No. 90934-2

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 44346-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TORRE WOODS,

Respondent,

v.

HO SPORTS COMPANY, INC.,

Petitioner,

and

MICHAEL E. WOODS, individually,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JOHN R. HICKMAN

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

RULES AND REGULATIONS

A. Identity of Petitioner.

HO Sports Company, Inc., asks this Court to accept review of the Court of Appeals' published decision terminating review designated in Part B.

B. Court of Appeals Decision.

Division Two's decision, filed August 19, 2014, reversed the trial court's summary judgment dismissal of Torre Woods' negligence action against his father Michael Woods.[1] The decision is published at ___ Wn. App. ___, 333 P.3d 455 (2014). (Appendix A) The Court of Appeals denied petitioner HO Sports' timely motion for reconsideration on September 16, 2014. (App. B.)

C. Issue Presented for Review.

Is a child's negligence claim against a parent for injuries sustained during a family recreational activity barred by the parental immunity doctrine on the ground that parental immunity extends only to a parent's *decisions*, but not to a parent's *actions*?

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[1] Michael Woods died June 19, 2014. His estate will be substituted as a party to this action. RAP 3.2. In this petition, Michael and Torre Woods are referred to by first name.

D. Statement of the Case.

On July 24, 2010, 17-year-old Torre Woods was severely injured when he fell off an inflatable tube being towed by a jet boat operated by his father Michael on Tiger Lake, where the Woods family had a cabin. (CP 2, 28-29) The Woods family went to their cabin nearly every summer weekend; Michael was an experienced boater and the Woods often used their boats to tow riders on inflatable tubes on Tiger Lake. (CP 29) On the day of the accident, Michael was supervising Torre and three of Torre's friends at the Tiger Lake cabin. (CP 29) As Michael pulled Torre and two of his friends behind the jet boat, the tube hit a wake and the three riders left the tube, landing in the water. (CP 4-5, 189) One of the riders allegedly struck Torre's head, fracturing his cervical spine and rendering him quadriplegic. (CP 5)

On May 8, 2012, Torre filed a complaint asserting claims for negligence against his father Michael and for product liability against HO Sports, the manufacturer of the tube. (CP 1-8) Michael moved for summary judgment on the basis of parental immunity. (CP 21) HO Sports joined in Michael's motion because Michael's immunity would preclude HO Sports' joint liability under RCW 4.22.070(1) for any fault allocated to Michael. (CP 32) *See Humes*

v. Fritz Companies, Inc., 125 Wn. App. 477, 491, 105 P.3d 1000 (2005) (RCW 4.22.070(1) provides for allocation of fault to immune entity, but a plaintiff "should not recover for fault attributable to immune parties" from a defendant).

The trial court dismissed Torre's claim against Michael. (CP 164-66) Recognizing Michael and Torre were engaged in their long-shared recreational activity of tubing, the trial court rejected Torre's argument that "the antiquated doctrine of 'parental immunity' is not available when injury is caused by the parent's negligent operation of a motor vehicle." (CP 34; *see also* CP 216-23)

On discretionary review, Division Two reversed and reinstated Torre's negligence action against Michael. (Opinion at ¶ 1) In holding the parental immunity doctrine did not apply to Torre's allegations of negligence against his father, the Court of Appeals announced a distinction between a parent's decision to allow a child to engage in a recreational activity and the parent's participation with a child in the activity:

> Torre's lawsuit alleges that Michael failed to exercise ordinary care while operating his boat in an inattentive, careless, or negligent manner. Torre does not allege that Michael acted negligently in allowing him to engage in the activity for which he received his injuries. This distinction is important. We recognize the difference between a parent having immunity for

> choosing an activity for his child to participate in versus a parent's negligence while participating in the chosen activity.

(Opinion at ¶ 11)

On reconsideration, HO Sports asked the court to consider under RAP 9.11 a 2014 perpetuation deposition given by Michael Woods nine days before the oral argument in the Court of Appeals, which provided additional facts relevant to the accident and to the parental immunity defense. The Court of Appeals declined to accept the additional evidence and denied reconsideration. (App. B)

E. Argument Why the Court Should Grant Review.

This Court should accept review because Division Two's published decision conflicts with this Court's decisions in *Zellmer v. Zellmer*, 164 Wn.2d 147, 188 P.3d 497 (2008), and *Borst v. Borst*, 41 Wn.2d 642, 251 P.2d 149 (1952), which in enunciating the parental immunity doctrine do not distinguish between a parent's discretionary decisions and a parent's actions in carrying out parental responsibilities. RAP 13.4(b)(1). Division Two's published decision also raises an issue of substantial public interest because it undercuts the bases for the parental immunity doctrine, which is grounded in a parent's freedom to provide for the needs, comforts

and pleasures of the family without judicial intervention. The opinion creates a distinction between parental decisions and parental actions that is unworkable in practice. RAP 13.4(b)(4).

1. Division Two's published decision conflicts with this Court's decisions granting immunity for parental behavior, not just decision-making.

This Court has held that the parental immunity doctrine applies to a parent's behavior as well as a parent's decision-making. As explained in *Zellmer*, 164 Wn.2d at 158, ¶ 23, the parental immunity doctrine applies "in cases of ordinary negligence when a parent is acting in a parental capacity." The *Zellmer* Court reaffirmed that the parental immunity doctrine applies whenever a parent acts in a parental capacity and the behavior does not rise to the level of wanton misconduct. *Zellmer*, 164 Wn.2d at 159, ¶ 23, *discussing Jenkins v. Sno. Co. PUD No. 1*, 105 Wn.2d 99, 105, 713 P.2d 79 (1986).

While *Zellmer* addressed primarily parental supervision, the Court did not limit the parental immunity doctrine to claims of negligent supervision. The immunity accorded a parent's actions when performing family tasks and participating in family activities was presumed in *Zellmer's* analysis; nothing in the decision defined

"acting in a parental capacity" to be limited to parental decision-making. As this Court said in *Borst*:

> 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. . . .
>
> 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.
>
> . . . The parental non-liability . . . is not granted as a reward, but as a means of enabling the parents to discharge the duties which society exacts.

Borst, 41 Wn.2d at 656 (internal quotation omitted).

In *Borst*, the Court ultimately decided the child's negligence claim was not barred by the parental immunity doctrine because the injury occurred in connection with the parent's trucking business – a "nonparental transaction" – rather than during a

family activity. *Borst,* 41 Wn.2d at 657 ("for all practical purposes, the relationship between the two at the time of this accident was not parent and child, but driver and pedestrian"). However, in holding that the doctrine grants parents a "wide sphere of discretion," the *Zellmer* Court followed the analysis of the parental immunity doctrine set out in *Borst.* 164 Wn.2d at 159, ¶ 24.

Here, the Court of Appeals rejected immunity for a parent's alleged negligent actions when participating with a child in a recreational activity, refusing to treat such participation as a parental function:

> We recognize the difference between a parent having immunity for choosing an activity for his child to participate in versus a parent's negligence while participating in the chosen activity.

(Opinion at ¶ 11) The Court of Appeals held that when Michael pulled Torre on the tube as part of a shared recreational activity, Michael's "actions did not involve parental control, discipline, or discretion . . . or decision-making in how to raise his child." (Opinion at ¶ 13) The Court of Appeals' bright-line rule wrongly separates decision-making from conduct, and eliminates parental conduct from the protection of Washington's parental immunity doctrine.

The Court of Appeals' attempt to distinguish between a parental decision to allow Torre to engage in a recreational activity (immune) and parental participation with Torre in the activity (not immune) is not supported by this Court's parental immunity decisions. Division Two's elimination of parental immunity for any parental *activity* is contrary to this Court's pronouncement in *Zellmer* that "a parent is not liable for ordinary negligence in the performance of parental responsibilities." 164 Wn.2d at 155, ¶ 18. The *Zellmer* Court explained that parental immunity protects parents from defending their child rearing practices even if negligently performed:

> We expressly rejected the "reasonable parent" standard and concluded the better approach was to continue to recognize a limited form of parental immunity in cases of ordinary negligence when a parent is acting in a parental capacity. . . .
>
> "Parents should be free to determine how the physical, moral, emotional, and intellectual growth of their children can best be promoted." *Foldi [v. Jeffries]*, 93 N.J. [533,] 545, 461 A.2d [1145], 1152 [(1983)]. **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.

Zellmer, 164 Wn.2d at 158-59, ¶ 23, *quoting Jenkins,* 105 Wn.2d at 105 (emphasis added).

The Zellmer Court did not exclude active participation in family recreational activities from the type of conduct involving parental discretion protected by the parental immunity doctrine. Even though the routine act of transporting a child in a motor vehicle for transportation does not enjoy parental immunity, parents retain immunity for "negligence in the performance of parental responsibilities." *Zellmer,* 164 Wn.2d at 155, ¶ 18. Under the *Zellmer* Court's analysis, therefore, parental behavior is as much protected by the parental immunity doctrine as parental supervision and other decision-making. The doctrine is not limited to matters of supervision (a generally passive process) or discipline, but extends to all aspects of parental discretion. 164 Wn.2d at 162, ¶ 30.

Michael's participation with Torre in a family recreational activity is precisely the kind of conduct the parental immunity doctrine shields from exposure to a negligence claim if Michael behaved negligently in pursuing this family activity. This Court should reverse the decision of the Court of Appeals and reinstate

the trial court's order dismissing Torre's negligence claim against Michael.

2. Division Two's artificial distinction between parental actions and parental decisions raises an issue of substantial public interest.

The Court of Appeals' elimination of parental immunity for claims based on a parent's participation in a recreational activity raises an issue of substantial public interest. RAP 13.4(b)(4). In refusing to hold that a parent's active participation in family recreational pursuits is parental conduct that enjoys the protection of the parental immunity doctrine, (Opinion at ¶¶ 11-14 and n. 4), the Court of Appeals created an artificial distinction between negligent parental decision-making and negligent parental actions that is unworkable in practice.

A parent's participation with a child in recreational pursuits necessarily entails numerous decisions regarding method and execution, any of which may create a risk of harm to the child. Under the Court of Appeals' reasoning, a parent would face potential liability for misjudging a child's ability to catch a fastball if the parent threw the ball to the child, while the decision to allow the child to face another pitcher or a pitching machine would enjoy immunity. A parent's misexecution of a rock climbing maneuver

may expose the parent to liability but the parent's choice of route may not. A parent could face liability for failing to avoid a tree on a toboggan run, or a notorious hole on river rapids, while retaining immunity for the parental decision to engage in the activity in the first instance. This is a distinction without a difference and invites creative pleading that undermines the rationale for parental immunity.

Washington has retained the parental immunity doctrine "as a means of enabling the parents to discharge the duties which society exacts." *Borst*, 41 Wn.2d at 656 (citation omitted). The *Borst* Court warned that judicial oversight of parental decision making and discretion makes for poor public policy:

> 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.

Borst, 41 Wn.2d at 656.

In refusing to retreat from the parental immunity doctrine, the *Zellmer* Court held that its underlying rationale – a parent's right to be free of judicial interference in parental discretion – is rooted in the Constitution and remains "vital" in modern society:

> Following *Jenkins*, the primary objective of the modern parental immunity doctrine is to avoid undue judicial interference with the exercise of parental discipline and parental discretion. This rationale remains as vital today as it was in 1986. Parents have a right to raise their children without undue state interference. *In re Custody of Brown*, 153 Wn.2d 646, 652, 105 P.3d 991 (2005) (citing *In re Custody of Smith*, 137 Wn.2d 1, 20-21, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)); *see also Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (right of Amish parents not to send kids to school after eighth grade); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (right of parents to send kids to parochial school). In exercising that right, parents are in need of a "wide sphere of discretion." *Borst*, 41 Wn.2d at 656.

Zellmer, 164 Wn.2d at 159, ¶ 24.

Distinguishing between a parent's decision to engage in a recreational pursuit and the precise manner in which that activity is

performed invites unwarranted judicial scrutiny of parental discretion that lies at the core of the continued vitality of the parental immunity doctrine. The "needs, comforts and pleasures of the family," identified by the *Borst* Court, surely encompass family recreation. Public policy demands now, just as much as in 1952, that parents who participate in family activities be given immunity from suits premised upon their actions while participating in those activities.

The decision by the Court of Appeals in this case is contrary to the public policy that underlies the doctrine of parental immunity and involves a matter of substantial public interest. This Court should accept review because the Court of Appeals' abrogation of parental immunity encourages litigation without providing clear guidance to the bench, the bar, or to the public and their liability insurers. RAP 13.4(b)(4).

F. Conclusion.

This Court should accept review, reverse the Court of Appeals' decision, and affirm the trial court's summary judgment order dismissing the negligence claim by Torre Woods against his father, Michael Woods.

Dated this 15th day of October, 2014.

SMITH GOODFRIEND, P.S.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 15, 2014, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 15th day of October, 2014.

V. Vigoren

Victoria K. Vigoren

333 P.3d 455
Court of Appeals of Washington,
Division 2.

Torre J. WOODS, individually; Appellant,
v.
H.O. SPORTS CO. INC., a for-profit Washington corporation; and Michael E. Woods, individually; Respondents.

No. 44346–5–II. | Aug. 19, 2014.

Synopsis

Background: Son, who was injured when father, driving his motor boat, pulled son and his friends on an inflatable tube and son was ejected from the tube, filed a negligence claim against his father and a product liability claim against the tube manufacturer. The Superior Court, Pierce County, John Russell Hickman, J., entered summary judgment for father, and son appealed.

[Holding:] The Court of Appeals, Melnick, J., held that parental immunity doctrine was inapplicable to son's allegations of negligence against his father.

Reversed and remanded.

West Headnotes (8)

[1] **Parent and Child**
Actions between parent and child
285 Parent and Child
285k11 Actions between parent and child
Primary purpose of the parental immunity doctrine is to avoid the chilling effect tort liability would have on a parent's exercise of parental discipline and parental discretion.

Cases that cite this headnote

[2] **Parent and Child**
Actions between parent and child
285 Parent and Child
285k11 Actions between parent and child
There are three exceptions to the parental immunity doctrine: (1) the first is where a parent negligently operates an automobile; (2) second is where a parent injures his or her child while engaging in a business activity; and (3) third is where a parent engages in willful or wanton misconduct or intentionally wrongful conduct.

Cases that cite this headnote

[3] **Parent and Child**
Actions between parent and child
285 Parent and Child
285k11 Actions between parent and child
When 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 and, thus, parent is not immune, under parental immunity doctrine, when acting outside his or her parental capacity.

Cases that cite this headnote

[4] **Parent and Child**
Actions between parent and child
285 Parent and Child
285k11 Actions between parent and child
Under parental immunity doctrine, parents are immune from claims for negligent supervision of their children; subjecting parents to liability for negligent supervision inevitably allows judges and juries to supplant their own views for the parent's individual child-rearing philosophy.

Cases that cite this headnote

[5] **Parent and Child**
Actions between parent and child
285 Parent and Child
285k11 Actions between parent and child
Parental immunity doctrine is intended to avoid undue judicial interference with the exercise of parental discipline and parental discretion; parents have a right to raise their children without undue state interference.

Cases that cite this headnote

[6] **Parent and Child**

Actions between parent and child

285 Parent and Child

285k11 Actions between parent and child

Purpose of parental immunity doctrine is to provide sufficient breathing space for making discretionary decisions, by preventing judicial second-guessing of such decisions through the medium of a tort action.

Cases that cite this headnote

[7] **Parent and Child**

Actions between parent and child

285 Parent and Child

285k11 Actions between parent and child

Parental immunity applies to parents' discretionary decisions to allow their children to engage in specific activities.

Cases that cite this headnote

[8] **Parent and Child**

Actions between parent and child

285 Parent and Child

285k11 Actions between parent and child

Parental immunity doctrine was inapplicable to son's allegations of negligence against his father, whose actions involved driving a boat and towing a tube occupied by his son and others, over a wake at a speed higher than the manufacturer's recommendation, which ejected the boys from the tube and injured son; son's lawsuit alleged that father failed to exercise ordinary care while operating his boat in an inattentive, careless, or negligent manner, son did not allege that father acted negligently in allowing him to engage in the activity for which he received his injuries, and, when father drove the boat and towed the tube, his actions did not involve parental control, discipline, or discretion.

Cases that cite this headnote

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Opinion

MELNICK, J.

¶ 1 Torre Woods appeals from the trial court's grant of summary judgment dismissal based on the parental immunity doctrine of his claims against his father, Michael Woods. Michael,[1] driving his motor boat, pulled Torre and his friends on an inflatable tube. Ejected from the tube, Torre suffered a serious injury. He subsequently filed a negligence claim against Michael and a product liability claim against the tube manufacturer. We granted discretionary review on the issue of whether the parental immunity doctrine should be applied to the facts of this case. We reverse the trial court's grant of summary judgment and remand to the trial court to reinstate Torre's negligence action against Michael.

FACTS

¶ 2 In July 2010, Michael went to a lake with Torre and two of Torre's friends. Michael drove a 240–horsepower jet boat at approximately 30 mph and towed Torre and his friends on an inflatable tube designed and manufactured by H.O. Sports Company, Inc. The tube crossed a wake and all three boys were ejected. One of Torre's friends landed on him. The impact broke Torre's neck and rendered him a quadriplegic.

¶ 3 The tube is a large inflatable device that seats four people. H.O. Sports's recommended maximum speed when pulling the tube is 15 mph for children and 20 mph for adults. Although Michael and Torre had engaged in this activity many times and Michael declared that he "was always careful to operate the boat at a speed that Torre was comfortable with," Michael also stated that he probably could have prevented the accident by travelling at a slower speed. Clerk's Papers at 29.

¶ 4 Torre filed a complaint against Michael for negligence and against H.O. Sports for product liability. Michael filed a motion for summary judgment and argued that the parental immunity doctrine required his dismissal. The trial court granted Michael's motion, ruling that he had parental immunity. A commissioner of this court granted discretionary review of the summary judgment order solely on the issue of the applicability of the parental immunity doctrine to this case.[2] We hold the parental immunity doctrine is inapplicable to this case and reverse the trial court's order granting summary judgment and dismissing Torre's claims against Michael.

ANALYSIS

I. STANDARD OF REVIEW

¶ 5 We review an order for summary judgment de novo, engaging in the same inquiry as the trial court. *Loeffelholz v. Univ. of Wash.*, 175 Wash.2d 264, 271, 285 P.3d 854 (2012). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with ***457** the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We construe all facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. *Loeffelholz*, 175 Wash.2d at 271, 285 P.3d 854. Summary judgment is proper only if reasonable persons could reach but one conclusion from the evidence presented. *Bostain v. Food Express, Inc.*, 159 Wash.2d 700, 708, 153 P.3d 846 (2007).

II. PARENTAL IMMUNITY DOCTRINE

[1] ¶ 6 The parental immunity doctrine is a judicially created doctrine that originally operated as a nearly absolute bar to a child's lawsuit for personal injuries caused by a parent, regardless of the wrongfulness of the parent's conduct. *See, e.g., Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905) (father raped daughter). Since its origination, the parental immunity doctrine has been subject to extensive critical commentary, and, like other jurisdictions, Washington has "substantially limited the scope of parental immunity." *Zellmer v. Zellmer*, 164 Wash.2d 147, 155, 188 P.3d 497 (2008); *see also Merrick v. Sutterlin*, 93 Wash.2d 411, 413–15, 610 P.2d 891 (1980). "The primary purpose of the doctrine is to avoid the chilling effect tort liability would have on a parent's exercise of parental discipline and parental discretion." *Zellmer*, 164 Wash.2d at 162, 188 P.3d 497. "In exercising that right, parents are in need of a 'wide sphere of discretion.' " *Zellmer*, 164 Wash.2d at 159, 188 P.3d 497 (quoting *Borst v. Borst*, 41 Wash.2d 642, 656, 251 P.2d 149 (1952)). Our Supreme Court has confirmed the continued viability of the parental immunity doctrine and has refused to replace it with "reasonable parent" standard of liability.[3] *Zellmer*, 164 Wash.2d at 158–61, 188 P.3d 497.

[2] ¶ 7 Washington courts have carved out three exceptions to the parental immunity doctrine.[4] The first is where a parent negligently operates an automobile.[5] *Merrick*, 93 Wash.2d at 412, 416, 610 P.2d 891 (mother rear-ended car, causing injury to her two-year-old child). The second is where a parent injures his or her child while engaging in a business activity. *Borst*, 41 Wash.2d at 657–58, 251 P.2d 149 (father ran over son while driving his business truck). The third is where a parent engages in willful or wanton misconduct or intentionally wrongful conduct.[6] *Hoffman v. Tracy*, 67 Wash.2d 31, 37–38, 406 P.2d 323 (1965); *see also Zellmer*, 164 Wash.2d at 157, 188 P.3d 497; *Jenkins v. Snohomish County PUD Dist. No. 1*, 105 Wash.2d 99, 105–06, 713 P.2d 79 (1986).

¶ 8 The Supreme Court to date has avoided adopting a bright line rule for application of the parental immunity doctrine. Instead, in *Merrick*, the court stated that the better approach is to make a case-by-case determination of when to apply parental immunity. 93 Wash.2d at 416, 610 P.2d 891.

> 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. Several courts, such as Wisconsin and California, have attempted to put forth an all-encompassing rule to deal with these situations. We believe that the better approach is to develop the details of any portions of ***458** the immunity that should be retained by a case-to-case determination.

Merrick, 93 Wash.2d at 416, 610 P.2d 891.

[3] **[4]** ¶ 9 To determine the scope and breadth of parental immunity, we look to our Supreme Court's pronouncements for guidance. "[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." *Borst,* 41 Wash.2d at 651, 251 P.2d 149. "A parent is not immune when acting outside his or her parental capacity." *Zellmer,* 164 Wash.2d at 155, 188 P.3d 497. Parents are immune, however, from claims for negligent supervision of their children. "Subjecting parents to liability for negligent supervision inevitably allows judges and juries to supplant their own views for the parent's individual child-rearing philosophy." *Zellmer,* 164 Wash.2d at 161, 188 P.3d 497. "Parents 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." *Jenkins,* 105 Wash.2d at 105, 713 P.2d 79 (citations omitted).

[5] [6] ¶ 10 The modern parental immunity doctrine is intended to "avoid undue judicial interference with the exercise of parental discipline and parental discretion.... Parents have a right to raise their children without undue state interference." *Zellmer,* 164 Wash.2d at 159, 188 P.3d 497. "[T]he purpose of immunity is to provide sufficient breathing space for making discretionary decisions, by preventing judicial second-guessing of such decisions through the medium of a tort action." *Zellmer,* 164 Wash.2d at 160, 188 P.3d 497.

[7] [8] ¶ 11 Based on the foregoing, we must determine if this case involves parental control, discipline, or discretion for which parental immunity applies. In so deciding, we keep in mind that Torre's lawsuit alleges that Michael failed to exercise ordinary care while operating his boat in an inattentive, careless, or negligent manner. Torre does not allege that Michael acted negligently in allowing him to engage in the activity for which he received his injuries. This distinction is important. We recognize the difference between a parent having immunity for choosing an activity for his child to participate in versus a parent's negligence while participating in the chosen activity. The former involves parental control, discipline, and discretion. As an example, parental immunity applies to parents' discretionary decisions to allow their children to engage in specific activities. *See Baughn v. Honda Motor Co., Ltd.,* 105 Wash.2d 118, 119–20, 712 P.2d 293 (1986) (nine-year-old child allowed to ride on the back of a mini bike operated by another minor, resulting in injuries); *Delay v. Delay,* 54 Wash.2d 63, 64–65, 337 P.2d 1057 (1959) (parent instructed son to siphon gas from a vehicle, resulting in burn injuries).

¶ 12 The situation before us is more akin to the facts of *Merrick,* where the mother drove an automobile and rear-ended another car. 93 Wash.2d at 412, 610 P.2d 891. Her two-year-old child, a passenger in the car, suffered injuries. *Merrick,* 93 Wash.2d at 412, 610 P.2d 891. Through a guardian ad litem, the child sued his mother for negligence. *Merrick,* 93 Wash.2d at 412, 610 P.2d 891. The Supreme Court reversed the trial court's grant of summary judgment and held "that a minor child injured by the negligence of a parent in an automobile accident has a cause of action against that parent." *Merrick,* 93 Wash.2d at 416, 610 P.2d 891. Subsequently, this case has been interpreted to mean that "[a] parent is not immune when acting outside his or her parental capacity." *Zellmer,* 164 Wash.2d at 155, 188 P.3d 497.

¶ 13 Here, when Michael drove the boat and towed the tube, his actions did not involve parental control, discipline, or discretion. Michael's actions did not involve negligent supervision of Torre. Lastly, Michael's actions did not involve parental discretion or decision-making in how to raise his child. Instead, Michael's actions involved driving a boat and towing a tube occupied by his son and others, over a wake at a speed higher than the manufacturer's recommendation, which ejected the boys from the tube and injured Torre. Michael thus engaged in an ***459** allegedly negligent activity that directly injured Torre. At the time of the accident, Michael's relationship with Torre was not primarily that of a parent and child, but of a boat driver and tube rider. We hold that the parental immunity doctrine is inapplicable in this case and that the trial court erred by granting summary judgment and dismissing Torre's claims against Michael. In so ruling, we note that the chilling effect of tort liability in this case does not adversely affect Michael's exercise of parental discipline and parental discretion as it relates to Torre. *See Zellmer,* 164 Wash.2d at 162, 188 P.3d 497.

¶ 14 We hold that the parental immunity doctrine is inapplicable to Torre's allegations of negligence against Michael under the facts of this case. We reverse the trial court's order granting summary judgment and remand to the trial court to reinstate Torre's negligence action against Michael.

We concur: HUNT and MAXA, JJ.

Footnotes

1 To avoid confusion, we refer to the parties by their first names and mean no disrespect to them.

2 The parties have briefed an additional issue based on Torre's motion for reconsideration in the trial court. With his motion for reconsideration, Torre submitted new evidence. The trial court would not consider new evidence and struck it from the record. Because this issue is beyond the scope of the discretionary review order, we decline to consider it.

3 The rationale for the parental immunity doctrine has been well documented by our Supreme Court. *See Borst,* 41 Wash.2d at 650–54, 251 P.2d 149; *Merrick,* 93 Wash.2d at 412–15, 610 P.2d 891; *Zellmer,* 164 Wash.2d at 154–55, 188 P.3d 497.

4 Michael and H.O. Sports urge us to find that parental immunity applies to all recreational activities. We decline the invitation to add a fourth category.

5 Torre urges us to expand the motor vehicle exception to include motor boats. He cited to no statute or case that defines an "automobile" to include a "motor boat." "We do not consider conclusory arguments unsupported by citation to authority." *State v. Mason,* 170 Wash.App. 375, 384, 285 P.3d 154 (2012); *see* RAP 10.3(a)(6), 10.4.

6 Torre also argues for the first time on appeal that there is a genuine issue of material fact as to whether Michael's conduct was wanton, thus making the parental immunity doctrine inapplicable. Because Torre neither argued this theory in the trial court, nor did the parties meaningfully address it in the trial court, we do not consider it on appeal. RAP 2.5(a), 9.12.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TORRE J. WOODS, Appellant, v. HO SPORTS CO. INC., and MICHAEL E. WOODS, Respondents.	No. 44346-5-II ORDER DENYING RESPONDENT'S MOTION TO SUPPLEMENT WITH ADDITIONAL EVIDENCE, DENYING APPELLANT'S MOTION FOR SANCTIONS, AND DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

Respondent Ho Sports Company moves to supplement the record with additional evidence and for reconsideration of the Court's August 19, 2014 opinion. Appellant Woods moves for sanctions against Ho for filing the motion to supplement with additional evidence. Upon consideration, the court denies all motions. Accordingly, it is

SO ORDERED.

PANEL: Jj. Hunt, Maxa, Melnick

DATED this 16th day of September, 2014.

FOR THE COURT:

Hunt, J.

PRESIDING JUDGE

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DIVISION II
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