IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

DANIEL S. JAYNE, a minor, by his next friend, TINA JAYNE, Plaintiff,	:	C.A. No. 02C-05-021 WLW
v.	:	
JAMES COLE, SR., MARY COLE, JAMES PATRICK COLE, JR., a minor, and DOROTHY EMORY, Defendants.	:	
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DOROTHY EMORY, Third-Party Plaintiff,	:	
v.	:	
ALICE THOMPSON, Third-Party Defendant.	:	

Submitted: February 21, 2003
Decided: March 7, 2003

ORDER

Upon Third-Party Defendant's
Motion for Summary Judgment. Denied.

William D. Fletcher, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware, attorneys for the Plaintiff.

Nicholas Skiles, Esquire of Schwartz Campbell & Detweiler, Wilmington, Delaware, attorneys for Defendants Cole.

Ransford B. Palmer, Jr., Esquire, Newark, Delaware, attorney for Defendant and Third-Party Plaintiff Emory.

Stephen F. Dryden, Esquire, Wilmington, Delaware, attorney for Third-Party Defendant Thompson.

I. Introduction

Upon consideration of third-party defendant, Alice Thompson's, motion for summary judgment, the response of the third-party plaintiff, Dorothy Emory, the oral arguments and the supplemental briefings, it appears to this Court that summary judgment should not be granted in this matter.

II. Facts

On May 20, 2000, 8 year old James Cole ("JC") went into his grandmother, Dorothy Emory's, garage to return a motorized bike. At the time the accident took place Ms. Emory was not at her premises but had allowed her grandson access to the garage of her house to return the bike. While in the garage JC picked up the BB gun and discharged it. As a result, a ricocheting BB was lodged in 4 year old Daniel Jayne's ("Daniel") right eye. The BB gun was owned by JC's grandmother, Dorothy Emory, the third-party plaintiff.

Daniel, through his parents, brought the instant suit against JC, his parents and his grandmother, Ms. Emory. Ms. Emory, as a third-party plaintiff, brought an action against Alice Thompson the grandmother of Daniel. The nature of the action is negligent supervision as to the grandchild. Ms. Thompson was watching her grandson, Daniel, while his mother was at work. According to the Motion for Summary Judgment, Ms. Thompson was inside her residence and was unaware that her grandson (4 year old Daniel) had followed JC over to the residence, nor did she know about the BB gun. On the other hand, Ms. Emory claims that Ms. Thompson admitted that before the incident occurred she had seen JC using a BB gun lots of

times. However, as was pointed out by counsel at oral argument, Ms. Thompson knew that Daniel used a BB gun under supervision.

Ms. Thompson claims that summary judgment is warranted in this case for three reasons: (1) negligent supervision is not a proper cause of action against a non-custodial grandmother; (2) the third-party action against Ms. Thompson is barred by the doctrine of parental immunity; and (3) Ms. Thompson's negligence, if any, was not the proximate cause of Daniel's injury.

III. Discussion

Superior Court Rule 56(c) provides that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] The burden is on the moving party to show, with reasonable certainty, that no genuine issue of material fact exists and judgment as a matter of law is permitted.[2] Summary judgment should only be granted when after viewing the record in a light most favorable to the non-moving party, there is no genuine issue of material fact.[3] "If a material fact is in dispute, or if it seems desirable to inquire

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[1] SUPER. CT. CIV. R. 56.

[2] *See Celotex Corp. v. Cattret*, 477 U.S. 317 (1986); *Martin v. Nealis Motors, Inc.*, 247 A.2d 831 (Del. 1968).

[3] *Oliver B. Connors & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973); *see also Christiana Marine Serv. Corp. v. Texaco Fuel & Marine Mktg.*, C.A. No. 98C-02-217WCC, *2 (Del. Super. Ct., June 13, 2002); *McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del.

more thoroughly into the facts, to clarify the application of the law, summary judgment is inappropriate. Moreover, if it appears to the Court that there is *any reasonable hypothesis* by which the non-moving party might recover, the motion will be denied."[4] Summary judgment is also inappropriate when there is a "dispute as to the inferences which might be drawn" from the facts of the case."[5]

A. Viability of the Tort Negligent Supervision

Although it is well settled that the law precludes tort claims against parents for negligent supervision,[6] no Delaware case has held that grandparents are likewise immune from such tort action. Furthermore, other jurisdictions have determined that the policy and constitutional reasons that preclude this type of tort claim against parents do not extend to grandparents.[7] This Court can find no persuasive reason to prohibit the negligent supervision tort in this case.

1994).

[4] *Christiana Marine Serv. Corp.,* C.A. *No. 98C*-02-217WCC at *2 (emphasis added).

[5] *Schagrin v. Wilmington Med. Ctr., Inc.*, 304 A.2d 61, 63 (Del. Super. Ct. 1973) (citing *Vanaman v. Milford Mem'l Hosp., Inc.*, 272 A.2d 718 (Del.1970)).

[6] *Sears, Roebuck, Co. v. Huang,* 652 A.2d 568, 570 (Del. 1995) (holding that although a parent can not be held liable for negligent supervision, evidence of a parental lack of supervision may be admitted to prove a superceding, intervening causation); *Strahorn v. Sears, Roebuck & Co.,* 123 A.2d 107, 108 (Del. Super. Ct. 1956) (following the majority rule that a minor can not sue a parent for ordinary negligence); *see also Hadden v. Kero-Sun, Inc.*, 602 N.Y.S.2d 880 (N.Y. App. Div. 1993); *Carey v. Reeve*, 781 P.2d 904, 906 (Wash. Ct. App. 1989) ("If a child has been injured himself as a result of his parent's failure to supervise, the parent cannot be sued for negligent supervision.")

[7] *Broome v. Horton*, 83 Misc. 2d 1002, 1003 (N.Y. App. Div. 1975).

B. Applicability of the Doctrine of Parental Immunity

"Historically, the parental immunity doctrine has been based on the public policy interest in maintaining family tranquility, fear of undermining parental control and authority, an interest in assuring that family property be shared by all rather than appropriated by one family member, fear of collusion and fraud, and a view of the parent-child relationship as analogous to the husband-wife relationship."[8] Additionally, "it is said that the real purpose behind the doctrine is simply to avoid undue judicial interference with parental discretion. The discharge of parental responsibilities . . . entails countless matters of personal, private choice. In the absence of culpability beyond ordinary negligence, those choices are not subject to review in court."[9] The Delaware Supreme Court has stated the policy behind the doctrine of parental immunity as:

> Reciprocal rights and duties inhere in the parent-child relationship. Anything creating conflict between parent and child, or interfering with the authority, discretion, or control that a parent has the right to exercise in supervising his child is repugnant to the institution of the family, and therefore is against public policy. Parental immunity will not be abrogated where the duty arises from the family relationship, for to do so would manifestly tend to disturb domestic tranquility.[10]

There has been no case in Delaware that has extended this immunity to

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[8] *Carey*, 781 P.2d at 906.

[9] *Cole v. v. Fairchild*, 482 S.E.2d 913, 926 (W. Va. 1996) (internal citations omitted).

[10] *Huang*, 652 A.2d at 571-72.

grandparents. In addition, other jurisdiction have not extended the doctrine of parental immunity to grandparents.[11] The trend in Delaware, and in many other jurisdictions, is to limit the doctrine of parental immunity, not to expand the doctrine.[12] Therefore this Court will not extend the doctrine of parental immunity

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[11] *Hadden*, 602 N.Y.S.2d at 881 ("It has since become established that this 'principle that precludes tort claims against parents for alleged negligent supervision of a child does not extend to immunize a grandparent from such claims when he or she is exercising temporary custody and control of the infant.'"); *Kaplan v. Vavasseur*, 101 Misc. 2d 519 (N.Y. App. Div. Ct. 1979) ("children entrusted to the care of grandparents, . . . have not had the doctrine of parental immunity extended to them"); *Broome*, 83 Misc. 2d at 1004-05 (holding that parental immunity can not be extended to grandparents even when charged with negligent supervision); *Mitchell v. Ensign-Bickford Haz-Pros.*, 1995 Conn. Super LEXIS 2063, * 12 (Conn Super. Ct. 1995) (a grandfather is not entitled to assert the doctrine of parental immunity).

[12] The Delaware Supreme Court explained that "an absolute rule of parental immunity in tort has no rational basis under modern day conditions and circumstances." *Williams v. Williams*, 369 A.2d 669 (Del. 1976) (allowing a child to sue a parent for injuries sustained in an automobile accident); *see also Pipher v. Burr,* 1998 Del. Super. LEXIS 26, *19 (Del. Super. Ct. 1998) (explaining that Delaware recognizes a limited doctrine of parental immunity); Huang, 652 A.2d at 570-572 (stating that the national trend is to erode the doctrine of parental immunity, and explaining that Delaware retains a limited parental immunity doctrine). The trend in other jurisdiction has also been to limit the doctrine of parental immunity. *Carey*, 781 P.2d at 906 ("The application of the doctrine of parental immunity, although widespread in the past, has been severely criticized . . . ."); *Cole*, 482 S.E.2d at 926 (explaining that the parental immunity doctrine is subject to several exceptions). Under Delaware law parental immunity is still viable when it deals with issues of parental decisions with regard to supervising their children. As stated by the Supreme Court in *Schneider v. Coe*:

> [S]upervision of one's children involves issues of parental control, authority, and discretion that are uniquely matters of a very personal type of judgment. The freedom to exercise such judgment has constitutional underpinning and contrasts sharply with the State's supervision and regulation of the judgment one must exercise while driving an automobile. Reciprocal rights and duties inhere in the parent-child relationship. Anything creating conflict between parent and child, or interfering with the authority, discretion, or control that a parent has the right to exercise in supervising his child is repugnant to the

to a grandparent in this case where the grandmother was merely acting as a baby-sitter. However, this Court makes no ruling with respect to whether or not the doctrine of parental immunity should be extended to a grandparent acting in *loco parentis*[13] with respect to the child as this was not the case presented to the Court.

C. Proximate Cause

In order to prevail in a negligence action, a plaintiff must prove by a preponderance of the evidence that the defendant's action breached a duty of care in a way that proximately caused plaintiff's injury.[14] Delaware adheres to the traditional "but for" definition of proximate causation; thus, a proximate cause is one "which in natural and continuous sequence, *unbroken by any efficient intervening cause*, produces the injury and without which the result would not have occurred."[15]

> institution of the family, and therefore is against public policy. Parental immunity will not be abrogated where the duty arises from the family relationship, for to do so would manifestly tend to disturb domestic tranquility. It is for these reasons that we decline to extend *Williams v. Williams*, to abrogate parental immunity in actions against parents for negligent supervision of their children.

Schneider v. Coe, 405 A.2d 682, 684-685 (Del. 1979) (citations omitted).

[13] The term loco parentis refers to a "person who puts himself in the situation of a lawful parent assuming obligations incident to the parental relationship without going through the formalities necessary to a legal adoption." *Trieval v. Sabo*, 1996 Del. Super. LEXIS 65, *16 (Del. Super. Ct. 1996).

[14] *Russell v. K-Mart Corp.*, 761 A.2d 1, 5 (Del. 2000).

[15] *Id.* (emphasis added) (citations omitted). The Supreme Court explained that some jurisdictions utilize the "'substantial factor' test, wherein the defendant is negligent if his conduct

The Supreme Court defined intervening and superseding causes as: "[O]ne which comes into active operation in producing an injury subsequent to the negligence of the defendant. The mere occurrence of an intervening cause, however, does not automatically break the chain of causation stemming from the original tortious conduct . . . . In order to break the causal chain, the intervening cause must also be a superseding cause, that is, the intervening act or event itself must have been neither anticipated nor reasonably foreseeable by the original tortfeasor." Thus, a third party's act is an intervening, superseding cause if it was either unforeseeable, or was foreseeable but conducted in an extraordinarily negligent manner. A foreseeable event is one where the defendant should have recognized the risk under the circumstances.[16]

Issues of "negligence either on the part of a defendant or of contributory negligence on the part of a plaintiff, . . . are, *except in rare cases*, questions of fact which ordinarily should be submitted to the jury to be resolved,"[17] and thus are generally not appropriate for summary judgment unless "a moving defendant has demonstrated not only that there are no conflicts in the factual contentions of the parties but that, also, the only reasonable inferences to be drawn from the

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was a material element and a substantial factor in bringing about the cause of plaintiffs injury." However, in Delaware, "[a]lthough there may be more than one proximate cause of plaintiffs injury, 'our time-honored definition of proximate cause' has been the 'but for' rule, not the 'substantial factor' test." *Id.*

[16] *Delaware Elec. Coop. v. Duphily*, 703 A.2d 1202 (Del. 1997).

[17] Likewise, issues of proximate cause are also questions normally preserved for the jury. *Russell,* 761 A.2d at 5 ("Since the issue of proximate cause is ordinarily a question of fact to be submitted to the jury, it is necessary for the trial judge to provide proper jury instructions on that concept.").

uncontested facts are adverse to the plaintiff."[18] Therefore, summary judgment in this case should be granted if the only conclusion a reasonable juror could make is that the intervening cause, namely Ms. Emory and JC's actions, were abnormal, unforeseeable, or extraordinarily negligent. After reviewing the submissions of the parties and the oral arguments, this Court determines that whether or not Ms. Emory's or JC's actions were an intervening, superseding cause of Daniel's injury is a question for the jury. Therefore, the third-party defendant's motion for summary judgement is denied.

IV. Conclusion

In conclusion, this Court has determined that the tort of negligent supervision is a viable cause of action against Ms. Thompson. Furthermore, this Court finds that Ms. Thompson cannot avail herself of the doctrine of parental immunity. Finally, this Court finds that the proximate cause issue, specifically whether there was a superceding, intervening cause, is a matter that should be left to the province of the jury. Consequently, after reviewing the applicable law, the submissions of the parties and listening to the oral arguments, this Court determines that the third-party defendant's motion for summary judgment is ***denied***.

IT IS SO ORDERED.

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[18] *Watson v. Shellhorn & Hill, Inc.*, 221 A.2d 506, 508 (Del. Supr. 1966) (emphasis added).

Honorable William L. Witham, Jr.

WLW/dmh
oc: Prothonotary
xc: Order Distribution
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