IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC07-1739

SCOTT COREY KIRTON, and DUDLEY R. KIRTON d/b/a/ THUNDER CROSS MOTOR SPORTS PARK,

Petitioners,

-vs-

JORDAN FIELDS, as Personal Representative of the Estate of CHRISTOPHER JONES,

Respondent.
_____/

AMICUS BRIEF IN SUPPORT OF RESPONDENT'S BRIEF ON THE MERITS

On certified question and certified conflict from the Fourth District Court of Appeal

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STATEMENT OF INTEREST

The Florida Justice Association ("FJA"), formerly known as "The Academy of Florida Trial Lawyers," is a large, voluntary statewide association of more than 4,000 trial lawyers, concentrating on litigation in all areas of the law. Members of the Association are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to the courts.

The underlying issue in the case is whether parents are authorized to execute pre-injury releases which relieve third parties of any duty of care to their children. This question implicates not only the safety of children, but also the protection of children's legal rights. The FJA is submitting this amicus brief to address the Petitioners' contention that this Court cannot limit parents' authority in this context because it would violate the parents' constitutional right to rear their children as they choose. However, the issue before this Court does not implicate those rights, especially since they are superseded in this situation by the parens patriae doctrine. Moreover, there is no basis to assume that a decision in favor of protecting children will interfere in any way with a parents' ability to make choices regarding recreational activities of their children.

QUESTION PRESENTED

WHETHER A PARENT MAY BIND A MINOR'S ESTATE BY THE PRE-INJURY EXECUTION OF A RELEASE

SUMMARY OF ARGUMENT

The decision before this Court does not implicate a parents' fundament right to make decisions regarding the education or rearing of their children. The issue before this Court is solely whether parents have the unilateral right to release third parties from any duty of care to their children and to thereby eliminate children's right to compensation for tortious conduct. There is no empirical justification for believing that pre-injury releases are necessary to ensure recreational opportunities for children and thus the Fourth District's decision cannot be construed as infringing on a parents' right to choose recreational activities for their children.

Even with respect to adults, exculpatory provisions are disfavored in the law because they relieve one party of the obligation to use due care and shift the risk of injury to the party least equipped to take the necessary precautions to avoid injury and bear the risk of loss. These concerns are obviously heightened in the context of children's activities, and relieving a third party of any obligation of due care to a child who is placed in a dangerous activity cannot be justified by any public policy

consideration. While parents have a constitutional right to rear their children as they see fit, they do not have the right to risk their children's safety solely for the economic benefit of a third party. This Court's role under the parens patriae doctrine forbids such action and does not infringe in any way on the privacy of the family or the parents' authority to rear and educate their children. Therefore, the parents' constitutional rights are not implicated by the decision before this Court.

For the reasons stated above, the certified question should be answered "no."

INTRODUCTION

The unilateral decision of a parent to relieve a third party from any duty of care to a child is a very serious and potentially harmful decision. When that decision is made in conjunction with the child being placed in an inherently dangerous situation, it is foreseeable that the consequences can be lethal, as the case before this Court clearly demonstrates. Under the parens patriae doctrine, the state has not only an interest in the safety of children, but a duty to protect them. Thus, this Court has the authority to regulate and forbid pre-injury releases for children. Such regulation does not interfere with the rights of parents to raise their children, as case law has long held that parents do not have unfettered authority to endangered their children or dispose of their property or legal rights.

Moreover, releasing a third party from any duty of care to a child is not an integral part of child rearing that is entitled to constitutional protection. Contrary to the argument of the Petitioners and their amicus, the American Motorcycle Association (hereinafter "The Motorcycle Association"), there is no empirical basis for the contention that such releases are an integral part of children having access to recreational activities. The conduct at issue must be analyzed for what it is, which is simply the unilateral decision to waive the child's rights to protection and compensation. As discussed below, such decisions are not protected by the liberty

interests of the Fourteenth Amendment of the Federal Constitution, nor the right of privacy contained in Article 1 Section 23 of the Florida Constitution.

QUESTION PRESENTED

WHETHER A PARENT MAY BIND A MINOR'S ESTATE BY THE PRE-INJURY EXECUTION OF A RELEASE

ARGUMENT

The Petitioners and their amicus, the American Motorcycle Association, contend that the constitutional right of parents to control the upbringing of their children requires that this Court quash the Fourth District's decision. However, they characterize those rights as absolute, which they are not under either the federal or the state constitution. While parents' authority to control the upbringing of their children is entitled to protection, it cannot displace the parens patriae role of the courts. Moreover, the parental decision at issue in this case does not actually involve the raising of children or the integrity of the family unit, but rather the unilateral extinguishment of valuable protections and rights. Therefore, it is not an inherent part of raising children that is entitled to constitutional protection.

Exculpatory contracts, even when applied to adults, are disfavored in the laws as a matter of public policy "because they relieve one party of the obligation to use due care and shift the risk of injury to the party who was probably the least equipped to take the necessary precautions to avoid injury and bear the risk of loss." Applegate v. Cable Water Ski, L.C., 2008 WL 45530 p.1 (Fla. 5th DCA January 4, 2008).

Clearly, that public policy consideration has greater importance in the context of pre-injury releases involving children. Such exculpatory agreements necessarily relieve the third party of any obligation to use due care on behalf of the child and shift the risk of injury to the child or the parent, who are necessarily in a weak, if not impotent, position to take necessary safety precautions. As a result, the State's concern for the safety of children requires that under the parens patriae doctrine this Court must strictly scrutinize such agreements when they are applied to children.

Nonetheless, the Petitioners and The Motorcycle Association contend that parents' authority to execute such releases must be analyzed as a protected activity under the parents' constitutional right to raise their children. However, their misplaced reliance on the state and federal constitutional provisions is demonstrated by an analysis of the cases upon which they rely.

Petitioners' reliance on the plurality opinion in Troxel v. Grandville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 2d 49 (2000) is unpersuasive. In Troxel, a Washington statute authorized "any person" to petition the court for visitation rights with a child. The Supreme Court noted that the practical effect of that statute was that the state court could (530 U.S. at 67), "disregard and overturn any decision by a fit custodial parent concerning visitation… based solely on the judge's determination of the child's best interest." The plurality opinion determined that the statute as applied, violated

the parent's liberty interest under the Fourteenth Amendment, which it described as including the right to "establish a home and bring up children" and "to control the education of their own." Significantly the court did not rule that the parents' constitutional rights were absolute or that the state was constitutionally precluded from intervening in a visitation decision. Instead, the Court stated (530 U.S. at 69):

> The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Grandville's determination of her daughter's best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption.

Thus, the Troxel plurality opinion does not support Petitioners' contention that the fourteenth amendment grants parents inviolate authority over their children's lives, including unfettered authority to relieve third parties of a duty of care to their children.

More importantly, the Petitioners' attempt to link a parent's execution of a pre-injury release of their child's rights to the constitutional right to rear children is fallacious. The issue in Troxel was the state imposing visitation rights against the parents' wishes, while here the issue is the parents' elimination of valuable legal rights of the child to protection and compensation. The Petitioners try to link the release to child rearing by claiming it is an integral part of accessing recreational activities for children, and argue that parents should not be inhibited by the state in making

recreational choices. However, there is no logical or empirical basis to justify that linkage.

The recent discussion in the California Supreme Court's decision in City of Santa Barbara v. Superior Court, 161 P.3d 1095 (Cal. 2007) demonstrates this point. In that case, the issue was the validity of a pre-injury release executed by the parents of a fourteen year old developmentally disabled child which relieved a city for ordinary and gross negligence in the operation of a recreational camp. The child died at the camp, and the parents sued alleging, inter alia, gross negligence on the part of the City. The trial court invalidated the release to the extent it applied to gross negligence and the City ultimately sought review in the California Supreme Court.

Numerous amici appeared in the California Supreme Court in support of the City's contention that the release was valid. They argued, as is customary in these cases, that voiding such releases would preclude the availability of sports, recreation, and related programs for children. The California Supreme Court observed that there was no empirical evidence supportive of that assertion and noted that Washington, Massachusetts, and Nebraska bar pre-injury releases of liability for gross negligence, yet there was absolutely no evidence that recreational opportunities in those states had in anyway been diminished. 161 P.3d at 1109-1110.

However the court in City of Santa Barbara went even further and addressed the

issue in the context of ordinary negligence, noting the same lack of empirical data to support the amicis' "parade of horribles" argument. The court noted that "a clear majority of courts… have held that a parent may not release a minor's prospective claim for negligence." 161 P.3d at 1110-1111, quoting Hawkins ex rel Hawkins v. Peart, 37 P.3d 1062, 1065-1066 (Utah 2001).

The California Supreme Court also surveyed the law of other states and noted seven states that had voided pre-injury releases for ordinary negligence in various recreational contexts, not limited to minors (Connecticut, New York, Utah, Vermont, Virginia, Washington, West Virginia). The Court then requested supplemental briefing from the parties and amici specifically for the purpose of providing any empirical evidence that the rulings in those states had, in any way, eliminated or diminished the availability of recreational activities. Having reviewed the supplemental briefs, the California Supreme Court stated (161 P.3d at 1112):

> The ensuing briefing, however, disclosed no empirical study suggesting that holdings such as those described above, precluding the release of liability for future ordinary negligence… have triggered the predicted elimination or even widespread substantial reduction of the affected services or programs. Indeed, defendants forthrightly concede in their supplemental briefs that they found no empirical support for such assertions.

Thus, the common assumption that pre-injury releases for minors are required

in order to ensure the availability of recreational activities for children is simply unsupported. This Court should recognize that the assertions of the Petitioners and their amicus are simply self-serving declarations made to support the industry's attempt to limit its liability at the expense of children's safety.

Additionally, that fallacy demonstrates that the Petitioners' cannot reasonably characterize the execution of pre-injury releases for children as an exercise of the constitutional right of parents to rear their children. This Court is not being asked to interfere in the parents' choice of recreational activities for their children. The issue here is whether parents can validly execute pre-injury releases which create additional risk to the children, solely to provide an economic benefit to the third party. Put another way, there is no basis to conclude that the Fourth District's holding would in any way diminish parents' options to have their children participate in recreational activities. The only certainty is that failing to regulate such releases will result in third parties having no duty of care to children and the children having no means of compensation for injuries suffered as a result of tortious conduct.

The Motorcycle Association cites two cases addressing parents' federal constitutional right to raise their children, but neither of them supports its position in this case. In Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), an individual was convicted of a misdemeanor for teaching the German

language to a child who had not passed the eighth grade. The Court held that the conviction violated the liberty interests guaranteed by the Fourteenth Amendment to the teacher and the child's parents. The Court noted that there was no conceivable injury to the child, stating that "mere knowledge of the German language cannot reasonably be regarded as harmful." (262 U.S. at 400). Concluding that the criminal statute was (262 U.S. at 403) "arbitrary and without reasonable relation to any end within the competency of the state," the Court reversed the conviction.

The Meyer case provides no support for Petitioners or the amicus. There, the criminal statute was determined to have no reasonable relation to any matter within the competency of the state, as it did not protect the child from any conceivable harm. Here, the execution of a pre-injury release is clearly within the authority of the state to regulate as it relates to the protection of children and their legal rights. As noted previously, a majority of jurisdictions in the country preclude parents from executing pre-injury releases for minors. Additionally, in Florida, the legislature has enacted a statute regulating parents' authority to settle personal injury claims of their children. See §744.301, Fla. Stat. These legal authorities are based on the premise that the state's parens patriae role authorizes such protection of children and the regulation of parent's unilateral disposition of their children's rights. Thus, this is not a situation, such as in Meyer, where there is no conceivable harm to the child and no valid state

interest to justify regulation of the parent's decisions.

The Motorcycle Association's reliance on Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982) is also unpersuasive. The court there simply held that when the state seeks to completely and irrevocably terminate a parents' rights with respect to their child, due process requires that the state prove the allegations of neglect by at least clear and convincing evidence. The constitutional issue there bears no resemblance or application to the question before this Court.

Another case often cited in support of parents' fundamental right to rear their children is Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed. 2d 101 (1978). In that case, there was a challenge to the constitutionality of procedures that allowed parents in Georgia to involuntarily commit their child to a psychiatric institution. The petitioners contented that the fourteenth amendment required a full evidentiary hearing before an independent adjudicatory official as a prerequisite to the child's admission to a psychiatric facility. The Court rejected that contention, noting that Georgia required a physician's independent examination of the child prior to such admission, and there were mandatory procedures for regular and independent evaluations of the child to determine whether continued commitment was in the child's best interest. While the Court's opinion expressed deference for the parents' authority to make decisions regarding their children, it is clear that the parents'

authority to commit the child was not unbridled, but subject to the initial evaluation by a physician, and subsequent monitoring to ensure that the child's best interests were protected.

None of the cases discussed above justify a conclusion that parents' constitutional right to rear their children grants them unfettered authority to dispose of a child's rights to compensation or to expose them to tortious conduct of third parties. In Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), the parens patriae authority of the state was upheld in the face of a claim of a fundamental rights of parents. In that case an aunt directed her niece (over whom she had legal custody) to distribute Jehovah's Witnesses publications on the street in violation of a Massachusetts' statute. The aunt was charged with violating the statute and she claimed that it violated her constitutional rights to freedom of religion and the fundamental authority of parents to rear their children. However, the United States Supreme Court rejected her reliance on those principles and stated that neither the rights of parents nor the freedom of religion could prevail over the state's interest in protecting children under the parens patriae doctrine.

Similarly here, even assuming *arguendo* that parents' right to raise their children is implicated in this case, the State's parens patriae role still applies. Since the safety of children and the protection of their legal rights are involved, the parents'

authority must yield to the state's authority to protect children.

Florida Constitutional Right to Privacy

Petitioners also assert that parents have authority to execute pre-injury releases on behalf of their children based on Article I Section 23 of the Florida Constitution which grants citizens a right of privacy. While that provision has been construed to provide broader privacy protection than the Federal Constitution, it does not override the parens patriae doctrine nor create an unfettered right on behalf of a parent to make decisions regarding their children's safety or legal rights.

In Florida, the right of parental control over children, while fundamental, has always been "subject to the paramount right of the state as parens patriae to protect minors," Hancock v. Dupree, 129 So. 822, 823 (Fla. 1930). In Padgett v. Dept of Health and Rehabilitative Services, 577 So.2d 565, 570 (Fla. 1991) this Court stated:

> While Florida courts have recognized the "God-given right" of parents to the care, custody and companionship of their children, it has been held repeatedly that the right is not absolute but is subject to the overriding principle that it is the ultimate welfare or best interest of the child which must prevail.

quoting In Re Interest of Camm, 294 So.2d 318, 320 (Fla. 1974) cert den 419 U.S. 866 (1974).

In Florida, minors are wards of the court and the circuit courts have the inherent authority and responsibility to protect their welfare. In Re Brock, 25 So.2d 659 (Fla. 1946); Phillips v. Nationwide Mutual Ins. Co., 347 So.2d 465 (Fla. 2d DCA 1977); Interest of Peterson, 364 So.2d 98 (Fla. 4th DCA 1978). This principle is not unique to Florida, but is commonly accepted throughout the United States, 42 Am.Jur.2d Infants §151 p.117:

> Historically, courts have possessed inherent and statutory authority to protect children, and minors are wards of the court with inherent power in the court to protect them. Thus, the courts have plenary jurisdiction over the persons and estates of infants which derives from the common law and is independent of any authority given by the legislature. Public policy dictates that courts should guard carefully the rights of infants, and that an infant should not be precluded from enforcing his or her rights unless clearly debarred from doing so by a statute or constitutional provision. [Emphasis supplied. Footnote deleted]

In the case sub judice, the rights of the child to protection and compensation are at issue, and the parents' right to privacy is not implicated.

Petitioners rely on Von Eiff v. Azicri, 720 So.2d 510 (Fla. 1998) which involved a statute mandating that if one or both parents are deceased the trial court was required to order grandparent visitation upon the grandparents' petition. As with Troxel supra, the issues there involved an intrinsic matter of the family unit, with the

state requiring visitation with third parties without a showing of demonstrable harm to the child. Von Eiff cannot reasonably be applied to the issue before this Court. The question here does not involve state interference with the family unit, but only the unilateral elimination of protection for the child and the extinguishment of significant legal rights. Therefore, the parents' constitutional right to privacy under the Florida Constitution is not relevant to this Court's analysis.

CONCLUSION

For the reasons state above, the certified question should be answered “no.”

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to William J. Wallace, Attorney for Scott Corey Kirton and Dudley R. Kirton d/b/a Thunder Cross Motor Sports Park, 115 N.W. 11th Ave., Okeechobee, FL 34972; Richard Lee Barrett, Attorney for Dean Dyess, Barrett, Chapman and Ruta, 18 Wall St., Orlando, FL 32801; Alan C. Espy, Attorney for H. Spencer Kirton and Kirton Brothers Lawn Service, 3300 PGA Blvd., Ste. 630, Palm Beach Gardens, FL 33410, Timothy S. Owens, Amicus for American Motorcyclist Association, Christensen Christensen Donchatz Kettlewell & Owens, LLP, 401 N Front St Ste 350, Columbus, OH 43215-2249; Jill Anne Hillman, Amicus for National Association of Underwater Instructors, Monroe and Zinder PC, 5933 W. Century Blvd., Ste 800, Los Angeles, CA 90045-5455; and Bard D. Rockenbach, Attorney for Christopher Jones, Burlington & Rockenbach, P.A., 2001 Palm Beach Lakes Blvd., Suite 410, West Palm Beach, FL 33409, by mail, on March 13, 2008.

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CERTIFICATE OF TYPE SIZE & STYLE

Respondent hereby certifies that the type size and style of the Amicus Brief is Times New Roman 14pt.

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