IN THE SUPREME COURT OF THE STATE OF FLORIDA

SCOTT COREY KIRTON, ETC., et al.,

Petitioner,

CASE NO.: SC07-1739
LT Case No.: 4D06-1486

-vs-

JORDAN FIELDS, ETC., et al.

Respondents.
_____/

PETITIONERS' KIRTON INITIAL BRIEF ON THE MERITS

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PREFACE

This is an appeal from the August 8, 2007 opinion of the Fourth District Court of Appeal. The parties will be referred to by their proper names or as they appeared below.

The following designations will be used:

The symbol “R” refers to the Record on Appeal. The symbol "T" refers to the hearing transcript contained in the Record on Appeal.

References to the record will be cited as “Vol. __, R. __.”

References to the December 13, 2005 Summary Judgment hearing transcript will be cited as “Trnspt. P. ___, L. ___.”

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE FACTS AND OF THE CASE

This is a wrongful death action arising from an accident resulting in the tragic death of a minor child, Christopher Jones, which occurred on May 10, 2003 at the Thunder Cross Motor Sports Park in Okeechobee, Florida. Christopher Jones was the fourteen year old son of Bobby and Bette Jones (V.5, R. 691). Bobby and Bette Jones were divorced on or about March 31, 2003 (V.5, R. 691). Under the terms of the Final Judgment of Dissolution of Marriage and the Jones' Marital Settlement Agreement, Mr. Jones was the custodial parent of both his sons, Christopher and Kyle, after he and his wife were divorced (V. 5, R. 697). Mr. Jones had the responsibility for the care of both sons on a day-to-day basis (V.5, R. 697). In fact, at the time of the accident, Bette Jones had not re-established visitation with Christopher.

Bobby Jones and his sons enjoyed racing all terrain vehicles ("ATVs"). Mr. Jones took Christopher to Thunder Cross Motor Sports Park to allow him to race and ride on several occasions. To gain entry into the track and, in order to1 participate in a race, all participants were required to execute the Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement (V.5, R. 691). In order for Christopher to be allowed to race, Mr. Jones was required by the Park to execute a Release and Waiver of Liability which authorized Christopher to participate in racing practice sessions with his ATV (V.5, R. 691). The Release

was executed by Mr. Jones, as the custodial parent, on Christopher's behalf (V.5, R. 691-692). At the time of this accident, which is the subject of this litigation, Christopher was participating in a racing practice session while riding his ATV (V.5, R. 691).

The Release executed by Mr. Jones provides as follows:

> IN CONSIDERATION of being permitted to complete, officiate, observe, work for, or participate in any way in the EVENT(S) ... EACH OF THE UNDERSIGNED, for himself, his personal representatives, heirs, and next of kin:
>
> HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoters, participants, racing associations, sanctioning organizations or any subdivision thereof, track operators, track owners, officials, car owners, drivers, pit crews, rescue personnel, any persons in any RESTRICTED AREA, promoters, sponsors, advertisers, owners and lessees of premises used to conduct the EVENT(S), premises and event inspectors, surveyors, underwriters, consultants and others who give recommendations, directions, or instructions or engage in risk evaluation or loss control activities regarding the premises or EVENT(S) and each of them, their directors, officers, agents and employees, all for the purposes herein referred to as "Releasees," FROM ALL LIABILITY TO THE UNDERSIGNED, his personal representatives, assigns, heirs, and next of kin FOR ANY AND ALL LOSS OR DAMAGE, AND ANY CLAIM OR DEMANDS THEREFOR ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY OR RESULTING IN DEATH OF THE UNDERSIGNED ARISING OUT OF OR RELATED TO THE EVENT(S). WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.

> HEREBY ASSUMES FULL RESPONSIBILITY FOR ANY RISK OF BODILY INJURY, DEATH, OR PROPERTY DAMAGE arising out of or related to the EVENT(S) whether caused by the NEGLIGENCE OF THE RELEASEES or otherwise.
>
> HEREBY acknowledges that THE ACTIVITIES OF THE EVENT(S) ARE VERY DANGEROUS and involve the risk of serious injury and/or death and/or property damage. Each of THE UNDERSIGNED, also expressly acknowledges that INJURIES RECEIVED MAY BE COMPOUNDED OR INCREASED BY NEGLIGENT RESCUE OPERATIONS OR PROCEDURES OF THE RELEASEES.

(V.5, R. 705).

The Affidavit of Bobby Jones was filed in support of Defendants' Motions for Summary Judgment (V.5, R. 684). **The Affidavit states in pertinent part that:**

> **On May 10,2003, I took my son Christopher Jones to Thunder Cross Motor Sports Park to take part in a practice session.**
>
> **[U]pon arrival at Thunder Cross Motor Sports Park, I was presented a General Release which was required to be executed before entry into the Thunder Cross Motor Sports Park facility.**
>
> **Upon the general release being presented to me, I executed same on behalf of myself and my minor child Christopher Jones. I willingly, and with full understanding, executed the release on behalf of myself and Christopher Jones, my child. Specifically, I understood and it was my intention to, personally**

> **and as custodial parent of Christopher Jones, waive the right to sue for the death of Christopher Jones**
>
> **I understood that by signing the General Release that I was forever discharging Thunder Cross Motor Sports Park, their directors, officers, agents and employees from all liability to the undersigned, his personal representatives, assigns, heirs, and next of kin for any and all loss or damage, and any claim or demands therefor on account of injury to the person or property or resulting in death of the undersigned arising out of or related to the event(s), whether caused by the negligence of the releasees or otherwise.**
>
> **That by signing this affidavit, I understand that a request is being made upon the court to dismiss this lawsuit with prejudice**

(V.5, R. 690-691)

At the time he executed the Release, Mr. Jones fully understood he was executing the Release on behalf of himself and his son, Christopher Jones (V.5, R. 692). Mr. Jones further understood the language contained in the Release and that by signing the Release, he was forever discharging the track, its directors, officers, agents and employees, from all liability to the undersigned, his personal representatives, assigns, heirs, and next of kin for any and all loss or damage, and any claims or demands therefore on account of injury to the person or property or resulting in death arising out of or related to the events at the track, including anything caused by the negligence of the releasees (V.5, R. 692).

On or about January 4, 2005, FIELDS, as Personal Representative of the estate of Christopher Jones, filed suit. KIRTONS/THUNDERCROSS filed their Answer and Affirmative Defenses to the Amended Complaint. One of the Affirmative Defenses raised by KIRTONS/THUNDERCROSS was that the claims raised by FIELDS were barred by the Release and Waiver executed by Mr. Jones on behalf of his son (V.1, R. 66).

After exchanging responses and proceeding through discovery, Defendants SCOTT COREY KIRTON, and DUDLEY R. KIRTON filed their Motion for Summary Judgment on or about November 22, 2005. On or about December 9, 2005, Defendants H. SPENCER KIRTON and KIRTON BROTHER LAWN SERVICE, INC. filed their Motion for Summary Judgment.

On December 15, 2005, a hearing was held before the trial court on Defendants' Motions for Summary Judgment[1] and, after having heard argument of

[1] During the December 15, 2005 hearing, counsel to DYESS moved *ore tenus* to join in Defendants SCOTT COREY KIRTON, and DUDLEY R. KIRTON Motions for Summary Judgment (Trnspt. P. 34, L. 24 through P. 35, L. 6). FIELDS stipulated that the Motions for Final Summary Judgment were based upon the identical issues raised by Defendants SCOTT COREY KIRTON, and DUDLEY R. KIRTON, and he did not object to DYESS' *ore tenus* motion (Trnspt. P. 35, L. 8-16). FIELDS further agreed to the form of the March 8, 2006 Order Granting Defendants' Final Summary Judgment providing that: "Motions for Final Summary Judgment based upon the identical issues raised by Defendants, Scott Corey Kirton and Dudley R. Kirton d/b/a Thunder Cross Motor Sports Park are capable of being disposed of in favor of Defendants, H. Spencer Kirton d/b/a Thunder Cross Motor Sports Park, Kirton Brothers Lawn Service, Inc. and Dean Dyess." (V.5, 717).

counsel, the trial court found that no issue disputed facts exist (Trnspt. P. 33, L. 8). The trial court granted Summary Judgment on behalf of the Defendants, dismissing the case with prejudice (Trnspt. P. 33, L. 12). The trial court found that a parent may specifically waive the personal injury rights of their minor child based upon *Theis v. J&J Racing*, 571 So. 2d 92 (Fla. 2d DCA 1990) and *Lantz v. Iron Horse Saloon*, 717 So. 2d 590 (Fla. 5th DCA 1998) (Trnspt. P. 33, L. 12-19). On March 8, 2006, the trial court entered its Order granting Summary Judgment.

Respondent appealed the final summary judgment to the Fourth District Court of Appeal. On August 8, 2007, the Fourth District Court of Appeal rendered its opinion reversing the trial court's final summary judgment. *Fields v. Kirton*, 961 So.2d 1127 (Fla. 4th DCA 2007). While reversing the trial court, the Fourth District Court of Appeal certified a conflict with *Lantz v. Iron Horse Saloon*, 717 So. 2d 590 (Fla. 5th DCA 1998). In addition, the Fourth District Court of Appeal certified the following question as a question of great public importance:

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

KIRTONS/THUNDERCROSS filed their Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court citing the certified question and the certified conflict by the Fourth District Court of Appeal. On December 20, 2007, this Court entered an order accepting jurisdiction of this case based upon the certified question and the certified conflict.

SUMMARY OF THE ARGUMENT

This Court accepted jurisdiction in this action to resolve the following certified question of great public importance of whether a parent may bind a minor's estate by the pre-injury execution of a release, and to resolve the certified conflict between the opinion rendered by the District Court below and the Fifth District Court of Appeal's opinion in *Lantz v. Iron Horse Saloon*, 717 So. 2d 590 (Fla. 5th DCA 1998).[2]

This case presents the single issue of whether a parent under Florida law may execute a binding, pre-injury release agreement on behalf of his minor child. A parent's right to make decisions relating to the care of his minor child is a fundamental right protected by both the Federal and Florida Constitutions. The United States Supreme Court has made it clear that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. More importantly, The Florida Constitution's express right to privacy provision provides an even broader protection of a parent's fundamental rights. The Florida Supreme Court has repeatedly held that under Article I, Section 23 of the Florida Constitution parents have a right to make decisions about their child's welfare without interference by third parties.

[2] On or about January 4, 2008, the 5th DCA clarified the *Lantz* decision wherein it appears that it would no longer be in conflict with the 4th DCA's Opinion rendered in *Fields v. Kirton*.

The District Court below found that parents do not have a common law authority to waive the substantive rights of a child without court approval. For this reason, the District Court held the release unenforceable finding that the release constituted a forfeiture of the minor's property rights and that it was the duty of the legislature and not the court to change the law. This argument misapprehends Florida law. Based upon a parent's fundamental constitutional right to make decisions for their minor children under both the State and federal constitutions, Florida courts recognize the enforceability of pre-injury agreements to arbitrate, pre-injury waivers of liability, and the waiver of an award under the Florida Birth-Related Neurological Compensation Act. Thus, the premise that only the Florida Legislature may grant parents the right to waive substantive rights is simply wrong.

FIELDS' and the District Court's citation to Fla. Stat. § 744.301(2) as authority that pre-injury waivers are unenforceable is also unpersuasive. §744.301(2) provides that natural guardians may settle a claims or causes of action for damages that do not exceed $15,000.00, but does not address pre-injury claims. This Court recognized in *Shea*, the absence of such a statutory scheme means that the Legislature has not precluded enforcement of such pre-injury releases. A pre-injury release is the equivalent to an accrued claim for less than $15,000.00. Like claims for less than $15,000.00, a pre-injury setting, the policy concerns requiring judicial instruction and supervision are simply not present. Thus, the Florida

Legislature's silence on providing restrictions relating to pre-injury claims argues in favor of a parent's right to execute a binding waiver of liability in a pre-injury setting.

Such a finding is consistent with and parallel's Florida law in regard to the running of applicable statutes of limitation for a minor's claim. Under Florida law, the disability of minority does not stop the running of the statute of limitations except in very limited circumstances. Generally, where the parent of a minor has knowledge of the minor's claim, the statute of limitations for such claim is not tolled. If a parent has the legal ability to allow a minor child's existing claim to be extinguished, a parent should have the authority to sign a binding release for a pre-injury claim.

Finding pre-injury releases valid is consistent with the strong public policy reflected in Florida's statutory framework. The Florida Legislature favors the ability of parents to make decisions on behalf of their children in numerous and wide-ranging activities. Under Florida law, several acts that would otherwise be criminal are expressly allowed with the permission of a parent. Additionally, a parent is provided the authority to make binding decisions relating to many fundamental aspects of a minor child's life, some of which clearly involve commercial activities.

Several other states have found pre-injury waivers to be valid and enforceable. The decisions upholding pre-injury waivers recognize the importance of both parental authority and the availability of opportunities for children to participate in a variety of sports and extracurricular activities. In contrast, the out of state cases cited by FIELDS finding pre-injury waivers invalid contain no discussions or otherwise even allude to any state constitutional provisions similar to Florida's and only two (2) even mention a parent's fundamental rights under the Federal Constitution. Additionally, none of the cases indicate or discuss the existence of a statutory scheme similar to Florida's laws. Florida law and public policy are clearly aligned with those jurisdictions upholding the validity of pre-injury releases.

KIRTON/THUNDERCROSS recognizes that the Fifth District Court of Appeal in *Applegate v. Cable Water Ski, L.C.*, ___ So. 2d ___ (Fla. 5th DCA Jan. 4 2008), 2008 WL 45530, 33 Fla. L. Weekly, D146 recently declared pre-injury releases invalid as against Florida public policy. Respectfully, the *Applegate* decision is wrongly decided. The Fifth District relied on the same foreign case law cited by FIELDS in his brief below which is not aligned with Florida law and public policy. Additionally, the Fifth District draws the distinction between commercial and non-commercial activities despite this Court's rejection of the distinction in *Shea*. However, this Court's reasoning for disapproving the

distinction applies with equal force to the decision of enforcing the pre-injury liability provisions. Under this Court's reasoning in *Shea*, pre-injury releases should be upheld without distinction as to the activities involved.

This Court should answer the certified question of great public importance in the affirmative, reverse the Fourth District's decision below and remand the case with instructions to affirm the trial court's grant of summary judgment in favor of KIRTON/THUNDERCROSS in this case.

ARGUMENT

I. Jurisdiction and Standard of Review

This is an appeal from the Fourth District Court of Appeal's reversal of a summary final judgment entered by the trial court in favor of KIRTON/THUNDERCROSS. This Court accepted jurisdiction in this action to resolve the following certified question of great public importance:

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

This Court further accepted jurisdiction based upon the certified conflict between the opinion rendered by the District Court below and the Fifth District Court of Appeal's opinion in *Lantz v. Iron Horse Saloon*, 717 So. 2d 590 (Fla. 5th DCA 1998) wherein the Fifth District upheld and enforced a pre-injury release executed by a mother on behalf of her minor child. For the reasons set forth herein, this Court should answer the certified question in the affirmative, and reverse the Fourth District Court of Appeal decision below. [3]

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[3] The case below was an appeal from trial court's grant of summary judgment in favor of KIRTON/THUNDERCROSS. The standard of review by this Court and the District Court of the trial court's entry of summary judgment is *de novo*. *State v. Presidential Women's Center*, 937 So. 2d 114, 116 (Fla. 2006). In order to be entitled to summary judgment, the Court must determine whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c); *Scheibe v. Bank of America, N.A.*, 822 So. 2d 575 (Fla. 5th DCA 2002). Essentially, all of the facts set forth in KIRTON/THUNDERCROSS' Statement of the Case were undisputed in the trial court. As of the date of this brief, neither the *Krathen* or *Applegate*

II. The Pre-Injury Assumption And Risk Indemnity Agreement Executed By Mr. Jones On Behalf Of His Minor Son Is Valid And Enforceable Under Florida Law, And, Therefore, The Claims Asserted By FIELDS In This Action Are Barred Under The Terms Of The Agreement.

This case presents the single issue of whether a parent under Florida law may execute a binding, pre-injury release agreement on behalf of his minor child in the context of allowing the minor child to participate in a commercial sporting event. For generations, parents and their children, together, have enjoyed activities which to others might appear as risky or inherently dangerous. These activities include horseback riding, scuba diving, and motor sports racing. As a result of our litigious environment, those who provide opportunities for families to engage in such activities have been unable to secure insurance without the participants' execution of liability waivers and releases. In particular, these activities often involve the necessity of the fathers and mothers executing such releases on behalf of their children so they can enjoy these lawful activities together. If the Court rules that such releases are unenforceable, it will have a devastating effect on the availability of such family opportunities and activities. Immediately, families will no longer be able to bond together through the intimate interaction inherently involved while participating in these lawful endeavors.

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opinions are noted as final opinions by Westlaw. Additionally, it appears from the docket in *Krathen* that an unresolved Motion for Rehearing is still pending before the court.

In analyzing the question before this Court, it is important to recognize the narrow issue presented in this case. Florida law recognizes, in general, that waiver and exculpatory clauses are valid and enforceable if the intent to relieve a party of its own negligence is clear and unequivocal. *Banfield v. Louis*, 589 So. 2d 441, 444 (Fla. 4th DCA 1991). Furthermore, Florida courts do not distinguish between exculpatory clauses contained in commercial contracts and those relating to recreational or sporting activities. *Banfield*, 589 So. 2d at 444. In fact, courts have upheld exculpatory clauses against participants in numerous sporting activities. *See, e.g., Travent, Ltd. v. Schecter*, 718 So. 2d 939 (Fla. 4th DCA 1998) (bicycle tour); *Banfield v. Louis*, 589 So. 2d 441, 444 (Fla. 4th DCA 1991) (triathlon event); *Shaw v. Premier Health and Fitness Center, Inc.*, 937 So. 2d 1204 (Fla. 1st DCA 2006) (health club); *Borden v. Phillips*, 752 So. 2d 69 (Fla. 1st DCA 2000) (scuba diving); *Theis, II v. J & J Racing Promotions*, 571 So. 2d 92 (Fla. 2nd DCA 1990) (sprint car racing); *Deboer v. Florida Offroaders Driver's Association, Inc.*, 622 So. 2d 1134 (Fla. 5th DCA 1993) (off-road race). FIELDS did not challenge the language of the release or that the release is void for public policy reasons associated generally with the type of activity at issue. The sole issue presented is whether the pre-injury release agreement executed by the parent on behalf of his minor child in the context of allowing the minor child to participate in a sporting event is binding under Florida law.

A. Article I, Section 23 of the Florida Constitution and the Due Process Clause of the Fourteenth Amendment to the Untied States Constitution create a longstanding and fundamental right for a parent to make decisions about their child's welfare without interference by third parties.

An analysis of the issue begins with the recognition under both the Federal and Florida Constitutions of a parent's fundamental right to make decisions relating to the care of his/her minor child. The United States Supreme Court has made it clear that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion). As explained in *Troxel*, "there is a presumption that fit parents act in the best interest of their children …. Accordingly, … there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. *Troxel*, 530 U.S. at 68-69 (plurality opinion). "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S. at 72-73. This federal constitutional right has been recognized by this Court. *See Global Travel Marketing, Inc. v. Shea*, 908 So.2d 392, 398-99 (Fla. 2005).

The Florida Constitution's express right to privacy provision provides an even broader protection of a parent's fundamental rights. Article I, Section 23 of the Florida Constitution provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life." Because Florida's right to privacy is expressly contained in the Florida Constitution, it has been interpreted as giving Florida citizens greater protections than the federal constitution. *See, State v. J.P.*, 907 So.2d 1101, 1115 (Fla. 2005); *In re T.W.*, 551 So.2d 1186, 1191-92 (Fla. 1989). Under Art. I, Sec. 23, this Court "has recognized 'a longstanding and fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism'", *State v. J.P.*, 907 So. 2d at 1115 *quoting Padgett v. Dep't of Children & Families*, 577 So. 2d 565, 570 (Fla. 1991), and, "[m]oreover, 'there is a constitutionally protected interest in preserving the family and raising one's children." *State v. J.P.*, 907 So. 2d at 1115 *quoting S.B. v. Dep't of Children & Families*, 851 So. 2d 689, 692 (Fla. 2003). As recognized by the First District Court of Appeal, this Court has repeatedly held that natural parents have a right to make decisions about their child's welfare without interference by third parties. *See Tallahassee Memorial Regional Medical Center, Inc. v. Petersen*, 920 So. 2d 75, 80 (Fla. 1st DCA 2006) *citing Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998).

B. Florida Courts addressing the enforcement of pre-injury releases have upheld the validity of such agreements.

Consistent with this fundamental constitutional right, several Florida courts have upheld the validity of a parent's execution of a pre-injury release on behalf of a minor child[4]. In the seminal case of *Global Travel Marketing, Inc. v. Shea*, 908 So.2d 392 (Fla. 2005), this Court reversed the Fourth District Court of Appeal and upheld the enforcement of an arbitration provision in a pre-injury release. In *Shea*, the mother of a minor executed a travel contract for an African safari containing an arbitration provision and a release of liability provision. *Shea*, 908 So. 2d at 395. Tragically, the minor was killed on the safari and the father filed suit on behalf of the estate and both parents under Florida's wrongful death statute. *Id.* at 395. Defendant Global Travel moved to compel arbitration, and the plaintiff argued that the mother did not have the authority to contract away the minor's rights through the release and arbitration clause. *Id*. at 395. The trial court granted the motion to compel arbitration finding the contractual provision valid, and the father appealed. *Id*. at 395.

[4] Since the Fourth District rendered its decision below, KIRTON/THUNDERCROSS is aware of two other district court opinions addressing this issue: *Krathen v. School Board of Monroe County*, ___ So. 2d ___, 2007 WL 2848127, 32 Fla. L. Weekly D2386 (Fla. 3d DCA Oct. 3, 2007) enforcing a pre-injury waiver, and *Applegate v. Cable Water Ski, L.C.*, ___ So. 2d ___ (Fla. 5th DCA Jan. 4 2008), 2008 WL 45530, 33 Fla. L. Weekly, D146, declaring pre-injury releases invalid in commercial settings. KIRTON/THUNDERCROSS addresses the *Applegate* decision *supra*.

On appeal, the Fourth District Court of Appeal reversed the trial court's order compelling arbitration and concluded that neither the arbitration provision or the release of liability provision were enforceable. The Court found that a parent could not "carte blanche" waive the litigation rights of their children in the absence of circumstances supported by public policy. *Id*. at 396. The Court held that commercial travel opportunities did not fall within the recognized public policy where waivers of such rights were recognized as valid. *Id*. at 396. As summarized by this Court, the Fourth District Court of Appeal's reversal of the trial court:

> ... rests on two conclusions: the opportunity to present a claim in court is so basic a right that its waiver is tantamount to a forfeiture of the claim, and the benefits to children of commercial travel opportunities do not justify enforcement of a parent's decision to agree to arbitrate a child's claims arising out of the travel contract.

Id. at 403. This Court granted review of the certified questions and reversed the Fourth District Court of appeal's decision.

This Court concisely framed the issue in *Shea* as whether the State, through the courts and public policy, can override a parent's right to make this decision by refusing to enforce its consequences. *Id*. at 398. This Court recognized the parent's fundamental right to make decisions regarding their minor child, *Id*. at 398-99, and disagreed with the lower court's conclusions regarding the fundamental nature of the right to present the claim in court. *Id*. at 403. Additionally, this Court disagreed with the distinction made between commercial

travel and other areas where such agreements would be deemed enforceable. This Court found the distinction to be arbitrary and with no basis in law or fact. *Id*. at 403-04. Finally, and most importantly, this Court emphasized the parent's fundamental right in making decisions for his child. This Court concluded that:

> Parents' authority under the Fourteenth Amendment and article I, section 23 encompasses decisions on the activities appropriate for their children – whether they be academically or socially focused pursuits, physically rigorous activities such as football, adventure sports such as skiing, horseback riding, or mountain climbing, or, as in this case, an adventure vacation in a game reserve. Parents who chose to allow their children to engage in these activities may also legitimately elect on their children's behalf to agree in advance to arbitrate a resulting tort claim if the risks of these activities are realized.

Id., at 404. KIRTON/THUNDERCROSS acknowledges that the decision in *Shea* was expressly limited to the arbitration provision of the release at issue; however, the reasoning and logic underlying *Shea* is equally applicable to the enforcement of the pre-injury release in the case at bar.

In *Krathen v. School Board of Monroe County*, ___ So. 2d ___, 2007 WL 2848127, 32 Fla. L. Weekly D2386 (Fla. 3d DCA Oct. 3, 2007), the Third District Court of Appeal applied this Court's reasoning in *Shea* to uphold the validity of a pre-injury release. *Krathen* involved a minor who was injured during cheerleading practice at Key West High School. Prior to participating in the cheerleading activities, the minor and her mother executed a Consent and Release from Liability

Certificate. The trial court granted summary judgment summary judgment based on the pre-injury release and the plaintiff appealed.

On appeal, the Third District Court of Appeal affirmed the trial court and held that the pre-injury release was enforceable. In validating the release, the *Krathen* court found that their prior decision in *Gonzalez v. City of Coral Gables*, 871 So. 2d 1067 (Fla. 3d DCA 2004) was controlling. However, the Court went on to explain that the distinction made by the *Gonzalez* court regarding commercial v. non-commercial activities had been specifically rejected by this Court in *Shea*. *Krathen*, 2007 WL 2848127, at p. 2. Instead, the Third District applied this Court's reasoning regarding the parent's fundamental rights and a parent's authority to act in the best interest of the child in deciding to choose a child's activities in upholding the validity of the pre-injury release. *Krathen*, 2007 WL 2848127, at p. 2. The Court concluded that

> Krathen's parent/guardian clearly thought participation in cheerleading was beneficial for Krathen and thus was willing to "release and hold harmless" the School Board from "any claim or injury" Krathen suffered as a result of her participation in cheerleading. Because it is within a parent's authority to make this decision on behalf of his or her child, Krathen and her parent/guardian are bound by the Release.

Krathen, 2007 WL 2848127, at p. 3.

The decisions in *Shea* and *Krathen* are consistent with other Florida courts that have upheld the validity of pre-injury releases executed by a parent on behalf

of a minor. As noted above, in *Gonzalez v. City of Coral Gables*, 871 So. 2d 1067 (Fla. 3d DCA 2004), the plaintiff sued for injuries to her daughter incurred from a slip and fall at a city fire station while participating in the City's Fire Rescue Explorer Program. In order to participate in the program, the plaintiff and her daughter had executed a hold harmless agreement. The trial court entered summary judgment against the plaintiff based upon the hold harmless agreement. The Third District Court of Appeals affirmed the trial court's summary judgment finding that the explorer program falls within the category of child oriented community or school activities for which a parent may waive a child's litigation rights. *See Gonzalez*, 871 So. 2d at 1067. While the Third District in *Krathen*, noted that the reasoning in *Gonzalez* based on the commercial/non-commercial distinctions was no longer valid after this Court's opinion in *Shea*, it affirmed the results of *Gonzalez*.

Enforcing the validity of a pre-injury release is also consistent with Florida Court's that have ruled that a parent has the pre-litigation right to forego settlement awards in favor of pursuing a lawsuit without court approval or appointment of a *guardian ad litem*. For example, in *Tallahassee Memorial Regional Medical Center, Inc. v. Peterson*, 920 So. 2d 75 (Fla. 1st DCA 2006), the plaintiffs, on behalf of their minor daughter and themselves, filed a medical malpractice claim against the hospital and a doctor who performed a cesarean section resulting in

injuries to the minor child. The action was abated while the plaintiff filed a petition under the Florida Birth-Related Neurological Compensation Act to determine compensability. The administrative law judge awarded the plaintiffs $100,000.00, plus lifetime medical expenses for their minor daughter. The day after entry of the award, the plaintiffs filed a notice of readiness for trial in the circuit court and informed defense counsel of their intent to reject the award. The defendant hospital moved for appointment of a *guardian ad litem* in the circuit court seeking a determination that the rejection of the award was in the best interest of the child. The trial court denied the motion, and the defendant filed a petition for *writ of certiorari* in the First District Court of Appeal.

In denying the writ, the First District Court of Appeal noted that no rule or statutory provision required the appointment of a *guardian ad litem* in the case. More importantly, the Court reiterated that Florida recognized that a parent had a fundamental and constitutional right to make decisions about their child's welfare. *Petersen*, 920 So. 2d at 80. The Court concluded that this right allowed the plaintiffs the ability reject the administrative law judge's award. The Court specifically found that waiver of the guaranteed return for the risk of a civil remedy was insufficient basis for the court to invade the plaintiffs' fundamental parental privacy rights. *Id*. at 80. This ability to reject the award in *Petersen* is directly analogous to a parent's ability to execute a pre-injury release here.

C. A Parent has the Authority to execute the pre-injury release on behalf of his minor child.

In his brief before the Fourth District, FIELDS argued that parents do not have a common law authority to waive the substantive rights of a child without court approval. In its opinion below, the Fourth District accepted this argument. Citing 59 Am. Jur. 2d *Parent and Child* s. 40, 183 and *Romish v. Albo*, 291 So. 2d 24, 25 9 (Fla. 3d DCA 1974), the Fourth District found that there was no common law authority for a parent to compromise or settle a child's claim or waive substantive rights without court approval. Based upon this analysis, the Fourth District found that the release constituted a forfeiture of the minor's property rights. *Fields*, 961 So. 2d at 1130. The Court ultimately held that, in the absence of such authority, it was the duty of the legislature and not the court to change the law. Based on this reasoning the lower court found the pre-injury release was unenforceable and reversed the trial court's entry of summary judgment. *Id*. at 1130. With all due respect, KIRTON/THUNDERCROSS contends this argument is incorrect in that it misapprehends Florida's statutory as well as fails to recognize the practical application of obtaining court approval on a case by case basis.

Both the Am. Jur. article and *Romish* cited by the District Court appear to deal with a minor's accrued cause of action. This fact distinguishes those authority from this case. As set forth above, a parent has a fundamental constitutional right to make decisions for their minor children under both the state and federal

constitutions. *See State v. J.P.*, 907 So.2d 1101, 1115 (Fla. 2005); *Padgett v. Dep't of Children & Families*, 577 So. 2d 565, 570 (Fla. 1991); *Tallahassee Memorial Regional Medical Center, Inc. v. Petersen*, 920 So. 2d 75, 80 (Fla. 1st DCA 2006). Importantly, in *Shea*, this Court unequivocally analyzed the release and arbitration agreement before the court as an issue of contract formation. *Shea*, at 398. Based upon such fundamental rights, Florida Courts have recognized the enforceability of pre-injury agreements to arbitrate, *Global Travel Marketing, Inc. v. Shea*, 908 So.2d 392 (Fla. 2005); pre-injury waivers of liability, *Lantz v. Iron Horse Saloon, Inc.*, 717 So. 2d 590 (Fla. 5th DCA 1998), *Gonzalez v. City of Coral Gables*, 871 So. 2d 1067 (Fla. 3d DCA 2004); *Krathen v. School Board of Monroe County*, ___ So. 2d ___, 2007 WL 2848127, 32 Fla. L. Weekly D2386 (Fla. 3d DCA Oct. 3, 2007) [5]; and the waiver of an award under the Florida Birth-Related Neurological Compensation Act, *Tallahassee Memorial Regional Medical Center, Inc. v. Petersen*, 920 So. 2d 75, 80 (Fla. 1st DCA 2006). Thus, the premise that only the Florida Legislature may grant parents the right to waive substantive rights is simply wrong.

[5] While striking down the enforceability of pre-injury waivers on public policy grounds, even the Fifth District Court of Appeal in *Applegate v. Cable Water Ski, L.C.*, ___ So. 2d ___, 2008 WL 45530 (Fla. 5th DCA 2008) expressed "considerable skepticism" about the contention that parents never have the authority to waive children's tort claims absent express authorization by statute. *Id* at p. 1.

D. Florida's statutory framework supports enforcement of pre-injury releases such as the one at issue in this case.

Both FIELDS and the Fourth District below cited Fla. Stat. § 744.301(2) to support the conclusion that pre-injury waivers are unenforceable. The District Court acknowledged that § 744.301(2) provides that natural guardians may settle a claims or causes of action for damages that do not exceed $15,000.00. *Fields v. Kirton*, 961 at 1130. The District Court noted that there "is no comparable statutory scheme governing the issue of pre-injury releases signed by a parent on behalf of a minor child." *Id* at 1130. From this, the district court concluded such release was invalid and it was up to the legislature to grant such authority to a parent. *Id*. at 1130. KIRTON/THUNDERCROSS respectfully contends that this conclusion is in error.

The fact that §744.301 does not address pre-injury releases executed before a cause of action accrues actually argues in favor of the enforcement of pre-injury releases. As this Court recognized in *Shea*, the absence of such a statutory scheme means that the Legislature has not precluded enforcement of such pre-injury releases. *Shea*, 908 So. 2d at 400. It is clear that the Florida Legislature limited court involvement to existing claims greater than $15,000.00. The legislature could have created a broader restriction on a natural guardian's ability to settle claims but it did not. As noted by this Court in *Shea*:

> [T]he lack of a statutory requirement for court involvement in pre-injury arbitration agreements provides a basis for treating these agreements differently from settlements of lawsuits involving minors' claims, for which appointment of a guardian as litem and court approval are necessary under certain circumstances pursuant to sections 744.301 and 744.387, Florida Statutes (2004).

Shea, 908 So.2d at 403. Although addressing only the arbitration clause at issue in *Shea*, this Court's reasoning is equally applicable to the pre-injury release portion of the contract.

A pre-injury release is the equivalent to an accrued claim for less than $15,000.00. At the time the parent signs the pre-injury waiver, the claim is worth less than $15,000.00 and, therefore, falls squarely within the parents authority to settle it pursuant to §744.301. Like claims for less than $15,000.00, the policy reasons for court involvement are not present in pre-injury releases. In a pre-injury situation, there are not concerns about potential financial burdens or conflicts of interest tainting a parent's decision making process. As explained by one commentator:

> The concerns underlying the judiciary's reluctance to allow parents to dispose of a child's existing claim do not arise in the situation where a parent waives a child's future claim. A parent dealing with an existing claim is simultaneously coping with an injured child; such a situation creates a potential for parental action contrary to that child's ultimate best interests.

> A parent who signs a release before her child participates in a recreational activity, however, faces an entirely different situation. First, such a parent has no financial motivation to sign the release. To the contrary, because a parent must pay for medical care, she risks her financial interests by signing away the right to recover damages. Thus, the parent would better serve her financial interests by refusing to sign the release.
>
> A parent who dishonestly or maliciously signs a preinjury release in deliberate derogation of his child's best interests also seems unlikely. Presumably parents sign future releases to enable their children to participate in activities that the parents and children believe will be fun or educational. Common sense suggests that while a parent might misjudge or act carelessly in signing a release, he would have no reason to sign with malice aforethought.
>
> Moreover, parents are less vulnerable to coercion and fraud in a preinjury setting. A parent who contemplates signing a release as a prerequisite to her child's participation in some activity faces none of the emotional trauma and financial pressures that may arise with an existing claim. That parent has time to examine the release, consider its terms, and explore possible alternatives. A parent signing a future release is thus more able to reasonably assess the possible consequences of waiving the right to sue.

Angeline Purdy, *Scott v. Pacific West Mountain Resort: Erroneously Invalidating Parental Releases of Minor's Future Claim*, 68 Wash.L.Rev. 457 (1993); *see, also,* Stephanie Ross, *Interscholastic Sports: Why Exculpatory Agreements Signed by Parents Should be Upheld*, 76 Temp.L.Rev. 619, 635 (2003).

These distinctions between a parent's decision in a pre-injury setting and decisions made after a claim accrue are crucial in assessing the policy reasons for enforcing pre-injury releases. In a pre-injury setting, the policy concerns requiring judicial instruction and supervision are simply not present. Thus, the Florida Legislature's silence on providing restrictions relating to pre-injury claims argues in favor of a parent's right to execute a binding waiver of liability in a pre-injury setting.

Such a finding is consistent with and parallel's Florida law in regard to the running of applicable statutes of limitation for a minor's claim. Under Florida law, the disability of minority does not stop the running of the statute of limitations. *See Slaughter v. Tyler*, 126 Fla. 515, 171 So. 320 (Fla. 1936) *overruled on other grounds, Manning v. Serrano,* 97 So. 2d 688 (Fla. 1957); *Velazquez v. Metropolitan Dade County*, 442 So. 2d 1036 (Fla. 3d DCA 1983). The only time the minority of a claimant tolls a limitation period is for the "period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to the minor …, or is adjudicated to be incapacitated to sue…. In any event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of action." §95.051(1)(h), Florida Statutes . Thus, under Florida law, where the parent of a minor has knowledge of the minor's claim, the statute of limitations for such claim is not tolled. If the parent allows the statute to

run, the minor's claim is barred. *See, e.g., Slaughter v. Tyler*, 126 Fla. 515, 171 So. 320 (Fla. 1936); *M.G. v. Arvida Corporation*, 630 So. 2d 1164 (Fla. 3d DCA 1993); *Velazquez v. Metropolitan Dade County*, 442 So. 2d 1036 (Fla. 3d DCA 1983); *Gasparro v. Horner*, 245 So. 2d 901 (Fla. 4th DCA 1971). Clearly, if a parent has the legal ability to decide to allow a minor child's existing claim to be extinguished, a parent likewise has the authority to sign a binding release for a pre-injury claim.

A finding of a parent's right to execute a binding pre-injury release is also consistent with a strong public policy reflected in the statutory framework created by the Florida legislature. The Florida legislature favors the ability of parents to make decisions on behalf of their children in numerous and wide-ranging activities. Under Florida law, several acts that would otherwise be criminal are expressly allowed with the permission of a parent. *See* Fla. Stat. § 790.17 (2006) and Fla. Stat. § 790.22 (2006) (parent may allow a minor to purchase, receive, possess and use weapons, including firearms); Fla. Stat. § 468.412 (2006) (parent may give talent agency permission to have a minor pose in the nude); Fla. Stat. § 877.04 (2006) (parent may allow minor to receive a tattoo); Fla. Stat. § 381.0075 (2006) (parent may allow minor child to receive body piercing); Fla. Stat. § 381.89 (2006) (parent may allow minor child to utilize tanning salon facility); Fla. Stat. § 550.0425 (2006) (allows parents to bring minor children to para-mutual facilities);

Fla. Stat. § 847.013 (2006) (allows exhibition to a minor of motion pictures, exhibits, shows, representations, or other presentations, which depict nudity, sexual conduct, sexual excitement, sexual battery, bestiality or sadomasochistic abuse).

Additionally, a parent is provided the authority to make binding decisions relating to many fundamental aspects of a minor child's life, some of which clearly involve commercial activities. *See* Fla. Stat. § 1002.20(2) (2006) and Fla. Stat. § 1002.20 (6) (2006) (parents may decide what form of school a child will attend, *i.e.* public, private or home school); Fla. Stat. § 1003.21(1)(c) (2006) (parent may agree to allow a 16 year old to opt out of school attendance); Fla. Stat. § 741.0405 (2006) (parent may give permission to a 16 year old to marry); Fla. Stat. § 540.08 (2006) (parent may grant permission for use of a minor's name, portrait, photo or likeness for commercial purposes). Fla. Stat. § 322.09 (provides consent for a minor to apply for and obtain a Florida driver's license). A parent's right to execute a binding release in a pre-injury setting is clearly consistent with Florida public policy when viewed in light of our state's statutory scheme.

> E. <u>The Florida Constitution and statutory framework are consistent with other states that have found pre-injury releases to be valid and enforceable, and distinguishes Florida from those cases cited below by FIELDS in support of declaring the pre-injury release invalid.</u>

In his brief in the District Court, FIELDS cited several non-Florida cases for support of his argument that the lower Court should declare the pre-injury release

void[6]. KIRTON/THUNDERCROSS recognizes that there is a split among the various states regarding the enforceability of a pre-injury waivers on behalf of a minor child; however, in contrast to the case law cited by FIELDS, there are several states that have found such waivers to be valid and enforceable. *See Pulford v. County of Los Angeles*, 2004 WL 2106545 (Cal. App. 2 Dist. 2004); *Platzer v. Mammoth Mountain Ski Area*, 128 Cal. Rptr.2d 885 (Cal. App. 3 Dist 2002); *Saccente v. LaFlamme*, 35 Conn.L.Rptr. 174 (Conn. Super. Ct. 2003); *Sharon v. City of Newton*, 437 Mass. 99, 109 N.E. 2d 738 (Mass. 2002); *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St. 3d 367, 696 N.E. 2d 201, 207 (Ohio 1998); *Brooks v. Timberline Tours, Inc.*, 941 F. Supp. 959 (D.Col. 1997); *Fire Insurance Exh. V. Cincinnati Insurance Company*, 610 N.W.2d 98 (Wisc. App. 2000); Kondrad v. Bismark Park District, 655 N.W.2d 411 (N.D. 2003). Additionally, two states, Colorado and Alaska have passed statutes specifically authorizing parents to execute binding pre-injury releases. *See* Colo. App. 13-22-107; Alaska Statutes §09.65.292.

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[6] *See Hojnowski v. Vans Skate Park*, 901 A. 2d 381 (N.J. 2006); *Cooper v. Aspen Skiing Company*, 48 P.3d 1229 (Col. 2002); *Hawkins v. Peart*, 37 P.3d 1062 (Utah 2001); *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6 (Wash. 1992); *Meyer v. Naperville Manner, Inc.*, 634 N.E.2d 411 (1994); *Munoz v. II Jaz, Inc.*, 863 S.W.2d 207 (Tex.Ct.App. 1993); *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242 (Tenn.Ct.App. 1990); *Simmons v. Parkette National Gymnastics Training Ctr.*, 670 F.Supp. 140 (E.D.Pa. 1987); *Apicella v. Valley Forge Military Acad. & Jr. College*, 630 F.Supp. 20 (E.D.Pa. 1985); *Doyle v. Bowdoin College*, 403 A.2d 1206 (Me. 1979).

Significantly, the decisions upholding pre-injury waivers recognize the importance of both parental authority and the availability of opportunities for children to participate in a variety of sports and extracurricular activities. *See Zivich*, 696 N.E. 2d at 205 – 207 (discussing the importance of recreational activities and parental authority); *Sharon*, 437 Mass. at 109-111 (court refuses to disturb parental judgment and discusses encouragement of athletic activities for minors); *Saccente v. LaFlamme,* 35 Conn.L.Rptr. 174 (Conn. Super. Ct. 2003) (court discusses fundamental rights of parents and fact that Connecticut legislature enactments favor parents rights to make fundamental decisions); *Pulford v. County of Los Angeles*, 2004 WL 2106545 (Cal. App. 2 Dist. 2004) (court notes the benefit from the availability of recreational and sports activities).

More importantly, the out of state case law finding pre-injury waivers invalid is of minimal persuasive value given Florida's strong predilection for favoring a parent's right to make decisions for his minor child. As discussed in detail above, Florida provides an express constitutional right for such parental decisions. The existence of such an express right in and of itself distinguishes many of the states which invalidate pre-injury waivers from Florida. Additionally, Florida's statutory framework highlights the strong public policy favoring parental decisions on behalf of their minor children.

Examining all of the foreign cases cited by FIELDS below which found the pre-injury waivers invalid, none of these cases contain any discussions or otherwise even allude to any state constitutional provisions similar to Florida's constitutional provision. In fact, of all the cases, only two even mention a parent's fundamental rights under the federal constitution. In *Hojnowski v. Vans Skate Park*, 901 A. 2d 381 (N.J. 2006), the court mentions only in passing the parent's fundamental rights under federal law. Similarly, in *Cooper v. Aspen Skiing Company,* 48 P.3d 1229 (Col. 2002), the Colorado Supreme Court only discussed the federal constitutional rights in a footnote in the opinion.[7] It is clear from *Hojnowski* and *Cooper* that neither New Jersey nor Colorado provides an express state constitutional provision regarding parental rights. Even more striking are the opinions in the remaining cases contained in FIELDS' string cite of foreign case law. (*Hawkins v. Peart*, 37 P.3d 1062 (Utah 2001); *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6 (Wash. 1992); *Meyer v. Naperville Manner, Inc.*, 634 N.E.2d 411 (1994); *Munoz v. II Jaz, Inc.*, 863 S.W.2d 207 (Tex.Ct.App. 1993); *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242 (Tenn.Ct.App. 1990); *Simmons v. Parkette National Gymnastics Training Ctr.*, 670 F.Supp. 140

[7] Significantly, shortly after the Colorado Supreme Court rendered its opinion in *Cooper*, the Colorado legislature passed a law specifically overturning *Cooper*. In Section 13-22-107, Colorado Statutes (2003), the Colorado legislature expressly declared that the *Cooper* decision did not reflect the public policy of Colorado and that a parent may waive a child's prospective claim of negligence.

(E.D.Pa. 1987); *Apicella v. Valley Forge Military Acad. & Jr. College*, 630 F.Supp. 20 (E.D.Pa. 1985); *Doyle v. Bowdoin College*, 403 A.2d 1206 (Me. 1979)). None of the cases indicate or discuss the existence of any federal or state constitutional protections, nor do they discuss a statutory scheme similar to Florida's laws. It is clear, therefore, that the Florida public policy accords a much greater importance to parental decision making than the laws of any of these other states. Additionally, it appears that all of these decisions rely on statutory schemes or laws that do not allow parents any authority to settle or dispose of any claims of a minor without court intervention. Again, Florida's statutory framework favors much more parental control than the laws described in these various other state decisions. Thus, the policy arguments made in these cases are not applicable here. *See Saccente v. LaFlamme*, 35 Conn.L.Rptr. 174 (Conn. Super. Ct. 2003) (noting that Connecticut law allows parents to settle claims under $10,000.00 without court intervention (similar to Florida law) and therefore the policy arguments in *Scott* and *Hawkins* were unavailing). Simply stated, a close examination of the cases cited by FIELDS below reveals that Florida's constitutional and statutory framework is distinctly different from those states where the courts have invalidated pre-injury releases. Florida law and public policy is clearly aligned with those jurisdictions upholding the validity of pre-injury releases. The foreign case law cited by FIELDS is inapplicable to Florida and is unpersuasive.

KIRTON/THUNDERCROSS recognizes the recent opinion of the Fifth District Court of Appeal in *Applegate v. Cable Water Ski, L.C.*, ___ So. 2d ___ (Fla. 5th DCA Jan. 4 2008) , 2008 WL 45530, 33 Fla. L. Weekly, D146 declaring pre-injury releases executed by parents invalid as against Florida public policy. For many of the same reasons articulated above, KIRTON/THUNDERCROSS contends that the *Applegate* decision is wrongly decided. Initially, the Fifth District opinion relies on the same foreign case law cited by FIELDS in his brief below. See *Applegate,* 2008 WL 45530 at p.1, n. 1. The Fifth District cites the case law without any in-depth analysis. As discussed above, this case law is not aligned with Florida law and public policy. *Applegate* dismisses the case law cited in support of pre-injury releases on the grounds that it all involves non-commercial activity. However, as cited above, authority supporting the enforcement of pre-injury releases also exists in commercial settings. *See, e.g., Lantz v. Iron Horse Saloon, Inc.*, 717 So. 2d 590 (Fla. 5th DCA 1998); *Platzer v. Mammoth Mountain Ski Area*, 128 Cal. Rptr.2d 885 (Cal. App. 3 Dist 2002); *Saccente v. LaFlamme*, 35 Conn.L.Rptr. 174 (Conn. Super. Ct. 2003); *Brooks v. Timberline Tours, Inc.*, 941 F. Supp. 959 (D.Col. 1997); *Quirk v. Walker's Gymnastics & Dance*, 2003 WL 21781387 (Mass. Super. 2003). *Applegate* further attempts to distinguish *Krathen* on the grounds that it did not involve a commercial enterprise. *Applegate*, 2008 WL 45530 at p.1. This is a clear misreading of *Krathen*. As discussed above, in

Krathen the Third District rejected the commercial/non-commercial distinction previously made in *Gonzalez*. *Krathen*, 2007 WL 2848127, p. 2. Instead, the decision rested on this Court's analysis in *Shea* regarding a parent's fundamental rights in deciding what activities are proper for his child. *Krathen* was not decided based on the nature of the activity at issue and expressly rejected the distinction approved in *Applegate*.

Additionally, like the Fourth District below, the Fifth District in *Applegate* cites section Fla. Stat. §744.301(2) in support of its determination that Florida public policy favors invalidating the subject releases. However, the Fifth District did not analyze Florida law or statutory in making its determination. As detailed above, Florida law favors a parent's right to execute such releases.

Finally, and more importantly, the court in *Applegate* draws the distinction between commercial and non-commercial activities in striking down pre-injury releases without truly addressing this Court's rejection of such distinctions in *Shea*. In *Shea*, this Court unequivocally rejected the distinction made by the Fourth District in *Shea* between commercial travel and community and school oriented activities. In expressly criticizing this distinction, this Court explained that:

> The line dividing commonplace activities and commercial travel opportunities if far from clear, given some commonplace school or community activities might also involve commercial travel.
>
> * * *

> We see no basis in fact or law for this distinction, nor a reliable standard by which to apply it without making value judgments as to the underlying activity that the parent has deemed appropriate for the child to engage in.

Shea, 908 So. 2d at 404, *see also Krathen v. School Board of Monroe County*, __ So. 2d __, 2007 WL 2848127 (Fla. 3d DCA 2007). This Court went on to warn that requiring court approval of contracts would put courts in the position of second guessing the decision-making of a parent. *Shea*, 908 So. 2d at 404. Quoting the United States Supreme Court in *Troxel*, this Court observed:

> There is a presumption that fit parents act in the best interest of their children…. Accordingly, so long as a parent adequately cares for his or her children (*i.e.* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parents children.

Shea, 908 So. 2d at 404 *quoting Troxel*, 530 U.S. at 68-69 (plurality opinion).

Despite this Court's rejection of the commercial/non-commercial distinction, the *Applegate* court simply dismissed the language by noting that *Shea* dealt with arbitration clauses and not releases. While KIRTON/THUNDERCROSS acknowledges that this Court limited its opinion in *Shea* strictly to the enforceability of the arbitration provision, the criticisms of making this distinction apply with equal force to the decision of enforcing the pre-injury liability provisions. As explained in *Shea*, any attempt to distinguish among different

activities is at best arbitrary, unclear and without a reliable standard by which to apply such distinctions. *Shea*, 908 So. 2d at 403-04. Thus, under the reasoning of this Court's in *Shea*, pre-injury releases should be upheld without distinction as to the activities involved. *See Krathen v. School Board of Monroe County*, ___ So. 2d ___, 2007 WL 2848127, 32 Fla. L. Weekly D2386 (Fla. 3d DCA Oct. 3, 2007).

To do otherwise would put a court in the position of having to rule repeatedly on each individual activity, leaving the citizens of Florida to guess on prospective rulings while conducting their daily family activities. Additionally, if the Court ever desired to assume the responsibility of ruling on individual activity, it would be impossible for the Court to determine that conditions wherein approval would be extended versus those conditions which would result in rejection of the requested activity. For example, a minor desiring to participate in an off-shore scuba diving trip. The seas could be clam or rough, underwater visibility could be crystal clear or limited to a few feet, currents could be strong or non-existent, the sky could be clear and sunny or windy and overcast. How could the Court ever be expected to approve or disapprove an activity in the sterile setting of a courtroom. Rather, it is a parent's right as provided by the Federal and State Constitution to consider all the factors and make the determination to engage or not engage in the activity. To distinguish for purposes of liability, whether an activity is sponsored by a for-profit verses a not-for-profit organization would also create a legal

anomaly which makes no practical sense. If two (2) motorcycle/off-road training facilities were located next door to one another, and one operated as a not-for-profit corporation, while the other operated as a mom and pop proprietorship, why one should be allowed to rely on a release of liability while the other may not. Both are engaging in the same activity with presumably the same customers, yet one is shielded from liability while mom and pop risk everything.

In reality, many of the inherently dangerous sports and motor sport activities such as scuba diving, horseback riding and racing motor sports are available to families through such mom and pop operations. The paramount concern in this case is to ensure that the law of releases of liability preserves and advances the public's best interests. It goes without saying that a fundamental concern in the public's interest is the continued viability of such socially beneficial programs in these financially strapped times. Whether privately or publicly operated youth recreational or sports activities survive may well turn on whether the ability to insure or self-insure in a cost effective manner in the face of a drastic change in the law restricting pre-injury releases. It is unreasonable to expect that these sufficient opportunities for families to enjoy such activities will be created and maintained through governmental or not-for-profit entities. Such opportunities should remain available to the citizens of Florida irrespective of what form of organization chooses to provide them. Accordingly, Florida public policy favors a finding that a

release executed by a parent on behalf of a minor child is enforceable in the State of Florida.

CONCLUSION

For the reasons set forth above, this Court should answer the certified question of great public importance in the affirmative, reverse the Fourth District Court of Appeal decision in this matter and, remand the case with instructions to affirm the trial court's grant of summary judgment in favor of KIRTON/THUNDERCROSS in this case.

Dated this ___ day of January, 2008.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Guy Bennett Rubin, Esquire and Laurence C. Huttman, Esquire, Rubin & Rubin, P.O. Box 395, Stuart, Florida 34995, Richard Lee Barrett, Esquire and R. Steven Ruta, Esquire, Barrett, Chapman &Ruta, 18 Wall Street, Orlando, Florida 32802, Alan C. Espy, Esquire, 3300 PGA Boulevard, Palm Beach Gardens, Florida 33410 and to Bard D. Rockenbach, Burlington & Rockenbach, P.A., 2001 Professional Building/Suite 410 2001, Palm Beach Lakes Blvd., West Palm Beach, Florida 33409 this____ day of January, 2008.

By: _____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, pursuant to Florida Rules of Appellate Procedure, this response complies with the font requirements.

By: _____
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