STATE OF MICHIGAN

COURT OF APPEALS

NICHOLAS RICH,

Plaintiff-Appellant,

v

THEODORE E. DUNN, Personal Representative of the ESTATE OF MICHAEL MOORE, SR., also known as MICHAEL W. MOORE,

Defendant-Appellee.

UNPUBLISHED
April 9, 1999

No. 201891
Ionia Circuit Court
LC No. 96-S17291 NO

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiff Nicholas Rich appeals as of right the trial court order granting summary disposition pursuant to MCR 2.116(C)(8) to defendant Theodore Dunn, as personal representative of the estate of Michael Moore. We affirm.

Plaintiff brought suit against defendant for injuries allegedly caused by the negligence of Moore, plaintiff's stepfather, in using an infrared heater to warm an ice fishing shanty. Plaintiff dozed off and fell on the heater, suffering severe burns as a result. Plaintiff appeals the trial court's finding that his claim is barred by parental immunity.

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(8) to determine whether the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. All factual allegations supporting the claim, and any reasonable inferences that can be drawn from the facts, are accepted as true. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

A child may maintain a lawsuit against a parent for injuries suffered as a result of the alleged ordinary negligence of the parent. However, there are two exceptions to this general rule: (1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to

the provision of food, clothing, housing, medical and dental services, and other care. *Plumley v Klein*, 388 Mich 1, 8; 199 NW2d 169 (1972). A stepparent standing in loco parentis may assert parental immunity as a defense to tort liability. *Thelen v Thelen*, 174 Mich App 380, 383; 435 NW2d 495 (1989). In determining whether a defendant was exercising reasonable parental authority, the question is not whether the defendant acted negligently, but whether the alleged act reasonably fell within one of the *Plumley* exceptions. *Phillips v Deihm*, 213 Mich App 389, 395; 541 NW2d 566 (1995). The determination whether conduct falls within one of the *Plumley* exceptions is a question of law for the court. *Id*.

Plaintiff argues that the trial court erred in finding that his claim is essentially one of negligent supervision. Claims for negligent supervision of a child are barred under the first *Plumley* exception. *Spikes v Banks*, 231 Mich App 341, 349; 586 NW2d 106 (1998); *Ashley v Bronson*, 189 Mich App 498, 502; 473 NW2d 757 (1991). Plaintiff asserts that Moore's failure to inspect the heater, his positioning the heater with the heating element facing upward, and his placement of the heater too close to plaintiff constitute acts of negligence that were unrelated to any negligent supervision of plaintiff.

We disagree. Despite plaintiff's attempts to frame his claims so as to avoid the operation of parental immunity, we agree with the trial court that the essence of his complaint is that Moore failed to properly supervise him. Cf. *Wright v Wright*, 134 Mich App 800, 806-807; 351 NW2d 868 (1984); *McAllister v Sun Valley Pools, Inc*, 100 Mich App 131, 139; 298 NW2d 687 (1980). As in *Wright* and *McAllister*, "the gravamen of the negligence was the failure of the parent[] to adequately . . . take steps to prevent potential injury." *Wright*, *supra* at 808.

Plaintiff next argues that defendant is not entitled to raise the defense of parental immunity because the allegedly negligent supervision did not relate to "reasonable parental discretion with regard to the provision of food, clothing, housing, medical and dental services, and other care." *Plumley*, *supra*. We need not determine whether recreational activities fall under the rubric of "other care" because we reject plaintiff's contention that the first *Plumley* exception applies only to the provision of the items in the second *Plumley* exception. Under plaintiff's interpretation of *Plumley*, the first exception would be mere surplusage, as all conduct which falls under the first *Plumley* exception would also fall under the second. Contrary to plaintiff's argument, the first *Plumley* exception bars claims of negligent supervision, regardless of whether the negligent supervision is related to provision of the items in the second *Plumley* exception. See *Spikes*, *supra*; *Ashley*, *supra*.

Plaintiff further maintains that parental immunity does not apply because Moore's conduct constituted gross negligence and, in addition, was wilful and wanton.[1] In *Plumley*, the Supreme Court abolished intra-family tort immunity, subject to the two exceptions for negligent acts discussed above. *Plumley*, *supra* at 8. However, at the time that the Supreme Court decided *Plumley*, the term "gross negligence" did not refer to a high degree or level of negligence. Rather, it merely referred to ordinary negligence of the defendant that follows the negligence of the plaintiff. See *Jennings v Southwood*, 446 Mich 125, 130; 521 NW2d 230 (1994).[2] In the absence of any indication that the Supreme Court did not intend that the *Plumley* exceptions apply to the higher level of negligence currently referred to as gross negligence, we decline to so hold.

With regard to plaintiff's claim of wilful and wanton misconduct,[3] we conclude that the trial court did not err in granting defendant's motion for summary disposition. Wilful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does. *Stott v Wayne Co*, 224 Mich App 422, 429; 569 NW2d 633 (1997). Plaintiff claims that Moore used an infrared heater to warm the ice fishing shanty, and when plaintiff fell asleep he fell on the heater. Accepting all plaintiff's factual allegations as true, we conclude that Moore's actions did not rise to the level of wilful and wanton misconduct.[4] See *id*.

Next, plaintiff urges us to hold that parental immunity does not apply in situations where the parent is deceased because the public policy objectives of the doctrine are inapplicable. In essence, plaintiff asks us to create an exception to the *Plumley* exceptions to the general rule abolishing parental immunity. However, the Supreme Court was obviously aware of the policy arguments for exempting the application of the parental immunity doctrine where the parent or child was deceased because the issue was discussed in this Court's opinion in that case. See *Plumley v Klein*, 31 Mich App 26, 29-30; 187 NW2d 250 (1971), aff'd 388 Mich 1 (1972).[5] Nevertheless, the Supreme Court did not choose to limit the applicability of the *Plumley* exceptions to situations where the parent and child were both still alive. Because the Supreme Court has not modified or overruled its decision in *Plumley*, we are bound by it. See *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Accordingly, we decline to hold that Moore's death renders the *Plumley* exceptions to the bar on parental immunity inapplicable.

Finally, plaintiff argues that the trial court erred in dismissing his claim of nuisance. Plaintiff contends that Moore's placement of the heater constituted a nuisance per se. We disagree. Under a nuisance theory, liability is based on "a dangerous, offensive, or hazardous condition *of the land* or on activities of similar characteristics which are conducted *on the land*." *Wagner v Regency Inn Corp*, 186 Mich App 158, 163; 463 NW2d 450 (1990) (emphasis added). A defendant held liable for the nuisance must have possession or control of the land. *Id*. Here, plaintiff does not allege that Moore possessed or had control of the land on which the accident occurred. Therefore, plaintiff has failed to plead sufficient facts to support a cause of action for nuisance. As this Court has stated, "Too often, 'nuisance' terminology is used to mask what are, in fact, simple negligence claims for the purpose of avoiding some effects of calling it what it is, a negligence claim." *Guinan v Truscott*, 167 Mich App 520, 524; 423 NW2d 48 (1988), quoting *Schroeder v Canton Twp*, 145 Mich App 439, 441; 377 NW2d 822 (1985).

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

[1] Plaintiff relies on this Court's decision in *Rodebaugh v Grand Trunk Western RR Co*, 4 Mich App 559; 145 NW2d 401 (1966). However, *Rodebaugh* was decided prior to the Supreme Court's decision in *Plumley*, which controls the applicability of the parental immunity doctrine.

In any case, the *Rodebaugh* Court held that parental immunity does not bar a child's claim against a parent if it is based on wilful and wanton, grossly negligent, or reckless conduct in activities which do not involve an exercise of parental care, discipline, and control. See *id*. at 567. In the present case, we have already determined that plaintiff's claim is essentially one of negligent supervision.

[2] In *Jennings*, the Court explained that the common-law definition of gross negligence had been fashioned in *Gibbard v Cursan*, 225 Mich 311; 196 NW 398 (1923), to avoid the harsh consequences of the contributory negligence rule. With the abandonment of the contributory negligence rule, the Court concluded that *Gibbard*'s formulation of gross negligence had outlived its usefulness. See *Jennings*, *supra* at 129-133.

[3] Plaintiff also alleges that Moore was "reckless;" however, "reckless" conduct is equivalent to "wanton" conduct. See *Pavlov v Community Emergency Medical Service, Inc*, 195 Mich App 706, 716; 491 NW2d 874 (1992).

[4] Although it is not relevant for purposes of reviewing the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8), we note that Moore testified at a deposition that prior to the accident involving plaintiff, Moore had used the heater "numerous" times, apparently without incident. Accordingly, summary disposition pursuant to MCR 2.116(C)(10) may also have been appropriate on this count. See *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

[5] This Court's opinion in *Plumley* specifically addressed the situation where both the parent and the child were deceased as a result of the alleged tortious conduct. *Plumley*, 31 Mich App at 30.