

No. 78852-9

WASHINGTON STATE SUPREME COURT

**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,**

Petitioners/Appellant,

vs.

JOEL ZELLMER,

Respondent.

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

SUPPLEMENTAL BRIEF OF RESPONDENT JOEL ZELLMER

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I. ISSUES FOR SUPPLEMENTAL BRIEFING

1. This Court should not abolish the parental immunity doctrine because (1) this Court upheld the current, limited doctrine in 1986 and no changes in the law or society justify abolition, (2) Washington's version of the doctrine is entirely justifiable as a means of protecting parental discretion, and (3) abolition would not further the deterrent and compensation policies of tort law.

2. The Court should not hold that the applicability of the immunity doctrine turns on what happens to the family unit after the accident.

3. This Court should affirm the Court of Appeals' holding that parental immunity applies to stepparents who stand *in loco parentis* to and are financially responsible for their stepchildren.

4. This Court should affirm the Court of Appeals' holding that Joel Zellmer was acting *in loco parentis* to his stepdaughter, Ashley, because at the time of the accident, Joel Zellmer was responsible for supervising her in his own home and he and Ashley were living together.

II. SUMMARY OF ARGUMENT

Respondent Joel Zellmer, defendant below, asks this Court to affirm the decision of the Court of Appeals by reaffirming the validity of the parental immunity doctrine and its applicability to Mr. Zellmer. This supplemental brief will focus on the issue of the abolition or retention of

this Court's parental immunity doctrine as the remaining issues were briefed sufficiently to the Court of Appeals.

The parental immunity doctrine protects parents from tort liability to their own children based on the parent's negligence in making decisions about the child's supervision and care. For example, if a child breaks her arm while playing sports, she cannot sue her parents on the theory that the parent should have concluded that she was too small to play.

The immunity is justified for a number of reasons. First, it gives parents reasonable discretion in parenting because exposing them to tort liability for negligent supervision would be unfair. It would be relatively easy to show in hindsight how almost any childhood injury could have been prevented if the parent had made a different decision or supervised child more intensely. For example, if a parent decides that a child is ready to left home alone while the parent makes a trip to the store, the decision will be difficult to justify to a jury if the child injures himself while unsupervised.

Second, the purposes of negligence law are not served by imposing liability on parents. The deterrent aspect of negligence law – designed to create a financial incentive to exercise reasonable care – is not needed because parents already have sufficient incentive (their natural parental affection and concern) to weigh the risks and benefits of their supervisory decisions. If tort exposure did influence a parent's decisions, such influence would not be desirable. Parents could limit exposure by minimizing the child's risk of injury, but this would not necessarily be

best for a child's growth and development. Moreover, imposing tort liability is unlikely to lead to greater compensation of injured children. Homeowners policies generally do not cover such claims and abolition of the immunity would permit third parties to enforce contribution claims against injured children's parents.

Turning to the other issues on review, there is no reason for excluding wrongful death claims from immunity because the immunity is designed to protect parents from litigation over their supervisory decisions. The rationale is unaffected by the extent of the child's injuries.

Furthermore, parental immunity should apply to custodial stepparents. Custodial stepparents are liable for supporting stepchildren in Washington and have the same, if not greater, need for immunity.

Finally, this Court should affirm the Court of Appeals' holding that as a matter of law, Mr. Zellmer stood *in loco parentis* to his stepdaughter at the time of her accident. As the Court of Appeals recognized, a custodial stepparent married to the primary custodial natural parent will always stand *in loco parentis* absent unusual facts compelling a contrary conclusion.

III. ARGUMENT

A. This Court Should Not Abolish the Parental Immunity Doctrine.

Parental immunity protects parents from liability for injuries to their children based on negligent supervision in the absence of willful and wanton misconduct by the parent. This Court revised and reaffirmed the

immunity doctrine in a trio of cases in 1986. Jenkins v. Snohomish Cy. Public Util. Dist. 1, 105 Wn.2d 99, 713 P.2d 79 (1986) (upholding parental immunity doctrine and explaining its rationale and limitations); Talarico v. Foremost Insurance Co., 105 Wn.2d 114, 712 P.2d 294 (1986) (“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 by Baughn v. Honda Motor Co., 105 Wn.2d 118, 712 P.2d 293 (1986). There is no reason for this Court to abandon parental immunity, as the arguments for and against the doctrine remain unchanged since 1986 and this Court’s position continues to be a mainstream one similar to that in effect in a majority of jurisdictions.

1. Application of *stare decisis* principles supports upholding the parental immunity doctrine.

Because this case raises the question of the continuing validity of a doctrine that has developed in Washington over the past 100 years, consideration of *stare decisis* principles should weigh heavily in the analysis of this case. The principle of *stare decisis* “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). “Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office.” Id.

Here none of the factors that would support overruling an established common law doctrine are present. This Court last reviewed parental immunity 20 years ago and since that time there have not been substantial changes in the national jurisprudence on the immunity doctrine, Washington law, or society as a whole that would indicate that Washington's approach to the concept is clearly incorrect or outdated.

A useful contrast with this case is presented by the Court's recent decision to abolish another common law tort defense, the doctrine of "completion and acceptance" under which a contractor was relieved of tort liability arising out of its work once the work was accepted by the owner. In abolishing the doctrine, this Court noted that it had "not addressed this doctrine in over 40 years and, in the meantime, 37 states have rejected it." Davis v. Baugh Indus. Contractors, Inc., ___ Wn.2d ___, 150 P.3d 545, 546-547 (2007). But the Court last considered parental immunity 20 years ago and, in the meantime, there has been no judicial trend toward rejecting it. Roughly the same number of courts accept the doctrine now as accepted it then.¹ In Davis the court also noted that the rationale for the

¹ Jill Elaine Hasday, The Canon of Family Law, 57 Stan. L. Rev. 825, 852-53 (2004) (estimating that at least 27 states recognize a form of parental immunity); Liability of parent for injury to unemancipated child caused by parent's negligence—modern cases, 6 A.L.R. 4th 1066 (1981). Here is a list of significant parental immunity cases since 1986: Broadbent by Broadbent v. Broadbent, 184 Ariz. 74, 907 P.2d 43 (1995) (parental immunity abolished and replaced with "reasonable and prudent parent" standard); Verdier v. Verdier, 364 Ark. 287 (2005) (upholding parental immunity); Terror Min. Co., Inc. v. Roter, 866 P.2d 929 (Colo. 1994) (continuing to recognize doctrine with "willful and wanton misconduct" and "business or employment" exceptions); Crotta v. Home Depot, Inc., 249 Conn. 634, 644, 732 A.2d 767, 773-774 (1999) (upholding doctrine); Sears, Roebuck & Co. v. Huang, 652 A.2d 568, 572 (Del. 1995) ("where parental control, authority, or discretion is involved, the rule of parental immunity [is]

“completion and acceptance” doctrine was based on legal concepts of privity in tort law, and the “last wrongdoer” theory of proximate causation that had long been abandoned under Washington law. Davis, 150 P.3d at 547. In contrast, deference to parental discretion in supervisory decisions, which is the rationale for parental immunity, has not eroded in past 20 years and even courts that have recently rejected parental immunity recognize that the purposes for it have some merit. E.g.,

(continued . . .)
preserved”); Rousey v. Rousey, 528 A.2d 416 (D.C. 1987) (declining to recognize doctrine); Herzfeld v. Herzfeld, 781 So.2d 1070, 1082 (Fla. 2001) (recognizing validity of doctrine but held inapplicable to sexual abuse claim); Blake v. Blake, 235 Ga. App. 38, 38, 508 S.E.2d 443 (1998) (immunity applied to father in auto accident suit brought by mother); Edgington v. Edgington, 193 Ill. App. 3d 104, 549 N.E.2d 942 (1990) (doctrine applied to suit against father for negligently injuring child in auto accident); Cooley v. Hosier, 659 N.E.2d 1127 (Ind. App. 1996) (parental immunity barred negligent supervision claim); Clark v. Estate of Rice ex rel. Rice, 653 N.W.2d 166, 174 (Iowa 2002) (“immunity exists only for negligent acts involving the exercise of parental authority over a child or the exercise of parental discretion in providing care”); Bonin v. Vannaman, 261 Kan. 199, 238, 929 P.2d 754 (1996) (holding limited parental immunity applied to claim that parent should have pursued malpractice claim against doctor on behalf of child); Cox v. Gaylord Container Corp., 897 So.2d 1, 3, (La. App. 2004) (immunity exists pursuant La. R. S. 9:571.); Allstate Ins. Co. v. Kim, 376 Md. 276, 829 A.2d 611 (2003) (upholding validity of statute creating exception to immunity for insured auto negligence cases); Stamboulis v. Stamboulis, 401 Mass. 762, 519 N.E.2d 1299 (1988) (holding no “absolute curtain” of immunity protects parents from negligence actions); Pack v. Nationwide Mut. Fire Ins. Co., 878 So.2d 177, 180 (Miss. App. 2004) (recognizing that immunity continues to apply to negligence claims outside the motor vehicle context); Hartman v. Hartman, 821 S.W.2d 852 (Mo. 1991) (doctrine abrogated); Buono v. Scalia, 179 N.J. 131, 137-138, 843 A.2d 1120 (2004) (recognizing continued validity of limited parental immunity); Broadwell by Broadwell v. Holmes, 871 S.W.2d 471, 476-477 (Tenn. 1994) (recognizing parental immunity for “conduct that constitutes the exercise of parental authority [or] performance of parental supervision”); Plainview Motels, Inc. v. Reynolds, 127 S.W.3d 21, 41 (Tex. App. 2003) (immunity exists for negligent exercise of parental authority or discretion); Pavlick v. Pavlick, 254 Va. 176, 491 S.E.2d 602 (Va. 1997) (refusing to abrogate doctrine); Sias ex rel. Mabry v. Wal-Mart Stores, Inc., 137 F. Supp. 2d 699 (S.D. W. Va. 2001) (counterclaim against parent by store barred by immunity doctrine under West Virginia law); Dellapenta v. Dellapenta, 838 P.2d 1153, 1158 (Wyo. 1992) (recognizing automobile negligence exception to doctrine).

Broadbent by Broadbent v. Broadbent, 184 Ariz. 74, 80, 907 P.2d 43 (1995) (noting that “[t]he justification that allowing children to sue their parents would undercut parental authority and discretion has more appeal than the other rationales.”).

Finally, in Davis, this Court noted that the completion and acceptance doctrine was harmful because it “weakens the deterrent effect of tort law on negligent builders.” In contrast, parents do not need the incentive of tort liability to behave reasonably in the supervision of their children, and the deterrent effect of tort law may itself be harmful to the parent-child relationship.

Petitioners point to no social changes since 1986 that would warrant reconsidering these precedents. Instead, in their petition for review, the Petitioners attacked the long-abandoned 1905 original case holding that a child’s lawsuit against her father for rape was precluded by the immunity. Roller v. Roller, 37 Wash. 242, 243, 79 P. 788 (1905) (overruled to the extent that Roller holds parents immune from all tort liability. Borst v. Borst, 41 Wn.2d 642, 657, 251 P.2d 149 (1952)). The broad rule announced in Roller, precluding tort liability of any kind, has been replaced by our modern doctrine that exists only to protect parents’ discretionary supervisory decisions from ordinary negligence claims. Borst, 41 Wn.2d at 655-66.

More recently, this Court upheld the validity of the modern rationale supporting parental immunity, adopting the New Jersey high court’s reasoning:

The Foldi court observed that there are certain areas of activities within the family sphere involving parental discipline, care and control that should remain free of judicial activity. "Parents should be free to determine how the physical, moral, emotional, and intellectual growth of their children can best be promoted." Foldi, 93 N.J. at 545, 461 A.2d at 1152. 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 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." Foldi, 93 N.J. at 546, 461 A.2d at 1152.

Jenkins, 105 Wn.2d at 105. There is nothing clearly incorrect about the Jenkins court's ruling or the rationale upon which it was based.

2. The parental immunity doctrine is not confusing or inconsistent.

Petitioners also attack the doctrine by claiming that it has led to inconsistent results. But the superficial "inconsistency" they point to amounts to no more than showing that sometimes a child can sue a parent and sometimes she cannot. There is no inconsistency. Since the rationale for immunity is limited to protecting a sphere of discretionary parenting decisions, immunity does not apply to all child-against-parent tort lawsuits. For example, parents have no special discretion in how they drive a car and hence are not immune from suit if they happen to injure their child in the course of negligent driving. Merrick v. Sutterlin, 93 Wn.2d 411, 416, 610 P.2d 891 (1980).

Similarly, willful or wanton misconduct will place the parent outside the doctrine's protection. Jenkins, 105 Wn.2d at 106. Also, if the parent injures the child outside the context of his parental duties, the rationale for the immunity no longer applies. Borst, 41 Wn.2d at 642 (father not acting in parental capacity when driving truck on business).

Contrary to the Petitioners' attempt to portray parental immunity as an outdated doctrine riddled with confusing and contradictory exceptions, this Court's rulings are consistent with one another and with the modern rationale for the doctrine.

3. Parental immunity makes policy sense.

Protection of parental decisions with respect to the rearing and supervision of children is the primary policy justification for the parental immunity doctrine. Jenkins, 105 Wn.2d at 103-106, 713 P.2d at 79. The immunity is justified by concerns of fairness to the parent from unreasonable exposure to liability based on unfair hindsight judgments. As this Court noted, "[t]here is no correct formula for how much 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.'" Jenkins, 105 Wn.2d at 105, 713 P.2d at 79 (citation omitted). This Court immunizes people in analogous supervisory roles who would otherwise be exposed to the harsh glare of hindsight and disproportionate liability. For example, the "business judgment rule" similarly protects persons responsible for supervisory and decision-making roles in the corporate context:

Under the “business judgment rule,” corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith.

Scott v. Trans-System, Inc., 148 Wn.2d 701, 709, 64 P.3d 1 (2003). Child rearing, like a business venture, is marked by risk, unpredictability, and the need to exercise judgment and discretion regarding the appropriate level of risk without fear of liability if things go wrong.

Not only is there good reason to give deference to parental supervisory decisions, the justification for parental immunity is also compounded by the fact that the twin aims of tort law: deterrence of negligent conduct and compensation of its victims,² are not well-served by parental liability.

Parents, unlike strangers or others who do not have a parent-child relationship with a particular child, already have adequate incentives to exercise reasonable care in the upbringing and supervision of a child precisely because they are parents. They do not need the financial stick of negligence law to ensure reasonable parenting decisions. Moreover, parents might respond by supervising their children more closely and by

² Davis, __ Wn.2d __, 150 P.3d at 548 (2007) (finding that “completion and acceptance” doctrine inappropriately “weakens the deterrent effect of tort law on negligent builders”); Viking Ins. Co. v. Nelson, 81 Wn. App. 539, 545, 914 P.2d 1215 (1996) (“A fundamental principle of tort law is full compensation of the injured person.”).

not allowing their children to engage in activities that might create a risk of injury, even if the activity was beneficial (*e.g.*, sports, after school jobs). Parents must balance supervision with the natural process of allowing a child to gain independence and growth based on the parents' judgments about the particular child. It is for this reason that this Court has held that "[p]arents should not routinely have to defend their child rearing practices where their behavior does not rise to the level of wanton misconduct." Jenkins, 105 Wn.2d at 105, 713 P.2d at 79 (quoting Foldi v. Jeffries, 93 N.J. 533, 546, 461 A.2d 1145 (1983)).

The Supreme Court of Idaho recognized all of the above concerns when it upheld the parental immunity, noting that parents generally want the best for their children and that raising a child properly involves an exercise of discretionary judgment as to the appropriate level of risk:

All of us, as parents, have hopes for our children. All of us want our children to grow safely into adulthood, but most of us also realize that children cannot mature in a vacuum. To become responsible adults, children must learn to assume responsibility and make judgments. This is a process and not an instantaneous miracle that automatically occurs at age eighteen, nineteen, or twenty-one. In the area of supervision, what one parent may perceive as too dangerous or unnecessary may be thought by another parent as desirable for the formation of growth abilities.

Pedigo v. Rowley, 101 Idaho 201, 205, 610 P.2d 560 (1980).

Just as allowing negligent supervision claims to proceed against parents would not advance the deterrent aspect of negligence law, parental

immunity would not advance, and may hinder, a child's ability to receive compensation for her injuries.

In Washington, parents will rarely have liability insurance coverage for negligent supervision claims because "family exclusions" in homeowners insurance policies (as opposed to auto policies) are allowed in this state. State Farm General Ins. Co. v. Emerson, 102 Wn.2d 477, 481-83, 687 P.2d 1139 (1984) (upholding "family exclusion" in a homeowners liability policy); see also Talarico, 105 Wn.2d at 116-17 (holding lawsuit against parent for negligent supervision barred by parental immunity and not covered by homeowners policy); cf., Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wn.2d 203, 643 P.2d 441 (1982) (family exclusion violates public policy when it is part of an auto policy).

Because negligent supervision claims will rarely be covered by insurance, if such a suit is successful and does not drive the parent into bankruptcy, it will usually result in inefficient compensation of the child. Because a parent's assets indirectly benefit the child because of the parent's obligation of support, a transfer of wealth from the family as a whole (of which the child is a part) to a trust account dedicated to the child does not benefit the child to the full extent of the payment. The parent's expenses in defending the lawsuit would also reduce family wealth and the child's net recovery.

And personal exposure of the parents in child accident cases could also be exploited to frustrate or deter a child's recovery from non-parent tortfeasors. Many parental immunity cases arise not in the context of a

child suing a parent, but a parent being sued for contribution as a third party defendant by a tortfeasor, or a tortfeasor asserting parental negligence as an affirmative defense. Jenkins, 105 Wn.2d at 103-106, 713 P.2d 79 (disallowing utility district's defense of parental negligence regarding child's injury based on parental immunity doctrine); Baughn, 105 Wn.2d at 118, 712 P.2d at 293 (tortfeasor may not seek indemnity or contribution from parents for tort damages paid to child on theory that parents negligently failed to supervise child); Chhuth v. George, 43 Wn. App. 640, 647, 719 P.2d 562 (1986) (parental immunity precluded contribution claim against parents).

Clearly, the children in Jenkins and Baughn were better off because of parental immunity. They were allowed to recover from the tortfeasor without an offset for the parent's negligence and without the tortfeasor being able to reduce the family wealth by means of a contribution action against the parents. Children will often be able to assert joint and several liability as fault free plaintiffs and recover all of their damages from a single solvent defendant, even if their parents are partially at fault. Price v. Kitsap Transit, 125 Wn.2d 456, 461, 886 P.2d 556 (1994) (child under six is not an "entity" to whom fault can be apportioned under RCW 4.22.070(1)); RCW 4.22.070(1)(b) (at fault defendants are jointly and severally liable to fault free plaintiff). In cases like Jenkins, Baughn, and Chhuth, parents will often have a great deal of influence over whether a suit is brought. Parents may refuse to sue on behalf of a child, or fail to encourage the child to sue if the result will be

an uninsured contribution claim from the tortfeasor. Defendants may bring contribution actions to create a conflict of interest between the child and parent to obtain a settlement advantage.

The Connecticut Supreme Court recently cited these concerns as justification for the doctrine:

[A]llowing such third party claims would have a detrimental effect upon the injured child. "It is artificial to separate the parent and child as economic entities by the assertion that the recovery of the nonparent defendant from the negligent parent does not technically diminish the injured child's recovery. The reality of the family is that, except in cases of great wealth, it is a single economic unit and recovery by a third party against the parent ultimately diminishes the value of the child's recovery." *Holodook v. Spencer*, 36 N.Y.2d 35, 47, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974). In addition, vulnerability to suit by third parties might make parents reluctant to seek legal redress for their child's injuries.

Crotta v. Home Depot, Inc., 249 Conn. 634, 644, 732 A.2d 767,773-774 (1999).

Finally, it is critical to recognize that focused, sterile analysis of tort liability concepts often ignores the reality of wider-reaching social effects. A judgment in favor of one child (or of a contribution-seeking joint tortfeasor) reallocates family assets from other uses. Indeed, abolition of parental immunity could lead to a transfer of family resources to an injured and fully-recovered sibling, and away from one more needy in the present and future (*i.e.*, one with a disability).

On balance, one cannot say that parental liability for negligent supervision claims will increase compensation to injured children, or result in an overall benefit to children and their families.

B. The Child's Death or Breakup of the Family Unit Does Not Affect the Applicability of the Modern Parental Immunity Doctrine.

Because the justification for parental immunity is to prevent second-guessing parents' supervisory actions, there is no basis for holding that the doctrine's applicability is affected by what happens *after* the allegedly negligent parental conduct takes place. The child's death or a subsequent family breakup would be relevant only under the outmoded "family harmony" rationale. But even under the family harmony rationale, family breakups would be encouraged if a breakup was all that stood between an aggrieved family member and his tort lawsuit.

In addition, there is no inconsistency between the Court of Appeals' decision in this case and Division Three's ruling in Sisler v. Seeberger, 23 Wn. App. 612, 596 P.2d 1362 (1979). In Sisler, a mother and one of her children died in a car accident caused by the mother's negligence. The court allowed a negligence action to proceed against the mother reasoning that "the parent is dead and the relationship is thus severed. As a result, there is no parental authority or familial tranquility to be preserved." Sisler, 23 Wn. App. at 614-615. Sisler was based on the outdated "family tranquility" rationale and not the rationale later adopted by this Court in Jenkins and Merrick, *supra*. In any event, the modern immunity would not apply under the facts in Sisler because liability was

based on negligent driving, not on negligent child supervision or parenting. Indeed, following this Court's decisions on parental immunity in 1986, Division Three upheld parental immunity for negligent supervision even though the child died. Chhuth, 43 Wn. App. at 640, 719P.2d at 562. Sisler is no longer good law because its reasoning conflicts with subsequent decisions of this Court.

C. The Court of Appeals Properly Held that Parental Immunity Applies to Stepparents.

The blending of stepparents and stepchildren into families is common in modern society. This Court has recently decided a case where the evidence showed a strong bond between a boy and his stepmother. In re Custody of Shields, 157 Wn.2d 126, 152, 136 P.3d 117 (2006). There, Justice Bridge noted that biology is not the sole creator of familial bonds between parent (natural or step) and child. Id., (Bridge, J., concurring). See also Smith v. Stillwell, 137 Wn.2d 1, 36, 969 P.2d 21 (1998) (Talmadge, J., dissenting). Similarly, implicitly acknowledging that stepfamilies do exist and function just like natural families, the Court of Appeals confirmed that the immunity should apply to stepfamilies.

The Court of Appeals noted, “[i]t 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.” Zellmer v Zellmer,

132 Wn. App. 674, 680, 133 P.3d 948 (2006). Clearly, stepparents may be at great risk from suit by a hostile natural parent following an accident and therefore are in greater need for immunity. As the Court of Appeals pointed out, 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.” Zellmer, 132 Wn. App. at 680, 133 P.3d at 948 (citing cases).

Cases following the minority rule deny stepparent immunity because the stepparent could not be liable for the child’s support in the state in question and therefore should not receive the corresponding parental immunity.³ In Washington, the family support statute applies to custodial stepparents.⁴ In re Marriage of Farrell, 67 Wn. App. 361, 366, 835 P.2d 267 (1992) (“custodial [stepfather], *in loco parentis* . . . had both a common law and statutory duty to support [stepdaughter] while she lived with him and her mother.”); Van Dyke v. Thompson, 95 Wn.2d 726, 730, 630 P.2d 420 (1981) (statute does not apply to a noncustodial stepparent).

³ Warren v. Warren, 336 Md. 618, 629, 650 A.2d 252 (1994) (“[T]he duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world. . . . No such duties are imposed upon stepparents by law.”); C.M.L. ex rel. Brabant v. Republic Services, Inc., 800 N.E.2d 200, 206 (Ind. App., 2003) (“[U]nder Indiana law, a stepparent has no legal obligation to support his stepchildren.”); Rayburn v. Moore, 241 So.2d 675, 676 (Miss. 1970) (“In the present case Lyle M. Moore stood *in loco parentis* to Carmen Hihn to the extent that he supported her and treated her the same as his own children, but he was not under a legal obligation to do so.”)

⁴ RCW 26.16.205 reads: “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.”

Because the reason for the minority position on stepparent immunity does not apply to custodial stepparents in Washington, this Court should affirm the Court of Appeals' adoption of the majority view.⁵

D. The Court of Appeals Correctly Held that Mr. Zellmer Stood *In Loco Parentis* to Ashley.

The Court of Appeals determined that when the stepparent is married to and lives with the primary custodial parent, the stepparent should be deemed *in loco parentis* for the purpose of the family immunity doctrine unless unusual facts show a contrary intent. As the Court of Appeals recognized, a highly fact-specific test would open the door to litigious finger-pointing over the quality of family life and rob the immunity doctrine of much of its benefit:

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. 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.

⁵ As demonstrated, this case involves the complex interplay between public policy-laden issues of tort law (the parental immunity doctrine), insurance law (the household exclusion), family law (the family support statute) and the overall well-being of children and families. The Legislature is in a better position to address whether, and how, these interconnected interests should be affected.

Zellmer, 132 Wn. App. at 682-683, 133 P.3d at 948 (footnote omitted).

Because Mr. Zellmer was married to Ashley's natural mother, cared for her as a parent would, and lived in the same home with her, the Court of Appeals' determination was clearly correct.

Finally, Petitioners argued in their Petition for Review that *in loco parentis* status should be determined at the time their tort lawsuit was filed instead of at the time the accident happened and conclude that since Ashley was dead at the time they brought suit, there was no *in loco parentis* status. Petitioners cite Morris v. Brooks, 186 Ga. App. 177, 178, 366 S.E.2d 777 (1988), for this proposition. But the Morris court recognized "preservation of family tranquility" as the policy rationale for the parental immunity doctrine and therefore held the doctrine inapplicable when the child was dead because "[t]he object of preserving family harmony does not control where there is no family status at the time of filing of the action." The Morris opinion is meaningless in Washington because Washington bases the immunity on the need to protect parental discretion and has long rejected the family harmony rationale.⁶ The subsequent death of the child is therefore immaterial. Chhuth, 43 Wn. App. at 647.

IV. CONCLUSION

This Court has considered and rejected an invitation to abolish parental immunity in the relatively recent past. Preservation of the

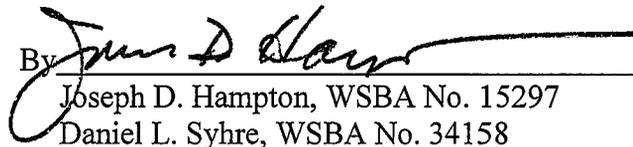
⁶ See discussion in part B, supra.

currently-formulated doctrine protecting a parent's discretionary decision-making is appropriate and wise. Mr. Zellmer respectfully requests that this Court affirm the Court of Appeals.

DATED this 5th day of April, 2007.

BETTS, PATTERSON & MINES, P.S.

By



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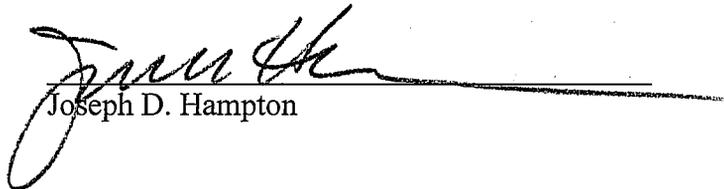
CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of Kitsap County. I am over 18 years of age and not a party to this action. My business address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, WA 98101-3927.

On the date indicated below, I caused the attached document to be served via legal messenger and via facsimile (206-230-4982) upon:

Eric W. Lindell
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Mercer Island, WA 98040

DATED this 5th day of April, 2007, at Seattle, Washington.


Joseph D. Hampton