

STATE OF MICHIGAN
COURT OF APPEALS

TONYA LYN SLAGER, as Next Friend of
CHADWICK VANDONKELAR, a Minor,

FOR PUBLICATION
September 30, 2010

Plaintiff-Appellee,

v

KID'S KOURT, L.L.C., and MARYANNE
BARRINGER,

No. 292856
Ottawa Circuit Court
LC No. 08-063033-NO

Defendants-Appellants.

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

MURRAY, J. (*dissenting*).

In this interlocutory appeal, we granted leave to appeal to decide whether the trial court erred in denying defendants' motion for leave to file a notice of nonparty at fault. The trial court had concluded that because the would-be nonparties at fault, the minor child's parents, had parental immunity from their alleged failure to adequately provide medical care to their child, they could not be nonparties at fault under the controlling statute. The majority does not answer the question decided by the trial court and briefed and argued by the parties (and on which we granted leave to appeal), but instead decides that the statute is wholly inapplicable for reasons of its own. With all due respect to my colleagues, I would address the issue decided below and addressed by the parties, and in doing so would hold that the existence of parental immunity does not foreclose an allocation of fault under the comparative fault statutes. Accordingly, I would reverse and remand this case.

I. FACTS AND PROCEEDINGS¹

The facts of this case are undisputed, and arise out of the injury the six-year-old plaintiff sustained while in defendants' daycare facility on May 9, 2007. The injury occurred when plaintiff placed his middle finger into one end of a metal pipe that held a large roll of paper. The pipe dislodged from the paper roller frame, and the child's finger was crushed and lacerated.

¹ Although the majority opinion has sufficiently detailed the material facts, I add my version simply to provide the reader with some context when reviewing my substantive analysis.

The paper roller was homemade and maintained by defendant Maryanne Barringer. Defendants do not contest their liability under these facts, but instead challenge the extent of plaintiff's damages.

Seventeen months after the injury, the child's mother, Tanya Slager, filed suit on the child's behalf alleging gross negligence, nuisance, and premises liability. Defendants admitted liability on the premises liability theory, and the court dismissed plaintiff's gross negligence and nuisance claims on defendants' motion for summary disposition. The court also limited discovery to evidence concerning the occurrence and extent of the injury in addition to damages.

Before entry of that order, on April 7, 2009, defense counsel met with the child's treating orthopedic surgeon, Dr. Michael Condit, to discuss the doctor's findings and opinions regarding the child's injury, treatment, and prognosis. Defense counsel averred that although Dr. Condit had prescribed physical therapy once a week for four weeks following surgery on the finger, the child was dismissed from therapy after only attending the initial evaluations and one session for failure to return to therapy. According to defense counsel, Dr. Condit indicated that his intent was for the child to attend at least 8 to 12 sessions over a three-month period to improve the range of motion as well as to alleviate the stiffness and swelling in the fingertip. In Dr. Condit's estimation, the failure to continue therapy had a "very significant" impact on the child's recovery.

Based on the information acquired from Dr. Condit, defendants quickly moved for leave to file a notice of nonparty at fault and to amend their affirmative defenses. The notice sought to designate the child's parents, Tonya Slager and Chadwick VanDonkelaar, Sr., as nonparties at fault for failing to follow Dr. Condit's advice and failing to ensure their son's attendance at follow-up physician appointments and physical therapy. The amended affirmative defenses sought to allege that the injuries were caused by acts or omissions over which defendants had no control and reserved defendants' right to seek fault allocations under MCR 2.112(K).

At the ensuing motion hearing, the parties disputed whether parental immunity precluded an allocation of fault.² Siding with plaintiff, the court ruled that parental immunity did preclude an allocation of fault based on our Supreme Court's ruling in *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18; 762 NW2d 911 (2009), which held that the comparative fault statutes³ require that a party owe a legal duty before the party may be named a nonparty at fault. The court concluded that the immunity enjoyed by plaintiffs' parents precluded their being named nonparties at fault because their immunity exempted them from any legal duties. Accordingly, defendants' motions were denied, as was their subsequent motion for reconsideration. We then granted defendants' application for leave to appeal these orders, *Slager v Kids Kourt, LLC*, unpublished order of the Court of Appeals, entered July 14, 2009 (Docket No. 292856).

² Plaintiff did not dispute defendants' summary of Dr. Condit's report.

³ See MCL 600.2957 and MCL 600.6304.

II. ANALYSIS

As they argued below, defendants maintain on appeal that the tort reform legislation of 1995 permits naming plaintiff's parents as nonparties at fault and that the court's ruling that parental immunity eliminated any legal duty was erroneous. This argument raises questions concerning statutory interpretation and the existence of a legal duty, both of which are subject to de novo review. *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 488; 697 NW2d 871 (2005); *Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004).

In 1995, the Legislature enacted comprehensive tort reform legislation. *Romain*, 483 Mich at 25 (YOUNG, J., *dissenting*). An important aspect of this reform was the replacement of the common-law doctrine of joint and several liability with the doctrine of several liability. MCL 600.2956. To this end, the Legislature passed MCL 600.2957 and MCL 600.6304, known as comparative fault statutes, which require fact-finders to assess fault in personal injury actions according to an individual's degree of fault irrespective of the individual's involvement in the suit. "The significance of the change is that each tortfeasor will pay only that portion of the total damage award that reflects the tortfeasor's percentage of fault[,] i.e., the tortfeasor will pay only his "fair share liability." *Smiley v Corrigan*, 248 Mich App 51, 54; 638 NW2d 151 (2001).

Section 2957 provides, in relevant part:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

Section 6304 similarly provides in part:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d], regardless of whether the person was or could have been named as a party to the action.

* * *

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

Fault is defined broadly to include “an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.” MCL 600.6304(8). Notably, the assessment of fault against a nonparty does not subject the nonparty to liability, but only is used to determine the percentage of fault, if any, of the named parties in an action. MCL 600.2957(3).

Recently, our Supreme Court in *Romain* clarified what is necessary to allocate nonparty fault under the comparative fault statutes for negligence claims. Specifically, the Court affirmed the holding of *Jones v Enertel, Inc.*, 254 Mich App 432, 437; 656 NW2d 870 (2002), that “a duty must first be proved before the issue of fault or proximate cause can be considered.” *Romain*, 483 Mich at 20.⁴ The *Romain* Court, however, did not address whether the existence of immunity abolishes a duty *per se* (and therefore precludes an assessment of percentage of fault under the comparative fault statutes as the trial court found), or whether an immunity serves only to protect the nonparty from being personally subject to liability where a duty otherwise exists. In fact, *Romain* did not discuss immunity at all, but instead focused on whether a duty was required to be proven before a person could be named a nonparty at fault.

A. IS THERE A DUTY?

Concerning the threshold issue of duty in the case at hand, it is well-established that parents have a duty to provide for the support and maintenance of their minor children, including for the provision of medical care. Speaking directly to this point, this Court has stated that a “parent’s duty to support a minor child requires the parent to furnish all necessities essential to the health and comfort of the child, including, for example, medical care.” *Manley v Detroit Automobile Inter-Insurance Exchange*, 127 Mich App 444, 453; 339 NW2d 205 (1983), *aff’d in part and rev’d in part on other grounds* 425 Mich 140 (1986).

That this duty is legal as well as moral is universally recognized in jurisdictions throughout this county, and Michigan is no exception. *Plumley v Klein*, 388 Mich 1, 8, 8 n 6; 199 NW2d 169 (1972) (referring to the rule that a minor child may sue his parent in tort, and therefore in negligence, as the “original common law rule”); 59 Am Jur 2d, Parent and Child, §§ 45, p 213 (“A [parent’s] duty to support and maintain minor children is universally recognized . . . [e]ven in the absence of statute . . .”); see also *Fonken v Fonken*, 334 Ark 637, 643; 976 SW2d 952 (1998) (“a parent has a legal duty to support his minor children, regardless of the existence of a support order”); *Stecyk v Bell Helicopter Textron, Inc.*, 53 F Supp 2d 794, 800 (ED Pa,

⁴ In reaching this decision, the *Romain* Court overruled this Court’s most recent pronouncement on this issue in *Kopp v Zigich*, 268 Mich App 258, 260; 707 NW2d 601 (2005), that “a plain reading of the comparative fault statutes does not require proof of a duty before fault can be apportioned and liability allocated.” *Romain*, 483 Mich at 20.

1999), citing *Blue v Blue*, 532 Pa 521; 616 A2d 628, 632 (1992) (“Pennsylvania imposes an independent common law duty upon the parent to support a minor child”); *RJD v Vaughan Clinic, PC*, 572 So 2d 1225, 1227 (Ala, 1990) (“Alabama has long recognized the principle that parents are, by the common law, under the legal duty of providing medical attention for their children”); *Rounds Bros v McDaniel*, 133 Ky 669, 674; 118 SW 956 (1969), quoting Schouler on Domestic Relations, p 415 (“Three leading duties of parents as to their legitimate children are recognized at the common law: First, to protect; second, to educate; third, to maintain them”); *Niewiadomski v United States*, 159 F2d 683, 686 (CA 6, 1947) (“At common law a parent is charged with the duty of educating and supporting a minor child”); *Doughty v Engler*, 112 Kan 583, 585; 211 P 619 (1923) (parents have a legal obligation independent of statute to support their minor child). Consequently, these parents had a common law duty to provide the appropriate medical care for their child. As such, unless their parental immunity provides otherwise, they could be named nonparties at fault.

B. THE IMPACT OF AN IMMUNITY

Although traditionally parents enjoyed immunity from suit by their minor child should they breach the duties owed to the child, the modern rule is that a child may sue his parents for negligence. *Plumley*, 388 Mich at 8. An exception to this rule in Michigan, however, extends immunity to parents “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.* According to plaintiff, the existence of this immunity abolished any duty his parents owed him.

Resolution of the effect of an immunity upon a duty, however, is not an open question. Indeed, as explained below, though an immunity will prevent a party from *being held liable* for breach of a duty, the pre-existing duty remains intact despite the liability shield provided by the immunity. Our Supreme Court has recognized this distinction in the context of the “highway exception” to governmental immunity⁵ and has concluded that the availability of an immunity goes to whether recourse exists for the breach of an *existing duty*. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 157; 615 NW2d 702 (2000). As *Nawrocki* explained:

Because immunity necessarily implies that a “wrong” has occurred, we are cognizant that some tort claims, against a governmental agency, will inevitably go unremedied. *Although governmental agencies may be under many duties, with regard to services they provide to the public, only those enumerated within the statutorily created exceptions are legally compensable if breached.* [*Id.* (emphasis supplied).]

Accordingly, the availability of an immunity has no bearing on whether a duty exists, but rather focuses on redressability. In other words, an immunity functions “as a defense so that acts that would otherwise be tortious are permissible because of the circumstances in which they occur.” *Domestic Linen Supply & Laundry Co v Stone*, 111 Mich App 827, 833; 314 NW2d 773 (1981).

⁵ MCL 691.1402(1).

Significantly, the language of the comparative fault statutes reflects this distinction. Concerning immunity, MCL 600.2957(3) provides:

Sections 2956 to 2960 *do not eliminate or diminish a defense or immunity that currently exists*, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action. [Emphasis supplied.]

By stating that a fact-finder's assessment of the percentage of a nonparty's fault does not eliminate or diminish an immunity, § 2957(3) necessarily presupposes that an immunity does not abrogate a duty. Otherwise, there would be no need to preserve that immunity after fault has been allocated. Put differently, if an immunity were to abrogate a duty, an allocation of fault could never come into play because as *Romain* held, a nonparty's duty is necessary to allocate nonparty fault in the first place. Without an allocation of fault, no predicate would exist to eliminate the immunity § 2957(3) otherwise seeks to preserve. Under the interpretation offered by plaintiff, the reference to immunity in § 2957(3) would be rendered superfluous, and "we must avoid construction of a statute that would render part of the statute surplusage or nugatory." *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010) (citation omitted).

In reaching the opposite conclusion, the trial court cited the Black's Law Dictionary (8th ed) definition of "immunity" as an "exemption from a duty, liability . . ." and another source that defined "immunity" as an "[e]xemption from normal legal duties, penalties, or liabilities granted to a special group of people." However, saying that one is "exempt" from a legal duty is not the same as saying that no duty exists. Indeed, according to The Random House College Dictionary (rev ed, 1988), "exempt" means "to free from an obligation or liability to which others are subject" or that one is "released from, or not subject to, an obligation, liability . . ." Clearly, to be freed or released from an obligation does not mean that there is no obligation to begin with. Instead, it means one cannot be liable for failing to adhere to the obligation. Otherwise, there would exist nothing from which one would be freed or released.

From the foregoing, it follows that the immunity enjoyed by plaintiff's parents did not abolish their duty to seek appropriate medical care in the first place. Indeed, a number of our sister states granting parental immunity have also found that such immunity does not serve to abolish an already existing duty. See, e.g., *Doering v Copper Mountain Inc*, 259 F3d 1202, 1216 (CA 10, 2001), citing *Trevarton v Trevarton*, 151 Colo 418; 378 P2d 640, 642 (1963) ("When the Colorado Supreme Court adopted the parental immunity doctrine, it indicated that courts adhering to the doctrine did so for public policy reasons, not because parents owe no duty of due care to their children"); *Larson v Buschkamp*, 105 Ill App 3d 965, 969; 435 NE2d 221 (1982) (the doctrine of parental immunity is a procedural rather than substantive bar to actions between a parent and child); *Emery v Emery*, 45 Cal 2d 421, 427 n 3; 289 P2d 218 (1955) ("The parent's immunity . . . from tort liability is based on the minor child's disability to sue rather than on the absence of a violated duty"); *Davis v Smith*, 126 F Supp 497, 504 (ED Pa, 1954), *aff'd* 253 F2d

286 (CA 3, 1958) (parental immunity “is given as a means of enabling the parent to discharge his duties in preserving the domestic tranquility”); *Dunlap v Dunlap*, 84 NH 352, 372; 150 Atl 905 (1930) (“Such immunity as the parent may have from suit by the minor child for personal tort arises from a disability to sue, and not from lack of violated duty”).⁶

Therefore, since the duty to seek appropriate medical care was incumbent upon the parents irrespective of their immunity, the doctrine of parental immunity does not as a matter of law preclude an allocation of fault under the comparative fault statutes. Instead, the immunity plaintiff’s parents enjoy insulates them from liability should the fact-finder allocate a percentage of fault to them for any breach of that duty,⁷ MCL 600.2957(3), and they were subsequently sued. Additionally, a holding that the existence of parental immunity does not preclude an allocation of fault is consistent not only with the language of § 2957(3), but also with the broad purpose of the comparative fault statutes, which is to ensure that defendants are only liable for their “fair share liability,” *Smiley*, 248 Mich App at 54, and therefore is in keeping with our obligation to construe statutes “reasonably, in a manner that is consistent with the purpose of the legislation[.]” *Koivisto v Davis*, 277 Mich App 492, 497; 745 NW2d 824 (2008).

Plaintiff argues that in overruling *Kopp v Zigich*, 268 Mich App 258; 707 NW2d 601 (2005), the *Romain* Court rejected the notion that fault can be allocated against a nonparty who is immune from liability. However, in finding an allocation of fault appropriate, the *Kopp* Court actually sidestepped the issue concerning immunity.⁸ Instead, the rationale underlying the *Kopp* decision was that the plaintiff’s employer (a nonparty to the action) could be a proper party at fault under the exclusive remedy provision of the Workers’ Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, even though that act also rendered the employer immune from a suit in negligence. *Kopp*, 268 Mich App at 261. In other words, *Kopp* did not rely upon or even discuss the interplay between a party’s immunity and a party’s duty in determining that an allocation of fault was appropriate. Rather, *Kopp* looked to the broad definition of fault contained in MCL 600.6304(8), and concluded that the exclusive remedy provision of the WDCA was a sufficient basis for allocating fault under that definition. *Id.* at 260-261. It was from this line of reasoning that *Kopp* concluded no proof of a duty was required before fault could be allocated, and it is this conclusion that the *Romain* Court specifically overruled.

⁶ The historical approach to parental immunity in Michigan reflects the same distinction. In *Plumley* the Court overturned a prior decision, *Elias v Collins*, 237 Mich 175; 211 NW 88 (1926), which had enforced parental immunity under all circumstances. *Plumley*, 388 Mich at 8. But in doing so, the *Plumley* Court did not *create* new duties vis-à-vis parent and child. Instead, it merely lifted the immunity granted parents for violation of most of those existing common law duties.

⁷ The contrary holding of *Byrne v Schnieder’s Iron & Metal, Inc*, 190 Mich App 176, 185; 475 NW2d 854 (1991), was decided before the enactment of tort reform legislation and, therefore, has no bearing on this conclusion.

⁸ In this respect, defendants’ reliance on *Dressner v Cradle of Hope Adoption Ctr, Inc*, 421 F Supp 2d 1024, 1027 (ED Mich, 2006), is misplaced since that court misinterpreted *Kopp* on this issue of immunity.

Romain, 483 Mich at 20. Thus, the effect of immunity upon the allocation of fault was untouched by *Romain*, and is ripe for our review.⁹

Finally, plaintiff claims that because proximate, or legal cause, is essentially a policy question overlapping with the concept of duty, see *Moning v Alfonso*, 400 Mich 425, 438-439; 254 NW2d 759 (1977), it must be determined at this juncture whether the conduct of plaintiff's parents was the proximate cause of plaintiff's injuries. The thrust of plaintiff's argument on this point is that since public policy renders parents immune from legal responsibility for certain conduct, that same policy necessarily makes it impossible for the same conduct to be the proximate, or legal cause of a plaintiff's injuries. However, even assuming that such an analysis is not premature, where duty and proximate clause intersect is on the issue of foreseeability. *Id.* at 439, citing *Palsgraf v Long Island R Co*, 248 NY 339; 162 NE 99 (1928). In contrast, the very foundations of parental immunity are "*the duties and responsibilities* [parents] assume within the household" as well as the need "to avoid judicial intervention into the core of parenthood and parental discipline" *Hush v Devilbiss Co*, 77 Mich App 639, 645-646; 259 NW2d 170 (1977) (emphasis supplied). And in any event, plaintiff has neither argued nor cited any authority for the proposition that the policy considerations underlying parental immunity were in any way related to matters of foreseeability.

For two reasons, I cannot join the majority opinion. First, and as noted at the outset, the majority is admittedly deciding this case based upon a theory neither raised nor decided below, nor raised before our Court. As explained in my partial dissent in *People v Michielutti*, 266 Mich App 223, 230-231; 700 NW2d 418 (2005), rev'd 474 Mich 889 (2005):

As any casual reader of the Michigan Appeals Reports will recognize, we quite frequently inform parties that we will not address an issue not raised or decided by the trial court, on the basis that it is not properly preserved. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992); *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992). We are likewise disinclined to review issues that are actually raised by the parties, but not adequately briefed. See, e.g., *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002). The general rationale supporting these prudent rules of appellate procedure is that it is best to decide issues with the benefit of briefing and argument. *Bradley v Saranac Bd of Ed*, 455 Mich 285, 302-303; 565 NW2d 650 (1997). Although we will, at times, decide a legal issue when the facts necessary to its resolution are properly before us, that is usually invoked when a

⁹ In a similar vein, plaintiff claims that in affirming *Jones*, the *Romain* Court approved of the reasoning in *Jones* that "a party adjudicated to be without fault may not have fault allocated to him under the guise of the doctrine of several liability." *Jones*, 254 Mich App at 437. This statement, however, has no impact on this conclusion because, as previously noted, the existence of immunity does not abrogate the parents' duty. And in any event, the affirmative defense negating an allocation of fault in *Jones* was the open and obvious doctrine—a doctrine that our Supreme Court has determined attacks the duty element in a common law negligence action. *Id.* at 437, citing *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

party raises the issue to this Court as an alternative means to affirm. See *Spruytte v Owens*, 190 Mich App 127, 132; 475 NW2d 382 (1991).

We should likewise refuse to engage our discretion in deciding this case on an issue that was not presented by the parties.

Second, the majority errs in holding that the comparative fault statutes are inapplicable to this case. The parents' alleged failure to take the child to the prescribed follow-up care is not a "separate tort that initiated a new causal chain leading to its own set of damages." Rather, as plaintiff's complaint itself makes clear, the alleged permanent injury to the child's finger is an element of the damages plaintiff seeks to recover against defendants. Based on Dr. Condit's statements, surely there is an argument to be made that plaintiffs at least in part caused that damage by breaching their duty to provide proper medical care to their son. Consequently, the injury at the child care facility, the immediate harm that was caused, and any lasting damage are all part of plaintiff's lawsuit, and as in all nonparty at fault cases, the defendant is asserting that more than one potential person caused at least some of the damages at issue. And, because these statutes reveal "a legislative intent to allocate liability according to the relative fault of *all persons contributing to the accrual of a plaintiff's damages*[" *Lamp v Reynolds*, 249 Mich App 591, 596; 645 NW2d 311 (2002), citing *Wysocki v Felt*, 248 Mich App 346, 364; 639 NW2d 572 (2001) (emphasis supplied), defendants should be allowed to argue to the jury that plaintiffs are at least partially at fault for some of the damages the child has suffered. The statutory language already discussed supports that intent, and the majority's decision that the parents are not capable of being nonparties at fault guts the entire statutory scheme.

III. CONCLUSION

Plaintiff's parents had a common law duty to provide appropriate medical care for their child, and the doctrine of parental immunity did not abrogate this duty. Therefore, the existence of parental immunity cannot preclude an allocation of fault under the comparative fault statutes. As the trial court erred in ruling otherwise, I would reverse the trial court's order denying defendants' motions for leave to file a notice of nonparty at fault and to amend their affirmative defenses and remand for further proceedings.

/s/ Christopher M. Murray