

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Richard Brooks, Individually and as
Father and Next Friend of Kodie Brooks,
Richard Brooks, Individually and as Father
and Next Friend of Ethan Brooks, and
Lisa Brooks, Plaintiffs Below, Petitioners**

FILED

December 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 11-0559** (Greenbrier County 09-C-132)

**Corey Napier, Defendants Below,
Respondents**

MEMORANDUM DECISION

Petitioners, plaintiffs below, appeal the circuit court's denial of their motion for a new trial in their negligence action that resulted in a defense verdict. Respondent, defendant below, has filed his response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In June 2008, petitioners, fifteen-year-old Kodie Brooks and fourteen-year-old Ethan Brooks, were returning home from a fishing trip when the scooter¹ on which they were both riding collided with a pick-up truck driven by respondent, nineteen-year-old Corey Napier. Neither Kodie nor Ethan were wearing helmets and both sustained serious injuries. Kodie and Ethan's parents, petitioners Richard and Lisa Brooks, owned the scooter. The accident occurred on a public road.

¹In the parties' briefs, the object upon which Kodie and Ethan Brooks were riding is called, among other things, a "vehicle," a "motor-driven cycle," a "motorcycle," and an "Eton Sanyco PN 20 Matrix." For the sake of uniformity, the generic term "scooter" is used herein to describe the object upon which Kodie and Ethan rode.

Richard Brooks sued respondent individually and on behalf of his sons, Kodie and Ethan. Lisa Brooks sued respondent individually. Respondent brought a counterclaim against Mr. and Mrs. Brooks² seeking contribution if the jury found them to be joint tortfeasors.

At trial, petitioners argued that respondent failed to maintain control of his pick-up truck and ran over Kodie and Ethan Brooks. Respondent countered that Kodie Brooks was negligent and drove the scooter into the side of the pick-up truck. Respondent entered evidence that Kodie did not have a valid motorcycle license or instruction permit to drive upon a street or highway in this State as required by West Virginia Code §§ 17B-2-1(e) and 17B-2-7b; had not taken the Motorcycle Safety Training Program created under West Virginia Code § 17B-1D-1 to -10; was impermissibly carrying a passenger in violation of West Virginia Code § 17B-2-5(b); and was driving on the left, or wrong side, of a single-lane road – which was wide enough for two cars to pass – in violation of West Virginia Code § 17C-7-6. Respondent also presented evidence that neither Kodie nor Ethan were wearing helmets as required by West Virginia Code § 17C-15-44.

Also at trial, Mrs. Brooks testified that she did not register or license the scooter even though she knew it had to be licensed to be driven on a public road; allowed her sons to operate the scooter on a public road; was aware her sons were both riding on the scooter at the same time; and knew that her sons had ridden the scooter at least once without helmets.

At the close of evidence, respondent dismissed his counterclaim against Mr. and Mrs. Brooks. In response, Mr. and Mrs. Brooks sought a mistrial on the grounds that the jury – having heard all the evidence regarding their alleged negligence – might attribute their alleged negligence to their sons. The circuit court denied the motion, but instructed the jury that Mr. and Mrs. Brooks had been dismissed from the action and that the jury was to “completely and totally disregard any evidence, argument, suggestion, testimony, or other inference that [Mr. and Mrs. Brooks] were in any way negligent in regard to any event leading up to, occurring during, or after the wreck.”

The circuit court also instructed the jury that pursuant to West Virginia Code § 17C-15-44, “no person shall operate or be a passenger on any motorcycle or motor-driven cycle unless the person is wearing securely fastened on his or her head, by either a neck or chin strap, a protective helmet;” and pursuant to West Virginia Code § 17B-2-1, “no person shall drive any motorcycle upon a street or highway in this State or upon any subdivision street generally used by the public unless such person has a valid motorcycle instruction permit.”

²The record is contradictory as to whether the counterclaim was filed exclusively against Mr. and Mrs. Brooks, or against Mr. and Mrs. Brooks *and* Kodie Brooks.

The jury found that respondent was not negligent. The circuit court entered a judgment order dismissing petitioners' action and requiring Kodie and Ethan Brooks to pay respondent's costs.

Petitioners first argue that the circuit court erred when it allowed respondent to introduce evidence at trial, in support of his counterclaim, that suggested that Mr. and Mrs. Brooks had negligently entrusted and/or supervised their sons' use of the scooter. Petitioners argue that the evidence violated the parental immunity doctrine.

This Court reviews evidentiary rulings made by a trial court for an abuse of discretion.

The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.

Syl. Pt. 1, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995).

Petitioners assert that they made the circuit court aware of their objection to respondents' counterclaim against Mr. and Mrs. Brooks throughout the case, first by filing a motion to dismiss the counterclaim, and thereafter by filing motions *in limine* regarding the counterclaim. However, petitioners failed to include those motions, or the circuit court's response to those motions, in the record designated for appeal. We therefore cannot evaluate the circuit court's reasoning in denying the motions. As we have made clear, we will not "consider an error which is not properly preserved in the record nor apparent on the face of the record." *Hanlon v. Logan Cnty. Bd. of Educ.*, 201 W.Va. 305, 315, 496 S.E.2d 447, 457 (1997).

Furthermore, the record presented on appeal shows that when – upon the motion of respondent – the circuit court dismissed respondent's counterclaim, it instructed the jury to disregard any evidence that might have pertained to the counterclaim. On this record, we cannot say that the circuit court abused its discretion in permitting the evidence or in denying petitioners' motion for a mistrial.

Petitioners next argue that the circuit court erred in giving instructions to the jury on the laws related to motorcycle licensing and helmet requirements. Petitioners assert that because the scooter was not a "motor-driven cycle" as defined under West Virginia law, the laws regarding motorcycle licensing and helmets did not apply to them. Petitioners note that

West Virginia Code § 17C-1-5 defines a “motor-driven cycle” as “every motorcycle having a piston displacement of more than fifty cubic centimeters but not more than one hundred fifty cubic centimeters” Petitioners aver that because their scooter had a piston displacement of 49.4 cubic centimeters, it was not a “motor-driven cycle,” and as such, Kodie was not required to have a motorcycle license or instructional permit, and neither Kodie nor Ethan were required to wear helmets.

Respondent argues that whether or not the scooter was a “motor-driven cycle,” it was still a “motorcycle” as defined in West Virginia Code § 17A-1-1(c) because the scooter was self-propelled, had a saddle or seat for the use of the rider, and was designed to travel on two wheels. West Virginia Code § 17A-1-1(c) defines a “motorcycle” as follows:

[E]very motor vehicle, including motor-driven cycles and mopeds as defined in sections five and five-a, article one, chapter seventeen-c of this code, having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding a tractor.

Therefore, because the scooter was a “motorcycle,” the circuit court did not err in giving instructions to the jury on the laws related to motorcycle licensing and helmet requirements.

In Syllabus Point 5 of *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959), we said that “[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.”

Considering the ordinary and familiar meaning of the words of the statutes, we find the scooter upon which Kodie and Ethan Brooks were riding was clearly a “motorcycle” under West Virginia Code § 17C-1-4. Therefore, the laws that apply to motorcycles applied to Kodie and Ethan Brooks on the day of the accident, including West Virginia Code § 17C-15-44 (motorcycle drivers and passengers must wear helmets) and West Virginia Code §§ 17B-2-1(e) and 17B-2-7b (requiring that a person driving a motorcycle upon a street or highway in this State be licensed). Therefore, we find that the circuit court did not err, and correctly stated the law, in the instructions given to the jury regarding the need for motorcycle licensing and helmets.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: December 2, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh