

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D33468  
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Argued - December 6, 2011

REINALDO E. RIVERA, J.P.  
RANDALL T. ENG  
SHERI S. ROMAN  
SANDRA L. SGROI, JJ.

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2011-02811

DECISION & ORDER

Mary Ann Zarilla, et al., respondents, v Lisa Pennachio,  
also known as Lisa Ribauso, appellant.

(Index No. 100107/10)

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Gannon, Lawrence & Rosenfarb, New York, N.Y. (Lisa L. Gokhulsingh of counsel),  
for appellant.

Nicholas Martino, Jr., Staten Island, N.Y., for respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals from an order of the Supreme Court, Richmond County (McMahon, J.), dated March 1, 2011, which denied her motion for summary judgment dismissing the complaint and granted the plaintiffs' cross motion for a trial preference.

ORDERED that the order is reversed, on the law, with costs, the defendant's motion for summary judgment dismissing the complaint is granted, and the plaintiffs' cross motion for a trial preference is denied as academic.

The plaintiff Mary Ann Zarrilla (hereinafter the plaintiff) allegedly was injured when she was struck by a battery-powered, motorcycle-type, tricycle scooter operated by her then three-year-old grandson, Michael. At the time of the incident, Michael was under the care of the plaintiff and her husband. The defendant, who is the child's mother, was not present. The plaintiff and her husband, suing derivatively, commenced the instant action against the defendant alleging, inter alia, that the defendant negligently entrusted Michael with a dangerous instrument. The defendant moved for summary judgment dismissing the complaint. The Supreme Court denied the defendant's motion, and granted the plaintiffs' cross motion for a trial preference based on age. We reverse.

December 27, 2011

ZARILLA v PENNACHIO, also known as RIBAUISO

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A parent owes a duty to protect third parties from harm that is clearly foreseeable from his or her child's improvident use or operation of a dangerous instrument, where such use is found to be subject to the parent's control (*see Rios v Smith*, 95 NY2d 647, 653; *LaTorre v Genesee Mgt.*, 90 NY2d 576, 582; *Nolechek v Gesuale*, 46 NY2d 332, 340). "[I]tems that are commonly used by children, of suitable age in a manner consistent with their intended use, may not, as a matter of law, be classified as dangerous instruments" (*Rios v Smith*, 95 NY2d at 653).

Here, the defendant made a prima facie showing of entitlement to judgment as a matter of law (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *cf. Nyhus v Valentino*, 83 AD3d 802, 804). Michael was of a suitable age to use the subject scooter, a toy manufactured for children between the ages of three to six. Further, Michael's operation of the scooter was consistent with its intended use. In opposition, the plaintiffs failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted the defendant's motion for summary judgment dismissing the complaint and denied, as academic, the plaintiffs' cross motion for a trial preference.

RIVERA, J.P., ENG, ROMAN and SGROI, JJ., concur.

ENTER:



Aprilanne Agostino  
Clerk of the Court