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 RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

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THE COURT OF APPEALS ERRED BY DETERMINING THAT AN INJURY RESULTING FROM THE OPERATION OF A GOLF CART ON A GOLF COURSE DURING A GAME OF GOLF WAS NOT GOVERNED BY THE RECREATIONAL ACTIVITY DOCTRINE, WHICH PRESCRIBES A "RECKLESS MISCONDUCT" STANDARD FOR LIABILITY ARISING FROM RECREATIONAL ACTIVITIES, BUT INSTEAD BY A NEGLIGENCE STANDARD.

Standard of Review

In arguing that this case lacks jurisprudential significance and does not warrant this Court's attention, Plaintiff incorrectly states that "[t]here is no real dispute as to the controlling legal standards. A defendant can escape accountability for negligently injuring a co-participant only when the injury was an 'inherent risk' of the activity." (Plaintiff's Response to Application for Leave to Appeal, p 10.) Defendant respectfully submits that there is indeed a vital dispute as to the controlling legal standards as the parties clearly disagree on what is meant by "inherent risk." Defendant, after reviewing the underpinnings of this Honorable Court's decision in *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999), and the meaning of "inherent" in certain legislative enactments (MCL 408.342), has argued that the term incorporates an element of foreseeability, such that the Court of Appeals should have adopted a meaning of "inherent risk" similar to the following, found in Black's Law Dictionary: "A fairly common risk that people normally bear whenever they decided to engage in a certain activity." Black's Law Dictionary (10th ed. 2014) (Risk). Plaintiff, on the other hand, agrees with the Court of Appeals' apparent adoption of a definition of "inherent risk" as "a risk that is necessarily entailed in a given activity.. . ." *Id.* (See Plaintiff's Response to Application for Leave to Appeal, p 17). Given this fundamental disagreement about the meaning and scope of this Court's decision in *Ritchie-Gamester, supra,* Defendant submits that the case indeed presents an issue of jurisprudential

significance. Moreover, the issue presented is one of law, which is well suited for this Honorable Court's consideration.

Nor does the fact that this case has not proceeded to judgment following the Court of Appeals' remand for retrial weigh against this Honorable Court's intervention at this time. Plaintiff's suggestion that this is an interlocutory appeal, and Defendant should await "final judgment" is simply erroneous. In fact, it is an appeal from a final judgment, and resort to this State's highest Court is Defendant's last opportunity to address the issue of what standard of care is applicable to Defendant's conduct. Contrary to Plaintiff's argument, now is the appropriate time to address the significant legal issue that is presented in this case.

Law and Analysis

1. New York law, including the seminal case of *Turcotte v Fell,* supports the conclusion that the risk of being struck by a golf cart is inherent to the game of golf.

Plaintiff summarily dismisses Defendant's reliance on New York law with the contention that it is based upon the doctrine of assumption of the risk which according to Plaintiff "has been consigned to the garbage dump of 'no longer the law' for more than fifty years." (Plaintiff's Response to Application for Leave to Appeal, p 21.)[1] What Plaintiff fails to recognize is that the doctrine of assumption of the risk is expressly subsumed into the "recreational activity" doctrine of *Ritchie-Gamester, supra.* In that case, the Supreme Court noted – with citation to the seminal New York case of *Turcotte v Fell,* 68 NY 2d 432; 502 NE2d 964 (1986), that "[a]s a general rule,

[1] This is a questionable proposition, as much more recent analysis has found that the defense is still viable. In *Hunley v DuPont Automotive,* 341 F3d 491 (2003), the United States Court of Appeals for the Sixth Circuit, applying Michigan law, found that primary assumption of the risk – where "defendant does not owe a duty of care because the plaintiff agreed in advance to relieve the defendant of a duty of care" – was a viable affirmative defense in Michigan, notwithstanding *Felgner v Anderson,* 375 Mich 23; 133 NW2d 136 (1965). *Hunley, supra,* 341 F3d at 501.

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." *Ritchie-Gamester, supra,* 461 Mich at 84. Then, when articulating the rationale for the recreational activities doctrine, the Supreme Court as much as said that it is assumption of the risk by a different name:

> 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. In short, Defendant's reliance on New York law is absolutely warranted. First, the case of *Turcotte,* which was seminal to *Ritchie Gamester, supra,* indicates that foreseeability of harm is an important element of the recreational activities doctrine. The more recent case of *Valverde v Great Expectations, LLC,* 131 AD2d 425; 15 NYS 2d 329 (2015), illustrates the application of the principle to a factual scenario that is quite similar to the one at bar. In *Valverde,* the plaintiff was thrown from a golf cart while it was being operated at a speed of 20 to 30 miles per hour. *Id.* at 330. The Court found no liability because "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).

Valverde is applicable and relevant to demonstrate that the risk involved in the instant case, of being struck by a golf cart, is inherent to the game of golf.

2. Golf carts being used in the game of golf are not governed by the Motor Vehicle Code.

Plaintiff urges as an alternate ground of affirmance that the *Ritchie-Gamester* doctrine does not apply to injuries caused by motor vehicles. Plaintiff relies 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.

[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).

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 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

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[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.

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.

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

[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).

because Defendant was neither the owner nor operator of the golf cart at the time of the accident. "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. Defendant respectfully submits, for the reasons set forth more fully in its Application for Leave to Appeal, that 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.

RELIEF REQUESTED

WHEREFORE Defendant-Appellant respectfully requests that this Honorable Court grant leave to appeal, 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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