STATE OF MICHIGAN

COURT OF APPEALS

MK, Minor, by Next Friend KAREN KNAACK,

Plaintiff-Appellee,

v

AUBURNFLY, LLC,

Defendant/Third-Party Plaintiff-Appellant,

and

KAREN KNAACK,

Third-Party Defendant-Appellee.

FOR PUBLICATION
December 17, 2024
2:00 PM

No. 364577
Oakland Circuit Court
LC No. 2020-185376-NO

Before: RIORDAN, P.J., and BOONSTRA and YATES, JJ.

BOONSTRA, J.

Defendant/third-party plaintiff Auburnfly, LLC appeals as on leave granted[1] the trial court's order granting third-party defendant Karen Knaack's motion for summary disposition under MCR 2.116(C)(8). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Auburnfly, a for-profit limited liability company, owns and operates TreeRunner Rochester Adventure Park. Knaack and her minor child, MK, attended an event at the park in June 2020. Before MK was permitted to participate in the event, Knaack was required to sign a "participant

[1] See *MK v Auburnfly, LLC*, 513 Mich 922 (2023).

agreement" in her own capacity and on behalf of MK. Relevant to the issue on appeal, the agreement contained a section entitled "Release, Indemnity and Hold Harmless," which provided:

> If I am an adult participant or Parent (for myself and on behalf of the minor participant), I agree to release and not to sue TreeRunner Rochester Adventure Park, Auburnfly LLC, a Michigan limited liability company, Oakland University[2] and their respective owners, members, officers, employees, representatives, subsidiaries, affiliates and staff (Released/Indemnified Parties) with respect to any and all claims of injury, disability, death, or other loss or damage to person or property suffered by me or by the child, if applicable, arising in whole or part from my (or the child's) visit to the premises of The Park or participation in any Park activity.
>
> In addition, if I am an adult participant or Parent, I agree to INDEMNIFY and HOLD HARMLESS (that is, defend and satisfy by payment or reimbursement, including costs and attorney's fees) Released Parties from any claim of injury, disability, death, or other loss or damage to person or property, brought by me or by or on behalf of the child, a co-participant in the activities, a rescuer, a member of my, or the minor child's family, or anyone else, arising out of or in any way related to a loss suffered by me or the child, or caused by me or the child.
>
> These agreements of release and indemnity include loss or damage caused or claimed to be caused in whole or in part by the negligence of a Released Party, but not intentional wrongs of the gross negligence or willful and wanton misconduct of the Released Party [sic].

Knaack signed the agreement electronically. MK participated in the event and was injured. MK, by Knaack as next friend, sued Auburnfly, alleging negligence, premises liability, and gross negligence. Auburnfly filed a third-party complaint against Knaack, seeking to enforce the participant agreement and compel Knaack to indemnify and hold Auburnfly harmless for injuries to MK. Knaack moved for summary disposition under MCR 2.116(C)(8), arguing that parental indemnification agreements are void as against public policy, or in the alternative that the agreement in this case was unenforceable because it violated the parental-immunity doctrine. The trial court granted Knaack's motion. Auburnfly applied to this Court for leave to appeal that decision; this Court denied the application. *Knaack v Auburnfly, LLC*, unpublished order of the Court of Appeals, entered July 20, 2023 (Docket Nos. 364577 and 364636). Auburnfly applied for leave to appeal this Court's denial to our Supreme Court. In lieu of granting leave to appeal, our Supreme Court remanded the case to this Court "for consideration, as on leave granted, of the enforceability of parental indemnification agreements." *MK v Auburnfly, LLC*, 513 Mich 922 (2023). The trial court entered a stipulated order staying the proceedings below pending the outcome of this appeal.

[2] The Park is located on land owned by Oakland University. Oakland University is not a party to this appeal.

II. STANDARD OF REVIEW

We review de novo a trial court's grant of summary disposition. *Jackson v Southfield Neighborhood Revitalization Initiative*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 361397), held in abeyance ___ Mich ___; 2 NW3d 465 (2024), slip op at 24.

> A court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmoving party. Summary disposition on the basis of subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. [*Id*., quotation marks and citations omitted.]

We review de novo the interpretation of contracts, *Patel v FisherBroyles, LLP*, 344 Mich App 264, 271; 1 NW3d 308 (2022), including whether a contractual provision violates public policy, *Bronner v Detroit*, 507 Mich 158, 165; 968 NW2d 310 (2021).

III. ANALYSIS

Auburnfly argues the trial court erred when it granted Knaack's motion for summary disposition because the contract at issue did not violate public policy or the parental-immunity doctrine. Under the law as it currently stands, we disagree with the former, and we need not address the latter.

"[A] contract is an agreement between parties for the doing or not doing of some particular thing and derives its binding force from the meeting of the minds of the parties . . . ." *In re Mardigian Estate*, 312 Mich App 553, 562; 879 NW2d 313 (2015) (quotation marks and citation omitted). "A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015). "This Court's goal in interpreting a contract is always to ascertain and give effect to the intent of the parties as reflected in the plain language of the contract." *Patel*, 344 Mich App at 271-272. "The words of a contract are interpreted according to their plain and ordinary meaning, and this Court gives effect to every word, phrase, and clause while avoiding interpretations that would render any part of the document surplusage or nugatory." *Id*. at 272 (quotation marks and citation omitted). For purposes of this appeal, the parties have not disputed that a contract between them exists, or that the contract language unambiguously requires Karen to indemnify Auburnfly for MK's injuries, even if they were caused by Auburnfly's negligence. Instead, the parties dispute whether the parental-indemnification agreement contained in the contract was enforceable.

Our Supreme Court has "held that the general rule of contracts is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Bronner*, 507 Mich at 165-166 (quotation marks, citations, and brackets omitted). "An unambiguous contract term must be enforced as written unless contrary to public policy." *Patel*, 344 Mich App at 272. But "where there are definite

indications in the law of some contrary public policy, the contract provision must yield to public policy." *Bronner*, 507 Mich at 166 (quotation marks and citations omitted). "However, a 'public policy' clear enough to force the rescission of an otherwise valid contract must come from objective sources, not from individual judges' subjective views." *Gavrilides Mgmt Co, LLC v Mich Ins Co*, 340 Mich App 306, 316; 985 NW2d 919 (2022), citing *Terrien v Zwit*, 467 Mich 56, 66-69; 648 NW2d 602 (2002). "Ideally, the best source of public policy is the Legislature." *Gavrilides Mgmt*, 340 Mich App at 316, citing *Woodman v Kera, LLC*, 486 Mich 228, 245-246; 785 NW2d 1 (2010). More generally, "such a policy must ultimately be clearly rooted in the law." *Terrien*, 467 Mich at 67.

In *Woodman*, our Supreme Court[3] considered whether a parent could waive his or her child's right to sue for negligence, in that case by signing a preinjury liability waiver. Our Supreme Court held that "the Michigan common law rule is clear: a guardian, including a parent, cannot contractually bind his minor ward." *Woodman*, 486 Mich at 238. More specifically, the Court noted that Michigan's common law had long held that a parent "possesses no greater authority to waive the property rights of his son [] than he possesses to waive the property rights of any other nonconsenting third party, such as his neighbor or a coworker." *Id*. at 243. In so holding, the Court held that "[t]he public policy of this state reflected in these common law liability doctrines is to protect children by imposing *greater liability* on adults for conduct involving potential harm to children." *Woodman*, 486 Mich at 257. Therefore, "[i]t would [] require an extremely compelling argument to change the common law and permit defendant to *limit* its liability involving children." *Id*.[4]

Auburnfly argues that the contract at issue here does not bind a minor child—rather, it binds the parent and Auburnfly itself, both parties competent to enter into a contract. On its face, defendant is correct—MK is not explicitly a party to the contract, nor does the contract state that MK has waived any of her rights. However, when considering whether a contract violates public policy, this Court is "not bound by the form of the transaction, and [], notwithstanding how it may be characterized by the parties in their written agreement, its real nature must be determined from all of the facts and circumstances." *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, 511 Mich 89, 111; 999 NW2d 8 (2023) (quotation marks and citation omitted). "[A] court must look squarely at the real nature of the transaction, thus avoiding, so far as lies within its power, the betrayal of justice by the cloak of words, the contrivances of

[3] The lead opinion in *Woodman* was signed only by Justice YOUNG. However, Justice HATHAWAY (joined by Justice M. J. KELLY and Justice WEAVER) and Justice M. J. KELLY concurred separately and expressly endorsed or joined parts I, II, and III(A) of the lead opinion. Our references to the Court's holding in *Woodman* reflect what we discern as comprising the majority holding of the Court.

[4] We note that the latter two quotations from *Woodman* appear in part III(B)(1)(b) of Justice YOUNG's lead opinion, which Justices HATHAWAY, M. J. KELLY, and WEAVER did not expressly join. However, those Justices did express agreement with Justice YOUNG's articulation of this state's public policy and of "compelling reasons not to depart from" the common-law rule. *Woodman*, 486 Mich at 259 (HATHAWAY, J., concurring) Therefore, we discern that these two quotations also garnered the support of a majority of the Court.

form . . . . We are interested not in form or color but in nature and substance." *Id*., quoting *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958) (alterations in *Soaring Pine*).

When the "nature and substance" of the parental indemnification agreement is considered in context, it is clear that is intended to limit a child's ability to sue Auburnfly for injuries caused by Auburnfly's negligence. *Soaring Pine*, 511 Mich at 111. Relevantly, and as is evident from this case, children require a representative party to sue on their behalf. In this case, as in many others, the representative is the child's parent. Accordingly, by requiring the parent to indemnify the negligent party, the parent would bear the financial burden of any judgment obtained in litigation on the child's behalf. Moreover, even if the child brought suit through a representative, the child's material situation would almost certainly not be improved by winning the lawsuit, if the ultimate source of payment was the child's parent. In the vast majority of cases, a parent or child in that position simply would not bring the litigation, which effectively results in the limitation of the child's rights.

Additionally, even if a parental indemnification agreement did not result in a de facto limitation or waiver of a child's rights, such an agreement, if enforceable, would result in Auburnfly not being liable for injuries it negligently caused to children. Rather than being subject to "greater liability on adults for conduct involving potential harm to children," *Woodman*, 486 Mich at 257, Auburnfly would bear no liability in the vast majority of cases. Although certain edge cases can be imagined where Auburnfly might end up "holding the bag" on liability for negligent injuries despite an enforceable parental indemnification agreement, Auburnfly has not presented an "extremely compelling argument to change the common law and permit defendant to *limit* its liability involving children." *Id*. In any event, it is not our role, as an intermediate appellate court, to change the common law; any such change should instead come from the Legislature or our Supreme Court. See *People v Woolfolk*, 304 Mich App 450, 475-476; 848 NW2d 169 (2014) ("[W]e are mindful that we are an error-correcting court. As such, we must confine our role to that function. Were we inclined to effect a significant change to Michigan law, such as by abrogating established common law in favor of a rule more to our liking, 'prudence would counsel against it because such a significant departure from Michigan law should only come from our Supreme Court [or the Legislature], not an intermediate court.' ") (citations omitted).

We are bound by *Woodman's* holding regarding the common law and public policy of Michigan. Although Auburnfly has supported its argument with reference to Justice MARKMAN's statements in *Woodman* concerning the evolving public policy in Michigan regarding parental authority, see *Woodman*, 486 Mich at 262, 285-290 (MARKMAN, J., concurring in part, dissenting in part), we are bound by *Woodman*'s majority holding. See *Estate of Pearce v Eaton Co Rd Comm*, 507 Mich 183, 195; 968 NW2d 323 (2021) ("[T]he Court of Appeals is bound to follow decisions by this Court except where those decisions have clearly been overruled or superseded . . . .") (quotation marks and citation omitted). We similarly are not bound by statements from Justice YOUNG that did not garner the support of a majority of justices. See *Woodman*, 486 Mich at 257 n 74 (opinion by YOUNG, J.) (suggesting that parental indemnity agreements are an available alternative to changing the common-law rule against parental preinjury liability waivers).

Additionally, we note that MCL 700.5109 (enacted after *Woodman* was released) provides that "[b]efore a minor participates in recreational activity, a parent or guardian of the minor may

release a person from liability for economic or noneconomic damages for personal injury sustained by the minor during the specific recreational activity for which the release is provided." MCL 700.5109(1). However, the statute "only applies to a recreational activity sponsored or organized by a nongovernmental, nonprofit organization." MCL 700.5109(2). Moreover, the statute only allows such entities to secure a release of "liability for injury or death that results solely from the inherent risks of the recreational activity." MCL 700.5109(4). In other words, the statute "does not limit the liability of" the entity for its "own negligence or the negligence of its employees or agents that causes or contributes to the injury or death." *Id*. The Legislature has thus provided a limited exception to the common law of Michigan by allowing preinjury liability waivers by parents on behalf of their children, but only for specific entities, and *not* for liability for damages caused by negligence. It is not our place to alter the common law or public policy any further. See *Gavrilides Mgmt*, 340 Mich App at 316; see also *Hunter v Hunter*, 484 Mich 247, 271 n 47, 262; 771 NW2d 694 (2009) (noting that the Legislature is presumed to be aware of caselaw affecting an area of legislation); *Woolfolk*, 304 Mich App at 475-476.

Affirmed.[5] Because the issue appealed presents a public question, neither party may tax costs. See *Kemerer v Michigan*, ___ Mich App ___, ___; ___ NW3d ___ (2024), slip op at 11.

/s/ Mark T. Boonstra
/s/ Michael J. Riordan
/s/ Christopher P. Yates

[5] Auburnfly also argues that the trial court erred by determining that the participation agreement violated the parental-immunity doctrine. We do not believe that this issue is properly before us, inasmuch as our Supreme Court remanded this matter to us only "for consideration, as on leave granted, of the enforceability of parental indemnification agreements." *MK*, 513 Mich at 922. Moreover, because we affirm the trial court's holding on other grounds, we need not address this argument. See *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018) (quotation marks and citation omitted) (holding that a case is moot when "[i]t involves a case in which a judgment cannot have any practical legal effect upon a then existing controversy," and that, "[a]s a general rule, this Court will not entertain moot issues or decide moot cases"). However, it appears that the parental-immunity doctrine (and its exceptions) would not apply to this case because it does not involve a minor child suing a parent in tort. See *Estate of Goodwin v Northwest Mich Fair Ass'n*, 325 Mich App 129, 143-144; 923 NW2d 894 (2018). We therefore expressly do not affirm the trial court's statements concerning the parental-immunity doctrine and its applicability to this case.