

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Honorable Richard A. Bandstra
Honorable Michael J. Talbot
Honorable Bill Schuette

SHEILA WOODMAN, as Next Friend
of TRENT WOODMAN, a minor,

Supreme Court No. 137347

Plaintiff-Appellee,

Court of Appeals No. 275882

V

Kent County Circuit Court
No. 06-00802-NO

KERA, LLC, a Michigan corporation,
d/b/a BOUNCE PARTY, LLC,

Defendant-Appellant.

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APPELLEE'S BRIEF ON APPEAL

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STATEMENT OF QUESTIONS PRESENTED

1. For more than 130 years, Michigan’s common law rule is and has been that a parent lacks authority to bind his or her minor child to a contract, including an agreement that waives, releases, or compromises claims by or against the minor child. The Legislature, as it did in the Medical Arbitration Act, has acknowledged the common law rule and has, when it deems appropriate, created an exception to it by authorizing parents to bind their children. This Honorable Court has expressed its reluctance, in recognition of the separation of powers, to change the common law and defers to the Legislature when called upon to make new and potentially societally dislocating changes to the common law.

The first question presented is: In light of 130 years of Michigan common law rule, under which a parent is not authorized to waive, release or compromise claims by or against a minor child, should this Honorable Court consider changing the common law or, rather, should it defer such changes to the Legislature, particularly given that the Legislature has, when it deems appropriate, promulgated statutes to modify the common law rule and given that the Legislature, not the judiciary, is the proper branch of government to assess the numerous trade-offs and costs of competing societal policies?

Plaintiff-Appellee answers, “No”.

Defendant-Appellant answers, “Yes”.

The trial court did not answer this question.

The Court of Appeals answered, “No”.

2. Consistent with the *parens patriae* doctrine, Michigan has a long-history of both common law and statutory protections safeguarding children as the most vulnerable in our society. Consistent with Michigan’s strong and deeply-rooted policy of protecting children, the vast majority of jurisdictions hold that parents cannot bind minor children to pre-injury exculpatory releases. Furthermore, a parent’s 14th Amendment right to make decisions concerning the activities in which a child may participate is not inconsistent with holding liable negligent parties whose breach of the minimum standard of care results in injury to minor children. While parents can, and do, evaluate whether the benefits of a particular activity outweigh the risks inherent in the activity, parents cannot know, and thus cannot evaluate in advance, non-inherent risks that are created or permitted to exist by a party’s failure to exercise ordinary care. A pre-injury parental waiver thus seeks to transfer unknown risks to parents, to families, and ultimately onto society, when the risks are uniquely and exclusively known by the person into whose care a parent entrusts their children.

The second question presented is this: If this Honorable Court nonetheless engages in a policy analysis, does Michigan’s strong public policy of protecting children, combined with the fact that the vast majority of other jurisdictions have invalidated pre-injury parental waivers, persuade this Court to affirm the decision of the Court of Appeals and confirm that that a parent does not have authority to waive, release or compromise claims by or against their children both pre-injury, when the risk of negligent harm is unknowable by the parent, and post-injury, when all facts are acutely understood?

Plaintiff-Appellee answers, “Yes”.

Defendant-Appellant answers, “No”.

The trial court did not answer this question.

The Court of Appeals did not reach agreement on the answer to this question.

COUNTER-STATEMENT OF FACTS

I. INTRODUCTION AND OVERVIEW.

This case involves the not very novel notion that those who come into contact with minor children are required to conform their conduct to the *minimum standard* required by law: ordinary care. Michigan law has long protected children. One such protection, deeply rooted in the fabric of our common law, is that a parent lacks authority to waive, release or compromise claims on behalf of their minor children. Defendant-Appellant, the owner and operator of an indoor play arena filled with inflatable slides and toys, asks this Honorable Court to negate this long-held common law rule and to sanction the use of pre-injury exculpatory waivers to immunize those whose negligent conduct – which is both unknown and unknowable by parents – injures children in this state.

Plaintiff-Appellee asserts that the common law rule, dating back for more than 130 years of Michigan jurisprudence, is clear in its determination that parents lack the authority to waive, release or compromise claims by or against their children. Plaintiff-Appellee further submits that, and as defendant-appellant recognizes in its Brief on Appeal, changes to the common law should be left to the Legislature.

II. FACTUAL BACKGROUND.

To celebrate Trent Woodman’s fifth birthday, his parents, Sheila and Jeffrey Woodman, decided to hold a party for him and his friends. The Woodmans chose to have the party at Defendant’s business, known as “Bounce Party,” which provides a series of arena-style rooms, each filled with large inflatable slides and other inflatable play equipment on which children and adults bounce and play.

Bounce Party markets its business to parents and children, and specifically seeks to host birthday parties.¹ To encourage parents to choose Bounce Party as the host for their child's birthday party, Defendant provides parents with the option of purchasing a number of birthday "party additions," including pizza and pop, cake and ice cream, balloons, and gift bags.² In addition, for the convenience of parents in holding their child's birthday party at its facility, Defendant provides parents with "free invitations for your guests."³ The free invitation provided by Defendant includes information as to the date and time of the party; a request for the invitee to RSVP; and the location of Defendant's facility.⁴ The free invitation also includes, in small print at the bottom, a signature line for the parent or legal guardian to sign and date.⁵

As part of its marketing efforts to parents and children, Defendant advertises its business as a "fun, safe, supervised indoor arena."⁶ Robert Pero, the owner of Defendant, testified at deposition that Bounce Party intends for parents to rely on the representation and assurance that its facility is both "safe" and "supervised" when deciding to bring their children to play on the inflatable equipment:

Q: You advertise your business as safe. We've been over that before. You do that so that you can attract business; is that right?

A: That's correct.

Q: You want people to come to your facility fully with the expectation that they're bringing their family member to a safe facility.

¹ A copy of Defendant's marketing materials are provided at Plaintiff-Appellee's Appendix, pp. 1b – 6b; *see also* Robert Pero deposition (April 20, 2006), p. 70, Appendix, p. 13b.

² *See* marketing materials, Appendix, pp. 1b – 6b

³ *See* marketing materials, Appendix, pp. 1b – 6b; Pero dep. p. 61.

⁴ *See* sample copy of Bounce Party invitation, Appendix, pp. 15b – 16b.

⁵ *See* copy of Bounce Party invitation, Appendix, pp. 15b – 16b.

⁶ *See* marketing materials, Appendix, pp. 1b – 6b; Pero dep. p. 70, Appendix, p. 13b.

A: That's correct.

Q: You advertise your facility as supervised?

A: Uh-huh, that's correct.

Q: And you do that with every intention that parents, like the Woodmans, would rely on that representation, bring their family members to your facility because it's supervised by you?

A: That's correct.

Pero dep. p. 89, Appendix, p. 14b.

The inflatable play equipment that the children bounce on came with operating instructions from the manufacturer. Specifically, the inflatable slide, which stands fifteen to twenty feet high, was accompanied by the manufacturer's operating instructions detailing the requirements for safe operation of the slide.⁷ In particular, the operating instructions for the inflatable slide state that “[a]ll participants must use slide mat to slide. Sit completely on the mat with legs straight and knee’s slightly bent.”⁸ Moreover, the posted rules attached to the slide itself state that “ALL PARTICPANTS MUST USE SLIDE MATS” and that the “UNIT MUST BE ATTENDED AT ALL TIMES.”⁹ As suggested by the instructions, the slide mats require participants to sit inside a pocket, and are made of a material that enables the participant to safely slide down the slide in a seated position.¹⁰ Although Defendant received the slide mats,

⁷ A copy of the Operating Instructions for Inflated Slide (“Operating Instructions”) is provided at Appendix, p. 17b (emphasis added); a picture of the inflatable slide is provided at Attachment, p. 18b.

⁸ Operating Instructions, Appendix, p. 17b (emphasis added).

⁹ See picture of posted rules attached to the slide, Appendix, p. 19b (capitalized letters for emphasis in original).

¹⁰ See Pero dep. pp. 58-60, Appendix, p. 11b.

and owner Robert Pero admits that he knew of the slide mat requirement, Defendant consciously chose to not use the slide mats, and instead discarded them:

Q: ...Before you opened for business and started to charge people money to come in and bring their kids to your facility, did you read the operating instructions?

A: Yes.

Q: And as I understand it, you bought slide mats, but never used them?

A: They – they came with it, yes.

Q: Never used them for this slide, the other slide, any slide?

A: No.

Q: And you did that knowing that the instructions for the slide specifically required that all participants must use the slide mat to slide?

A: (Pause) Yes.

Pero dep. pp. 56-57, Appendix, pp. 10b-11b. When pressed as to why, in light of the operating instructions, Defendant did not provide the slide mats, Mr. Pero invoked the civil equivalent of the Fifth Amendment and responded, “no comment:”

Q: Help me understand your thought process. You spent roughly \$14,000 on the Fortress Slide. You purchased slide mats with it. The owner instruction, operating instructions, tell you specifically that all participants must use slide mats to slide. Help me understand, sir, why you disregarded that requirement.

A: I have no comment.

Q: You don’t have a good reason is the answer.

A: I have no comment.

Pero dep. p. 58, Appendix, p. 11b.

In addition to requiring the use of slide mats, the inflatable slide operating instructions also mandate that the slide “have two (2) ADULT supervisors while in use. One attendant must monitor the entrance and exit area and another must aid participants into the sliding mat at the

top of the slide ramp.”¹¹ Just as Defendant knowingly failed to provide the required slide mats, it also consciously disregarded the instruction requiring supervision at both the top and bottom of the inflatable slide:

Q: Turning back to the operating instructions, number three indicates that the unit must have two adult supervisors while in use. “One attendant must monitor the entrance and exit area, and the other must aid participants into the sliding ramp at the top of the slide ramp.” Do you see that?

* * *

A: Yes.

Q: And actually the first sentence is bolded and underlined, apparently, to stress its importance. Is that how you read it?

A: Yes.

Q: You agree with me that Bounce Party is conducting its business in violation of this rule, it does not provide two adult supervisors while in use? Is that correct?

A: We do not provide two adult supervisors.

Pero dep. p. 54, Appendix, p. 10b. The only supervision provided by Defendant is through a single “party host” who is supposed to supervise the various rooms comprising the indoor play arena.¹² Defendant provides only one party host regardless of the age of the party-goers, be they adults, ten-year olds, five-year olds, or three-year olds.¹³

The simple fact is, as testified to by Bounce Party owner Mr. Pero, that although Defendant markets its business to children with assurances that its facility is “safe” and “supervised,” it consciously failed to provide the safety and supervision specifically required by the manufacturer:

¹¹ See Operating Instructions, Appendix, p. 17b (emphasis in original); Pero dep. pp. 54-58, Appendix, pp. 10b-11b.

¹² Pero dep. pp. 40-43, 54-55, Appendix, pp. 8b-10b.

¹³ Pero dep., pp. 40-43, Appendix, pp. 8b-9b.

Q: In all candor, sir, you didn't follow these rules [manufacturer's instructions], did you?

A: No.

Pero dep. p. 56, Appendix, p. 10b.

With the belief that, as advertised, Defendant was providing a "safe" and "supervised" facility, the Woodmans booked their son Trent's fifth birthday party at Bounce Party for September 19, 2004, paying \$222.60.¹⁴ Defendant provided the Woodmans with the "free invitations" to send to their guests.¹⁵ The party was supposed to last for two hours, and consist of ninety minutes in the "supervised" inflatable play rooms, followed by thirty minutes in the "party room" where Trent and his guests would eat birthday cake.¹⁶

On the day of the party, Mr. Woodman signed the invitation as the parent of Trent.¹⁷ The party began with a Bounce Party employee attempting to give verbal instructions to the group of five-year-old regarding use of the inflatable equipment. As testified to by Sheila Woodman, although she and the other parents would have been happy to supervise and make sure the children used the slide mats had they been asked, Defendant never informed the parents, in the verbal safety talk or otherwise, that *the parents* were responsible for supervising the slide, or making sure the children used a slide mat:

Q. At any point in time when you were there for Trent's birthday party did anyone pull you aside or any other adult, to your knowledge, and say to you, you as the parent are now responsible for certain safety features of our facility, for example, I need a volunteer to sit at the top of the slide and do the following four things, whatever they are? Anything like that?

¹⁴ Sheila Woodman deposition (June 13, 2006), p. 79, attached as Appendix, p. 26b.

¹⁵ Sheila Woodman dep. pp. 8, 76-77, Appendix, pp. 22b, 26b.

¹⁶ See marketing materials, Appendix, pp. 1b-6b; Pero dep. pp. 40-42, Appendix, pp. 8b-9b; Jeffrey Woodman deposition (June 13, 2006), p. 24, Appendix, p. 30b.

¹⁷ Jeff Woodman dep. p. 12; see also a copy of the invitation signed by Mr. Woodman on Trent's behalf, Appendix, p. 31b.

A. Never.

Q. Did you have people with you on the date of Trent's birthday party that had they done that would you folks have complied?

A. Absolutely.

* * *

Q. Did anyone tell you that the manufacturer required two adult supervisors for the slide any time it was in use, did anyone tell you that?

A. No.

Q. Would you have held your party at Bounce Party had you known that the manufacturer required the facility to provide that level of supervision and the facility didn't do that?

A. I would not have.

Q. Did anyone from Bounce Party tell you that the manufacturer required the use of a slide mat on the slides?

A. No.

Sheila Woodman dep. pp. 79-81, Appendix, pp. 26b-27b.

On the day of his birthday party, five-year-old Trent Woodman stood at the top of the fifteen to twenty foot high inflatable slide, with no slide mat and no supervision as required by the manufacturer, and jumped, seriously fracturing his right leg.

III. PROCEDURAL HISTORY.

Following the serious injury to her son, Sheila Woodman commenced this action on his behalf, as Trent Woodman's "next friend." The Complaint alleged that Defendant committed gross negligence (Count I), negligence (Count II) and violated the Michigan Consumer Protection Act (Count III). Defendant's Answer to the Complaint asserted that the "free

invitation” signed by Trent’s parents was actually a pre-injury “waiver” of Trent’s negligence claim.

Well established Michigan common law holds that a parent “has no authority merely by virtue of the parental relation to waive, release, or compromise claims by or against his child.” *Tuer v Niedoliwka*, 92 Mich App 694, 698-99; 285 NW2d 424 (1979). Therefore, pursuant to MCR 2.116(C)(8) and (C)(10), Plaintiff moved for summary disposition as to the defense of waiver by motion and brief dated July 27, 2006. In turn, pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), Defendant moved for summary disposition of all of Plaintiff’s claims. Defendant argued that the invitation signed by Trent Woodman’s father effectively barred Plaintiff’s negligence claim.

Oral argument on both parties’ summary disposition motions was held on September 14, 2006. In its opinion, the trial court recognized Michigan’s “well established” common law rule that a parent lacks the authority to waive, compromise, or release claims by or against his or her child, but concluded that the rule applied only in the post-injury setting. As a result, the trial court upheld the free invitation as a waiver and granted Defendant’s motion for summary disposition as to Plaintiff’s negligence claim. Plaintiff moved for reconsideration, which was similarly denied.

Plaintiff filed a subsequent Motion for Partial Summary Disposition, arguing that, despite the trial court’s ruling that a parent may waive the claims of his or her minor child, the language of the “free invitation” used by Defendant is insufficient under Michigan law to constitute a waiver, or alternatively, the language is at best ambiguous and presents a question for the jury.

The trial court also denied this Motion. Thereafter, the parties agreed to stay the proceedings so interlocutory appeals could be filed.¹⁸

Plaintiff appealed the decision of the trial court which held, contrary to Michigan common law, that a parent may waive his or her minor child's claims. The Court of Appeals granted the interlocutory application and ultimately reversed the trial court's decision upholding the waiver, holding that under Michigan's long established common law, a parent does not have the authority to waive, pre-injury, the claims of his or her child.

The Court of Appeals based its decision on the "well-recognized common law premise" that "[i]n Michigan, a parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims of his or her child." *Woodman v Kera, LLC*, 280 Mich App 125, 144; 760 NW2d 641, 652 (2008). The court recognized its consistent ruling throughout Michigan case law that "[u]nless authorized by statute, a guardian is without power to bind the infant or his estate." *Woodman v Kera, LLC*, 280 Mich App at 145; 760 NW2d at 652. The court went on to cite to Michigan case law and statutory law demonstrating the "overriding public policy concern" of Michigan to protect the rights of children, "consistent with the common-law limitations placed on parental authority to compromise claims belonging to their children." *Woodman v Kera, LLC*, 280 Mich App at 147; 760 NW2d at 654.

The court next addressed waivers under Michigan law and noted that although the Legislature has clearly identified very specific situations in which parents are allowed to compromise the rights of their minor child, nothing in the current statutory scheme permits a parent to release the property rights of their child in the circumstances of this litigation.

¹⁸ This interlocutory appeal does not include review of the trial court's ruling that the language of the invitation was sufficient to waive claims for negligence (apart from the issue of whether a parent had the authority to bind a minor child to the proclaimed waiver). That issue was not appealed and remains with the trial court pending the outcome of the instant interlocutory appeal.

Moreover, the court noted that, “[b]ased on the history of case law and context of legislative enactments and safeguards, it is apparent that Michigan is particularly cautious when it comes to permitting the compromise of any child’s rights and strictly adheres to the common-law preclusion of parental authority in these situations, recognizing only very limited and specific statutory exceptions to this general rule.” *Woodman v Kera, LLC*, 280 Mich App at 149; 760 NW2d at 654. As a result, the court concluded that the “designation or imposition of any waiver exceptions is solely within the purview of the Legislature,” reaffirmed the common law rule that a parent cannot waive the claims of his or her minor child, invalidated the waiver in the present case and reinstated Plaintiff’s negligence claim. *Id.*

Defendant filed its Application for Leave to Appeal to this Honorable Court on September 18, 2008. By Order dated May 7, 2009, this Honorable Court granted the application, “limited to the issue whether the parental pre-injury liability waiver was valid and enforceable.” (May 7, 2009 Order).

LAW AND ARGUMENT

I. FOR OVER 130 YEARS, MICHIGAN COMMON LAW HAS HELD THAT A PARENT LACKS AUTHORITY TO WAIVE, RELEASE, OR COMPROMISE CLAIMS BY OR AGAINST HIS OR HER MINOR CHILD.

On January 26, 1837, then President Jackson signed a bill admitting Michigan as the nation’s 26th state.¹⁹ Shortly after the Civil War, the Michigan Supreme Court made clear in a series of cases that, at common law, a parent lacks authority to bind his or her minor child to contracts, specifically including contracts which waive, compromise, or release claims by or

¹⁹ <http://www.michigan.gov/formergovernors> (“Statehood Beginnings”).

against a minor child. These common law principles have been part of the fabric of Michigan jurisprudence virtually from the inception of this state.

In *Carrell v Potter*, 23 Mich 377 (1871), this Honorable Court ruled as invalid a contract between parties because the party seeking to enforce contract rights obtained by assignment from a minor who was a party to the original contract. Potter entered into a contract for the sale of land to Young, a minor. Young later assigned his contract rights to Chance, who thereafter assigned his rights to Carrell. When Potter failed to perform under the agreement, Carrell sued. In denying Carrell relief, the Michigan Supreme Court made clear that contracts with minors are not binding on the minor unless confirmed after reaching the age of majority:

The contract with Potter, and the assignment to Chance through which complainant claims, *having been made while Young was under age, are not binding upon him unless confirmed since January, 1866, when he became of age*, and if not so confirmed, it still remains optional with him to disaffirm either of them; and if there is an outstanding option in Young to disaffirm the original contract or his assignment to Chance, the defendant Potter ought not to be required to convey to complainant, who holds subject to such option, which is personal to Young. The absoluteness of the assignment to Chance is not only a matter of supreme importance as it bears upon complainant's title to sue, but also as it bears upon the protection due to Potter against outstanding claims.

Carrell v Potter, 23 Mich 377, 378 (1871) (emphasis added).

Young had moved out of Michigan and did not participate in the litigation. Thus, Carrell could not establish whether Young affirmed or disaffirmed the contract upon reaching the age of majority. The Court concluded that Carrell could not enforce his contract rights against Potter given the ongoing option by Young to disaffirm the contract (having then reached the age of majority):

If Young had sued to enforce the agreement, it would, in itself, have been an act of confirmation or affirmance. But a suit by a party, claiming to be his assignee under an assignment made

during his minority, has no such effect. ***The competent party cannot, by suing to enforce or affirm the contract of the infant, thereby ratify the infant's agreement and bind him.***

Id. (emphasis added).

While the *Potter* case makes clear that a contract entered into by a minor is not binding upon the minor unless, after reaching the age of majority, the agreement is ratified or confirmed, this Court in *Dunton v Brown*, 31 Mich 181 (1875) made clear that the treatment accorded contracts entered into by minors would depend on the nature of the contract. First, “agreements as are not possible to be regarded as beneficial” to the infant are “null from the beginning.” *Dunton*, 31 Mich at 181, 182. The Court’s headnote, which summarized this holding, in turn referenced a footnote, which described various kinds of agreements as null and void, including, specifically, releases.²⁰ All other agreements are voidable by the minor upon reaching the age of majority. Important to the instant Application, this Court held that neither the minor nor his or her guardian can affirm or annul an agreement while infancy continues. Rather, “[i]t appears to be a matter for his [the minor’s] own decision when he arrives at mature age.” *Dunton*, 31 Mich at 182.

Two years after *Dunton*, in *Armitage v Widoe*, 36 Mich 124 (1877), this Court ruled that a parent could not bind his or her minor child to a contract. In *Armitage*, a contract for the sale of land was entered into between Jesse Widoe, as vendor, and Henry Armitage, as vendee. The agreement was negotiated and executed on behalf of Henry Armitage, a minor, by Henry’s father, William. *Id.* at 127. In finding that the minor child could not be bound to the contract by his father, this Court held that “no rule is clearer than that an infant cannot empower an agent or

²⁰ (Reference was made to a release by the minor to his guardian; a release by a minor of his legacy or distributive share; and a naked release”).

an attorney to act for him” and, further, that a child cannot affirm an act which was not authorized:

Had the infant in the first place undertaken to make another his agent to enter into the contract for him, the appointment would not have been valid. ***On the authorities no rule is clearer than that an infant cannot empower an agent or attorney to act for him.*** But if he cannot appoint an agent or attorney, it is clear he cannot affirm what one has assumed to do in his name as such. He cannot affirm what he could not authorize.

Armitage v Widoe, 36 Mich 124, 128 (1877) (emphasis added) (citations omitted).

This Honorable Court noted the repugnancy of the contention that the protection accorded to infancy could be subverted, indirectly, by having a minor adopt, after-the-fact, his or her parent’s unauthorized act of purporting to bind the child to a contract in the first instance:

It would be extraordinary if a party who has no power to do a particular act could yet do it indirectly by the mere act of adoption. Such a doctrine would deprive the infant wholly of his protection; for one has only to change the order of proceeding, assume to act for the infant first and get his authority afterwards, and the principle of law which denies him the power to give the authority is subverted. But such a doctrine is wholly inadmissible. The protection of infancy is a substantial one, and is not to be put aside and overcome by indirect methods.

Armitage, 36 Mich at 129 (emphasis added).

In 1878, this Honorable Court again ruled that a parent or guardian could not bind his or her minor child to a contract. In *Wood v Truax*, 39 Mich 628 (1878), the issue presented was whether a guardian could bind a minor to a mortgage and a subsequent deficiency judgment. In rejecting the claim that a guardian could bind the minor, this Court noted that “[t]here is neither statute nor common law which can sustain the personal liability of an infant on a bond made by her guardian.” *Id.* at 629. This Court further held that the enforceability of the contract was not just voidable, “but one beyond a guardian’s authority” and, as such, was void. *Id.* at 630. On reconsideration, the Court affirmed its decision, stating that the agreement was “unquestionably

void.” “It cannot be claimed that either equitably or in any other way a guardian, even if she had authority to bind the ward by a loan, which she certainly had not, could make the ward liable jointly with any one else who was to have a part of the money borrowed.” *Wood v Traux*, 39 Mich at 633 (on rehearing).

The issue of whether a parent could act on behalf of, and bind, a child was revisited in 1924. In *O’Brien v Loeb*, 229 Mich 405, 408; 201 NW 488 (1924), this Honorable Court struck down, as invalid, a parent’s release of liability on behalf of her ten-year-old son, who was injured in a collision between an automobile and a horse-drawn carriage:

The transaction was carried on entirely with the mother, who was without authority to bind him in the release of his cause of action against the defendants. An infant is not bound by a contract made for him or in his name by another person purporting to act for him, unless such person has been duly appointed his guardian or next friend and authorized by the court to act and bind him.

Id. (quotation marks and citations omitted).

The issue was revisited fifty years later, in 1974. In *Reliance Insurance Company v Haney*, 54 Mich App 237, 220 NW2d 728 (1974), the Court was presented with whether the father of a 19-year old son (thus, not a minor) could bind the son to a waiver of uninsured motorist coverage. The Court of Appeals again acknowledged the common law:

A parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims by or against his child. 67 C.J.S. Parent & Child §58, p. 764; *Schoefield v Spilker*, 37 Mich. App. 33, 194 N.W.2d 549 (1971). The status of a parent is one of guardian by nature. *Monaghan v. Agricultural Fire Insurance Co.*, 53 Mich. 238, 244, 18 N.W. 797, 799 (1884); 39 C.J.S. Guardian & Ward §5, p. 13. ***Unless authorized by statute, a guardian is without power to bind the infant or his estate.*** 39 Am. Jur. 2d, *Supra*, §99, p. 84.

Reliance Insurance Company v Haney, 54 Mich App 237, 242, 220 NW2d 728, 731 (1974) (emphasis added).

Because the *Reliance Insurance* case involved a child of majority age, the Court of Appeals remanded for factual development regarding whether the majority age child conferred authority on his father to sign the waiver of uninsured motorist coverage. The discussion of the common law in *Reliance Insurance*, while summary in form, is consistent with Michigan's entrenched common law rule prohibiting a parent from binding a minor to a contract of any kind. The case did add that this common law rule could be altered or modified by statute.

The common law rule was again acknowledged and applied in *Tuer v Niedoliwka*, 92 Mich App 694, 285 NW2d 424 (1979). There, the Court of Appeals held that an agreement by a parent purporting to compromise and release child support obligations was not binding as it relates to the child's right to receive support. The holding derived from the common law proposition that:

[I]n Michigan a parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims of his or her child. Generally speaking, the natural guardian has no authority to do an act which is detrimental to the child. Authorization by statute is necessary to give the mother power to bind the child.

Tuer, supra, 92 Mich at 698-699, 285 NW2d at 426 (citations omitted).

The Court of Appeals again applied the common law rule in *Estate of Kinsella v Kinsella*, 120 Mich App 199, 327 NW2d 437 (1982). Petitioners, twin girls, claimed they were heirs of Patrick Kinsella. The probate court ruled in favor of the Estate, finding that an earlier annulment proceeding brought by Patrick Kinsella barred the claim by the petitioners that Patrick Kinsella was their father. The annulment proceeding was premised on the claim that Rose Ann McMillan, the mother of the twins, admitted to Kinsella that he was not, in fact, the father of the children (who were yet unborn at the time the annulment proceeding was filed). Ms. McMillan did not contest the annulment and even approved the judgment. The probate court denied the

Petition, finding that the annulment proceeding precluded the claim that petitioners were heirs of Patrick Kinsella.

The Court of Appeals reversed because the earlier annulment proceeding could not impair the rights of the children regardless of whether Ms. McMillan contested the annulment proceeding:

However, a parent does not have power, merely by virtue of the parental relationship, to waive, release or compromise claims of his or her child. In the within case, there was not a contested trial. While counsel for the mother approved the annulment judgment, that stipulation did not and could not, under *Tuer v. Niedoliwka*, deprive the twins of an opportunity for a full hearing on the merits to decide whether Patrick Kinsella was their father.

Estate of Kinsella v Kinsella, 120 Mich App 199, 203, 327 NW2d 437, 439 (1982); see also, *Sayre v Sayre*, 129 Mich App 249, 252, 341 NW2d 491, 492 (1983) (finding that a stipulated support order was not binding “because Michigan law does not allow parents to bargain away the rights of their children”).

In the 1980s, the common law rule that a parent is without authority to waive, release or compromise claims by or against their minor child was discussed in a string of cases involving the issue of whether a parent could bind a minor child to an arbitration agreement, thus waiving the right to a jury trial. The first such case was *Benson v Granowicz*, 140 Mich App 167, 363 NW2d 283 (1984). In *Benson*, the mother of an eight-month old baby signed an arbitration agreement upon admission to the hospital, which waived the minor child’s right to a jury trial and compelling arbitration of any claims. Plaintiff contested the validity of the agreement because a parent may not waive a child’s right. The Court of Appeals acknowledged that such an agreement was barred at common law, but that the common law may be abrogated by statute and that the Malpractice Arbitration Act authorized the waiver:

Under the common law a parent has no authority to waive, release or compromise claims by or against his or her child. However, the common law can be modified or abrogated by statute. Because the common law may be abrogated by statute, a child can be bound by a parent's act when a statute grants the authority to a parent. The R. Hood-McNeely-Geake Malpractice Arbitration Act clearly changes the common law to permit a parent to bind a child to an arbitration agreement.

Benson v Granowicz, 140 Mich App 167, 169, 363 NW2d 283, 285 (1984) (citations omitted); see also, *Osborne v Arrington*, 152 Mich App 676, 679, 394 NW2d 67, 68 (1986) (“This Court has recently noted that § 5046(2) clearly changes the common law to permit a parent to bind a child to an arbitration agreement”); *Crown v Shafadeh*, 157 Mich App 177, 178, 403 NW2d 465, 466 (1986) (“The Malpractice Arbitration Act, M.C.L. § 600.5046(2); M.S.A. § 27A.5046(2), changes the common law to permit a parent to bind a child to an arbitration agreement”).

The Court of Appeals analyzed the issue the same way in *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 146 Mich App 307, 380 NW2d 93 (1987). Upon admission to the hospital for complications with her pregnancy, Kathleen McKinstry signed two arbitration agreements, one in her name and the other in the name of “Baby or Babies McKinstry.” She did not revoke the arbitration agreements as permitted by statute within 60 days of their execution. She later filed a medical malpractice lawsuit as next friend of her infant daughter, Amanda.

The Court of Appeals held that the Medical Arbitration Act provided the necessary statutory exception to the common law rule prohibiting a parent from waiving claims by or against his or her child: “[A]t common law a parent did not have the authority to bind a child to an arbitration agreement. We believe that the purpose of § 5046(2) is to grant parents that authority and thus enable many claims by minor children to go to arbitration.” *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 146 Mich App 307, 313, 380 NW2d 93, 96 (1987) (emphasis added).

This Court granted leave in *McKinstry* to consider “whether the parent of an unborn child can bind the child, after birth, to arbitrate disputes which arise out of the prenatal care and delivery of the child.” *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 173, 405 NW2d 88, 91 (1987). This Court began its analysis by reviewing the Michigan Medical Arbitration Act, which specifically authorized a parent to bind his or her minor child to an arbitration agreement:

A minor child shall be bound by a written agreement to arbitrate disputes, controversies, or issues upon the execution of an agreement on his behalf by a parent or legal guardian. The minor child may not subsequently disaffirm the agreement.

MCL 600.5046(2) (repealed).

In analyzing whether a parent could bind an unborn child to arbitration under the statute, this Court again acknowledged the common law rule in concluding that “the arbitration statute is aimed at allowing parents to bind their children, all of their children, to arbitration *rather than permitting a child subsequently to avoid arbitration at the age of majority.*” *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 191, 405 NW2d 88, 99 (1987) (emphasis added). After determining that a fetus in utero properly fell within the scope of the arbitration act, this Court specifically acknowledged, just as the Court of Appeals had done in *Benson, Osborne and Crown, supra*, that the Michigan Medical Arbitration Act is an exception to the common law rule that a parent lacks authority to waive, release or compromise claims by or against their child:

Our interpretation of § 5046(2) is a departure from the common-law rule that a parent has no authority to waive, release, or compromise claims by or against a child. However, the common law can be modified or abrogated by statute. Thus, a child can be bound by a parent’s act when a statute grants that authority to a parent. We believe that § 5046(2) of the MMA changes the common law to permit a parent to bind a child to an arbitration agreement.

McKinstry v Valley Obstetrics-Gynecology Clinic, PC, 428 Mich 167, 192, 405 NW2d 88, 99 (1987) (citations omitted).

This Court's discussion of the common law in *McKinstry* was not dictum. If common law permitted a parent to waive or release claims by or against their children, then the only issue for this Court in *McKinstry* would have been limited to whether a parent could bind a child to an arbitration agreement *before birth*. Because of the common law rule that a parent lacks authority to waive, compromise or release claims by or against their children, this Honorable Court appropriately analyzed the arbitration act and concluded that the Legislature had modified Michigan's common law rule by promulgating an exception as it related to arbitration agreements under the arbitration act.

The common law rule was applied to void a release signed by a parent on behalf of a minor child in *Smith v YMCA of Benton Harbor*, 216 Mich App 552, 550 NW2d 262 (1996) (1v app den 454 Mich 863, 558 NW2d 733 (1997)). When Christine Smith was 10-years old, she was injured at defendant's swimming pool. After negotiating a settlement, Christine's parents executed a release and indemnification agreement which purported to release all causes of action by Christine or her parents in exchange for a lump-sum payment of \$3,275. After Christine reached the age of majority, she filed suit against the defendant. Defendant moved for summary disposition, asserting that Christine's parents released her cause of action years earlier. The Court of Appeals held that the release was ineffective to preclude Christine's cause of action under "well settled" Michigan common law:

It is well settled in Michigan that, as a general rule, a parent has no authority, merely by virtue of being a parent, to waive, release, or compromise claims by or against the parent's child. Although statutory enactments can abrogate the common-law rules, such rules may not be eliminated by implication, and statutes in derogation of the common law must be strictly construed.

Smith v YMCA of Benton Harbor, 216 Mich App 552, 554, 550 NW2d 262, 263 (1996).

In order to overcome the “well settled” common law rule, the defendant argued that MCL 700.403 (Estates and Protected Individuals Code) authorized Christine’s parents to compromise her claim because it allowed a parent to receive on behalf of a child sums not exceeding \$5,000.²¹ The Court rejected the defendant’s contention that MCL 700.403 provided an exception to the common law rule:

The statute does not provide parents the authority to compromise their children’s claims; it merely permits a debtor of a minor to make payments directly to the minor’s parents without seeking judicial approval for each payment as long as the aggregate amount of the payments is less than \$5,000 per year. In other words, it provides a simple procedure for payments of relatively small *liquidated amounts* to parents of minors to whom the money is owed.

Smith v YMCA of Benton Harbor, 216 Mich App at 555, 550 NW2d at 264 (emphasis in original).²² This Court denied defendant’s application for leave to appeal in *Smith v YMCA of Benton Harbor*.

As the above demonstrates, for over 130 years Michigan’s jurisprudence has recognized the “well settled” common law rule that a parent lacks authority to waive, release or compromise claims by or against their children. That a parent is not authorized to so bind a child dates back to at least 1878 in the *Armitage* case, *supra*, where this Court, in concluding that a father could

²¹ MCL 700.403 was replaced by MCL 700.5102.

²² The same statute referenced by the YMCA in *Smith* was likewise asserted as a defense to a minor’s claim in *Commire v Automobile Club of Michigan Insurance Group*, 183 Mich App 299; 454 NW2d 248 (1990). There, insurance benefits for the benefit of Ronald Commire, a minor, were paid to Kenneth Commire, the father. After reaching the age of majority, Ronald Commire sued the Auto Club for the funds, which he father had squandered. The Court allowed Auto Club the right under MCL 700.403 to pay up to \$5,000 to the father for the benefit of the child, but permitted Ronald Commire to recover from Auto Club all amounts paid in excess of \$5,000. *Id.* at 303-304. Payments to the father beyond the reach of the statute were therefore not payments made to the minor child.

not bind his son to a contract, held that “no rule is clearer than that an infant cannot empower an agent or attorney to act for him.” *Armitage, supra*, at 128.

Turning to the instant case, defendant-appellant Bounce Party ignores Michigan’s long-standing common law rule. Instead, argument section (I)(A), its lead argument, advances the naked proposition that parents “should” be authorized to waive, release and/or compromise the claims of their minor children by way of pre-injury exculpatory agreements.

II. THIS HONORABLE COURT SHOULD DEFER CHANGES TO THE COMMON LAW TO THE LEGISLATURE, WHICH HAS LONG RECOGNIZED MICHIGAN COMMON LAW AND HAS, WHEN IT SEES FIT, PROMULGATED EXCEPTIONS TO IT.

While ignoring the common law rule, Bounce Party advances a perplexing argument that the Court of Appeal’s decision is itself “judicial activism,”²³ that it is “based upon the court’s opinion on what would be the best policy for the state of Michigan,”²⁴ that the decision crafts “a new rule in which the court creates law instead of doing what the court should do, interpret the law,”²⁵ and finally, that “such policy decisions should be made by the Legislature and not by the court.”²⁶

Bounce Party has it backwards. The common law rule that a parent lacks authority to waive, release or compromise claims by or against their minor children not only exists, it is black letter law. The common law can be abrogated, however, by statute if the Legislature sees fit. Bounce Party conceded in earlier proceedings that the Michigan Legislature has not passed a statute to authorize parents to bind their children to pre-injury waivers. That being the case, the

²³ Defendant-Appellant’s Brief on Appeal, p. 16.

²⁴ Defendant-Appellant’s Brief on Appeal, p. 18.

²⁵ Defendant-Appellant’s Brief on Appeal, p. 20.

²⁶ Defendant-Appellant’s Brief on Appeal, p. 23.

very argument advanced by Bounce Party compels the conclusion, shared by plaintiff-appellee, that it is up to the Legislature to pass a statute if it desires to change the common law rule. As defendant-appellant Bounce Party states: “If there is some overriding societal protection that must be implicated, then that is the job of the Legislature.”²⁷ As discussed below, Bounce Party, at least in this respect, is exactly right.

As this Honorable Court has observed, the proper exercise of judicial power is to “assert what the law ‘is,’ not what it ‘ought’ to be.” *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602, 608 (2002) (quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 177, 2 L Ed 60 (1803)). “[T]he focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.” *Id.* (citations omitted).

As the above section details, Michigan common law has long held that a parent lacks authority to bind his or her minor child to a contract, including an agreement that seeks to waive, compromise, or release claims by or against the child. These long-ingrained common law principles date back virtually to Michigan’s statehood. As noted by this Court, “[t]he common law, which has been adopted as part of our jurisprudence, remains in force until amended or repealed.” *Wold Architects and Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750, 756 (2006) (citing Const. 1963, art. 3, § 7).

The Legislature, of course, is charged with knowledge of the common law. “[W]hen enacting legislation, the Legislature is presumed to be fully aware of existing laws, including judicial decisions.” *Alvan Motor Freight, Inc v Dep’t of Treasury*, 281 Mich App 35, 41; 761 NW2d 269, 273 (2008) (citing *Walen v Dep’t of Corrections*, 443 Mich 240, 248; 505 NW2d

²⁷ Defendant-Appellant’s Brief on Appeal, p. 23.

519 (1993); and *Gordon Sel-Way, Inc v Spence Brothers, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991)).

In *Wold Architects and Engineers v Strat*, 474 Mich, 223; 713 NW2d 750 (2006), this Court held that the absence of evidence of specific legislative intent to change the common law shows that the Legislature intended to leave the common law untouched. *Wold*, 474 Mich at 236-237; 713 NW2d at 758 (holding that the Legislature, in passing the Michigan Arbitration Act, did not abrogate common law arbitration and, with it, the unilateral revocation rule). When the Legislature has not acted to change the common law, this Court has expressed an unwillingness to expand or contract the common law. See *People v Riddle*, 467 Mich 116, 126; 649 NW2d 30, (2002) (“because the Legislature has not acted to change the law of self-defense since it enacted the first Penal Code in 1846, we are proscribed from expanding or contracting the defense as it existed at common law”).

As it applies to the common law rule at issue here – that a parent does not have authority to waive, compromise, or release claims by or against his or her minor child – there can be no doubt that the Legislature is aware of the common law rule, as it must have been in passing the Michigan Medical Arbitration Act. That act itself recognized the common law rule by creating an exception to it by specifically authorizing a parent to bind a child to an arbitration agreement. In further recognition of the common law, the arbitration act not only specifically authorized a parent to bind a minor, but further provided that, “[t]he minor child may not subsequently disaffirm the agreement.” MCL 600.5046(2) (repealed).

This Court has recognized its obligation to “exercise caution and to defer to the Legislature when called upon to make a new and potentially societally dislocating change to the common law.” *Henry v Dow Chemical Co*, 473 Mich 63, 89; 701 NW2d 684, 697 (2005).

Similarly, the Court has observed “that policy decisions are properly left for the people’s elected representatives in the Legislature, not the judiciary. The Legislature, unlike the judiciary, is institutionally equipped to assess the numerous trade-offs associated with a particular policy choice.” *Devillers v Auto Club Insurance Association*, 473 Mich 562, 589; 702 NW2d 539, 555 (2005).

In the instant case, Bounce Party ignores (as it must) Michigan’s long common law rule that parents have never had the authority to waive, release, or compromise claims by or against their minor children. Bounce Party’s characterization of the Court of Appeals decision as “interventionist” is simply incorrect. The Court of Appeals recognized, properly, that under the common law parents have never had the authority to waive or release claims by their children, and that any change to this rule must come from the Legislature. The suggestion, however, by the concurring opinions of Judge Bandstra and Judge Schuette (both former Legislators) that Michigan’s time-honored common law rule will somehow have “significant and far reaching implications” (Bandstra, concurring) ignores the reality that proclaimed waivers²⁸ *have never been effective* in Michigan to waive a claim by a minor child. Similarly, Judge Bandstra’s contention that “the cost of providing opportunities will rise” is wholly without support. It is exactly the kind of policy argument that this Court rejects and defers for consideration by the Legislature.

²⁸ When used to attract families to its business, the document is called an “Invitation.” When in litigation, Bounce Party refers to the document as a “Waiver.” Apart from the fact that the common law does not authorize a parent to bind his/her minor child to such a document, Plaintiff also strongly challenges that the language contained in the “Invitation/Waiver” is sufficient to release negligence claims. Rather, it focuses solely on risks inherent in the activity. The efficacy of the language was the focus of Plaintiff’s (Second) Motion for Summary Disposition. That issue is not part of the interlocutory application for leave to appeal which was filed with the Court of Appeals. That issue, and others, remain before the trial court as this case remains on interlocutory appeal.

As this Court noted in *Devillers, supra*, “the Legislature is better equipped to evaluate the costs and benefits associated with a specific policy choice” *Devillers*, 473 Mich at 555; 702 NW2d at 589 (fn 62). Just as was the case in *Devillers*, “there has been no evidence presented” in this case to support the contention that costs will increase. *Id.* Similarly, as noted by the Court:

“As a general rule, making societal policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: ‘The responsibility for drawing lines in a society as complex as ours – of identifying priorities, weighing the relevant considerations and choosing between competing alternatives – is the Legislature’s, not the judiciary’s.’”

Terrien v Zwit, 467 Mich 56, 67; 648 NW2d 602, 609 (2002) (quoting *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999)).

The above pronouncements by this Court underscore that the Court of Appeals (including Judge Schuette’s concurring opinion) was correct in concluding that “the designation or imposition of any waiver exceptions is solely within the purview of the Legislature.” That determination, consistent with the separation of powers, is properly for the Legislature. On this issue, both plaintiff-appellee and defendant-appellant agree. Plaintiff-Appellee submits that the inquiry ends here and requests that this Honorable Supreme Court affirm the Court of Appeals.

III. WHILE THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE PRE-INJURY WAIVERS ARE INVALID AT COMMON LAW, MICHIGAN PUBLIC POLICY AND THE OVERWHELMING MAJORITY OF OTHER JURISDICTIONS LIKEWISE COMPEL THE SAME OUTCOME.

Because a parent cannot bind a child to a release under Michigan common law, and because any change to the common law, which inherently involves the balancing of competing

societal interests and numerous trade-offs associated with a particular policy choice, must be deferred to the Legislature, this Court should affirm the decision of the Court of Appeals.

To the extent, however, that this Honorable Court chooses to engage in a policy analysis, plaintiff-appellee submits that Michigan's strong public policy to protect children and the overwhelming majority of other jurisdictions having decided this same issue likewise compel that the decision of the Court of Appeals should be affirmed.

A. MICHIGAN'S STRONG PUBLIC POLICY OF PROTECTING CHILDREN.

Michigan's common law rule is part of a greater public policy of protecting children in this state. The public policy of Michigan has always been to protect the best interests of minor children. *Beverly Island Ass'n v Zinger*, 113 Mich App 322, 330; 317 NW2d 611 (1982) (stating, in the context of care for mentally handicapped children, "Unquestionably, the public policy of this state is to provide for the protection, growth and development of the children").

This public policy, manifest both through common law and statutory law, recognizes that children are unable to adequately protect themselves or to fully appreciate the consequences of their actions and, as a corollary, that those who come into contact with children must conform their conduct to the minimum standard required by law. *In re Hildebrant*, 216 Mich App 384, 386; 548 NW2d 715 (1996) ("The public policy has its basis in the presumption that the children's immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct"); *Bragan ex rel. Bragan v Symanzik*, 263 Mich App 324, 335; 687 NW2d 881 (2004) (noting, in the context of child invitees and trespassers, that children are entitled to greater protection due to their inability to understand or appreciate the dangers involved, or to protect themselves against such dangers). This policy of protecting minor children is evident throughout Michigan law, from the divorce context to the premises liability

context. See, for e.g., *Pellar v Pellar*, 178 Mich App 29, 35-36; 443 NW2d 427 (1989) (discussing the “overriding needs” of the child as the focus in child support determinations); *Bragan, supra*.

In its opinion, the Court of Appeals discussed the state’s duty to protect children under the doctrine of *parens patriae*. The above cases are just a few examples of the various protections accorded in the common law for minor children. Similar protections are also found throughout Michigan statutory law, as noted by the Court of Appeals:

Various statutory provisions afford similar protections to minors, including but not limited to: (a) MCL 700.5102, which restricts the payment or delivery of property to minors not in excess of \$5,000 in value unless certain safeguards are present; (b) MCL 700.5401, involving court appointment of a conservator or issuance of a protective order to ensure oversight in the management of a minor’s estate; and (c) MCL 600.5851, tolling accrual of actions in order to preserve a child’s rights to initiate certain causes of action, following removal of the disability of an individual’s status as a minor.

Woodman v Kera, LLC, 280 Mich App 125, 147; 760 NW2d 641, 653 (2008).

There are countless other statutory protections unique to children. For example, the Youth Employment Standards Act prohibits the employment of a minor in *any work* “hazardous or injurious to the minor’s health” absent a deviation under the act. MCL 449.103(1). Similarly, the act establishes that the minimum work age in this state is 14 years, subject to certain defined categories where younger children are permitted to work, e.g., 11-year-olds can work as a golf caddy, 13-year-olds can work in farming, etc. MCL 449.103(2). Further, the hours a minor under 16 can work are limited by statute, including the number of hours worked in a single day, hours worked in a week, the number of combined work and school hours, and times of day that are prohibited (e.g., between 9:00 p.m. and 7:00 a.m.). MCL 409.110. Another example, with a host of protections, is the Michigan Uniform Transfers to Minors Act, under which custodians

have defined fiduciary duties to manage assets for the benefit of a minor child (as well as harsh penalties for a custodian's failure to discharge his/her fiduciary duties). MCL 554.537. A final example of the *parens patriae* doctrine in action, among many others that can be found in Michigan's statutes, is the Revised School Code, which provides for compulsory education of children from age 6 to age 16. MCL 380.1561.

That Michigan has a strong history of common law and statutory protections for children is clear. It is beyond question that Michigan has a strong public policy of safeguarding children.

B. OTHER JURISDICTIONS OVERWHELMINGLY HOLD THAT PRE-INJURY PARENTAL EXCULPATORY AGREEMENTS ARE INVALID.

1. The Need for Pre-Injury Protections is Just as Great, Indeed Greater, than the Need for Post-Injury Protections.

Defendant-Appellant Bounce Party argues that the rationale to protect minors from post-injury waivers does not persist in the pre-injury setting. A majority of jurisdictions with laws similar to Michigan Court Rule 2.420, which requires judicial oversight of any waiver or settlement of post-injury claims, conclude that the need to protect minors in the pre-injury setting is at least co-extensive, if not more pronounced. *See, e.g., Hojnowski v Vans State Park*, 187 NJ 323, 334; 901 A2d 381 (2006) (holding that “[a]lthough the [r]ule governing post-injury settlements is not dispositive of our treatment of pre-injury releases, we find that the purposes underlying the post-injury settlement rule also apply in the present context” and that “*children deserve as much protection*” *before as after an injury occurs*); *Cooper v Aspen Skiing Co*, 48 P3d 1229, 12334 (Colo, 2002) (agreeing with the Utah and Washington Supreme Courts, the Supreme Court of Colorado concluded that “since a parent generally may not release a child’s cause of action after injury, it makes little, if any, sense to conclude a parent has the authority to

release a child's cause of action prior to an injury"); *Hawkins v Peart*, 37 P3d 1062, 1065-66 (Utah, 2002) (finding that "a parent does not have the authority to release a child's claims before an injury" and that "*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*"); *Scott v Pacific West Mountain Resort*, 119 Wash 2d 484, 494; 834 P2d 6 (1992) (finding that since "parents may not settle or release a child's claim without prior court approval" a "parent does not have legal authority to waive a child's own future cause of action for personal injuries resulting from a third party's negligence").

Consider the stark differences between what a parent knows in the post-injury setting, where even Bounce Party agrees a parent lacks authority to bind their minor child, from the pre-injury setting. In the post-injury setting, the releasing parties are fully knowledgeable and have been able to explore in detail such things as the culpability of the at-fault party and the nature and extent of any injuries to the child. The parties often hire lawyers to investigate the case, secure the necessary expert opinions, and determine their legal rights. The parties have had an opportunity to review all pertinent documents and interview witnesses to determine the exact factual circumstances surrounding the at-fault party's negligence and the nature and extent of the resulting injury. Armed with this information, a parent is clear as to the fact and extent of negligence and possesses all of the information necessary to enter a fair settlement. However, in the post-injury context – when a parent has full and complete knowledge regarding the at-fault party's negligence and the resulting injury – Michigan law still finds reason to step in to "ensure that the best interests of the minor are protected" by requiring judicial scrutiny and oversight of any waivers.

In stark contrast, in the pre-injury waiver situation, there is no possible way for a parent to know that he or she is exposing their child to a risk of harm, what that risk is, and what steps he or she can take to avoid or minimize the risk. A parent has no way of knowing that, as was the case here with the Woodmans, the business was neither using required safety equipment (i.e., slide mats) nor providing the required supervision for the safe use of a 15-20 foot inflatable slide. This is all the more concerning when, as was also the case here, the business is directly marketed to children and invites parents to bring their children to its premises based on assurances that its facility is “safe” and “supervised.” In the pre-injury waiver situation, the parents are completely “in the dark” as to the risks he or she is purportedly waiving on behalf of their child. Unlike the parent, the party seeking the pre-injury exculpatory waiver, however, has unique and exclusive knowledge of the risks lurking about. To shift the *unknown* risk of harm to a parent (who presumes that everyone is taking ordinary care for the protection of children) while immunizing the risk *known* by the party seeking the pre-injury waiver would be extraordinarily unjust.

Comparing the post-injury and pre-injury situations, public policy mandates the same protections afforded to minor children in the post-injury waiver setting to minors in the pre-injury waiver situation. Minor children are at even greater risk in the pre-injury waiver setting, because a parent cannot possibly know how the business will act or how seriously their child could be injured. The parent has no reason to know that, for example, building codes are not being followed, manufacturer’s instructions are being ignored, and statements of “supervision” and “safety” are in reality lies. Because Michigan law protects minor children in the post-injury context, it must also protect minor children in the pre-injury context, who are at an even greater risk of suffering unknown injuries from unknown risks. Indeed, the pre-injury waiver situation calls for even greater protection, not less, than that afforded to minors in the post-injury context.

2. The Supreme Court Decisions Invalidating Pre-injury Parental Exculpatory Releases.

The Supreme Courts of Washington, Colorado, New Jersey, and Florida have each ruled that a parent lacks authority to bind their minor child to pre-injury exculpatory agreements sought as a condition for participation in a certain activity.

The first was the 1992 decision by the Washington Supreme Court in *Scott v Pacific West Mountain Resort*, 119 Wash2d 484; 834 P2d 6 (2002). As a condition of participating in the ski school, the minor's mother signed an exculpatory agreement releasing the school from any claims by her minor son for negligence. Like Michigan, a parent in Washington cannot bind a child to a release post-injury. The Washington court concluded that "it makes little, if any, sense to conclude a parent has the authority to release a child's cause of action prior to an injury." *Id.* at 494. The court likewise dismissed arguments that invalidating pre-injury releases "would make sports engaged in by minors prohibitively expensive due to insurance costs," noting that "the same argument can be made in many areas of tort law, e.g., provision of medical or legal services. No legally sound reason is advanced for removing children's athletics from the normal tort system." *Id.* at 495.

In 2002, the Colorado Supreme Court struck down pre-injury parental exculpatory releases in *Cooper v Aspen Skiing Company*, 48 P3d 1229 (Colo, 2002).²⁹ Like *Scott*, *Cooper* involved a minor who was injured while skiing and whose parent signed, on his behalf, an exculpatory release. Like *Scott*, the court in *Cooper* found no meaningful distinction that would

²⁹ As noted *infra*, the Colorado Legislature, subsequent to the *Cooper* decision, passed a statute authorizing parents to bind their children to a pre-injury exculpatory agreement. Col Rev Stat § 12-22-107.

authorize a parent to bind the minor to a pre-injury exculpatory release when the parent could not bind the minor to a post-injury release:

Thus, given our historical regard for the special needs of minors and the fact that both a pre-injury release and a post-injury one work to deprive a child of rights of recovery, the fact that a parent is not affording unilateral power to foreclose a minor's rights in the post-injury context supports our holding that he may not do so in the pre-injury setting either.

To allow a parent or guardian to execute exculpatory provisions on his minor child's behalf would render meaningless for all practical purposes the special protections historically accorded minors.

Id. at 1234.

The court in *Cooper* further noted the risk, should such a pre-injury release be sanctioned, that the minor may be left in “an unacceptably precarious position with no recourse, no parental support, and no method to support himself or care for his injury.” *Id.* at 1235.

In 2006, the Supreme Court of New Jersey issued its decision striking down pre-injury parental releases in *Hojnowski v Vans Skate Park*, 187 NJ 323; 901 A2d 381 (2006), a case arising out of injuries sustained by a minor at skateboarding park. On an earlier visit to the skateboard park, the minor's mother had executed an exculpatory release on behalf of the minor.³⁰ The Court concluded that the purposes underlying the post-injury settlement rule, under which a parent lacks authority to bind the minor, also applies in the pre-injury waiver setting. *Id.* at 334. First, “children deserve as much protection” from the compromise of their rights before, as after, an injury occurs. *Id.* At the time a parent is called upon to sign a pre-injury waiver, the parent may not fully understand the consequences of that action:

³⁰ Unlike the purposefully vague and ambiguous language utilized in the invitation/waiver at issue in the instant case, the release in *Hojnowski* included a series of six questions and detailed answers outlining the rights being waived and released in the agreement.

These clauses are . . . routinely imposed in a unilateral manner without any genuine bargaining or opportunity to pay a fee for insurance. The party demanding adherence to an exculpatory clause simply evades the necessity of liability coverage then shifts the full burden of risk of harm to the other party. Compromise of an existing claim, however, relates to negligence that has already taken place and is subject to measurable damages. Such releases involve actual negotiations concerning ascertained rights and liabilities. *Thus, if anything, the policies relating to restrictions on a parent's right to compromise an existing claim apply with ever greater force in the preinjury, exculpatory clause scenario.*

Hojnowski v Vans Skate Park, 187 NJ 323; 901 A2d 381 (2006) (quoting with approval *Hawkins v Peart*, 37 P3d 1062, 1066 (Utah 2001) (emphasis added by *Hojnowski*).

The court in *Hojnowski* also recognized the problem that a pre-injury parental waiver places the cost of another party's negligence on the family unit itself. "If the parent is unable to finance the child's injuries, the child may be left with no recourse to obtain much needed care or support." *Id.* at 335. Although unstated by the court in *Hojnowski*, the ultimate cost, should the family not be able to bear it, will be borne by the people of the state. Finally, the court in *Hojnowski* noted that its decision to strike down the pre-injury parental waiver is "in agreement not only with our own State's case law, but also with the overwhelming majority of other jurisdictions." *Id.* at 336 (citations omitted).

The most recent pronouncement by a state Supreme Court came from Florida in December of 2008 in the case of *Kirton v Fields*, 997 So2d 349 (Fla, 2008). In *Kirton*, the father of a minor executed a release and indemnity agreement in order for his minor son to ride his all terrain vehicle (ATV) at the defendant's motor sports park and race course. Unlike the other cases discussed above, Florida common law does not prohibit a parent from entering into a release on behalf of his/her minor child. *Id.* at 353-354. Notwithstanding inconsistent decisions from lower Florida courts regarding whether pre-injury parental waivers were enforceable, the

Florida Supreme Court would ultimately join the “majority of other jurisdictions”³¹ and “find that public policy concerns cannot allow parents to execute pre-injury releases on behalf of minor children.” *Id.* at 355-356.

The Florida Supreme Court found no conflict between a parent’s right, under the 14th Amendment, to determine what activities may be appropriate for the minor child’s participation and its ruling that a parent lacks authority to bind a child to a pre-injury exculpatory release. Specifically, the Florida Supreme Court agreed with the lower court’s determination that the “decision to absolve the provider of an activity from liability for any form of negligence (regardless of the inherent risk or danger in the activity) **goes beyond the scope of determining which activity a person feels is appropriate for their child.**” *Kirton v Fields*, 997 So2d 349, 357 (Fla, 2008). “[T]he question of whether a parent should be allowed to waive a minor child’s future tort claims implicates wider public policy concerns.” *Id.*

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 well-being 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

³¹ Michigan was included in the majority of jurisdictions: “*Smith v. YMCA of Benton Harbor/St. Joseph*, 215 Mich. App. 552, 550 N.W.2d 262, 263 (1996) (“It is well settled in Michigan that, as a general rule, a parent has no authority, merely by virtue of being a parent, to waiver, release, or compromise claims by or against the parent’s child.”).

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.

Kirton, at 357-358. (emphasis added).

In striking down the pre-injury parental release, the court in *Kirton* also noted that “[i]f pre-injury releases were permitted for commercial establishments, the incentive to take reasonable precautions to protect the safety of minor children would be removed.” *Id.* at 358. A commercial business can take precautions to ensure the child’s safety and can obtain insurance in the event of injury caused by negligence. “On the other hand, a minor child cannot insure himself or herself against the risks involved in participating in that activity.” *Id.* at 358.

3. Non-Supreme Court Authority Invalidating Pre-Injury Parental Exculpatory Releases.

Multiple jurisdictions invalidate pre-injury waivers because a parent lacks authority to bind a minor child to such a waiver. See³² *Meyer v Naperville Manner, Inc*, 262 Ill App 3d 141, 146-147; 634 NE2d 411 (1994) (concluding that because “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 SW2d 207, 210 (Tex App, 1993) (it is not within the law “which empowers a parent to make legal decision concerning their child” and would be against the “public policy to protect minor children” to allow a parent to waive a right to sue for personal injury”); *Rogers v Donelson-Hemitage Chamber of Commerce*, 807 SW2d 242, 245-246 (Tenn App, 1991) (held that the mother “could not execute a valid release as to the rights of

³² There are multiple decisions in various jurisdictions. This string cite focuses on the principal case deciding the issue.

her daughter to sue for injuries suffered from the alleged negligent acts of the defendants” who sponsored a horse racing event in which plaintiff participated (relying upon *Childress v Madison Co*, 777 SW2d 1, 7-8 (Tenn App, 1989), which held that “[t]he law is clear that a guardian cannot on behalf of an infant or incompetent, exculpate or indemnify against liability those organizations which sponsor activities for children and the mentally disabled”)); *Apicella v Valley Forge Military Academy and Junior College*, 630 F Supp 20, 24 (ED 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” (additional citations omitted)); *Doyle v Bowdoin College*, 403 A2d 1206, 1208 n 3 (Me, 1979) (stating in dicta that parent cannot release child's cause of action); *Santangelo v New York*, 411 NYS2d 666, 667; 66 AD2d 880 (New York, 1978) (held that a minor was not bound by a release purporting to waive claims resulting from defendant City of New York’s failure to supervise ice hockey clinic); *see also Auto Workers v Johnson Controls, Inc*, 499 US 187, 213; 111 S Ct 1196 (1991) (White, J., concurring in part and concurring in the judgment) (stating that “the general rule is that parents cannot waive causes of action on behalf of their children”).

4. Bounce Party’s Assertion that Pre-Injury Parental Waivers have been Upheld in the For-Profit Context is Unsupported.

At page 28 of its Brief on Appeal, Bounce Party cites to three cases as support for the proposition that courts have upheld pre-injury exculpatory parental waivers in the for-profit context. The first case, *Fire Ins Exchange v Cincinnatti Ins Co*, 234 Wis 2d 314; 610 NW 2d 98 (Wis App 2000), involved a minor who volunteered at the local animal shelter; the case does not

concern a for-profit enterprise and is inapposite.³³ The second case cited by Bounce Party, *Plazter v Mammoth Mountain Ski Area*, 128 Cal Rptr 2d 885 (Cal App 3 Dist 2002), did not involve the issue of whether a parent has the authority to bind his/her minor child to a pre-injury exculpatory waiver.³⁴ The third case cited by Bounce Party, the Federal district court decision in *Brooks v Timberline Tours, Inc*, 941 F Supp 959 (D Col 1996), is inapposite because it, too, did not involve the issue whether a parent had the authority to bind a child to a pre-injury exculpatory waiver, as the issue was not raised.

Because the *Brooks* case was decided under Colorado law, Bounce Party fails to acknowledge that the Colorado Supreme Court later ruled, in *Cooper v The Aspen Skiing Company*, 48 P 3d 1229, 1235 (2002), that such pre-injury exculpatory waivers are invalid under Colorado law as they would “render meaningless for all practical purposes the special protections historically accorded minors.” *Id.* Just as Bounce Party argues here that “policy decisions are best left to the Legislature,”³⁵ it fails to recognize that the Colorado Legislature responded to the *Cooper* decision by passing a statute, specifically Col Rev Stat § 13-22-107 (2005), that authorizes parents to bind their minor children to a pre-injury release.

³³ The *Fire Insurance Exchange* case did contain dicta by the court, unnecessary to its holding, that “there may be occasions where a parent can waive the claim of a child,” but neither that case, nor any other Wisconsin published decision, has so held.

³⁴ Furthermore, under California law, unlike Michigan, “[a] parent may contract on behalf of his or her children.” *Hohne v San Diego Unified School District*, 224 Cal App 3d 1559, 1565 (Dist 4 1990).

³⁵ Defendant-Appellant’s Brief on Appeal, p. 17. Bounce Party further argues at page 20 of its Brief on Appeal that “[t]his Court should not usurp the power of the Legislature by, in effect, crafting a new rule in which the court creates the law instead of doing what the court should do, that is, interpret the law.”

5. The Fundamental Rights of Parents to Raise their Children is Not the Least in Conflict with Invalidating Pre-injury Parental Exculpatory Waivers and Holding Negligent Parties Accountable to Harm Caused to Children.

As can be seen through a discussion of the case law, the prevailing argument, advanced in support of the notion that parents should be able to bind their minor children to pre-injury exculpatory releases, is that such a decision is within a parent's fundamental right under the 14th Amendment to raise their children. Not only does this argument "prove too much," but indeed a parent's right to decide upon the activities in which their child may participate is *entirely consistent* with the requirement that negligent parties be held accountable for injuring children. A corollary to a rule that a parent may not bind a minor child to a pre-injury exculpatory release is that parties cannot immunize themselves from the consequence of negligently injuring children. Such a rule requires all who come into contact with children to conform their conduct to the minimum standard required by law – that of "ordinary care."

First, the 14th Amendment argument "proves too much," because, if accepted, it likewise compels the conclusion that parents must also have the right, which they clearly lack, to waive, release or compromise claims by their minor children post-injury. It similarly "proves too much" because, if accepted, such a rule would necessarily authorize a parent to bind a child to other contracts. Could a parent then bind a child to a purchase agreement? A mortgage? A guaranty?

Second, the argument that a parent's 14th Amendment right to make decisions on behalf of their children somehow translates into authority to waive or release claims by their children is fallacious. The two concepts are not in conflict. When parents decide to permit their child to participate in an activity, they cannot be expected to weigh the unknowable risk of harm that is not inherent in an activity, created by another's negligence.

“When people engage in a recreational activity, they have ordinarily subjected themselves to certain risks inherent in that activity.” *Ritchie-Gamseter v Berkley*, 461 Mich 73, 87; 597 NW2d 517 (1999). ***Risks inherent in an activity, however, are distinctly different than risks not inherent in the activity that are carelessly created or carelessly permitted to exist.*** This distinction was discussed by this Court in *Felgner v Anderson*, 375 Mich 23, 46 fn3; 133 NW2d 136, 149 (1965), where the Court explained that certain risks attend all outdoor sporting activities “and recovery may be had only if an injury is the result of negligence that could and should have been avoided by the use of ordinary care.” *Id.*

Thus, analysis indicates that the spectator’s suit is barred not by his assumption of risk but rather by a lack of negligence on the part of the park owner. This, of course, is in the ordinary instance of a batted ball flying into unscreened stands. Certainly the situation would be different if a spectator sitting in a screened portion of the stands were injured because a batted ball passed through a hole which the park owner had neglected to repair. Then the owner might be liable for negligence and the spectator would not be barred by any ‘assumption of risk.’

Felgner v Anderson, 375 Mich at 46, fn3; 133 NW2d at 149.

As this Court indicated in *Felgner*, injury due to risks inherent in an activity is not negligence. Negligence arises when injury is caused by a risk that is ***not inherent in the*** activity. This analysis in *Felgner* was followed in *Schmidt v Youngs*, 215 Mich App 222, 228; 544 NW2d 743, 746 (1996), where the Court concluded: “***Simply put, one may consent to the inherent risks of being a spectator or participant in a sport, but one does not ordinarily consent to another’s negligence.***” *Id.* (emphasis added).

Plaintiff-Appellee supports a parent’s right to make decisions concerning the activities in which their child may participate. In doing so, parents are weighing whether the benefits of participating in an activity outweighs the risks ***inherent*** in the activity. The fallacy of the 14th

Amendment argument is that it presumes that parents somehow can include in their decision making process the *unknowable* risk of injury to their child – that is not inherent in an activity – caused by another party’s failure to exercise ordinary care.

For example, in deciding whether to permit her child to play football, a mother contemplates the risk inherent in the sport, e.g., a broken ankle as a result of the child being tackled by an opponent. The same parent is not including in her calculus, however, the risk that her child may be injured because an overzealous coach carelessly deprived the kids of water and rest in extreme heat, resulting in heat stroke. Likewise, parents who permit their children to play baseball do not contemplate injury caused by the failure to use batting helmets. Turning to the instant case, while the Woodmans could anticipate the inherent risk of a possible rug burn, they could not know the non-inherent risk created by Bounce Party’s abject failure to use required safety equipment (slide mats) or to provide required supervision at both the top of the slide and entrance of the slide. While such non-inherent risks are completely unknown and unknowable by parents, the risks are within the *exclusive knowledge* of the party into whose care a child is entrusted.

Parents consent to their children participating in activities because they expect that those who come into contact with their children, or in whose care they entrust their children, will exercise ordinary care. The expectation of ordinary care is a fundamental underpinning of a parent ever relinquishing their child to anyone’s care or permitting their child to participate in any activity. Pre-injury exculpatory waivers seek to undermine this fundamental precept of our society by putting onto parents, and families, and society as a whole, the consequences of absolutely unknowable risks of harm that are not inherent in an activity and are caused by another party’s failure to exercise ordinary care.

RELIEF REQUESTED

Plaintiff-Appellee Sheila Woodman, as Next Friend of Trent Woodman, a minor, respectfully requests an order of this Honorable Supreme Court affirming the decision of the Court of Appeal's.

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Dated: July 31, 2009

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