STATE OF MICHIGAN

COURT OF APPEALS

JAMES ALAN WILKINS, by his Next Friend NANCY WILKINS,

Plaintiff-Appellant,

v

RALPH MAYHEW and GERALDINE MAYHEW,

Defendants-Appellees.

UNPUBLISHED
June 18, 1996

No. 176171
LC No. 93-000948 NO

Before: Neff, P.J., and Jansen and G.C. Steeh III,* JJ.

PER CURIAM.

Plaintiff[1] appeals as of right from a May 11, 1994, order of the St. Clair Circuit Court granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) and MCR 2.116(C)(10) (no genuine issue regarding any material fact and moving party entitled to judgment as a matter of law). We affirm.

I

This case arises from a diving accident which occurred in the afternoon of August 11, 1988, at the defendants' home. The defendants are married, and they are the plaintiff's grandparents. Plaintiff was thirteen-years-old at the time of the accident. On the date of the accident, plaintiff was staying with defendants and swimming in their above-ground pool. Plaintiff knew that the pool was three feet deep at the shallow end, and six feet deep at the deep end. Plaintiff had been in the pool many times over the previous several years. Plaintiff had been repeatedly told by his grandparents to not dive into the pool because he might get hurt. However, plaintiff dove into the shallow end of the pool and sustained a serious spinal injury.

There were no depth markers on the pool, but plaintiff knew the depth of the pool because he had been in it many times before. There were stickers that said "no diving" that had been placed on the

---

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

pool, but those stickers became worn and faded after the first summer the pool was installed in 1985. When the pool was first installed, plaintiff had put the "no diving" stickers on the pool.

Plaintiff, by his next friend, filed his complaint on February 20, 1993, alleging that he was an invitee of defendants and that defendants breached their duty by failing to warn, to prohibit diving, to remove the unsafe condition, to correct and/or repair the unsafe condition, and to adequately supervise plaintiff in the use of their above-ground pool. Following discovery, defendants moved for summary disposition under MCR 2.116(C)(8) and (10). Defendants argued that there was no genuine issue as to any material fact that plaintiff was a licensee at the time of the accident. Defendants also argued that they verbally warned plaintiff not to dive into the pool, that plaintiff knew that he was not to dive into the pool, but that plaintiff ignored those warnings. Defendants also argued that the trial court should extend the intra-family tort immunity to them as plaintiff's grandparents standing *in loco parentis*. The trial court agreed with defendants' arguments, concluding that plaintiff was a licensee and that defendants had no duty to warn plaintiff. The trial court also found that the intra-family immunity rule applied, as a matter of public policy.

On appeal, plaintiff raises three issues. He asserts that the trial court erred in ruling that defendants owed no duty to him because he was a licensee. Plaintiff claims that there is a material factual dispute regarding whether he was a licensee or an invitee. Finally, plaintiff argues that the trial court erred in applying the intra-family tort immunity doctrine to this case where the defendants were not *in loco parentis* to plaintiff.

II

We review the trial court's decision on a motion for summary disposition de novo. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1995). A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings, or whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded allegations in the pleadings. Only if the allegations fail to state a legal claim will summary disposition under MCR 2.116(C)(8) be valid. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

A motion brought under MCR 2.116(C)(10), on the other hand, tests the factual support of a plaintiff's claim. The court must consider the affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted. MCR 2.116(G)(5). The court's task is to review the record evidence, and all reasonable inferences drawn from the evidence, and decide whether a genuine issue of any material fact exists to warrant a trial. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

First, we believe that the trial court properly found that there was no material factual dispute regarding whether plaintiff was a licensee on defendants' property. The duty a possessor of land owes to those who come upon the land depends on the status of the visitor. *Stanley v Town Square Cooperative*, 203 Mich App 143, 146; 512 NW2d 51 (1993). Invitees and licensees are two groups

of persons who may be present on the land. The distinction between these two groups is critical because it defines the scope of the duty owed to the person on the land by the landowner. The distinguishing characteristic between a licensee and an invitee depends upon the presence on the land and is related to the pecuniary interests of the possessor of the land. *Id.*, p 147.

If the person's use of the land was related to the pecuniary interests of the landowner, then that person is an invitee. *Id.* That is, an invitee is a person who enters the premises at the owner's express or implied invitation to conduct business concerning the owner. *Butler, supra,* p 532. However, if the person is a social guest, and not on the property for the pecuniary interests of the landowner, then that person is a licensee. *Preston v Sleziak,* 383 Mich 442, 451-452; 175 NW2d 759 (1970).

Plaintiff relies upon this Court's decision in *White v Badalamenti,* 200 Mich App 434; 505 NW2d 8 (1993), in support of his argument that there is a material factual dispute for the jury to resolve regarding whether he was an invitee or licensee at the time of the accident. In *White,* the defendants were baby-sitters for the plaintiff's daughter. The plaintiff was walking up to the defendants' house on the sidewalk when she slipped and fell on some ice. The plaintiff did not pay the defendants to baby-sit her daughter. This Court held that there was a material factual dispute regarding the plaintiff's status as being either an invitee or a licensee. This Court specifically noted that the plaintiff would sometimes baby-sit the defendants' niece. Thus, this Court concluded that there was a reasonable inference that the plaintiff's presence on the defendants' property was part of a mutually beneficial, although informal, exchange of services. *Id.*, pp 436-437.

In the present case, defendants were not paid by the plaintiff's mother to watch him. Further, plaintiff is the grandson of the defendants and visited defendants nearly every day. There is no evidence in this case that there was any mutually beneficial exchange of services, informal or otherwise. Plaintiff was clearly a social guest of defendants and the trial court did not err in ruling that plaintiff was a licensee for purposes of determining the scope of duty owed in this case.

The scope of the duty owed to a child social guest (licensee) is to exercise reasonable or ordinary care to prevent injury to the child. *Klimek v Drzewiecki,* 135 Mich App 115, 120; 352 NW2d 361 (1984). The trial court ruled that because plaintiff was a social guest, and therefore a licensee, defendants owed him no duty to warn. Although the trial court's legal analysis on this question is not correct, it reached the proper conclusion and we affirm the grant of summary disposition in defendants' favor for the following reasons.

With respect to the failure to warn claim, we first turn to *Glittenberg v Doughboy Recreational Industries (On Rehearing),* 441 Mich 379; 491 NW2d 208 (1992), where the Supreme Court held that where it was undisputed that the above-ground pool was a simple tool, and the potential for injury from diving into observably shallow water is a common and generally recognized danger, the manufacturer owed no duty to warn of the dangers associated with the use of an above-ground swimming pool. Although *Glittenberg* involved a product liability claim, the open and obvious danger doctrine has been applied to premises liability cases as well. *Riddle v McLouth Steel Products Corp,*

440 Mich 85; 485 NW2d 676 (1992); *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995).

Recently, this Court in *Mallard v Hoffinger Industries, Inc*, 210 Mich App 282; 533 NW2d 1 (1995), vacated in part on other grounds 451 Mich 884 (1996), held that a manufacturer or seller of an above-ground pool has no duty to warn of potentially dangerous conditions or characteristics that are readily apparent or visible upon casual inspection, and this rule applies to any user regardless of whether the user is an adult or a child. However, in *Pigeon v Radloff*, 215 Mich App 438; ___ NW2d ___ (1996), this Court distinguished *Glittenberg* and *Mallard* and held that because the plaintiff was a child licensee, the question whether the defendant had a duty to warn the plaintiff of the dangers associated with the use of an above-ground pool should have been submitted to the jury rather than decided by the trial court as a matter of law. Specifically, this Court held that when a child licensee is injured by something that may be open and obvious to an adult, summary disposition based on the open and obvious rule is inappropriate as a matter of law unless the trial court can conclude from the undisputed evidentiary facts that all reasonable persons would agree that the child licensee did or could have been expected to realize the risk involved. *Id.*, pp 444-445.

Although the holding in *Pigeon* is questionable in light of *Mallard*, we note that our Supreme Court has recently ordered that this Court's opinion in *Pigeon* shall have no precedential force or effect. *Pigeon v Radloff*, 451 Mich 885 (1996). Therefore, we are not bound by Administrative Order 1996-4 to follow *Pigeon*. In extending the holding in *Mallard*, a product liability case, to this case, a premises liability case, defendants would owe no duty to warn of the dangers of diving into shallow water of an above-ground pool because that danger is open and obvious, regardless of the age of the user.

Moreover, even were we to follow *Pigeon*, summary disposition was still appropriately granted in favor of defendants. This Court in *Pigeon* specifically held that:

> when a child licensee is injured by something that is or may be an open and obvious danger to an adult, summary disposition based on *Glittenberg's* open and obvious danger rule is inappropriate as a matter of law unless the trial court can say from the undisputed evidentiary facts that all reasonable persons would agree that the child licensee did or could have been expected to realize the risk involved. [*Pigeon, supra*, pp 444-445.]

In this case, the undisputed facts are that plaintiff, a child licensee, did or could have been expected to realize the risk involved. First, it is undisputed that the defendants had warned plaintiff on numerous occasions not to dive into the pool because he might get hurt. Further, it was plaintiff who put the "no diving" stickers on the pool when it was first set up. Although there were no depth markers, plaintiff conceded that he knew that the deep end of the pool was six feet and the shallow end was three feet because he had been in the pool many times before. Plaintiff also admitted that he knew that he should not have dived into the pool, but that he ignored the warnings given him. Plaintiff was thirteen years old

at the time of the accident. Thus, from the undisputed facts of this case, not only did defendants in fact warn plaintiff to not dive into the pool because he might get hurt, it is evident that all reasonable persons would agree that plaintiff could have been expected to realize the risk involved in diving into the shallow end (three feet) of a pool.

Accordingly, the trial court properly granted summary disposition in defendants' favor as a matter of law with respect to the failure to warn claim. Under *Mallard*, defendants owed no duty to plaintiff to warn him of the danger in this case, and even were we to follow *Pigeon*, all reasonable persons would agree that plaintiff could have been expected to realize the risk involved from the undisputed evidentiary facts.

III

Next, we address the remaining claims, including failure to supervise, failure to prohibit diving, failure to remove, and failure to correct and/or repair the unsafe condition. Presumably, the trial court granted summary disposition in defendants' favor under the intra-family immunity doctrine with respect to all plaintiff's claims, although this is not clear from the lower court record. We will address the remaining claims in context of the doctrine of intra-family immunity.

In *Plumley v Klein*, 388 Mich 1, 8; 199 NW2d 169 (1972), our Supreme Court abrogated intra-family tort immunity, with two exceptions: (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. This case includes a claim of negligent supervision, which would fall under the first *Plumley* exception. *Ashley v Bronson*, 189 Mich App 498, 502; 473 NW2d 757 (1991).

However, because this case involves the grandparents of the plaintiff, we must determine whether the first exception applies so that defendants are immune from liability with respect to all the negligence claims. In *Hush v Devilbiss Co*, 77 Mich App 639; 259 NW2d 170 (1977), this Court considered whether to extend parental immunity to persons standing *in loco parentis*. In *Hush*, this Court affirmatively held that persons standing *in loco parentis* are also entitled to immunity under the two *Plumley* exceptions. This Court also held that there was sufficient undisputed evidence to sustain the trial court's holding that the defendant (grandmother) stood *in loco parentis* to the plaintiff as a matter of law. *Hush, supra*, p 648. In so doing, this Court stated that the assumption of *in loco parentis* status is a question of intent. Intent to assume parental status can be inferred from the acts and declarations of the parties. *Id.*, p 649. Some factors to consider are: the age of the child; the degree to which the child is dependent on the person claiming to be standing *in loco parentis*; the amount of support, if any, provided; and the extent to which duties commonly associated with parenthood are exercised. *Id.*

In the present case, plaintiff was thirteen years old at the time of the accident. Plaintiff's mother dropped him off at defendants' house in the morning to spend the day with them. From the age of five until sixteen, plaintiff spent almost every day with defendants. Mrs. Mayhew would often perform the same tasks for plaintiff that plaintiff's mother would do. Further, although defendants did not provide financial support, there were clearly other benefits flowing to plaintiff by defendants' care of him. *Id*. Thus, there is no dispute regarding the essential evidentiary facts in this case. Defendants were clearly responsible for plaintiff on the day of the accident and had provided much care for him for several years; the same type of care normally provided by parents.

Accordingly, plaintiff failed to raise a material factual dispute regarding defendants' *in loco parentis* status to him. The undisputed evidentiary facts show that defendants were clearly acting *in loco parentis* and were entitled to immunity. Because defendants were exercising reasonable parental authority over plaintiff, they are immune from the alleged negligent acts of failure to supervise and failure to prohibit from diving. *Ashley, supra*, p 502; *Phillips v Deihm*, 213 Mich App 389, 395; 541 NW2d 566 (1995). Further, with respect to the negligence claims of failure to remove the pool and failure to correct and/or repair the unsafe condition, defendants are entitled to intra-family immunity under the second *Plumley* exception. As this Court has held, the decision to keep a swimming pool on the property, and the decision to build a gate and stairs around the pool is an exercise of reasonable parental discretion regarding the provision of housing. *Ashley, supra*, pp 506-507.

Therefore, the trial court did not err in ruling that plaintiff's negligence claims were barred by the intra-family immunity doctrine in this case.

Affirmed.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ George C. Steeh III

[1] In this opinion, "plaintiff" will refer solely to the minor plaintiff, James Wilkins, because he is the person who was injured.