[Cite as *Parker v. Patrick*, 2012-Ohio-3312.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

COREY T. PARKER, A Minor, By and Through his Next Best Friends and Natural Guardians, Kelly Parker and Nancy Parker, et al.,	:	CASE NO. CA2011-12-027
Plaintiffs-Appellants,	:	O P I N I O N 7/23/2012
- vs -	:	
WILLIAM PATRICK, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 20090850

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PIPER, J.

{¶ 1} Plaintiffs-appellants, Corey Parker and his parents Kelly and Nancy Parker (the Parkers), appeal a decision of the Brown County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Elwood and Esther Patrick, Grange Mutual Casualty Company (Grange), and State Farm Fire and Casualty Company (State Farm).

{¶ 2} Elwood and Esther Patrick (the Patricks) own a 305-acre property that their son, William Patrick (William), operates as a tobacco farm.[1] As of August 2007, the Patricks owned a John Deere Gator (Gator), a motorized four-wheel vehicle with a small bed for hauling loads. In August 2007, William's son, Logan Patrick (Logan), was working for his father on the farm along with two of his friends, Michael Gloff and Corey Parker. The boys were tasked with delivering tobacco sticks among the tobacco plants, and they loaded the sticks in the Gator for transport.[2] After completing their work by dropping off the sticks, the boys decided to drive the Gator around the farm, each taking turns driving.

{¶ 3} While Gloff was driving, Parker was seated in the front seat with his arm wrapped around the Gator's roll-bar and Logan was standing in the bed of the Gator. Gloff, who was driving between 15-20 m.p.h. at the time, "jerked the wheel over" to avoid driving in a field, and the Gator flipped as a result of the sharp turn. Logan was thrown into the field, but did not sustain any serious injuries. However, the roll-bar crushed Parker's arm and he received substantial injuries and had to be airlifted to the hospital. At the time of the accident, Gloff was 15 years old, Logan was 15 years old, and Parker was 14 years old.

{¶ 4} After the accident, Parker and his parents filed suit against the Patricks, William, Logan, and Gloff. The Patricks held an insurance policy on the farm through

1. At some point during the litigation, Esther passed away.

2. After a stalk of tobacco is cut, it is placed on the tobacco stick for further transport.

Grange. At the time of the accident, Gloff lived in a home owned by his grandfather, Rickie Cupp, who insured the home through State Farm. Grange and State Farm intervened in the suit and moved for declaratory judgments establishing that they were not obligated to provide defenses or indemnification of their insureds.

{¶ 5} After discovery, the Patricks, William, and Logan each filed motions for summary judgment. The trial court granted the Patricks' motion, but denied those of William and Logan. William and Logan then reached a limited settlement involving William's homeowner's policy. Grange and State Farm also filed motions for summary judgment, both of which were granted by the trial court. The Parkers now argue that the trial court erred in granting the motions of the Patricks, Grange, and State Farm, raising the following assignments of error.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES ESTHER PATRICK AND ELWOOD PATRICK BECAUSE QUESTIONS OF FACT EXIST WHETHER DEFENDANTS ACTED RECKLESSLY WHEN THEY ENTRUSTED THREE CHILDREN WITH A UTILITY VEHICLE AND WHEN THEY FAILED TO DETERMINE WHETHER THE CHILDREN HAD THE SKILL TO OPERATE THE VEHICLE, WHEN THEY FAILED TO WARN THE CHILDREN OF THE DANGERS OF THE VEHICLE, WHEN THEY FAILED TO TRAIN THE CHILDREN TO OPERATE THE VEHICLE, AND WHEN THEY ALLOWED TOO MANY CHILDREN TO RIDE IN THE VEHICLE AND DESTABILIZED THE VEHICLE. THE DANGERS, THEREFORE, WERE OUT OF THE ORDINARY AND PLAINTIFF-APPELLANT COREY PARKER WAS UNABLE TO ASSUME THE RISK.

{¶ 8} The Parkers argue in their first assignment of error that the trial court erred in granting summary judgment to the Patricks.

{¶ 9} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.*, 118 Ohio App.3d 881, 887 (2nd Dist.1997). Civ.R.56 sets forth the summary judgment standard and requires that (1) there be no genuine issues of material fact to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, 12th Dist. No. CA2007-08-030, 2008-Ohio-3077, ¶ 8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978).

{¶ 10} The nonmoving party "may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue." *Mootispaw v. Eckstein,* 76 Ohio St.3d 383, 385, 1996-Ohio-389. A dispute of fact can be considered "material" if it affects the outcome of the litigation. *Myers v. Jamar Enterprises*, 12th Dist. No. CA2001-06-056, 2001 WL 1567352,*2 (Dec. 10, 2001). A dispute of fact can be considered "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. *Id.*

{¶ 11} Negligence claims require a showing of a duty owed, a breach of that duty, and an injury proximately caused by the breach. *Brennan v. Schappacher*, 12th Dist. No. CA2008-09-231, 2009-Ohio-927, ¶ 10. In addition to the general elements of negligence, the Parkers alleged that the Patricks were liable based on a theory of negligent entrustment of the Gator. In addition to the general negligence elements, a claim of negligent entrustment requires that the plaintiffs prove that the owner of the Gator "knowingly, either through actual knowledge or through knowledge implied from known facts and circumstances, entrusts its operation to an inexperienced or incompetent operator whose negligent operation results in the injury." *Hundemer v. Partin*, 12th Dist. No. CA2007-01-006, 2007-Ohio-5631, ¶ 6, quoting *Gulla v. Straus*, 154 Ohio St. 193 (1950), paragraph three of the syllabus.

{¶ 12} The Patricks assert that they were not negligent based on the Recreational User statute, R.C. 1533.181, which states,

> (A) No owner, lessee, or occupant of premises:
>
> (1) Owes any duty to a recreational user to keep the premises safe for entry or use;
>
> (2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use;
>
> (3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user.

{¶ 13} Regarding the Recreational Use statute, the record is undisputed that the boys had permission to be on the farm in order to drop tobacco sticks. However, the work was completed when the boys delivered the tobacco sticks, and drove back to the barn to unload any remaining sticks from the bed of the Gator. The boys then decided to drive the Gator around the farm, but such activity began after the work was completed. When asked whether he or Gloff had operated the Gator on the day of the accident, Parker responded, "not while we were working." There are no facts to suggest that the boys were engaged in anything other than recreational activity at the time of the accident. Therefore, Parker was engaged in recreational activity at the time of the accident and R.C. 1533.181 is applicable. As such, the Patricks cannot be liable to Parker for negligence, unless flipping a Gator is not an ordinary risk of the activity or Parker did not assume the risk of the activity.

{¶ 14} According to the Ohio Supreme Court, "where individuals engage in recreational or sports activities, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant's actions were either 'reckless' or 'intentional.'" *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, ¶ 6, quoting *Marchetti v. Kalish*, 53 Ohio St.3d 9 (1990), syllabus.

{¶ 15} Primary assumption of the risk is a question of law. The effect of raising

primary assumption of the risk as a defense, if successful, "means that the duty element of negligence is not established as a matter of law, [preventing] the plaintiff from even making a prima facie case." *Gallagher v. Cleveland Browns Football Co.,* 74 Ohio St.3d 427, 431-432, 1996-Ohio-320. "Primary assumption of the risk relieves a recreation provider from any duty to eliminate the risks that are inherent in the activity * * * because such risks cannot be eliminated." *Whisman v. Gator Invest. Properties, Inc.,* 149 Ohio App.3d 225, 236, 2002-Ohio-1850.

{¶ 16} Flipping is a known risk that is inherent in the activity of driving or riding in a Gator and Parker was aware of that risk. Parker testified that he is familiar with four-wheel vehicles, as well as dirt bikes, and that he has participated in such activity "pretty much my whole life." Parker stated that he began driving four-wheelers at seven or eight years old. Parker had his own four-wheeler, an "80 Raptor" since he was 13, and was permitted to drive it without any direct parental supervision. Parker also stated during his deposition that he had previously driven his neighbor's Gator before the accident occurred. Parker stated that he had had accidents before and had, himself, rolled four-wheelers on more than one occasion in the past. Parker also stated that he understood that Gators can be "dangerous pieces of equipment if operated in an unsafe manner." Given Parker's assumption of the risk, he cannot recover unless it can be shown that the Patricks' actions were either "reckless" or "intentional."

{¶ 17} Intent, as used by the Ohio Supreme Court, denotes "that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Marchetti* at fn. 2, quoting Restatement of Torts 2d, Section 8A. The supreme court defined recklessness as,

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know

> of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id., quoting Restatement of Torts 2d, Section 500.

{¶ 18} The record demonstrates that the Patricks' actions were not reckless or intentional. The Patricks allowed their son William, and grandson Logan, to use the Gator and other equipment for the purpose of farming, as is customary in the rural area in which the Patricks lived. While the Patricks allowed William and Logan to use the Gator, they were unaware of any misconduct or misuse of the Gator by either their son or grandson. Esther also stated that she kept the key to the Gator in the kitchen in her home, and that she had never given permission or authority to anyone other than William and Logan to use it. Specific to Gloff, Esther testified that she was not on the farm on the day of the accident, and that she had no knowledge of Gloff's use of the Gator. Both Parker and Gloff admitted during their depositions that the Patricks did not give them permission to drive the Gator, and that both knew that Logan was the only person allowed to drive the Gator, and that he was permitted to use it for farming purposes. Therefore, the Patricks did not engage in any conduct that they knew or would have known would create an unreasonable risk of physical harm to anyone.

{¶ 19} For these same reasons, the Parkers have failed to raise any genuine issues of material fact regarding their negligent entrustment cause of action against the Patricks. The record indicates that the Patricks did not knowingly entrust the Gator's operation to Gloff. Even if we were to consider that the Patricks entrusted the Gator to William and Logan, we cannot say that either was inexperienced or incompetent operators whose negligent operation resulted in injury. Beyond the fact that neither William nor Logan was actually operating the Gator at the time, neither were inexperienced or incompetent operators as is

contemplated in the final element of the cause of action. William stated in his deposition that Logan had been driving farm equipment since age ten, and that he was trusted as a safe operator, and Elwood Patrick stated his belief that Logan was a "good driver." Moreover, the Patricks had never known of any prior issue with William or Logan operating the Gator in the past.

{¶ 20} Given the applicability of the Recreational Use statute, that Parker assumed the risk, and because the Patricks' conduct was not intentional or reckless, the Patricks are entitled to judgment as a matter of law because they owed no duty to Parker. There are also no material facts regarding the Parkers' negligent entrustment cause of action. As such, the trial court properly granted the Patricks summary judgment, and the Parkers' first assignment of error is overruled.

{¶ 21} Assignment of Error No. 2:

{¶ 22} THE TRIAL COURT COMMITTED ERROR WHEN IT GRANTED INTERVENOR GRANGE MUTUAL CASUALTY COMPANY'S MOTION FOR SUMMARY [SIC] BY WEIGHING THE EVIDENCE AND FINDING THAT LOGAN PATRICK, COREY PARKER AND MICHAEL GLOFF LACKED PERMISSION TO USE THE GATOR AND BY IGNORING THAT, BY OPERATION OF LAW, DEFENDANTS ESTHER PATRICK AND ELWOOD PATRICK GAVE CONSENT BY ARGUING THAT OHIO'S RECREATIONAL USER STATUTE APPLIED, WHICH REQUIRES PERMISSION AS AN ESSENTIAL ELEMENT.

{¶ 23} The Parkers argue in their second assignment of error that the trial court erred in granting summary judgment to Grange because the Patricks gave the boys consent to use the Gator on the farm.

{¶ 24} As previously discussed, Ohio's Recreational Use statute limits liability to a premises owner for any injury to person or property caused by any act of a recreational user.

R.C. 1533.18(B), states,

> (A) "Premises" means all privately owned lands, ways, and waters, and any buildings and structures thereon, and all privately owned and state-owned lands, ways, and waters leased to a private person, firm, or organization, including any buildings and structures thereon.
>
> (B) "Recreational user" means a person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency of the state, or a lease payment or fee paid to the owner of privately owned lands, to enter upon premises to hunt, fish, trap, camp, hike, or swim, or to operate a snowmobile, all-purpose vehicle, or four-wheel drive motor vehicle, or to engage in other recreational pursuits.

{¶ 25} The Parkers now argue that a finding that the boys were recreational users requires an inherent finding that the boys had permission to use the Gator. However, we disagree. The only things required by the statute is that the boys had permission to "enter upon premises * * * to engage in other recreational pursuits."

{¶ 26} The record establishes that the boys decided to engage in recreational pursuits after their work was completed. Parker stated in his deposition that after he completed the work, he climbed a silo, and then climbed down to ride on the Gator, and Logan and Gloff also stated in their depositions that their work had been completed by the time they took turns driving the Gator.

{¶ 27} A finding that the boys were permitted to come onto the farm and given permission to engage in recreational pursuits does not establish that the boys had permission to use the Gator for any of those recreational pursuits. For example, if the boys had engaged in a football game after completing their job of dropping tobacco stakes, they would have been recreational users as it pertains to the statute. The fact that the boys were engaged in the recreational activity of riding on the Gator at the time of the accident does not, however, impute the permission to be on the premises to permission to use the Gator. Instead, the

record establishes that no one other than William and Logan had permission to use the Gator because Gloff and Parker each stated in their depositions that they were never given permission to use the Gator.

{¶ 28} Whether the boys had permission to use the Gator becomes important based on the language of the policy that Grange had with the Patricks, which defines "insured" as "insured also means any person using a vehicle on the 'insured location' with your consent, provided the insurance applies to the vehicle." The record establishes that Gloff did not have the Patricks' consent to use the Gator. The Patricks and William all testified that they had not given Gloff permission to drive the Gator, and Gloff stated in his deposition that he "didn't have permission to drive."

{¶ 29} Nonetheless, the Parkers argue that the Patricks impliedly gave consent to Gloff because they gave consent to Logan to drive the Gator and did not place any limitations on his use. However, this court has specifically held that the person to whom permission is actually given "cannot delegate this authority to a second permittee so as to bring the use of the vehicle by that person within the protection of the insured's policy where the initial permission by the insured owner is silent as to the issue of delegation of authority." *Rice v. Jodrey*, 19 Ohio App.3d 183, 186 (12th Dist.1984).

{¶ 30} The Patricks gave Logan qualified use of the Gator, to use it for farming purposes. As William stated, Logan was told that that the Gator was for "work and work only." Therefore, even if their consent to Logan somehow transferred to Gloff, such permission would have also been limited to farming purposes. As such, any use other than for farming purposes, exceeded the scope of the Patricks' consent.

{¶ 31} There are no genuine issues of material fact to be litigated regarding whether Gloff was an insured under the Grange insurance policy. As such, the trial court properly granted summary judgment, and the Parkers' second assignment of error is overruled.

{¶ 32} Assignment of Error No. 3:

{¶ 33} THE TRIAL COURT COMMITTED ERROR WHEN IT GRANTED STATE FARM CASUALTY COMPANY'S MOTION FOR SUMMARY JUDGMENT BUT FAILED TO DETERMINE WHETHER THE TERM "HOUSEHOLD" WAS SUSCEPTIBLE TO A MEANING THAT INCLUDED FAMILY MEMBERS WHO RESIDED IN A HOME OWNED BY ANOTHER FAMILY MEMBER.

{¶ 34} The Parkers argue in their final assignment of error that the trial court erred in granting summary judgment in favor of State Farm because Gloff was a member of Rickie Cupp's household.

{¶ 35} As previously stated, Rickie Cupp is Gloff's maternal grandfather. The record indicates that Cupp lives in Norwood, Ohio, in a home he has owned for 25 years. In 2006, he built a home in Sardinia, Ohio, in which he planned on retiring. Cupp permitted his daughter, son-in-law and grandchildren, including Gloff, to live at the Sardinia property, which the family referred to as the "lake house." While Cupp paid the mortgage on the lake house, Gloff's mother and father paid for the utilities and provided the general maintenance and upkeep.

{¶ 36} State Farm insured Cupp's Sardinia property. According to that policy, "'insured' means you and, if residents of your household: a. your relatives; and b. any other person under the age of 21 who is in the care of a person described above." The Parkers argue that Gloff is a member of Cupp's household because he lived at the lake house and shares an important relationship with Cupp.

{¶ 37} The State Farm policy does not define household. For that reason, the Parkers argue first that the language should be construed against State Farm and in favor of finding coverage. We note first that just because a term is not defined separately in an insurance policy does not render that term ambiguous where the term has an ordinary meaning. Even

if we were to determine that the term was somehow ambiguous, the Ohio Supreme Court has stated that where the plaintiff is not a party to the insurance contract, the plaintiff "is not in a position to urge, as one of the parties, that the contract be construed strictly against the other party." *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 14. "This rings especially true where expanding coverage beyond a policyholder's needs will increase the policyholder's premiums." *Id.*

{¶ 38} Given that the State Farm insurance policy does not define "household," "'household' must be given its common, ordinary, usual meaning." *Shear v. West American Ins. Co*., 11 Ohio St.3d 162, 165 (1984). The Ohio Supreme court has defined household according to its definition in the Webster's Third New International Dictionary as "* * * those who dwell under the same roof and compose a family: * * * a social unit comprised of those living together in the same dwelling place * * *." *Id*. Courts have also defined "household" as "one who lives in the home of the named insured for a period of some duration or regularity, although not necessarily there permanently, but excludes a temporary or transient visitor." *Allstate Indemn, Co. v. Collister*, 11th Dist. No. 2006-T-0112, 2007-Ohio-5201, ¶ 19; *see also Hill v. Cundiff*, 7th Dist. No. 05 CA 824, 2006-Ohio-5270.

{¶ 39} These definitions establish that in order to be a household member, the person must actually live with the insured. Therefore, in order for Gloff to be a member of Cupp's household, he must have lived with him. The record demonstrates that Gloff did not live with Cupp. Although Cupp owned the lake house and planned on eventually retiring there, he did not live there at the time of the Gator accident. Gloff executed a power of attorney in favor of his daughter, Gloff's mother, so that she and her husband could maintain the lake house, and attend to any matters pertaining to the lake house. Cupp did not keep any personal belongings at the lake house, other than a lawnmower, and he did not have any designated space for himself at the lake house, such as a bedroom. Nor did he use the lake house for

any registration purpose, such as receiving mail. Cupp's presence at the lake house was limited to visits with his family, with only one such visit extending overnight.

{¶ 40} Nor did Gloff live with Cupp at Cupp's Norwood home. Gloff kept all of his personal belongings at the lake house, had his own bedroom there, and attended school within the lake house's school district. Gloff used the lake house address for registration purposes and received his mail there. Gloff did not maintain a personal space at Cupp's Norwood home, and limited his presence at Cupp's home to visits.

{¶ 41} The Parkers argue that this court should abandon the ordinary meaning of "household" and instead employ a definition of "household" as it applies to criminal charges of domestic violence. The Parkers cite *State v. Williams*, 79 Ohio St.3d 459, 462, 1997-Ohio-79, in which the Ohio Supreme Court declined to limit the definition of "household" to family members who physically share a residential address. However, the court discussed its unwillingness to limit the definition of "household" in the criminal context because the legislature's specific purpose was to "criminalize those activities commonly known as domestic violence and to authorize a court to issue protection orders designed to ensure the safety and protection of a complainant in a domestic violence case." *Id*. at 462. The court went on to explain that "in contrast to 'stranger' violence, domestic violence arises out of the *relationship* between the perpetrator and the victim." *Id.* (Emphasis in original.)

{¶ 42} We, therefore, see a distinction between the criminal application of the term and a contractual application. In a criminal context, the term "household" should not be limited in its application because of the need to protect victims from violence that arises out of their relationships. However, in the civil context of insurance policies, contract law controls interpretation and application of coverage. Moreover, the Ohio Supreme Court has already defined "household" as it relates to insurance policies, and has not expanded the usage to mirror a criminal application.

{¶ 43} The record is clear that Gloff was not a resident of Cupp's household at the time of the accident, and was therefore not an insured as contemplated under the State Farm policy. As such, the trial court did not err in granting summary judgment to State Farm, and the Parkers' final assignment of error is overruled.

{¶ 44} Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.