

STATE OF MICHIGAN  
COURT OF APPEALS

---

NICOLE MICKEL, Personal Representative of the  
Estate of JORDYN DANIELLE WILSON,

UNPUBLISHED  
August 31, 2010

Plaintiff-Appellant,

v

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

DANIEL WILSON,

Defendant-Appellee,

and

BRIAN JOHNSON and EMERALD LAKES  
VILLAGE HOME OWNERS ASSOCIATION,

Defendants.

---

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

GLEICHER, J. (*dissenting*).

I respectfully dissent. The general rule in this state, as announced in *Plumley v Klein*, 388 Mich 1, 8; 199 NW2d 169 (1972), is that “[a] child may maintain a lawsuit against his parent for injuries suffered as a result of the alleged ordinary negligence of the parent.” In my view, the parental conduct at issue in this case falls outside the narrow exceptions to parental responsibility adopted in *Plumley*. Furthermore, I believe that Michigan should fully abrogate the judicially created parental immunity doctrine because it is unfair, unworkable, and logically unsupportable.

In *Plumley*, 388 Mich at 8, our Supreme Court acknowledged that the abolition of intrafamily tort immunity “best serves the interests of justice and fairness to all concerned.” Nevertheless, the Supreme Court tempered that sweeping pronouncement by approvingly borrowing from “sister states . . . two exceptions to this new rule of law . . . .” *Id.* The exceptions envision immunity “(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.*

Our Supreme Court selected the exceptions from two sister state opinions that examined the exceptions: *Goller v White*, 20 Wis 2d 402; 122 NW2d 193 (Wisc, 1963), and *Silesky v Kelman*, 281 Minn 431; 161 NW2d 631 (Minn, 1968). However, the exceptions set forth in *Goller* and *Silesky* differ in two notable respects from those adopted in *Plumley*. The Michigan Supreme Court inserted the word “reasonable” to modify the term “parental authority,” and substituted the term “reasonable” for “ordinary” as a descriptor of “parental discretion.”<sup>1</sup> These deliberate modifications clearly signal our Supreme Court’s intent to *limit or restrict* the reach of the *Goller* exceptions, and to immunize only reasonable exercises of parental authority and discretion. Moreover, the insertion of the term “reasonable” reflects the Supreme Court’s anticipation that whether parental conduct fell within an exception would be a jury question. I agree with this Court’s analysis in *Grodin v Grodin*, 102 Mich App 396, 402; 301 NW2d 869 (1980), that our Supreme Court’s decision to incorporate a reasonableness standard “appears deliberate and would seem ... to require a determination by the finder of fact, thus precluding summary judgment.” Although the majority characterizes *Grodin*’s analysis as “beg[ging] the question,” *ante* at 6 n 2, quoting *Thelen v Thelen*, 174 Mich App 380, 384 n 1; 435 NW2d 495 (1989), the majority neither attaches any significance to the Supreme Court’s alteration of the *Goller* exceptions, nor imbues with any meaning the word “reasonable.”<sup>2</sup>

The instant case presents the question whether the negligent parental supervision alleged by plaintiff falls within the second *Plumley* exception because it involves “an exercise of reasonable parental discretion.” 388 Mich at 8. Logically, it makes no sense that the Supreme Court in *Plumley* rejected a broad form of “intra-family tort immunity” in “the interests of justice and fairness,” yet deliberately maintained broad immunity for parental supervision. *Id.* The supervision of children consumes most of a parent’s time and energy. As the case law since *Plumley* demonstrates, a substantial number of tort claims involve allegations falling under the parental supervision umbrella. But, notwithstanding that parental supervision encompasses an enormous range of regular parental activities, the Supreme Court in *Plumley* did not specifically

---

<sup>1</sup> The Wisconsin Supreme Court had adopted the exceptions as follows:

After a careful review of the arguments for and against the parental-immunity rule in negligence cases, we are of the opinion that it ought to be abrogated except in these two situations: (1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. Accordingly the rule is abolished in personal injury actions subject to these noted exceptions. [*Goller*, 20 Wis2d at 413.]

<sup>2</sup> As the majority concedes, this Court has inconsistently interpreted the phrase “reasonable exercises of parental authority” over a child. *Ante* at 5. Beginning with *Thelen*, 174 Mich App 380, this Court has effectively erased the word “reasonable” by simply eliminating its meaning from both exceptions.

incorporate the term “supervision” in the list of exceptions to immunity. Instead, the Supreme Court shielded from tort liability a discrete and narrowly drawn list of parental acts: “the provision of food, clothing, housing, medical and dental services, and other care.” *Id.* I cannot conceive why the Supreme Court would expressly maintain immunity for discretionary decisions that occur only occasionally, like deciding whether to take a child to the doctor or dentist, yet neglect to mention that it also meant for immunity to cover the single most frequently performed parental task.

Had our Supreme Court intended to immunize parents for torts committed in the scope of general parental supervision, it would have maintained the immunity that previously existed. I find reinforcement of my conclusion in footnote 6 of *Mayberry v Pryor*, 422 Mich 579, 588; 374 NW2d 683 (1985), in which a unanimous Michigan Supreme Court observed, “The two *Goller* exceptions were adopted nearly verbatim in *Plumley*. However, Wisconsin courts have consistently held that parental supervision does not fall within either exception.”

Additionally, the majority’s interpretation of the second *Plumley* exception simply ignores the word “reasonable,” instead immunizing *all* exercises of parental discretion related to the care of children. The majority’s interpretation, that “an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care” encompasses *any* act relating to parental supervision, permits the *Plumley* exceptions to almost entirely undermine *Plumley*’s abrogation of intrafamily immunity. 388 Mich at 8. The Wisconsin Supreme Court reached precisely the same conclusion in *Cole v Sears Roebuck & Co*, 47 Wis 2d 629; 177 NW2d 866 (1970), in which the Court rejected that the term “other care” includes supervision, observing:

Granting immunity to a parent solely because the negligence complained of arose out of a familial obligation would give immunity the same breadth and scope as in those jurisdictions which carved out another exception to the rule of immunity premised on whether the negligent act was an activity intimately associated with the parent-child relationship. However, this approach was considered in *Goller* and rejected when the rule of parental immunity was abolished in personal injury actions subject to the two noted exceptions. ... *Goller* limited immunity to a greater degree than simply acts which are “essentially parental” in nature. To qualify for the exception to liability in this state, the act must not only be parental in nature but it must also constitute an exercise of discretion with “respect to the provision of food, clothing, housing, medical and dental services, and other care.” ... *The term “other care” is not so broad as to cover all acts intimately associated with the parent-child relationship.* [Internal citations omitted, emphasis added.]

In *Thoreson v Milwaukee & Suburban Transport Co*, 56 Wis 2d 231, 247; 201 NW2d 745 (Wis., 1972), the Wisconsin Supreme Court reemphasized its rejection of the notion that the *Goller* exceptions embraced immunity for all forms of parental supervision:

We think the rationale in *Cole* is correct that the rule of *ejusdem generis* should be applied in interpreting the words “other care” and that the exception does not extend to the ordinary acts of upbringing, whether in the nature of supervision or education, which are not of the same legal nature as providing

food, clothing, housing, and medical and dental services. *The care sought in the exclusion is not the broad care one gives to a child in day-to-day affairs. If this were meant, the exclusion would be as broad as the old immunity was. The exclusion is limited to legal obligations, and a parent who is negligent in other matters cannot claim immunity simply because he is a parent.* [Emphasis added.]

The Minnesota Supreme Court, the second “sister state” court decision on which *Plumley* relied, soon followed Wisconsin’s lead by entirely rejecting the *Goller* exceptions. In *Anderson v Stream*, 295 NW2d 595, 598 (Minn, 1980), that Court explained:

While the *Silesky* court was well-intentioned in continuing the immunity doctrine in regard to certain parental conduct, application of the exceptions has proven to be very difficult because their precise scope is by no means clear. The prospect of applying these vaguely worded, highly subjective standards to the ever-increasing number of parent-child liability cases coming before this court is reason to reflect upon the degree of difficulty in meaningful interpretation of the exceptions and alternative means of providing parents with some leeway in exercising their parental authority and discretion. We believe that since the problems inherent in construing the *Silesky* exceptions present a real danger of arbitrary line-drawing and in light of the fact that instructing the jury on a “reasonable parent” standard adequately protects functions which are parental in nature, the continued existence of the *Silesky* exceptions cannot be justified. [Footnote omitted.]

In *Anderson, id.*, the Minnesota Supreme Court adopted a “reasonable parent” standard, as described by the California Supreme Court in *Gibson v Gibson*, 3 Cal 3d 914; 92 Cal Rptr 288; 479 P2d 648 (1971). Yet another sister state abolished the doctrine of parental immunity “without reservation” in 1984. *Kirchner v Crystal*, 15 Ohio St 3d 326, 327; 474 NE2d 275 (1984).

As the Michigan Supreme Court took note in *People v Stevenson*, 416 Mich 383, 390; 331 NW2d 143 (1982), “This Court has often recognized its authority, indeed its duty, to change the common law when change is required.” A decade later, in *Adkins v Thomas Solvent Co*, 440 Mich 293, 317; 487 NW2d 715 (1992), the Supreme Court reiterated, “When appropriate, we have not hesitated to examine common-law doctrines in view of changes in society’s mores, institutions, and problems, and to alter those doctrines where necessary.” I believe that the time has come to jettison the *Goller* exceptions, which have entirely undermined the abrogation of intrafamily immunity announced in *Plumley*. Basic notions of fairness animate my view. A child injured by tortious conduct is no less deserving of compensation because the tortfeasor is her father, rather than her uncle or an unrelated stranger. I cannot fathom a logical justification for the rule that defendant here owes his daughter a lesser duty of care than he would his niece, had he agreed to supervise her water play along with his daughter’s. Alternatively, it would make no sense to hold defendant responsible in tort for negligently supervising his niece, but not for negligently supervising his daughter.

Because our Supreme Court in *Plumley* offered no elucidation of any rationale for its adoption of the *Goller* exceptions, the precise public policies they serve are difficult to reconstruct. Presumably, the Court’s central concern was that a complete abrogation of parental

immunity could subvert parental discipline or interfere with parental decisionmaking powers. But I fail to understand how a standard obligating a parent to act reasonably under the circumstances erodes parental prerogatives. For example, defendant in this case certainly possessed wide discretion with regard to the general supervision of his daughters while they played in the lake. Whether that discretion reasonably extended to permitting a 3-1/2-year-old child to swim unattended, without a life jacket, constitutes a question that can be answered without implicating a parent's fundamental decisionmaking authority. Although defendant had the power and the duty to supervise his children in a potentially dangerous environment, it hardly undermines or threatens his parental authority to insist that his supervisory decisions must qualify as reasonable. Here, a jury could decide that defendant reasonably understood that the other adults in the area would watch the girls while observing the other children. Jurors understand that a momentary parental misjudgment does not necessarily equate to a negligent act. Alternatively, a jury could decide that defendant negligently failed to assign or identify a specific spotter to watch the children when he entered the house. Permitting a jury to determine whether defendant's conduct was reasonable under the circumstances neither undercuts parental discretion with respect to such fundamental matters as the "provision of food, clothing, housing, medical and dental services, and other care," nor challenges parental authority over a child.

Consistent with the plain language of *Plumley*, 388 Mich at 8, I would hold that a jury should decide whether defendant's decision to permit his daughters to play unsupervised in the lake amounts to a reasonable exercise of parental discretion. But in light of this Court's virtual abrogation of *Plumley*, I urge wholesale judicial revisitation of parental immunity, bearing in mind the Ohio Supreme Court's conclusion that "[a]bolition of parental immunity as a matter of public policy will provide the innocent victims of tortious conduct the forum they deserve in attempting to redress their claims." *Kirchner*, 15 Ohio St 3d at 330.

/s/ Elizabeth L. Gleicher