

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UNPUBLISHED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

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 case³ 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

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

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

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DANIEL WILSON,

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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.”¹ 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.”²

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

¹ 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.]

² 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 (Wisc, 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