SAFEGUARDING PARENT'S RIGHTS, CHILDREN'S CHOICES, AND BUSINESS'S ABILITY TO LIMIT LIABILITY EXPOSURE: THE CASE FOR RECOGNIZING THE ENFORCEABILITY OF LIABILITY WAIVERS IN FLORIDA

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Executive Summary

Pre-injury releases from liability serve an important function. They allow service providers to offer to the public athletic and recreational activities without fear of substantial liability for inherent risks. Recently, however, the Florida Supreme Court ruled that some pre-injury releases are unenforceable and it did so in an arbitrary, inequitable, and confusing way. The court's decision in *Kirton v. Fields* eliminated the ability of a parent to enter into a release so that his or her child might participate in an activity that is "commercial" in nature. As word of this decision spreads, Florida businesses are already considering reducing or eliminating the athletic and recreational activities available to children given the extraordinary liability exposure accompanying injury to a child.

Kirton is an aberration in Florida law, which generally entrusts parents to make important life decisions in the best interests of their children. Parents are responsible for making daily life choices for their children as well as critical medical decisions should they become ill. For minors to undertake some activities, Florida law requires parental consent. Yet, the court's decision injects the state into such personal family decisions and limits parental choice. The court's ruling is further complicated by its arbitrary distinction between commercial and noncommercial activities. Applying this distinction disregards a release signed by a parent whose child was injured in a private little league, but may enforce it if the child is injured in a public high school football game or a church-sponsored softball team.

H.B. 285 and S.B. 1578 would restore a parent's authority to enter into an enforceable agreement to release a claim for a minor child to the same extent that the parent might do so on his or her own behalf. In doing so, it will preserve the athletic and recreational activities available to Florida's youth.

Introduction

In December 2008, the Florida Supreme Court ruled in *Kirton v. Fields* that releases of liability signed by parents on behalf of their children in order for them to participate in inherently risky activities are invalid when the activity involved is commercial in nature.[1] The ruling is likely to have a broad impact on a wide range of businesses that include children among their clientele, such as sports leagues, boating, amusement parks, and water skiing. The inability for parents to enter into waivers on behalf of their children exposes these types of businesses to significant liability both because they cannot limit their liability as they could with adult patrons and because injuries involving children are likely to result in substantially higher damage awards than adults. For his reason, as businesses learn of the Florida Supreme Court's ruling, they are responding by discontinuing offering their services to children. As this paper explains, such an outcome is contrary to parental choice and unduly limits the life experiences of Florida's youngest generation.

The Broad Scope and Effect of Parental Rights in Florida

The basic rights of a parent in Florida, as in any other state, are firmly rooted in, and protected by, federal and state constitutional law, statutes and courts.

The United States Supreme Court has expressly interpreted the Fourteenth Amendment of U.S. Constitution to guarantee parents the right "to establish a home and bring up children" and has explained that "this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."[2] More recently, the Court has recognized that there is a presumption that fit parents act in their children's best interests, that there is normally no reason for the

State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children, and that parents have a fundamental liberty interest in making decisions concerning the care and control of their children.[3]

The Florida Constitution's explicit guarantee to privacy[4] goes even further, ensuring that "parents have a constitutional right of privacy to raise their children as they see fit short of the existence of a compelling state interest to justify the violation of a parent's fundamental right to raise his or her child."[5] The Florida Supreme Court has also held that this parental right "encompasses decisions on the activities appropriate for their children, whether they be academically or socially focused pursuits, physically rigorous activities, adventure sports, or an adventure vacation."[6]

Outside of constitutional protections, Florida law consistently recognizes that a parent has the ability, indeed, the responsibility, of making significant life decisions for his or her child. This right and responsibility is also one which is not easily curtailed. For example, when dissolving a marriage, Florida statutes define "shared parental responsibility" such that parents retaining full parental rights must "confer with each other so that major decisions affecting the welfare of the child will be determined jointly."[7]

Such parental rights include making basic decisions on what the child eats, where the child sleeps, and where the child attends grade school, and whether that education is public, private or home school.[8] These rights also include more difficult and potentially contentious decisions such as the child's religious upbringing[9] or the appropriate medical care should the child become ill. For instance, Florida law expressly permits parents to admit their minor child in a mental health facility, without the child's consent, and even to authorize therapy such as electroconvulsive or "electro-shock" treatment.[10]

In addition to major upbringing and caretaking decisions, a parent exercises significant control over his or her child's daily personal life choices. This includes, for example, a parent's right to accept or reject his or her child's receiving of a tattoo[11] or

body piercing,[12] and applies in the case of more significant or intimate life choices, such as a minor child's desire, as early as age 16, to marry,[13] or drop out of school.[14]

A parent also has the authority to approve or disapprove of his or her child's participation in any number of commercial, for-profit activities, such as acting, modeling, or singing. A child in Florida, for instance, may not consent to the use of his or her name, portrait, photo or likeness for "commercial purposes" without a parent's express permission.[15] In addition, some of these commercial activities in which a parent can approve, or even encourage, his or her child's participation include activities commonly viewed in society as unsavory or morally objectionable. An example expressly protected under Florida law is a parent's right give a talent agency permission to have the minor child pose in the nude.[16] Along similar lines, Florida law also protects a parent's discretion in approving the exhibition to his or her child of motion pictures, exhibits, shows, representations, or other presentations, which depict nudity, sexual conduct, sexual excitement, sexual battery, bestiality or sadomasochistic abuse.[17]

This wide latitude of parental discretion and authority is further demonstrated through parents' ability to permit or encourage their children to engage in inherently risky or outright dangerous activities. These are activities which even involve direct physical contact and pain through participation in a sport such as boxing.[18] A parent may also allow a minor to purchase, receive, possess and use weapons, including firearms.[19]

Florida law is very cautious in restricting a parent's broad authority and discretion to approve the activities of his or her child, often reserving limitations to extremely narrow circumstances where a child's actions pose a serious risk of harm both to the child *and other persons*. To protect against such risks of injury, the law rarely prohibits the child's activity outright, but rather may require direct supervision. For instance, a minor under the age of 16 is permitted to use BB guns, air or gas-operated guns, or electric weapons or devices when under the supervision and presence of an adult who is acting with the consent of the minor's parent.[20] Similarly,

a minor of age 15 may not drive an automobile unless accompanied by an adult.[21] Only in exceptional circumstances where the child and public's health and safety are placed in serious jeopardy, such as with a minor's consumption of alcoholic beverages[22] or desire to legally carry a concealed weapon, [23] is the activity prohibited entirely.

Where the immediate risk of harm to others in society is not as high, Florida law expressly looks to parents to authorize his or her child to engage in potentially dangerous activities. Parental authorization, for example, is required in Florida for children under the age of 17 to engage in skateboarding, inline skating, paintball, or freestyle or mountain and off-road bicycling on property owned or controlled by a governmental entity. [24] A parent or legal guardian must also sign a statement in order for a minor between the ages of 14 and 18 to use a tanning device. [25] The law further requires that such a signed statement must be kept on file by the tanning salon. [26] This reliance on parental notification and authorization for a minor's potentially dangerous activities extends to a minor's most personal choices, such as having an abortion performed. [27]

In essence, there is a logical disconnect between the Florida Supreme Court's ruling that a parent cannot release a business from liability for facilitating an activity, and the parent's right to allow his or her child to engage in any number of presumably more risky activities. For instance, the parent may not release a waterslide park from liability, but may provide his or her child with a skateboard, rollerblades, water skis, or a motorbike as a gift to use unsupervised. Equally unsound is that a parent *must* sign a statement acknowledging the risks of certain activities, such as a child's use of a tanning bed, in order for the child to engage in the activity, yet the parent lacks the authority to release that same business from potential liability.

Moreover, when viewed in light of the state's statutory scheme, a parent's right to execute a binding release in a pre-injury setting is clearly consistent with Florida public policy.

Exceeding Consent

Opponents of pre-injury releases will likely wield a hypothetical "parade of horribles" to scare legislators into not supporting the bill. "Signing a release of liability, however, does not completely foreclose a claimant's ability to recover. To the contrary, releases do not insulate potential defendants for liability that resulting from (1) intentional conduct; (2) conduct that rises to the level of recklessness; or (3) conduct falling outside of the scope of the waiver.

Pre-injury releases for intentional torts are invalid in Florida on public policy grounds. The Restatement (Second) of Contracts provides that "a term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."[28] For example, a tenant who is assaulted by the property manager can recover regardless of a "hold harmless" clause in the lease agreement.[29] Even if the exculpatory clause could be construed to purport to relieve the landlord of liability for intentional torts, a Florida court found that "such an attempt to exempt one from liability for an intentional tort is generally declared void."[30] Likewise, if a child is assaulted in an amusement park, even the broadest waiver is not likely to preclude liability.

It is also important to note that courts have generally found that releases do not absolve a defendant for reckless and outrageous conduct, and, therefore, plaintiffs maintain their right to sue in such instances notwithstanding the existence of a release. The Restatement of Contracts recognizes that a contract "exempting a party from tort liability for harm caused . . . recklessly is unenforceable on public policy grounds."[31] The Florida Supreme Court has found wanton, willful, and recklessness conduct when there are "facts evincing a reckless disregard of human life or rights which is equivalent to an intentional act or a conscious indifference to the consequences of an act."[32]

Further, because exculpatory provisions are disfavored by Florida law,[33] courts strictly construe releases to cover only those risks detailed in the waiver and the

inherent risks of the subject activity. The language of the waiver must make its intent to relieve liability in the circumstance "clear and unequivocal," or the court will allow the claim to go forward. Such agreements do not insulate defendants for injuries outside the scope of the waiver.

For example, consider the case of a young man, who, after signing a release form to participate in a boxing match at a Boca Raton nightclub, suffered serious brain injuries.[34] During the fight, the 19-year-old was knocked from the ring and hit his head on a nearby wooden stage. After reentering the ring and suffering additional blows to the head, the boxer slumped in his chair and the fight was called. The nightclub did not have medical professionals on hand and failed to call for an ambulance until forty-five minutes after the fight's conclusion. The court determined that "the release did not bar the plaintiff's lawsuit, because under the agreement the plaintiff assumed only the risks inherent in the boxing match, and thus, released liability only for injuries resulting from his voluntary participation in the boxing match."[35]

Commercial vs. Noncommercial: An Arbitrary Distinction That Will Have Adverse Consequences

The foundation of the Florida Supreme Court's decision in *Kirton* is the state's apparent responsibility for the well being of children, which apparently trumps the right of parents to decide to allow their child to participate in certain activities. Given that concern, the second part of court's ruling, which prohibits releases of liability with respect to "commercial activities" but continues to allow releases for "noncommercial activities," makes little sense. It is based on factors that have nothing to do with child welfare and suggests that the court's decision was more about who can get sued (businesses, not nonprofits), than protecting children. For example, under the court's

ruling, a child whose parents have signed a release for him or her to participate in a for-profit little league and is hit by a wild pitch when not provided with a helmet may seek recovery, but a similar child who participates in a church or school-sponsored ballgame may not be able to do so. Such a distinction arbitrarily allows a parent to sue on behalf of his or her child despite understanding the risks and signing a waiver to allow their child to participate in the activity if the defendant will be a business, but disregards the parent's consent if the defendant is a nonprofit organization.

The rationale accepted by the Florida Supreme Court for this commercial versus noncommercial distinction is that commercial enterprises "can insure against the risk of loss and include these costs in the price of participation."[36] This reasoning necessarily presumes that providers of noncommercial community and volunteer-run activities cannot afford to carry liability insurance because "volunteers offer their services without receiving any financial return." [37] This premise is simply false as many courts and legislatures have recognized that nonprofit organizations are capable of insuring against losses in the same manner as for-profit businesses. The logic employed by the Florida Supreme Court further collapses under the reality that almost any non-profit business or provider of noncommercial activities to adults or minors carries some form of liability insurance.

Moreover, nearly seventy years ago, the Florida Supreme Court abandoned the notion that a person's ability to recover for an injury should be based upon who does the injuring. In 1940, Florida was among the first states to abandon the doctrine of "charitable immunity," which broadly immunized charitable institutions from liability for negligence of a person working or volunteering for the organization, precisely because it found that recovery should not depend on the noncommercial status of the entity responsible for an injury. The court explained that,

> There is no doubt but that the public has an interest in the establishment and maintenance of charitable institutions, whose beneficent value is generally recognized and appreciated, but it also has an interest in obliging corporations undertaking the performance of charitable duties, vitally affecting the lives and health of our citizens, to perform then carefully, and there-fore the public also has an interest in

> this matter of exempting a charitable corporation from liability for its negligence. A charitable institution should be just before being charitable or generous.[38]

In *Kirton*, however, the Florida Supreme Court resurrects this discarded doctrine of distinguishing commercial and noncommercial activities, and does so without acknowledgement or discussion of this important precedent.

The Florida Supreme Court's commercial-noncommercial activity distinction will not only unfairly respect parental choice in some cases but not others, but determining whether a particular activity is commercial or noncommercial will also result in confusion in the courts and needless litigation. As Justice Wells explained in his reasoned dissent in *Kirton*:

> [T]he line dividing commercial activities from community-based and school-related activities is far from clear. For example, is a Boy Scout or Girl Scout, YMCA, or church camp a commercial establishment or a community-based activity? Is a band trip to participate in the Macy's Thanksgiving Day parade a school or commercial activity? What definition of commercial is to be applied?
>
> The importance of this issue cannot be overstated because it affects so many youth activities and involves so much monetary exposure. Bands, cheerleading squads, sports teams, church choirs, and other groups that often charge for their activities and performances will not know whether they are a commercial activity because of the fees and ticket sales.[39]

The lack of a clear basis to determine the commercial or non-commercial nature of a minor's activity is likely to result in litigation to determine the enforceability of a parental release of liability on a case-by-case basis through litigation at great expense to both plaintiffs and defendants.

Legislation Under Consideration in Florida Would Restore Parental Choice & Preserve the Opportunities Available to Children

The Florida Legislature is currently considering whether to enact legislation that would restore a parent's right to execute a valid pre-injury releases of liability on behalf of a child. H.B. 285 / S.B. 1578 would effectively overturn the Florida Supreme Court's decision in *Kirton*, and its unique and disfavored commercial and noncommercial distinction for the purposes of upholding a parental wavier.[40] The legislation simply recognizes a parent's authority to enter into an enforceable agreement to waive or release a claim or cause of action that would accrue to a minor child exists to the same extent that that parent may do so on his or her own behalf, just as a parent is responsible for making numerous other significant life choices for his or her child. The legislation protects a parent's ability to allow his or her child to experience activities that the parent believes is important to the child's growth and enjoyment. If such waivers are not enforceable, then many businesses will choose to either serve only adults or shut down altogether, rather than open themselves up to substantial liability exposure.

Responding to Critics

Critics will likely point out that some Florida courts have enforced extremely broad releases that have shielded defendants from liability rising to the level of even gross negligence.[41] Again, courts are not likely to construe such waivers to release

defendants for liability stemming for intentional or reckless conduct, or conduct falling even arguably outside the purview of the waiver, thereby preserving a claimant's right to sue for resulting injuries. Many of the horror story situations plaintiffs' attorneys are peddling of children being injured in ridiculous situations would likely fall within this realm.

Making it impossible to parents to enter into releases that reduce a service provider's liability exposure when a child participates in an inherently risky activity is not necessary in the best interest of children, some members of the Florida Supreme Court concluded. Some courts in other states strongly disagree with this narrow view. For example, California courts have repeatedly expressed their concern that without such releases, thousands of children would lose the benefits of recreational and sports activities due to the overwhelming costs of litigation because "every learning experience involves risk."[42]

At its core, arguments against the proposed legislation stem from a concern that pre-injury releases of liability are unfair. That concern, however, is not based on whether the person injured is a child or adult (particularly given a parent's responsibility for making life decisions for children in numerous other areas), or whether the activity involved is "commercial" or "noncommercial" in nature (since both may result in injury through negligence). It also is contrary to centuries of case law recognizing the enforceability of waivers. If critics broadly oppose waivers, they should say so outright and propose a rational solution, not defend a Supreme Court decision that arbitrarily recognizes the enforceability of releases for some plaintiffs (minors) and not others (adults) and imposes liability against some defendants (those providing commercial activities), but not others (those involved in noncommercial activities). Aside from hurting parental choice, limiting the opportunities available to children, and punishing businesses, it will lead to inequitable results.

Child Injured + Commercial Activity	=	Valid Waiver
Child Injured + Noncommercial Activity	=	Invalid Waiver
Child Injured + Mixed Activity	=	Unknown
Adult Injured + Commercial activity	=	Valid Waiver
Adult Injured + Noncommercial activity	=	Valid Waiver
Adult Injured + Mixed Activity	=	Valid Waiver
17-Year-Old Injured Cheerleading	=	Invalid Waiver
18-Year-Old Injured in Football League	=	Valid Waiver

As Justice Wells' recognized in dissent in *Kirton,* "If pre-injury releases are to be banned or regulated, it should be done by the legislature so that a state can set universally applicable standards and definitions. When the Legislature acts, all are given advance notice before a minor's participation in an activity as to what is regulated and as to whether a pre-injury release in enforceable."[43] If the state has a philosophical objection to pre-injury waivers, the proper forum for deliberation and resolution of the matter is through the legislature, not through judicial fiat.

Conclusion

The far reaching impact of the Florida Supreme Court's decision in *Kirton* will be myriad companies refusing to permit minors to engage in a broad range of activities for fear of unfettered liability. This result not only impairs business interests, but ends up denying Florida children many rewarding, fun and learning experiences that are important to their healthy growth and development. These are also experiences that parent's expressly want for their children, making the result incompatible with Florida's clear public policy, grounded in constitutional law, statutes and court decisions, favoring and protecting broad parental authority and discretion. Instead, the Supreme Court's decision creates an arbitrary distinction for commercial and noncommercial activities that, in addition to adding ambiguity to the law and having nothing to do with safeguarding children, ignores well-defined limits and careful balancing in scope and effect that Florida courts apply with regard to waivers. For these reasons, legislation to overturn the court's ruling and restore parent's ability to effectuate a waiver on behalf of their minor child is appropriate.

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Endnotes

[1] *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008).

[2] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

[3] *See generally Troxel v. Granville*, 530 U.S. 57 (2000).

[4] *See* Fla. Const. art. I, § 23.

[5] *Forbes v. Chapin*, 917 So.2d 948, 952 (Fla. 4th DCA 2005).

[6] *Global Travel Marketing, Inc. v. Shea*, 908 So.2d 392, 404 (Fla. 2005).

[7] Fla. Stat. § 61.046(15).

[8] *See* Fla. Stat. § 1002.20(2)(b) (providing parental options for minor's compulsory school attendance).

[9] *See, e.g., Abbo v. Briskin*, 660 So. 2d 1157, 1161 (Fla. Ct. App. 1995) ("the question of a child's religion must be left to the parents").

[10] *See* Fla. Stat. § 394.459(3).

[11] *See* Fla. Stat. § 877.04 (requiring parental consent to allow minor to receive a tattoo).

[12] *See* Fla. Stat. § 381.0075 (requiring parental consent to allow minor to receive body piercing).

[13] *See* Fla. Stat. § 741.0405 (requiring parent to give permission to a 16 year old to marry).

[14] *See* Fla. Stat. § 1003.21(1)(c) (requiring parental consent to allow a 16 year old to opt out of school attendance).

[15] Fla. Stat. § 540.08.

[16] *See* Fla. Stat. § 468.412.

[17] *See* Fla. Stat. § 847.013; *see also* Fla. Stat. § 550.0425 (allowing parents to bring minor children to para-mutuel facilities).

[18] *Cf. Cousins Club Corp. v. Silva*, 869 So.2d 719 (Fla. 4th DCA 2004) (19-year-old man who signed pre-injury waiver was severely injured in a boxing tournament); Fla. Stat. § 847.013.

[19] *See* Fla. Stat. § 790.17(2).

[20] *See* Fla. Stat. § 790.22.

[21] *See* Fla. Stat. § 322.05(1) (prohibiting minors under 15 from driving, and 15-year-olds from driving unaccompanied by an adult).

[22] *See* Fla. Stat. § 562.111(1) (prohibiting persons under 21 from possessing alcoholic beverages).

[23] *See* Fla. Stat. § 790.01 (prohibiting those under 21 years old from obtaining a license to carry concealed weapons).

[24] *See* Fla. Stat. § 316.0085(3).

[25] *See* Fla. Stat. § 381.89(7).

[26] *See id.*

[27] *See* Fla. Stat. § 390.01114.

[28] Restatement (Second) of Contracts, § 195(1) (1979). Florida courts have adopted this general rule. *See generally Loewe v. Seagate Homes, Inc*., 987 So. 2d 758 (Fla. 5th DCA 2008) ((holding that exculpatory clauses releasing defendants for liability for intentional torts are against public policy and therefore unenforceable).

[29] *Fuentes v. Owen,* 310 So. 2d 458, 459 (Fla. 3d DCA 1975).

[30] *Id.* at 460.

[31] Restatement (Second) of Contracts § 195(1).

[32] *See Dyals v. Hodges*, 659 So. 2d 482, 485 (Fla. 1995) (quoting *Rupp v. Bryant*, 417, So. 2d 658, 670 (Fla. 1980); *see also Caraway v. Revel*, 116 So. 2d 16, 20 n.12 (Fla. 1959) (defining the character of negligence necessary to support a punitive damage award as "conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them"). The Restatement (Second) of Torts § 500 finds that a person acts in reckless disregard of the safety of others "if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." Florida has adopted this standard. *See Dyals*, 658 So. 2d at 485.

[33] *See, e.g., Ivey Plants, Inc. v. FMC Corp*., 282 So.2d 205 (Fla. 4th DCA 1978).

[34] *Cousins Club Corp. v. Silva*, 869 So. 2d 719 (Fla. 4th DCA 2004).

[35] *Id.* at 721.

[36] *Kirton* , 997 So. 2d at 360.

[37] *Id.* (quoting *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 205 (Ohio 1998)).

[38] *Nicholson v. Good Samaritan Hosp.*, 199 So. 344, 348 (Fla. 1940).

[39] *Kirton* , 997 So. 2d at 963.

[40] *See* H.B. 363, Reg. Sess. (Fla. 2009); S.B. 886, Reg. Sess. (Fla. 2009).

[41] For instance, in a case in which a race car driver was killed on a racetrack while another driver was taking practice laps, a Florida appellate court found that a waiver signed by the decedent that clearly excused the racetrack and the other driver from acts resulting from their own negligence included "all forms of negligence, simple or gross." *Theis v. J &J Racing Promotions*, 571 So. 2d 92, 94 (Fla. 2d DCA 1990).

[42] *Hohe v. San Diego Unified Sch. Dist*., 224 Cal. App.3d 1559, 1564 (1990) (finding pre-injury release signed by parent valid as to 15-year-old girl injured during campus hypnotism show); *see also Pulford v. County of Los Angeles*, No. B155044, 2004 WL 2106545, at *5 (Cal. Ct. App. Sept. 22, 2004) (finding pre-injury release signed by parent valid as to 16-year-old boy injured by unknown object during lifeguarding program).

[43] *Kirton v. Fields,* 997 So. 2d at 363 (Wells, J., dissenting).