IN THE SUPREME COURT OF THE STATE OF FLORIDA

DEAN DYESS,

Petitioner,

CASE NO.: SC07-1741
LT Case No.: 4D06-1486

-vs-

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

Respondent.
_____/

PETITIONER DEAN DYESS' REPLY TO RESPONDENT'S BRIEF ON THE MERITS

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This case presents the single issue of whether a parent may bind a minor's estate by the pre-injury execution of a release. In his brief on the merits, FIELDS begins his defense of the Fourth District Court of Appeal's opinion by noting that it was based in the same court's prior opinion in *Shea v. Global Marketing, Inc.*, 870 So. 2d 20 (Fla. 4th DCA) quashed, 908 So. 2d 392 (Fla. 2005). *See* Respondent's Brief on the Merits, p. 11. Interestingly, FIELDS quotes a passage from the Fourth District Court of Appeal's *Shea* opinion wherein the court based its decision on a distinction between commercial activity and non-commercial activity. *See* Respondent's Brief on the Merits, p. 11. FIELDS then makes the assertion that this Court in *Shea v. Global Marketing, Inc.*, 908 So. 2d 392 (Fla. 2005) found this analysis "instructive". *See* Respondent's Brief on the Merits, p. 12. However, it is clear that this Court rejected this logic in *Shea*. In fact, the Fourth District Court of Appeals recognized this Court's rejection of such reasoning in its opinion below. *Fields v. Kirton*, 961 So. 2d 1127, 1129 (Fla. 4th DCA 2007). Thus, FIELDS reliance on this language in its initial argument is surprisingly misplaced.

FIELDS next argues that a parent has no authority to waive the property rights of the minor child relying on the doctrine of *parens patriae*. Like FIELDS initial argument regarding *Shea*, this argument is misplaced and, in fact, misconstrues the issue before the Court. FIELDS contends that the petitioner "ignores the role of the state and its laws in protecting children." Respondent's Brief on the Merits, p. 13. Far from ignoring the role

of the State, DYESS recognizes that this issue before the Court is a question of balancing the rights of the parents with the State's power to protect children. It is this balancing of interests that is ignored or, at best minimized by FIELDS.

This Court in *Shea* correctly framed the issue as "whether the state, through the courts and for reasons of public policy, can override a parent's right to make decision by refusing to enforce its consequences." *Shea*, 908 So. 2d at 398.[1] FIELDS' argument that no common law right to waive pre-injury claim exists is inaccurate. FIELDS conveniently ignores the underlying parental fundamental rights recognized by this Court in *Shea*. This Court unequivocally recognized the fundamental constitutional right of a parent to make decisions on behalf his child. *Shea*, 908 at 398-99. It is this fundamental constitutional right that provides the authority for a parent to enter the contract on behalf of the child. FIELDS further ignores the Fourth District Court of Appeal's acknowledgement that "courts have consistently held that a waiver executed by a parent on behalf of a minor child is supported by public policy when it relates to obtaining medical care, insurance or participation in school or community sponsored activities." *Fields*, 961 So. 2d at 1129. Thus, FIELDS' assertion that there is no basis for a parent executing a waiver on behalf of the child is simply not accurate.

[1] Although Shea dealt only with the enforceability of the arbitration provision of the release at issue, this Court's framing of the issue is equally appropriate to the case at bar.

In further support of his position, FIELDS cites Florida's statutory scheme dealing with the settlement of a minor's claims, Fla. Stat. §744.301 and §744.387. In discussing this statutory scheme, FIELDS boldly asserts that a "parent has no authority to settle a minor's claim without approval by the court pursuant to these statutes, and without a finding that settlement is in the best interest of the minor. *Hernandez v. United Contractors Corp.*, 766 So. 2d 1249 (Fla. 2d DCA 2000)." Respondent's Brief on the Merits, p. 14-15. FIELDS statement is simply wrong.

Both §744.301(2) and §744.387 clearly and unequivocally allow a parent or guardian to settle a minor's claims or causes of action without any judicial involvement if the claims are under $15,000.00. The *Hernandez* case cited by FIELDS does not stand for this general proposition for which it is cited. *Hernandez* involved a lump sum workers' compensation settlement of $10,000.00. *Id.* at 1251. The issue before the court was whether an election of remedies had occurred in relation to the lump sum settlement. In determining that no election occurred as to the minor plaintiff, the court noted that the workers' compensation settlement was above the statutory limit set forth in §744.387 and therefore the appointment of a guardian was required.[2] *Id.* at 1253. The *Hernandez* court simply applied the clear standards set forth by §744.301 and §744.387. *Hernandez*, therefore, does not support the inexplicable statement of FIELDS that a parent has no authority to settle a minor child's claim.

[2] At the time *Hernandez* was decided, the statutory threshold for requiring judicial approval for the settlement of a minor's claim was $5000.00.

Florida's existing statutory scheme leaves no doubt that parents have the right to execute pre-injury release waivers on behalf of their children. Those statutes clearly allow a parent to settle minors' claims without judicial involvement when they are less than $15,000.00. The reasoning behind §744.301 is that when claims exceed $15,000.00, it becomes more likely that a parent will place his own pecuniary interest ahead of that of his child's. No such problem exists in a pre-injury release situation. The decision to execute a pre-injury release is made without any pecuniary pressure whatsoever. The likelihood that parents will place their own personal interest ahead of their child's is far more likely in the post-injury scenario than in the pre-injury scenario. Certainly the opportunity exists, after a child has suffered a traumatic injury, for a parent to forgo suit and allow the statute of limitations to run in return for an off-the-record payment to the parent by the tortfeasor. Nevertheless, under Florida law, such a situation could occur. Not so with a pre-injury release. Furthermore, common sense dictates that parents and children would line up to be paid $14,999.00 to execute pre-injury releases.[3] As such, there can be no doubt that the execution of a pre-injury release, in return for the ability to participate in dangerous activities, is, in fact, the settlement of a claim worth less than $15,000.00 and well within the permissive ambit of sections 744.301(2) and 744.387.

[3] As this Court has noted in interpreting constitutional and statutory provisions, "the courts must give a reasonable and common sense construction to terms used in light of their relation to the factual situation prescribed…" *State v. Gray*, 74 So. 2d 114 (Fla. 1954).

Thus, the fact that §744.301 does not address pre-injury releases executed before a cause of action accrues 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. Both §744.301(2) and §744.387 are a restriction on rights, not an extension. The Legislature could have created a broader restriction on a natural guardian's ability to settle claims but it did not. 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 public policy reasons for court involvement are not present in pre-injury releases. In a pre-injury situation, there are not concerns about potential financial motivations and burdens, malicious or dishonest actions or conflicts of interest tainting a parent's decision-making process. Additionally, a parent is less vulnerable to coercion and fraud in a pre-injury setting. *See* 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 accrues 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. 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.

Furthermore, FIELDS' contention that parents lack authority to execute a release is further belied by Florida's statutes of limitations. As pointed out in DYESS' Initial Brief on the Merits, under Florida law, the disability of minority does not stop the running of the statute of limitations. The only time the minority of a claimant tolls a limitation period is if a parent or guardian ad litem does not exist, has an interest adverse to the minor, or is adjudicated to be incapacitated to sue. §95.051(1)(h), Florida Statutes. 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) (*overruled on other grounds by Manning v. Serrano*, 97 So. 2d 688 (Fla. 1957)); *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.

FIELDS attempts to distinguish this statutory scheme arguing that "the authority to file a lawsuit is an act which prosecutes a cause of action and preserves a right of the child, while the execution of a pre-injury release destroys the child's rights." Respondent's Brief on the Merits, p. 26. This distinction is weak at best. The decision not to file suit or to allow a statute of limitations to run, either consciously or inadvertently, eliminates a child's existing claims in a setting generally more complex than that facing a parent executing a pre-injury waiver. A parent facing the decision to initiate legal proceedings deals with not only the issues inherent with a minor's injuries but also the laws and nuances of the legal system of which one generally has minimal understanding.[4] If a parent can exercise authority to forgo an existing claim under such circumstances, a parent can clearly exercise similar authority in a pre-injury setting. FIELDS' attempt to distinguish decisions regarding pre-injury releases and decisions regarding the timely filing of claims is without merit. A parent's authority under Florida's statute of limitations is directly analogous to the issue before the Court in this matter.

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[4] Interestingly, FIELDS cites two cases holding that a parent cannot represent a child in court in support of his *parens patriae* argument: *Cheung v. Youth Orchestra Foundation of Buffalo, Inc.*, 906 F.2d 59 (2d Cir. 1990) and *Devine v. Indian River County School Board*, 121 F.3d 576 (11th Cir. 1997). However, far from being decided based upon the *parens patriae* grounds, "the sole policy at stake concerns the exclusion of non-licensed persons to appear as attorneys on behalf of others." *Cheung*, 906 F.2d at 61. *See also Devine*, 121 F.3d at 581 (We are aware of no authority permitting non-lawyers to represent their children *pro se*). These cases actually highlight the unique nature of legal process and the difficulties a parent or guardian may have in dealing with the legal system. This further bolsters the parallel between a parent's authority to make decisions regarding filing suit and the authority to execute a pre-injury release.

FIELDS next attempts to distinguish the statutory framework cited by DYESS that clearly recognizes Florida's public policy supporting parental rights. FIELDS argues that the fact "that the legislature has to enact statutes giving parents authority to act on those matters, and to compromise claims, on behalf of their children is proof that parents have no inherent or natural authority." Respondent's Brief on the Merits, p. 20. Just the opposite is true. The numerous statutes cited by DYESS in his Initial Brief recognize the inherent authority of a parent to make decisions on behalf of the child. Several of these statutes create criminal sanctions for conduct involving minors. *See* DYESS Initial Brief on the Merits, p. 30 citing Fla. Stat. §790.17 (2006); Fla. Stat. §790.22 (2006); Fla. Stat. §468.412 (2006); Fla. Stat. §877.04 (2006); Fla. Stat. §381.0075 (2006); Fla. Stat. §381.89 (2006); Fla. Stat. §550.0425 (2006); and Fla. Stat. §847.013 (2006). All of these statutes provide exceptions to the criminal sanctions where a parent allows the child's participation. These are all areas and activities that the Legislature determined were harmful to minors, yet deferred to the authority of the parent making decisions for a minor child. Far from supporting the lack of parental authority, creating exceptions for otherwise criminal conduct based upon the authority of the parent is a clear and unequivocal recognition by the Legislature of a parent's inherent authority regarding the activities of the child.[5] This

[5] This is also true of the remaining statutes cited by DYESS (Fla. Stat. §1002.20(2) (2006); Fla. Stat. §1002.20 (6) (2006); Fla. Stat. §1003.21(1)(c) (2006); Fla. Stat. §741.0405 (2006); Fla. Stat. §540.08 (2006). *See* DYESS Initial Brief on the Merits, p. 30. Although not criminal, these statutes create parental exceptions to

recognition of authority by the Legislature supports a finding that the public policy of Florida is consistent with a parent's authority to execute a pre-injury release.

Finally, FIELDS argues that finding pre-injury releases executed by a parent unenforceable will have no affect on businesses and the availability of recreational activities in Florida. FIELDS relies almost exclusively on the California Supreme Court's decision in *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 161 P.3d 1095, 62 Cal.Rptr.3d 527 9Cal. 2007). FIELDS specifically quotes large portions of the opinion wherein the California Supreme Court discussed the effects of voiding pre-injury releases. However, FIELDS conveniently neglects to point out that California consistently upholds the enforceability of pre-injury releases executed by parents on behalf of minor children participating in recreational sports. *See, e.g., Hohe v. San Diego Unified School Dist.*, 274 Cal. Rptr. 647 (Cal. App. 4 1990); *Platzer v. Mammoth Mountain Ski Area*, 128 Cal. Rptr.2d 885 (Cal. App. 3 Dist 2002). In fact, FIELDS relegates to a footnote (Respondent's Brief on the Merits, p. 30, n. 6) the procedural setting of *City of Santa Barbara*, which is crucial to the case.

In *City of Santa Barbara*, the Plaintiff's 14-year-old disabled daughter drowned while participating in the City's summer camp for disabled children. As part of the application process, the Plaintiff executed a form releasing the City and its employees from

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what are otherwise mandatory laws regarding school, marriage and commercial exploitation. The creation of such exceptions highlight Florida's public policy favoring parental control and authority.

any act of negligence related to the daughter's participation in the camp. On appeal from the trial court, the California appellate court ruled that the release executed by the mother of the minor child was effective and enforceable as it related to ordinary negligence, but found it was unenforceable as to future gross negligence. *City of Santa Barabra*, 161 P.3d 1096. The case was then appealed to the California Supreme Court.

The sole issue before the California Supreme Court was whether such a release would also be enforceable as to a claim of gross negligence,[6] and eventually held that pre-injury releases for gross negligence were unenforceable. However, and importantly for this case, the California Supreme Court let stand the appellate court's ruling that the release at issue was effective and enforceable for future ordinary negligence. *City of Santa Barabra*, 161 P.3d at 1098. The Court recognized that "more recent appellate decisions have concluded categorically that private agreements made 'in the recreational sports context' releasing liability for future ordinary negligence 'do not implicate the public policy interest and therefore are not void as against public policy.'" *City of Santa Barabra*, 161 P.3d at 1103 *quoting Benedek v. PLC Santa Monica*, 104 Cal.App.4th 1351, 1356-57 (Cal. App. 2002). Thus, the Court in *City of Santa Barabra* affirmed the validity of pre-injury releases executed by parents on behalf of children in recreational sports activities, a fact FIELDS failed to disclose.

[6] The California Supreme Court expressly declined to address any other issues. *City of Santa Barabra*, 161 P.3d at 1096, n. 1.

The discussions cited by FIELDS regarding the effect of the invalidation of pre-injury releases must thus be viewed in context of the issue before the California Supreme Court in City of Santa Barbara. The court was addressing the issue in a context where the releases would be unenforceable only as to gross negligence. In fact, the California Supreme Court acknowledged that it was "sensitive to the policy arguments advanced by the defendants and amici curiae that caution against rules triggering wholesale elimination of beneficial recreational programs and services … ." *Id* at 1109. The court itself put the discussion in context by noting "some cases and authorities assert that upholding releases of liability for ordinary negligence may help ensure the continuation of sports recreation and related programs … we do not discern … any discussion of an asserted corresponding need to recognize and enforce agreements releasing liability for future gross negligence …." *Id.* at 1109. It was in this context of gross negligence that the Court addressed the issues before it. The case before this Court is distinctly different as FIELDS seeks a blanket invalidation of all forms of pre-injury releases, not just releases addressing gross negligence.

DYESS concedes that he has no empirical data before this Court regarding the proffered effect of declaring the pre-injury releases at issue here unenforceable. However, FIELDS likewise does not offer any empirical data to the contrary. Instead, throughout his brief, FIELDS laments over the evils that will occur if commercial businesses are allowed to utilize pre-injury releases and personally attacks the decedent's father without record

support for decisions judged in hindsight. *See* Respondent's Brief on the Merits, p. 33-38.[7] FIELDS' diatribe is nothing more than a smoke screen to distract attention from the issue presented.

Common sense and practical experience dictate that declaring pre-injury releases unenforceable under the circumstances of the case at bar cannot help but have a detrimental effect on untold number of businesses and civic organizations across the state. Any parent or person involved in youth activities can testify as to the almost universal use of pre-injury releases for such activities. Rock climbing centers, skating rinks, health clubs, YMCA's, youth sports leagues, motor sports, scuba diving, horseback riding, public and private skate parks, dance studios, public and private school field trips and extracurricular activities, public and private summer camps; the list can go on and on.

Focusing on the legal issue before the court, FIELDS cannot contest the fact that pre-injury releases are legal and enforceable in Florida and have been for numerous years. *See e.g. Banfield v. Louis*, 589 So. 2d 441, 444 (Fla. 4th DCA 1991). Furthermore, FIELDS does not contest the language of the specific release at issue. The sole and narrow issue is whether a parent can execute an otherwise enforceable pre-injury release on behalf of their child. The answer to the question is yes. A parent has the fundamental

[7] This case was decided in the trial court on summary judgment on the narrow issue of the enforceability of the pre-injury release. In his statement of the case and facts, FIELDS presents a litany of "facts" citing various parts of the record for support. A large part of the cites for FIELDS' "facts" are to the amended complaint and affidavits submitted by FIELDS in the lower court. Many of the "facts" are contested by DYESS.

constitutional right and a statutory right to execute such a release and such a finding is consistent with the public policy of the state of Florida. For the reasons set forth above, this court should answer the certified question in the affirmative.

Dated this ___ day of April, 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 and Bard D. Rockenbach, Esquire, Burlington & Rockenbach, P.A., 2001 Professional Building, Suite 410, 2001 Palm Beach Lakes Blvd., West Palm Beach, Florida 33409, Attorneys for JORDAN FIELDS, as Personal Representative of the Estate of CHRISTOPHER JONES; William Wallace, Esquire, 115 NW 11 Avenue, Okeechobee, Florida 34972, Attorneys for SCOTT COREY KIRTON and DUDLEY R. KIRTON d/b/a THUNDER CROSS MOTOR SPORTS PARK; Alan C. Espy, Esquire, 3300 PGA Boulevard, Palm Beach Gardens, Florida 33410, Attorneys for H. SPENCER KIRTON and KIRTON BROTHERS LAWN SERVICE; and Timothy J. Owens, Esquire, Christensen, Christensen, Donchatz, Kettlewell & Owens, LLP, 100 East Campus View Blvd., Suite 360, Columbus, Ohio 43235, Attorney for Amicus Curiae, THE AMERICAN MOTORCYCLIST ASSOCIATION on the _____ day of April, 2008.

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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.

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