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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

NO. 554735

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,

v.

JOEL ZELLMER,

Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
NO. 04-2-12706-8 KNT

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Joel and Stacy Zellmer were married in September 2003. CP 26. After the wedding, Stacey Zellmer and her three-year-old daughter, Ashley McLellan, permanently moved into Joel Zellmer's home in Kent, Washington. CP 27.

Joel Zellmer and his stepdaughter Ashley enjoyed a close familial relationship. CP 93. Joel cared for Ashley as if she was his own biological daughter. CP 16, 27, 93. Joel provided for Ashley financially and emotionally. CP 16, 27, 102. Ashley had her own room in the Zellmer household and Joel often fed her meals, arranged her doctor's appointments, attended to Ashley's eyewear needs, and made regular payments for her daycare services. CP 27, 103.

Joel Zellmer took Ashley trick-or-treating on Halloween, bought her clothes and also took steps to get Ashley started in ballet lessons. CP 103. Joel Zellmer frequently made up Ashley's hair and received many compliments in that regard when he picked her up from daycare. CP 103. Ashley often called Joel Zellmer "daddy" and would often say, "Joel, I love you" when Joel would see Ashley at her grandparents' house before Stacey and Joel were married. CP 103, Ashley often called Joel her "prince" and Joel called Ashley his "princess." CP 103.

Joel Zellmer thought of and included Ashley as one of his own children and introduced her to people as his daughter. CP 103. Joel Zellmer considered himself as one of Ashley's parents and he still considers Ashley as his daughter to this day. CP 103. Joel Zellmer spent more time with Ashley than her natural father, Bruce McLellan, who was frequently away on business in the Philippines. CP 16, 27, 93.¹ Joel Zellmer frequently supervised and took care of Ashley when she was not in daycare and while Stacey Zellmer was at work. CP 25, 105.

On December 3, 2003, Ashley was not feeling well and stayed at home. CP 71. Prior to leaving for work that very same afternoon, Stacey Zellmer asked her husband Joel, to supervise Ashley. CP 72. Stacey Zellmer then left for work and left Ashley under Joel's supervision.²

At approximately 5:00 p.m., Joel Zellmer moved Ashley to her bedroom, adjacent to Joel and Stacey's bedroom, and set up a movie for Ashley to watch. CP 27. Also around this time, Joel Zellmer's eight-year-old son Dakota returned from school. At approximately 5:30 p.m., Joel Zellmer checked on Ashley and personally observed Ashley watching her movie in her room. CP 27. Soon thereafter, Joel and Dakota went

¹ Appellant Bruce McLellan was, in fact, in the Philippines when this tragic accident occurred.

² See Appellants' Brief, 4 & 7 ("App.Br.").

downstairs to build a fire and Joel Zellmer subsequently told Dakota to get Ashley from her room. CP 27.

Dakota, however, was unable to locate Ashley and he told his father that the back sliding door was open. CP 27. When Dakota informed Joel Zellmer that he could not find Ashley, but had seen that the back sliding door was open, Joel Zellmer immediately ran out the back sliding door looking for Ashley. CP 27. Joel found Ashley in the backyard pool and immediately brought her back inside and told Dakota to call 911 while he performed CPR. CP 17, 27. The paramedics arrived quickly and continued CPR, but Ashley died two days later from this tragic accident. CP 17.

Stacey Zellmer and Bruce McLellan sued Joel Zellmer, primarily alleging negligent supervision and breach of an implied contract. CP 3. Joel Zellmer filed a motion for summary judgment requesting dismissal of the appellants' complaint with prejudice. CP 15, 93. Joel Zellmer's summary judgment motion was based upon Washington's parental immunity doctrine which prohibits civil suits brought by children against their parents for negligence. CP 15, 93.

The appellants, understandably hurt deeply by this tragic accident, responded to the summary judgment motion with hearsay and character attacks in an attempt to create material issues of fact and persuade the trial

court not to apply the parental immunity doctrine. CP 29, 94. This strategy failed and the trial court, after noting that parental immunity should apply to stepparents, granted Joel Zellmer's summary judgment motion based upon Washington's parental immunity doctrine. RP 5.³

Now, in their appeal, the appellants have once again distorted the facts and resorted to personal attacks and exaggerations in order to persuade this Court to abolish the parental immunity doctrine and overturn well established and clearly defined Washington case law. Appellants' brief contains several factual allegations that are not supported by the evidence, are distorted or presented out of context, and/or contradict their previous claims. The following are examples:

1. Appellants claim that another child "almost drowned in the defendant's swimming pool while under the defendant's sole care and supervision." App. Br. 5. The appellants made this same claim to the trial court and attempted to support their allegation with a declaration that contained inadmissible hearsay. CP 88-92; CP 93-101; CP 111-116.⁴

Regardless of the fact that the appellants are attempting to create an issue

³ The trial court found the breach of contract claim to be without merit RP 2. Appellants have not appealed this aspect of the trial court's summary judgment decision.

⁴ Respondent brought a motion to strike the hearsay sections of the declarations submitted to the trial court by the appellants. *See* Defendant's Motion to Strike Inadmissible Evidence from Summary Judgment Pleadings. CP 88-92; *see also*, Defendant's Reply re: Plaintiff's Summary Judgment Hearsay Evidence. CP 111-116.

of fact with inadmissible hearsay evidence, the characterization of the event when Michelle Barnett's daughter fell into the swimming pool is grossly incorrect. Approximately one year before the subject accident, Michelle Barnett's daughter, Madison, was playing by the pool and tripped. CP 105. Joel Zellmer was stacking wood near the pool when she tripped and he immediately got her out of the pool. CP 105. Madison was never in danger of drowning. CP 105.

2. Appellants claim that Joel Zellmer "arranged for the purchase of a life insurance policy insuring Ashley's life in the event of her accidental death" and that Joel would receive \$100,000 if Ashley died by accidental means. App.Br. 5, 6. Appellants fail to mention, however, that Stacey and Joel were the co-beneficiaries of the policy and that they considered the policy to be an investment when they purchased it. CP 104.

Ashley's life insurance policy was a whole life policy that increased in value over time and had a cash value that could have been used for Ashley's college tuition, etc. CP 104. Stacey Zellmer was actively involved in obtaining the insurance policy that Stacey and Joel purchased together because Stacey wanted the same policy for Ashley that Joel had with his other children. CP 104.

3. Appellants claim that Joel Zellmer "was warned that his pool was not safe for small children and that he should put a fence with a gate around the pool." App.Br. 5. Once again, the appellants made this claim to the trial court and attempted to support it

with inadmissible hearsay evidence. CP 88-92; CP 111-116.

Hearsay evidence notwithstanding, this claim is false. Michelle Barnett's father never warned Joel Zellmer that the pool was unsafe and he never suggested that Joel should put another fence around it. CP 105. In fact, Joel Zellmer has never received any formal or informal complaints about the condition of his pool prior to Ashley's unfortunate accident. CP 27.

4. Appellants claim that Joel was apparently "asleep and had not seen Ashley for some time before the 3-year old child drowned." App.Br. 31. Two pages later, the appellants exaggerate the alleged timing of the accident by claiming that Joel "hadn't seen 3-year old Ashley for most of the evening when she died." App.Br. 33. These allegations are inconsistent with the appellants' earlier claims.

At the trial court, the appellants attempted to submit inadmissible police reports and a 911 call log to establish that "Joel Zellmer hadn't seen Ashley for approximately 40 minutes" prior to her accident. CP 77; CP 88-92; CP 111-116. Now, the appellants inexplicably allege a much different and larger time lapse between Joel observing Ashley watching her video and her accident. Furthermore, the appellants have completely failed to submit any admissible evidence in this case that Joel was asleep when Ashley accidentally drowned.

Appellants' pattern of exaggeration, and attempts to impugn Joel Zellmer's character, can neither create material issues of fact where none exist nor obfuscate the truth in this case; that Joel Zellmer and Ashley enjoyed a loving, parental relationship, and that together they were part of a family unit.⁵

Parental immunity is a viable and valid legal doctrine in Washington that should apply to shield stepparents from negligent supervision claims. Joel Zellmer was engaged in a core parental function, i.e. supervising his stepdaughter, when this tragedy occurred. As such, Joel Zellmer is entitled to parental immunity in this case.

II. ARGUMENT

A. **Washington Recognizes The Parental Immunity Doctrine.**

The Washington Supreme Court has made it abundantly clear that parental immunity is a viable and valid legal doctrine in this state. In *Baughn v. Honda Motor Co.*, 105 Wn.2d 118, 712 P.2d 293 (1986), the Washington Supreme Court reaffirmed that vitality of the doctrine of

⁵ This Court can get a sense of the closeness of the family relationship by viewing the family photographs that were taken on December 2, 2003, the day before this tragic accident. CP 102-110.

parental immunity with respect to assertions of negligent supervision and stated the following:

In order for the conduct of parents in supervising their child to be actionable in tort, such conduct must rise to the level of willful and wanton misconduct; if it does not, then the doctrine of parental immunity precludes liability. *Baughn v. Honda Motor Co.*, 105 Wn.2d at 119 (citing *Talarico v. Foremost Ins. Co.*, 105 Wn.2d 114, 116, 712 P.2d 294 (1986)).

Division One of the Washington Court of Appeals has also held that a parent cannot be sued for negligent supervision if his child has been injured as a result of an alleged failure to supervise. *See Carey v. Reeve*, 56 Wn.App. 18, 781 P.2d 904 (1989). This Court has noted that “[t]he Washington Supreme Court has generally found parental immunity for negligent supervision” and held that “[i]f a child has been injured himself as a result of his parent’s failure to supervise, the parent cannot be sued for negligent supervision.” *Carey v. Reeve*, 56 Wn.App. at 21-22 (citing *Cox v. Hugo*, 52 Wn.2d 815, 329 P.2d 467 (1958); *Baughn v. Honda Motor Co.*, 105 Wn.2d 118, 712 P.2d 293 (1986); *Jenkins v. Snohomish County PUD*, 105 Wn.2d 99, 713 P.2d 79 (1986); *Talarico v. Foremost Ins. Co.*, 105 Wn.2d 114, 116, 712 P.2d 294 (1986)).

Furthermore, this Court has stated that a “parent will be liable for his child’s injuries only if his failure to properly supervise the child

amounts to willful or wanton misconduct.” *Carey, supra* at 21. In this case, Joel Zellmer is not liable for Ashley’s accident because there are no admissible facts to support the appellants’ claim that Joel Zellmer’s alleged failure to supervise amounted to willful or wanton misconduct.

B. Joes Zellmer Is Entitled To Parental Immunity.

The Washington Supreme Court has previously recognized parental immunity for claims of negligent supervision. *See Cox v. Hugo*, 52 Wn.2d 815, 329 P.2d 467 (1958); *Stevens v. Murphy*, 69 Wn.2d 939, 421 P.2d 668 (1966). Parents are immune from liability when their supervision is negligent but does not rise to the level of willful or wanton conduct, unless the parent is not acting in a parental capacity. *Jenkins v. Snohomish County PUD*, 105 Wn.2d 99, 713 P.2d 79 (1986).

1. Joel Zellmer was acting in a parental capacity.

Joel Zellmer was engaged in a core parental function, i.e. the supervision of a young child, at the time of his stepdaughter’s accident. Appellants argued to the trial court that Joel Zellmer should not be entitled to parental immunity because he was not engaged in parental conduct when Ashley accidentally drowned because he “was either sleeping or was watching television.” CP 29. The appellants, however, failed to offer any admissible evidence to the trial court that Joel Zellmer was sleeping at the time of the accident. CP 88.

In any event, the claim of sleeping or watching television may support a claim of negligence, i.e. that Mr. Zellmer should have supervised Ashley more closely; but this does not change the fact that the appellants' claim is for negligent supervision, and the supervision of a young child is a core parental function.

It would be fundamentally unfair to find only one parent liable for the accident in this case. This is a case of alleged negligent supervision. The property was surrounded by a fence. CP 105. The lone fact that there was not an additional fence surrounding the pool does not rise to a willful or wanton misconduct standard. If it does, Stacey Zellmer would be guilty of willful and wanton misconduct as well. Stacey Zellmer knew of the conditions surrounding the pool and she continued to allow her young daughter to live and play at their residence.

2. Parental immunity should apply to stepparents.

While it is true that Washington courts have yet to decide a case in which a stepparent has sought immunity through the parental immunity doctrine, several other jurisdictions have refused to make a distinction between a natural parent and one standing in loco parentis and have extended immunity when a stepparent stands *in loco parentis*.⁶ See

⁶ *But see, De Lay v. De Lay*, 54 Wn.2d 63, 337 P.2d 1057 (1959) (Washington Supreme Court held father **and stepmother** were immune from liability to son for burns received) (emphasis added).

Unah v. Martin, 676 P.2d 1366 (Okla.1984); *Gunn v. Rollings*, 250 S.C. 302, 157 S.E.2d 590 (1967); *Lyles v. Jackson*, 216 Va. 797, 223 S.E.2d 873 (1976).

For example, a Minnesota court held that there was no justification for refusing to apply the “parental immunity” doctrine to stepparents who genuinely stood in loco parentis to the child of a spouse by a former marriage. *London Guarantee & Acci. Co. v. Smith*, 242 Minn.App. 211, 64 NW.2d 781 (1954). The court held that it was contrary to public policy to discourage a stepfather from voluntarily assuming the unselfish, in loco parentis, position to a child in need of parental care. *Id.*

A federal district court concluded that the majority rule appears to be that in a mere negligence case, the same immunity is applied to a person standing in loco parentis as is applied to a natural parent. This rule is grounded in sensible policy, as there is no persuasive reason for distinguishing between a natural parent and one who unselfishly and devotedly serves as a parent. *Mathis v. Ammons*, 453 F. Supp. 1033 (D.C. Tenn. 1978).

Additionally, in an action brought by the mother of deceased children against the children’s stepfather, the Oklahoma Supreme Court held that since the stepfather stood in loco parentis to his stepchildren, the deceased children could not have maintained an action against him had

they lived, and an action could not be maintained against him for their wrongful deaths. See *Workman v. Workman*, 498 P.2d 1384 (Okla. 1972) (citing *Wooden v. Hale*, 426 P.2d 679 (Okla. 1967) (Supreme Court held that unemancipated stepchild cannot maintain an action for ordinary negligence against a stepparent and said that there is no good reason for applying immunity rule to parents and not to stepparents)).⁷

Joel Zellmer, as Ashley's stepparent, should be entitled to parental immunity for claims of negligent supervision. The trial court in this case recognized the fact that blended families are commonplace today and that a stepparent assumes a role in the family unit after marriage. RP 3. Furthermore, the trial court noted that "[i]f there is a basis for a legal doctrine, then it should apply, whether a particular person may or may not like the outcome." RP 5.

In this case, an absurd and fundamentally unfair result would ensue if this Court chooses to deny immunity to Joel Zellmer solely by reason of his status as Ashley's stepparent while granting immunity to Stacey Zellmer due to her status as Ashley's natural parent. Stacey Zellmer knew of the condition of the pool, allowed Ashley to live at the Zellmer

⁷ In *Workman*, the Oklahoma Supreme Court found that the stepfather stood in loco parentis to the deceased children and noted the following factors: the children and mother moved into stepfather's home and were living with stepfather at the time of the accident; the children called the stepfather "Dad" or "Daddy"; and the stepfather furnished his home to the mother and the children without cost to them. *Id.*

residence, and had the same opportunities to action to make the pool safer for her daughter.

Granting parental immunity to a natural parent, while denying parental immunity to a stepparent, defies logic, common sense and notions of fairness. For example, assume a wife came into a marriage with a child. Further assume that the wife and her new husband (i.e. the stepfather) subsequently had a child together. If the husband/stepfather negligently injured one of the children, should his immunity depend upon whether his stepchild or natural child was injured? The only logical and just remedy in such a situation is to grant parental immunity to both parents in regard to all of the children in their family unit.

The trial court in this case addressed the above-referenced situation and correctly found that “when there is a marriage ceremony and there is a blended family and someone becomes a stepparent that the doctrine of parental immunity applies, and there does not have to be a finding of *in loco parentis*.” RP 9.

3. Joel Zellmer stood *in loco parentis* to Ashley.

If this Court finds that an “*in loco parentis*” determination is a prerequisite to parental immunity, the trial court’s decision should be upheld because Mr. Zellmer was *in loco parentis* to Ashley.

As the Washington Supreme Court stated in *Ertman v. Olympia*, 95 Wn.2d 105, 108, 621 P.2d 724 (1980): "We have held many times that where a judgment or order is correct, it will not be reversed merely because the trial court gave the wrong reason for its rendition." Furthermore, a trial court's disposition may be affirmed on any theory within the pleadings and the proof. *Timms v. James*, 28 Wn.App. 76, 81, 621 P.2d 798 (1980). Therefore, the trial court's decision in this case should be upheld because Joel Zellmer stood in loco parentis to Ashley. *See Carey v. Reeve*, 56 Wn.App. 18, 781 P.2d 904 (1989) (although the trial court granted summary judgment on improper grounds, it does not necessarily follow that the decision must be reversed).

Joel Zellmer is entitled to parental immunity that Washington law provides to parents because he stood in loco parentis to Ashley.⁸ The rights arising out of an in loco parentis relationship are substantially similar to the relationship between parent and child. *In re Welfare of Hansen*, 24 Wn.App. 27, 599 P.2d 1304 (1979). An "in loco parentis" relationship becomes established when a stepparent intends to assume the status of parent. *Matter of Montell*, 54 Wn.App. 708, 775 P.2d 976 (1989).

⁸ *In loco parentis* – Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent. *Black's Law Dictionary* (8th ed. 2004).

A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming obligations incident to the parental relation, without going through the formalities necessary to a legal adoption. *State ex rel. Gilroy v. Superior Court for King County*, 37 Wn.2d 926, 226 P.2d 882 (1951) (citing 67 C.J.S. Parent and Child, p.803, sec. 71). Assuming the parental relation may be shown by the acts and declarations of the persons alleged to stand in that relation. *Id.*

In this case, there is no material issue of fact as to whether Joel Zellmer intended to assume the status of Ashley's parent. Joel Zellmer was one of Ashley's parents. Joel Zellmer cared for Ashley as if she was his own child and he always thought of and included Ashley as one of his own children. CP 16, 27. In fact, Joel Zellmer spent more time with Ashley than her natural father, Bruce McLellan, and he introduced Ashley to people as his daughter. CP 16, 27, 93, 103. Joel Zellmer provided for Ashley financially and emotionally. Joel often fed Ashley her meals, arranged her doctor's appointments, attended to Ashley's eyewear needs, and made regular payments for her daycare services. CP 16, 27, 102, 103. Joel Zellmer took Ashley trick-or-treating on Halloween, bought her clothes and also took steps to get Ashley started in ballet lessons. CP 16, 27, 102, 103.

C. No Evidence Of Willful Or Wanton Misconduct.

Appellants have failed to establish that there is an issue of material fact with regard to whether Joel Zellmer's supervision of Ashley can reasonably be considered willful or wanton misconduct. An appellate court will affirm a grant of summary judgment where reasonable minds can reach only one conclusion based on the admissible facts in evidence. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). Appellants have failed to offer any evidence that Joel Zellmer's conduct on the day of the accident was willful or wanton.

Appellants, as the responding party at the trial court, were required to submit more than mere argumentative assertions. In order to create a genuine issue of material fact, a party must provide "specific facts" to support their argument. *Guntheroth v. Roadway*, 107 Wn.2d 170, 177, 727 P.2d 982 (1986). In *Anderson v. Liberty*, 447 U.S. 242, 106 S.Ct. 2505 (1986), the Supreme Court cited *Guntheroth, supra*, with approval and stated:

If the defendant in a run of the mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself NOT whether he thinks the evidence unmistakably favors one side or the other but whether a fair minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be

evidence on which the jury could reasonably find for the plaintiff. *Anderson, supra*, 106 S.Ct. at 2512.

Appellants presented no specific facts to the trial court which raised a material issue as to whether Joel Zellmer acted willfully or wantonly on December 3, 2003. CP 111-116. Appellants simply alleged that it “is unlikely Mr. Zellmer had even seen 3-year old Ashley as recently as 42 minutes prior to her death.” Appellants offered no evidence in regard to what Joel Zellmer allegedly did on that day that could reasonably be construed as was willful or wanton misconduct. Instead, the appellants simply argued that the alleged time lapse in regard to the last time Joel Zellmer personally observed Ashley before her accident should allow them to present a willful and wanton misconduct theory to the jury. Based upon the bare allegations and evidence submitted to the trial court, however, reasonable minds could only conclude that Joel Zellmer’s alleged supervisory conduct did not rise to the level of willful or wanton misconduct.

Common sense dictates that a parent cannot reasonably be expected to continuously follow a child around the house. *See Cox v. Hugo*, 52 Wash.2d 815, 329 P.2d 467 (1958) (Washington Supreme Court held court held that it was not prepared to hold parents, who let their children go out of the house to play and do not keep them under constant

surveillance during the period they are outside the house, negligent in their supervision); *see also* W. Prosser, *Law of Torts* § 59 (3d ed. 1964) (it is neither customary nor practicable for parents to follow their children around with a keeper, or chain them to a bedpost).

Appellants now cite cases with highly different and easily distinguishable fact patterns from this case in order to support their claim that Joel Zellmer should not be entitled to parental immunity because he somehow abdicated his parental responsibility. App.Br. 30. Although the Washington Supreme Court has established parental immunity for negligent supervision, it has recognized a few clearly defined exceptions to the parental immunity doctrine generally limited to the particular facts of a case. *See Hoffman v. Tracy*, 67 Wn.2d 31, 406 P.2d 323 (1965) (no parental immunity for child's injuries because parent abdicated parental responsibility by driving while intoxicated); *Borst v. Borst*, 41 Wn.2d 642, 251 P.2d 149 (1952) (no parental immunity when the parent is acting in his business capacity rather than the parental).

None of the aforementioned exceptions, however, remotely apply to the facts of this case. This Court should not be swayed by the appellants' attempt to equate drunk driving with negligent supervision. In order for Joel Zellmer's conduct in supervising Ashley to be actionable in tort, such conduct "must rise to the level of willful and wanton

misconduct; if it does not, then the doctrine of parental immunity precludes liability.” *Baughn v. Honda Motor Co.*, 105 Wn.2d 118, 712 P.2d 293 (1986). In this case, there is no evidence that Joel Zellmer’s supervision, a core parental function, was anything close to willful or wanton misconduct.

Appellants have presented no admissible evidence to support their claim that Joel Zellmer was sleeping when Ashley apparently fell into the pool. Instead, they have once again relied upon unsubstantiated allegations and hearsay evidence in an attempt to impugn Joel Zellmer’s character. CP 88-92; CP 93-101; CP 111-116. As this Court stated in *Turngren v. King County*, 38 Wn.App. 319, 686 P.2d 1110 (1984), at page 328:

[C]onclusory allegations, speculative statements or argumentative assertions that unresolved factual matters remain are not sufficient to preclude an order of summary judgment. *Peterick v. State*, 22 Wn.App. 163, 181, 589 P.2d 250 (1977); *Dwinell’s Cent. Neon v. Cosmopolitan Chinook Hotel*, 21 Wn.App. 929, 933, 587 P.2d 191 (1978).”

Joel Zellmer’s conduct, as applied to the facts of this case, obviously did not rise to willful or wanton misconduct. A failure to supervise for a brief period of time, in the family home, cannot be characterized as wanton misconduct. *See Stevens v. Murphy*, 69 Wn.2d

939, 421 P.2d 668 (1996) (although father's act of turning into oncoming traffic was gross negligence, it was not willful misconduct since it was neither deliberate, intentional, nor wanton misconduct with knowledge or appreciation of the fact that danger was likely to result).

Washington case law clearly holds that the conduct of a parent, in supervising his child, must rise to the level of willful and wanton misconduct in order to be actionable in tort; if it does not, then the doctrine of parental immunity precludes liability. *See Jenkins v. Snohomish County PUD*, 105 Wn.2d 99, 713 P.2d 79 (1986); *Chhuth v. George*, 43 Wn. App. 640, 719 P.2d 562 (1986). For example, parents will not be said to have acted with willful or wanton misconduct when they are generally aware of their children's whereabouts. *See Jenkins*, 105 Wn.2d. at 106.

In *Jenkins*, 105 Wn.2d 99 (1986), the Washington Supreme Court reaffirmed the principle that unless a parent's negligence is "willful or wanton," the law will not provide a cause of action which would assuredly interfere with basic parenting decisions.⁹ The *Jenkins* Court noted that "there are certain areas of activities within the family sphere involving

⁹ *Jenkins*, 105 Wash.2d at 106.

parental discipline, care and control that should remain free of judicial activity." ¹⁰

In *Jenkins, supra*, a child was injured while climbing an electrical fence. The Washington Supreme Court affirmed the trial court's decision granting summary judgment to the parents despite evidence that the parents had been warned by the police, that people had complained about the child playing near a gas station, that the child had been warned by the parents not to play near railroad tracks, and that the child had discipline problems at school, as the totality of the evidence did not rise to the level of willful and wanton misconduct. *Id.* ¹¹

The *Jenkins* Court also noted that "[p]arents should be free to determine how the physical, moral, emotional, and intellectual growth of their children can best be promoted. Parents should not routinely have to defend their child rearing practices where their behavior does not rise to the level of wanton misconduct. There is no correct formula for how much

¹⁰ *Jenkins*, 105 Wash.2d at 105 (citing *Foldi v. Jeffries*, 93 N.J. 533, 461 A.2d 1145 (1983)).

¹¹ The *Jenkins* Court also noted that "the admission of evidence that Jonathan's parents received a warning from the local police, that people had complained about Jonathan playing in the vicinity of the gas station, that Jonathan had been warned not to play on the railroad tracks by Lance's mother, and that Jonathan was a discipline problem in one class at school, was error as a matter of law" and that "[e]ven in total these pieces of evidence do not rise to the level of willful and wanton misconduct." *Id.* In addition, the *Jenkins* Court noted that the aforementioned evidence was also inadmissible under ER 404(a) and (b). *Id.*

supervision a child should receive at a given age. What may be perfectly safe to entrust to one five year-old may be utterly dangerous in the hands of another child of the same age.”¹²

The case of *Cox v. Hugo, supra*, involving the alleged negligent supervision of two children, is also instructive. There, a five-year-old child was severely burned when her clothing ignited while playing in or near the remains of a small trash fire started by the 13-year-old son of the defendant. *Id.* at 820. As previously mentioned, the Washington Supreme Court held that it was not prepared to hold parents, who let their children go out of the house to play and do not keep them under constant surveillance during the period they are outside the house, negligent in their supervision. *Id.*

The *Cox* Court also stated that “[t]he law imposes no such impracticable standard” and that “[p]arents are required to restrain their children within doors at their peril.”¹³

In *Carey v. Reeve, supra*, this Court stated that the following in regard to the standard to which a parent, such as Joel Zellmer in this case, should be held:

The law does not require that parents or
custodians do the impossible for children,

¹² *Id.*

¹³ *Cox v. Hugo*, 52 Wn.2d at 820 (citing *Westerfield v. Levis Bros.*, 43 La. Ann. 63, 9 So. 52 (1891)).

"[t]hey are not required to watch them every minute." 57 Am.Jur.2d, *supra* § 377, at 785).... Thus, one with responsibility for a child's care "has no duty to foresee and guard against every possible hazard", and will not be found to have negligently supervised a child unless he or she "had some knowledge that the child was frequenting a dangerous area, and failed to warn the child or to take other adequate precautions." *Carey v. Reeve*, 56 Wn.App. at 25 (citing 57 Am.Jur.2d Negligence § 377, at 784-85 (1971)).

Applied to this case, Joel Zellmer's conduct does not rise to willful or wanton misconduct. There is no evidence that Ashley had ever engaged in dangerous behavior before in or near the swimming pool before December 3, 2003. There is no evidence that Joel Zellmer had any reason to believe that Ashley would suddenly wander out to the swimming pool in the dark of night.

According to the appellants, Joel Zellmer's house is located in a rural area and the property surrounding the pool is dark and wooded. App.Br. 7. Access to the pool at night from inside the 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. *Id.*

These very same facts show the truly unusual and tragic nature of this accident. There was absolutely no reason in this case for Joel Zellmer

to expect Ashley to suddenly stop watching her movie, leave her room and then “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,” especially in light of the fact that the “area surrounding the pool is dark and wooded.”¹⁴

A review of the admissible evidence in this case simply does not support a claim of willful or wanton misconduct by Joel Zellmer. The most that can be claimed against Joel Zellmer is that he should have supervised Ashley more closely. This conduct does not rise to the level of willful or wanton misconduct.

D. This Court Should Not Abolish Parental Immunity.

Parental immunity has not been abrogated in parental supervision cases such as this one. *See Jenkins v. Snohomish County PUD*, 105 Wn.2d 99, 713 P.2d 79 (1986); *Carey v. Reeve*, 56 Wn.App. 18, 781 P.2d 904 (1989). Parental immunity is based on the public policy interest in maintaining family tranquility, a desire to avoid an undermining of parental control and authority, a fear of collusion and fraud, and a view of the parent-child relationship as analogous to the husband-wife relationship. *See Jenkins v. Snohomish County Pub. Utility Dist. No. 1*, 105 Wash.2d 99, 713 P.2d 79 (1986).

¹⁴ See App.Br. 7.

Appellants argue that the policy reasons supporting parental immunity are absent in this case because Ashley is deceased and there is no longer a need to preserve tranquility within this family. These arguments should be rejected.

1. Death does not abrogate parental immunity.

Appellants claim that Joel Zellmer is not entitled to immunity because Ashley is deceased. This claim is contrary to established precedent. In *Chhuth v. George*, 43 Wn.App. 640, 719 P.2d 562 (1986), the school district argued that the doctrine of parental immunity should not apply in wrongful death cases because the reason for the rule no longer exists in wrongful death cases. The Court of Appeals, however, was not persuaded and specifically held that an accident resulting in the death of a child will not abrogate the parental immunity doctrine:

The District argues that the doctrine of parental immunity should not apply since in wrongful death cases the reason for the rule no longer exists. 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. As noted in *Jenkins*, at 104-05, there are additional policy reasons for granting parental immunity even in wrongful death cases. 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. Id. at 647. (emphasis added).

Appellants rely upon *Sisler v. Seeberger*, 23 Wn.App. 612, 596 P.2d 1362 (1979) as contrary authority.¹⁵ *Sisler*, however, was decided seven years before *Chhuth* by the very same appellate court and is factually and legally distinguishable. In *Sisler*, Division Three of the Court of Appeals found that the parental immunity doctrine did not operate to bar an action arising from an automobile accident against the mother's estate because no single child could deplete the parent's entire estate to the detriment of the remaining children.

The *Sisler* Court noted that immunity did not apply in “these limited circumstances” because “[a]ll of the parent's minor children are parties to the action and no single one of them can deplete the mother's entire estate to the detriment of the remaining children.” In this case, unlike *Sisler*, all of Joel and Stacey’s children are *not* parties to this action and a single one of them can potentially deplete Joel Zellmer’s entire estate to the detriment of the other children. Furthermore, *Sisler* involved an auto accident. As previously mentioned, Washington case law has

¹⁵ Appellants allege that, similar to *Sisler*, there is no claim in this case that Ashley’s death was caused by a third party because “[h]er death was caused by her stepfather, the defendant.” App.Br. 20. Appellants have once again failed to cite any support for this allegation and have failed to offer any such evidence.

recognized an exception to immunity for cases of negligent driving. This case does not involve negligent driving; this is a case about a parent's alleged negligent supervision of his child.

2. Joel and Stacey Zellmer have a newborn daughter.

Appellants mistakenly claim that there is no longer a need to preserve tranquility within this family. Appellants have chosen to completely ignore the fact that Joel and Stacey Zellmer have a newborn daughter together and that this unfortunate accident continues to have a negative effect on their family.¹⁶ CP 105, 106, 111. This lawsuit has only helped to foster an atmosphere of animosity. If the appellants' wrongful death claim based upon Joel's alleged negligent supervision is allowed to go to trial, the ensuing public display of disagreement and accusation will only further damage the already tenuous relationships that exist in this case.

Joel Zellmer sincerely hopes that he and Stacey Zellmer can somehow establish and maintain a harmonious relationship in order to provide a stable foundation for their daughter. CP 105, 106. As such, the legitimate public policy interest of enabling and maintaining family tranquility directly applies to this situation.

¹⁶ Stacey Zellmer was pregnant with Joel's child when the accident occurred in this case.

Appellants claim that Joel and Stacey's marriage was not harmonious and, as such, the public policy reasons for parental immunity should not apply. Appellants' attempt to advocate an unworkable rule is unpersuasive. Appellants fail to establish how much family harmony is sufficient to justify application of the parental immunity doctrine. Furthermore, the appellants ignore the fact that most, if not all, families have some degree of conflict and they fail to explain exactly how a court would determine whether the family unity was sufficiently harmonious.¹⁷

At the trial court, the Honorable Brian D. Gain noted that “[w]hether this was a healthy relationship is not something that the Court should decide. It means either there is a legal doctrine of parental immunity or not. Either it applies or it doesn't apply.” RP 4. In addition, Judge Gain noted that the appellants' flawed harmony arguments are “down the slippery slope of a judge deciding the legal doctrine based on the feelings of the judge or the jury as opposed to what the law is or should be.” RP 4.

¹⁷ Would a court need to conduct a trial, which in many ways would resemble a divorce trial, to determine the extent of harmony in the family before the accident?

3. Majority of jurisdictions have parental immunity.

Appellants claim that seventeen states have either refused to adopt or have abolished the parental immunity doctrine.¹⁸ However, the overwhelming majority of jurisdictions, including Washington State, have retained and applied the parental immunity doctrine.¹⁹

¹⁸ See App.Br. 12-13. Appellants, however, erroneously claim that New York is one of the states that has abolished parental immunity. In *Holodook v. Spencer*, 36 NY2d 35, 364 N.Y.S.2d 859, 324 NE2d 338 (1974), the New York Court of Appeals held that negligent supervision was not a tort actionable by the child and that *Gelbman v. Gelbman* did not pave way for law's seizure of the duty to supervise a child. See also *Zikely v. Zikely*, 98 App.div.2d 815, 470 N.Y.S.2d 33 (1983 2d Dept) (child who suffered severe burns falling into bathtub when mother left the room could not recover from mother because New York does not recognize child's cause of action against parent for negligent supervision).

¹⁹ See e.g., *Cates v. Cates*, 156 Ill 2d 76, 189 Ill Dec 14, 619 NE2d 715 (1993) (immunity should afford protection to conduct inherent to the parent-child relationship; such conduct constitutes an exercise of parental authority and supervision over the child or an exercise of discretion in the provision of care to the child); *Sears, Roebuck & Co. v. Hsu-Nan Huang for Huang*, 652 A2d 568 (Del Sup 1995) (where parental control, authority or discretion is involved, rule of parental immunity is preserved); *Squeglia v. Squeglia*, 234 Conn. 259, 661 A.2d 1007 (1995) (action by an unemancipated minor child, who had been injured as a result of his parent's decision to keep a dog in the home and expose the child to it, falls within the scope of claims the parent-child immunity doctrine is intended to bar; plaintiff is barred by the doctrine from bringing an action in strict liability for such claim); *Bonin v. Vannaman*, 929 P.2d 754 (Kan. 1996) (parent's decision regarding whether a child's medical condition should be investigated for signs of malpractice or whether a malpractice action should be pursued is an exercise of parental discretion regarding a child's medical condition and financial well-being in which a court should not interfere and is entitled to parental immunity); See also, *Dubay v. Irish*, 207 Conn 518, 542 A2d 711 (1988) (declining to abrogate immunity in cases involving negligent exercise of parental discretion with regard to care, supervision and instruction of child); *Foldi v. Jeffries*, 182 NJ Super 90, 440 A2d 58 (1981) (Parental authority or discretion which is excepted from the abrogation of parent-child immunity includes situation where a mother was working in a garden and her 2- 1/2-year-old child wandered onto a neighbor's property and was bitten by a dog).

The parental right to govern the rearing of a child has been afforded protection under both the federal and state constitutions.²⁰ The integrity of the family unit has also found protection against arbitrary state interference in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.²¹

Many courts have expressed a concern that without the imposition of parent-child immunity, juries would feel free to express their disapproval of what they consider to be unusual or inappropriate child rearing practices by awarding damages to children whose parents' conduct was only unconventional.²² Most courts have also properly found that

²⁰ See e.g., *Bellotti v. Baird*, 443 U.S. 622, 638, 99 S.Ct. 3035, 3045, 61 L.Ed.2d 797 (1979) (recognition of parents' right to be free of undue, adverse interference by state); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978) (recognition that parent-child relationship is constitutionally protected); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 1541, 32 L.Ed.2d 15 (1972) (recognition of parents' primary role in child rearing as a "fundamental interest" and "an enduring American tradition"); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944) (recognition that the custody, care and nurture of the child "reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder").

²¹ See *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40, 94 S.Ct. 791, 796-97, 39 L.Ed.2d 52 (1974); *Roe v. Wade*, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942); *Griswald v. Connecticut*, 381 U.S. 479, 496, 85 S.Ct. 1678, 1688 (1965) (Goldberg, J., concurring).

²² See, e.g., *Pedigo v. Rowley*, 101 Idaho 201, 205, 610 P.2d 560, 564 (1980); *Holodook v. Spencer*, 364 N.Y.S.2d at 869-71, 324 N.E.2d at 345-46 (N.Y.1974).

parents whose "[p]hysical, mental or financial weakness [causes them] to provide what many a reasonable man would consider substandard maintenance, guidance, education and recreation for their children, and in many instances to provide a family home which is not reasonably safe as a place of abode," should not be liable to the child for those "unintended injuries."²³

Imposing liability for negligent supervision would effectively curtail the exercise of constitutionally guaranteed parental discretion in matters of child rearing. Parental immunity as it relates to the right and duty to rear children implements a constitutional right. *See Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn.1973) (recognizing a fundamental constitutional right of parents to care for their children without unwarranted state intervention).

The exemption from liability recognized in the majority of jurisdictions, including Washington, is not based on the absence of a duty of care. Obviously, parents owe their children a duty of care. However, the rights, responsibilities, and privileges of parents in relation to their children are so unique that the ordinary standards of care which regulate conduct between others are not applicable to conduct incident to the

²³ *Broadwell v. Holmes*, 871 S.W.2d 471 (1994) (citing *Chaffin v. Chaffin*, 239 Or. 374, 397 P.2d 771, 774 (1964) (*en banc*), *overruled by Heino v. Harper*, 306 Or. 347, 759 P.2d 253 (1988) (abolishing inter-spousal immunity)).

particular relationship of parent and child. That relationship includes responsibilities not owed by parents to any persons other than their children; these responsibilities are inseparable from the privileges that parents have in rearing their children which are not recognized in any other relationship.

For example, in *Holodook v. Spencer*, 36 N.Y.2d 35, 364 N.Y.S.2d 859, 324 N.E.2d 338 (1974), it was alleged that the minor child's mother had negligently supervised her child when, as a result of being left untended, the child wandered into the street where she was struck by a passing automobile. After noting that parents are obligated to support, guide, protect, and supervise their children, the New York Court of Appeals stated that imposing a parental duty of "constant surveillance and instruction" would place an overwhelming burden on parents since it is virtually impossible to supervise a child 24 hours a day. *Id.* Furthermore, the New York Court of Appeals specifically held that negligent supervision was not a tort actionable by the child, reasoning that there are very few accidental injuries to children that could not have been prevented by more intense parental supervision. *Id.* 364 N.Y.S.2d at 865-67, at 342-43.

In *Broadwell v. Holmes*, 871 S.W.2d 471 (1994), the Tennessee Supreme Court noted that "each parent has unique and inimitable methods

and attitudes on how children should be supervised. Likewise, each child requires individualized guidance depending on intuitive concerns which only a parent can understand. Consequently, allowing a cause of action for negligent supervision would enable others, ignorant of a case's peculiar familial distinctions and bereft of any standards, to second-guess a parent's management of family affairs. *Id.* (citing *Paige v. Bing Construction Co.*, 61 Mich.App. 480, 233 N.W.2d 46, 49 (1975)).

The *Broadwell* Court also noted that “even though the courts routinely and successfully intervene in order to protect a child when the parent's conduct towards the child is criminal or where the child's physical or mental health is seriously endangered, the court system is not an appropriate or effective forum for resolving controversies between parent and child, when such controversies necessarily involve ethical, religious, moral, or cultural values.” *Id.* Finally, in *Broadwell v. Holmes, supra*, the Tennessee Supreme Court stated the following in regard to the necessity of granting parental immunity for cases involving parental supervision:

Immunity should afford protection to conduct inherent to the parent-child relationship; such conduct constitutes an exercise of parental authority and supervision over the child or an exercise of discretion in the provision of care to the child. These limited areas of conduct require the skills, knowledge, intuition, affection, wisdom, faith, humor, perspective,

background, experience, and culture which only a parent and his or her child can bring to the situation; our legal system is ill-equipped to decide the reasonableness of such matters. *Id.*

In *Merrick v. Sutterlin*, 93 Wn.2d 411, 610 P.2d 891 (1980), the Washington Supreme Court elected to examine parent-child cases on a case by case basis rather than to absolutely abolish the doctrine:

An absolute abrogation of the doctrine of parent-child immunity is not before the court. We have examined every case dealing with the issue. We recognize that there may be situations of parental authority and discretion which should not lead to liability. *Id.*

Supervision of a child is a core parental function. The cause of action in this case is based in negligence, rather than intentional or wanton conduct. The majority of jurisdictions, including Washington, hold that immunity applies to cases involving core parental duties, such as supervision. This Court should follow Washington precedent and apply parental immunity to this claim of negligent supervision.

III. CONCLUSION

The Washington Supreme Court has repeatedly made it clear that parental immunity is a viable and valid legal doctrine in this state. A parent will therefore be immune from liability when their supervision is negligent but does not rise to the level of willful or wanton conduct, unless

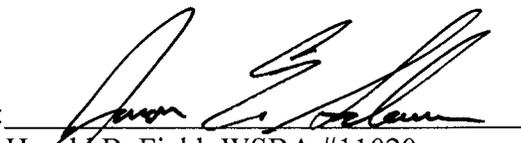
the parent is not acting in a parental capacity. *Jenkins v. Snohomish County PUD*, 105 Wn.2d 99, 713 P.2d 79 (1986).

Joel Zellmer should be granted parental immunity because he was engaged in a core parental function, i.e. the supervision of a young child, at the time of Ashley's tragic accident. Joel Zellmer treated Ashley as his own child and viewed her as part of the family unit. The family portraits, taken the day before this tragic accident, illustrate that fact. CP 102-110.

The applicability of parental immunity in this case is a legal question. Appellants have failed to establish that there is an issue of material fact with regard to whether Joel Zellmer's supervising of Ashley can reasonably be considered willful or wanton. This Court should affirm the trial court's summary judgment dismissal of the appellants' claims based upon Washington's parental immunity doctrine.

Respectfully submitted this 30th day of August, 2005.

MURRAY, DUNHAM & MURRAY

By: 
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of Attorneys for Respondent

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

NO. 554735

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,

v.

JOEL ZELLMER,

Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
NO. 04-2-12706-8 KNT

CERTIFICATE OF SERVICE

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554735

ORIGINAL

I declare that on August 31, 2005, I sent true and correct copies of the Respondent's Brief messenger to:

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Mercer Island, Washington 98040

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on August 31, 2005 at Seattle, Washington.


Susan Zimmerman, Declarant