HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 285 Parental Authority
SPONSOR(S): Criminal & Civil Justice Policy Council; Civil Justice & Courts Policy Committee; Horner and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1578

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	10 Y, 3 N, As CS	De La Paz	De La Paz
2)	Criminal & Civil Justice Policy Council	16 Y, 0 N, As CS	De La Paz	Havlicak
3)				
4)				
5)				

SUMMARY ANALYSIS

The United States Supreme Court and the Florida Supreme Court have both recognized that the right of parents to make decisions concerning care, custody and control of their children is a fundamental liberty interest protected by the constitution.

In Kirton v. Fields, decided December 11, 2008, the Florida Supreme Court held that "a parent does not have the authority to execute a pre-injury release [of liability] on behalf of a minor child when the release involves participation in a commercial activity." In Kirton, the Florida Supreme Court acknowledged that "[t]he absence of a statute governing parental pre-injury releases demonstrates that the Legislature has not precluded enforcement of such releases on behalf of a minor child." Nevertheless, the Court later declared ". . .we find that public policy concerns cannot allow parents to execute pre-injury releases on behalf of minor children."

CS/CS/HB 285 amends s. 744.301, F.S., to expressly authorize natural guardians, on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action, specifically against a commercial activity provider, that would accrue to any of their minor children for personal injury, death or property damage resulting from an inherent risk in the activity. The bill includes specific requirements for a waiver to satisfy in order to be valid. A waiver meeting these requirements entitles an activity provider to two rebuttable presumptions. First, that the waiver is valid, and second that the injury or "damage" to the minor child arose from the inherent risk involved in the activity. These presumptions can be rebutted by the claimant.

Additionally, the bill provides that a motorsport liability release signed by a natural guardian on behalf of a minor is valid to the same extent provided for other nonspectators, if the minor is participating in a sanctioned motorsports event. However, if a minor is participating in any other activity at a closed-course motorsport facility, other than a sanctioned motorsports event, then the waiver is valid only if it complies with the general waiver requirements proposed by the bill.

This bill appears to have a positive fiscal impact by reducing the increase in the judicial workload and litigation costs that are a foreseeable result of continued application of the Kirton decision.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Kirton v. Fields

In Kirton v. Fields, decided December 11, 2008, the Florida 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."[1] In its opinion the Court identified two compelling concerns regarding the enforceability of pre-injury liability releases: the right of parents in raising their children and the interest of the state in protecting children.[2]

The United States Supreme Court and the Florida Supreme Court have both recognized that the right of parents to make decisions concerning care, custody and control of their children is a fundamental liberty interest protected by the constitution.[3] It is "perhaps the oldest fundamental liberty interest recognized by [the United States Supreme Court]."[4] Under the federal constitution, the Fourteenth Amendment's Due Process Clause provides heightened protection against government interference with certain fundamental rights and liberty interests, including parents' fundamental right to make decisions concerning the care, custody, and control of their children.[5] In fact, in Troxel v. Granville, a decision cited by the Florida Supreme Court in Kirton, the United States Supreme Court reiterated its recognition that there is a presumption that fit parents act in their children's best interests.[6] "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), 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."[7]

In Kirton, the Florida Supreme Court acknowledged that "[t]he absence of a statute governing parental pre-injury releases demonstrates that the Legislature has not precluded enforcement of such releases on behalf of a minor child."[8] Nevertheless, the Court later declared ". . .*we find* that public policy

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1 Kirton v. Fields, 997 So.2d 349 (Fla. 2008) The Kirton decision was a 4 to 1 decision. Justices Quince, Anstead, Lewis and Pariente were in the majority. Justice Wells dissented. Justices Polston and Canady did not participate in the opinion.

2 Id. at 352.

3 See, Troxel v. Granville, 530 U.S. 57, 60 (2000); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Beagle v. Beagle, 678 So.2d 1271, 1275 (Fla. 1996).

4 Troxel, supra at 65, citing Meyer v. Nebraska, 262 U.S. 390 (1923).

5 Washington v. Glucksberg, 521 U.S. 702 (1997).

6 Troxel, supra at 69. See also, Parham v. J.R., 442 U.S. 584, 602 (1979).

7 Troxel, supra at 69 & 70. See also e.g., Reno v. Flores, 507 U.S. 292 (1993).

8 Kirton, supra at 354.

concerns cannot allow parents to execute pre-injury releases on behalf of minor children" (emphasis added).[9]

The Court explained further:

> Although parents undoubtedly have a fundamental right to make decisions concerning the care, custody, upbringing, and control of their children, Troxel [v. Granville], 530 U.S. 57, 67 (2000), the question of whether a parent should be allowed to waive a minor child's future tort claims implicates wider *public policy* concerns. See Hojnowski [v. Vans Skate Park], 901 A.2d 381, 390. While a parent's decision to allow a minor child to participate in a particular activity is part of the parent's fundamental right to raise a child, this does not equate with a conclusion that a parent has a fundamental right to execute a pre-injury release of a tortfeasor on behalf of a minor child. It cannot be presumed that a parent who has decided to voluntarily risk a minor child's physical wellbeing is acting in the child's best interest. Furthermore, we find 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. When a parent executes such a release and a child is injured, the provider of the activity escapes liability while the parent is left to deal with the financial burden of an injured child. If the parent cannot afford to bear that burden, the parties who suffer are the child, other family members, and the people of the State who will be called on to bear that financial burden. Therefore, when a parent decides to execute a pre-injury release on behalf of a minor child, the parent is not protecting the welfare of the child, but is instead protecting the interests of the activity provider. Moreover, a "parent's decision in signing a pre-injury release impacts the minor's estate and the property rights personal to the minor." Fields, 961 So. 2d at 1129-30. For this reason, the state must assert its role under parens patriae to protect the interests of the minor children (emphasis added).

In Troxel v. Granville, when the United States Supreme Court had before it a Washington state statute allowing any person to petition for forced visitation of a child at any time with the only requirement being that visitation serve the best interests of the child, they said of the statute:

> [The statute] contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.[10]

The U.S. Supreme Court in Troxel, while refraining from invalidating the statute on its face, found the application of the statute against the parent's wishes in her case to be an unconstitutional violation of her due process right to make decisions concerning the care, custody and control of her daughters.[11] The effect of the Kirton decision is much broader in its application than the statute the U.S. Supreme Court had before it in Troxel. Under the Kirton decision, rather than having the validity of waivers evaluated on a case by case basis on their own facts and circumstances, the Florida Supreme Court preemptively invalidated all parental liability waivers for all commercial activities as a matter of statewide public policy.

While the decision in Kirton is limited to pre-injury releases for participation in commercial activities, its rationale may not be. The Court said in a footnote:

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[9] Kirton, supra at 354.
[10] Troxel v. Granville, 530 U.S. 57 (2000).
[11] Troxel, supra at 76.

> We answer the certified question as to pre-injury releases in commercial activities because that is what this case involves. Our decision in this case should not be read as limiting our reasoning only to pre-injury releases involving commercial activity; however, any discussion on pre-injury releases in noncommercial activities would be dicta and it is for that reason we do not discuss the broader question posed by the Fifth District.[12]

Justice Wells in a dissenting opinion pointed out several issues concerning the effect of the Court's new public policy edict. Justice Wells stated in part:

> 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. 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.
>
> 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.*
>
> The majority opinion also does not explain the reason why after years of not finding pre-injury releases to be against public policy, it today finds a public policy reason to rule pre-injury releases unenforceable when the Legislature has not done so.[13] (emphasis added).

Current Situation

Natural Guardians

Section 744.301(2), F.S., provides that natural guardians are authorized, on behalf of their minor children, to:

- Settle any claim or cause of action accruing to any of their minor children;
- Collect, receive, manage, and dispose of the proceeds of any such settlement;
- Collect, receive, manage, and dispose of any real or personal property distributed from an estate or trust;
- Collect, receive, manage, and dispose of the proceeds from a life insurance policy payable to, or accruing to the benefit of, the child; and
- Collect, receive, manage, and dispose of the proceeds of any benefit plan as defined in s. 710.102, F.S.,[14] of which the minor is a beneficiary, participant, or owner.

Motorsport Nonspectator Releases

[12] Kirton, supra at n2.

[13] Wells dissenting, Kirton, supra at 363.

[14] A benefit plan is defined as "a retirement plan and may include, but is not limited to, any pension, profit-sharing, stock-bonus, or stock-ownership plan or individual retirement account." Section 710.102(2), F.S.

Section 549.09, F.S., authorizes the operator of a closed-course motorsport facility[15] to require nonspectators to sign a liability release form as a condition of entry. The statute defines "nonspectators" as "event participants who have signed a motorsport liability release." The liability release form must be printed in at least eight-point type and provides that the "persons or entities owning, leasing, or operating the facility or sponsoring or sanctioning the motorsport event shall not be liable to a nonspectator or his or her heirs, representative, or assigns for *negligence* which proximately causes injury or property damage to the nonspectator."[16] (emphasis added). The release may be signed by more than one person as long as the release form appears on each page that is signed.[17]

If a closed-course motorsport facility meets certain requirements it is considered a motorsports entertainment complex and can host sanctioned motorsports events.[18] These events must be sanctioned by a sanctioning body. The following are statutorily authorized sanctioning bodies:

- American Motorcycle Association (AMA);
- Auto Racing Club of America (ARCA);
- Championship Auto Racing Teams (CART);
- Grand American Road Racing Association (GRAND AM);
- Indy Racing League (IRL);
- National Association for Stock Car Auto Racing (NASCAR);
- National Hot Rod Association (NHRA);
- Professional Sportscar Racing (PSR);
- Sports Car Club of America (SCCA); and
- United States Auto Club (USAC).[19]

Effect of CS/CS/HB 285

Authority of Natural Guardians

CS/CS/HB 285 amends s. 744.301, F.S., to expressly authorize natural guardians, on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action, specifically against a commercial activity provider, that would accrue to any of their minor children for personal injury, death or property damage resulting from an inherent risk in the activity. The bill defines "inherent risk" to mean " those dangers or conditions, known or unknown, which are characteristic of, intrinsic to, or an integral part of the activity and which are not eliminated even if the activity provider acts with due care in a reasonably prudent manner." The bill describes two examples of what can constitute an inherent risk:

1. The failure by the activity provider to warn the natural guardian or minor child of an inherent risk; and
2. The risk that the minor child or another participant in the activity may act in a negligent or intentional manner and contribute to the injury or death of the minor child.[20]

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[15] A "closed-course motorsport facility" is defined as "a closed-course speedway or racetrack designed and intended for motor vehicle competition, exhibitions of speed, or other forms of recreation involving the use of motor vehicles, including motorcycles." Section 549.09(1)(a), F.S.

[16] Section 549.09(2), F.S.

[17] Section 549.09(3), F.S.

[18] Section 549.10, F.S. The requirements are that the facility 1) has at least 70,000 fixed seats for race patrons; 2) has at least seven scheduled days of motorsports events each year; 3) has at least four motorsports events each year; 4) serves food and beverages at the facility through concession outlets, a majority of which are staffed by members of non-profit civic or charitable organizations; 5) engages in tourism promotion; and 6) has on the property permanent exhibitions of motorsports history, events, or vehicles.

[19] Also, any successor of these organizations may be a sanctioning body, as well as any other nationally recognized governing body of motorsports that 1) establishes an annual schedule of motorsports events and grants rights to conduct the events; 2) has established and administers rules and regulations governing all participants involved in the events and all persons conducting the events; and 3) requires certain liability assurances, including insurance. Section 549.10(1)(d), F.S.

[20] The bill describes that a "participant" does not include the activity provider or its owner's affiliates, employees or agents.

Waiver Validity

The bill includes specific language which must be included in the waiver in uppercase type at least 5 points higher than the remaining text of the waiver in order to be enforceable. A waiver that complies with the bill's requirements and that waives no more than the inherent risk of the activity creates two rebuttable presumptions:

1. That the waiver is valid, and
2. That the injury or "damage" to the minor child arose from the inherent risk involved.

The first presumption can be rebutted if the claimant demonstrates by a preponderance of the evidence that the waiver does not comply with the bill's waiver specifications. The second presumption can be rebutted if the claimant demonstrates by clear and convincing evidence that the conduct, condition or other cause resulting in injury or damage was not an inherent risk of the activity.

If either presumption is successfully rebutted, liability and compensatory damages must be established by a preponderance of the evidence.

Non-Commercial Activities

CS/CS/HB 285 contains an express provision to the effect that the bill does not limit the ability of natural guardians to execute advance waivers and releases of liability for their minor children against non-commercial activity providers to the extent allowed by common law.

Motorsport Nonspectator Releases

The bill also amends s. 549.09, F.S., to make conforming changes to the current statute specifically addressing motorsport nonspectator liability releases. The bill revises the definition of "nonspectator" at a motorsports event to include a minor event participant whose natural guardian has signed a liability release on their behalf. The bill amends s. 549.09, F.S., to provide that a motorsport liability release signed by a natural guardian on behalf of a minor is valid to the same extent provided for other nonspectators, if the minor is participating in a sanctioned motorsports event. In these situations, the motorsport liability release must comply with the requirements of s. 549.09, F.S. However, if a minor is participating in any other activity at a closed-course motorsport facility, other than a sanctioned motorsports event, the waiver must comply with the requirements in s. 744.301(3), F.S., and is valid only to the extent, and subject to the presumptions, provided in that subsection.

Enforceability of Waivers

Courts generally disfavor exculpatory clauses and strictly construe such clauses against the party claiming to be relieved of liability.[21] "Such clauses are enforceable only where and to the extent that the intention to be relieved was made clear and unequivocal in the contract, and the wording must be so clear and understandable that an ordinary and knowledgeable party will know what they are contracting away."[22]

B. SECTION DIRECTORY:

Section 1. Amends s. 549.09, F.S., relating to motorsport nonspectator releases.

Section 2. Amends s. 744.301, F.S., relating to a parent's ability to waive liability on behalf of their children for commercial activities.

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[21] See, Murphy v. Young Men's Christian Association of Lake Wales, 974 So.2d 565, 567 (Fla. 2nd DCA 2008); Theis v. J&J Racing Promotions, 571 So.2d 92, 94 (Fla. 2nd DCA 1990); Southworth & McGil, P.A. v. S. Bell Tel. & Tel. Co., 580 So.2d 628, 634 (Fla. 1st DCA 1991).

[22] Southworth, *supra* note 24 at 634.

Section 3. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

This bill will have a positive fiscal impact if it operates to reduce or avoid litigation costs and court operating expenses associated with claims brought on behalf of minors against commercial providers of activities for children due to the enforceability of parental pre-injury liability releases. Increases in litigation costs and the judiciary's workload are foreseeable without passage of CS/CS/HB 285 due to the continued application of the Kirton decision and any possible subsequent extension of Kirton to non-commercial activities as alluded to by the Court in footnote 2 of its decision. The bill does not recognize releases signed by natural guardians that waive negligence, gross negligence, or intentional conduct. It is unknown at this time whether, by authorizing releases for inherent risks only, commercial activities will need to purchase additional insurance due to concerns related to the risk of liability. However, liability insurance rates for commercial activity providers are more likely to be adversely impacted by the statewide invalidation of all parental liability waivers resulting from the Kirton opinion.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure to funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill's approach at determining the validity of the waiver and challenging a presumption of validity appears to be circular in operation. Under the bill, an activity provider whose waiver complies with the statutory requirements of the newly created subsection (3) of section 744.301, F.S., is entitled to a presumption that the waiver is valid. A claimant, however, can rebut that presumption by a showing that the waiver is not in compliance with the statute. The "rebuttable" presumption of a waiver's validity, however, cannot exist under the bill until the question of the waiver's compliance with the subsection has already been determined. Before such a determination is made, no presumption is established. A claimant rebutting the waiver's validity will be doing so only after its validity has already been determined by the court.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On February 2, 2010, the Civil Justice and Courts Policy Committee adopted a strike-all amendment that amended the bill to prohibit parental waivers from waiving liability for acts of intentional misconduct and gross negligence. The amendment also specified circumstances where an employer could be held liable for conduct of an employee.

On March 22, 2010, the Criminal & Civil Justice Policy Council adopted a strike-all amendment that made the following changes:

- Authorizes a motorsport liability release signed on behalf of a minor participating in a sanctioned motorsports event to be valid to the same extent as other nonspectators.
- Clarifies that if a minor is participating in an activity at a closed-course motorsport facility, other than a sanctioned motorsports event, then the waiver must comply with, and is valid only to the extent and subject to the presumptions of, the general waiver requirements established by the bill.
- Provides that the general waiver requirements established by the bill, limiting pre-injury releases signed on behalf of minors to inherent risks, only apply to commercial activity providers.
- Authorizes natural guardians, on behalf of their minor children, to waive, in advance, any claim against a noncommercial activity provider, or its owners, affiliates, employees, or agents, to the extent authorized by common law.
- Changes the effective date from July 1, 2010, to upon becoming a law.