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SUPREME COURT NO. _____
COURT OF APPEALS NO. 554735-I

IN THE SUPRME COURT OF THE STATE OF WASHINGTON

**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,**

Petitioner/Appellant,

Vs.

JOEL ZELLMER,

Respondent.

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**ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR KING COUNTY
The Honorable Brian Gain, Judge**

PETITION FOR REVIEW

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A. Identity of Petitioners

The petitioners are Ms. Stacey Zellmer, individually and as Co-Personal Representative of the Estate of Ashley Cay McLellan; and Mr. Bruce McLellan, individually and as Co-Personal Representative of the Estate of Ashley Cay McLellan,

B. Citation to the Court of Appeals Decision

The petitioners seek review of the decision filed by Division One of the Washington State Court of Appeals filed on May 1, 2006. A copy of this decision, which is published, is appended to this petition.

C. Issues Presented for Review

1. Whether, after crafting numerous exceptions to its application, Washington should join those states that have abolished the doctrine of parental immunity altogether.

2. If the doctrine of parental immunity is allowed to survive, whether parental immunity should be applied even though the child at issue is deceased and the child's mother and stepparent are divorced and the "family unit" parental immunity was designed to protect ceased to exist.

3. Whether Washington should, for the first time, expand application of the doctrine of parental immunity to stepparents so that a

child would be prohibited from seeking civil redress for injuries or death caused by that stepparent.

4. If the doctrine of parental immunity is expanded to include stepparents, whether a stepparent can attain *in loco parentis* status even though they do not evidence the intent to stand in the place of the child's parent.

5. If the doctrine of parental immunity is expanded to include stepparents, so long as the stepparent has attained *in loco parentis* status, as is advocated by the Court of Appeals, whether *in loco parentis* status can be granted a stepparent even though at the time the lawsuit at issue is filed, the stepparent did not stand *in loco parentis* to the child at issue.

6. 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.

D. Statement of the Case

The petitioners, 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. Ashley was 3 years old in December of 2004 when she died from drowning. CP 5. The defendant, Joel Zellmer, was married to Stacey Zellmer at the time of

Ashley's death. CP 70. Stacey Zellmer divorced the defendant shortly after Ashley's death, and the petitioners filed a wrongful death action against the defendant. CP 70, *In re Zellmer v. Zellmer*, 04-3-12165-9 KNT.

The History of the Zellmer Marriage: In May of 2003, more than a year after Stacey had divorced Ashley's father, 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 married. CP 68.

Following the marriage, Stacey and Ashley began to stay with the defendant at his residence. CP 7. The marriage was marked by constant turmoil. CP 69. The defendant was physically abusive to Stacey. CP 69. The defendant treated 3-year old Ashley in an intimidating manner. CP 71. As a result, Stacey separated from the defendant for various periods during the parties' 88-day marriage and, when separated, she and Ashley moved in with Stacey's parents. CP 69-70, 72.

The defendant's swimming pool and Ashley's death: An in-ground swimming pool was located approximately 50 feet from the back door of the defendant's residence. CP 72. Nine months before 3-year old Ashley began staying at the defendant's residence, another small child nearly drowned in the defendant's swimming pool while under the

defendant's sole care and supervision. CP 58. Subsequently, the defendant received a warning 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 was aware that Ashley could not swim when she and Stacey began staying with the defendant at his residence. CP 76.

Although the defendant did not take any safety precautions regarding the pool, within days of marrying Stacey, he arranged for the purchase of a life insurance policy, insuring 3-year old Ashley's life in the event of her accidental death. CP 28, 72, 74, 75. The defendant named himself as a co-beneficiary under the policy. CP 72.

Shortly before Thanksgiving 2003, the defendant 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 the defendant's residence. CP 70.

On December 3, 2003, Ashley was home from daycare because she was ill. CP 72. Stacey asked the defendant to supervise 3-year old Ashley while she was at work. CP 72. He agreed. CP 72.

That night, approximately six hours after Stacey left for work, Ashley was found floating unconscious in her pajamas outside 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 by an undeveloped wooded area. CP 72, CP 74, 75 and 76.

After Ashley was found in the defendant's pool, Stacey Zellmer never returned to the defendant'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. The trial court granted the defendant's motion for summary judgment and suggested the decision be appealed. RP 5. The petitioners appealed. The Court of Appeals upheld the trial court's ruling on summary judgment.

E. Argument

- 1. The Court of Appeals should have ruled that the Doctrine of Parental Immunity in Washington should be abolished.**

The doctrine of parental immunity, which prohibits children who have been injured or killed due to parental negligence from seeking any civil redress for their injuries, is based on an anachronistic doctrine of public policy, without a basis in either statute or English common law, and

the Court of Appeals should have determined that the doctrine should be abolished.

The Supreme Court has the legal authority to abolish the doctrine of 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 interspousal 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").

Parental immunity is strictly a creation of the American judiciary. The doctrine's origin in Washington can be traced to *Roller v. Roller*, 37 Wn. 242, 79 P. 788 (1905); see also *Merrick v. Sutterlin*, 93 Wn.2d 411 (1980) (outlining a history of the doctrine).

In *Roller*, the court prohibited a minor from proceeding with a civil suit against her father for injuries she suffered after her father 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 would disrupt “harmony in domestic relations.”

Societal attitudes clearly have changed since the *Roller* decision. For the past 30 years the doctrine of parental immunity has been consistently criticized in American jurisprudence¹. Furthermore, although the original rationale justifying application of parental immunity survives in Washington, the doctrine has been significantly criticized. See, *Merrick v. Sutterlin*, 93 Wn.2d 411, 413-414 (1980) (noting the “trend in modern cases is to limit or entirely abolish parental immunity” *Id.* at 414 and describing the rationale in *Roller* as “unreal”); see also, *Borst v. Borst*, 41 Wn.2d 642 (1952); but see, *Jenkins v. Snohomish County Pub. Utility Dist. No 1*, 105 Wn.2d 99, 105 (1986).

Rather than abolish the doctrine, Washington courts have attempted a compromise of sorts by crafting various exceptions to the

¹ *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).

circumstances under which immunity will be applied². Unfortunately, the creation of numerous exceptions to the doctrine's application, rather than simply abolishing the doctrine, has resulted in both inconsistent application of the doctrine and in decisions relying on parental immunity that are at odds with other areas of the law.

For example, in Washington, a child injured when a parent negligently operates an automobile can sue the parent for negligence, but a child injured when that same parent negligently exposes the child to an obviously dangerous condition cannot sue the parent for 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 for injuries caused by negligence, but a child in that same family who is injured in the same

² See, *Borst v. Borst*, 41 Wn.2d 642 (1952) (court refused to apply parental immunity where injuries to child occurred when parent was engaged in the course of his or her employment); *Hoffman v. Tracy*, 67 Wn.2d 31 (1965) (parental immunity does not apply to injuries resulting from conduct constituting a temporary abdication parental responsibility); *Livingston v. Everett*, 50 Wn. App. 655, 751 P.2d 1199 (1988) (parental immunity does not apply when parental conduct resulting in injury to child was "willful and wanton"); *Sisler v. Seberger*, 23 Wn. App. 612, 596 P. 2d 1362 (1979) (Div 3 holding that parental immunity did not apply when tortfeasor parent died, thereby terminating the family unit.); *Merrick v. Sutterlin*, 93 Wn.2d 411, 413-414 (1980) (parental immunity does not apply to injuries resulting from parents negligent operation of car).

way by that same parent is prohibited from bringing suit to recover for her injuries unless the injuries were willfully caused. 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, while an illegitimate child can proceed with a civil suit for damages to secure financial support from his or her putative father, *Kuar v. Chawla*, 11 Wn. App. 363, 522 P. 2d 1198 (1978), a child needing financial redress for injuries caused even by the gross negligence of that same parent cannot proceed with a civil suit. *Jenkins v. Snohomish County Pub. Utility Dist. No 1*, 105 Wn.2d 99,105 (1986).

There is no evidence that Washington's abrogation of parental immunity in automobile negligence cases has had a detrimental effect on "family tranquility," "parental authority" or ensuring that parents "retain discretion in performing their parental duties". Whether an injured child can secure redress for injuries they suffer due to the negligence of another should be determined under general tort law principles and should not depend on the status of the various parties.

Because the question of whether or not the doctrine of parental immunity should be abolished involves an issue of substantial public interest, this court should grant review under RAP 13.4(b)(4).

2. Despite the Holding in *Sisler v. Seeberger*, 23 Wn. App. 612, 615, 596 P.2d 1362 (1979), the Court of Appeals in this case applied the Doctrine of Parental Immunity even though the child at issue is deceased and the family unit immunity was intended to protect no longer existed.

Even if this court determines there is no need to review whether or not the doctrine of parental immunity should be abolished, review is necessary because the decision of the Court of Appeals conflicts with *Sisler v. Seeberger*, 23 Wn. App. 612, 615, 596 P.2d 1362 (1979), a Division Three case. Parental immunity should not apply when the child at issue is deceased. In addition, it is error to apply the doctrine when the family unit the doctrine was created to protect, no longer exists. See, *Borst v. Borst*, 41 Wn.2d 642, 657, (1952); *Hoffman v. Tracy*, 67 Wn.2d 31, 37 (1965).

In *Sisler*, the court allowed a negligence action on behalf of a deceased child against her mother to proceed. In allowing the suit to proceed, the *Sisler* court noted that

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 in cases where child died due to negligent supervision by mother).

Instead of following the *Sisler* case, the Court of Appeals here relied on a factually distinguishable case, *Chhuth v. George*, 43 Wn. App. 640 (1986), which indicates that in a contribution claim, the mere fact that a child is deceased does not prohibit application of the parental immunity doctrine.

Because the decision of the Court of Appeals is in conflict with another Court of Appeals decision, this court should accept review pursuant to RAP 13.4(b)(2).

In addition, when the family unit that parental immunity was designed to protect ceases to exist before a lawsuit is filed against a (step)parent for negligence, it was error for the Court of Appeals to apply the doctrine of parental immunity. *Hoffman v. Tracy*, 67 Wn.2d 31, 37

(1965) (once the rationale justifying application of the doctrine ceases to exist, the doctrine will not apply).

Because the issue of whether parental immunity should apply although the rationale justifying imposition of the doctrine, preservation of the family unit, has ceased to exist, involves an issue of substantial public interest, this court should grant review. RAP 13.4(b)(4).

3. The Court of Appeals mistakenly expanded the Doctrine of Parental Immunity when, for the first time in Washington, it ruled that the doctrine applied to stepparents.

The issue of whether or not parental immunity should be expanded to shield stepparents from negligence actions has not previously been decided in Washington. The Court of Appeals mistakenly expanded application of the doctrine to shield stepparents, thereby reversing the trend in Washington these past 50 years towards narrowing the circumstances under which the doctrine can be applied.

The law generally, in jurisdictions that continue to 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*).

Additionally, prohibiting application of immunity to stepparents is consistent with the recognition that the law on occasion 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).

Because the issue of whether or not parental immunity should be applied to stepparents has not previously been decided in Washington, this petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

4. The Court of Appeals was in error in its determination of what is necessary for a stepparent to attain *in loco parentis* status, and was likewise mistakenly in holding that the defendant stood *in loco parentis* to the decedent child in this case.

In an effort to limit their expansion of the parental immunity doctrine, the Court of Appeals determined that the doctrine can be expanded to include stepparents, but only so long as the stepparent stands *in loco parentis* to the injured child. The Court of Appeals then mistakenly determined that a stepparent attains *in loco parentis* status with a child merely by virtue of the fact that the stepparent has a financial obligation for the child. *Zellmer v. Zellmer*, p. 5, No. 55473-5-1 (Div. One, 5-1-06). Likewise, the Court of Appeals mistakenly determined that the defendant stood *in loco parentis* to 3-year old Ashley in this case³.

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). Contrary to the Court of Appeals’ assertion, actually attaining *in loco parentis* status involves more and requires something in addition to

³ In this case, the trial court never determined whether the defendant had reached *in loco parentis* status, instead declaring that such a finding was unnecessary because “either there is a legal doctrine of parental immunity or [there is] not. Either it applies or it doesn’t apply”. RP 4.

simply taking a child into your home and providing for limited financial support. See, *In re Montell*, 54 Wn. App. 708 (1989) (court found some subjective intent on part of stepparent was required before *in loco parentis* status was attained): see e.g., *In re Marriage of Allen*, 28 Wn. 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).

Before finding that a stepparent should be granted *in loco parentis* status, the stepparent is required to demonstrate an intent to act as a parent would a child.

Here, it was error to conclude that the defendant stepparent evidenced the intent necessary to reach *in loco parentis* status in regard to 3-year old Ashley. In point of fact, during his 88-day marriage to Ashley's mother, the defendant did not provide financial support for Ashley; she was supported financially by her mother and biological father, Bruce McLellan. CP 68, CP 71. Ashley had a close relationship with her biological father. CP 62-64, CP 67-68. Ashley regularly stayed with her biological father. CP 63. The defendant did not attend to Ashley's everyday needs, CP. 71, and did not fulfill the "standard" parental duties such as disciplining Ashley. CP 71. Ashley did not refer to the defendant

as though he were her parent. CP 70. The defendant referred to 3-year old Ashley using derogatory terms. CP 66. Ashley herself had reported that the defendant had treated her poorly by pushing her down some stairs. CP 82 and Exhibit to Declaration of Bruce McLellan, CP 62-64. The defendant here did not demonstrate the subjective intent necessary to attain *in loco parentis* status.

To resolve the apparent conflict between the subjective intent requirement in *In re Montell*, 54 Wn. App. 508 (1989), and the Court of Appeals' determination that no such requirement is necessary for a stepparent to attain *in loco parentis* status with a child, review is proper in this case. RAP 13.4(b)(2). In addition, the issue of what type of conduct is sufficient to establish an *in loco parentis* relationship is an issue of substantial public interest that should be decided by this court. RAP 13.4(b)(4).

5. The Court of Appeals erred when it failed to recognize that for purposes of applying parental immunity to stepparents, *in loco parentis* status, is determined at the time the lawsuit at issue is filed.

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”).

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 3-year old Ashley deceased at the time petitioners filed their lawsuit, but prior to the time the action was filed, the defendant and Ashley’s mother had legally separated, their divorce action was proceeding, and they were residing separately.

Because the Court of Appeals ruled for the first time in Washington that parental immunity should be expanded to include stepparents, the issue of when, in regard to stepparents, a determination of *in loco parentis* status is attained involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

F. CONCLUSION

For several decades our courts have created exceptions to limit the circumstances under which parental immunity ought to apply. In this case, the petitioners raise the question of whether the doctrine of parental immunity should be abolished in Washington. Because the petitioners’ question involves an issue of substantial public interest that should be

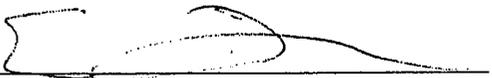
determined by this court, the petitioners' request for review should be granted.

Because the Court of Appeals' decision conflicts with *Sisler v. Seeberger*, 23 Wn. App. 612, 615, 596 P.2d 1362 (1979), review is proper under RAP 13.4(b)(2).

The petitioners are asking this court to determine for the first time in Washington whether or not the doctrine of parental immunity should be expanded to include stepparents. Because that question presents an issue of substantial public interest, the answer should be determined by the Supreme Court. RAP 13.4(b)(4).

When the Court of Appeals determined that parental immunity will only apply to stepparents so long as the stepparent stands *in loco parentis* to the child at issue, several issues of substantial public interest, such as what is necessary for a stepparent to reach *in loco parentis* status, when *in loco parentis* status should be determined, should be determined by the Supreme Court. RAP 13.4(b)(2)(4).

RESPECTFULLY SUBMITTED this 30th day of May, 2006.


ERIC W. LINDELL WSBA# 18972
Attorney for Petitioners

About 30 or 40 minutes later, Joel found Ashley floating in the swimming pool in the backyard. He performed CPR until paramedics arrived, but Ashley died two days later.

The Zellmers' marriage ended soon after Ashley's death. Stacey Zellmer and Ashley's father, Bruce McLellan, sued Joel Zellmer for wrongful death, alleging negligent supervision, negligent infliction of emotional distress, willful or wanton misconduct, outrage, and breach of contract. The trial court dismissed all claims on summary judgment, ruling as to the negligence claims that Zellmer was entitled to the protection of the parental immunity doctrine.

ANALYSIS

With certain exceptions, parents and guardians are generally immune from liability to their children for injuries caused by negligent supervision.¹ The doctrine of parental immunity originated to "preserv[e] harmony in domestic relations,"² and its purpose has been variously described as "maintaining family tranquility, fear of undermining parental control and authority, an interest in assuring that family property be shared by all rather

¹ Baughn v. Honda Motor Co., 105 Wn.2d 118, 119, 712 P.2d 293 (1986); Cox v. Hugo, 52 Wn.2d 815, 820-21, 329 P.2d 467 (1958). A parent is not immune where a failure to supervise amounts to willful or wanton misconduct, Jenkins v. Snohomish County Public Utility District No. 1, 105 Wn.2d 99, 106, 713 P.2d 79 (1986), where the child is injured as a result of a parent's negligent driving, Merrick v. Sutterlin, 93 Wn.2d 411, 416, 610 P.2d 891 (1980), or where the parent is not acting in a parental capacity at the time of injury. Hoffman v. Tracy, 67 Wn.2d 31, 38, 406 P.2d 323 (1965) (mother abdicated parental responsibility by driving while intoxicated); Borst v. Borst, 41 Wn.2d 642, 251 P.2d 149 (1952) (father not acting in parental capacity when driving truck in the course of his business).

² Roller v. Roller, 37 Wash. 242, 243, 79 P. 788 (1905) (overruled by Borst to the extent that parents are not immune from injuries due to willful or wanton misconduct).

than appropriated by one family member, fear of collusion and fraud, and a view of the parent-child relationship as analogous to the husband-wife relationship.”³

The Washington Supreme Court has expressly rejected most of these rationales, holding that the doctrine is grounded not on a need to preserve family tranquility or avoid fraud, but solely on the need for discretion in performing parental duties:

Parenthood places a grave responsibility upon the father and mother. It is their duty to rear and discipline the child. In rearing the child, the parents must provide a home and perform tasks around the home and on the premises. In most cases, it is necessary or convenient to provide a car for family transportation. In all the family activities, the parents and children are living and working together in close relationship, with neither the possibility of dealing with each other at arm’s length, as one stranger to another, nor the desire to so deal. The duty to discipline the child carries with it the right to chastise and to prescribe a course of conduct designed for the child’s development and welfare. This in turn demands that the parents be given a wide sphere of discretion.

In order that these parental duties may adequately be performed, it is necessary that the parents be not subject to the risk of suit at the hands of their children. If such suits were common-place, or even possible, the freedom and willingness of the father and mother to provide for the needs, comforts and pleasures of the family would be seriously impaired. Public policy therefore demands that parents be given immunity from such suits while in the discharge of parental duties.^[4]

Initially, appellants urge us to follow the trend in other jurisdictions and abolish the parental immunity doctrine. Our Supreme Court has, however, declined to go so far, directing instead that the doctrine be reviewed on a case by case basis.⁵ Appellants also point out that the trend has been to narrow the scope of parental immunity. But the

³ Carey v. Reeve, 56 Wn. App. 18, 21, 781 P.2d 904 (1989) (quoting Jenkins v. Snohomish County Public Utility Dist. No. 1, 105 Wn.2d 99, 104, 713 P.2d 79 (1986)).

⁴ Borst, 41 Wn.2d at 656 (cited with approval in Merrick, 93 Wn.2d at 413 (“In an exhaustive opinion, . . . this court examined and renounced most of the policy considerations advanced by the cases to justify the doctrine of immunity. We approve of that analysis.”)).

⁵ See Merrick, 93 Wn.2d at 416.

doctrine's reach has thus far been limited in Washington only by the types of parental behavior it protects, not by the parties to whom it applies. Washington thus continues to recognize immunity from suit for parents performing parental duties such as supervision. The question, therefore, is whether the doctrine applies to stepparents performing parental duties.

It is difficult to see why a stepparent living with a child and performing parental duties does not require the same wide sphere of discretion as a legal parent. Indeed, the "freedom and willingness" of a stepparent to provide for the child may be more in need of protection, given that a stepparent's obligation to the child derives only from the circumstance of marriage. In one of the earliest cases to address this question, the Minnesota Supreme Court observed as follows:

If a stepfather has voluntarily assumed all the obligations and beneficent attitudes of a natural parent toward an unemancipated minor child, it is difficult to understand why he should be denied any of the immunities from suit accorded for reasons of public policy to a natural parent. The California supreme court in Trudell v. Leatherby, 212 Cal. 678, 683, 300 P.7, 9, pointed out that:

"The same vexatious conditions created in the family circle by litigation between parent and child, would result from like litigation instituted by a minor against the stepfather or stepmother when the minor has been taken into and is a member of the household of the latter. We can see no good reason why we should apply the rule in one case and deny its application in the other. . . ."

Clearly, the interests of society require peace and discipline in a home presided over by a faithful and devoted stepparent as well as in a natural home.^[6]

⁶ London Guarantee & Accident Co. v. Smith, 242 Minn. 211, 215–16, 64 N.W.2d 781 (1954). Minnesota's parental immunity doctrine was overruled by Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980).

The majority of courts to address this question agree that the policies justifying parental immunity apply equally to stepparents, so long as they stand *in loco parentis* to the child.⁷

The requirement of a showing of *in loco parentis* standing reflects the connection between entitlement to immunity and financial obligation toward the child. In most of these jurisdictions, stepparents are not legally bound to support their stepchildren.⁸ Reasoning that immunity is a reciprocal benefit arising from a legally enforceable financial responsibility, these courts conclude that stepparents do not earn the benefit of immunity simply by virtue of marriage to a legal parent.⁹ These courts therefore look to *in loco parentis* status as some guarantee of a continuing commitment, an indication that the injured child will not be left without the negligent stepparent's financial resources.

⁷ See Wooden v. Hale, 1967 OK 69, ¶ 8, 426 P.2d 679 (Okla.1972); see also C.M.L. v. Republic Servs., 800 N.E.2d 200, 206 (Ind. App. Ct. App. 2003); Lyles v. Jackson, 216 Va. 797, 799, 223 S.E.2d 873 (1976); Mathis v. Ammons, 453 F. Supp. 1033, 1034–35 (E.D. Tenn. 1978); Gunn v. Rollings, 250 S.C. 302, 308, 157 S.E.2d 590 (1967); Bricault v. Deveau, 21 Conn. Supp. 486, 486, 157 A.2d 604 (Conn. Super. Ct. 1960).

⁸ See, e.g., Wooden, 1967 OK 69, ¶ 8. A minority of states cite the same rationale for denying immunity to all stepparents, even those who stand *in loco parentis*. See Warren v. Warren, 336 Md. 618, 629–30, 650 A.2d 252 (1994); Burdick v. Nawrocki, 21 Conn. Supp. 272, 274, 154 A.2d 242 (Conn. Super. Ct. 1959) (no immunity for stepfather who “presently voluntarily stands *in loco parentis*, [but] is not under the legal obligation to care for, guide, and control the child.”); Rayburn v. Moore, 241 So.2d 675, 676 (Miss. 1970) (parental immunity not extended to stepfather who stood *in loco parentis*, but was under no legal obligation to support stepchild or treat her as his biological children).

⁹ See, e.g., Warren v. Warren, 336 Md. 618, 629–30, 650 A.2d 252 (1994) (“stepparents, unlike natural parents, have no duty of support, and need not make restitution for the delinquent acts of a child”).

Financial responsibility is a touchstone in Washington immunity cases as well, and was determinative in Stevens v. Murphy,¹⁰ in which the Washington Supreme Court held a divorced, noncustodial parent immune from suit because the children remained entitled to his financial support:

The prior divorce did not totally deprive him of his parental rights. It did not divest him of the right to the love and affection of his children; nor them of the right to his. Nor did the divorce decree take from the children their legitimate claims of support and aid from their father. This is a complete answer to the argument tendered by appellants that the divorce decree extinguished any parental relationship that existed prior thereto.^[11]

Further, in Washington, the family support statute imposes financial responsibilities upon stepparents.¹² The statute applies to all stepparents whose stepchildren "are part of the family unit, who reside in the family home, or who are in the residential care of one of the adults in this family unit."¹³ The statute codifies the common law, and incorporates the *in loco parentis* inquiry.¹⁴ A financial support

¹⁰ 69 Wn.2d 939, 421 P.2d 668 (1966) (abolishing immunity in cases of negligent driving), overruled on other grounds by Merrick v. Sutterlin, 93 Wn.2d 411, 416, 610 P.2d 891 (1980).

¹¹ Id. at 947.

¹² "The expenses of the family and the education of the children, including stepchildren, are chargeable upon the property of both husband and wife, or either of them, and they may be sued jointly or separately. When a petition for dissolution of marriage or a petition for legal separation is filed, the court may, upon motion of the stepparent, terminate the obligation to support the stepchildren. The obligation to support stepchildren shall cease upon the entry of a decree of dissolution, decree of legal separation, or death." RCW 26.16.205.

¹³ Harmon v. Dep't of Soc. & Health Servs., 134 Wn.2d 523, 542, 951 P.2d 770 (1998) (stepfather not responsible for financial support of stepchildren not in custody of or residing with his wife; RCW 26.16.205 does not impose child support obligations on noncustodial stepparents);

¹⁴ Van Dyke v. Thompson, 95 Wn.2d 726, 729-30, 630 P.2d 420 (1981) (family support statute applies only to custodial stepparents); In re Marriage of Farrell, 67 Wn. App. 361, 366, 835 P.2d 267 (1992) (custodial stepparent stands *in loco parentis* and has both statutory and common law duty to support stepchild who resides with

obligation thus arises where a stepparent is *in loco parentis*, which usually occurs when a stepparent is married to a child's primary residential parent.

There may be rare circumstances in which residential arrangements are not determinative, because a stepparent stands *in loco parentis* to a child only if he or she has the subjective intent to assume the status of parent to the child.¹⁵ This is a highly factual inquiry, and may be neither simple nor predictable. In today's world of blended families and shared parenting, the question could generate litigation of precisely the kind the immunity doctrine seeks to prevent: putting hearsay and finger pointing on the main stage in circumstances where hindsight clouds rather than illuminates.

But we have discovered only one Washington case considering the *in loco parentis* status of a stepparent whose stepchildren resided in his home. In In re Montell, unusual facts prevailed, in that the children lived with their mother and stepfather only for the duration of the custodial father's incarceration.¹⁶ The court held the stepfather was essentially an accidental and temporary custodial stepparent without the intent necessary for *in loco parentis* standing, and thus was not liable to the State for the children's support.¹⁷

In most cases, however, the stepparent who is married to the primary residential parent and lives in the same household with the child is obliged to support the child.¹⁸

stepparent and legal parent); In re Montell, 54 Wn. App. 708, 712, 775 P.2d 976 (1989) (RCW 26.16.205 merely codifies a custodial stepparent's common law child support obligation).

¹⁵ See Montell, 54 Wn. App. at 712.

¹⁶ Id. at 711.

¹⁷ Id. at 713.

¹⁸ See Harmon, 134 Wn.2d at 542.

These stepparents assume the duties of parents, and have need of the same wide sphere of discretion as legal parents. We hold that stepparents who are obligated to support stepchildren under the family support statute are protected by the immunity doctrine to the same extent as legal parents.¹⁹

Nonparental Capacity. Appellants contend that even if the doctrine applies to stepparents, a question of fact exists as to whether Zellmer was engaged in a parental activity at the time of Ashley's death. A parent is not immune where injury to the child results from nonparental activity: "[W]hen the parental activity whereby the child was injured has nothing to do with parental control and discipline, a suit involving such activity cannot be said to undermine those sinews of family life."²⁰ Thus, a father operating a truck and trailer used for the family business was not immune when he drove over his son who was playing in the public street, because "[f]or all practical purposes, the relationship between the two at the time of the accident was not parent and child, but driver and pedestrian."²¹ Similarly, a parent who drives while intoxicated "is temporarily abdicating his parental responsibilities," and thus is not entitled to immunity from liabilities that arise from that behavior.²²

Here, the parties do not dispute the parental nature of Zellmer's duties at the time of Ashley's death. Rather, appellants allege Zellmer temporarily abdicated his parental responsibility when he fell asleep, which they contend is comparable to driving drunk

¹⁹ We do not address whether immunity will protect stepparents in other circumstances.

²⁰ Borst, 41 Wn.2d at 651.

²¹ Id. at 658.

²² Hoffman v. Tracy, 67 Wn.2d 31, 38, 406 P.2d 323 (1965).

with a child in the car. Appellants' allegation is based upon inadmissible hearsay.²³ But in any case, the analogy is off the mark. Taking a nap while a sick three-year-old child is in bed watching a video is not like driving drunk with a child in the car. The trial court did not err in its implicit conclusion that Zellmer was acting in a parental capacity at the time of Ashley's death.

Willful or Wanton Conduct. Immunity does not extend to injuries inflicted on a child by a parent's willful or wanton misconduct,²⁴ which occurs if the actor knows, or has reason to know, of circumstances that would inform a reasonable person of the highly dangerous nature of that conduct.²⁵ Negligence implies inadvertence; willfulness suggests premeditation or formed intention.²⁶

Appellants point to the evidence that Ashley was three years old, that Zellmer knew she could not swim, that Zellmer had not seen her for most of the evening, and that he knew from previous experience that unsupervised young children might wander into the pool area and fall in.²⁷ Appellants also rely upon evidence of Zellmer's bad

²³ Appellants submitted the affidavit of Shelly Ahlquist, Dakota's mother, relating Dakota's statement to her that Zellmer was asleep when Ashley drowned. The affidavit is inadmissible hearsay. Zellmer objected below, but the trial court simply considered all evidence submitted and remarked that the court would discount improper evidence. Appellants contend Zellmer waived the hearsay issue by failing to cross-appeal. This is incorrect. See State v. McNally, 125 Wn. App. 854, 863, 106 P.3d 794, review denied, 155 Wn.2d 1022 (2005).

²⁴ Jenkins v. Snohomish County Public Utility District No. 1, 105 Wn.2d 99, 106, 713 P.2d 79 (1986).

²⁵ Livingston v. City of Everett, 50 Wn. App. 655, 660, 751 P.2d 1199 (1988) (citing Jenkins, 105 Wn.2d at 105-06).

²⁶ Adkisson v. City of Seattle, 42 Wn.2d 676, 682, 258 P.2d 461 (1953).

²⁷ Michelle Barnett testified that in December 2002, her four-year-old daughter fell into the pool in Zellmer's backyard and had to be rescued. According to police, another child fell into Zellmer's hot tub. (This latter evidence is hearsay, but may have been considered by the trial court.)

character, and point out that after the Zellmers' marriage, insurance was purchased on Ashley's life. Appellants contend this evidence creates a question of fact as to whether Zellmer's conduct was willful or wanton.²⁸

We disagree. As our cases demonstrate, acting despite awareness of risk is not, by itself, willful or wanton behavior. A parent's act or failure to act must be so shockingly careless that no reasonable person could fail to act differently in the circumstances.²⁹

The previous experience involving other children merely illustrates the obvious danger presented by a pool or hot tub. The incidents do not amount to evidence that Zellmer's conduct on this occasion was willful or wanton.

Parents act within the protected area of discretion when they know their child's general whereabouts, and are not negligent simply because they fail to keep their children under constant surveillance.³⁰ Further, the pool was in a wooded, unlit backyard, and Ashley was in her bedroom upstairs, separated from the pool by interior stairs, several doors, a second flight of steps outdoors, and a patio. If we were to adopt appellants' theory, any parent whose home has a backyard swimming pool would be

²⁸ The week before argument of this case, appellants sought to supplement the record with new police information. That request is denied. Any new evidence should be presented to the trial court. See CR 59.

²⁹ Compare Stevens, 69 Wn.2d at 947 (father immune despite evidence of his gross negligence in turning left off a highway), and Jenkins, 105 Wn.2d 106 (failure to supervise not willful or wanton where parents knew child's general whereabouts and assumed there was adult supervision where child played with a friend), with Livingston, 50 Wn. App. at 660 (it is willful or wanton misconduct to leave a four year old child alone in a room with two Doberman Pinschers).

³⁰ See Jenkins, 105 Wn.2d at 106; Cox v. Hugo, 52 Wn.2d 815, 820, 329 P.2d 467 (1958) ("Parents are not required to restrain their children within doors at their peril"; refusing to impose liability for allowing children outside the house to play without keeping them "under constant surveillance.").

required to maintain constant visual surveillance of all small children, even when they are sick in bed.

Finally, evidence of bad general character is not evidence of willful or wanton conduct on a particular occasion. Nor does the purchase of an insurance policy, which many parents consider an investment toward college education, constitute evidence that Ashley's death resulted from willful or wanton conduct.

The court did not err in concluding that questions of fact did not prevent summary judgment.

Immunity in Wrongful Death Actions. In the alternative, appellants contend parental immunity should be unavailable where the child has died, because the family unit no longer exists and thus has no need of the doctrine's protection.

Division Three rejected this argument in Chhuth v. George,³¹ reversing a trial court ruling that allowed a school district's contribution claim against the deceased child's father for failure to properly supervise and instruct:

The District contends since the child is deceased, there is no longer a need to protect family tranquility, parental control and authority. We are not persuaded. . . . Since the underlying reasons for granting parental immunity are unaffected by the demise of a family member, the mere fact the cause of action is for wrongful death will not abrogate the parental immunity doctrine.^[32]

We agree. As pointed out above, family tranquility is no longer a viable basis for the immunity doctrine.³³ Further, immunity does not depend upon the severity of

³¹ 43 Wn. App. 640, 719 P.2d 562 (1986).

³² Id. at 646-47.

³³ Borst, 41 Wn.2d at 650-51.

injuries to the child.³⁴ To rule otherwise would allow precisely the kind of scrutiny of parental decisions that Borst and other cases sought to prevent.

Appellants rely upon Sisler v. Seeberger,³⁵ in which Division Three permitted children to sue their mother's estate for negligence because the mother's death removed any need to preserve familial tranquility. Again, familial tranquility is not an objective of the immunity doctrine. But if it were, the death of the tortfeasor is different from the death of the injured child. It is true that the Zellmers' marriage failed after Ashley died. But appellants' argument that a stepchild's death leaves no need to protect family tranquility amounts to an assumption that marital dissolution is the inevitable consequence, and we decline to endorse this premise.

Parental immunity precludes actions for wrongful death just as it does actions for nonfatal injuries.³⁶

³⁴ See, e.g., Commerce Bank v. Augsburg, 288 Ill. App. 3d 510, 517, 680 N.E.2d 822 (1997) ("The subsequent death of the child does not bear upon the freedom the . . . parent . . . needs to deal with the child in his or her lifetime."); Campbell v. Gruttemeyer, 222 Tenn. 133, 142, 146, 432 S.W.2d 894 (1968) ("It is, to say the least, shocking to our concept of justice that an unemancipated child, who has no cause of action against his living parent, may, if the parent die, and contingent upon such event, have a cause of action against his parent's estate or his administrator. [Though none of the policy bases for parental immunity are present] if both parents are dead, . . . we are of the opinion that the rule . . . should be applied to such a situation and that the rule . . . should not be limited to a situation where the parent is living. . . . [To find otherwise] would be discriminating against children whose parents are living in favor of those whose parents are deceased.").

³⁵ 23 Wn. App. 612, 614–15, 596 P.2d 1362 (1979).

³⁶ Appellants present a variation on this argument, contending immunity is inapplicable here because this particular family never enjoyed tranquility, even before Ashley's death. The argument is unavailing for the same reason. So long as a marriage is legally entered, it is not for the courts to weigh the intimacy or quality of any given relationship.

CONCLUSION

The trial court properly ruled that the parental immunity doctrine applies to Joel Zellmer. We therefore affirm the order of dismissal.

Elemyon, J.

WE CONCUR:

Cox, J.

Baker, J.