STATE OF MICHIGAN

COURT OF APPEALS

NICOLE MICKEL, personal representative of the estate of JORDYN DANIELLE WILSON, deceased,

Plaintiff-Appellant,

v

DANIEL WILSON,

Defendant-Appellee,

and

BRIAN JOHNSON and EMERALD LAKES VILLAGE HOME OWNERS ASSN,

Defendants.

UNPUBLISHED
August 31, 2010

No. 289037
Oakland Circuit Court
LC No. 2007-085390-NO

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Plaintiff Nicole Mickel, personal representative of the estate of Jordyn Danielle Wilson (Jordyn), appeals an order granting defendant Daniel Wilson summary disposition and dismissing plaintiff's claims against him with prejudice.[1] We affirm.

I. BASIC FACTS AND PROCEDURE

The facts are not in dispute. This case arose after the unfortunate death of Jordyn, who drowned in an inland lake while under the care of defendant, her father.

[1] The claims against defendants Brian Johnson and Emerald Lakes Village Home Owners Assn were dismissed by stipulation.

After plaintiff and defendant divorced in 2007, defendant had custody of their three girls, Robin (9 years old), Taylor (7 years old) and Jordyn (3-½ years old), on every other weekend. On August 12, 2006, defendant and his three girls attended a relative's high school graduation party at a home located within a subdivision managed by defendant Emerald Lakes Village Home Owners Assn. The home is situated on an inland lake. There were 30 to 50 people at the party, most of which had congregated under a large tent in the backyard.

By 6:00 p.m., the girls had changed into swimsuits and were playing near the shoreline. Defendant knew that Jordyn could not swim without a life preserver, but he did not make her wear one. The host of the party announced that "parents should be watching their kids." He also announced that life preservers were available. He averred that there was at least one life preserver that Jordyn could have worn and there were also flotation rings.

Defendant supervised Jordyn, who ran in and out of shallow water and played on the beach. Defendant told Robin and Taylor not to swim to a floating platform in the lake. Robin, Taylor and Jordyn took a break and later resumed play in the same area. At some point, defendant told the children that he needed to use restroom, and went to the house. Defendant averred that "I didn't think I was leaving them unattended" and that "there were adults over there and adults at the tent and on the deck and in the backyard." He did not ask anyone to watch the children.

Defendant estimated that he was in the house no more than six minutes. He also stopped and talked with someone on the deck for two to three minutes. At this point, he looked for Taylor and Jordyn and did not see them where he had left them. He ran to his cousin, Melissa Dupage, and asked where the girls were. She indicated that they could have gone upstairs to play video games, and defendant ran to check. The girls were not there and defendant ran outside. He looked around the outside of the house, but could not find them. He enlisted the help of other partygoers to find the girls. Jordyn was soon found unconscious in two to three feet of water. She was carried to the shore where CPR was performed. Jordyn was unresponsive. Paramedics arrived but could not revive her. She was taken to the hospital and pronounced dead at 8:22 p.m.

Troy police conducted an investigation but did not charge defendant with a crime. Defendant admitted that he had a beer and a mixed drink at the party. He was administered a Breathalyzer test two hours after arriving at the hospital, which registered a .01 or .02 BAC. Child services also investigated and only required that defendant attend parenting classes. Plaintiff asked the Oakland County Prosecutor's Office to charge defendant with criminal neglect, but it declined.

Plaintiff was appointed personal representative of the estate of Jordyn and filed suit against defendants on August 22, 2007. Plaintiff alleged negligence, negligence per se (based on criminal neglect) and gross negligence. Plaintiff presented as evidence a report from an "aquatic safety and consultation" company, which concluded, "had constant adult supervision by the parent been provided, this submersion fatality would not have occurred."

On August 4, 2008, defendant filed a motion for summary disposition, arguing that plaintiff's claims were barred by the doctrine of parental immunity. After conducting a hearing, the trial court dismissed the complaint against defendant with prejudice. This appeal ensued.

II. STANDARD OF REVIEW

Under MCR 2.116(C)(7), summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id*. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id*. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no factual dispute, whether a plaintiff's claim is barred under MCR 2.116(C)(7) is a question of law for the court to decide. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If a factual dispute exists, however, summary disposition is not appropriate. *Id*.

This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10); *Veenstra v Washtenaw Country Club*, 466 Mich 155; 159, 645 NW2d 643 (2002). In deciding the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id*. at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 540; MCR 2.116(C)(10) and (G)(4).

III. PARENTAL IMMUNITY

Plaintiff argues that the trial court erred in granting defendant summary disposition on plaintiff's negligence claim. We disagree.

Early on, our Supreme Court followed ". . . the common law [rule] that a minor cannot sue his father in tort. The rule had its beginning in the interest of the peace of the family and of society, and is supported by sound public policy." *Elias v Collins*, 237 Mich 175, 177; 211 NW 88 (1926). In *Plumley v Klein*, 388 Mich 1, 8; 199 NW2d 169 (1972), our Supreme Court limited the doctrine of parental immunity to two situations:

> (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*.]

The trial court concluded that there was no genuine dispute that "the alleged negligent act involve[d] an exercise of reasonable parental authority over the child." Plaintiff challenges this conclusion, arguing defendant unreasonably left Jordyn unattended near water.

We acknowledge that the phrase, "exercise of reasonable parental authority" has not been consistently interpreted in this Court. As noted in *Ellis v Target Stores, Inc*, 842 F Supp 965, 970 (WD Mich, 1993), at times this Court has focused on whether the alleged negligent conduct of the parent was reasonable. See *Carey v Meijer, Inc*, 160 Mich App 461, 408 NW2d 478 (1987), *Grodin v Grodin*, 102 Mich App 396, 301 NW2d 869 (1980). However, at other times, this Court has reviewed the applicability of parental immunity by focusing on the type of

conduct in which the parents were engaged. See *Thelen v Thelen*, 174 Mich App. 380, 435 NW2d 495 (1989); *Mayberry v Pryor*, 134 Mich App 826, 352 NW2d 322 (1984), rev'd on other grounds, 422 Mich 579; 374 NW2d 683 (1985).

Notwithstanding this apparent lack of clarity, in *Phillips v Deihm*, 213 Mich App 389, 395; 541 NW2d 566 (1995), citing *Ashley v Bronson*, 189 Mich App 498, 508; 473 NW2d 757 (1991), this Court established that, "[i]n 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." This distinction is made very clear in *Thelen*, which disagreed with *Grodin*, 102 Mich App 396, and *Carey*, 160 Mich App 461; the only cases emphasizing the reasonableness of the parental conduct:

> By focusing on the reasonableness of the parents' conduct, the analysis employed in those cases begs the question of whether the parent is entitled to immunity from tort liability. Both cases conclude that if a parent was negligent, he or she will not be immune from liability. The logical predicate to the immunity question, however, is an assumption that the defendant's conduct was negligent, and hence unreasonable; the issue is whether the parent should be shielded from liability for that unreasonable conduct. To properly resolve that issue, the focus must be placed not on the reasonableness of the parent's conduct, but on the type of activity the parent was involved in at the time of the alleged negligence-whether the parent was exercising his or her "reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." Under this analysis, if the act complained of constituted such discretionary conduct, immunity should attach. [174 Mich App at 381 n 1 (internal citation omitted).]

Thelen's reasoning is persuasive. The word, "reasonable" does not modify the phrase, "alleged negligent act," but the phrase "parental authority over the child." We conclude courts should not focus on the reasonableness of the parent's actions to determine if there is parental immunity.[2] Thus, we need only address whether the alleged negligent act falls within one of the *Plumley* exceptions.

Here, there is no dispute that plaintiff's claim alleges that defendant failed to properly supervise Jordyn. The second amended complaint alleges that defendant "fail[ed] to adequately supervise [Jordyn]" and that Jordyn was harmed as a result. There are many cases supporting the

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[2] The dissent ignores the powerful point raised in *Thelan* that any analysis of immunity that focuses on the reasonableness of negligent conduct undermines the purpose of immunity. Negligent acts are not reasonable acts. The purpose of immunity is to insulate from liability one who is negligent. At bottom, the dissent is not interested in applying any form of parental immunity previously sanctioned by our Supreme Court. Rather, the dissent calls for the total abolition of the parental immunity expressly adopted by our Supreme Court. However, it is for the Supreme Court and not this Court, to overrule or modify Supreme Court case law. *Paige v City of Sterling Heights*, 476 Mich 495, 524; 720 NW2d 219 (2006).

proposition that, "[a] child's claim against his or her parents based upon negligent supervision is deemed to involve the exercise of parental authority over the child, and thus is barred." 19a Mich Civ Jur, Parent and Child § 102. See *Ashley*, 189 Mich App at 508 (failing to watch 2 ½ year old near swimming pool); *Haddrill v Damon*, 149 Mich App 702; 386 NW2d 643 (1986) (father negligently entrusted the dirt bike to his 12-year-old son); *Wright v Wright*, 134 Mich App 800; 351 NW2d 868 (1984) (negligently allowing daughter to be alone in car with accessible firearm); *McCallister v Sun Valley Pools, Inc*, 100 Mich App 131, 139-140, 298 NW2d 687 (1980) (failing to prevent swimming pool injury). Given that plaintiff's claim is based on negligent supervision, the trial court properly dismissed plaintiff's suit on the basis of parental immunity.

Our result is consistent with the result recently reached by this Court in an unpublished case[3] that addressed the liability of foster parents.[4] *State Farm Fire & Cas Co v Lequia*, unpublished per curiam opinion of the Court of Appeals (Docket Nos. 286139, 286776, issued December 15, 2009). There, the foster parents had allowed a 2-½ year-old child to remain outdoors with their 12-year old son for approximately 30 minutes. The foster father checked on the child periodically from the windows and deck of their home. The child wandered into a river adjacent to the foster parents' home and drowned. The trial court granted summary disposition in favor of the foster parents, finding that the foster parents were immune from suit under MCL 722.163. This Court, in a 2-1 decision, held that "the facts demonstrate that the estate's claim is based on negligent supervision, which the Supreme Court has determined to be barred by parental authority immunity." *Id*., at 2, citing *Plumley*, 388 Mich at 8. Similarly, in the present case there is no question that plaintiff's claim is based on defendant's supervision of Jordyn, which is conduct within a parent's reasonable exercise of discretion. The trial court properly granted defendant summary disposition.

IV. GROSS NEGLIGENCE

Plaintiff argues that the trial court erred in granting defendant summary disposition on plaintiff's gross negligence claim. We disagree.

Plaintiff specifically argues that parental immunity does not apply because defendant's conduct constituted gross negligence. However, at the time that the Supreme Court decided *Plumley*, 388 Mich 1, 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). Because the Supreme Court has not subsequently indicated that *Plumley* exceptions

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[3] We recognize that "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1).

[4] The parental immunity provisions in *Plumley* are replicated in the foster parent immunity statute, MCL 722.163. *Spikes by Simmons v Banks*, 231 Mich App 341, 348, 586 NW2d 106 (1998).

apply to the higher level of negligence currently referred to as gross negligence, we decline to do so.[5]

However, plaintiff does argue that defendant's actions constituted willful and wanton negligence, a concept that did exist at the time *Plumley* was decided.

To establish willful and wanton misconduct on the part of defendants, plaintiff must prove:

> (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*Miller v Inglis*, 223 Mich App 159, 166; 567 NW2d 253 (1997), citing *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994).]

Further, "willful 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." See *Hill v Saginaw*, 155 Mich App 161, 170; 399 NW2d 398 (1986).

Here, there is no evidence of intent to harm and there is no indication that defendant willingly wanted Jordyn to be harmed. Although plaintiff, during her deposition testimony, suggested and implied a possibility that defendant intended to harm Jordyn, there is no evidence to support those aspersions. Further, there is no evidence that defendant's failure to delegate supervision was "likely" to prove disastrous to Jordyn. Any number of events could have occurred during defendant's brief absence that were as equally plausible as Jordyn leaving her sister and cousins on the beach and wading deeper into the water. In other words, plaintiff failed to present evidence that Jordyn had a proclivity to wade into deep water. The evidence only indicated that Jordyn would run in and out of very shallow water. The trial court did not err in granting defendant summary disposition on plaintiff's gross negligence claim.

V. NEGLIGENCE PER SE

Plaintiff argues that this Court should remand to allow plaintiff to amend the complaint to add a claim that defendant violated MCL 750.136(B). We disagree.

On appeal, plaintiff "respectfully submits that this Court should consider whether plaintiff could have stated a claim for negligence grounded in [defendant]'s violation of § 136 of

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[5] 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. After the contributory negligence rule was abandoned, the Court discarded *Gibbard*'s formulation of gross negligence. See *Jennings*, 446 Mich at 129-133.

the penal, rather than, as pled in Count III, negligence per se based on § 2 of the child protection law."

Even assuming that plaintiff has not waived this issue by failing to propose the amendment below, we would conclude that amending the complaint to allege that defendant committed third-degree child abuse would be futile. An amendment would be futile if it is legally insufficient on its face. *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). The addition of allegations that merely restate those already made is futile, as are the addition of allegations that still fail to state a claim, or the addition of a claim over which the court lacks jurisdiction. *Id.*; *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

MCL 750.136b(7) and (8), provide that:

> 7) A person is guilty of child abuse in the fourth degree if any of the following apply:
>
> (a) The person's omission or reckless act causes physical harm to a child.
>
> (b) The person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, regardless of whether physical harm results.
>
> (8) Child abuse in the fourth degree is a misdemeanor punishable by imprisonment for not more than 1 year.

Plaintiff specifically claims that defendants' "reckless act cause[d] physical harm to a child." Plaintiff characterizes defendant's leaving Jordyn on the beach as a reckless act. However, Jordyn being harmed by defendant's failure to provide adequate supervision is better characterized as an omission. MCL 750.136b(c) defines "omission" as "a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." The word omission is specifically limited under the statute to include a "willful failure to provide food, clothing, or shelter," none of which are implicated by defendant's actions. Further, even assuming defendant's failure to provide adequate supervision is not an omission, but an alleged "reckless act," plaintiff fails to distinguish how a "reckless act" is not encompassed by claim for willfull and wanton negligence. The addition of allegations that merely restate those already made is futile. *PT Today, Inc*, 270 Mich App at 143. This Court need not remand to allow plaintiff to amend the complaint to add a claim that defendant violated MCL 750.136(B).

We affirm.

/s/ Jane E. Markey
/s/ Brian K. Zahra