

2007 WI APP 264

**COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION**

Case No.: 2006AP2861

† Petition for Review filed

Complete Title of Case:

AARON R. HARDY,

PLAINTIFF,

DONALD HARDY AND TONNA HARDY,

PLAINTIFFS-RESPONDENTS,

**TAYLOR COUNTY, WEATHER SHIELD HEALTH PLAN AND DELTA
DENTAL OF WISCONSIN, INC.,**

INVOLUNTARY-PLAINTIFFS,

v.

GARY L. HOEFFERLE AND ACUITY, A MUTUAL INSURANCE COMPANY,

†DEFENDANTS-APPELLANTS.

Opinion Filed: November 6, 2007
Submitted on Briefs: September 24, 2007

JUDGES: Hoover, P.J., Peterson and Brunner, JJ.

Appellant
ATTORNEYS: On behalf of the defendats-appellants, Acuity, and Gary L. Hoefflerle, the cause was submitted on the briefs of *Terrance E. Davczyk* and *Gottlieb J. Marmet* of *Davczyk & Varline, LLC* of Wausau.

Respondent
ATTORNEYS:

On behalf of the plaintiffs-respondents, Aaron Hardy, Donald Hardy and Tonna Hardy, the cause was submitted on the brief of *Dixon R. Gahnz* of *Pitman, Kyle & Sicula, S.C.* of Watertown.

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2861

Cir. Ct. No. 2005CV159

STATE OF WISCONSIN

IN COURT OF APPEALS

AARON R. HARDY,

PLAINTIFF,

DONALD HARDY AND TONNA HARDY,

PLAINTIFFS-RESPONDENTS,

**TAYLOR COUNTY, WEATHER SHIELD HEALTH PLAN AND DELTA DENTAL
OF WISCONSIN, INC.,**

INVOLUNTARY-PLAINTIFFS,

V.

GARY L. HOEFFERLE AND ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Taylor County:
GARY L. CARLSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 BRUNNER, J. Gary Hoefflerle appeals a summary judgment dismissing his counterclaim for contribution against Donald and Tonna Hardy in a personal injury case. Hoefflerle contends the circuit court erred when concluding that his claims for Donald and Tonna’s alleged negligence were statutorily precluded. He also contends the court erred by concluding his counterclaim was barred by a *Loy* release¹ and covenant not to sue. We affirm the summary judgment.

BACKGROUND

¶2 On August 22, 2004, Donald and Tonna’s son, Aaron, and Hoefflerle were each operating an all-terrain vehicle (ATV) when they collided, both sustaining injuries. Aaron, who was a minor at the time, was not wearing a helmet and suffered significant head injuries. The accident occurred on land owned by Tonna and, in December 2004, an insurance company paid Hoefflerle \$50,000 for his injuries in exchange for Hoefflerle signing a document entitled, “Loy Release/Covenant Not to Sue.”

¶3 In December 2005, Donald, Tonna, and Aaron commenced this action against Hoefflerle, alleging negligence and seeking damages for Aaron’s personal injuries. Donald and Tonna also sought damages for their loss of Aaron’s “aid, association and companionship.”

¹ See *Loy v. Bunderson*, 107 Wis. 2d 400, 320 N.W.2d 175 (1982).

¶4 Hoefflerle counterclaimed, alleging that Donald and Tonna negligently supervised Aaron. By stipulation of the parties, Donald and Tonna's claims were dismissed, after which they were bound to the case only by Hoefflerle's counterclaim.

¶5 Donald and Tonna moved for summary judgment, challenging the merits of the counterclaim and asserting it was precluded by the release Hoefflerle signed. The circuit court agreed with Donald and Tonna on both grounds and dismissed the counterclaim. Hoefflerle appeals.

DISCUSSION

¶6 Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.² We review summary judgments de novo, applying the same methodology as the circuit court. *Park Bancorporation, Inc. v. Sletteland*, 182 Wis. 2d 131, 140, 513 N.W.2d 609 (Ct. App. 1994).

¶7 We conclude that, based on the record, summary judgment was appropriate on the merits of Hoefflerle's counterclaim. Because Hoefflerle's counterclaim fails on the merits, we do not address whether it is also barred by the release.

¶8 The basis for Hoefflerle's counterclaim is Donald and Tonna's alleged negligent supervision of Aaron and his ATV use. Hoefflerle contends that

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Donald and Tonna were negligent because Aaron was not wearing a helmet at the time of the accident and because they did not require Aaron to obtain an ATV safety certificate by taking a safety course.

¶9 Donald and Tonna argue that the legislature has precluded Aaron's failure to wear a helmet from being a basis for negligence. They rely upon WIS. STAT. § 895.049, which states, in relevant part:

Notwithstanding s. 895.045, failure by a person who operates ... an all-terrain vehicle ... to use protective headgear shall not reduce recovery for injuries or damages by the person or the person's legal representative in any civil action. This section does not apply to any person required to wear protective headgear under s. 23.33(3g) or 347.485(1).

Hoefflerle responds that this statute only applies to damages, not negligence, and that the statute is inapplicable because Aaron was required to wear a helmet under WIS. STAT. § 23.33(3g).

¶10 We first address whether Aaron was statutorily required to wear a helmet. Pursuant to WIS. STAT. § 23.33(3g), unless an exception applies, persons under the age of eighteen must wear protective headgear when operating, or a passenger on, an ATV. The exception at issue here is when the ATV "is being operated by a person on land under the management and control of the person's immediate family." WIS. STAT. § 23.33(3g)(d). Land under the management and control of the person's immediate family means "land owned or leased by the person or a member of the person's immediate family over which the owner or lessee has management and control...." WIS. STAT. § 23.33(1)(f). Here, Tonna owned and resided on the land where the accident occurred.

¶11 Hoefflerle contends that Tonna must present evidence that she was actively managing and controlling the ATV operators at the time of the accident. This assertion finds no support in the language of WIS. STAT. § 23.33(1)(if). There is no evidence suggesting that anyone other than Tonna had management and control of her property. Because Aaron was operating an ATV on property under the management and control of Tonna, he was exempt from having to wear a helmet pursuant to WIS. STAT. § 23.33(3g)(d). Therefore, WIS. STAT. § 895.049 prohibited Aaron’s failure to wear a helmet from reducing his damages.

¶12 We next address Hoefflerle’s contention that WIS. STAT. § 895.049 applies only to damages, not negligence. We conclude that where § 895.049 applies to prohibit a reduction of damages, it necessarily also precludes a person’s failure to wear a helmet from being considered a form of negligence. To illustrate why, we refer to the methodology by which damages are reduced when § 895.049 is inapplicable—that is, when a person is statutorily required to wear protective headgear. *See* WIS. STAT. § 895.049.

¶13 In *Stehlik v. Rhoads*, 2002 WI 73, 253 Wis. 2d 477, 645 N.W.2d 889, our supreme court explained what it described as the “helmet defense.” *Id.*, ¶8. Where the “helmet defense” is raised, a jury must make two negligence determinations. *Id.*, ¶46. The jury must first determine and allocate “accident negligence,” which refers to who caused the accident itself. *Id.* The contributory negligence statute, WIS. STAT. § 895.045, applies to the jury’s allocation of “accident negligence” and may reduce or bar the plaintiff’s recovery. *Id.*

¶14 The amount that remains recoverable after applying the contributory negligence statute is then subject to a second negligence allocation, which our supreme court referred to as “helmet negligence.” *Id.* Before engaging in the

“helmet negligence” inquiry, a jury must first decide whether the plaintiff’s failure to wear a helmet was a causal factor in the plaintiff’s injuries. *Id.* If so, the jury must allocate “helmet negligence” between the plaintiff and the defendant.³ *Id.* The percentage of “helmet negligence” allocated to the plaintiff further reduces the amount otherwise recoverable under the “accident negligence” inquiry. *Id.* However, WIS. STAT. § 895.045’s provision barring recovery where a plaintiff’s negligence exceeds a defendant’s negligence does not apply to a jury’s allocation of “helmet negligence.” *Id.*

¶15 The effect of WIS. STAT. § 895.049 is to exempt certain plaintiffs from the *Stehlik* “helmet negligence” inquiry. This is how § 895.049 prohibits any reduction in damages associated with a person’s failure to wear a helmet. By viewing § 895.049 in the context of *Stehlik*, it becomes apparent that § 895.049 necessarily applies not only to the amount of recoverable damages, but also to the allocation of negligence.

¶16 This view is reinforced by WIS. STAT. § 901.053, an evidence statute. Where a person is not statutorily required to wear a helmet, § 901.053 prohibits evidence of that fact from being introduced at trial, with certain exceptions.⁴ Where evidence of a person’s failure to wear a helmet is not

³ The *Stehlik* court noted that this allocation of “helmet negligence” was similar to, but distinct from, the methodology applicable in “seat belt defense” cases, where the jury must only allocate damages, rather than negligence. *Stehlik v. Rhoads*, 2002 WI 73, ¶¶6, 8, 253 Wis. 2d 477, 645 N.W.2d 889.

⁴ The text of WIS. STAT. § 901.053 states:

Evidence of use or nonuse of protective headgear by a person, other than a person required to wear protective headgear under s. 23.33(3g) or 347.485(1), who operates or is a passenger on ... an all-terrain vehicle, as defined in s. 340.01(2g) ... on or off a

(continued)

admissible at trial, it would be impossible for that failure to constitute negligence. The circuit court was therefore correct to conclude that the survival of Hoefflerle's counterclaim could not rest upon Aaron's failure to wear a helmet.

¶17 In addition to Hoefflerle's argument on the helmet issue, he refers to Donald and Tonna's failure to require Aaron to undergo ATV safety certification. Pursuant to WIS. STAT. § 23.33(5), certain people must obtain an ATV safety certificate by completing a safety course. Here, Aaron was not required to obtain the safety certificate because he was operating the ATV on property under the management and control of his mother, Tonna. *See* WIS. STAT. § 23.33(5)(c). Regardless of whether Aaron was statutorily required to obtain the safety certificate, Hoefflerle argues that a jury should ultimately decide whether Donald and Tonna were negligent for failing to require Aaron to do so.

¶18 The safety certificate requirement of WIS. STAT. § 23.33(5) is a creation of the legislature, and the legislature has specified who is required to comply with the requirement. Where a person is not required to obtain a safety certificate, we conclude that person cannot be negligent for failing to do so. Hoefflerle essentially implies that a jury should be given the opportunity to

highway, is not admissible in any civil action for personal injury or property damage. This section does not apply to the introduction of such evidence in a civil action against the manufacturer or producer of the protective headgear arising out of any alleged deficiency or defect in the design or manufacture of the protective headgear or, with respect to such use of protective headgear, in a civil action on the sole issue of whether the protective headgear contributed to the personal injury or property damage incurred by another person.

supplant the legislature's policy judgment on who should obtain a safety certificate. We disagree.

By the Court.—Judgment affirmed.

