FLORIDA Justice Reform INSTITUTE

Supreme Court ruling compromises parents' ability to allow children to participate in wide-range of activities

Issue

In *Kirton v. Fields*, 2008 WL 5170603 (Fla. 2008), the Court ruled on the enforecability of a pre-injury release form, or in other words, a waiver of liability signed by a parent and given to a service provider in exchange for a child's participation in a specified activity.

Facts

This case concerns a tragic accident, when a 14 year-old boy was killed while riding an ATV at a local motor sports park. In order for Christopher Jones to drive the ATVs at the park, his father, as his natural guardian, was required to sign a "pre-injury release" form, essentially agreeing to hold the park harmless for any injuries that may incure to his son as a result of the activity. The child had ridden ATVs before and incurred injuries, of which his father was aware. On the day of his passing, Christopher Jones flipped his ATV and sustained fatal traumatic injuries.

Outcome

The crux of this case was the authority of the child's parent to sign a pre-injury release. The Supreme Court held that parents have no right to release a service provider from tort liability for injury to and on behalf of a child or the child's estate, in light of the purported public policy of the state. *Kirton v. Fields*, 2008 WL 5170603 (Fla. 2008).

The Court cited no legislative act in support of this elusive public policy pronouncement. Instead, the Court pointed to a doctrinal argument mainly applicable to dependency and juvenile delinquency proceedings—*parens patriae*—which stands for the proposition that "parental rights are not absolute and the state may, in certain situations, usurp parental control." *Id.* at 3.

As a result of the Court's inability to point to any legislation from the policy-making branch of this state, the Court cites numerous lower court cases from this state and others in order to improvise a semblance of public policy. *Id.* at 4-6.

Analysis

While the federal and state constitutions bestow on parents the right to determine what is best for their children, the Court held that this interest did not also secure a parent's right to sign a waiver for his/her child to engage in a specified activity. *Id.* at 6-7. Thus, a parent is unable to release an organization from potential tort liability on behalf of his/her child so that the child can participate in an activity. *Id.*

In stripping parents and children of the right of self-determination, the Court's decision was largely based on a results-oriented analysis. *Id.* at 6. In other words, instead of looking to Legislature as the policy-setting branch of government, the Court saw its decision as a necessary step to prevent parents from dealing with the financial burden of such an accident, and the potential burden to the child, other

family members, and the state as a whole. *Id*. Conspicuously absent from the majority's conjecture was a consideration of the effect such a decision would have on parental liberty and the ability of children to engage in a variety of activities. *Id*. The Court took the position that waivers are usually not in the best interests of children, irrespective of the wishes of child and parent. *Id.*

The Court also made a fine distinction between releases for "commercial activities" and "community" or "volunteer-run" activities because of yet another set of non-legislative policy concerns. *Id* at 5. However, the Court gave no framework for distinguishing between the two, requiring lower courts to delineate the very blurry line.

The Wells Dissent

In his reasoned dissent, Justice Wells emphasized the lack of any legislative action requiring pre-jury releases to be declared unenforceable. *Id.* at 11. Predicting that a myriad of problems will now arise as a result of the majority's decision, Justice Wells noted the majority's failure to give specifics as to how lower courts should proceed under the new precedent

> "I believe that it is fundamentally unfair to now declare a new public policy…The answers will have to be gleaned from further costly case-by-case litigation, and if the particular circumstances of other releases are found to be against the declared public policy, the result will be additional after-the-fact determinations of liability without sufficient notice to the parties involved." *Id.*

Justice Wells also attacked the distinction made between "commercial" and "community" activities. *Id.* The distinction between these activities is murky at best, and endangers "bands, cheerleading squads, sports teams, church choirs, and other groups that often charge for their activities and performances" for they "will not know whether they are a commercial activity because of the fees and ticket sales," *Id.* at 11-12. In so holding, the majority also bucked its own precedent in a 2005 case, *Global Travel Marketing, Inc. v. Shea*, 908 So.2d 392 (Fla. 2005).

> "How can these groups carry on their activities that are so needed by youth if the groups face exposure to large damage claims either by paying defense costs or damages? Insuring against such claims is not a realistic answer for many activity providers because insurance costs deplete already very scarce resources. The majority's decision seems just as likely to force small-scale activity providers out of business as it is to encourage such providers to obtain insurance coverage." *Id.*

In his dissent, Justice Wells aptly pointed out that as a result of the Court's ruling, unlike when the Legislature acts and creates new public policy, no notice was given to businesses, organizations, and parents about this sudden departure from existing law. *Id.* at 13. Reversing course on the enforceability of pre-injury releases is, in Justice Wells' opinion, unfair to parties who will now be significantly affected by the majority's decision.

> "If pre-injury releases are to be banned or regulated, it should be done by the Legislature so that a statute 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 is enforceable. In contrast, the majority's present opinion will predictably create extensive and expensive litigation

> attempting to sort out the bounds of commercial activities on a case-by-case basis." *Id.*

Justice Wells' dissent also focused on one of the most fundamental constitutional rights—that of a parent to rear his/her child. *Id.* at 13. The majority's decision is likely to have the affect of trampling on the rights and decisions requisite to parenting. Citing *Shea*, *supra*, Justice Wells wrote:

> "Parents' authority under the Fourteenth Amendment and article I section 23 [of the Florida Constitution] encompasses decisions on the activities appropriate for their children—whether they be academically or socially focused pursuits, physically rigorous activities such as football, adventure sports such as skiing, horseback riding, or mountain climbing….Without the ability to execute pre-injury releases, a parent may find that his or her minor child will not be able to participate in activities because the operators of the activities will not accept the financial exposure of the minor's participation, regardless of whether the parent would decide that the benefit to the minor outweighed the risk of injury." *Shea*, 908 So.2d at 404.

Impact

The Fourteenth Amendment to the Constitution of the United States vests parents with a unique right concerning the upbringing of their children—the liberty to make decisions for their children without interference from the government.

The Florida Constitution furthers this interest by including a guarantee of privacy. These rights underlie many of the functions parents perform every day, for example, signing a release for a field trip, authorizing medical treatment for a child, or agreeing to limit the liability of high schools so that a child can participate on sports teams.

Indeed, such agreements had been generally enforceable because they furthered important interests of schools, sports organizations, summer camps, etc.; namely, to insulate themselves from costly litigation and liability over and above the amounts that the group or organization is financially able to insure against. Unfortunately, in light of the Court's decision, the state's right to determine what is an appropriate risk for someone else's child now trumps parental liberty.

The *Kirton* case jeopardizes every youth football team, every safety patrol trip to D.C., and countless other activities where organizations, in order to be able to offer activities to children, contract with parents who agree to limit the liability or hold the organization or business harmless from tort liability in exchange for the participation of their child. Simply put, the Court has overstepped its bounds in formulating a public policy for the state of Florida.

Conclusion

The *Kirton* decision now forces the Legislature to render its own deicision and either endorse or reject the reasoning of the Court, to the detriment or benefit of the freedom of children and parents to determine what is an appropriate risk for their families.