STATE OF MICHIGAN
IN THE SUPREME COURT

KENNETH BERTIN,

Plaintiff-Appellee,

vs

DOUGLAS MANN,

Defendant-Appellant.

/

Supreme Court No. 155266
Court of Appeals No. 328885
LC Case No: 14-139901-NO
(Oakland County Circuit Court)

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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STATEMENT OF QUESTION PRESENTED

I. DOES THE ORDINARY NEGLIGENCE STANDARD OF CARE APPLY TO AN INJURY RESULTING FROM THE OPERATION OF A GOLF CART WHILE PLAYING GOLF RECREATIONALLY?

Plaintiff-Appellee answers: "YES".

COUNTER-STATEMENT OF FACTS

Introduction

A detailed review of the background facts may be found at pp. 1-9 of Plaintiff-Appellee's Brief in Response to Application for Leave to Appeal ("P. Response to App."). In lieu of repeating it, that excerpt is adopted by reference.

Defendant has filed a Statement of Facts in his Supplemental Brief in Support of Application ("D. Supp. Brief"), pp. 1-7. Plaintiff accepts the accuracy of that Statement and also accepts as accurate and complete the Appendix filed by Defendant.

For present purposes the important facts and legal issue can be readily distilled. While playing a round of golf in a senior men's league, Plaintiff Kenneth Bertin was struck by an electric cart driven by another golfer, Defendant Douglas Mann, who then drove over Plaintiff's leg (Tr. 7/14/15, pp. 171-172, 180). It is accepted, for purposes of this appeal, that the driver, Defendant Mann, was negligent in his operation of the electric cart,[1] but did not engage in reckless misconduct.[2] The issue, then, is simply whether a golfer who negligently drives an

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[1] Defendant has not challenged the sufficiency of evidence of negligence, so the issue is jury-submissible under the standards of MCR 2.116(C)(10) ("no genuine issue..."). See also Court of Appeals Opinion ("Opinion"), p. 13, 168a.

[2] Plaintiff does not challenge the jury verdict which found that Mann had not engaged in reckless misconduct.

electric cart into another golfer is civilly accountable for negligent operation of the cart.

That question, in turn, depends on whether getting struck by an electric cart driven by a negligent operator is "an inherent risk" of the game of golf, as that phrase was used by this Court in Richie-Gamester v City of Berkley, 461 Mich 73; 597 NW2d 517 (1999). Under Ritchie-Gamester, injuries arising from an "inherent risk" of a sporting activity are not actionable unless they result from "reckless misconduct". If however, the injury did not result from an "inherent risk", then the negligent driver may be held civilly accountable for that negligence.

The circuit court dismissed Plaintiff's action for negligence, concluding that a golfer inherently risks being run over by a negligently driven electric cart (26a – 43a). In an Opinion authored by Judge Riordan, with Judges Gadola and Fort Hood concurring, the Court of Appeals reversed, concluding that being struck by a golf cart is not an "inherent risk" of golfing (156a – 169a).

The appellate court was not persuaded by Plaintiff's argument that operation of the electric cart was subject to the legislatively enacted Motor Vehicle Code rather than the judge-made doctrine of Ritchie-Gamester [Opinion, pp. 6-7, rejecting Plaintiff's reliance on Van Guilder v Collier, 248 Mich App 633; 650 NW2d 340 (2001)]. In the panel's view, even if an electric cart is a "motor vehicle" as defined in the Motor Vehicle Code, the negligence standard of MCL

257.401(1) does not apply to the operator of that motor vehicle off the highway (Id.).[3]

With appropriate deference to the carefully chosen words of this Court in Ritchie – Gamester, the Court of Appeals looked to the standard definition of the word "inherent" (Opinion, p. 8). These include "necessarily contained in a given activity", "the risks cannot be tailored to satisfy the idiosyncratic needs of any particular participant", "essential character", "a permanent and inseparable element", "if its elimination would [both] chill rigorous participation in the sport [and] alter the fundamental nature of the activity", and "dangers... obvious and necessary" (Id.).

The appellate decision recognized that there may be "inherent risks" of golf involving the use of golf clubs and balls, implements unique to, and necessary to, the game of golf (Opinion, p. 9). In contrast, electric carts were never used in golf until centuries after golf began, as an alternative means of transporting clubs. That decision also recognized, as in PGA Tour, Inc v Martin, 532 US 661 (2001), that the method of club transportation does not alter the fundamental nature of the game (Opinion, p. 10). And, the Court cited Forman v Krebs, 2016 Ohio 1604, ¶¶ 29-31,

[3] Plaintiff's argument regarding the applicability of Van Guilder and the Motor Vehicle Code is found at pp. 22-26 of his Brief in Response to Application and pp. 11-15 of his Court of Appeals Brief. He continues to contend that this case is best viewed under vehicular negligence standards. In view of the Court's Order of September 22, 2017, this Supplemental Brief focuses on the specific question the parties were asked to address. Plaintiff nonetheless urges the Court to deny leave or affirm on this alternative basis.

50NE3d 1 (Ohio App, 2016), where the Ohio Court found that the risk of being struck by an electric cart was not an ordinary risk of the game of golf (Opinion, p. 12). Accordingly, the Court of Appeals ultimately concluded that, under the circumstances of the case, the applicable standard was ordinary negligence rather than "reckless misconduct".

Defendant has now filed his Application for Leave to Appeal to this Court. In response this Court will conduct oral argument on the Application (Order of September 22, 2017). That Order directs 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". The Argument which follows addresses that issue.

LAW AND ARGUMENT

I. THE ORDINARY NEGLIGENCE STANDARD OF CARE APPLIES TO AN INJURY RESULTING FROM THE OPERATION OF A GOLF CART WHILE PLAYING GOLF RECREATIONALLY

As a starting point, there is no legislative enactment to displace the common law "negligence" standard that is the mainstay of tort law. The Ritchie-Gamester limitation is solely a judicial creation. Its scope is necessarily limited by the role of the Legislature in matters of policy. Trentadue v Gorton, 479 Mich 378, 389; NW2d 664 (2007); McDougall v Schanz, 461 Mich 15, 25-27; 597 NW2d 148 (1999).

The Motor Vehicle Code is extensive and unquestionably covers electric carts when used on public roads. In fact, electric carts are not used exclusively to transport golf clubs. In gated communities, for example, they may be a common means of transportation within that community or subdivision. On an island where internal combustion engines are barred or disfavored for environmental purposes,[4] electric carts and bicycles may be the primary means of human transportation. As other courts have recognized, injuries caused by motor vehicles, even off the road, are governed by negligence law principles, not Ritchie-Gamester analysis. Van Guilder v Collier, 248 Mich App 633; 650 NW2d 340 (2001) [injury from 4 wheel

[4] The Palm Island resort in Placida, Florida is one example.

off-road vehicle]; Allred v Broekhuis, 519 F Supp 2d 693 (WD Mich, 2007) (all terrain vehicles); Gaggo v Kennedy, 2008 Mich App LEXIS 1503, Ct. of App. #278607, rel'd 7/22/08 (moped).

The appellate court found no significance to this because the automobile owner's liability statute does not apply by its express terms. That point is fairly debatable. It is also largely beside the point. What is important is that the Legislature has created a comprehensive Motor Vehicle Code, covering electric carts and other vehicles,[5] which does not create an exemption from liability for negligence. This Court should take particular care not to allow a judge-made doctrine to intrude on the province of the Legislature.

An illustration may help show why the Court of Appeals reached the correct result. Consider a golf course in which golfers must cross a public road to get from one hole to the next. If the plaintiff, walking across the road, were struck by an electric cart driver, the location would almost certainly give rise to negligence analysis. Can the result rationally differ when it is another golfer who is the one operating the injury-causing cart? And if the golfer-driver is liable for negligence on the road, does it make sense to immunize the driver when the injury occurs ten feet away, on the golf course grass? Since the Ritchie-Gamester protection is provided to fellow participants, it would seem that a maintenance worker driving

[5] See MCL 257.657a (regulating operation of golf carts on city streets); MCL 257.660 (operation of low speed vehicles and "an electric personal assistive mobility device").

an electric cart would be subject to liability for negligence even under Defendant's approach. If that is so, does it make sense to allow a negligence recovery against the maintenance worker, but not another golfer, when both are operating the same machinery, an electric cart. It would be unwise to adopt Defendant's argument, creating an irrational approach to injuries caused by negligent operation of a motor vehicle.

Beyond that, the Court of Appeals Opinion is exemplary, especially for an intermediate appellate court striving to decide a steady flow of appeals in a timely fashion. It is detailed and considers the issue from several perspectives, as well as reflecting scholarship in uncovering the history of the game of golf. It is difficult to improve on the Court of Appeals analysis. That decision and the earlier briefing require only a brief response to Defendant's Supplemental Brief.

1. The Michigan Standard, "Inherent Risk"

In large part, Defendant calls upon the Court to extend negligence immunity to all "foreseeable" injuries (D. Supp., pp. 9-11). In carefully chosen words, this Court made "inherent risks" the test. Defendant has not challenged the correctness or application of the Ritchie-Gamester test.

The Court of Appeals aptly rejected Defendant's effort to conflate "foreseeable" with "inherent risk" (Opinion, pp. 11-12, fn. 11):

> "...[E]ven though [the ubiquitous nature of golf carts] may lead to the conclusion that accidents

> involving carts are *foreseeable*, a *foreseeable* aspect of the game is not necessarily an *inherent* aspect. Compare *Black's Law Dictionary* (10th ed) (defining "foreseeability" as "[t]he quality of being reasonably anticipatable") with the definitions of "inherent" previously discussed. Cf. MCL 600.2966 (precluding governmental tort liability for "an injury to a firefighter or police officer that arises from the normal, *inherent, and foreseeable* risks of the firefighter's or police officer's profession") (emphasis added); *Ritchie-Gamester*, 461 Mich at 94 (implicitly recognizing a difference between something's being foreseeable and being natural); *Forman*, 2016 Ohio at ¶¶ 29-30 (implicitly recognizing a difference between something's being foreseeable and being customary or ordinary)" (emphasis in the original).

The "inherent risk" line of demarcation establishes an important middle ground. It preserves the very nature of sporting activities by immunizing conduct when it would change the essence of the sport to impose liability for negligence. At the same time, "inherent risk" preserves traditional responsibility for negligence where preservation of the game does not require otherwise. At bottom, this Court took a moderate approach in Ritchie-Gamester by drawing the line at "inherent risk". There is no reason to discard that standard or replace it with an expanded judge-made immunity based on mere "foreseeability".

2. The Court of Appeals Properly Defined The Term "Inherent" As Used By This Court In *Ritchie-Gamester*

Seeking guidance on the meaning of "inherent", the Court of Appeals turned to common dictionary meanings, just as this Court has done in interpreting statutes.

Defendant does not dispute the propriety of seeking guidance from recognized dictionaries.

Other than trying to morph "inherent risk" into "foreseeability", Defendant cannot seriously quarrel with the meaning of the term "inherent". The definitional phraseology can vary from one lexicon to another but the essence is the same. An "inherent" feature of a sport is one that is essential to the game itself. That is the meaning of the term which this Court chose to describe the scope of Ritchie-Gamester immunity from negligence liability.

3. The "Inherent" Risks of Golf Are Those Arising From The Use Of Objects Necessary To The Game

The fundamental nature of golf is described in Rule 1-1:

> "The Game of Golf consists of playing a ball with a club from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules."

There is a single action required, "a stroke". The game only requires two fixed locations ("teeing ground" and "hole") and two necessary implements (a "ball" and "club"). The permissible characteristics of "Clubs" (Rule 4) and "Ball" (Rule 5) are discussed, defined and limited in considerable detail. "Teeing Ground" is the subject of Rule 11, and "Stroke" is addressed in Rule 14.

Consistent with the necessary components of "golf", in Ritchie-Gamester,

this Court quoted the Texas Hathaway decision in describing the sort of risks "inherent" in golf (461 Mich at 88):

> "As those persons who play golf know, 'shanking the ball is a foreseeable and not uncommon occurrence.' 'The same is true of hooking, slicing, pushing, or pulling a golf shot.' Because of the great likelihood of these unintended and offline shots, it can indeed be said that the risk of being inadvertently hit by a ball struck by another competitor is built into the game of golf.... Many bad shots carry the ball to the right or left of an intended line of play. Golfers playing to the right or left of that line will of course be endangered by such shots. 'The risk all golfers must accept.'"

Precisely. Since the use of a ball and club are necessary to the game, with the ball propelled by a "stroke" designed to send the ball into the distance, the "inherent risks" of golf are those involving golf balls, golf clubs and golf strokes, the essential elements of the game itself.

4. The Court Of Appeals Correctly Held That Getting Run Over By A Negligently Driven Electric Cart Is Not An Inherent Risk Of Golf

The Court of Appeals gave several reasons why getting run over by a negligently driven electric cart is not an "inherent risk" of golf. Its well-researched, well-reasoned decision was correct.

Unlike a golf club or golf ball, an electric cart has uses separate from the game. As the appellate panel correctly noted, established rules of golf go back to the 1700's, long before the advent of motorized golf carts. The fact that golf was

played for centuries without electric carts makes clear that there is nothing "inherent" about the use of golf carts in the game of golf. Indeed, Defendant himself golfed without a cart while younger.

Even at present, carts are but one means of transporting golfers or clubs. At posh country clubs, a player's clubs may be carried by a caddie. Or, a golfer may carry his or her own clubs, or use a pull cart. The availability of alternative means of transportation belies the notion that electric carts are "inherent" to the game.

Defendant points to the fact that golf carts are mentioned in the Rules of Golf (D. Supp. Brief, pp. 17-18). Although the Rules may acknowledge the existence of golf carts, nothing in the Rules requires their usage or limits their size, or composition, as with the elements of the game; balls, clubs, teeing grounds and holes. Mention of golf carts scarcely makes them "inherent" features of the game itself. Local rules may provide relief when the ball comes to rest near an alligator or in some goose dung, but this does not make alligators or goose dung "inherent" features of the game.

Defendant also dismisses the significance of the decision in PGA Tour, Inc v Martin, 532 US 661 (2001) (D. Supp. Brief, pp. 16-17). That case shows that, at the professional level, electric carts are banned because the stamina required to walk the course is regarded as one of the skills tested by the game. While requirement to walk was subordinated to the Americans With Disabilities Act in

Martin, the Supreme Court based that ruling on a finding that the means of transportation - - walking or riding - - did not affect the fundamental nature of the game. That is exactly the point which the Court of Appeals correctly grasped. There is nothing essential to the game of golf that is changed by the use of carts. The essential nature of the game remains, regardless of how the player or clubs are transported.

In the final analysis, the use of electric carts is not inherent in the game of golf, hence the risk of getting run over by a negligently driven cart is not an "inherent risk" of golf. The Ritchie-Gamester limitation is therefore inapplicable. The Court of Appeals got it right. This Court should deny leave or affirm.

RELIEF SOUGHT

WHEREFORE, Plaintiff Kenneth Bertin prays that this Honorable Court deny Defendant's Application for Leave to Appeal or affirm the decision of the Court of Appeals.

Respectfully Submitted,

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Dated: December 28, 2017