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

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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?

STATEMENT OF FACTS

Plaintiff writes in his Supplemental Brief that "[i]t is accepted, for purposes of this appeal, that the driver, Defendant Mann, was negligent in his operation of the electric cart, but did not engage in reckless misconduct." (Plaintiff-Appellee's Supplemental Brief in Response to Application for Leave to Appeal, p 1). While the jury indeed determined that Defendant did not engage in reckless misconduct (Appendix, pp 111a-112a), there has been no determination nor any admission that Defendant was negligent, and that premise is not accepted as true by Defendant. With that being said, the issue in this case, as phrased by this Honorable Court, is "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" (Appendix, p 170a).

THE COURT OF APPEALS ERRED 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.

Articulating its rationale for the doctrine that "coparticipants in recreational activities owe each other a duty not to act recklessly," this Court in *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 75; 597 NW2d 517 (1999), explained that "[w]hen 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. The Court of Appeals essentially reasoned, as does Plaintiff, that because golf can be played without a golf cart, an injury incurred by being struck by a golf cart during a recreational game of golf is not caused by an inherent risk of the sport. But this approach ignores the second definition of "inherent risk" found in Black's Law Dictionary (10th ed):

> **1.** A risk that is necessarily entailed in a given activity and involves dealing with a situation that carries a probability of loss unless action is taken to control or correct it. **2.** A fairly common risk that people normally bear whenever they decide to engage in a certain activity.

Black's Law Dictionary (10th ed. 2014) (Risk) (emphasis added).

The meaning of the word "inherent" should not be considered in a vacuum. When one examines the *Ritchie-Gamester* decision as a whole, it is clear that the second definition, which would clearly encompass the risk of being struck by a golf cart while engaged in a recreational game of golf, is the one that is most consistent with its underpinnings and purpose. Instead of focusing myopically on the meaning of the word "inherent," we should also consider what this Court intended when it referred to "foreseeable, built in risks of harm," 461 Mich at 88, and "an occasional injury that is a foreseeable and natural part of being involved in recreational activities," 461 Mich at 94, as subject to the recreational activity doctrine, and to "participant expectations" as a principle underlying the recreational activity doctrine. 461 Mich at 94-95. As fully set forth in Appellant's Application for Leave to Appeal and Supplemental Brief in support of that Application, the concept of foreseeability was just as integral to the *Ritchie-Gamester* Court's decision as the concept of "inherent risk," and the latter term must be interpreted consistently with the former. Thus the second definition above – a *fairly common* risk that people *normally bear* whenever they decide to engage in a certain activity – appears by far the most consistent with the decision as a whole.

Plaintiff's suggestion that the application of the recreational activity doctrine to the circumstances of this case would somehow impinge on the role of the Legislature (Plaintiff-Appellee's Supplemental Brief in Response to Application for Leave to Appeal, pp 5-7), is entirely without merit. It is true that "the Legislature has the authority to abrogate the common law," and

that if the common law conflicts with a statutory provision, the former must yield. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 389; 738 NW2d 664, 670 (2007). It is also true that the Legislature has never sought to regulate or control any aspect of the operation of a golf cart on a golf course. The only statute expressly addressing golf carts (which was enacted after the events of this case), only addresses the operation of golf carts on city streets. MCL 257.657a (effective January 13, 2015). There is no authority to suggest that this statute or any provision of the Motor Vehicle Code governs the operation of a golf cart during a game of golf.

Plaintiff brings up an unlikely hypothetical wherein a person walking across a public road that cuts through a golf course is hit by a golfer-driven electric cart. Plaintiff posits that "the location would almost certainly give rise to a negligence analysis" (Plaintiff-Appellee's Supplemental Brief in Response to Application for Leave to Appeal, p 6). Assuming that the victim was a participant in the game[1] who happened to be injured by a golf cart on the roadway that crossed through the golf course, the standard for liability – negligence or reckless misconduct – would be determined by asking if the golfer's operation of the cart at that moment was governed by a statute that abrogated the common law rule of *Ritchie-Gamester, supra.*[2] But even assuming as Plaintiff does that different results would occur depending on the location of the cart, this would merely reflect a legislative judgment that in some instances, operation of a golf cart *on a street or highway* is subject to a negligence standard of care. The potential difference of result depending on whether the accident occurred on a street or highway or on a golf course is entirely rational. After all, the

[1] If the injured person was not a golfer, then a negligence standard would be applied. This is because a victim who was not participating in a recreational activity did not "voluntarily subject [him or herself] to certain risks inherent in that activity." *Ritchie-Gamester, supra,* at 87.

[2] For instance, if the action were against the owner of the golf cart, MCL 257.401, which specifies a negligence standard for liability, might be applicable. This would depend on a determination that a golf cart is a motor vehicle, MCL 257.33, which the Court of Appeals merely assumed without deciding (Appendix, p 162a).

Legislature determined (albeit after the events of this case) that in certain circumstances – and only on city streets -- golf carts should be regulated by the Motor Vehicle Code. See MCL 257.657a.

By contrast, the Legislature has not even arguably abrogated the *Ritchie-Gamester* recreational activity doctrine as it applies to activities occurring on a golf course. On a golf course, and during a game of golf, the doctrine applies to prescribe a reckless misconduct standard of care for inherent risks, that is, those described by the *Ritchie-Gamester* Court as "foreseeable, built in risks of harm," 461 Mich at 88. Because the use of golf carts is, as the Court of Appeals panel recognized, both ubiquitous and foreseeable (Appendix, p 166a, n 11), and particularly given the fact that Defendant never golfed without using a cart, the risk of being struck by a cart was certainly an inherent risk, that is, a "foreseeable, built-in risk." 461 Mich at 88. When harm results from such a risk, liability may only be imposed in the case of reckless misconduct.

Defendant does not "dismiss" the case of *PGA Tour, Inc. v Martin*, 532 US 661; 121 S Ct 1879; 149 L Ed2d 904 (2001) as Plaintiff suggests (Plaintiff-Appellee's Supplemental Brief in Response to Application for Leave to Appeal, p 11), but relies on its observations that golf carts have become part and parcel of the game of golf as it is recreationally played:

> 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 v United States Golf Assn*, 205 F3d 1001, 1003 (7th Cir 2000 (footnotes omitted) (emphasis added). The Supreme Court's ultimate conclusion that the use of a golf cart by a disabled contestant in a high level tournament would not fundamentally alter

the nature of the game of golf, is entirely consistent with the Court's earlier observation that golf carts have become an integral part of the game as it is recreationally played. The fact that recreational golf has evolved to include golf carts as part and parcel of the game, while it does not alter the essential nature of the game, does mean that the risk of harm from a golf cart is inherent to the game of golf as it is recreationally played. That is, because golf carts have become an integral part of the game as it is recreationally played, the risk of injury from a golf cart is a "foreseeable, built in risk of harm," *Ritchie-Gamester, supra,* 461 Mich at 88, and a "fairly common risk that people normally bear whenever they decide to engage in a certain activity," in this instance a recreational game of golf. Black's Law Dictionary (10th ed. 2014) (Risk).

Lastly, it must be noted that *under the particular facts of this case,* namely that Plaintiff chose to play his game of golf with the aid of a golf cart, the risk of injury from the cart was an inevitable aspect of the risks generally posed by the game. In the same vein, Defendant's testimony that he never played golf without the aid of a cart (Appendix, p 82a), illustrates that Plaintiff could not have engaged in a game of golf with the Defendant without encountering this particular risk. In *Minho Hahn v Town of West Haverstraw, NY,* 563 Fed Appx 75 (2nd Cir 2014), where the Plaintiff was injured when his cart overturned, the United States Court of Appeals for the Second Circuit held that Plaintiff "assumed the risk of this particular type of golf-cart accident," noting that "*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.* at 77 (emphasis added). Equally in this case, the risk of being struck by a golf cart was inherent in the Plaintiff's choice to play his round of golf with the aid of a golf cart. Because Plaintiff's injury arose out of a risk inherent to the game of golf as recreationally played, and inherent to the particular game of golf in which Plaintiff opted to use a cart, his injury is only compensable if Defendant engaged in reckless misconduct. The jury found

that he did not (Appendix, pp 111a-112a). Therefore, the trial court's judgment of no cause for action in favor of Defendant should be reinstated.

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 and the August 3, 2015 Order for Entry of Judgment of No Cause for Action, or in the alternative, peremptorily reverse the decision of the Court of Appeals and reinstate the verdict of the jury and the August 3, 2015 Order for Entry of Judgment of No Cause for Action.

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