

STATE OF MICHIGAN
COURT OF APPEALS

STATE FARM FIRE & CASUALTY
COMPANY,

Plaintiff-Appellee,

v

TIMOTHY LEQUIA and ANN LEQUIA,

Defendants-Appellees,

and

PATRICIA WILKES and NICHOLAS LAMERE,
JR., Co-Personal Representatives of the Estate of
TRAVIS ALVIN LAMERE,

Defendants-Appellants.

UNPUBLISHED
December 15, 2009

No. 286139
Marquette Circuit Court
LC No. 08-045454-CK

PATRICIA WILKES and NICHOLAS LAMERE,
JR., Co-Personal Representatives of the Estate of
TRAVIS ALVIN LAMERE,

Plaintiffs-Appellants,

v

TIMOTHY LEQUIA and ANN LEQUIA,

Defendants-Appellees.

No. 286776
Marquette Circuit Court
LC No. 07-044816-NO

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

Servitto, J. (*concurring in part and dissenting in part*).

While I agree with the majority's conclusions with respect to the insurance action, I respectfully dissent as to the majority's conclusion in the wrongful death action that the action is barred by the parental authority immunity provision.

Pursuant to MCL 722.163, a foster child may maintain an action against his or her foster parent or his or her legal guardian for injuries suffered as a result of the alleged ordinary negligence of the foster parent or legal guardian except in either of the following instances:

- (a) If the alleged negligent act involves an exercise of reasonable parental authority over the child.
- (b) If 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.

As indicated by the majority, to overcome the statutory immunity protection, one must state a claim for neglect, for which there is no immunity, or for negligence that falls outside the protections of the immunity statute set forth above. While the majority concludes that the claim is based upon negligent supervision, which is a claim barred by statutory immunity, I believe that, though this is a close call, the plaintiffs in this matter sufficiently stated a claim for neglect, such that MCL 722.163 is inapplicable.

Child neglect, for purposes of child protection laws, is defined as:

- (j) . . . harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following:
 - (i) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care.
 - (ii) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk.

MCL 722.622

Here, the 2-year-old child was left outside essentially on the bank of a river, under the supervision of a twelve year old boy and his friend, who were otherwise occupied in the family garage. At first blush, it would seem that the claim is thus based on negligent supervision, as the majority concluded. However, it is not the alleged negligent supervision, as a singular, isolated ground that placed the child at an unreasonable risk. It is the supervision (or lack thereof) *coupled with* the proximity of the home to the river that placed the child at an unreasonable risk of harm. The alleged negligent supervision is simply *a* factor—not *the* factor leading to this tragic accident. Had the child been left outside in a fenced yard with a twelve-year-old and his friend, for example, the child would arguably not have been placed in a situation unreasonably risking his welfare.

Here however, the home was a mere forty feet from the river and there was admittedly no barrier between the family yard and the river. Moreover, there was a slide located on an island in the middle of the river—undoubtedly a temptation for any two-year-old—presenting the river as a form of recreation. The foster parents were well aware of the river's short distance from the house, and by allowing the child to remain outside so near this danger without adequate supervision, the foster parents could be regarded as having placed the child at an unreasonable

risk to his health or welfare by failing to intervene to eliminate that risk when they were able to do so. Essentially, they failed to protect the child from the known risk of being outside by a river without adult supervision and, in fact, placed the child in this dangerous, unnecessary situation. They appeared to have taken no steps to intervene or eliminate the known risk posed to the child. I would thus find that the foster parents' actions fall within the definition of neglect, as set forth in MCL 722.622(j)(ii). Because neglect is not, as matter of law, a reasonable exercise of parental discretion (See, *Spikes by Simmons v Banks*, 231 Mich App 341, 352; 586 NW2d 106 (1998)), I would hold that neither exception that abrogates foster parent liability under MCL 722.163 applies, and I would reverse the trial court's grant of summary disposition in defendants' favor in the wrongful death action.

/s/ Deborah A. Servitto