# STATE OF MICHIGAN

# COURT OF APPEALS

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DAVID BOROFF, Personal Representative of the Estate of DAVID SCHLOSSER, deceased, and JUSTIN SCHLOSSER, Minor, by his Next Friend, DAVID BOROFF,

Plaintiffs-Appellees,

v

WESLEY RAY ANDREWS,

Defendant/Cross-Plaintiff/Counter-Defendant/Appellee,

and

TERRANCE GENE HUNT,

Defendant/Cross-Defendant/Counter-Plaintiff/Appellee,

and

PENNY L. EATON, Personal Representative of the Estate of TINA SCHLOSSER, deceased,

Defendant/Cross-Defendant/Counter-Plaintiff/Appellant.

UNPUBLISHED
December 12, 2000

No. 216531
Lapeer Circuit Court
LC No. 97-024452-NI

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DENNIS PROTASIEWICZ, Next Friend of RYAN SCOTT PROTASIEWICZ, also known as RYAN SCOTT SCHLOSSER,

Plaintiff-Appellee,

v

No. 216532
Lapeer Circuit Court
LC No. 98-025084-NI

WESLEY RAY ANDREWS, TERRANCE GENE HUNT, and PAMELA HUNT,

Defendants-Appellees,

and

PENNY L. EATON, Personal Representative of the Estate of TINA MARIE SCHLOSSER, deceased,

Defendants-Appellants.

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PENNY EATON and CYRIL SCHLOSSER, Personal Representatives of the Estate of TINA MARIE SCHLOSSER, deceased,

Plaintiffs-Appellants,

v

No. 216571
Lapeer Circuit Court
LC No. 98-025065-NI

WESLEY RAY ANDREWS and TERRANCE GENE HUNT,

Defendants-Appellees.

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Before: Owens, P.J., and Jansen and R. B. Burns*, JJ.

PER CURIAM.

In these consolidated appeals, the estate of Tina Marie Schlosser appeals by leave granted from an order of the trial court denying her motion for summary disposition brought under MCR 2.116(C)(8). We affirm.

These appeals arise out of a head-on automobile collision that occurred on January 21, 1997. Wesley Ray Andrews was the driver of a vehicle in which Tina Schlosser and her three sons, David, Justin, and Ryan, were all passengers. Andrews' vehicle collided with another vehicle driven by Terrance Gene Hunt. Tina and David Schlosser were killed as a result of the collision, while Justin and Ryan suffered injuries. It is undisputed that the children were not wearing seat belts at the time of the collision.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In docket no. 216531, David Boroff, the father of David and Justin, filed a complaint against Andrews, Hunt, and the estate of Tina Schlosser. With regard to Tina Schlosser, the complaint alleged that she negligently failed to ensure that David and Justin were properly secured in their seat belts while they were traveling in the vehicle. In docket no. 216532, Dennis Protasiewicz, the father of Ryan, filed a complaint against Andrews, Hunt[1], and the estate of Tina Schlosser. With regard to Tina Schlosser, it was similarly alleged that she negligently failed to ensure that Ryan was properly restrained in the vehicle. In docket no. 216571, the estate of Tina Schlosser filed a complaint against Andrews and Hunt; however, there is no issue arising from that case involved in these appeals.

The issue with which we are faced is a narrow one; appellant contends that the complaints filed against the estate of Tina Schlosser failed to state a claim because she is immune from liability under the parental immunity doctrine. The trial court denied appellant's motion for summary disposition below, ruling that Tina Schlosser's failure to properly secure her children in seat belts was not conduct immune from liability under the parental immunity doctrine. The trial court thus concluded that the plaintiffs had stated claims against the estate of Tina Schlosser. For the reasons set forth, we agree with the trial court and affirm.

Appellant's motion for summary disposition was brought under MCR 2.116(C)(8), failure to state a claim on which relief can be granted. A motion brought under this subsection tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). All well-pleaded allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id.* When deciding a motion under this subsection, only the pleadings are considered, MCR 2.116(G)(5), to determine whether the claims alleged are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Maiden, supra*, p 119. We review de novo the trial court's ruling on a motion for summary disposition. *Id.*, p 118.

In *Plumley v Klein*, 388 Mich 1; 199 NW2d 169 (1972), our Supreme Court abrogated intrafamily tort immunity. The Court held:

> A child may maintain a lawsuit against [the] parent for injuries suffered as a result of the alleged ordinary negligence of the parent. . . . [There are] two exceptions to this new rule of law: (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. [*Id.*, p 8.]

This Court has held that the question is not whether the defendant (parent) acted negligently, but whether the defendant's alleged negligent act falls within one of the *Plumley* exceptions. *Spikes v Banks*, 231 Mich App 341, 348-349; 586 NW2d 106 (1998); *Phillips v Deihm*, 213 Mich App

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[1] Pamela Hunt, the owner of the vehicle driven by Terrance Gene Hunt, was also named as a defendant in this case.

389, 95; 541 NW2d 566 (1995); *Ashley v Bronson,* 189 Mich App 498, 506; 473 NW2d 757 (1991). The determination whether conduct falls within one of the *Plumley* exceptions is a question of law for the court. *Spikes, supra,* p 349. Further, this Court has held that claims of negligent supervision of a child are barred under the first exception noted in *Plumley*. *Spikes, supra,* p 349; see also, *Ashley, supra,* p 502 (and cases cited therein).

We note initially that we do not believe that these appeals constitute claims of mere negligent supervision such that the claims are barred under the first *Plumley* exception. Here, the plaintiffs have alleged that Tina Schlosser breached her duty to the children by negligently failing to ensure that they were properly secured in their seat belts while traveling in the vehicle.[2] Because this allegation relates to an omission by Tina Schlosser, rather than her negligent supervision leading to the children's injuries, the allegation is not barred as being a mere pleading of negligent supervision. See *Ashley, supra,* p 502. Consequently, it must be determined whether Tina Schlosser's act of not restraining the children in the vehicle (the alleged negligent act) reasonably falls within one of the *Plumley* exceptions.

Here, we agree with the trial court's analysis under the two *Plumley* exceptions. With regard to the first exception (exercise of reasonable parental authority), the trial court stated:

> According to [*Paige v Bing Construction Co,* 61 Mich App 480; 233 NW2d 46 (1975)], exercising parental authority includes the responsibility to supervise a child's behavior, and providing instruction and education so that a child may be aware of dangers. In the case at bar, Tina Schlosser was not supervising David, Justin, or Ryan's behavior by permitting them to ride in the vehicle without the security of seat belts, nor was she providing education or instruction so that they would be aware of dangers. Therefore the [first] exception of *Plumley* does not apply.

With regard to the second *Plumley* exception (exercise of reasonable parental discretion) the trial court noted that MCL 257.710e(4); MSA 9.2410(5)(4) of the motor vehicle code requires that each driver of a vehicle transporting a child aged four to fifteen must secure that child in a properly adjusted and fastened safety belt. Similarly, MCL 257.710d(1); MSA 9.2410(4)(1) requires that the driver of a vehicle must properly secure children under the age of four in a child restraint system. Both of these statutes contain mandatory language (shall) and provide that violations shall constitute a civil infraction.

We acknowledge, as did the trial court, that the statutes require the driver to ensure that the children are properly restrained and that Tina Schlosser was not the driver of the vehicle. However, there is no discretion regarding whether any child under the age of sixteen should use a seat belt or other type of child restraint system in a motor vehicle because state law requires their

[2] To the extent that the complaint in docket no. 216531 also alleges that Tina Schlosser failed to adequately supervise the children, that particular claim would be barred. However, the complaint further alleges that Tina Schlosser negligently failed to ensure that David and Justin were properly secured in their seat belts while traveling in the vehicle. We agree with the trial court's conclusion that the plaintiffs alleged negligence rather than mere negligent supervision.

use. Because it would violate a statute to allow children to travel in a motor vehicle without any type of safety restraint system, a parent's failure to require or ensure that a child under the age of sixteen be properly restrained cannot be considered an exercise of reasonable parental discretion.

Accordingly, we hold that the trial court did not err in denying the estate of Tina Schlosser's motion for summary disposition brought under MCR 2.116(C)(8) because the trial court properly found that she is not immune from liability under the parental immunity doctrine as a matter of law.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Robert B. Burns