IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC07-1742

H. SPENCER KIRTON, KIRTON BROTHERS LAWN SERVICE, INC.,

Petitioners,

-vs-

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

Respondent.
_____/

BRIEF OF RESPONDENT ON THE MERITS

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

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PREFACE

The parties will be referred to by their proper names or as they appear in this Court. The following designation will be used:

(R) – Record On Appeal

STATEMENT OF THE CASE AND FACTS

Bobby Jones and Bette Jones were married on July 1, 1988 (R. 697). They had two sons: Christopher born on December 8, 1988 and Kyle born on March 20, 1991 (R. 697). After 15 years, the marriage ended in divorce (R 694-695). A Final Judgment of Dissolution of Marriage was entered on March 31, 2003 which gave Bobby Jones primary custody of Christopher and Kyle, provided for shared parental responsibility for their sons, and stated (R 694-695):

> The parties shall attempt to work cooperatively in making future plans consistent with the welfare and best interests of the children and in amicably resolving any disputes that may arise.

Bobby Jones never consulted with Bette Jones before signing the waiver which is the subject of this appeal (R. 661). He also never advised Bette Jones that he intended to allow Christopher to ride ATVs (Id.).

Bobby Jones took his sons to Thunder Cross Motor Sports Park ("Thunder Cross") to allow them to race and ride all terrain vehicles (ATVs)(R. 691). He did not consult with Bette Jones, nor did he tell her that he brought the boys there (R. 661). In order for Christopher to be allowed to race, Bobby Jones had to execute a Release and Waiver of Liability which authorized Christopher to participate in a practice session

racing his 2003 Yamaha Banshee twin 350 cc four wheel ATV on a course operated, constructed and maintained by Thunder Cross (R. 25, 691).

Thunder Cross was built in 1996 by three brothers, H. Spencer Kirton, Scott "Corey" Kirton and Dudley R. Kirton, on 56 acres of land in Okeechobee County that they inherited from their grandparents (R. 420-421, 549, 559-560). Thunder Cross consisted of two tracks; one for stock car races and one for motocross (R. 549). Although there were two periods of time when the Kirtons leased the track to other people, Thunder Cross was repossessed by the Kirtons one week before Christopher was killed (R. 415, 424). The Kirtons did not maintain any liability insurance for injuries caused to riders on the track (R. 110, 133-134).

One of the lessees of the track was Michael Spotts (R. 209). Upon his taking over the racetrack, Mr. Spotts hired Dean Dyess and observed the manner in which he operated the motocross side of the track (R. 209). Mr. Spotts concluded that Dean Dyess' operation of the track was grossly deficient in the areas of supervision of child riders, training of flaggers, failure to red flag the track for poor conditions, failure to hire an appropriate number of flaggers, and allowing various jumps on the track to deteriorate to a sub-par condition during practice sessions (R. 210-211). Michael Spotts became so concerned with the insufficient safety precautions he observed that

he fired Dean Dyess (R. 210). He changed the operation of the track, and the construction of the jumps, to better comply with industry safety guidelines (R. 211).

The Defendants repossessed Thunder Cross from Michael Spotts one week before Christopher Jones was killed, and immediately hired Dean Dyess to undo all of the safety changes made by Mr. Spotts (R. 415-417). One of the changes was to redesign the "Double Dean" jump to, once again, make it more dangerous (R. 211).

Dean Dyess was also responsible for grooming and manicuring the track (R. 330). If he needed help, Spencer Kirton would assist him (R. 330). The track was groomed the day before practice sessions (R. 331). No maintenance was done on the track during the practice sessions unless a participant complained (R. 332). During races, however, the track was groomed before the start of the race and re-groomed half way through the race (R. 567). In addition to grading the track, they also added dirt to the jumps every two weeks to keep the ruts filled in (R. 509).

Although Dean Dyess is familiar with ATVs like the one which killed Christopher Jones, and once sold Yamaha ATVs, he is not familiar with rules promulgated by the ATV Safety Institute regarding age appropriate ATV use (R. 361, 371). No one on the track was assigned the task of evaluating the age of the rider before allowing them to participate in the practice session (R. 356). At Thunder Cross, the size or power of a particular ATV being ridden by a particular rider has no

bearing on whether people (including children) are allowed to participate in a practice session (R. 356-357). The 350 cc ATV ridden by Christopher Jones on the day of the accident exceeded the ATV Safety Institute Guidelines for a 14 year old rider (R. 213). The American Motocross Association Rulebook limits any ATV being used by anyone under the age of 16 to 200 cc (R. 214). As a sanctioned facility, Thunder Cross was not adhering to the age restrictions set forth in the rules of the sanctioning authority by allowing Christopher Jones to ride his 350 cc twin cylinder two stroke Yamaha Banshee at the track (R. 214). Thunder Cross was therefore violating safety rules by allowing a 14 year old boy to ride a 350 cc ATV, and by designing the track to be dangerous (R. 211, 213).

On April 6, 2003, one month prior to being killed, Christopher Jones was involved in a serious accident on the "Double Dean" riding the same 350 cc ATV which killed him a few weeks later [1](R. 24). He was taken by ambulance to the hospital and treated for a fractured rib and mild concussion (R. 24). Although the emergency room physician recommended follow up care and consultations with other medical specialists, Bobby Jones did not bring Christopher for the recommended medical care or medical clearance (R. 661). Bette Jones was not told about

[1] The "Double Dean" is described as a double jump in which the first hill is 7 feet high with an upward angle of 15-19 degrees and a second hill which is 5 feet 7 inches high with an angle of approximately 9 degrees. The hills are 38 feet apart, peak to peak,

Christopher's injury in the first until after he was killed in a second accident one month later (R. 661).

Christopher Jones was killed on May 10, 2003 after he recovered from the injuries sustained in the first accident (R. 26). To gain access to the Thunder Cross park, Bobby Jones executed the Waiver/Release on behalf of both Kyle and Christopher (R. 404-405, 685). He also executed the Waiver/Release for two other riders under the age of 18 who were not accompanied by a parent or guardian (R. 404-405). Bobby Jones did not consult with or advise Christopher's mother, Bette Jones, of his intentions regarding permitting their fourteen year old son to race and jump a 350 cc ATV at Thunder Cross (R. 661).

Christopher was killed when he lost control while in the air on the "Double Dean" jump and fell off of the ATV, hitting the ground (R. 26-27, 278, 383, 532). The ATV then landed on top of him (R. 277). He got up, walked a very short distance, collapsed and died (R. 530).

After Christopher was killed, the Kirtons held a "memory race" in Christopher's honor in an effort to raise money for a headstone (R. 513). According to Corey Kirton, the Kirtons kept the money that was raised in the "memory race" and never

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and 120 feet apart base to base (R. 445-446).

paid for a headstone or gave the money to Christopher's family (R. 514). It was simply deposited into the track's bank account (R. 514).

The personal representative of the Estate of Christopher filed suit for wrongful death against Spencer Kirton, Scott Corey Kirton, Dudley Kirton and the Kirton Brother Lawn Service, Inc. as owners and operators of Thunder Cross Motor Sports Park (R. 22-29). The Amended Complaint also named Dean Dyess as a defendant for his participation in the management of the park (R. 22-29). The Amended Complaint alleged that the jumps and track were negligently constructed or maintained, that the park failed to have the proper number of "flag men" to ensure the rider's safety, and that the park allowed ATVs which were more than 200cc.

The Petitioners (Defendants below) alleged an affirmative defense based on the waiver and release signed by Bobby Jones on behalf of Christopher Jones. The release purported to release all claims against the operators of Thunder Cross Motor Sports Park for negligence.[2] Petitioners, Kirtons and Kirton Brothers Lawn Service, Inc. thereafter filed a Motion for Summary Judgment based on the release. [3]

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[2] The release provided that the undersigned:

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, directors, 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 CUASED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.

HEREBY AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the Releasees and each of them FROM ANY LOSS LIABILITY, DAMAGE, OR COST they may incur 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 OR BODILY INJURY, DEATH OR PROPERTY DAMAGE arising out of or related to the EVENT(S) whether caused by the NEGLIGENCE OF 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.

HEREBY agrees that this Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement extends to all acts of negligence by the Releasees, INCLUDING NEGLIGENCE RESCUE OPERATIONS and is intended to be as broad and inclusive as permitted by the laws of the Province or State in which the Event(s) is/are conducted and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full force and effect.

3 Without objection, Dyess was permitted to adopt the Motion for Summary Judgment *ore tenus*.

The trial court entered Final Summary Judgment against the Plaintiff on the wrongful death claim, finding that the pre-injury Waiver/Release signed by Bobby Jones was valid and prevented any claim against the Defendants for Christopher's death (R. 717-727). Bobby Jones filed an Affidavit in support of Defendants' Motion for Summary Judgment in an effort to destroy the claim brought by his former wife (R. 691-693). The affidavit stated that he signed the release on behalf of Christopher, that he understood that by signing it he was discharging Thunder Cross along with its directors, officers, employees and agents, and that he intended to waive any rights to sue because of Christopher's death.

The Fourth District reversed, holding that a parent does not have the legal authority to sign a release of claims held by a minor. It certified the following question of great public importance:

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

It also certified a conflict with Lantz v. Iron Horse Saloon, Inc., 717 So. 2d 590 (Fla. 5th DCA 1998).[4]

[4] In Applegate v. Cable Water Ski, LLC, 2008 WL 45530 (Fla. 5th DCA January 4, 2008), the Fifth District invalidated pre-injury releases signed by parents on behalf of minors in favor of commercial activity providers. It found no conflict between its decision and the decision in Lantz because Lantz only involved the issue of whether the release language was ambiguous. Id. at 3.

SUMMARY OF ARGUMENT

The Fourth District correctly concluded that a parent does not have the legal authority to release his or her child's personal injury and wrongful death claims through a pre-injury release. At common law, a parent had no authority and the Florida legislature has only given parents the authority to settle claims under very specific circumstances which are not applicable to a pre-injury release. As a result, a release signed by a parent is invalid.

The certified question should be answered in the negative, and the decision of the Fourth District should be approved. This matter should be remanded for further proceedings.

ARGUMENT

CERTIFIED QUESTION

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

In this petition, this Court must consider the enforceability of a minor's pre-injury Waiver/Release executed by a parent. Christopher Jones was a 14 year old boy who rode all-terrain vehicles (ATVs). His parents were divorced and his mother did not approve of him riding ATVs, so his father let him race an ATV at Thunder Cross Motor Sports Park, which is owned by Defendants. Christopher was involved in an ATV accident at the track one month before he died and sustained a broken rib and a concussion. Despite that accident and injury, his father still allowed Christopher to race his ATV at the Thunder Cross track. On May 10, 2003, he had another accident on the same part of the track but this time was killed when the ATV landed on his back. His mother was never told that he was racing ATVs, or that he was injured in April, 2003, until after he was killed in the second accident.

In the wrongful death suit, Kirtons raised the issue of a pre-injury Waiver/Release as a complete defense. As a precondition to participation, all riders or parents of children who would be riding were required to sign a Waiver/Release which absolved Kirtons and Thunder Cross, as well as a host of other people such as rescue

workers or pit crews, from any liability for injury or death of the participants or spectators, even if caused by the negligence of the defendants. Christopher's father, Bobby Jones, submitted an Affidavit in support of the Final Summary Judgment in favor of Defendants in which he admitted that he signed the Waiver/Release, that he understood what it meant, and that he intended to destroy his son's legal rights. The trial court entered Final Summary Judgment, holding that the Waiver/Release barred any and all claims which could be brought as a result of Christopher's death.

The Fourth District held that a parent cannot waive the litigation rights of a child without court approval. It based its decision, in part on its decision in Shea v. Global Travel Marketing, Inc., 870 So. 2d 20, 25 (Fla. 4th DCA 2003), quashed, 908 So. 2d 392 (Fla. 2005), in which the Fourth District concluded:

> Although we recognize that it is impractical for a parent to obtain a court order before entering into pre-injury contracts, we cannot accept the notion that parents may, carte blanche, waive the litigation rights of their children in the absence of circumstances supported by public policy. Circumstances in which a waiver would be supported by a recognized public policy include waivers in cases of obtaining medical care or insurance or for participation in commonplace child oriented community or school supported activities. We need not decide, here, what additional circumstances might support such a waiver; it is sufficient to state that commercial travel opportunities are not in that category.

Although the Fourth District's decision in Shea was quashed by this Court in Global Travel Marketing, Inc. v. Shea, 908 So. 2d 392 (Fla. 2005), this Court nevertheless found the Fourth District's analysis of the issue whether a parent may waive a minor child's substantive rights to be "instructive." In the final analysis, however, this Court held that the Fourth District's analysis of the enforceability of a release was inapplicable because the question in Global Marketing was whether a parent may waive the right to trial, not whether a parent may waive a cause of action. In Global Travel Marketing, this Court held that a parent has the legal authority to agree to arbitration. This Court's opinion makes it very clear that the opinion only applied to arbitration agreements signed by parents, and not to the issue of whether a pre-injury release signed by a parent is valid. As pointed out by this Court in Global Travel Marketing, the waiver of a right to jury trial is different from the waiver of a cause of action because it only selects the forum for the dispute; it does not extinguish the cause of action.

Petitioner nevertheless attempts to enforce a pre-injury release which destroys a cause of action the same as the enforcement of an arbitration selection clause. Petitioner's argument is based on two points: 1) parents have the common law right to release causes of action held by their children, and 2) parents can only exercise their constitutional right to raise their children if they also have the authority to give

activity providers immunity for injuring or killing their children. Both of these arguments are flawed and without support. While parents as natural guardians have the right to decide in what activities their children should participate, only the state has the authority to extinguish the protections afforded by the law while children are participating in the activity. Petitioner ignores the role of the state and its laws in protecting children.

I. Parents Have No Common Law Authority to Waive Substantive Rights

A natural guardian has no common law authority to dispose of the estate or assets of the minor child. McKinnon v. First National Bank, 77 Fla. 777, 82 So. 748 (1919) (The status as a natural guardian "confers no right to intermeddle with the property of the infant, but is a mere personal right in the father or other ancestor to the custody of the person"); In Re Estate of Fisher, 503 So.2d 962 (Fla., 1st DCA 1987) ("A 'guardian of the property' is not the same as a 'natural guardian.' Except to the extent provided in section 744.301, Florida Statutes, a natural guardian is entitled to the charge of the person, not to the estate of the ward."). It is also clear that a natural guardian may not enter into a compromise or settlement of a child's claim, or to waive substantive rights of the child without court approval, Romish v. Albo, 291 So. 2d 24 (Fla. 3d DCA 1974) (neither a minor's attorney nor his father could waive his right to

file a compulsory counterclaim, absent a court order), *receded from on other grounds*, Venus Laboratories, Inc. v. Katz, 573 So.2d 993 (Fla. 3rd DCA 1991); see also Whitcomb v. Dancer, 140 Vt. 580, 587, 443 A.2d 458, 461 (Vt. 1982) (at common law even one appointed guardian *ad litem* cannot bind a minor litigant to a settlement agreement absent an independent investigation by the court and a concurring decision that the compromise fairly promotes the interests of the minor). Because there is no common law authority to waive a minor's rights, a parent can only waive a minor's rights to the extent it is authorized by statute.

The Florida legislature has granted natural guardians only limited rights to settle claims through the enactment of §744.301, Florida Statutes. That statute provides that the natural guardians are authorized to settle any claim or cause of action occurring to their minor child for damages when the amount does not exceed $15,000 without the necessity of court approval. §744.301(2), Fla. Stat. Any settlement greater than $15,000 but less than $25,000 may involve a guardian *ad litem*, if the court chooses to appoint one, while a settlement in excess of $25,000 requires a court-appointed guardian, as well as a specific determination by the court that the settlement is in the best interest of the minor. §744.387(2), Fla. Stat. 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).

Although §744.301 clearly applies after a claim is known to exist, the legislative intent would be thwarted if the same restriction was not placed on waiver of a minor's claim before it accrues. The legislature clearly enacted these statutes to protect minors, and the statutes must be applied to effectuate that purpose. Trindade v. Abbey Road Beef 'N Booze, 443 So. 2d 1007 (Fla. 1st DCA 1983). The waiver of a right of action through the use of a Waiver/Release such as the one signed by Bobby Jones is simply the settlement of a potential claim for nothing. In exchange for the Waiver/Release of all potential claims, Bobby Jones negotiated for nothing but his son's opportunity to be injured or killed.

The authority granted in §744.301, Florida Statutes is the only authority of the natural guardians to affect their children's property rights. As explained in In Re Estate of Fisher, 503 So. 2d 962, 964 (Fla. 1st DCA 1987), "a natural guardian is entitled to the charge only of the person, not of the estate of the ward." By enforcing a pre-injury waiver, however, the parent obtains the worst possible type of control over the minor's estate; absolute control without any information with which to make a decision.

It is also true that because the common law does not give parents the right to waive a minor's substantive rights, then the authority granted by the legislature is the extent of the authority given. If §744.301, Florida Statutes does not apply to pre-injury waivers, then the conclusion must be that such waivers are invalid. This is a necessary conclusion, given the premise that neither the common law, nor the legislature, has given parents the authority to waive substantive rights of a child. In order for such authority to exist, it must be created by the legislature. Thus far the legislature has chosen not to do so.

The State's Interest In Protecting Children

The right of parental control has always been limited by the paramount right of the state as parens patriae[5] to protect minors. Hancock v. Dupree, 129 So.822 (Fla. 1930). Parents' rights to the care, custody, and companionship of their children are not absolute. Their rights are subject to the overriding principle that the ultimate welfare or best interest of the child must prevail. In Re Interest of Camm, 294 So. 2d 318, 320 (Fla. 1974). In Florida, minors are wards of the court and the circuit court has the inherent jurisdiction and responsibility to protect their welfare. In Re Brock,

[5]/Parens patriae refers to the role of the state as sovereign and guardian of persons under legal disability, such as children, see Black's Law Dictionary (7 Ed. 1999) 1137.

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.

Under the common law, parents' status as the natural guardians of their children does not entitle them to affect the personal estate of the ward, but is merely a personal right to the custody and care of the child until they reach the age of majority, see McKinnon v. First National Bank, 77 Fla. 777, 82 So. 748 (1919). The general rule is that a guardian may not waive the rights of an infant, 42 Am.Jur.2d Infants §187, pp.146-47; Childress v. Madison County, 777 S.W.2d 1 (Tenn. 1989); Fedor v. Mauwehu Council, Boy Scouts of America, 143 A.2d 466 (Conn. 1958).

In addition, the common law of torts exists, at least in part, to encourage people to act reasonably to protect those they have a duty to protect. As was explained by Professor Prosser:

> The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

Prosser, Handbook of the Law of Torts § 4 at 25-26 (5th ed.1984). Through the common law of torts, the state protects all citizens of the state, including children. The legislature has taken it a step further by enacting statutes which protect children from injury. For example, section 548.008, Florida Statutes prohibits any sport which utilizes or allows strikes to the head, and specifically prohibits mixed martial arts competitions, even in public schools. §§548.008 and 548.007, Florida Statutes. The state requires parents to place children in child restraint seats in motor vehicles. §316.613, Florida Statutes. In section 316.2065, Florida Statutes, the legislature has made it illegal to rent or lease a bicycle to a child under the age of 16 unless the child possesses a helmet. And although an adult may choose to ride a motorcycle without a helmet, a child under the age of 16 must use a helmet and protective eye gear.

§316.211, Fla. Stat. (2006). As noted below, parents do not have the authority to waive child support obligations of the other parent because the right to support belongs to the child, not the parent. It is obvious that the state takes the protection of its children very seriously.

This is similar to the reasoning why parents cannot represent children "pro se" in legal actions. In Cheung v. Youth Orchestra Foundation of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir. 1990), the court held that parents do not have the knowledge and training to prosecute a claim on behalf of a child (Id. at 61):

> It goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected. There is nothing in the guardian-minor relationship that suggests that the minor's interests would be furthered by representation by the non-attorney guardian.

The Eleventh Circuit Court of Appeals has agreed with this proposition. Devine v. Indian River County School Bd., 121 F.3d 576, 581 (11th Cir. 1997). Yet when a parent agrees to release an activity provider from negligence claims on behalf of a minor, the parent has done exactly what the Second Circuit has held the parent is not equipped to do; the parent has represented the minor and waived legal rights the parent does not even understand.

In support of the argument that public policy is consistent with the finding that parents have the authority to bind their children to a pre-injury release, Petitioner has pointed out that there are many statutes which give parents the authority to make decisions for their children regarding schooling, marriage, and publications (Petitioner's Brief, p. 30). However, if parents as natural guardians had the common law right to make all decisions for their children, then the legislature would not need to enact laws giving parents authority to make specific decisions. 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.

Other Jurisdictions

After this Court issued its decision in Global Marketing Travel, the New Jersey Supreme Court reviewed a decision involving a parent's execution of a pre-injury release and found the pre-injury release to be invalid. Hojnowski v. Vans Skate Park, 187 N.J. 323, 901 A. 2d 381 (N.J. 2006). It noted that pre-injury releases are disfavored as a general rule because they "encourage a lack of care." Hojnowski at 333. The court found that in accordance with the *parens patriae* doctrine, the legislature and courts have "afforded considerable protections to claims of minor

children," referring to New Jersey Rule 4:44 which requires court approval of settlement of minor's claims. Id. at 333-334. The purpose of that rule is to "guard against improvident compromise [and] to secure the minor against dissipation of the proceeds." Ibid. Although the court did not treat the rule as dispositive of the question, because Rule 4:44 did not apply to pre-injury releases, it decided the purpose of the rule nevertheless applied to invalidate pre-injury releases. It agreed with the Utah Supreme Court in Hawkins v. Peart, 37 P.3d 1062 (Utah 2001) that the "policies relating to restrictions on a parent's right to compromise an existing claim apply with even greater force in the pre-injury, exculpatory clause scenario." Although it discussed briefly whether the same policy considerations would apply to volunteer or non-profit entities, it expressed no opinion except to state that there are valid reasons to apply a different rule to those entities.

The court agreed with several other state courts which have concluded that pre-injury release agreements signed by a parent on behalf of a child cannot be enforced. See Cooper v. Aspen Skiing Co., 48 P.3d 1229, 1233-35 (Colo. 2002) (invalidating prospective exculpatory provision on public policy grounds), Scott v. Pacific West Mtn. Resort, 119 Wash.2d 484, 834 P.2d 6, 11-12 (1992) ("[T]o the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable"); Hawkins v. Peart, 37 P.3d

1062, 1065-66 (Utah 2001) (voiding release in horseback riding context on public policy grounds), Meyer v. Naperville Manner, Inc., 262 Ill.App.3d 141, 199 Ill.Dec. 572, 634 N.E.2d 411, 415 (1994) ("Since the parent's waiver of liability was not authorized by any statute or judicial approval, it had no effect to bar the minor child's (future) cause of action"); Munoz v. II Jaz Inc., 863 S.W.2d 207, 209-10 (Tex.Ct.App.1993) (Texas law does not give parents the right to waive a cause of action for personal injuries), Simmons v. Parkette National Gymnastic Training Ctr., 670 F.Supp. 140, 144 (E.D.Pa.1987) (concluding that a parent's execution of a pre-injury release did not exculpate third party from claims of child); Apicella v. Valley Forge Military Acad. & Jr. College, 630 F.Supp. 20, 24 (E.D.Pa.1985) ("Under Pennsylvania law, parents do not possess the authority to release the claims or potential claims of a minor child merely because of the parental relationship"); Doyle v. Bowdoin College, 403 A.2d 1206, 1208 n. 3 (Me.1979) (stating, *in dictum*, that a parent cannot release a child's cause of action). It recognized that other courts have reached the contrary conclusion, Zivich v. Mentor Soccer Club, Inc., 82 Ohio St.3d 367, 696 N.E.2d 201, 207 (1998) and Sharon v. City of Newton, 437 Mass. 99, 769 N.E.2d 738 (2002), it distinguished decisions because they involved non-commercial activities, where there are different policy considerations. It expressed no opinion as

to the validity of releases in those situations as its opinion was limited to commercial recreational providers.

Since the decision of the Fourth District in this case, the Third District has found a pre-injury release valid in Krathen v. School Bd. of Monroe County, 2007 WL 2848127 (Fla. 3rd DCA 2007) because Krathen's parents "clearly thought that participation in cheerleading was beneficial for Krathen and thus was willing to release and hold harmless the School Board…" It based its decision that a parent had authority to sign a pre-injury release based on this Court's decision in Global Travel Marketing. It found that this Court's decision recognized a parent's right to decide "whether to waive a child's litigation rights in exchange for participation in an activity the parent feels is beneficial for the child," and that "parents are free to make this decision without interference from the State, as parents are presumed to act in the best interests of their children." Krathen, 2007 WL 2848127 at 2. Taking these two assumptions together, one would be forced to conclude that all activities in which a parent allows a child to participate are beneficial to the child. Therefore, all releases signed by parents would be valid. It is unclear on what basis the Third District made the decision. Early in the opinion the court wrote that its decision was controlled by its decision in Gonzalez v. City of Coral Gables, 871 So.2d 1067 (Fla. 3d DCA 2004) which enforced a release because it related to a school function based on the Fourth

District's decision in Shea. The Third District noted that this Court subsequently rejected Shea's commercial/educational distinction "implying that the distinction was too narrow" but, apparently, still considered Gonzalez controlling. Krathen, 972 So.2d at 889. In the final paragraph the Third District based its decision on the conclusion that the parent must have thought participation was in the child's best interest, which appears to be a public policy reason only.

For the proposition in Global Travel Marketing that there is a presumption that all fit parents act in the best interests of their children, this Court quoted the United States Supreme Court in Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000) which cited the decision in Parham v. J. R., 442 U.S. 584, 598, 99 S.Ct. 2493, 2502 (1979) for that same proposition. Neither Troxel nor Parham involved the same type of decision as is involved in a pre-injury release, however. The decision in Parham involved a parent's ability to involuntarily admit a child into a mental health facility, while Troxel involved a parent's decision to limit a child's visitation with grandparents. Neither Troxel nor Parham involved a decision by a parent which directly placed the child's health and safety in jeopardy as is the case with a pre-injury release of claims. Although the decision of any parent that his or her child should participate in an activity may be one that is made with the child's best interests in mind, the same cannot be said of the separate decision to allow the activity provider to

provide the activity negligently. If one purpose of tort law is to protect the safety of children, then the decision to waive the protection tort law affords is a conscious decision to expose a child to injury. It cannot be presumed that a parent who has decided to voluntarily risk a child's physical well-being is acting in the child's best interest, no more than it would be presumed that a parent who takes down a pool fence in the presence of an unattended baby is acting in the baby's best interest.

More recently, in Applegate v. Cable Water Ski, LLC, 2008 WL 45530 (Fla. 5th DCA January 4, 2008), the Fifth District also recognized that this Court rejected the commercial/educational distinction but decided this Court's rejection was only as to arbitration clauses and that the "distinction is logical and remains viable in the context of exculpatory clauses." Id. at 3. In Applegate, the parents of a five year old girl signed a release as part of their agreement to allow their daughter to participate in cable waterskiing camp. Their daughter was injured after she fell off of the wakeboard she was riding and was then hit by the next customer riding a wakeboard.

The court noted that exculpatory contracts are disfavored in the law because it relives one party of the obligation to use due care and shifts the risk to the party who is probably least equipped to take the necessary precautions. It concluded that public policy required that such contracts not be enforced as to children because of the state's obligation to protect children under the *parens patriae* doctrine. Although it

acknowledged that this Court rejected a distinction between commercial and non-commercial endeavors, it nevertheless limited its opinion to commercial activity providers because it thought the distinction was logical and valid when applied to exculpatory contracts. Despite the decision in Applegate, it is clear that any distinction between activity providers would be arbitrary and unworkable.

Statutory Indications of a Parent's Lack of Authority

Petitioner has likened the authority to destroy a child's rights with the authority to preserve a child's rights under a statute of limitations (Petitioner's Brief, p. 9). Although both rights involve a parent's authority, 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. One can understand the distinction between the authority to preserve an asset for a child and the authority to destroy an asset for a child by reviewing other aspects of Florida law. For example, parents are authorized to obtain an order for child support for their children in a divorce proceeding, but do not have the right to waive their child's right to child support because that right is one imposed on the parents by the state and does not belong to either parent. It belongs to the child. See Serio v. Serio, 830 So.2d 278, 280 (Fla. 2d DCA 2002); Armour v. Allen, 377 So.2d 798, 799-800 (Fla. 1st DCA 1979).

In addition, and as discussed above, parents have the authority to prosecute a cause of action for their child with the help of an attorney, but only a limited right to destroy a cause of action.

Nor does the decision in Tallahassee Memorial Regional Medical Center, Inc. v. Petersen, 920 So.2d 75 (Fla. 1st DCA 2006) provide any support for Petitioner. In Peterson, the First District considered a petition for certiorari to review an order denying the hospital's request that a *guardian ad litem* be appointed to represent the interest of a minor patient who was allegedly the victim of medical malpractice. The question before the court was whether the court must appoint a *guardian ad litem* to determine whether parents should reject an award pursuant to the Florida Birth-Related Neurological Compensation Act (the "Act").

The First District first catalogued the various statutes and rules which require or authorize the appointment of a guardian for a minor. It then noted that the Act did not provide for the appointment of a guardian. The court noted that there was no showing that the interests of the parents were so adverse to those of the child, nor any showing that the parents were not properly representing the interests of their child. The court concluded that the hospital had failed to show the trial court departed from the essential requirements of the law or that there was any reason for the court to violate the parent's right to make decisions for their child concerning the child's welfare.

As in the other instances discussed above, the parents in Peterson were acting to preserve, not destroy, their child's rights. Although one could argue that it was a better plan to accept the award under the Act instead of risking the outcome of a jury trial, the decision to do so was made by the parents after consultation and advice of counsel and based on all the facts of the situation after a hearing before the ALJ. It should also be pointed out that the entity which was advocating for the acceptance of the award (the hospital) was the entity which would benefit from the decision to accept the award and forego a jury trial. It is doubtful that the hospital had the child's best interests in mind.

The difference between the situations cited by Petitioner and the enforceability of a release can be understood as a recognition that parents generally have control over the person of the child, while having almost no control over the property of the child. When it comes to the question of where the child should go to school, with whom the child should socialize, to file suit and the activities in which the child should participate, a parent has the right to make those decisions. However, the decision to allow a child to participate in an activity is separate from the decision to waive the protection the law provides a child and destroy a child's potential right of action. To the extent the parents in Peterson were foregoing an award, it was done after a full hearing, on advice of counsel and after all the facts were known. When a

parent is given a pre-injury release, the parent knows nothing about the activity provider, the risk, what injuries the child will sustain, the medical expenses that will be incurred or the impact on the child's life. It is a decision made in the dark with lifelong, or life-ending, implications for the child.

The Petitioner's argument is based on the assumption that a parent cannot make the decision to allow a child to participate without also waiving future claims. This is based on the erroneous assumption that the activity does not exist without the waiver. Although experience may suggest that activity providers always require a release before providing the activity, there is no reason to assume that the activity will not exist without the release.

II. Predictions of Economic and Social Upheaval

As the foundation for the argument that pre-injury releases must be enforceable, Petitioners and amicus have argued that if parental pre-injury releases are unenforceable then children will be robbed of all recreational activity. The argument assumes that a parent cannot make the parental decision to allow a child to participate without also succumbing to the activity provider's tactic of including a release of all claims. In essence, the Petitioners and amicus argue that they can only provide

activities for children if they are allowed to provide the activities negligently and at the risk of injury or death to the children participating.

Respondents submit that the claim of economic upheaval and the loss of all interesting activities for children is only a scare tactic without evidentiary or even anecdotal support. The same argument was made in City of Santa Barbara v. Superior Court, 41 Cal.4th 747, 770, 161 P.3d 1095, 1110, 62 Cal.Rptr.3d 527, 545 (Cal. 2007), and was addressed by the California Supreme Court to a considerable degree.[6] In City of Santa Barbara, the defendants argued that unless "recreation service providers" could obtain agreements to release liability for both future ordinary and future gross negligence, the "inevitable result will be fewer-and more expensive-programs" and that "many popular and lawful recreational activities are destined for extinction." Id. at 1109. The claims of Armageddon were numerous and varied. In that case, a wide variety of amici claimed that invalidating releases for gross negligence would "[wreak] havoc on recreational providers" leading them to a "precipice from which there would be no return," cause "far reaching and devastating consequences" and make certain activities a thing of the past. In this case, the American Motorcycle

[6] City of Santa Barbara involved the question of whether a pre-injury release, which purported to release the operator of a summer camp (the City) for developmentally disabled children from all negligence was enforceable to release the operator from gross negligence as well as ordinary negligence. The court only addressed, and the parties only briefed, the issue of enforceability as to gross negligence.

Association claims that without exculpatory releases the providers would find it "economically untenable" to continue to provide the activity, blaming the need for pre-injury releases on a litigious society. Petitioner has argued that if pre-injury releases are held unenforceable (Petitioner Brief, p. 13-14),

> it will have a devastating effect on the availability of such family opportunities and activities. Overnight, hundreds, if not thousands, of small "mom and pop" businesses will cease to exist, and hundreds, if not thousands, of families will no longer be able to bond together through the intimate interaction inherently involved while participating in these lawful endeavors.

In its discussion of the various claims of social disaster if pre-injury releases of gross negligence were invalidated, the California Supreme Court in City of Santa Barbara looked to instances where pre-injury releases of ordinary negligence were invalidated and wrote (emphasis added):

> …in numerous contexts concerning recreational sports and related programs, courts categorically have voided agreements releasing liability for future ordinary negligence without (so far as we can discern) triggering in any substantial degree the dramatically negative effects predicted by defendants and their amici curiae. (City of Santa Barbara., 41 Cal.4th at 770, 161 P.3d at 1110
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> * * *
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> We brought the cases from these six states (Connecticut, Utah, Vermont, Virginia, Washington, and West Virginia) and the New York statute to the parties' attention and solicited supplemental briefing concerning defendants'

> policy argument that enforcing releases of liability for future ordinary negligence, but not for future gross negligence, would lead to the demise or substantially diminished availability of recreational services and programs. Thereafter, pursuant to a request by defendants, we allowed additional supplemental briefing. 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 (or for that matter, similar holdings under Tunkl [v. Regents of the University of California, 60 Cal.2d 92, 383 P.2d 441, 32 Cal.Rptr. 33 (1963)] 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. (City of Santa Barbara, 41 Cal.4th at 773, 161 P.3d at 1112)
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> * * *
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> Indeed, it appears that the experience of our sister states has not borne out the predictions of defendants and their supporting *amici curiae*. In Virginia and New York, for example-where, as noted above, agreements to release future liability for ordinary negligence causing personal injury long have been categorically barred by case law or generally precluded by statute, as construed by case law-service providers have been subjected to the potential of liability substantially greater than that facing their counterparts in California and most other jurisdictions, which (as observed ante, at part II.E) generally uphold such releases. And yet, our research suggests that the predicted demise of recreational opportunities apparently has not come to pass in Virginia or New York. Id. at 1113.

The California Supreme Court noted that one of the amici curae, NASCAR, argued that without the releases there would be no spectators and no NASCAR racing.

However, the court found that according to NASCAR's own website, 2 of the 31 NASCAR affiliated major speedways were located in Virginia and New York, two states which have long held pre-injury releases for ordinary negligence unenforceable. City of Santa Barbara, 41 Cal.4th at 774-775, 161 P.3d at 1113-1114). Similarly, there has been no vast economic upheaval reported since the Fourth District issued its decision in this case.

This discussion by the California court demonstrates that there is no link between the availability of recreational activities and the enforceability of pre-injury releases. It also shows that a parent can exercise the right to make decisions about the activities in which his or her child should participate without also having the authority to release pre-injury claims. Until the decision of the Fourth District decision in this case, activity providers had the ability, albeit without legal authority, to demand a release from parents with the threat that unless the parent signed, the child would not participate. Their ability to demand the releases actually reduced the parent's freedom to do what was best for the child because it took away the parent's ability to demand safety. If a school offered to bring an entire class of children to the zoo but children could only participate if the parents signed a release of the zoo, then any parent who wanted to keep his or her child safe would have only one choice – refuse to sign the release and have the child live with being the only one who didn't go. Most, if not all,

parents feel the pressure of not wanting their child to be an outcast. Therefore, they succumb to the demand for the release of liability. If the release is invalidated, parents regain the power to do what is best for their children without having to agree to the immunity demanded by the provider.

Petitioner's argument is further eroded by the realities of this case. Petitioner and amicus argue that unless exculpatory agreements are valid, they will be unable to obtain liability insurance and unable to operate. Actually, the Petitioners did not carry insurance. The argument that they need a pre-injury release so they can be responsible vendors and obtain insurance is simply not true. The argument also misses the point that if pre-injury releases are valid then the activity provider has no liability and <u>has no need for insurance</u>. Petitioner obtained the pre-injury release so they would not have any liability, could save money by not buying insurance, and not have to worry about keeping the children safe and running a legitimate facility which complied with the rules of the sanctioning organization. Contrary to the arguments in their brief, Petitioners do not want pre-injury releases to be valid so they can obtain insurance. They want pre-injury releases to be valid so they have no need to buy insurance. More importantly, that fact that Petitioner in this case operated Thunder Cross without insurance clearly disproves their argument that without insurance they will have to close down the business.

In response to the amicus' argument that ATV motocross sports provide valuable recreation for children like Christopher Jones (who was only 14 years old at the time of his death), it should be noted that the United States Consumer Product Safety Commission ("CPSC") states that in 2004 there were an estimated 136,100 victims of ATV accidents. [7] In 2003, 2004 and 2005, ATVs killed 152, 155 and 120 children under 16 years old.[8] In consent decrees in 1988, manufacturers agreed they would place engine size restrictions on ATVs sold for use by children under 16 years old. [9]. The CPSC states that children under 16 years old lack the developmental skills to safely drive ATVs with engine sizes over 90cc. [10] This lawsuit is based, in part, on Petitioner's negligence of allowing Christopher Jones to race a 350cc ATV when he was only 14 years old. With regard to the valuable family fun provided by the ATV Winter Olympics, the Gainesville Sun printed an in-depth article discussing the high number of fatalities and serious injuries to children participating in the ATV Winter Olympics and other events. [11]

Application of the Law to this Case

[7] http://www.cpsc.gov/cpscpub/pubs/540.html
[8] http://www.atvsafety.gov/stats.html
[9] http://www.cpsc.gov/cpscpub/pubs/540.html
[10] http://www.atvsafety.gov/children_tip.html
[11] http://www.gainesville.com/article/20060326/LOCAL/203260351

Bobby Jones was clearly not concerned with the best interest of his son. According to the Affidavit of Bette Jones, Bobby Jones did not comply with the requirements of the Marital Settlement Agreement when it came to raising Christopher or Christopher's safety. He allowed his 14 year old son to race ATV motocross on a 350 cc vehicle, which was nearly four times more powerful than was allowed by the American Motocross Association. After Christopher suffered a broken rib and a concussion riding his oversized ATV on the dangerous track, Mr. Jones did not inform Christopher's mother. He then allowed Christopher to race again one month later. As a final insult, Bobby Jones filed an Affidavit in this case to help Defendants avoid the wrongful death claim brought to benefit the only other survivor, Bette Jones. His actions have, at every turn, been contrary to the best interest of Christopher and, now, Christopher's estate.

These are precisely the circumstances in which the state's interest to protect children becomes critical. Parents do not always act in accordance with the best interest of their children. Mr. Jones may have been attempting to curry favor with his son in an effort to pull Christopher away from Bette Jones, or may have acted as he did in an effort to hurt his former wife. Certainly, his willingness to file an Affidavit to help the defense of the case indicates the latter. While his motivations may never

be known, it is obvious from the fact that he allowed his very young son to race a powerful and dangerous vehicle that he was not concerned with the safety of his son.

However, the unenforceability of the release in this case does not depend on the finding that Bobby Jones was not acting in the best interest of Christopher when he signed the release. As natural guardians, parents have limited authority which does not include authority to compromise claims on behalf of their children, and the legislature has not given parents the unlimited right to do so by statute. More importantly, the decision to let the child participate is separate from the decision to release all claims. Parents are free to make the decision to allow their child to participate, and the invalidation of any accompanying pre-injury release does not infringe on the parents' right to make decisions concerning how to raise their child. They are two separate decisions which implicate two different legal authorities and public policy considerations. Since tort law exists to protect children (among others), it is important to maintain the protections of the law. A pre-injury release actually encourages activity providers to cut costs at the expense of the safety of the children, perhaps even ignoring safety entirely because it removes their obligation of reasonable care toward children. Only the state has the authority to reduce the level of safety applicable to children.

Moreover, parents sign pre-injury releases without any information about the safety protocols in place by the activity provider. Parents are not told about the level of training given to the provider's employees, the history of injuries or deaths in the activity, the maintenance procedures used by the activity provider, or the level of supervision which will be in place with the children. Parents just know that his or her child wants to participate. The state, on the other hand, has a duty to protect children and the means to effectuate that goal. By finding that a pre-injury release signed by a parent on behalf of a child is unenforceable, the state gives parents the power to make childrearing decisions without being subjected to demands for immunity by those who provide the activities.

CONCLUSION

This Court should answer the certified question in the negative and approve the decision of the Fourth District. Inasmuch as the Fifth District has held that its decision in Applegate does not conflict with its decision in Lantz, there is no conflict between Lantz and the decision by the Fourth District for this Court to resolve.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail to WILLIAM J. WALLACE, ESQ., 115 N.W. 11th Ave., Okeechobee, FL 34972; RICHARD LEE BARRETT, ESQ., Barrett, Chapman and Ruta, 18 Wall St., Orlando, FL 32801; ALAN C. ESPY, ESQ., 3300 PGA Blvd., Ste. 630, Palm Beach Gardens, FL 33410, TIMOTHY S. OWENS, ESQ., Amicus for American Motorcyclist Association, 4100 W. Kennedy Blvd., Suite 222, Tampa, FL 33609-2244; and JILL ANNE HILLMAN, ESQ., Amicus for National Association of Underwater Instructors, Monroe and Zinder PC, 5933 W. Century Blvd., Ste 800, Los Angeles, CA 90045-5455, by mail, on March 6, 2008.

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CERTIFICATE OF TYPE SIZE & STYLE

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

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