Supreme Court of State of Washington No. 90934-2

No. 44346-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TORRE J. WOODS, individually,

Appellant,

v.

HO SPORTS COMPANY, INC., a for-profit Washington Corporation,

Respondent,
And

MICHAEL E. WOODS, individually,

Respondent.

AMENDED ANSWER TO PETITION FOR REVIEW

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TABLE OF CASES AND AUTHORITIES

I. Washington Cases

II. Other States Cases

III. Revised Code of Washington

IV. Court Rules

V. Other Authority

TABLE OF CONTENTS

A. IDENTITY OF ANSWERING PARTY AND CROSS-PETITIONER

Michael Woods, individually, Co-Defendant below, provides the following Answer to Co-Defendant HO Sports Company, Inc.'s Petition for Review.[1]

B. COURT OF APPEALS DECISION

Co-Defendant HO Sports accurately sets forth and describes the Court of Appeals Division II's decision at issue in this matter. A copy of that Opinion is attached as Appendix A to the Petition for Review, and the Court of Appeals Order Denying HO Sports timely Motion for Reconsideration, dated September 16, 2014, is attached as Appendix B to the Petition for Review.

C. ISSUES PRESENTED IN ANSWER FOR REVIEW (RAP 13.4 (d)

1. Does Co-Defendant HO Sports have "standing" to raise as a defense the parental immunity held by the individual Co-Defendant Michael Woods?

2. Should the doctrine of parental immunity be categorically applied to parental decisions and actions relating to recreational activities?

[1] Michael Woods died June 19, 2014. His estate will be substituted as a party to this action pursuant to RAP 3.2, upon the filing of appropriate paperwork within the Pierce County Superior Court. This Answer is being filed prior to such substitution in order to ensure that all appropriate timelines for the filing of this document are complied with.

3. Should the Supreme Court grant discretion or review of the issue framed within HO Sports' Petition for Review?

4. If the Supreme Court is inclined to accept review, will it examine how a grant of "parental immunity" will impact allocation of fault issues at time of trial?

5. Is "parental immunity" just a shorthand way of saying that there is no parental duty to be non-negligent in the supervision of children, and if so, does that mean that an "immune" parent can engage in no actions that fall within the definition of "fault" set forth within RCW 4.22.015?

D. STATEMENT OF THE CASE

Defendant Michael Woods concurs with the Statement of the Case set forth at pages 2 through 4 of the Petition for Review, with one caveat: Michael Woods respectfully disagrees with that portion of HO Sports' "Statement of the Case" indicating or suggesting that HO Sports had the right to join into Michael's Motion for Parental Immunity because such immunity "would preclude HO Sports' joint liability under RCW 4.22.070(1) for any fault allocated to Michael." As explored below, such a statement is legally inaccurate.

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E. ARGUMENT WHY THE COURT SHOULD GRANT REVIEW OF ISSUES PRESENTED IN THIS ANSWER – (RAP 13.4 (d)).

1. Introduction.

Co-Defendant Michael Woods respectfully agrees with HO Sports that the Court should grant review in this case, but not solely with respect to the issue raised by HO Sports. Parental immunity and its implications, particularly as it relates to potential allocation of fault at time of trial, involves a matter of substantial public interest within the meaning of RAP 13.4(b)(4). To date, what has transpired in this case, serves to illustrate the substantial amount of uncertainty that still exists within the State of Washington with respect to "parental immunity." This case provides an appropriate opportunity for the Supreme Court to provide substantial clarity and guidance on how "parental immunity" issues should be navigated in the future. Under the terms of RAP 13.4 (d), the Supreme Court should consider the issues raise in this Answer.

2. Does HO Sports Have Standing?

The fact that HO Sports, as opposed to Michael Woods, the holder of the immunity, is the party petitioning this Court for review begs the question as to "the elephant in the room," i.e., what "standing" does a Co-Defendant, such as HO Sports, have to raise another Co-Defendant's "parental immunity" in a case involving an injury to a child? The

common law doctrine of "standing" prohibits a litigant from raising another's legal rights. See, *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 115 Wn.2d 791, 802, 83 P.3d 419 (2004). Simply because a party may procure a litigation advantage by raising someone else's interests does not confer that party's "standing" to assert the rights of another. See, *Cassell v. Portelance*, 172 Wn.App. 156, 294 P.3d 1 (2012).

On this issue of specific note is comment "h" to the Restatement (second) of Torts, Section 89G, which provides as follows:

> *h. · Another exception now generally recognized is that the immunity of the parent or child is a personal one that does not protect the third party who is liable for the tort of either. Thus when a parent within the scope of his employment by another negligently inflicts personal injury upon his child, his employer is not protected by the parent's immunity and is subject to liability to the child as if the negligence had been that of the employer himself.* ***This is also true of any other defendant who is liable for the tort of the parent, as in the case of a joint tortfeasor acting in concert with him or a partnership or association which he is a member, or the owner of an automobile who is made liable by statute for the negligent of one whom he allows to operate the car.*** (Emphasis added).

Here, HO Sports, in its relationship to Michael Woods, would be that of a "joint tortfeasor" who should not be benefited by its Co-Defendant's parental immunity, nor does it fall within "parental immunities" protective "coverage," (for lack of a better term). If HO Sports is not entitled to a

benefit of parental immunity, then it is hard to imagine that it otherwise would have "standing" to raise this highly individualized defense, which is vested in Co-Defendant Woods, as a parent.

Such a proposition is consistent with prior cases of this Court which has precluded "joint tortfeasors" from circumventing parental immunity by bringing actions for indemnification and/or contribution. See, *Baughn v. Honda Motor Co., Ltd.*, 105 Wn2d 118, 712 P.2d 293 (1986); *Talarico v. Foremost Ins.*, 105 Wn.2d 114, 712 P.2d 79 (1986).

If the Court is inclined to accept review in this case, it is humbly submitted that the Court should squarely address this issue.[2]

3. Parental Immunity Should Categorically Apply to Recreational Activity.

Co-Defendant Michael Woods concurs with HO Sports that the Court of Appeals' decision, which separates parental conduct from parental decision making, is an unworkable erosion of the parental immunity doctrine. Under the Court of Appeals' unworkable standards, a parent's decision to allow a child to ride a dirt bike would fall under the heading of "decision making supervision," but once the parent participates in the

[2] It is respectfully submitted that the purposes of parental immunity is to protect the interpersonal and financial integrity of families. While in most instances it is likely that such purposes are best served by a parent asserting "parental immunity," there may be other instances where the family, as a whole, is better served by waiver of such protection. See, *Romero v. West Valley School Dist.*, 123 Wn.App. 385, 98 P.3d 96 (2004), overruled in part, *Barton v. State*, 178 Wn.2d 193, 308 P.3d 597 (2013). Ultimately, it should be the parent's choice, and not a third-party tortfeasor's decision as to whether or not to assert such "immunity," if in fact it is a "true immunity at all."

activity, potentially it would not. See, *Baughn v. Honda Motor Co., Ltd.*, 105 Wn.2d AT 119-20 (permission to ride on a mini-bike subject to parental immunity). For example, would the parent be subject to liability when, while riding his own dirt bike, he or she is trying to instruct the child how to ride his, and pushes the child to test his limits and he ultimately drives too fast and crashes?

Would a father be subject to liability if a mishap occurs when trying to teach a child to "snow plow," he places the child between his skis while holding the child, but not when the teaching involves erroneous verbal instruction without parental physical participation? Part of parental supervision, particularly as it relates to sporting activities, (such as at issue in this case), involves gauging the limits of a child's skills which always may entail some level of risk. Given the wide variety scenarios involving recreational activity, it would be impossible in the future to determine the line which separates parental decision making from parental conduct.

It is respectfully suggested that the better approach is to categorically recognize that parental immunity applies to all aspect of recreational activities. Courts from other jurisdictions have recognized that "recreational activities" involve the kind of fundamental parental decision making which "parental immunity" is designed to address. See, *McCullough v. Godwin*, 214 S.W.3d 1793 (Tex. App. 2007) (listing

"recreation" as being an "essential parental activity." – Surveying cases); see also, *Hall v. Martin*, 851 S.W.2d 905 (Tex. App. 1993) (parental immunity applied to decision of parents to allow minor child to ride a motorcycle without proper training or helmet). As noted in *McCullough*, at 802, "... supervising [the child] during recreation [is] a parental activity..."

Here, Co-Defendant Michael Woods was clearly supervising Torre in a recreational activity when the accident occurred. The policies which animate the parental immunity doctrine clearly indicate that Michael's actions, and decision making, should be provided a wide berth prior to the imposition of tort liability.

4. Is "Parental Immunity" Just a Short-Hand Way of Stating That a Parent Breached No Actionable Duty?

Acceptance of review of this case would afford the Supreme Court an opportunity to clear up potential confusion regarding the interplay between "parental immunity" and fault allegation pursuant to RCW 4.22.070. RCW 4.22.070 (1) "on its face" appears to permit allocation of fault to "immune" parties. Because of this aspect of the 1986 tort reforms, it is absolutely essential that the Supreme Court determine what exactly is "parental immunity."

The issue as to "what is parental immunity" was touched upon in this Court's seminal opinion on *Zellmer v. Zelmer*, 164 Wn.2d 147, 157, 188 P.3d 497 (2008). In *Zellmer*, the Court in analyzing law from other jurisdictions, recognized that "parental immunity" has been addressed in a variety of different ways, including the notion that it is truly a "limited parental immunity," or a matter of "parental privilege," or simply a recognition of "lack of any actionable parental duty to supervise," citing to *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 264 N.Y.S.2d 859 (1974) (declining to recognize cause of action for negligent supervision claim following abolition of parental immunity doctrine).

The language of RCW 4.22.070, which purports to permit the allocation of fault even to "immune" parties, creates an imperative, (something beyond scholarly interest), that the Supreme Court ultimately resolves this issue for the purposes of Washington law. To be analytically and jurisprudentially consistent with Washington law, the Supreme Court should broadly pronounce that "parental immunity" simply means there is a "lack of an actionable parental duty to supervise." Stated another way, a parent cannot be sued for the negligent supervision of their children, because they have breached no actionable duty. Such a determination would certainly be consistent with the language of *Zellmer*, as well as this Court's opinion in *Talarico v. Foremost Ins. Co.*, 105 Wn.2d 114 712 P.2d

294 (1986). According to *Zellmer,* at page 158, the *Talarico* case stands for the proposition that the Supreme Court "disallowed suit by child for negligent parental supervision."

Upon the recognition that "parental immunity" is nothing more than a shorthand way of stating that a parent has breached no actionable duty, it follows that a parent cannot be found at "fault" under the terms of RCW 4.22.015. If a parent is not at "fault," under RCW 4.22.015, their actions cannot be subject to allocation under RCW 4.22.070 because they have breached no actionable duty.

Such a proposition is consistent with Washington's long-standing common law and statutory prohibition against imputing the negligence of a parent onto a child. See, *Vioen v. Cluff*, 69 Wn.2d 306, 316, 418 P.2d 430 (1966); *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 615, 260 P.3d 857 (2011) (recognizing that RCW 4.22.020 continues to stand for the proposition that "the negligence of a parent may not be imputed to a child").[3]

It has long been recognized that, when interpreting words of a statute, Courts seek to determine legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 21 (2005). If the plain language is clear and

[3] Although allocation of fault to an "immune" parent would not be directly imputing parental negligence to the child, it would have the same practical impact of reducing the compensation available to the child because of parental negligence.

unambiguous, the legislative intent is also clear. See, *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2013). The meaning of a statutory provision should be harmonized with other provisions in the statute and with the statutory scheme as a whole. *Id.*

As discussed in *Welch v. Southland*, 134 Wn.2d 629, 634 – 37, 952 P.2d 162 (1998), in order to be an entity towards whom fault can be apportioned under RCW 4.22.070, it must first be established that the entity engaged in "any measure of negligence or reckless conduct..." (within the meaning of RCW 4.22.015), which caused or contributed to the injury. Intentional acts are not within the statutory definition, *Id.* Because "parental immunity" should be construed to mean that a parent violates no actionable duty, they have not engaged in "any measure of negligence or reckless conduct." If they have not engaged in anything that is by "any measure of negligence...," then they cannot be subject to fault allocation under RCW 4.22.070(1), because they have done nothing legally wrong. Under RCW 4.22.070 (1), if there is no "fault," you do not even have to reach the issue of whether an "at-fault" party is "immune."

To construe the statue otherwise would place RCW 4.22.070(1) in direct conflict with RCW 4.22.020, which expresses the public policy that the negligence of a parent should not be utilized as a damage-reducing factor when it comes to claims brought by their children against third

parties. The construction advocated by defendant Michael Woods serves to harmonize these two statutes, and is consistent with the common law and the longstanding public policy of the State of Washington.

The purpose of "parental immunity" is to protect families, and its members. It would seem inconceivable that the legislature by using the undefined term "immune" in RCW 4.22.070 (1) intended, in derogation of common and statutory law, to transfer the benefit provided by "parental immunity" from families and give it to third-party tortfeasors. It is suggested that before the Court could reach such a conclusion, it would need far clearer evidence of legislative intent than that which currently exists.

Thus, if the Court is inclined to accept review of this case it should clarify what is meant by "parental immunity." On application of the above advocated definition, the title of the doctrine will no longer create confusion, particularly as it is matched up against the terms of the above-referenced statute. See, RCW 4.22.070.

F. CONCLUSION

For the reasons stated above, Co-Defendant Michael Woods does not object to HO Sports' Petition for Review, to the extent the Supreme Court determines that it has appropriate "standing" to raise the question of parental immunity at all. Further, Co-Defendant Michael Woods

respectfully requests that the Supreme Court consider the issues raised in this Answer, which will afford the Supreme Court an opportunity to resolve many unanswered questions regarding "parental immunity," which, if unanswered, have the potential of plaguing our courts for years to come.

Dated this 30 day of October 2014.

Paul A. Lindenmuth, WSBA# 15817
Of Attorneys for Respondent
Michael E. Woods

DECLARATION OF SERVICE

I, MARILYN DELUCIA, hereby declares under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

That I am over the age of 18 years of age, have personal knowledge of the facts herein, and am competent to testify thereto.

I am a paralegal working for the The Law Offices of Ben F. Barcus & Associates, PLLC.

On the 5th day of November, 2014, a true and correct copy of the **AMENDED ANSWER TO PETITION FOR REVIEW** was sent for delivery as indicated to the following:

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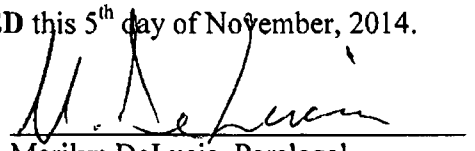
DATED this 5th day of November, 2014.



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Please see attached.

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