

A08-1209

State of Minnesota
In Supreme Court

Patrick Brian Stewart,

Respondent,

v.

Christopher Michael Koenig and
Jean Marie Koenig,

Petitioners.

REPLY BRIEF OF PETITIONERS
CHRISTOPHER MICHAEL KOENIG
AND JEAN MARIE KOENIG

Kay Nord Hunt (I.D. No. 138289)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Peter C Sandberg (I.D. No. 095515)
SANDBERG & SANDBERG
4057 28th Street N.W., Suite 300
Rochester, MN 55901
(507) 282-3521

*Attorneys for Respondent
Patrick Brian Stewart*

Angela C. Shackelford (I.D. No. 183209)
LaBORE, GIULIANI,
COSGRIFF & VILTOFT, LTD.
10285 Yellow Circle Drive
Post Office Box 70
Hopkins, MN 55343-0070
(952) 933-3371

*Attorneys for Petitioners Christopher
Michael Koenig and Jean Marie Koenig*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. KOENIG WHILE DRIVING A MOTOR VEHICLE ON A PRIVATE DRIVEWAY IS NOT SUBJECT TO A DNR RULE WHICH APPLIES ONLY TO TRAIL USERS 1

 A. Stewart Has Offered No Response to Koenigs’ Arguments as to Why He Was Not a “Trail User.” 1

 B. Minn. Stat. Chapter 169 Has No Provision Governing the Fact Situation Presented Here 1

II. THE GRANT OF A NEW TRIAL ON BOTH LIABILITY AND DAMAGES WAS BASED SOLELY ON THE COURT OF APPEALS’ RULING THAT CHRISTOPHER KOENIG, AS THE DRIVER OF A MOTOR VEHICLE CROSSING A STATE RECREATIONAL TRAIL, WAS A “TRAIL USER” AND SUBJECT TO THE DNR TRAIL RULES, INCLUDING THE DUTY TO YIELD TO TRAIL USERS ALREADY ON THE TREADWAY 4

CONCLUSION 6

CERTIFICATION OF BRIEF LENGTH 8

TABLE OF AUTHORITIES

Statutes:

Minn. Stat. § 169	1, 3
Minn. Stat. § 169.01	2
Minn. Stat. § 169.011	2
Minn. Stat. § 169.011, subd. 20	2
Minn. Stat. § 169.011, subd. 57	2
Minn. Stat. § 169.011, subd. 68	2
Minn. Stat. § 169.011, subd. 75	2
Minn. Stat. § 169.011, subd. 8	2
Minn. Stat. § 169.222, subd. 4(f)	2
Minn. Stat. § 169.31	1, 3
Minn. Stat. § 169.89	4
Minn. Stat. § 84.87, subd. 4	1

Rules:

Minn. R. 6100.3400	1, 3, 4
Minn. R. 6100.3400, subp. 6(D)	1
Minn. R. 6100.4300	3
Minn. R. 6100.5200, subp. 4	1

Cases:

Bogut v. Jannetta, 410 N.W.2d 451 (Minn. Ct. App. 1987)	5
Otterness v. Horsley, 263 N.W.2d 403 (Minn. 1978)	5
State v. Ibarra, 355 N.W.2d 125 (Minn. 1984), <i>reh'g denied</i>	3
Stewart v. Koenig, 767 N.W.2d 497 (Minn. Ct. App. 2009)	4
Williamson v. Furch, 304 Minn. 558, 229 N.W.2d 39 (1975)	5

I. KOENIG WHILE DRIVING A MOTOR VEHICLE ON A PRIVATE DRIVEWAY IS NOT SUBJECT TO A DNR RULE WHICH APPLIES ONLY TO TRAIL USERS.

A. Stewart Has Offered No Response to Koenigs' Arguments as to Why He Was Not a "Trail User."

Respondent/Plaintiff Patrick Brian Stewart (Stewart) asserts that "motor vehicles [other than snowmobiles]¹ are not authorized to use the treadway for recreation but can cross the treadway subject to yielding the right-of-way to an authorized trail user under Minn. R. §6100.3400, Subp. 1." (Respondent's Brief, p. 7). This is not what Minn. Rule 6100.3400 states. The DNR, in its promulgated Rule 6100.3400, subpart 6(D) does not declare that anyone who is about to enter or cross a state trail must yield to an authorized trail user. (A. 30). It states that "any trail user" is to yield to any "trail user" already on the treadway. (Id.) As set out in detail in Petitioners/Defendants Koenigs' (Koenigs) brief to this Court, to which Stewart offers no response, Christopher Koenig was not a "trail user" and therefore was not subject to DNR Rule 6100.3400, subpart 6(D).

B. Minn. Stat. Chapter 169 Has No Provision Governing the Fact Situation Presented Here.

Stewart cites various statutory provisions which have no application to this case. Minn. Stat. § 169.31, a statutory provision cited by Stewart, does require the driver of a vehicle emerging from a driveway to stop prior to driving onto a sidewalk and to "yield

¹ Stewart later asks this Court, in essence, to assume the treadway is limited to use by bicyclists. (Respondent's Brief, p. 7). The treadway is also available for snowmobile use, which snowmobiles can travel in excess of 50 miles per hour. *See* Minn. Stat. § 84.87, subd. 4; *see* Minn. R. 6100.5200, subp. 4.

the right-of-way to any pedestrian and all other traffic on the sidewalk.” The situation before the Court does not involve a sidewalk and the Minnesota Legislature has not enacted a state statute that governs a right-of-way under the circumstances before the Court.

Minn. Stat. § 169.222, subd. 4(f), also cited by Stewart, regulates the operation of a bicycle on a sidewalk or across a roadway or shoulder on a crosswalk. It also has no application here. Stewart was not operating a bicycle on a “sidewalk” or across a “roadway” or shoulder on a “crosswalk” as those terms are statutorily defined in Minn. Stat. § 169.011, subd. 20, 68 and 75.²

“Roadway” is statutorily defined to mean “that portion of a highway improved, designed or ordinarily used for vehicular traffic, exclusive of the sidewalk or shoulder.” Minn. Stat. § 169.011, subd. 68. The Minnesota Legislature has also defined the terms “private road or driveway” and “bicycle trail.” “Private road or driveway” means “every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not other persons.” Minn. Stat. § 169.011, subd. 57. “Bicycle trail” is defined as a “bicycle route or bicycle path developed by the commissioner of natural resources under Section 85.016.” *Id.* at subd. 8. There is no statute regulating the right-of-way between a “bicycle trail” and a “private road or driveway,” which is the situation before this Court.

² The Minnesota Legislature renumbered Minn. Stat. § 169.01 to Minn. Stat. § 169.011 in 2008. The definitions cited herein have remained the same.

Because the Legislature has not regulated the right-of-way under these circumstances, the trial court, after careful consideration, instructed the jury on proper lookout under common law principles of exercise of due care. (A. 9; T. 277-78). In so doing, the trial court did not commit error, as the Court of Appeals has ruled.

Stewart asserts that the criminal penalties for violation of Minn. Chapter 169 are “no different” than a violation of Minn. Rule 6100.3400, subpart 6(D). (Respondent’s Brief, p. 7). But Stewart misses the point of Koenigs’ argument at pages 18-19 of Petitioners’ brief to this Court. Where one could be found guilty of a crime for a statutory or rule violation, this Court has demanded, consistent with due process, that the rule or statute must be sufficiently definite to give notice of what conduct constitutes a crime. State v. Ibarra, 355 N.W.2d 125, 128-29 (Minn. 1984), *reh’g denied*. That is certainly not the situation here.

Reading Minn. Rule 6100.3400 as written and in the context of the other Chapter 6100 DNR Rules, a person in Christopher Koenig’s position would have no reason to believe that he was subject to DNR trail rules. Nonetheless, if Stewart’s argument is accepted, a person in Christopher Koenig’s position could be found guilty of a misdemeanor and subject to arrest for failure to yield the right-of-way. Minn. R. 6100.4300. (A. 33). In contrast, Minn. Stat. § 169.31 clearly declares that a driver of a vehicle emerging from a driveway “shall stop such vehicle immediately prior to driving onto a sidewalk or into the sidewalk area and shall yield the right-of-way to any pedestrian and

all other traffic on the sidewalk.” A violation of this statute, whose application and directive is clear and unequivocal, is a petty misdemeanor. Minn. Stat. § 169.89.

DNR Rule 6100.3400 cannot be construed as Stewart requests and as the Court of Appeals has ruled.

II. THE GRANT OF A NEW TRIAL ON BOTH LIABILITY AND DAMAGES WAS BASED SOLELY ON THE COURT OF APPEALS’ RULING THAT CHRISTOPHER KOENIG, AS THE DRIVER OF A MOTOR VEHICLE CROSSING A STATE RECREATIONAL TRAIL, WAS A “TRAIL USER” AND SUBJECT TO THE DNR TRAIL RULES, INCLUDING THE DUTY TO YIELD TO TRAIL USERS ALREADY ON THE TREADWAY.

The Court of Appeals’ grant of a new trial on both liability and damages is premised on one legal ruling – DNR trail rules apply to this case. 767 N.W.2d at 498, 501. (A. 2, 5). The Court of Appeals concluded that because the trial court committed error in failing to instruct the jury per DNR Rule 6100.3400, the jury’s finding on liability could not stand. Because the jury’s ruling on liability could not stand, the Court of Appeals also ruled that a new trial must be awarded on damages. 767 N.W.2d at 501. (A. 5). Because that one legal ruling is the sole basis for the Court of Appeals’ grant of a new trial on both liability and damages, Koenigs’ petition for further review to this Court raising that legal issue brings before this Court the Court of Appeals’ grant of a new trial on liability and damages. Stewart has no basis to contend the issue of the grant of a new trial on damages is also not before this Court.

Stewart, while initially asserting the issue of a new trial on damages is not before this Court, then concedes that if the Court concludes Stewart was not entitled to a new trial on liability, “there is no need to reverse and remand for a new trial”

(Respondent's Brief, p. 8). Such conclusion is in accord with well-established Minnesota law, as enunciated by this Court, that a jury's award of purported inadequate or, in this case, no damages does not warrant a new trial where the jury's finding of no liability is supported by the evidence. Otterness v. Horsley, 263 N.W.2d 403, 405 (Minn. 1978).

Stewart cites to Williamson v. Furch, 304 Minn. 558, 229 N.W.2d 39 (1975). In that case, the trial court directed a verdict on the issue of liability, holding the defendant was liable for the accident as a matter of law. Id. at 39-40. The jury was presented with "no conflicting medical evidence" and all doctors who testified "concluded that plaintiff's physical symptoms resulted, at least to some extent," from the collision, but awarded the plaintiff no damages. Id. at 40. This Court, after reviewing the evidence of record which contained uncontradicted evidence of damage, held that the verdict of no damages cannot stand. Under those unique circumstances, which certainly are not the circumstances before this Court, this Court remanded the case for a new trial solely on damages.

In Bogut v. Jannetta, 410 N.W.2d 451 (Minn. Ct. App. 1987), also cited by Stewart, the jury found the defendant 50% at fault, found plaintiff had suffered a permanent injury, but awarded no damages. Id. at 453. The Court of Appeals held under those circumstances plaintiff was entitled to a new trial on damages. Id. at 454. Again, those circumstances are not those before this Court.

The Court of Appeals' reversal and grant of a new trial here is premised solely on the Court of Appeals' legal ruling that the jury was not properly instructed on Minnesota law on right-of-way. The Court of Appeals did not otherwise fault the trial court's post-

trial determination that the jury's liability finding was supported by the credible evidence. Stewart also does not argue that the trial court was wrong in its ruling based on the evidence of record given the trial court's jury instruction. It is only if the trial court was wrong in denying Stewart's requested jury instruction on right-of-way that Stewart contends, and the Court of Appeals held, the jury's verdict cannot stand. (A. 9-10).

Since the Court of Appeals' grant of a new trial on damages as well as liability is based solely on its legal conclusion that the no negligence verdict cannot stand due to failure to instruct per DNR Rule on right-of-way, if the trial court's jury instruction is upheld by this Court, so, too, must this Court reverse the Court of Appeals' grant of a new trial on damages as well. There can be no other ruling given the record in this case and Stewart does not argue to the contrary.

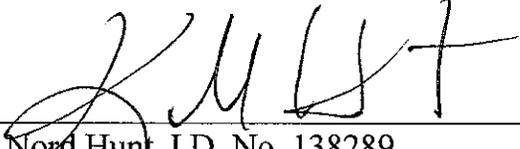
CONCLUSION

Petitioners respectfully request that the Court of Appeals be reversed and the judgment in favor of Petitioners be reinstated.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: November 18, 2009

BY



Kay Nord Hunt, I.D. No. 138289
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

LaBORE, GIULIANI, COSGRIFF & VILTOFT, LTD.
Angela C. Shackleford (I.D. No. 183209)
10285 Yellow Circle Drive
Post Office Box 70
Hopkins, MN 55343-0070
(952) 933-3371

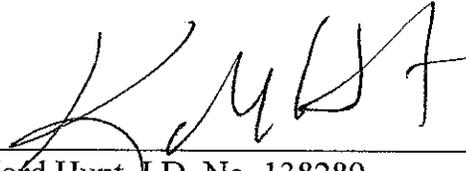
*Attorneys for Petitioners Christopher
Michael Koenig and Jean Marie Koenig*

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 1,605 words. This brief was prepared using Word Perfect 12.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: November 18, 2009

BY 

Kay Nord Hunt, I.D. No. 138289
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

LaBORE, GIULIANI, COSGRIFF & VILTOFT, LTD.
Angela C. Shackelford (I.D. No. 183209)
10285 Yellow Circle Drive
Post Office Box 70
Hopkins, MN 55343-0070
(952) 933-3371

*Attorneys for Petitioners Christopher
Michael Koenig and Jean Marie Koenig*