ran over his leg (Tr. 7/14/15, p 173; Appendix, p 56a).

Defendant testified that he took his shot at the 17th hole and went back to the cart (Tr. 7/14/15, p 301; Appendix, p 85a). After hitting his shot, he decided he would take the cart to the other side of the green so that it would be in place when the players walked off the green (Tr. 7/14/16, p 302; Appendix, p 86a). When he got behind the wheel of the golf cart, Plaintiff was to the right of and slightly behind him (Tr. 7/14/15, p 273; Appendix, p 70a). Defendant testified that he looked ahead and around, and there was no one ahead of him (Tr. 7/14/15, p 277; Appendix, p 73a). However, when Defendant put his foot on the accelerator, Plaintiff stepped in front of the cart, which struck him (Tr. 7/14/15, p 279; Appendix, p 75a). Defendant believed that Plaintiff stepped in front of the cart just as it started moving (Tr 7/14/15, p 306; Appendix, p 90a). Defendant testified that the cart did not run over Plaintiff, and he did not feel the cart go over Plaintiff's leg (Tr. 7/14/15, p 282; Appendix, p 78a).

Defendant testified that using golf carts to get to the holes was part of the game of golf (Tr 7/14/15, p 309; Appendix, p 93a). The rules and etiquette of golf prescribe driving the cart on the fairway (Tr. 7/14/15, p 316; Appendix, p 96a). Both parties testified regarding cart paths that run all over the golf course (Tr. 7/14/15, pp 213-214, 278; Appendix, pp 59a-60a, 74a).

Procedural Facts

Prior to trial, Defendant brought a Motion to Settle Proposed Jury Instructions, asserting that the applicable standard of care for coparticipants in a recreational activity was reckless misconduct (Defendant's Motion to Settle Proposed Jury Instructions, 5/4/15, pp 3, 7-12; Appendix, pp 5a, 9a-14a). Defendant relied on the Michigan Supreme Court case of *Ritchie-Gamester, supra,* where the Supreme Court adopted a reckless misconduct standard of care for coparticipants in recreational activities (*Id.* at 7; Appendix, p 9a).

In response, Plaintiff asserted that negligence, and not reckless misconduct, was the appropriate standard of care (Plaintiff's Response and Brief in Opposition to Defendant's Motion to Settle Proposed Jury Instructions, 5/8/15, p 7; Appendix, p 22a). Plaintiff maintained that the recreational activity doctrine of *Ritchie-Gamester* was not applicable when a motorized vehicle was involved in the activity (*Id*., p 8; Appendix, p 23a). Plaintiff relied on two cases that involved off road vehicles [ORVs], not golf carts. See *Van Guilder v Collier*, 248 Mich App 633; 650 NW2d 340 (2001) and *Allred v Broekhuis*, 519 F Supp 2d 693 (WD Mich 2007).

After hearing oral argument, the trial court determined that the reckless misconduct standard was the appropriate standard to be applied in this case:

> I do find that the issue of whether or not the game of golf and the use of a golf cart in the game of golf entitles the defendant to the reckless negligence standard. And the Court finds that it does fit that standard in the sense that it is involved with the game of golf.
>
> Off road vehicles, though not all of them, they all could be under the motor vehicle statute, driven on roads and some of them are, as some Jeeps are off road vehicles and are driven on the roads also. Golf carts are not allowed on roads. They're not – they're not licensed, they don't have a license, they don't – they don't qualify under the Motor Vehicle Code. So the Court will give the reckless negligence standard with respect to negligence.

(Tr. 5/13/15, pp 14-15; Appendix, pp 39a-40a.) The trial court then clarified that the appropriate standard was reckless misconduct (Tr. 5/13/15, p 15; Appendix, p 40a).

At trial, the jury was accordingly instructed that coparticipants in a sport or recreational activity owe a duty to avoid reckless misconduct toward each other:

> When people participate in a sport or recreational activity the law presumes that the participants consent to the ordinary risks involved with that activity. Co-participants in a recreational activity owe each other a duty not to act with reckless misconduct.

> Conduct within the scope of ordinary activity involved in the sport or activity is not reckless. The recklessness standard requires that the defendant's actions demonstrate a willingness or purposeful indifference to the injury of the co-participant.

(Tr. 7/16/15, pp 67-68; Appendix, pp 101a-102a.)

The jury found that Defendant did not engage in reckless misconduct (Tr. 7/16/15, pp 78-79; Appendix, pp 111a-112a). Accordingly, a judgment of no cause for action was entered in favor of Defendant (Order for Entry of Judgment of No Cause for Action, 8/3/15; Appendix, pp 113a-114a).

Plaintiff appealed as of right to the Michigan Court of Appeals, contending that the proper standard for liability was negligence rather than reckless misconduct. Plaintiff relied as he had in the trial court on the cases of *Van Guilder, supra*, and *Allred, supra*, arguing that negligence was the appropriate standard for liability allegedly arising from vehicular injuries (Plaintiff's COA Brief, pp 12-15; Appendix, pp 132a-135a). Plaintiff further argued that only those injuries arising from inherent risks of the activity require a reckless misconduct standard of liability (Plaintiff's COA Brief, p 15; Appendix, p 135a). Plaintiff argued that any risk presented by motorized golf carts is not inherent to the game of golf, since the game does not require the use of such carts (*Id.*).

Defendant argued that given the ubiquitous presence of golf carts as an accessory to the game of golf, the risk of being struck by a golf cart during a game of golf was a risk inherent in the game of golf (Defendant's COA Brief, p 6; Appendix, p 149a). Defendant further argued that *Van Guilder, supra,* did not apply to this case because a golf cart, when operated on a golf course, was not regulated by statute but by rules of etiquette governing the game of golf. Defendant noted that ORVs, unlike golf carts, are extensively regulated by statutes formerly found in the Motor Vehicle Code and now found in the Natural Resources and Environmental Protection Act (Defendant's COA Brief, pp 7-8; Appendix, pp 150a-151a).

The Court of Appeals in a published opinion issued December 27, 2016, vacated the jury's verdict of no cause of action and reversed the trial court's Order finding that reckless misconduct was the applicable standard for liability in this case (COA Opinion, p 1; Appendix, p 156a). However, the appellate panel rejected Plaintiff's argument that "the applicable standard in this case is that of ordinary negligence because a golf cart, like the off-road vehicles ('ORVs') at issue in *Van Guilder v Collier,* 248 Mich App 633; 650 NW2d 340 (2001), is a motor vehicle and, therefore, subject to the civil liability provisions under the Motor Vehicle Code ('MVC'), MCL 257.1 *et seq.*" (COA Opinion, pp 5-7; Appendix, pp 160a-162a). The panel noted *Van Guilder's* reasoning that multiple statutes, formerly appearing in the Motor Vehicle Code and then reenacted in the Natural Resources and Environmental Protection Act, apply to ORVs (COA Opinion, p 6; Appendix, p 161a). Noting that "whether the civil liability act of the MVC similarly applies to carts driven on a golf course appears to be an issue of first impression in Michigan," the panel ultimately concluded that, assuming a golf cart was a motor vehicle for purposes of the MVC, "MCL 257.401(1) does not apply to the golf cart or parties at issue in the instant case." (COA Opinion, p 7; Appendix, p 162a). The panel noted that Plaintiff identified no violation of the MVC in this case, and furthermore that Defendant was neither the owner of the golf cart nor an operator as defined by statute (*Id.*). The panel concluded that Plaintiff's reliance on *Van Guilder, supra,* was unavailing.

However, the panel concluded that "[i]n considering the specific facts of this case, we agree that the risks posed by the golf cart were not risks inherent in the game of golf." (COA Opinion, p 8; Appendix, p 163a) (citation omitted). The panel concluded that this case was distinguishable "from the class of recreational activities to which *Ritchie-Gamester* applies and, therefore, the trial court erred in ruling that the reckless misconduct standard applies to plaintiff's claims" (*Id.*). After

considering dictionary definitions of "inherent" and "inherent risk," as well as interpretation of Michigan's Ski Area Safety Act which refers to "dangers that inhere in that sport," the Court noted numerous cases holding that being struck by an errant golf ball is an inherent risk in the game of golf (COA Opinion, pp 8-9; Appendix, pp 163a-164a). However, the panel went on to note, the use of golf carts is a relatively recent development in the game of golf (COA Opinion, p 9; Appendix, p 164a). The panel noted the United States Supreme Court's holding in *PGA Tour v Martin*, 532 US 661; 121 S Ct 1879; 149 L Ed2d 904 (2001), that the use of a cart would not "fundamentally alter the nature" of the game of golf in the context of an American with Disabilities Act claim (COA Opinion, p 10; Appendix, p 165a). The panel examined the USGA Rules of Golf, which include no provision that forbids, penalizes, or requires the use of carts (*Id.*). These last two considerations, along with the fact that there was "no evidence in the instant case that the golf course where the accident occurred *required* the use of golf carts," persuaded the panel that "risks related to golf carts are not inherent to the game of golf" (COA Opinion, p 11; Appendix, p 166a).

Accordingly, the panel concluded that the trial court erred in ruling that a reckless misconduct standard of care applied in this case (COA Opinion, p 12; Appendix, p 167a). In the absence of any statutory or common law rule imposing a higher standard, the panel found that the applicable standard for liability in this case was negligence (COA Opinion, pp 12-13; Appendix, pp 167a-168a). Since the panel could not conclude from the jury's determination that Defendant did not commit reckless misconduct that it would also have concluded he did not act negligently, it vacated the jury's verdict and remanded for further proceedings consistent with its opinion (COA Opinion, pp 13-14; Appendix, pp 168a-169a).

Defendant sought leave to appeal to this Honorable Court, which has ordered that oral argument be heard on whether to grant the application or take other action (9/22/17 Order;

Appendix, p 170a). Specifically, this Honorable Court has ordered the parties to address "whether the reckless misconduct standard of care or the ordinary negligence standard of care applies to an injury resulting from the operation of a golf cart while playing golf recreationally (9/22/17 Order; Appendix, p 170a).

LAW AND ARGUMENT

Standard of Review

The appropriate legal standard for liability of a coparticipant in the game of golf presents a question of law that is reviewed de novo. *Minority Earth Movers, Inc. v Walter Toebe Const. Co.*, 251 Mich App 87, 91; 649 NW2d 397 (2002).

DID THE COURT OF APPEALS ERR BY DETERMINING THAT A NEGLIGENCE STANDARD FOR LIABILITY APPLIES TO AN INJURY RESULTING FROM THE OPERATION OF A GOLF CART WHILE PLAYING RECREATIONALLY, AS OPPOSED TO A RECKLESS MISCONDUCT STANDARD FOR LIABILITY?

This case requires examination of this Court's decision in *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999). There, the Plaintiff was injured at a skating rink during open skate when another skater, skating backward, collided with her. *Id.* at 75. The Court in *Ritchie-Gamester* asked whether the standard for liability under these circumstances was mere negligence, or recklessness. *Id.* at 76. After analyzing prior Michigan law and the law of other states, the Court in *Ritchie-Gamester, supra*, then joined the majority of jurisdictions and adopted "reckless misconduct as the minimum standard of care for coparticipants in recreational activities." *Ritchie-Gamester, supra,* at 89. The holding of the Court is this: "coparticipants in recreational activities owe each other a duty not to act recklessly." *Id.* at 75. In explaining its rationale, the Court explained that "[n]o 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." *Id.* at 86-87. In order to understand what the Supreme Court meant to encompass within risks "inherent in [an] activity," it is essential to examine the legal underpinnings for the *Ritchie-Gamester* opinion.

1. The Underpinnings for the *Ritchie-Gamester* Decision

When this Court adopted the recreational activity doctrine in *Ritchie-Gamester, supra,* it incorporated traditional concepts variously described as "consent," "assumption of the risk" and "notice," among others:

> 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.

Id. at 86-87 (emphasis added).

These doctrines are all grounded in some manner in the foreseeability of the potential harm. When examining the law of other jurisdictions, the Court in *Ritchie-Gamester, supra,* quoted from the seminal New York case of *Turcotte v Fell,* 68 NY 2d 432, 439; 502 NE2d 964 (1986), emphasizing knowledge of the risk and foreseeability as the factors that give rise to a presumed consent on the part of participants:

> As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation.

461 Mich at 84 (emphasis added). Later, the Court referred to Justice Cardozo's opinion in *Murphy v Steeplechase Amusement Co*, 250 NY 479; 166 NE 173 (1929), involving a young man injured on an amusement park ride. Justice Cardozo reasoned that "[o]ne who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious or necessary . . .". *Id.* at 482. Applying this reasoning to the case before it, the Court again invoked the principle of foreseeability:

> Justice Cardozo's observations apply just as well to the conduct of coparticipants in a recreational activity as they do to the conduct of a person enjoying an amusement park ride. Indeed, while most of the cited cases have addressed "contact" sports or team sports, Justice Cardozo's comments help illustrate that the same general analysis applies to noncontact and individual recreational activities. In all these activities, there are foreseeable, built-in risks of harm.

461 Mich at 87–88 (emphasis added).

In responding to the concurring opinion, the Court in *Ritchie-Gamester* once again articulated a rationale of foreseeability as the basis for the recreational activity rule:

> [W]e suspect that reasonable participants recognize that skill levels and play styles vary, and that an occasional injury is a foreseeable and natural part of being involved in recreational activities, however the "informal and formal rules" are structured and enforced.

461 Mich at 94 (emphasis added). Finally, the Court in adopting a standard of recklessness for liability for injuries arising from recreational activities made clear that "common-sense understanding" and "participant expectations" are key to this rule:

> [W]e believe that the line of liability for recreational activities should be drawn at recklessness. Recklessness is a term with a recognized legal meaning and, more importantly, is a term susceptible of a common-sense understanding and application by

> judges, attorneys, and jurors alike in the myriad recreational activities that might become the backdrop of litigation. Just as important, our standard more nearly comports with the common-sense understanding that participants in these activities bring to them. While the concurrence may disagree whether we have accurately assessed participant expectations, we think that our standard has the significant value of providing an explicit, easy to apply rule of jurisprudence.

461 Mich at 94–95 (emphasis added). A rule that is derived from participant expectations and common sense understanding is one that has foreseeability as its guiding principle. Defendant submits that when determining whether the recreational activity rule applied in this case, the Court of Appeals applied an unduly narrow definition of risks inherent in an activity. Even while recognizing that golf carts are a ubiquitous presence on the golf course, and even while allowing that this fact "may lead to the conclusion that accidents involving golf carts are *foreseeable*," the panel in this case then reasoned that "a *foreseeable* aspect of the game is not necessarily an *inherent* aspect" (COA Opinion, p 11, n 9; Appendix, p 166a). Defendant submits that this Court's repeated references in *Ritchie-Gamester* to foreseeability as a rationale for its recreational activity rule indicates to the contrary that foreseeability is key in determining what risks inhere in an activity.

2. Law from Other Jurisdictions

The Court in *Ritchie-Gamester* approvingly cited the case of *Hathaway v Tascosa Country Club, Inc*, 846 SW2d 614 (Tex App 1993), where the Texas Court of Appeals applied a "reckless and intentional" standard for liability for injuries incurred during the game of golf: "While the genteel game of golf can hardly be described as a 'competitive contact sport,' we believe the reckless and intentional standard is every bit as appropriate to conduct on the links as it is to

conduct on the polo field." *Ritchie-Gamester*, *supra,* 461 Mich at 88, quoting *Hathaway*, *supra,* 846 SW2d at 616.[1]

The panel in this case looked to the case of *Forman v Kreps,* 2016 Ohio 1604; 50 NE3d 1 (Ohio App 2016), in which the Ohio Court of Appeals held that the use of a golf cart was not an inherent part of the game of golf, and therefore an assumption of the risk instruction was not warranted in a case in which a golfer sustained injuries when struck by a cart. *Id.* at ¶ 31. The panel noted that it was unable to find any cases holding the driver of an injury-causing golf cart to a standard of reckless misconduct (COA Opinion, p 13, n 12; Appendix, p 168a).

Defendant respectfully submits that while the terminology used may vary, the law of other jurisdictions offers substantial support for the trial court's conclusion that golf cart injuries fall within the recreational activity rule and are only actionable upon a showing of reckless misconduct. In *Wooten v Caesars Riverboat Casino, LLC*, 63 NE3d 1069 (Ind App 2016), for example, the plaintiff was injured when his golf cart was struck by another golf cart, and sued the driver of the cart which struck the cart in which he was riding. *Id.* at 1072. The Court of Appeals looked to the Indiana Supreme Court's decision in *Pfenning v Lineman,* 947 NE2d 392 (Ind 2011), where the Court adopted the following standard for liability for sport injuries:

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[1] Numerous cases, like *Hathaway*, *supra,* involving errant golf balls or clubs apply a standard of recklessness for liability arising from injuries sustained during the game of golf. See *Shin v Ahn*, 64 Cal Rptr 3d 803, 814; 42 Cal 4th 482; 165 P3d 581 (2007) (holding "that golfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is 'so reckless as to be totally outside the range of ordinary activity involved in the sport); *Gray v Giroux,* 49 Mass App Ct 436, 439; 730 NE2d 330 (2000) ("wilful, wanton, or reckless standard of conduct, and not ordinary negligence, is the appropriate standard of care in noncontact sports such as golf"); *Schick v Ferolito*, 167 NJ 7, 22; 767 A2d 962, 970 (2001) (holding "that the recklessness or intentional conduct standard of care applies generally to conduct in recreational sporting contexts, including golf").

> We hold that, in negligence claims against a participant in sports activity, if the conduct of such participant is within the range of ordinary behavior of participants in the sport, the conduct is reasonable and does not constitute a breach of duty.

Id. at 404. In determining when a participant's conduct falls outside the ordinary behavior of participants of a sport, the Indiana Supreme Court went on to articulate a standard of recklessness:

> In any sporting activity, however, a participant's particular conduct may exceed the ambit of such reasonableness as a matter of law if the participant either intentionally caused injury or engaged in reckless conduct. Such intentional or reckless conduct may be found to be a breach of duty.

Id. The Court in *Wooten, supra*, observed that "the golf cart has become part and parcel of the modern game of golf, with an unremitting presence on the fairway." 63 NE3d at 1076. Noting that the evidence failed to establish either recklessness or intent on the part of the golf cart driver, the Court concluded that summary disposition in his favor was required. *Id.* at 1076, 1077. The Court reasoned that the imperfect or inexact operation of a golf cart did not render conduct unreasonable "in the absence of intent or recklessness":

> The inclusion of golf carts in the sport is "commonly understood" and while an inexact operation of a cart may somewhat "increase the normal risks attendant to the activities of ordinary life outside the sports arena, it does not render unreasonable the ordinary conduct" within the golf game, in the absence of intent or recklessness.

Id. at 1077. In Indiana, therefore ordinary conduct – such as the inexact operation of a golf cart -- is not actionable in the absence of recklessness or intent.

While using the terminology of assumed risk, the law of New York reaches a similar conclusion. *In Valverde v Great Expectations, LLC,* 131 AD2d 425; 15 NYS 2d 329 (2015), the plaintiff, a golf cart passenger, sought damages for injuries sustained when she was thrown from the golf cart while it was being operated at a speed of 20 to 30 miles per hour. *Id.* at 330. The Court found that the cart driver "established his entitlement to summary judgment based on the

doctrine of assumption of the risk." *Id.* Essential to this conclusion was the reasoning that "golfers . . . must be held to a common appreciation of the fact that there is a risk of injury from improperly used carts on a fairway which is inherent in and aris[es] out of the nature of the sport generally and flow[s] from participation in it." *Id.* at 331, quoting *Brust v Town of Caroga*, 287 AD 923, 925; 731 NYS2d 542 (2001).

In *Minho Hahn v Town of West Haverstraw, NY,* 563 Fed Appx 75 (2nd Cir 2014), the United States Court of Appeals for the Second Circuit held that a plaintiff injured when his golf cart overturned "assumed the risk of this particular type of golf-cart accident. *Id.* at 77. Put another way, his "risk of injury while driving on the cart path was inherent in his choice to play his round of golf with the aid of a golf cart." *Id.* (emphasis added).

These cases illustrate this Court's observation that "[t]here are myriad ways to describe the legal effect of voluntarily participating in a recreational activity." *Ritchie-Gamester,* 461 Mich at 86. But whether a golf cart is denominated as an "ordinary" risk of the game, *Wooten, supra,* or an inherent risk, *Valverde, supra,* these cases are wholly consistent with the proposition that a risk that is known, apparent, or reasonably foreseeable, *Turcotte, supra,* does not give rise to tort liability.

3. The Michigan Ski Area Safety Act

The meaning of risks inherent in an activity has been explored in the context of the Ski Area Safety Act, MCL 408.321 *et seq.*, which was cited and considered by the panel in the instant case. The SASA includes the following provision:

> (2) Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of

> natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment.

MCL 408.342 (emphasis added). This provision unambiguously establishes that conditions such as snow-making and snow-grooming equipment are dangers that "inhere in the sport" of skiing.

The panel in the instant case appeared to conclude that because golf carts are not a *traditional* aspect of the game of golf, the risk posed by them is not inherent to the game of golf. The panel specifically noted that golf carts did not become commonplace until relatively recently, and that they were not produced until the 1940s (COA Opinion, p 9, n 7; Appendix, p 164a). The panel further noted that the first recorded rules of golf were published in 1744 (*Id.*). Skiing, like golf, has a lengthy history, dating into the archaeological record. See https://en.wikipedia.org/wiki/History_of_skiing (accessed January 24, 2017). Yet snow-making was first used at a ski resort in 1952, and did not become commonplace at ski resorts until the 1970s. See https://en.wikipedia.org/wiki/Snowmaking (accessed January 24, 2017). Just as it is possible to play golf without a golf cart, it is also possible to ski without snow-making equipment. Nevertheless, the Legislature has made the judgment that snow-making or snow-grooming equipment is a danger that inheres in the sport of skiing. MCL 408.342(2). See also *Anderson v Pine Knob Ski Resort, Inc.*, 469 Mich 20; 664 NW2d 756 (2003) (hazard posed by timing shack inhered in the sport of skiing); *Barrett v Mt. Brighton, Inc.*, 474 Mich 1087; 712 NW2d 154 (2006) (snowboard rail is an obvious and necessary hazard that inheres in the sport of skiing).

The Legislature when enacting the SASA clearly envisioned a meaning of "inherent" that looks to the modern day practices of ski resorts. Thus, the equipment for a technology only recently incorporated into commercial ski facilities is legislatively deemed to "inhere" in the sport of skiing. Similarly, it is undeniable that in modern day golf, golf carts are an essential and inherent aspect of the game. As the Supreme Court quoted in *PGA Tour, Inc. v Martin,* 532 US 661;

121 S Ct 1879; 149 L Ed2d 904 (2001), "Today [golf carts] are everywhere. And they are encouraged. For one thing, they often speed up play, and for another, they are great revenue producers." *Id.* at 685, quoting *Olinger v United States Golf Assn,* 205 F3d 1001, 1003 (7th Cir 2000). Golf carts are undeniably an inevitable part of recreational golf today. Pursuant to the judgment of the Legislature in defining those risks that inhere in skiing, a risk that is universally part of the modern sport is one that is inherent in that sport.

4. <u>The Panel's Faulty Rationale in the Instant Case</u>

In holding that the risk of injury from a golf cart was not inherent to the game of golf, the Court of Appeals found three factors persuasive: "(1) the United States Supreme Court's observations in [*PGA Tour, Inc. v*] *Martin,* [532 US 661; 121 S Ct. 1879; 149 L Ed 2d 904 (2001)], (2) the fact that golf carts are not referenced as an inherent component of golf in the current USGA Rules of Golf, and (3) the fact that there is no evidence in the instant case that the golf course where the accident occurred *required* the use of golf carts" (COA Opinion, p 11; Appendix, p 166a).

Defendant respectfully submits that none of these factors compel, or even support, the conclusion reached by the appellate panel in this case. *In Martin, supra,* the Supreme Court considered, *inter alia*, whether a disabled contestant in golf tournaments could use a golf cart despite rules requiring all other contestants to walk. *Id.* at 664-665. In order to determine whether prohibiting this contestant to use a golf cart would constitute discrimination under the Americans with Disabilities Act, 42 USC 12101, *et seq.*, the Court had to determine whether use of such an accommodation would "fundamentally alter the nature" of the game of golf. *Id.* at 682. In concluding that it would not, the Court noted the evolution of the game to include motorized transportation:

> Over the years, there have been many changes in the players' equipment, in golf course design, in the Rules of Golf, and in the method of transporting clubs from hole to hole. Originally, so few clubs were used that each player could carry them without a bag. Then came golf bags, caddies, carts that were pulled by hand, and eventually motorized carts that carried players as well as clubs. "Golf carts started appearing with increasing regularity on American golf courses in the 1950's. Today they are everywhere. And they are encouraged. For one thing, they often speed up play, and for another, they are great revenue producers."

Martin, 532 US 661, 684–85, quoting *Olinger*, *supra*, 205 F3d at 1003 (footnotes omitted) (emphasis added). Nothing in *Martin*, *supra*, compels the conclusion that the use of golf carts is not an inherent aspect of the modern day game of golf as it is recreationally played. Indeed, the petitioner in *Martin*, PGA Tour, Inc., distinguished "the game of golf as it is generally played" from golf at the highest levels of competition. *Id.* at 686. The game *as it is generally played* has as a commonplace, and as the panel in this case acknowledged, ubiquitous feature, the use of motorized golf carts for the transport of clubs and players (COA Opinion, p 11, n 11; Appendix, p 166a). Given the ubiquitous nature of this accessory, injury from a golf cart is clearly a "known, apparent or reasonably foreseeable" consequence of participation in the game of golf. *Turcotte*, *supra*, 68 NY 2d at 439 (quoted in *Ritchie-Gamester*, *supra*, 461 Mich at 84). It is therefore an inherent risk, the occurrence of which would only give rise to liability if it resulted from reckless misconduct.

The panel also relied on the fact that "golf carts are not referenced as an inherent component of golf in the current USGA Rules of Golf" to conclude that the risk of injury from a golf cart is not an inherent risk of the game of golf (COA Opinion, p 11; Appendix, p 166a). To the contrary, however, these rules reflect that golf carts are an entirely usual aspect of the game of golf which gives rise to a known, apparent and reasonably foreseeable risk of injury. For example, the rules provide for the appropriate positioning of golf carts during play:

> When playing on or near the putting green, [players] should leave their bags or carts in such a position as will enable quick movement off the green and towards the next tee.

(USGA Rules of Golf, p 28; Appendix, p 185a) (accessed November 3, 2017 at www.usga.org/content/dam/usga/pdf/2015/2016%20Rules/2016-rulesofgolf-USGAfinal.pdf). The rules also provide that "[l]ocal notices regulating the movement of golf carts should be strictly observed" (USGA Rules of Golf, p 29; Appendix, p 185a). The Rules of Golf also denote golf carts as equipment of the game:

> If a shared golf cart is being moved by one of the players sharing it (or his *partner* or either of their *caddies*), the cart and everything in it are deemed to be that player's *equipment.* Otherwise, the cart and everything in it are deemed to be the *equipment* of the player sharing the cart whose ball (or whose *partner's* ball) is involved.

(USGA Rules of Golf, p 33; Appendix, p 187a.) As the United States Supreme Court noted in *Martin, supra*, "[t]here is nothing in the Rules of Golf that either forbids the use of carts or penalizes a player for using a cart." *Id.* at 685. By including reference to the proper placement of carts and other aspects of cart use, the Rules of Golf recognize that motorized golf carts are simply a part of the game, as played at the ordinary level. Thus, if anything, they support the conclusion that the risk of injury from a golf cart is an inherent risk in the game of golf as it is played today.

Finally, the panel in this case relied on the fact that no evidence indicated that the use of carts was required on the Farmington Hills Golf Club course, to conclude that the risks related to golf carts are not inherent in the game of golf (COA Opinion, p 11; Appendix, p 166a). Defendant suggests that the panel should have reached the opposite conclusion where the evidence showed that Defendant *always* used a golf cart when golfing (Tr. 7/14/15, p 295; Appendix, p 82a). In other words, Plaintiff could not have engaged in a game of golf with the Defendant which did not involve a golf cart. This fact only attests to the ubiquity of golf carts in the game of golf as it is

played recreationally, supporting the conclusion that the risk of being struck with a golf cart during a recreational game of golf is known, apparent, and reasonably foreseeable, and therefore inherent in the game of golf as it is played recreationally.

5. The panel correctly found that golf carts being used in the game of golf are not governed by the Motor Vehicle Code.

In response to Defendant's Application for Leave to Appeal, Plaintiff urged as an alternate ground of affirmance that the *Ritchie-Gamester* doctrine does not apply to injuries caused by motor vehicles. Plaintiff relied on the case of *Van Guilder v Collier,* 248 Mich App 633; 650 NW2d 240 (2001), where the Court of Appeals declined to apply the *Ritchie-Gamester* reckless misconduct standard to determine liability for injuries sustained when a driver of an off road recreation vehicle attempted to push another off road vehicle with his own, causing it to flip and its driver to fall off. The first driver then ran over the fallen driver, causing serious injuries. *Id.* at 634. The court in *Van Guilder, supra,* found that a negligence standard rather than a standard of reckless misconduct applied to determine liability, specifically noting that "the operation of motor vehicles, including ORVs, is not governed by the 'rules of the game,' but by the law." *Id.* at 637. By contrast, the operation of golf carts – especially when operated on a golf course – is governed by the rules of the game of golf and not by the Motor Vehicle Code.

The contention that a golf cart is governed by the Motor Vehicle Code while it is operated on a golf course during a game of golf finds no support in the law. No statute prescribes the manner in which such a vehicle may be operated when it is on a golf course. Defendant agrees that a golf cart, *if operated on a highway,* would be governed by the Motor Vehicle Code rather

than the "rules of the game."[2] But there is simply no authority to suggest that the Motor Vehicle Code governs the operation of a golf cart during a game of golf.

In *Van Guilder, supra,* the Court specifically noted that "this Court has held that ORV's are vehicles to which certain provisions of the MVC [Motor Vehicle Code] apply." *Id.* at 637, citing *People v O'Neal*, 198 Mich App 118, 120; 497 NW2d 535 (1993).[3] Similarly, it has been held that mopeds and snowmobiles "are motor vehicles within the ambit of the MVC." *Van Guilder, supra,* at n 2, citing *People v Rogers*, 438 Mich 602, 605-606; 475 NW2d 717 (1991) and *Farm Bureau Mut Ins Co of Michigan v Stark*, 437 Mich 175, 182-183; 468 NW2d 498 (1991), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). By contrast, neither the Court of Appeals nor this Court have held that golf carts are motor vehicles to which the Motor Vehicle Code applies, especially when operated on a golf course.

It must also be noted that ORVs are extensively regulated as to title and licensure by a comprehensive series of statutes, MCL 324.81101 et seq. The requirements for titling apply to *all* ORVs sold by dealers to retail purchasers. MCL 324.81103. The requirements for licensure apply

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[2] Legislation enacted subsequent to the accident in this case provides certain rules for the operation of a golf cart on city, village or township streets. MCL 257.657a (effective January 13, 2015).

[3] A golf cart is not an ORV. MCL 324.81101 defines ORV:

> "ORV" or, unless the context implies a different meaning, "vehicle" means a motor-driven off-road recreation vehicle capable of cross-country travel without benefit of a road or trail, on or immediately over land, snow, ice, marsh, swampland, or other natural terrain. A multitrack or multiwheel drive vehicle, a motorcycle or related 2-wheel vehicle, a vehicle with 3 or more wheels, an amphibious machine, a ground effect air cushion vehicle, or other means of transportation may be an ORV. An ATV is an ORV.

A golf cart is not "capable of cross country travel," and is neither designed for nor capable of negotiating "natural terrain." Indeed, it is specifically designed for and used in non-natural terrain such as golf courses or other artificially groomed and maintained areas.

to all operation of an ORV except on private property or except on designated free ORV riding days. MCL 324.81115. As the Court in *Van Guilder* noted, "[s]tatutes governing off-road vehicles were included in the MVC, MCL 257.1601 to MCL 257.1626, until they were repealed by 1995 PA 58, § 90106, effective May 24, 1995, and reenacted, in large part, by 1995 PA 58, § 1, as part 811 of the recreation chapter of the NREPA [Natural Resources and Environmental Protection Act], and are codified at MCL 324.81101 et seq." *Van Guilder, supra,* n 4. By contrast, statutes governing golf carts are not included in the Motor Vehicle Code, with the exception of MCL 257.657a, which was enacted after the events of this case (effective January 13, 2015), and which applies only to golf carts when driven on the streets of a city, village or township. *Id.* Similarly, golf carts – unlike ORVs – are not governed by any provision of the Natural Resources and Environmental Protection Act. In short, there is no authority whatsoever to support the Plaintiff's contention that golf carts, when driven on a golf course during a game of golf, are subject to the provisions of the Motor Vehicle Code.

To the extent that *Van Guilder, supra,* and *Allred v Broekhuis,* 519 F Supp 2d 693 (WD Mich 2007),[4] which followed it, rely on the reasoning that MCL 257.401 compels a negligence standard to be applied to any operation of a golf cart, their reasoning should not be adopted. MCL 257.401(1) provides:

> 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 negligence consists of a violation of a statute of this state or the ordinary care standard required by common law.

[4] *Allred,* of course, as federal precedent does not control this case and is in no way binding on this Court. *Rasheed v Chrysler Corp,* 445 Mich 109, 125; 517 NW2d 19 (1994).

This statute does not apply to this case at all. As the Court of Appeals panel in the instant matter correctly observed with respect to the first sentence of the statute, the language does not impact this case, not only because Plaintiff has identified no violation of the Motor Vehicle Code, but also because Defendant was neither the owner nor operator of the golf cart at the time of the accident (COA Opinion, p 7; Appendix, p 162a). "Operator," importantly, means "a person, other than a chauffeur, who . . . [o]perates a motor vehicle *upon a highway or street*." MCL 257.36 (emphasis added).[5] Defendant respectfully submits that the Legislature's use of the word "operator" in the first sentence of MCL 257.401(1) clearly indicates that this entire section is intended to apply to the use of motor vehicles *on highways or streets.* When discerning the correct interpretation of a statute, the statute must be read as a whole. *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1, 8 (2009). Read in this fashion, MCL 257.401(1) simply does not apply to the use of a golf cart on a golf course. Finally, the second sentence of section 401(1) by its terms does not apply to this case where there is no action against the *owner* of the golf cart.

By urging the Court to follow *Van Guilder, supra,* and *Allred, supra,* Plaintiff overlooks the controlling principle of *Ritchie-Gamester, supra,* that when an inherent risk of a sport results in injury, the standard for liability is reckless misconduct. We thus return to the central question that was addressed by the Court of Appeals panel in this case – whether the risk of being struck by a golf cart is inherent to the game of golf. There is no dispute that golf carts are a ubiquitous and usual accessory to the game of golf. For these reasons, the Court of Appeals erred when it concluded that risks posed by a golf cart are not inherent in the game of golf.

[5] At the time of the accident, this section defined operator as "every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway." The act was amended by P.A. 2013, No. 231, which did not introduce any change relevant to this analysis.

Conclusion

In this case, Plaintiff was injured when he was struck by a golf cart while on the golf course during a recreational game of golf. The golf cart was present as an accessory used to facilitate the game of golf. Any time that Defendant played golf, a golf cart would be in use, since he testified that he always used a cart when golfing (Tr. 7/14/15, p 295; Appendix, p 82a). There can be no dispute that golf carts are a normal, anticipated and as the panel in the instant case acknowledged, ubiquitous feature of the modern day game of golf as it is recreationally played. They are "part and parcel of the modern golf game." *Wooten, supra*, 63 NE3d at 1076. Indeed, the golf course is laced with paths for the golf carts that run all over the golf course (Tr. 7/14/15, pp 213-214, 278; Appendix, pp 59a-60a, 74a). The rules of etiquette for golf, predictably, encompass conduct with golf carts, prescribing driving them on the fairway (Tr. 7/14/15, p 316; Appendix, p 96a), and the USGA Rules of Golf also prescribe proper golf cart etiquette, while denominating golf carts as equipment of the game (USGA Rules of Golf, pp 28, 29, 33; Appendix, pp 185a, 187a). Clearly, while Plaintiff did not expect to be struck by a golf cart during a game of golf, given the ubiquitous presence of golf carts as an accessory to the game, it was a foreseeable risk and a risk that was inherent in the game of golf. In summary, the testimony in this case (that Defendant never golfs without a golf cart, that the golf course is interlaced with golf cart trails, and that one's conduct with a golf cart is governed by the rules of etiquette attending the game of golf), and the law of this and other jurisdictions, indicate that the use of golf carts is inherent to the game of golf, and that the risk of injury from a golf cart is also inherent to the game of golf.

RELIEF REQUESTED

WHEREFORE Defendant-Appellant respectfully requests that this Honorable Court grant leave to appeal, or in the alternative, issue a decision reversing the decision of the Court of Appeals and reinstating the verdict of the jury, or in the alternative, peremptorily reverse the decision of the Court of Appeals and reinstate the verdict of the jury in this case.

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