

Michigan Court of Appeals: Seller of Boat was Not Owner During Accident



Jennifer A. Richards

As the 2016 boating season comes to an end, the Michigan Court of Appeals in *Williams v. Kennedy et. al*, issued Aug. 2, 2016 (Docket No. 325267), recently held that the seller of a boat does not qualify as the owner of the boat during the period after the seller delivers the certificate of title, but before the transfer of title is registered with the Secretary of State. This is significant due to Michigan's imposition of liability on the "owner" of a watercraft for injuries caused by negligent operation of the watercraft under MCL 324.80157.

This case, not handled by CMDA, arose out of a boating accident in 2013 that caused severe injuries to a minor. Michael Metcalf sold his boat to Mark Kennedy on August 26, 2013. In exchange for the sale price of the boat, Metcalf signed and delivered a "Watercraft Certificate of Title" containing a "Title Assignment by Seller." Kennedy left the transaction with the boat and the Certificate of Title. Kennedy was then supposed to apply to transfer the legal title with the Secretary of State as is required by statute. Kennedy attempted to do so on August 28th and August 30th, but was unable due to long lines. Before the transfer paperwork was submitted to the Secretary of State, on September 1, 2013, Kennedy piloted boat and injured a minor after striking her with the boat. Kennedy was later able to complete the transaction at the Secretary of State on September 5, 2013.

The injured minor's mother filed a negligence action naming both the seller and the buyer of the boat. She alleged that Metcalf,

the seller, was liable as an owner for the alleged negligent operation of the boat under MCL 324.80157 which imposes liability on the owner of a watercraft for its negligent operation. Because the transaction had not been completed with the Secretary of State, the Court was faced with the question of "whether the seller of a boat qualifies as an 'owner' during the period after a seller delivers the certificate of title to a purchase but before the transfer of title had been registered with the Secretary of State."

The Court ultimately held that Metcalf did not qualify as an owner before the transfer of title of the watercraft was registered with the Secretary of State. The Court construed the Natural Resources and Environmental Protection Act which sets forth the requirements for applying for a certificate of title for watercraft with the Secretary of State. The Court noted that this application must be filed within 15 days after the date of the purchase, and Kennedy fulfilled this requirement. The Court also noted that the Act provides that "[i]f satisfied that the applicant is the owner of the watercraft and that the application is in the proper form, the secretary of state shall issue a certificate of title." The Court reasoned that this suggested that ownership precedes the legal transfer of title with the Secretary of State.

Lastly, the Court construed the definition of "owner" under the Act. It noted that an owner is "a person who claims or is entitled to lawful possession of a vessel by virtue of that person's legal title or equitable interest in the vessel." The Court concluded that Metcalf could only qualify as an "owner" if he was entitled to lawful possession as a result of his legal title at the time of the accident. But, the Court determined that Metcalf was not entitled to lawful possession of the boat because he had already expressly transferred his possessory interest in the boat to Kennedy when he sold him the boat. Accordingly, Metcalf was not the owner of the boat at the time of the accident.

Based upon this decision, a seller of a watercraft is not an owner

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Michigan COA: Seller of Boat was Not Owner (cont.)

during the period after a seller delivers the certificate of title to a purchaser, but before the transfer of title has been registered with the Secretary of State. Although this decision seems to protect the seller of a watercraft from liability during the transfer of title, a seller of a watercraft can avoid liability for negligent operation under MCL 324.80157 by making sure that the application of a certificate of title for a watercraft is made

with the Secretary of State.

Jennifer A. Richards

Jennifer A. Richards is an attorney in our Livonia office where she concentrates her practice on appeals, law enforcement defense and litigation, municipal law and insurance defense. She may be reached at (734) 261-2400 or jrichards@cmda-law.com.

Occupational Safety and Health Act: New Rules for Injury and Illness Reporting



Gerald C. Davis

The workplace environment is governed by the Occupational Safety and Health Act (OSHA). The United States Department of Labor's Occupational Safety and Health Administration recently issued a final order that will require employers and many high-hazard industries to electronically submit injury and illness data to OSHA. Such reporting is already required to be tracked, but the reporting aspect of such injury or illness is what is new.

The new rule prohibits, "employers from using drug testing or the threat of drug testing as a form of retaliation against employees who report injuries or illnesses." The new rule also "clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting," additional to incorporating the existing prohibition on retaliation for reporting. OSHA will then share the injury and illness data on its website as the organization believes such posting of injury and illness data will provide valuable information to employers, employees, employee representatives (unions) and researchers.

Accordingly, employers must be aware of the new rule and comply with the reporting requirements. Employers must review "post-accident drug and alcohol testing policies," since they will be more strictly scrutinized by OSHA going forward. Some employers administer a drug and alcohol test to anyone that may have been involved in an incident or event resulting in injury or illness to an employee.

Accordingly, any policy that automatically tests employees who suffered work-related injuries will be targeted by OSHA because such policies may be viewed as deterring employees from workplace injury reporting. The testing must be limited to circumstances where the employee likely contributed to the reported injury or illness. If, for example, a hi-lo driver in a plant injured a co-worker, it is appropriate that the driver of the hi-lo be examined for drug and alcohol while the co-worker

that was injured by the hi-lo driver probably should not be similarly examined. The policy for alcohol and drug testing must be designed to accurately identify the impairment caused by the drug or alcohol use.

The employers must also consider tests that only measure very recent drug use to determine if an employee was impaired by alcohol or drugs at the time of the accident by use of tests which visually show how much drugs or alcohol caused impairment at the time of the accident, rather than merely be designed to show how much drugs or alcohol are in the employee's system.

Employers should consider avoidance of post-accident drug and alcohol testing in favor of implementing reasonable suspicion testing instead, or using random drug and alcohol testing programs to deter drug use before an accident actually occurs. Employers will be required to file state and federal reports for drug testing, but may continue to test for drugs and alcohol. However, the employer is reminded not to retaliate in any way against an employee who reports workplace injury or illness. Retaliation can include change in workplace duties, status, compensation, hours of work and other conditions of employment. Consequently, an employer should avoid a mandatory drug testing policy after report of injury, unless justified by the circumstances, behavior of the workers, and other facts.

The motivating reason for this change of policy is to provide employees with the ability to truthfully and completely report workplace injuries and illnesses without fear of retaliation.

Attorneys from CMDA are available to evaluate workplace policies to help assure compliance with this and other laws. OSHA provides fines of up to \$12,471 for serious violations of these rules.

Gerald C. Davis

Gerald C. Davis is a partner in our Livonia office where he concentrates his practice on corporate and business law, leveraged buy-outs, company reorganization and refinancing, analyzing investments for joint ventures, intellectual property, and drafting loan agreements. He may be reached at (734) 261-2400 or gdavis@cmda-law.com.

Experienced Attorneys Join CMDA

We are pleased to announce that two attorneys have recently joined our Firm.



Norman E. Richards

Norman E. Richards (Gene) has joined our Livonia office as a partner.

Mr. Richards primarily focuses his practice on elder law and estate planning. Drawing on 20 years of experience, his mission is to help clients safely navigate life's transitions through the skillful, practical, and compassionate application of comprehensive elder law and estate planning services.

As an elder law attorney, he guides senior clients in planning for their future care needs. This includes maximizing financial resources to pay for care. As an estate planning attorney, he develops customized legal documents for each client's unique needs, such as wills, trusts, and power of attorneys; disability and special needs trusts; estate plans for blended families; and business succession plans.

Christopher Schultz, managing partner of the Firm, explains, "Gene has substantial experience in the areas of estate planning and elder law. He is a significant asset to CMDA's growing elder law practice group and a welcome addition to our Firm."

Mr. Richards may be reached at (734) 261-2400 or nrichards@cma-law.com.



Christopher A. McIntire

Christopher A. McIntire has joined our Riverside office as an attorney.

Mr. McIntire primarily focuses his practice on public entity defense, employment law, premise liability and mass tort defense.

As an attorney, he has represented public entities in a wide range of disputes, from mass flooding and fire cases, to wrongful death, breach of contract, trip-and-falls and accidents involving traumatic brain injury. He has also represented public entities in employment law, civil rights and police misconduct.

Before becoming a lawyer, Mr. McIntire served for 23 years in the U.S. Navy, rising through the enlisted ranks from E-2 to E-8, before he retired. He began his military career as a military broadcast and print journalist and eventually became a public affairs and marketing professional.

Mr. Schultz explains, "Chris uses his background and experience to provide honest, clear and concise information and advice to his clients. Clients appreciate his communication skills and thorough follow-up, strategy and case management."

Mr. McIntire may be reached at (951) 276-4420 or cmcintire@cma-law.com.

CMDA Attorneys Selected as Michigan Super Lawyers & Rising Stars

We are pleased to announce that several CMDA attorneys have been selected for inclusion in the 2016 Michigan Super Lawyers & Rising Stars List. Christopher Schultz, managing partner of the Firm, explains, "Having many attorneys from CMDA selected as Michigan Super Lawyers and Rising Stars is validation for the hard work they put into the Firm and the superb level of service they offer clients. Congratulations to each of them on their well-deserved title."

2016 MICHIGAN SUPER LAWYERS*

Jeffrey R. Clark: Top Rated State, Local and Municipal Attorney

Haider A. Kazim: Top Rated State, Local and Municipal Attorney

Jim Schuster: Top Rated Elder Law Attorney

Carla Testani: Top Rated Family Law Attorney

Allan C. Vander Laan: Top Rated State, Local and Municipal Attorney

**The Super Lawyers list recognizes no more than 5% of attorneys in Michigan.*

2016 MICHIGAN RISING STARS*

Kevin M. Hirzel: Top Rated Real Estate Attorney

Joe Wloszek: Top Rated Real Estate Attorney

**The Rising Stars list recognizes no more than 2.5% of attorneys in Michigan.*



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To meld our legal expertise, professional support staff,
technical resources and variety of locations to deliver
first rate legal services at a fair value to a full range
of business, municipal, insurance and individual clients.