



Pre-Injury Releases Now in Question in Florida

Insights

1.01.09

(Education Update, No. 1, January 2009)

A recent Florida Supreme Court decision leaves more questions than answers when it comes to the enforceability of pre-injury releases executed by parents on behalf of a minor child who participates in school-sponsored activities. In the decision released on December 11, 2008, the Supreme Court held that a parent does not have the authority to execute a pre-injury release on behalf of a minor child when the release involves participation in a *commercial* activity. But the Supreme Court left open the possibility that, despite differing policy considerations, its reasoning may apply to pre-injury releases involving school or community activities. *Kirton v. Fields*.

Facts Of The Case

In May 2003, a father took his fourteen-year-old son to the Thunder Cross Motor Sports Park. To enter the facility and ride an ATV, the father had to sign a release and waiver of liability, assumption of risk, and indemnity agreement on behalf of the minor child. While attempting a particular jump, the child lost control of the ATV and was ejected. The child died as a result of his injuries.

Following the child's death, the personal representative of his estate filed suit against the owners and operators of Thunder Cross Motor Sports. Thunder Cross asked the court to throw the suit out, based solely on the release and waiver executed by the child's father. In support, Thunder Cross submitted an affidavit from the father, which acknowledged that he willfully and with full understanding executed the release and that he, among other things, intended to waive the right to sue for the death of his child. The trial court agreed and dismissed the lawsuit because the release executed by the father on behalf of his minor child barred any claims.

The estate appealed and the appellate court reversed the trial court's order. In so doing, it opined that the issue was not about a parent's determination concerning what activities were appropriate for his or her child, but, rather, the issue was whether a parent could "absolve the provider of an activity from liability for any form of negligence."

The appellate court noted that such a determination went beyond the scope of deciding what type of activity is appropriate for their child because the "effect of the parent's decision in signing a pre-injury release impacts the minor's estate and the property rights personal to the minor." Thus, the appellate court found that the rights of the child or his or her estate "could not be waived by the

parents absent a basis in common law or statute," and ultimately held that a parent cannot bind the minor child's estate by signing a pre-injury release.

The appellate court asked the Supreme Court to take a position on whether a parent can legally bind a minor's estate by executing a pre-injury release. The Supreme Court determined that a parent has no such authority.

The Court's Reasoning

In finding that a parent does not have the authority to execute a pre-injury release on behalf of a minor child when the release involves participation in a commercial activity, the Court explained that parental rights were not absolute, and that the State has the right to step in, in certain situations, and assume parental authority. The Court acknowledged that the legislature had not expressly precluded the enforcement of pre-injury releases, but nonetheless determined that "public policy concerns" prohibited parents from executing pre-injury releases on behalf of their minor children.

In reviewing other cases concerning the enforceability of parental waiver, the Court looked to its 2005 decision in *Global Travel Marketing*, in which a father filed a wrongful death action against a safari operator for the death of his son. Before the safari, the child's mother signed a travel contract on behalf of herself and her son, which included a release of liability and an arbitration agreement provision. Global Travel Marketing moved to compel arbitration of the father's claim, which the trial court granted. On appeal, the appellate court cited public policy reasons in determining that the arbitration clause was unenforceable as to the child.

But the Supreme Court found the arbitration agreement enforceable against the minor child's estate and noted several important distinctions. For example, the Court considered the nature of the waiver and whether it concerned the waiver of a legal right or just the waiver of a particular forum in which the claim is presented. Based on this consideration, the Court determined that a parent could waive the forum (i.e., arbitration vs. litigation) in which a claim is presented on behalf of his or her child. The Court further emphasized that its decision only concerned the enforceability of binding arbitration agreements, and not the broader issue of parental waiver of a tort claim on behalf of a minor child.

In reaching its decision in the *Kirton* case, the Court noted that a parent's decision to allow a minor child to participate in a certain activity is not the same as the conclusion that the parent is authorized to execute a pre-injury release on behalf of the minor child. The Court further explained that "there is injustice when a parent agrees to waive the tort claims of a minor child and deprive the child of the right to legal relief when the child is injured as a result of another party's negligence," because when the parent executes that type of release, he or she is not acting in their child's best interest, but rather, "protecting the interests of the activity provider."

The Court reasoned that enforcing pre-injury releases would remove the incentive for business owners to take reasonable precautions to provide a safe environment for minor children. The Court further noted that "a commercial business can take precautions to ensure the child's safety and

turner noted that "a commercial business can take precautions to ensure the child's safety and insure itself when a minor child is injured while participating in the activity. On the other hand, a minor child cannot insure himself or herself against the risks involved in participating in that activity." Relying on these public policy concerns, the Court determined that the pre-injury release signed by the child's father was not enforceable because it prevented the child's estate from bringing an action against the commercial establishment that provided the activity that resulted in injury.

What does This Mean For Your School?

While the facts of the *Kirton* decision involve a pre-injury release authorizing the child to participate in a *commercial* activity, the Court declined to discuss the enforceability of pre-injury releases for *non-commercial* activities. But the Court was clear that its "decision . . . should not be read as limiting [the Court's] reasoning only to pre-injury releases involving commercial activity." This, of course, strongly suggests that this Court would invalidate pre-injury releases for children participating in non-commercial activities, such as school-sponsored activities, as well.

Interestingly, later in its opinion, the Court reviewed several out-of-state cases that enforced pre-injury releases executed by parents on behalf of their minor children participating in school or community-sponsored activities, and noted that different policy considerations applied to pre-injury releases in the commercial setting. The Court explained that, in the case of "community and volunteer-run activities, the provider cannot afford to carry liability insurance because volunteers offer their services without receiving any financial return," and invalidating those releases would discourage volunteer participation. The Court's indication that its reasoning should not be limited to pre-injury releases for participation in commercial activities is concerning, but it is too soon to tell whether this Court would follow the reasoning of its sister courts to uphold the enforceability of pre-injury releases for non-commercial activities.

Until the Florida courts give more guidance, schools in that state (and indeed in other states, as well) should understand that the releases they ask parents to sign for children to participate in field trips or other extracurricular activities may not be enforceable. It is critically important to ensure that all staff and volunteers are well trained on their supervisory responsibilities while attending trips and that all aspects of the trip are planned carefully, using known outside operators who provide adequate insurance. Schools should also be assessing their insurance coverage to determine who and in what circumstances are covered under their policy in the event an unfortunate accident occurs.