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NO. 554735

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STACEY ZELLMER, Individually and as Co-Personal  
Representative of the Estate of Ashley Cay McLellan;  
and BRUCE McLELLAN, Individually and as  
Co-Personal Representative of the  
Estate of Ashley Cay McLellan,

Appellants,

Vs.

JOEL ZELLMER,

Respondent.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Judge Brian Gain

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BRIEF OF APPELLANTS

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## I. NATURE OF CASE

Plaintiffs Stacey Zellmer and Bruce McLellan, biological parents and co-personal representatives of their 3-year old daughter Ashley McLellan, ask this court to abolish the doctrine of parental immunity and allow them to proceed in their wrongful death action against Joel Zellmer, Stacey's ex-husband.

Alternatively, the plaintiffs request that the court apply exceptions to the parental immunity doctrine in wrongful death cases where either a minor child has died due to the negligence of his or her parent or where the family unit, are dissolved at the time a civil action is filed on behalf of a child for injury caused by a parent. The plaintiffs assert that either the death of the child or the dissolution of the family unit prior to the time a suit is filed terminate the need for the protections to "family harmony," traditionally used to justify application of parental immunity.

In the event the court does not abolish the doctrine or recognize exceptions to its application, the plaintiffs request this court refuse to expand parental immunity to shield a stepparent from suit by a child who is injured or killed by the stepparent. The issue of whether parental immunity should be expanded to include stepparents has not been decided in Washington. If this court expands parental immunity to include stepparents, the plaintiffs request that the court require a finding that the

stepparent had reached *in loco parentis* status at the time death or injury to the child occurred.

Finally, because a genuine issue of material fact exist in this case as to whether or not the defendant was engaged in a “parental responsibility” when injury occurred here, and because genuine questions of material fact exist as to whether the defendant was engaged in “willful and wanton” conduct when injury occurred, the plaintiffs request this court reverse the trial court’s order granting summary judgment, and that the plaintiffs be allowed to proceed to trial on their wrongful death action.

## **II. ASSIGNMENT OF ERROR**

1. The superior court erred when it applied the doctrine of parental immunity.

2. The superior court erred by applying parental immunity in this case because the child at issue was deceased.

3. The superior court erred in applying the doctrine of parental immunity because, at the time plaintiffs filed their wrongful death action, the family unit that the doctrine was intended to protect had ceased to exist.

4. The superior court erred when, for the first time in Washington, it expanded application of the doctrine of parental immunity

to prevent a child from seeking civil redress against a stepparent who caused injury or death to a child.

5. The superior court erred in applying parental immunity because the defendant was not engaged in a “parental responsibility” at the time his conduct caused the death of the child at issue.

6. The superior court erred in applying parental immunity because there was a genuine issue of material fact as to whether or not the conduct the defendant was engaged in when the 3-year old child was killed was “willful and wanton”.

### **III. STATEMENT OF THE ISSUES**

1. Whether Washington should abolish the doctrine of parental immunity.

2. Whether parental immunity should be applied even though the child at issue is deceased.

3. Whether parental immunity should prevent a child from civil redress for injuries even though at the time the lawsuit was filed the family unit that the doctrine was intended to protect ceased to exist.

4. Whether Washington should, for the first time, expand application of the doctrine of parental immunity so that an injured child would be prohibited from proceeding with a civil action against a stepparent who had caused the child injury or death.

5. Whether summary judgment is proper when a genuine issue of material fact exists as to whether the defendant was engaged in a “parental responsibility” at the time his conduct caused the death of the child at issue.

6. Whether summary judgment is proper when a genuine issue of material fact exists as to whether or not the conduct engaged in by the defendant resulting in the death of the child at issue was “willful and wanton”.

#### IV. STATEMENT OF CASE

The plaintiffs, Stacey Zellmer and Bruce McLellan, are the biological parents and co-personal representatives of their deceased daughter, Ashley McLellan. CP 5, CP 62, CP 67. The defendant, Joel Zellmer, is Stacey Zellmer’s former husband. CP 70, *In re Zellmer v. Zellmer*, 04-3-12165-9 KNT. When 3-year old Ashley drowned to death alone on a dark night in December of 2004 in the defendant’s unheated pool, she was in the exclusive care and supervision of the defendant. CP 71-72, CP 9. Following Ashley’s death, the plaintiffs, alleging several theories of liability, filed a lawsuit, individually and on behalf of their daughter, against Mr. Zellmer. CP 3-14.

How Ashley arrived at the defendant’s residence prior to her death: When Ashley’s father, Bruce McLellan, and Ashley’s mother, Stacey McLellan

(Zellmer), divorced, Stacey maintained custody of Ashley. CP 62. In May of 2003, more than a year after she divorced Bruce, Stacey met the defendant. CP 68-69. Shortly thereafter, Stacey became pregnant by the defendant. CP 68. On September 6, 2003, Stacey went to Idaho with the defendant where they were married. CP 68.

The defendant had been warned that the swimming pool at his residence was a danger to small children: After the marriage, Stacey and Ashley began to stay with the defendant at his residence. CP 7. There was an in-ground swimming pool approximately 50 feet from the back door of the defendant's residence. CP 72. Approximately nine months before 3-year old Ashley began staying at the defendant's residence, another small child had almost drowned in the defendant's swimming pool while under the defendant's sole care and supervision. CP 58. Subsequently, the defendant was warned that his pool was not safe for small children and that he should put a fence with a gate around the pool. CP 59. The defendant did not install any barriers around the pool prior to Ashley's death. CP 74, 75. The defendant was aware that Ashley could not swim. CP 76.

Within days of their marriage, the defendant arranged for the purchase of a life insurance policy insuring Ashley's life in the event of her accidental death. CP 72. At the time, Ashley was in perfect health.

CP 72. The defendant named himself as a co-beneficiary under the policy even though he had not adopted Ashley, had only known Ashley for a short time, and had only been her stepfather for a few days. CP 72. Under the policy, if Ashley died by accidental means, the defendant would receive \$100,000.00. CP 28.

There was no family harmony or tranquility during Stacey Zellmer's 88-day marriage to the defendant: Stacey Zellmer married the defendant because of her pregnancy and based on her reliance on a number of material misrepresentations made by the defendant. CP 69. The marriage was marked by constant turmoil. CP 69. The defendant had misled Stacy about his personal history and financial situation. CP 69-71. The defendant was physically abusive to Stacey. CP 69. The defendant treated 3-year old Ashley in an intimidating manner. CP 71. Stacey separated from the defendant for various periods during the 88-day marriage and, when separated, moved in with her parents. CP 69-70, 72. When Stacey left the defendant, she brought Ashley with her. CP 69-70. The turmoil was constant, and the defendant himself gathered and filled out papers to divorce Stacey prior to Ashley's death. CP 70.

Shortly before Thanksgiving 2003, Mr. Zellmer was again physically abusive to Stacey. CP 70. Stacey and Ashley left the defendant's residence and began staying with Stacey's parents. CP 70.

On November 30, 2003, four days before Ashley drowned, Stacey and Ashley returned to Joel's residence. CP 70.

Ashley's drowning: On December 3, 2003, Ashley was home from daycare because she was ill with a slight fever. CP 71. Although the defendant was not employed and had not been employed during the parties' short marriage, Stacey had to go to work. CP 71. Stacey asked the defendant to supervise 3-year old Ashley while she was at work. CP 72. He agreed. CP 72.

On the night of December 3, 2004, approximately six hours after Stacey left for work, Ashley was found floating unconscious in her pajamas in the defendant's unheated, dark, swimming pool. CP 72, CP 27, CP 85. The defendant's house is located in a rural area isolated from neighbors both by distance and an undeveloped wooded area. CP 72, CP 74, 75 and 76. The swimming pool at the defendant's house is located approximately 50 feet from the back door of his house. CP 72. Access to the pool at night from inside the defendant's house requires a person to exit the house via a back door, walk across a patio, proceed down some darkened steps and walk down a darkened path where the unlit pool deck can be accessed. CP 72, 74, 75, 76, 85. The area surrounding the pool is dark and wooded. CP 72, 74-76.

After Ashley was found in the defendant's pool, Stacey Zellmer did not return to Mr. Zellmer's residence. CP 70. She filed for divorce from the defendant before this wrongful death action was filed. CP 70.

The Summary Judgment hearing: Prior to trial, the defendant, through his counsel, moved the trial court for summary judgment. CP 15-25. In ruling on the defendant's motion, the trial court was critical of the doctrine of parental immunity, questioning whether or not the doctrine was still a viable concept in Washington. RP 4, RP 7, RP 2, RP 3. The court indicated that it was the place of an appellate court, not the trial court, to determine whether or not parental immunity should be abolished in Washington. RP 4, RP 10. The trial court, after considering whether or not it would be appropriate to put the plaintiffs through the expense and emotional repercussions of trial when an appellate court could reverse an award on appeal by application of the doctrine of parental immunity, granted the defendant's motion for summary judgment and suggested the decision be appealed. RP 5. This appeal follows.

## **V. ARGUMENT**

### **A. The Doctrine of Parental Immunity Should be Abolished in Washington.**

Parental immunity is based on an anachronistic doctrine of public policy, created without a basis in either statute or the English common

law. The doctrine generally prohibits children who have been injured or killed due to parental negligence from seeking any civil redress for their injuries. See, *Roller v. Roller*, 37 Wn. 242, 79 P. 788 (1905). Recognizing that, in the more than 100 years since the doctrine was created, familial relations and the law have changed significantly, the plaintiffs respectfully ask this court to join the increasing number of states that have abolished the doctrine in its entirety.

This court has the legal authority to abolish parental immunity. See, *Merrick v. Sutterlin*, 93 Wn.2d 411, 412 (1980) (confirming parental immunity is a judicial creation); and see *Wyman v. Wallace*, 94 Wn.2d 99, 101-102, 615 P.2d 652 (1980) (a rule of law having its origins in the judiciary that has not been addressed by the legislature may be modified or abolished by the courts); See also *Freehe v. Freehe*, 81 Wn.2d 183, 189, 500 P. 2d 771 (1972) (in abolishing inter-spousal tort immunity, court noted their decision was properly a matter for the courts since "the rule is not one made or sanctioned by the legislature, but rather is one that depends for its origins and continued viability upon the common law").

History of Parental Immunity: Any understanding of why the present "parental immunity doctrine" should be abolished or, if not abolished, refined, requires an understanding of the doctrine's evolution and the rationale that resulted in its creation.

Parental immunity is strictly a creation of the American judiciary. The doctrine's origin can be traced to three appellate opinions, frequently referred to as the "Great Trilogy". *Merrick v. Sutterlin*, 93 Wn.2d 411, 412 (1980). The first of those opinions, *Hewellette v. George*, 9 So. 885 (Miss. 1891), involved a lawsuit wherein a daughter sought damages against her mother for having been wrongfully committed to an insane asylum. On public policy grounds and without citing any legal authority, the Supreme Court of Mississippi announced that the "peace of society" prohibited a minor child from seeking civil redress for injuries suffered at the hand of a parent. *Id.* at 887.

The second case, *McElvey v. McElvey*, 77 S.W. 664 (Tenn. 1903), decided while it was still a criminal offense in Tennessee to teach evolution in public schools, *Scopes v. Tennessee*, 154 Tenn. 105 (1927), was an action for damages brought by a child as the result of having been abused by his parent. Relying on *Hewellette*, and noting the potential disruption to family peace that could result from allowing a civil remedy for the assault, the Tennessee court prohibited the damages suit.

The case that brought parental immunity to Washington, and the final opinion in the "Great Trilogy," comes from Washington's Supreme Court. In *Roller v. Roller*, 37 Wn. 242, 79 P. 788 (1905), the court prohibited a minor from proceeding with a civil suit against her father for

injuries she suffered when he raped her. Although the plaintiff's father had been convicted of the rape, the *Roller* court asserted that, allowing the child to proceed with the suit against her father, would disrupt "harmony in domestic relations." *Roller*, 37 Wn. at 243. The court justified its decision by noting that maintenance of harmonious and proper family relations was conducive to "good citizenship and therefore beneficial to the welfare of the state." *Roller*, 37 Wn. at 244.

While prohibiting a child from suing a parent who had been convicted of raping her for fear the lawsuit would disturb the "tranquility" of that child's family seems absurd today, the decision reflected the norms of society as it existed 100 years ago. See, *Merrick v. Sutterlin*, 93 Wn.2d 411, 413 (1980) (J. Brachtenbach for the majority describing the rationale as applied in the *Roller* decision as "unreal"). Times clearly have changed, although the rationale used to support imposition of parental immunity has not. In fact, the rationale relied upon by the *Roller* court and criticized in *Merrick*, is the same rationale relied upon by the defendants in this action. CP 19.

Familial relationships and personal injury law relating to the family relationships have evolved significantly since parental immunity was created. The weight of authority did, at one time, favor parental immunity. However, support for the doctrine has steadily eroded over the

past 40 years, ever since the Wisconsin Supreme Court first abrogated the doctrine in all cases but those where injury occurred while the parent was fulfilling a “parental responsibility” by providing services such as food, clothing, and housing to a child. *Goller v. White*, 20 Wis.2d 402, 413, 122 N.W.2d 193, 198 (1963).

Since the *Goller* case, the doctrine has been consistently criticized in American jurisprudence<sup>1</sup>. Six states - Hawaii, Nevada, North Dakota, South Dakota, Utah, Vermont, and the District of Columbia - simply refused to adopt the doctrine at all<sup>2</sup>. Eleven states - Arizona, California, Minnesota, Missouri, New Mexico, New Hampshire, New York, Ohio, Oregon, Pennsylvania, and South Carolina - that once recognized the

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<sup>1</sup> *Gibson v. Gibson*, 3 Cal.3d 914, 922 (1971) (referring to doctrine as "deadwood"); *Falco v. Pados*, 444 Pa. 372, 376, 282 A.2d 351 (1971) (doctrine serves "no rational purpose"); *Elam v. Elam*, 275 S.C. 132, 136, 268 S.E.2d 109 (1980) (calling the “family harmony” rationale "specious"); *Kirchner v. Crystal*, 15 Ohio St. 3d 326, 327, 474 N.E. 2d. (1984) (rationale underlying the doctrine is “outdated”, “highly questionable” and “unpersuasive”); *Hebel v. Hebel*, 435 P.2d 8, 15 (Alaska 1967) (rationale underlying doctrine is “unpersuasive”, “illogical”); *Rousey v. Rousey*, 528 A.2d 416, 416 (D.C. 1987) (concept is “out of date”); *Elkington v. Foust*, 618 P.2d 37,40 (Utah 1980) (doctrine has no foundation); *Glaskox v. Glaskox*, 614 So. 906, 911 (Miss. 1992) (doctrine rationale is “something of a mockery”). Comment, Parent-Child Immunity: The Case for Abolition, 6 SAN DIEGO L.REV. 286, 295-296 (1969). Jonathan Cardi, Apportioning Responsibility To Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement, 82 IOWA LAW REV. 1293, 1314 (1997); Children’s Rights: A Renewed Call for the End of Parental Immunity, 27 LAW & PSY. REV. 123 (2002).

<sup>2</sup> See *Rousey v. Rousey*, 528 A.2d 416 (D.C. 1987); *Peterson v. City & County of Honolulu*, 51 Haw. 484, 462 P.2d 1007 (1969); *Rupert v. Steinne*, 90 Nev. 397, 528 P.2d 1013 (1974); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967); *Kloppenburg v. Kloppenburg*, 66 S.D. 167, 280 N.W. 206 (1938); *Elkington v. Foust*, 618 P.2d 37 (Utah 1980); and *Wood v. Wood*, 135 Vt. 119, 370 A.2d 191 (1977).

doctrine have since abolished it<sup>3</sup>. The remaining states where parental immunity is still recognized significantly limit the circumstances under which the doctrine can be applied by creating a variety of exceptions to its application<sup>4</sup>.

Although Washington has not abolished the doctrine, there has been a consistent trend towards limiting the circumstances where immunity will be applied. In *Borst v. Borst*, 41 Wn.2d 642 (1952), the Supreme Court addressed and then renounced each of the policy considerations primarily relied on to support parental immunity. *Borst*, 41 Wn.2d at 650-654. The *Borst* case involved a child injured when struck by a truck driven by his father as part of his employment. The *Borst* court

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<sup>3</sup> See, *Broadbent v. Broadbent*, 184 Ariz. 74, 907 P.2d 43 (1995); *Hartman by Hartman v. Hartman*, 821 S.W.2d 252 (Mo. 1991); *Shearer v. Shearer*, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985); *Winn v. Gilroy*, 296 Or. 718, 681 P.2d 776 (1984); *Guess v. Gulf Ins. Co.*, 96 N.M. 27, 627 P.2d 869 (1981); *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980); *Elam v. Elam*, 275 S.C. 132, 136, 268 S.E.2d 109 (1980); *Gibson v. Gibson*, 3 Cal.3d 914, 92 Cal. Rtr. 288, 479 P.2d 648 (1971); *Falco v. Pados*, 444 Pa. 372, 376, 282 A.2d 351 (1971); ).; *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192 (1969); and *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966).

<sup>4</sup> *Hebel v. Hebel*, 435 P.2d 8 (Alaska 1967); *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970) (en banc); *Nocktonick v. Nocktonick*, 227 Kan. 758, 611 P.2d 135 (1980); *Transamerica Insurance Co. v. Royle*, 202 Mont. 173, 656 P.2d 820 (1983); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967); *Silva v. Silva*, 446 A.2d 1013 (R.I. 1982); *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971); *Merrick v. Sutterlin*, 93 Wn.2d 411, 610 P.2d 891 (1980); *Lee v. Comer*, 159 W. Va. 585, 224 S.E.2d 721 (1976); Conn.Gen.Stat. §52-572c (Supp. 1986); N.C.Gen.Stat. §1-539.21 (1983); *Williams v. Williams*, 369 A.2d 669 (Del. 1976); *Ard v. Ard*, 414 So.2d 1066 (Fla. 1982); *Farmers Insurance Group v. Reed*, 109 Idaho 849, 712 P.2d 550 (1985); *Sorensen v. Sorensen*, 369 Mass. 350, 339 N.E.2d 907 (1975); *Unah v. Martin*, 676 P.2d 1366 (Okla. 1984).

allowed the boy to proceed with his negligence action, finding that immunity did not apply to injuries sustained when a parent was engaged in the course of his or her employment.

In *Hoffman v. Tracy*, 67 Wn.2d 31 (1965), our Supreme Court determined that parental immunity was not applicable when a child was injured by parental conduct that constituted a temporary “abdication of parental responsibility”. In *Hoffman*, the court found the offending parent had temporarily abdicated parental responsibility and exposed her child to danger by driving under the influence with the child in the car. *Hoffman*, 67 Wn.2d at 38.

*Livingston v. Everett*, 50 Wn. App. 655, 751 P.2d 1199 (1988), confirmed that parental immunity did not apply to shield a parent when the parental conduct resulting in injury to a child was “willful and wanton.”

In *Sisler v. Seberger*, 23 Wn. App. 612, 596 P. 2d 1362 (1979), a wrongful death action where the at-fault parent had also died, the court refused to apply parental immunity. The *Sisler* court reasoned that the participant’s death terminated the family unit and when the family unit ceased to exist, the rationale supporting immunity also ceased to exist.

In *Merrick v. Sutterlin*, 93 Wn.2d 411, 413-414 (1980), our Supreme Court again criticized the basis used to justify parental immunity. In *Merrick*, our Supreme Court abrogated the doctrine in its entirety in

cases when a child is injured by a parent as the result of the parent's negligent operation of an automobile. The *Merrick* court went on to note that "[t]he trend in modern cases is to limit or entirely abolish parental immunity." *Merrick v. Sutterlin*, 93 Wn.2d at 414.

Unfortunately, creating exceptions to the doctrine's application, rather than simply abolishing it, has resulted in inconsistent application and in decisions at odds with other areas of the law in this state. For example, in Washington, a child injured when a parent negligently operates an automobile can sue the negligent parent, but a child injured when that same parent negligently supervises the child by putting him exposing him to a dangerous condition cannot sue for the injuries that result from that parent's negligence. Compare *Merrick v. Sutterlin*, 93 Wn.2d 411, 412 (1980), with *Livingston v. City of Everett*, 50 Wn. App. 655, 751 P.2d 1199, rev den, 110 Wn.2d 1028 (1988).

Furthermore, failure to abolish the doctrine has led to the confusing situation where one parent can sue the other parent for causing injury, but a child in that same family who is injured in the same way by the same parent, is prohibited from bringing suit to recover for her injuries. Compare *Freehe v. Freehe*, 81 Wn.2d 183, 192, 500 P.2d 771 (1972) (abolishing inter-spousal immunity), with *Baugh v. Honda Motor Co.*, 105 Wn.2d 118, 712 P.2d 293 (1986). In addition, although even an

illegitimate child can file a civil suit for support against his or her putative father, *Kuar v. Chawla*, 11 Wn. App. 363, 522 P. 2d 1198 (1978), a child cannot file a civil suit against a parent if the child suffers serious injury due to that same parent's negligent supervision. In addition, the superior court itself has jurisdiction to remove a child from the custody of a child's natural parent and to award custody of the child to a non-parent. RCW 26.10. The superior court also has jurisdiction to terminate a parent's rights over a child altogether. RCW 13.34. Although the law allows the court to "disrupt" family tranquility and parental authority to the degree the family unit is in essence terminated, under the parental immunity doctrine, the "family tranquility" rationale is still used to prohibit a child who is seriously injured by the parent's negligence from being made whole. Commentators have long pointed out the inconsistency in the rationale, noting that once injury occurs, the damage to family tranquility is done and its more likely that additional harm to the family unit will result from prohibiting the injured child from seeking redress than results from allowing the child to secure compensation for the injury. *Rousey v. Rousey*, 528 A.2d 416, 416 (D.C. 1987); *Peterson v. City and County of Honolulu*, 51 Haw. 484, 462, P.2d 1007, 1009 (1969); Note, Tort Liability Within the Family Area – A Suggested Approach, 51 NW. U.L.Rev. 610, 613-614 (1956) (citations omitted).

History, as reflected in various scholarly critiques and court opinions as listed above that have attempted to cope with problems created by the adoption of the doctrine, demonstrates that it is time to abandon the doctrine altogether and to begin to address personal injury and wrongful death lawsuits involving parents and children like all other personal injury and wrongful death lawsuits. Rather than continue to whittle away at parental immunity by crafting exception to its application, this court should join those states that have simply abolished the doctrine. The common law provides this court with the flexibility and the ability to address the ever-changing societal conditions. In a multitude of settings, this court has previously crafted rules determining when compensation for injury is merited based upon breach of duty. Whether the defendant is liable in this case should be determined under general tort law principles and should not depend on the status of the various parties. Accordingly, this court should abolish the doctrine of parental immunity and allow the plaintiffs' wrongful death action to proceed.

**B. If Parental Immunity is Not Abolished, the Doctrine Should Not Apply in Wrongful Death Actions Where the Child at Issue is Deceased.**

In the event this court is disinclined to abolish the parental immunity doctrine in its entirety, the court should recognize the exception applied to cases where either the parent or child has died.

Of the jurisdictions which have considered the question, it appears that a majority have found an exception to the parental immunity doctrine where either the child or parent or both are dead.

*Sisler v. Seeberger*, 23 Wn. App. 612, 615, 596 P.2d 1362 (1979) (numerous citations omitted); see also, *Brile v. Estate of Brile*, 321 Ill. App.3d 933, 748 N.E.2d 828 (2001) (deceased child severs family relationship for purposes of parental immunity); *Bushey v. Northern Assurance Co. of America*, 362 Md. 626, 766 A.2d 598 (2001) (parental immunity not applied because of death of the child); *Broadbent v. Broadbent*, 184 Ariz. 74, 907 P.2d 43 (1995) (court abrogates parental immunity where child deceased due to negligent supervision by mother).

The reasoning behind the basis for this exception rests in the common sense notion that, once either the death of the tortfeasor or victim occurs, the rationale supporting the doctrine, specifically preservation of “family harmony and parental authority between parent and child,” no

longer exists. *Brile v. Estate of Brile*, 321 Ill.3d at 937; *Bushey v. Northern Assurance Co. of America*, 362 Md. at 649; *Cole v. Fairchild*, 198 W. Va. 736, 750, 482 S.E.2d 913 (1996). Once the rationale justifying application of the doctrine ceases to exist, the doctrine will not apply. *Borst v. Borst*, 41 Wn.2d 642, 657, (1952); accord, *Hoffman v. Tracy*, 67 Wn.2d 31, 37 (1965).

Whether parental immunity applies in any case must be determined on a case by case basis. *Merrick v. Sutterlin*, 93 Wn.2d 411, 415 (1980).

At summary judgment in this case the defendant relied on *Chhuth v. George*, 43 Wn. App. 640 (1986), for the proposition that death of the child in this case did not abrogate parental immunity. CP 19. But see, *Sisler v. Seeberger*, 23 Wn. App. 612, 615, 596 P.2d 1362 (1979) (parental immunity not applied when child or parent deceased). *Chhuth*, as noted below, is factually distinguishable from the case at hand. Instead, the case before the court more closely resembles the legal and factual issues present in *Sisler v. Seeberger*, 23 Wn. App. 612, 615, 596 P.2d 1362 (1979).

*Chhuth* involved a contribution action where the decedent, a 7-year old child, had been killed after being struck by a car driven by a third party unrelated to the decedents family. At trial, a jury apportioned 100% of the fault to the decedent child, not the child's parents. *Id* at 643. In *Chhuth*,

both of the decedents parents, who were still married, brought action on behalf of their deceased child. *Id.* at 642. In ruling that the contribution action was prohibited by parental immunity, the *Chhuth* court noted that there were policy reasons justifying immunity that still existed in that case, commenting that, merely because an action was for wrongful death, standing alone, did not prohibit application of parental immunity in a contribution action. *Chhuth*, 43 Wn. App. at 648.

*Sisler* involved a single car accident where two children were injured and one child was killed. In *Sisler*, unlike *Chhuth*, the death to one child and the injuries to the others were caused by the children's mothers negligence, not a third party. Further, in *Sisler*, unlike the *Chhuth* case, the children's father and mother were divorced. Due to the deaths at issue and the divorce, there is no parental authority or familial tranquility to preserve, the *Sisler* court allowed the plaintiffs to proceed with their wrongful death and personal injury actions against the mother's estate. *Sisler*, 23 Wn. App. at 614.

Similar to *Sisler*, in this case there is no contribution claim and no allegation that Ashley's death was caused by a third party. Her death was caused by her stepfather, the defendant. Further, consistent with *Sisler* but distinct from *Chhuth*, it is significant that Ashley's mother divorced Ashley's stepfather. Unlike the situation in *Chhuth*, when Ashley Zellmer

died, there was no longer any familial harmony or parental authority to preserve either between Ashley and her stepfather or between Ashley's mother and her stepfather.

Accordingly, this court should follow the reasoning applied in *Sisler*. Specifically, that with the death at issue the family unit was severed and, therefore, the rationale justifying application of parental immunity does not exist. Parental immunity should have no application in the context of wrongful death actions generally and under the facts of this case specifically. It is unreasonable that the defendant, no longer part of the decedent's family unit, should be allowed to escape civil accountability for the part he played in causing her death.

**C. Parental Immunity Should Not Prevent a Child From Civil Redress for Injuries When the Family Unit That the Doctrine Was Intended to Protect Ceased to Exist.**

Because family harmony, tranquility and parental authority, the reasons justifying application of parental immunity, did not exist in this case, immunity cannot be applied. When the reasons justifying application of parental immunity do not exist, "the mantle of immunity disappears" and immunity should not be provided. *See, Borst v. Borst*, 41 Wn.2d 642, 657, (1952); accord, *Hoffman v. Tracy*, 67 Wn.2d 31, 37 (1965).

As argued by the defendants at the trial court level in their summary judgment motion, CP 19, the primary purpose behind parental immunity is to preserve tranquility within the family. See, *Roller*, 37 Wn.2d at 243, 244. In this case, by the time 3- year old Ashley died, there was no longer any “family tranquility” to preserve. In fact, even before Ashley’s death, family harmony and family stability did not exist. The marriage was a sham. Ashley’s mother entered into the marriage not because of feeling of love and devotion to the defendant, but because he had deceived her with various stories, and because she did not want her child to be born out of wedlock. CP 69. The marriage lasted only 88 days and was marred by constant conflict and the defendant’s physical and emotional abuse of the decedent’s mother, CP 69-70, as well as his unkind treatment of 3-year old Ashley. CP 71. The defendant himself filled out papers to divorce Ashley’s mother prior to her death. CP 70. Before this wrongful death action was filed, Stacey Zellmer had filed divorce proceedings against the defendant. CP 70. Her divorce action proceeded after summary judgment was argued in this case. *In Re: Zellmer v. Zellmer*, 04-3-12165-9 KNT.

If the basis upon which to apply parental immunity is an attempt to preserve family harmony, that basis is wholly absent in this case. In fact, none of the rationales traditionally used to justify imposition of the

parental immunity doctrine are present in this case. Accordingly, because the reasons supporting parental immunity do not exist, parental immunity should not be applied to protect the defendant in this case.

**D. Parental Immunity Does Not Apply to the Defendant  
Because He Was the Decedent's Stepparent:**

The issue of whether or not parental immunity should be expanded to encompass stepparents has not previously been decided in Washington. RP 3, CP 19. At summary judgment the trial court in this case did not provide any analysis or authority and as to why parental immunity ought to be expanded. Instead, the trial court flatly declared that if a marriage occurs, parental immunity applies. RP 9. However, the trial court's declaration is contrary to the law in jurisdictions that have addressed the issue, and is contrary to the requirement that determinations of whether parental immunity applies must be determined by looking to the facts of each particular case. See, *Merrick v. Sunderland*, 93 Wn.2d at 415 (1980).

The law generally, in jurisdictions that still recognize parental immunity, is that parental immunity does not apply to shield stepparents from suits for negligence brought by stepchildren. See e.g., *Warren v. Warren*, 336 Md. 618, 629 650 A.2d 252 (1994) ("We also decline to extend parent-child immunity to protect stepparents, regardless of whether they stand *in loco parentis* to the injured child"). *C.M.L. v. Republic*

*Services, Inc.*, 800 N.E.2d 200 (Ind. App. 2003) (“For the reasons stated herein, we decline to extend parental immunity doctrine to apply to stepparents”); *Rayburn v. Moore*, 241 So.2d 675, 676 (Miss. 1970) (refusing to extend parent-child immunity to stepparents); *Xaphes v. Mossey*, 224 F. Supp. 578, 579 (D.C. Vt. 1963) (no parental immunity for stepparent in negligence claim regardless of whether stepparent was *in loco parentis*).

Allowing children to secure redress for injuries caused by stepparents is consistent with the national trend limiting the circumstances under which parental immunity will be applied. Additionally, following the immunity exception applicable to injury caused by stepparents is consistent with the recognition that the law frequently treats stepparents differently than natural parents. See e.g. *Harmon v. DSHS*, 134 Wn.2d 523, 951 P.2d 770 (1998) (stepparent not chargeable with family expenses related to stepchild even though under same circumstances natural parent would be). That is especially true in this case where the defendant was only the decedent’s stepfather for 88 days.

Since the doctrine of parental immunity first appeared in Washington courts some 100 years ago, this state has consistently narrowed the circumstances under which the doctrine can be applied. This court should not reverse that trend. This court should follow those

jurisdictions that have already recognized that parental immunity should not be applied to prohibit children from seeking redress for injuries caused by the negligence of a stepparent. Determinations of whether or not a stepparent is liable for negligently causing injury to a child should be determined based on the same principles of duty and breach that apply in other areas of personal injury law.

1. The defendant did not stand *in loco parentis* to the decedent when this action was filed and, therefore, parental immunity cannot apply:

In the event this court considers expanding application of the doctrine of parental immunity to prevent children from redress for injury caused by a stepparent, immunity would still be inapplicable in this case because the defendant did not have an *in loco parentis* relationship with the decedent. No court in any state has extended parental immunity to a stepparent without a finding that the stepparent stood *in loco parentis* to the child. *Warren v. Warren*, 336 Md. 618 at fn.3.

*In loco parentis*, in its plainest sense, means, “instead of a parent”. *State ex. rel. Gilroy v. Superior Court*, 37 Wn.2d 926, 933, 226 P.2d 882 (1951). Despite the trial court’s assertion in this case, an *in loco parentis* relationship with a stepchild does not exist as soon as a marriage ceremony occurs. Actually attaining *in loco parentis* status involves more and requires something in addition to taking a child into your home and

providing limited financial support. *In re Montell*, 54 Wn. App. 708 (1989): *see e.g.*, *In re Marriage of Allen*, 28 W. App. 637 (1981) (stepmother who *devotedly* provided for, encouraged and otherwise raised deaf stepson from age 3 on, and who was solely responsible both for child and all family members learning to sign so child could communicate with family, found to have reached *in loco parentis* status).

A determination of whether an *in loco parentis* relationship exists is made “at the time the action was filed and thereafter”. *Morris v. Brooks*, 186 Ga. App. 177,179, 366 S.E. 2d 777 (1988) (“Where there is a change in status in the relationship between the parties in the interval between the tortious act and the filing of the action, the time of filing governs. The object of preserving family harmony does not control where there is no family status at the time of filing of the action”).

Here, there is no question that at the time this action was filed, the defendant did not stand *in loco parentis* to Ashley. Not only was the 3-year old victim in this case deceased, but even prior to the time this wrongful death action was filed, Ashley’s mother had separated from the defendant and was proceeding with divorce.

- a. Regardless of the time, the defendant did not ever stand *in loco parentis* to the decedent child:

Regardless of when the relationship between Ashley and the defendant is examined, the defendant never attained *in loco parentis* status with Ashley. The defendant held the status of being Ashley's stepparent for 88 days. CP 68-69. The defendant's financial contribution to Ashley was limited at best. CP 71. Ashley's daily personal and financial needs were met by her mother and her biological father. CP 71, CP 62-64. Ashley had a close relationship with her biological father. CP 62-64, CP 67-68. Although Ashley and her mother stayed at the defendant's residence for sustained periods when her mother was married to him, Ashley spent significant periods where she resided elsewhere. Ashley regularly stayed with her biological father. CP 63. In addition, when the defendant was abusive to Ashley's mother, Ashley and her mother lived with Ashley's paternal grandparents. CP 69-70.

In addition to a lack of major financial support, the defendant did not stand "instead of a parent" with Ashley in any emotional sense. On at least one occasion he referred to 3-year old Ashley as "a little bitch." CP 66. Ashley alleged that the defendant had pushed her down some stairs. CP 82. The defendant was not allowed to discipline Ashley. CP 71. Ashley was uncomfortable around him, and he was impatient with her and

intimidated her. CP 71. The defendant apparently was not even aware of Ashley's death until informed by her grandfather the day after she had died. CP 61. Further, weeks later, during a long conversation with a former girlfriend about the status of his life, the defendant never even mentioned that Ashley had died recently in his pool. CP 58. In a subsequent conversation when he did bring Ashley's death up, the defendant didn't appear to be bothered by Ashley's death, although he seemed irritated by the way Ashley's mother was treating him in reaction to the death. CP 59.

In summary, the consistent trend in courts throughout the country has been to abolish or restrict application of the parental immunity doctrine, not to expand it. Parental immunity in Washington should not be expanded to prevent children from seeking civil redress for injuries they suffer due to negligence by a stepparent. Further, even if this court expands parental immunity to shield stepparents, no jurisdiction has allowed parental immunity to apply to a stepparent without the stepparent first having attained *in loco parentis* status. The defendant in this case did not stand *in loco parentis* to Ashley McLellan.

**E. Parental Immunity Does Not Apply in this Case Because the Defendant Was Not Acting in a “Parental Responsibility” at the Time Death to the Child Occurred:**

A genuine issue of material fact exists as to whether or not the defendant “temporarily abdicated” any parental authority he may have had at the time death occurred in this case. Accordingly, it was an error for the trial court to grant the defendant’s motion for summary judgment.

The court must deny a motion for summary judgment if the record shows any reasonable hypothesis that entitles the non-moving party to the relief they seek, i.e. denial of summary judgment. *Mostrom v. Pettibone*, 25 Wn. App. 158, 162 (1980). Summary judgment is appropriate only if, after considering all of the evidence and the inferences from the evidence in a light most favorable to the non-moving party, reasonable people could reach only the conclusion that no genuine issue of material fact exists. *See, McKee v. American Home Products*, 113 Wn.2d 701, 705 (1989); and *see, Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 256-57, 616 P.2d 644 (1980) (summary judgment is not appropriate when reasonable minds might reach different conclusions).

In making the determination of whether the moving party met its burden to establish that no genuine issue of material facts exists, the court

must hold the moving party to a strict standard, and any doubts as to the existence of a genuine issue of material fact are resolved against the moving party. *See, Atherton Condominium Ass'n v. Blume Development Co.*, 115 Wn.2d 506, 516 (1990) (citation omitted). Further, rather than attempting to decide the merits of factual disputes, the court should limit its inquiry in summary judgment proceedings to a determination of whether any genuine issues of material fact exist. *See, Balise v. Underwood*, 62 Wn.2d 195, 200 (1963).

In Washington, parental immunity will not apply to a parent/tortfeasor unless, at the time injury occurs, the parent was discharging a parental duty. *See, Hoffman v. Tracy*, 67 Wn.2d 31 (1965); *Borst v. Borst*, 41 Wn.2d 642 (1952).

*Hoffman* involved a mother who injured her child when driving while intoxicated. The *Hoffman* court noted that, even if she had been driving for a family purpose, parental immunity did not apply because, by driving while intoxicated, she had temporarily stepped outside her parental responsibilities. Similarly in *Borst*, where a parent struck his child while driving a work truck, the court ruled parental immunity did not apply because at the time of injury the parent was engaged in a business activity, not a parental obligation. Both cases relied on a rationale that parent-child immunity only applies when injury occurs while a parent is acting within

the scope of parental duty - engaged in providing such things as food, clothing, housing, medical and dental services and 'other care' related to a legal obligation. See also, *Thoreson v. Milwaukee & S. Transport Corp.*, 56 Wis.2d 231, 246-247 201 N.W. 2d 745 (1972).

Here, it appears the defendant was asleep and had not seen Ashley for some time before the 3-year old child drowned. CP 27, CP 58, CP 71-72.

Just as the courts in *Hoffman* and *Borst* found that a parent who was either intoxicated or working was not acting within the parameters of parental responsibility for purposes of applying parental immunity, the defendant was likewise not acting within the parameters of parental responsibility when he was sleeping.

A genuine issue of material fact exists as to whether or not the defendant was engaged in a parental responsibility when his conduct caused Ashley McLellan's death. Accordingly, parental immunity should not apply to the defendant in this case, and the trial court's order granting summary judgment should be reversed.

**F. Parental Immunity Does Not Apply in This Case  
Because the Defendant's Conduct Was Willful and  
Wanton:**

Because there was a genuine question of material fact as to whether the conduct the defendant engaged in that resulted in Ashley's death was "willful and wanton", summary judgment was improper.

The doctrine of parental immunity will not preclude liability if parental negligence can be said to constitute willful and wanton conduct. *Jenkins v. Snohomish County Pub. Utility Dist. No 1*, 105 Wn.2d 99, 105-106 (1986); *Livingston v. Everett*, 50 Wn. App. 655 (1988). "The doctrine of parental immunity does not protect a parent who has willfully or wantonly failed to watch over his or her child." *Foldi v. Jeffries*, 93 N.J. 533, 547, 461 A.2d 1145 (1993) (relied on in *Jenkins*, supra.)

Willful and wanton conduct,

"falls between simple negligence and an intentional tort. It is sufficient that the actor 'know' or has reason to know, of circumstances which would bring home to the realization to the ordinary reasonable person the highly dangerous character of his conduct".

*Jenkins* at 106.

In *Jenkins*, the parents of the 7-year old decedent brought action against a power company that owned a substation where the decedent was playing when electrocuted. The power company claimed the Jenkins'

were contributorily negligent because they negligently supervised their son.

The *Jenkins* court noted that there is a point at which parental neglect rises to the level of willful and wanton misconduct. *Id.* at 105. In examining whether or not the Jenkins' neglect reached the willful and wanton stage, the court concluded that because:

[Decedent's father] had seen Jonathan [the decedent] *within a few minutes* of the accident. He regularly kept track of Jonathan's comings and goings, watched him cross the street, generally knew where he was and knew that when he was playing with Lance at Lance's mother's store, there was parental supervision. There is no evidence that [decedent's parents] knew of the existence of the power substation or knew that Jonathan had ever been there before or on the day of the accident. No evidence exists that the Jenkins were reckless or *indifferent* with regard to Jonathan's welfare or that there was wanton or willful misconduct by them with regard to supervision of Jonathan either in general or in this particular instance.

*Id.* at 106 (emphasis added).

In the case now before the court, the defendant's conduct was of a substantially different character than that of Jonathan Jenkins' parents.

Unlike the parents in *Jenkins*, whose 7-year old was only out of sight for a few minutes, the defendant apparently hadn't seen 3-year old Ashley for most of the evening when she died. CP 56.

Of even greater significance, the defendant, unlike the parents in *Jenkins*, knew of the dangerous condition his pool posed to young

children. He was aware Ashley could not swim. CP 73. A few months before Ashley died in the pool, another child under Mr. Zellmer's sole supervision almost drowned in the pool when he lost track of that child while he had been cutting wood. CP 58. In addition, Mr. Zellmer was subsequently warned that, without fencing, the pool created a dangerous condition for children. CP 59.

*Livingston v. Everett*, 50 Wn. App. 655, 751 P.2d 1199 (1988), is similar to the case at hand. In *Livingsnton*, the mother of a 4-year old child sent her son into a neighbor's living room apparently unaware two Doberman Pincher dogs were in the room. Within a minute the dogs began biting the boy. The boy, through his guardian, brought a negligent action for his injuries. The defendants counterclaimed that the boy's injuries were the result of his mother's negligent supervision. The Court of Appeals refused to apply parental immunity to the counterclaim, finding that there was a genuine issue of material fact as to whether or not the boy's mother "knew or had reason to know of circumstances informing a reasonable person of the highly dangerous character of his conduct." *Livingston*, 50 Wn. App. at.660. In short, the court felt that a material question existed as to whether or not the boy's mother's negligence had risen to a level that could be characterized as willful and wanton. *Id.* Specifically the court noted that, under the circumstances, a

reasonable person would know that it would be highly dangerous to leave a 4-year old child unsupervised with two strange dogs. *Id.* The same reasoning applies in this case.

Knowing that 3-year old Ashley could not swim, CP 73, and knowing from previous experience that if he failed to watch small children at his house they might wander into the unfenced pool area and drown, a reasonable person in the defendant's position would know it was highly dangerous to give the 3-year old child unobstructed access to pool and to just go to sleep<sup>5</sup>.

Because there is a genuine issue of material fact as to whether the defendant's conduct in this case exceeded simple negligence and reached willful and wanton misconduct, the trial court's order granting summary judgment should be reversed.

## VI. CONCLUSION

The doctrine of parental immunity should be abolished in Washington. There is no evidence that there has been an increase in the demise of the traditional nuclear family in jurisdictions that have abolished

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<sup>5</sup> When the reasonableness of a party's actions is a question of fact, and when that question "is a material issue in resolving the litigation," the granting of a summary judgment is improper. *Morris v. McNicol*, 83 Wn.2d 491 (1974). Similar to the *Morris* case, the status of Mr. Zellmer's conduct (whether it was willful and wanton) is a question of fact, and that question is a material issue in resolving the litigation. Accordingly, granting summary judgment was improper.

parental immunity. Nor is there any evidence that Washington's abrogation of parental immunity in automobile negligence cases has had a detrimental effect on "family tranquility" or "parental authority." Whether a parent should be liable for injuries they cause to children due to parental negligence should be determined by traditional tort concepts.

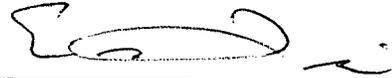
In the event this court is reluctant to abolish parental immunity in its entirety, the court should recognize exceptions to immunity in this case either because the child at issue is deceased, or because, before this wrongful death action was filed, the family unit at issue had been dissolved.

If the court applies immunity, it should not expand immunity for the first time in Washington to shield stepparents from liability for their negligence. If this court expands the doctrine to encompass stepparents, the doctrine is still inapplicable in this case because the defendant did not stand *in loco parentis* with 3-year old Ashley McLellan.

Finally, the order issued by the trial court granting summary judgment should be reversed because genuine issues of material fact exist as to whether or not the defendant had temporarily abdicated parental responsibility when Ashley McLellan died, and, whether or not the

defendant's negligence rises to a level constituting "willful and wanton" misconduct.

DATED this 6<sup>th</sup> day of June, 2005.



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