STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM FIRE & CASUALTY COMPANY,

Plaintiff-Appellee,

v

TIMOTHY LEQUIA and ANN LEQUIA,

Defendants-Appellees,

and

PATRICIA WILKES and NICHOLAS LAMERE, JR., Co-Personal Representatives of the Estate of TRAVIS ALVIN LAMERE,

Defendants-Appellants.

UNPUBLISHED
December 15, 2009

No. 286139
Marquette Circuit Court
LC No. 08-045454-CK

PATRICIA WILKES and NICHOLAS LAMERE, JR., Co-Personal Representatives of the Estate of TRAVIS LAMERE,

Plaintiffs-Appellants,

v

TIMOTHY LEQUIA and ANN LEQUIA,

Defendants-Appellees.

No. 286776
Marquette Circuit Court
LC No. 07-044816-NO

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

These consolidated appeals arise from the tragic accidental death of a young child in foster care. We affirm the trial court decisions in both cases.

The Marquette Department of Human Services (DHS) placed the child, who was aged two and a half, in the foster parents' household after the child's parents were arrested. The child lived in the foster home for a week while DHS investigated alternative placement with the relatives. Before DHS completed its investigation, the child wandered into the river adjacent to the foster parents' home and drowned. The child's estate sued the foster parents, who sought coverage from State Farm Fire & Casualty Company, their homeowners insurance company. The company filed a summary disposition motion against the foster parents and the estate, on the ground that the policy's household exclusion barred coverage of the estate's claim. The trial court granted summary disposition in favor of the company. Subsequently, a different trial court granted summary disposition in favor of the foster parents on the underlying claim, finding that the foster parents were immune from suit under MCL 722.163.

We turn first to the appeal in the insurance action. The estate and the foster parents claim that the trial court erred by finding that the child was a "resident" of the foster parents' household within the meaning of the policy. We review the trial court's summary disposition decision de novo, *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005), considering the entire record and examining the evidence in the light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). We also conduct a de novo review of legal questions concerning insurance contracts. *Rory*, *supra* at 464.

When deciding an insurance coverage issue, this Court must apply the terms of the policy. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). Unless the policy terms are ambiguous, the Court will enforce the policy as written. *Id*. To decide whether a policy provision is ambiguous, the Court must determine whether the "words may reasonably be understood in different ways." *Raska v Farm Bureau Mut Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982). When considering exclusions to insurance policies, we read the contract as a whole, and we must enforce clear and specific exclusions. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). If we find the exclusion ambiguous, we construe the provision in favor of the insured. *Id*.

The policy in this case excluded liability coverage for bodily injury to any "insured." The policy defined "insured" to include residents of the named insureds' household. The parties on appeal disagree as to whether the term "resident" is ambiguous as used in the policy. Having examined the household exclusion and the definition of "insured," we find no ambiguity. Although the term "resident" is not defined in the policy, we apply the term as written, in accordance with its plain and ordinary meaning. *Berkeypile v Westfield Ins Co*, 280 Mich App 172, 178; 760 NW2d 624 (2008). The plain and ordinary meaning of "resident" in this context refers to a person living in a particular place as a member of a household. The child was living in the foster parents' household at the time of his death, having been formally placed there by a government agency having legal authority to do so to provide him a "stable, loving family environment." MCL 722.953(a). Thus, the child was an insured within the meaning of the policy.

The estate and the foster parents argue that the trial court should have applied the analysis described in *Workman v Detroit Automobile Inter-Ins Exch*, 404 Mich 477, 496; 274 NW2d 373 (1979) to find that the child was not a resident of the foster parents' household. Assuming without deciding that the *Workman* analysis applies in this context, the *Workman* factors would

suggest that the child was a resident within the meaning of the homeowners policy. Most importantly, although the child's placement was temporary and indefinite, he was physically present in the foster parents' household in a family environment. And, consistent with the language of the insurance policy at issue here, the foster parents were not just providing the child a place to be domiciled, they were responsible for his care.

Turning to the appeal in the wrongful death action, we must determine whether the foster parents are immune from the estate's suit. The determination whether statutory immunity bars a foster child's claim is a question of law for the Court. *Spikes by Simmons v Banks*, 231 Mich App 341, 349; 586 NW2d 106 (1998). We review questions of law de novo. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006).

The immunity issue requires application of MCL 722.163, which protects foster parents from negligence suits arising from the "exercise of reasonable parental authority" over their foster children, and from negligence suits arising from the "exercise of reasonable parental discretion with respect to the provision of" care. MCL 722.163(1)(a), (b). To overcome the statutory immunity protections, the alleged facts must be sufficient to state a claim for negligence falling outside the protection provided by the parental authority and parental discretion provisions, or for neglect, for which there is no statutory immunity. See *Spikes*, *supra* at 350-351.

To state a claim for neglect, the allegations must establish that the defendant placed a child at an unreasonable risk, that the defendant should have had knowledge of the risk, and that the defendant was able to intervene to eliminate the risk but failed to do so. MCL 722.622(j); *Spikes*, *supra* at 350-351.[1] Here, the record contains nothing to establish that the foster parents placed the child at an unreasonable risk. Rather, 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. *Plumley v Klein*, 388 Mich 1, 8; 199 NW2d 169 (1972).[2] The record establishes that the foster parents allowed the child to remain outdoors with their 12-year-old son for approximately half an hour, while the foster father checked on the child periodically from the windows and the deck.[3] Both the foster father and the 12-year-old stated that they were monitoring the child. Even if their monitoring efforts were negligent, their conduct can only be described as negligent supervision, not as neglect. As our Court has reasoned in applying *Plumley*, "not every act or omission by a parent can be regarded as actionable negligence." *Haddrill v Damon*, 149 Mich App 702, 706; 386 NW2d 643 (1986). Thus, parents have been adjudged immune from suit in a variety of situations, including dirt bike crashes, *id*., gunshot

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[1] The Child Protection Act has been amended and various subsections have been redesignated since the *Spikes* opinion. See PA 1998 531; PA 2000 45; PA 2002 661; PA 2002 693; PA 2004 563. The language of the child neglect definition has not changed.

[2] The *Plumley* immunity provisions for parents were replicated in the foster parent immunity statute. *Spikes*, *supra* at 348. Thus, precedents applying *Plumley* are apposite here.

[3] We note that parents often place children of the victim's age here in the care of 12-year old babysitters.

wounds, *Wright v Wright*, 134 Mich App 800, 807-808; 351 NW2d 868 (1984), and swimming pool injuries, *McCallister v Sun Valley Pools, Inc*, 100 Mich App 131, 139-140; 298 NW2d 687 (1980).

The estate also argues that the foster parents should have provided a fence to prevent access to the river. This Court rejected a similar argument in *Ashley v Bronson*, 189 Mich App 498, 506-507; 473 NW2d 757 (1991). The parental discretion provision provides immunity for negligent acts of commission and omission, so long as the acts are attributable to reasonable parental discretion. Here, the foster parents' decision to live adjacent to the river was a reasonable, albeit tragic, exercise of parental discretion, as was their decision to leave the area unfenced.

We affirm. No taxable costs pursuant to MCR 7.219, a question of public policy involved.

/s/ Joel P. Hoesktra
/s/ Richard A. Bandstra