

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

GRANGE MUTUAL CASUALTY COMPANY :

Plaintiff-Appellant : C.A. CASE NO. 23235

vs. : T.C. CASE NO. 08CVE1920

TONY REYNOLDS, A MINOR, ET AL. : (Civil Appeal from
Municipal Court)

Defendants-Appellees :

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O P I N I O N

Rendered on the 15th day of January, 2010.

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GRADY, J.:

{¶1} Plaintiff, Grange Mutual Casualty Co. ("Grange"),
appeals from a judgment of the municipal court that dismissed
Grange's action against Defendant, Tony Reynolds, a minor, on a
claim for relief alleging negligence.

{¶2} On March 12, 2008, Grange commenced an action against

Reynolds and his mother, Dusty R. Hisel. Grange's complaint alleged that Reynolds was born on December 27, 1991, and that on August 8, 2007, Reynolds had used a vehicle owned by Grange's insured, without her authorization, and that he negligently caused damages to the vehicle in the amount of \$4,130.96. Grange alleged that it paid its insured the sum of \$4,030.96 for her loss, and that Grange is entitled to recover that amount from Reynolds on Grange's right of subrogation. Grange further alleged that Hisel is Reynolds' mother, and that she is liable to Grange pursuant to R.C. 3109.09 for the damage that Reynolds committed. (Dkt. 1).

{¶3} Following service, Hisel filed a notice of bankruptcy, seeking a stay of the proceedings against her. (Dkt. 9). Reynolds filed an answer, denying liability and setting up affirmative defenses. (Dkt. 10). Reynolds contended that his minority bars the proceedings against him on the complaint Grange filed.

{¶4} On October 16, 2008, Reynolds moved to dismiss the action against him. (Dkt. 12). Reynolds argued that while his mother may be liable in damages pursuant to R.C. 3109.09 on Grange's claim, Reynolds "has not reached the age of majority and cannot be sued in this court on this issue." Grange filed a memorandum in opposition to Reynolds' motion. (Dkt. 13).

{¶5} On December 31, 2008, the trial court granted Reynolds'

motion and dismissed Grange's action against him, without prejudice. The court wrote "that this Complaint should be dismissed. Plaintiff brought this action under R.C. 3109.09, which provides for recovery of damages from the minor's parent." (Dkt. 15). Grange filed a notice of appeal. (Dkt 16).

ASSIGNMENT OF ERROR

{¶ 6} "THE TRIAL COURT ERRED WHEN IT DISMISSED PLAINTIFF-APPELLANT'S COMPLAINT FOR DAMAGES AGAINST THE MINOR DEFENDANT-APPELLEE WHEN THE COMPLAINT SUFFICIENTLY STATES A CAUSE OF ACTION FOR NEGLIGENCE AND/OR INTENTIONAL TORT AGAINST THE DEFENDANT-APPELLEE WHO WAS FIFTEEN YEARS OLD AT THE TIME OF THE INCIDENT."

{¶ 7} R.C. 3109.09(B) provides that an owner of property "may maintain a civil action to recover compensatory damages not exceeding ten thousand dollars and court costs from the parent of a minor if the minor willfully damages property belonging to the owner or commits acts cognizable as a 'theft offense' as defined in section 2913.01 of the Revised Code, involving the property of the owner."

{¶ 8} At common law, parents were not liable for the wrongful conduct of their children. R.C. 3109.09 creates a statutory exception to the common law rule, permitting liability to be imposed on parents for damages to property resulting from the wrongful

conduct of their children, in an amount up to the statutory maximum.

{¶ 9} Unauthorized use of motor vehicle by a minor may constitute a theft offense subjecting the minor's parents to liability pursuant to R.C. 3109.09(B) for damage to an automobile operated without the owner's consent. *Evans v. Graham* (1991), 71 Ohio App.3d 417; *Nationwide Insurance Co. v. Love* (1984), 22 Ohio App.3d 9. In that circumstance, the plaintiff is not required to prove that the minor willfully caused the damages out of which the claim arises. *Schirmer v. Losaker* (1980), 70 Ohio App.2d 138.

{¶ 10} Grange's claim for relief against Hisel relied on R.C. 3109.09, but its claim for relief against Reynolds alleged a common law claim for negligence. The two claims for relief are independent claims. The trial court therefore erred in finding that Grange's claim against both relied on R.C. 3109.09. That finding also suggests that Grange's claims against both Defendants are barred by Hisel's bankruptcy filing and eventual discharge. That is incorrect, for two reasons.

{¶ 11} First, the stay and potential discharge in bankruptcy to which Hisel may be entitled apply to her personal liability to Grange pursuant to R.C. 3109.09 on its claim for relief in the action. They have no application to Reynolds' liability to Grange on its negligence claim, which may proceed.

{¶ 12} Second, while a civil action commenced against a minor is irregular, the irregularity may be cured by appointment of a guardian ad litem to represent the minor defendant in the action.

Nichols Brothers v. Koshinick (1911), 32 Ohio C.D. 388, 42 Ohio C.C. 388, 19 Ohio C.C. (N.S.) 148. Civ.R. 17(B) provides: "Whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative the minor may sue by a next friend or defend by a guardian ad litem. When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent person."

{¶ 13} The trial court erred when it dismissed Grange's action against Reynolds. The court was charged by Civ.R. 17(B) to instead appoint a guardian ad litem to represent Reynolds in the action and proceed to adjudicate Grange's claim for relief against Reynolds. The court could have appointed Hisel for that purpose.

The bar that her bankruptcy petition creates does not prevent Hisel from acting on Reynolds' behalf in the action.

{¶ 14} The assignment of error is sustained. The judgment of the trial court will be reversed and the case will be remanded

for further proceedings consistent with this opinion. Even so, our consideration of Reynolds' minority may be a moot issue. If Grange's allegation that Reynolds was born on December 27, 1991 is correct, Reynolds has by now achieved his majority and the action against him may proceed directly, without appointment of a guardian ad litem.

BROGAN, J. And FROELICH, J., concur.

Copies mailed to:

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Hon. Dennis J. Greaney