



Premises Liability Practice Group

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## APPELLATE COURT INVALIDATES PARENTS' PRE-INJURY LIABILITY WAIVERS FOR MINOR CHILDREN

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In a recent published opinion, *Woodman v. Kera, L.L.C. d/b/a Bounce Party*, --- N.W.2d ----, 2008 WL 3355963 (Mich.App., August 12, 2008), the Michigan Court of Appeals, held that, in the absence of specific legislative exceptions, Michigan common law compels the conclusion that pre-injury waivers of liability made by parents on behalf of their minor children are invalid.

The case stemmed from an injury suffered at a children's birthday party held at the defendant's facility, which included an area containing large inflatable play equipment. The invitation to the party contained a release of liability form to be signed by the child's parent or guardian. The invitation stated that parent or guardian approval was required for a child to participate in the activities in the play area. The subject child's father signed the release on the day of the party. While playing at the party, the plaintiff's son jumped from the top of a slide and suffered a broken leg.

The plaintiff subsequently filed a complaint on the child's behalf, alleging negligence, gross negligence and violations of the Michigan Consumer Protection Act (MCPA). Based on the release signed by the child's father, the defendant asserted the waiver as an affirmative defense and subsequently moved for summary disposition on all three counts. The plaintiff, in turn, moved for summary disposition on the defendant's affirmative defense of waiver.

The trial court held that the signing of the release by the child's parent constituted a valid waiver and, therefore, dismissed the ordinary negligence claim and denied summary disposition of the affirmative defense of waiver.

The court denied the defendant's motion for summary disposition as to the gross negligence claim, holding that a reasonable juror could conclude that the defendant's conduct, which included not supervising play on the slide, amounted to substantial indifference as to whether injury would result from the slide's operation. The trial court also declined to grant summary disposition on the MCPA claim until the claim could be further developed. Both parties subsequently appealed the trial court's rulings.

In authoring the lead opinion, Michigan Court of Appeals Judge Michael Talbot first turned to the validity of a parent's waiver of liability on behalf of a minor child. The appellate court noted that the predominant issue of

the case, at its most basic level, was whether a parent could bind a child to an agreement that precluded a defendant's liability for negligence before an injury occurred. The court stated that the issue juxtaposed the fundamental right and authority of a parent to make determinations pertaining to the care, custody and control of their minor children against public policy concerns and the state's authority in regard to children's welfare.

The court surveyed the manner in which this issue has been treated in other jurisdictions, including opinions emphasizing the public benefit of promoting the availability of programs and activities for children that might not otherwise be possible in the absence of such protection from liability on the part of the sponsoring organization, particularly schools and other non-profit entities, who must often depend on the participation of volunteers who could be exposed to personal liability.

The appellate court then turned to an analysis of Michigan law. The court started its analysis with a recitation of the "well recognized common law premise" that, in 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."

The court then cited multiple court opinions which have expressed the public policy of limiting parental authority in compromising claims on behalf of their minor children. The court also observed that this policy is demonstrated in specific statutes and court rules designed to protect the rights of minors relative to the pursuit and settlement of injury claims. Therefore, the court noted, the legislature can, and has, crafted statutory exclusions to the common law rule, which allow a framework for parents to compromise the claims of their minor children, but could find no statutory enactments which upheld pre-injury exculpatory agreements executed by parents on behalf of their minor children, which waived liability for injuries incurred in either commercial or non-profit settings.

In the absence of such a "clear or specific legislative directive," the court declined to judicially assume or construct an exception to the common law by granting authority to a parent to bind their child to an agreement that waived liability.

The appellate court, therefore, reversed the trial court's holding that the parental waiver was valid and reinstated the plaintiff's negligence claim. The court also went on to reverse the trial court with respect to its denial of summary disposition as to the claims of gross negligence and violations of the MCPA. The court concluded that the evidence could not support a finding of gross negligence and that the MCPA was not an appropriate basis upon which the plaintiff could recover in this case because the gravamen of the claim was based upon the way the defendant operated the slide. It was not the manner in which it solicited or advertised its business.

The court's opinion was accompanied by two concurring opinions. Both concurring justices reluctantly agreed that Michigan law required the court to invalidate the parent's pre-injury waiver of liability.

Judge Bandstra emphasized that the decision, although legally correct, would have the effect of undermining a parent's authority to decide in which activities his or her children should participate. Furthermore, in the absence of pre-injury waivers, in what Judge Bandstra referred to as our "extremely and increasingly litigious society," the risk of liability to the providers of such activities will necessarily increase the cost of providing the activity. This increased cost, Judge Bandstra argued, will preclude some children from having the opportunity to participate and ultimately will cause some of the activities to become completely unavailable. He, therefore, encouraged the Michigan Legislature and the Michigan Supreme Court to further consider the issue of pre-injury waivers of liability made by parents on behalf of their

children.

In his concurrence, Judge Schuette also noted that the issue should be promptly addressed by the Michigan Legislature and Supreme Court. Judge Schuette stated that ultimately it will be up to the Legislature to decide if a statutory exception to the common law rule invalidating pre-injury waivers of the kind at issue in this case should be enacted. He further noted that the Legislature can follow the lead of other jurisdiction and differentiate between for-profit and non-profit entities with regard to the validity of such pre-injury waivers.

As noted repeatedly by all three of the judges on the *Woodman* panel, the effect of their decision in this case will be far-reaching and immediate. The inability of those sponsoring or offering activities for minor children to protect themselves from potential liability for injuries sustained in the course of those activities is very likely to have a significant impact on the cost, if not the very availability, of such activities.

In recognition of the potentially profound consequences of their decision, each of the judges implored the Michigan Legislature and Michigan Supreme Court to react accordingly.