DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2012

CLAIRE'S BOUTIQUES, INC.,
Appellant,

v.

AMY LOCASTRO, individually
and as parent and natural guardian of
Alexis Locastro, a minor,
Appellee.

No. 4D09-968

[April 25, 2012]

ON MOTIONS FOR REHEARING, REHEARING EN BANC, AND FOR CERTIFICATION

POLEN, J.

We grant appellant/cross-appellee, Claire's Boutiques, Inc. (Claire's) motion to consider this case en banc, and for certification. Upon en banc consideration, the following is the opinion of the court:

We are presented with two issues that are the subject of this appeal and cross-appeal: whether the trial court correctly denied a directed verdict for Claire's on the Locastros' negligence claim and whether the trial court correctly entered summary judgment for Claire's on its claim of contractual indemnity. We affirm the trial court's denial of Claire's motion for a directed verdict on the Locastros' negligence claim but reverse the trial court's entry of summary judgment on Claire's claim of contractual indemnity.

In August 2006, Amy Locastro took her thirteen-year-old daughter, Alexis, to Claire's to get Alexis's ear cartilage pierced. After the piercing, Alexis developed an infection in the cartilage of the ear that required hospitalization and extensive medical treatment. Alexis's ear has been permanently disfigured.

At trial, the Locastros introduced evidence of the ear piercing process used at Claire's. All employees watched a video prior to being permitted

to pierce a customer's ears. The video did not provide any training on sterilization of equipment. Employees, however, were instructed as to the increased risks regarding piercing of cartilage and the longer healing period required. Finally, employees were required to receive a perfect score on a written test before being permitted to perform ear piercings. Stacy Smith, the loss prevention manager for Claire's, further testified as to the piercing procedure. She testified that employees would use gloves and alcohol wipes to clean a customer's ears and the ear piercing instrument. An employee would then mark the area to be pierced with a surgical pen, but Claire's employees were not required to sterilize the surgical pen between customers.

The employee who performed the piercing on Alexis, Erica Stokes, may or may not have had such training. No evidence of her training or testing was found in her employee file. No one at trial testified to training Stokes or seeing proof of such prior training. Ms. Locastro also testified to not seeing Stokes wash her hands prior to piercing her daughter's ear.

A disclosure form was signed by Ms. Locastro that included a release from liability provision, as well as an indemnity provision. Ms. Locastro agreed to the following provisions:

> I am the parent or legal guardian of a minor under 18 years of age, and I hold only myself liable and hereby release and waive any and all claims that I or the minor may make as a result of this ear piercing. I further agree that I shall indemnify and hold Claire's harmless with respect to any and all claims that I or my minor child may make as a result of this ear piercing, even if due to the sole or joint negligent acts or omissions of Claire's Boutiques, Inc., its agents, or employees.

In the same form, Ms. Locastro acknowledged the aftercare requirements of a cartilage piercing, although Alexis testified that she was not instructed about the care for her piercing after the procedure. Ms. Locastro and Alexis both testified to cleaning the ear cartilage around the piercing for days after the piercing. Although there was some redness and swelling, Ms. Locastro did not notice anything unusual until Alexis complained about pain in the ear at a doctor's office nine days after the piercing. Alexis's doctor, Dr. Jantunen, prescribed an antibiotic for the infection. A few days later, with the pain continuing, Dr. Jantunen instructed Alexis to continue taking antibiotics. After a third visit, Dr. Jantunen referred Alexis to a specialist. The specialist immediately sent her to the emergency room, where the wound in her ear was drained due

to a severe infection. Surgery was performed on her ear, and Alexis remained in the hospital for eight or nine days. Alexis testified to having no feeling in the top of the ear. At trial, there was medical testimony that Alexis suffered permanent cartilage deformities as a result of the infection.

At trial, Dr. Jantunen's deposition testimony was entered into evidence. He stated that it was inappropriate for Claire's to reuse a surgical marking pen without having it sterilized and that it was negligent for employees to pierce ears without washing their hands. Dr. Jantunen felt, at a minimum, Claire's should have had a hand-washing sink at the piercing station. Dr. Jantunen concluded that the infection and resulting damage was "most probably caused by the ear piercing" within a reasonable degree of medical probability, and Claire's negligence made the infection more likely to occur.

Dr. Nachman, a pediatric infectious disease specialist, testified that she did not believe that Alexis's infection could have been caused by the surgical marking pen. Likewise, she believed the infection could not have been caused by hand contamination since the type of bacteria causing Alexis's infection does not "colonize on your hands." Moreover, this type of bacteria would have recolonized the area within one day, so the fact that Alexis's infection did not manifest for several days indicates the bacteria came from another source. Dr. Nachman concluded that Claire's had "nothing to do" and was not associated "in any way" with Alexis's infection.

After a trial, the jury returned a verdict for Alexis, finding Claire's 75% negligent. The jury awarded Alexis $7,012 in past medical expenses, $72,987 in past pain and suffering and $20,000 in prospective damages. The final judgment against Claire's was for $69,740. The trial court denied a motion for new trial on the negligence claim.

Separate from the trial of the negligence claim, Claire's filed a cross-motion for summary judgment to compel Ms. Locastro to indemnify Claire's for the negligence claim pursuant to the agreement. Ms. Locastro also filed a motion for summary judgment, claiming that she was immune from liability because she did not have liability insurance and parents are "immune from suit by their children and could be held liable only to the extent of available liability coverage." The trial court found the indemnity provisions valid against Ms. Locastro in her individual capacity, but not in her capacity as Alexis's mother, and entered a judgment against Ms. Locastro for $200,274, inclusive of defense costs, attorney's fees, and the judgment against Claire's. From

the denial of the motion for directed verdict and motion for new trial on the claim of negligence and the summary judgment on the enforcement of the indemnity provision, this appeal ensues.

A trial court's order on a motion for a directed verdict is to be reviewed de novo on appeal. *Dep't of Children & Family Servs. v. Amora*, 944 So. 2d 431, 435 (Fla. 4th DCA 2006). A directed verdict is improper if "any evidence" will support a verdict for the non-moving party. *Id.* The trial court should direct a verdict in favor of the defendant only "where the facts are unequivocal, such as where the evidence supports no more than a single reasonable inference." *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992).

In the present case, Claire's urges that a directed verdict should have been granted since there was insufficient evidence that its actions "caused" the infection and resulting injuries. In negligence cases, like the present one, "Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury." *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984). If sufficient evidence is offered to meet this standard, the remaining questions of causation are to be resolved by the trier of fact. *Wallace v. Dean*, 3 So. 3d 1035, 1047 n.18 (Fla. 2009).

The Florida Supreme Court in *Gooding* cited to Professor Prosser as to the plaintiff's burden of proving causation:

> On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result.

Gooding, 445 So. 2d at 1018 (quoting William Prosser, *Law of Torts* § 41 (4th ed. 1971)). "In other words, the plaintiff must show that what was done or failed to be done probably would have affected the outcome." *Id.* at 1020. Expert testimony is not an absolute requirement to establish causation. *See Atkins v. Humes*, 110 So. 2d 663, 666 (Fla. 1959) ("[J]urors of ordinary intelligence, sense and judgment are, in many cases, capable of reaching a conclusion, without the aid of expert testimony . . . ."); *State Farm Mut. Auto. Ins. Co. v. Penland*, 668 So. 2d 200, 202-03 (Fla. 4th DCA 1995) ("[T]he opinion of an expert should be excluded where facts testified to are of a kind that do not require any special knowledge or experience in order to form a conclusion."). If a

plaintiff does offer expert testimony, the expert need not incant any talismanic phrases to survive a motion for directed verdict, and the expert's testimony should be considered as a whole. *See Edwards v. Simon*, 961 So. 2d 973, 974-75 (Fla. 4th DCA 2007) (finding a medical expert's testimony on the standard of care sufficient to withstand summary judgment where the expert never specifically opined as to whether the physician's actions fell below the standard of care).

Based upon the testimony of Dr. Jantunen, there was evidence that the actions of Claire's in failing to have a sink with warm water for hand washing and in failing to sterilize the reusable surgical marker in between uses was a substantial factor in bringing about Alexis's injury. In addition, there was also Ms. Locastro's testimony of Stokes's failure to wash her hands before the piercing. Together, this would be a sufficient quantum of "any evidence" of causation to survive a directed verdict. Simply, the testimony of the Claire's employees, Dr. Jantunen, Ms. Locastro, and Alexis presented sufficient evidence that the trial court did not err when it denied Claire's motion for directed verdict and motion for new trial. While Dr. Nachman disagreed with Dr. Jantunen, her testimony created an issue of fact for the jury to resolve. Considering all of the evidence presented at trial, we cannot conclude that the facts are so "unequivocal" that the evidence "supports no more than a single reasonable inference" regarding causation. Accordingly, we affirm the order denying a directed verdict for Claire's.

As to the issue raised on cross-appeal, the trial court's entry of summary judgment in favor of Claire's on its claim of contractual indemnity, we reverse. We conclude that a parent's indemnification of a third party for the third party's negligent conduct causing injury to the parent's child violates public policy.

This indemnification agreement between a commercial activity provider and a parent, requiring the parent to indemnify the commercial entity for *its own negligence* when the commercial provider injures the child of the parent, is invalid. Such an onerous provision conflicts with the public policy expressed in *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008), that *requires* the state "to assert its role under parens patriae to protect the interests of the minor children" where a parent's release, or in this case indemnity, would impact a child's well-being and leave a parent with the prospects of bearing the financial burden caused by the negligence of the activity provider, thus protecting only that provider's interest and not the overall welfare of the child. It also conflicts with the public policy pronouncements of both *Ard v. Ard,* 414 So. 2d 1066 (Fla. 1982), and *Joseph v. Quest*, 414 So. 2d 1063 (Fla. 1982).

Parents are generally immune from tort claims brought by their children. *Herzfeld v. Herzfeld*, 781 So. 2d 1070, 1072 (Fla. 2001). Such immunity has been premised on public policies that favor harmonious familial relations and parental discretion over discipline while discouraging the depletion of family resources from frivolous suits, among others. *Id.* at 1072-73, 1076-77. "To reduce the available assets of the family through a straight suit is to reduce the amount available for support, education, and protection of the family as a whole." *Ard v. Ard*, 414 So. 2d 1066, 1067 (Fla. 1982).[1] *Ard* also teaches that:

> Protecting the family unit is a significant public policy behind parental immunity. We are greatly concerned by any intrusion that might adversely affect the family relationship. Litigation between family members would be such an intrusion.

In a case decided on the same day as *Ard*, the supreme court held that a parent could be liable for contribution where the parent's negligence was a cause of injury to the child but only to the extent of existing liability insurance coverage for the parent's tort against the child. The court further explained why a parent should not be generally liable for contribution for injuries sustained by their children:

> Minors and infants must bring suits through a representative, next friend, or guardian ad litem. Fla.R.Civ.P. 1.210(b). *See Youngblood v. Taylor*, 89 So.2d 503 (Fla. 1956). Logically, an infant injured through the combined negligence of a parent and a third party would in most cases bring suit through his parents. If the parents feared possible liability through contribution then it would be their decision and not the child's to withhold suit.
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> Any award that the child received would be his and not a part of the family treasury. The parents would be responsible for using it for the child's welfare or holding the award in trust for the child until he reached the age of majority. And, of course, the parents could not use any of that money as a setoff for their liability. This fact alone can

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[1] Though the Florida Supreme Court has recognized an exception to the general rule of parental immunity for negligence actions brought by children where the parent is insured against the parent's own negligent conduct, this exception does not apply in the instant case because Ms. Locastro had no insurance which would cover the claim. *Ard*, 414 So. 2d at 1067.

> cause a chilling effect on the parents when considering whether to sue where their own negligence is a factor.

Joseph v. Quest, 414 So. 2d 1063, 1064 (Fla. 1982). Thus, public policy prohibits even a *negligent* parent from being compelled to contribute to his or her child's damages because of the strain it would place on the family relationship.

This is even truer with an indemnification agreement such as the one in this case. Under this agreement, not only would the non-negligent parent be responsible for the entire amount of the child's damages, thus depleting the family treasury, but Amy, the mother, is also required to repay all of Claire's costs and legal fees, which in this case amounted to almost three times the amount of damages. Thus, for a $72,000 damage award, Amy is liable for over $200,000. What parent would even attempt to bring suit when the recovery would be so catastrophic to the family fortunes? Thus, the burden of the provider's negligence would fall, not on the responsible party, but on the family and, if they could not provide for the injured child, on the state and its taxpayers. When the agreement induces a parent to act contrary to the child's welfare, the state as parens patriae must step in and void such an agreement.

Kirton v. Fields also compels this result, as its public policy pronouncements relating to the prohibition of parental releases for injuries to children by negligent commercial providers applies as well to parental indemnity agreements. In *Kirton*, our supreme court held that public policy concerns preclude parents from executing a pre-injury release on behalf of a minor or the minor's estate in a tort action arising from injuries suffered in participating in a commercial activity. The court noted that a majority of other states have held that such releases are unenforceable. The court hearkened back to the same public policy arguments made in *Herzfeld* involving the problem of the financial burden to the family where a release precludes a minor from recovering for injuries suffered through a third party's negligence:

> 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.

Kirton, 997 So. 2d at 357.

When a parent agrees to indemnify the third party for its negligence causing injury to the minor child, the same burden shifting occurs. Indemnification "shifts the entire loss from one . . . to another who should bear the costs" for damages resulting from tortious activity. *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490, 493 (Fla. 1979). Indemnification may be arranged by contract, whereby "the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party." *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 643 (Fla. 1999).

Kirton leads to the conclusion that a parental indemnification agreement is violative of public policy. In reaching its result, *Kirton* cited with approval to a number of out-of-state cases holding parental releases unenforceable, which cases also disapproved of parental indemnification agreements based upon public policy. In *Johnson v. New River Scenic Whitewater Tours, Inc.*, 313 F. Supp. 2d 621 (S.D.W.Va. 2004), the court held that a parent could neither waive liability on behalf of his child nor indemnify a third party against the parent's minor child for liability for conduct that violated a state safety statute. *Id.* at 631-32. The court in *Johnson* also recognized a necessary tension that would arise if an indemnification agreement like that in the instant case were enforced:

> [A]llowing a parent to indemnify a third party for its tortious conduct towards the parent's minor child would result in a serious affront to the doctrine of parental immunity. If a parent could enter into a binding contract of indemnification regarding tort injuries to her minor child, the result would be that the child, for full vindication of his legal rights, would need to seek a recovery from his parent. This would clearly abrogate the strong West Virginia public policy to "preserve the peace and tranquility of society and families by prohibiting such intra-family legal battles."

Id. at 632 (citations omitted).

In *Childress By and Through Childress v. Madison County*, 777 S.W.2d 1 (Tenn. App. 1989), also cited in *Kirton*, the court likewise declared a

parental indemnity agreement invalid as against public policy, stating that indemnity provisions were on a similar footing with pre-injury releases. The court noted the conflict which would arise between the parent and child where the parent must indemnify the tortfeasor:

> Indemnification agreements executed by a parent or guardian in favor of tort feasors, actual or potential, committing torts against an infant or incompetent, are invalid as they place the interests of the child or incompetent against those of the parent or guardian. *See Valdimer v. Mt. Vernon Hebrew Camps, Inc.*, 9 N.Y.2d 21, 210 N.Y.S.2d 520, 172 N.E.2d 283, 285 (1961). "Clearly, a parent who has placed himself in the position of indemnitor will be a dubious champion of his infant child's rights." *Id. See also Ohio Casualty Insurance Co. v. Mallison*, 223 Or 406, 354 P.2d 800, 802–803 (1960).

Childress, 777 S.W.2d at 7.

Finally, *Kirton* cited to *Hawkins ex rel. Hawkins v. Peart*, 37 P.3d 1062 (Utah 2001), which also held that a parental indemnity agreement was against public policy. First noting that the common law disfavors agreements to indemnify parties against their own negligence, the court agreed with the New York Court in *Valdimer* that an indemnity agreement places the parent and child at "cross-purposes" which would tend to motivate the parent to discourage the prosecution of the minor's claim because of the financial burden it would place on the family unit, the same reasoning by which *Kirton* held the pre-injury release as violative of public policy. Moreover, *Hawkins* also held that the indemnity agreement was inconsistent with a parent's duty to protect the child's best interests.

We agree with these out-of-state cases and hold that they are consistent with the supreme court's analysis in *Kirton* as well as being cited with approval by the court. Allowing a parent to agree to indemnify a third party for any damages suffered by her child seriously undermines the parent-child relationship and places undue financial burden on the family unit in the same way a pre-injury release compromises those same interests. Thus, such an indemnification agreement is void and unenforceable.

The dissent applies contractual principles and claims freedom of contract requires that the indemnity agreement be upheld. But where that freedom interferes with a child's welfare by reducing the ability of

that child to find redress for the negligence of others, then the state as parens patrie must step in. That is what *Kirton* required with respect to the parental release of the minor's claim, and the same public policy principles of *Kirton, Ard, and Joseph* compel the voiding of the indemnity agreement in this case.

The indemnification agreement is not merely a bad bargain as the dissent suggests. It is an agreement made by the parent which is injurious to the child's best interest, harming a third party—the child. The indemnification agreement will make it likely that, when the child is injured, the parent as natural guardian will not initiate proceedings to recover for injuries, however grievous, because of the concern for the parent's exposure to those damages. *Joseph.* If the child were rendered a quadriplegic as a result of a commercial provider's negligence, who would pay for those expenses? Will the child's life be compromised because of the parent's agreement with the negligent activity provider? Will the state and its taxpayers be required to step in and pay for treatment? The indemnity agreement in this case makes the likely answer to those questions "yes."

The dissent suggests that it is more appropriate to await legislative direction as to whether these indemnity agreements violate public policy. However, the public policy concerns regarding the parent-child relationship and parental immunity and releases developed over the last hundred years as part of the common law through court decisions. *See Herzfeld*, 781 So. 2d at 1072. For most of that time, statutes have not been enacted to either codify or disaffirm court decisions in this area. After *Kirton*, however, the legislature passed a statute to limit its holding by permitting parents to release a commercial activity provider for a child's injuries occurring as a result of the inherent risk of the activity under certain circumstances. *See* § 744.301(3) Fla. Stat. (2010).[2] Those circumstances do not include releasing the commercial activity provider from liability for its own negligence. We think that this limited release clearly evinces a Legislative public policy choice that commercial providers should be liable for their own negligence when minors are injured. In fact, the Senate Staff analysis of the statutory amendment

[2] *Kirton* involved the negligent activity of a commercial activity provider. As Justice Anstead noted in his concurrence, the holding of the majority opinion was narrow and directed at "commercial providers who wrongfully and negligently cause injury to a child but seek to be relieved of liability for their misconduct by securing a pre-activity release from the child's parent." *Id. at 358.* Nevertheless, language in the majority opinion caused the Legislature's concern over the impact of the decision on parental rights, thus permitting a parent to release a commercial provider for inherent risks of an activity.

permitting limited releases states that "the bill does not recognize releases signed by natural guardians that waive negligence, gross negligence, or intentional conduct." Fla. Staff An. S.B. 2440 3/17/2010. Thus, the legislature did not intend to permit commercial activity providers to avoid the consequences of their own negligence when children are injured, recognizing the essential holding of *Kirton.*[3] Validating this parental indemnity agreement would be contrary to that intention. Therefore, holding this agreement invalid is consistent with the expression of the public policy of this state through its statutes.

In respect to the arguments made by the dissent, and upon Claire's motion, we certify the following question as being of great public importance:

> Whether an indemnification agreement executed by a parent agreeing to indemnify a *commercial* activity provider for its **own negligence** in causing injury to the parent's child is enforceable?

Affirmed in part; Reversed in part; Question Certified.

WARNER, STEVENSON, GROSS, TAYLOR and CIKLIN, JJ., concur.
LEVINE, J., concurs in part and dissents in part with opinion, in which MAY, C.J., DAMOORGIAN, GERBER and CONNER, JJ., concur.
HAZOURI, J., recused.

LEVINE, J., concurring in part and dissenting in part.

I agree with the majority's finding that the trial court correctly denied a directed verdict for Claire's on the Locastros' negligence claim, as the Locastros presented sufficient evidence of causation to establish a prima facie claim of negligence. However, I respectfully disagree with the majority's conclusion that the trial court erred in granting summary judgment for Claire's on its claim of contractual indemnity. I agree with the majority's certification to the supreme court.

The majority relies on a line of cases which states that parents are generally immune from tort claims brought by their children. *See generally Herzfeld v. Herzfeld*, 781 So. 2d 1070 (Fla. 2001) (describing

[3] It should be noted that the original version of the statute introduced in the House of Representatives provided for parental waiver even for claims of negligence. *See HB 285* (on file at www.myfloridahouse.gov). The House then adopted Senate Bill 2440 as a committee substitute, recognizing parental releases only for inherent risks of commercial activities. *Id.*

the doctrine of parental immunity); *Ard v. Ard*, 414 So. 2d 1066, 1069 (Fla. 1982) (expressing policy of avoiding "depletion of the family assets at the expense of the other family members"). Applying these cases, the majority makes Ms. Locastro, as the parent, immune from any counterclaims asserted by Claire's, the third party, for injuries sustained by Alexis due to Claire's negligence. These arguments are, of course, very appealing. "To reduce the available assets of the family . . . is to reduce the amount available for support, education, and protection of the family as a whole." *Ard*, 414 So. 2d at 1067. Such an "intrusion . . . might adversely affect the family relationship." *Id.*

It is important to note, however, that Ms. Locastro freely executed this indemnity agreement. Parties are free to negotiate contracts for indemnity. *See Horowitz v. Laske*, 855 So. 2d 169, 174 (Fla. 5th DCA 2003) ("The right to indemnity arises through express or implied contract."). Although Florida courts generally "view with disfavor contracts that attempt to indemnify a party against its own negligence," such a contract will be upheld where the language in the indemnification provision states in "clear and unequivocal terms" that the party's intent is to indemnify another for the indemnitee's own tortious acts. *Zeiger Crane Rentals, Inc. v. Double A Indus., Inc.*, 16 So. 3d 907, 914 (Fla. 4th DCA 2009).

While the majority is persuaded by the "public policy" behind the parental immunity doctrine, I find other considerations to be more persuasive. The Florida Supreme Court once explained as follows:

> When a particular contract, transaction, or course of dealing is not prohibited under constitutional or statutory provision, or prior judicial decision, it should not be struck down on the ground that it is contrary to public policy, except it be clearly injurious to the public good or contravene some established interest of society. Courts, therefore, should be guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, unless it be made clearly to appear that there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract between parties sui juris.

Bituminous Cas. Corp. v. Williams, 17 So. 2d 98, 101-02 (Fla. 1944) (citations omitted); *accord Mazzoni Farms, Inc. v. E.I. DuPont De Nemours*

& Co., 761 So. 2d 306, 311-12 (Fla. 2000). While the majority has highlighted a generalized public policy concern that would invalidate the indemnity agreement, the freedom of contract would weigh, on the other hand, in favor of enforcing the indemnification agreement at issue.

"A fundamental tenet of contract law is that parties are free to contract, even when one side negotiates a harsh bargain." *Barakat v. Broward Cnty. Hous. Auth.*, 771 So. 2d 1193, 1195 (Fla. 4th DCA 2000); *accord Posner v. Posner*, 257 So. 2d 530, 535 (Fla. 1972) ("Freedom to contract includes freedom to make a bad bargain."). Ms. Locastro freely entered this agreement in exchange for the services provided to Alexis. Her signature on the document was not procured by fraud or duress. Ms. Locastro was free not to enter into this contract. *See Yachting Promotions, Inc. v. Broward Yachts, Inc.*, 792 So. 2d 660, 663 (Fla. 4th DCA 2001) (noting that the "freedom of contract entails the freedom not to contract") (citation omitted). Ms. Locastro did not have to utilize the services of Claire's for her daughter and could have walked away from the transaction. She did not, and instead she executed the contract.

The law cannot and will not presume that a party intended to form an illegal or unenforceable contract. *Neiman v. Galloway*, 704 So. 2d 1131, 1132 (Fla. 4th DCA 1998) (citing *Edwards v. Miami Transit Co.*, 7 So. 2d 440, 442 (Fla. 1942)). Likewise, I will not assume that Ms. Locastro entered into an illegal contract, and this court should not relieve Ms. Locastro of her contractual duties because her agreement "turn[ed] out to be a bad bargain." *Barakat*, 771 So. 2d at 1195.

The indemnity agreement signed by Ms. Locastro with the indemnification provision is an otherwise valid contract, and there is no statutory or precedential reason not to enforce it. Ms. Locastro admitted to signing the indemnity form provided to her by Claire's. She should be held to her obligation, notwithstanding our desire to empathize with her situation.

Further, the trial court enforced the indemnification against Ms. Locastro as an individual, not against Ms. Locastro as Alexis's mother. The monies awarded for Alexis as a judgment in this case would be separate and distinct from the judgment awarded for Claire's as a result of the indemnity agreement signed by Ms. Locastro as an individual. Ms. Locastro may not use these funds to satisfy her own obligations and may use those funds to support Alexis only with court authorization. §§ 744.361(6)(a), 744.397(3), Fla. Stat. Thus, a judgment against Ms. Locastro does not vitiate the judgment in favor of Alexis.

The majority references *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008). *Kirton* stands for the proposition that a "pre-injury release executed by a parent on behalf of a minor child is unenforceable against the minor or the minor's estate in a tort action arising from injuries resulting from participation in a commercial activity." *Id.* at 358. The Florida Supreme Court asserted that the "parent's decision in signing a pre-injury release impacts the minor's estate and the property rights personal to the minor." *Id.* at 357 (citation omitted). In the present case, the trial court protected the rights of the minor by finding the indemnity provisions valid against Ms. Locastro individually, not in her capacity as a parent. Again, the judgment entered on behalf of Alexis was separate and distinct from any monies the trial court determined that Ms. Locastro owed in her individual capacity to indemnify Claire's. By safeguarding the judgment entered on behalf of Alexis, the trial court followed the spirit and the letter of *Kirton* by protecting the property rights of the minor child.[4] *Id.* at 357-58.

I also disagree with the majority's conclusion that the issue in this case involves the doctrine of parens patriae, as the parent-child relationship is not per se involved. This case does not involve a situation where a child has sued her parent. Instead, the child sued a third party, and the third party asserted a counterclaim against the parent. While the state can intervene in the parent-child relationship in limited instances when necessary to protect the child, the state has no legal

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[4] The majority places reliance on the supreme court's citation of *Johnson v. New River Scenic Whitewater Tours, Inc.*, 313 F. Supp. 2d 621 (S.D. W. Va. 2004). In *Johnson*, the court held that an activity provider who violates a state safety statute and causes harm to a minor cannot enforce an indemnity agreement executed by the parent. Claire's has not been accused of failing to comply with a comparable legislative enactment. Moreover, the court in *Johnson* was not professing the public policy of any jurisdiction. That court merely "predict[ed] what [the West Virginia Supreme Court] would decide were it confronted with this issue." *Id.* at 631. A federal court sitting in diversity "write[s] in faint and disappearing ink," because its opinion is little more than an educated guess rather than a definitive pronouncement of state law or policy. *McMahan v. Toto*, 311 F.3d 1077, 1079-80 (11th Cir. 2002) (citation omitted).

The majority also relies on *Childress ex rel. Childress v. Madison County*, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989), which recognized the "good and logical reasons for giving effect to exculpatory and indemnification clauses executed by parents and guardians on behalf of infants and incompetents. Risk is inherent in many activities that make the lives of children richer. A world without risk would be an impoverished world indeed." The *Childress* court postulated that if the rule they annunciated was "other than as it should be, we feel the remedy is with the Supreme Court or the legislature." *Id.* at 8.

authority to intervene in a contract between Ms. Locastro individually and Claire's. Though *Kirton* relied on the doctrine of parens patriae, *Kirton* involved a parent signing a waiver on the child's behalf. Thus, the parent-child relationship was involved. In contrast, Ms. Locastro, by signing the indemnification agreement, bound only herself.

The majority also suggests that the enforcement of executed and enforceable indemnification agreements could possibly discourage parents from pursuing lawsuits on behalf of their children. Of course, this speculation, which may or may not prove to be true, still does not overcome the basic premise that Ms. Locastro would not have had to confront this decision of whether to pursue a lawsuit if she had not utilized the services offered, if she had not executed the indemnification agreement, or if she found a business that did not require the execution of such an agreement. After all, piercing services are hardly the type of services that constitute adhesion contracts. Ms. Locastro and Alexis could have kept walking in the mall from this business to another store for the services, or they could have skipped having Alexis's ear cartilage pierced altogether.[5]

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[5] Justice Markman of the Michigan Supreme Court, commenting on the parent-child relationship, has stated:

> The common-law rule that parents are empowered to make important decisions regarding their children was recognized in *In re Rosebush*, 195 Mich.App. at 682–683, 491 N.W.2d 633 [(Mich. Ct. App. 1992)]. *See also In re L.H.R.*, 253 Ga. 439, 445, 321 S.E.2d 716 ([Ga.] 1984) ("The right of the parent to speak for the minor child is . . . imbedded in our tradition and common law . . . ."). Moreover, as previously indicated, caselaw holds that parents are presumed to act in the best interests of their children and are entitled to make judgments and decisions concerning risks to their children.
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> . . . .
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> A majority of the justices forbid parents under all circumstances to undertake even a perfectly rational decision to assess the risks and benefits when determining what is in the best interests of their children. Instead, such decision-making will now be monopolized by judges, and the answer will always be the same: "No. The parent cannot be permitted to make such a determination."

Woodman ex rel. Woodman v. Kera LLC, 785 N.W.2d 1, 36-37 (Mich. 2010) (Markman, J., concurring).

I would note that the majority's invalidation of a freely executed indemnification agreement as an extension of "public policy" is a decision that would be best determined by the legislature.[6] It is axiomatic that the courts are not in the best position to determine the most effective course for the furtherance and extension of public policy as a whole.[7] Further, court decisions should not turn on "the philosophy or predilection of judges as to what the law ought to be." *Ball v. Branch*, 16 So. 2d 524, 525 (Fla. 1944).

If the legislature wanted to foreclose the use of indemnification agreements by parents when contracting with third parties for services for their minor children, then the legislature would have acted. For instance, the Florida Supreme Court noted that "[t]he Legislature has chosen to authorize court protection of children's interests as to [the settlement of] extant causes of action, but has not exercised its prerogative as parens patriae to prohibit arbitration of those claims." *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 403 (Fla. 2005). In *Shea*, the court upheld an arbitration agreement signed by the parent on behalf of a minor child or minor child's estate arising out of a tort action. "In the absence of legislation restricting agreements to arbitrate the potential claims of minors, enforcement of these agreements in commercial travel contracts is not contrary to the public policy of protecting children." *Id.* at 405. It is significant that in *Shea*, the Florida Supreme Court found that the absence of legislative restriction was effectively an approval of arbitration agreements executed by parents on behalf of their children.

The legislature has, in fact, acted in response to *Kirton*. Section 744.301, Florida Statutes, has been recently amended to authorize a parent "to waive and release, in advance, any claim or cause of action against a commercial activity provider . . . which would accrue to a minor child for personal injury, including death, and property damage resulting from an inherent risk in the activity."[8] § 744.301(3), Fla. Stat. (2010). At

[6] The separation of governmental powers was aptly described by Justice Pariente as being the "cornerstone of American democracy." *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).

[7] Legal commentators have, at times, written about the intended and unintended consequences of judicial decisions. For instance, at least one writer has opined on the effects of *Kirton*. Jordan A. Dresnick, *The Minefield of Liability For Minors: Running Afoul of Corporate Risk Management in Florida*, 64 U. Miami L. Rev. 1031, 1058 (2010).

[8] The amendment is a direct response to the holding in *Kirton*. Fla. S. Comm. on Judiciary, CS/SB 2440 (2010) Staff Analysis 10 (Mar. 21, 2010) (on file at

the same time, the legislature also implicitly excluded from this explicit grant of power the right of a parent to waive his or her child's negligence claims against the activity provider. § 744.301(3)(a)2., Fla. Stat. It is clear that the legislature can give statutory guidance regarding settlement of a minor's legal claims, as demonstrated by *Shea*. The legislature has also offered guidance by specifying a class of claims that a parent may waive, as evidenced by the statute enacted in response to *Kirton*. In the present case, the legislature has not exercised that same authority to prohibit parents from signing indemnification agreements with third parties who provide commercial services to minors. One could postulate, based on *Shea*, that the lack of legislative restriction could be just as reasonably interpreted as an approval of the indemnification agreement at issue in the present case.

The majority states that "public policy concerns regarding the parent-child relationship and parental immunity and releases" have "developed over the last hundred years as part of the common law." Although it is true that the courts in general, when interpreting the common law, may "properly extend old principles to new conditions," it is also equally true that "it is the province of the legislature and not of the court to modify the rules of the common law." *State v. Egan*, 287 So. 2d 1, 6 (Fla. 1973). In *Egan*, the Florida Supreme Court concluded that "[u]nder our constitutional system of government, however, courts cannot legislate. They cannot abrogate, modify, repeal, or amend rules long established and recognized as parts of the law of the land." *Id.* at 7.

In the past when courts "extended" common law principles to newer conditions,

> the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely "discovered" rather than created. It is only in this century . . . that we came to acknowledge that judges in fact "make" the common law, and that each state has its own.

Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution & Laws*, *in A Matter of Interpretation: Federal Courts & the Law* 10 (Antonin Scalia & Amy Gutmann eds., 1997). Thus, as Justice Souter has stated, "in most

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http://www.myfloridahouse.gov/). Although not directly addressed by the senate bill, the legislature acknowledged the fact that "indemnification clauses" are "[e]xculpatory clauses [that] extinguish or limit liability." *Id.* at 4.

cases where a court is asked to state or formulate a common law principle in a new context . . . the law is not so much found or discovered as it is either made or created." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

However, Justice Scalia recognized the inevitable tension in the "uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of the separation of powers)." Scalia, *supra*, at 10. Recognizing this tension, judges have long acknowledged that courts are not free agents in how they decide cases and apply the common law which has developed over time. As then-Judge Cardozo explained:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the "primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921) (footnote omitted). The judge is constrained by the history and experience of the applicable common law principle. "The life of the law has not been logic – it has been experience." Oliver Wendell Holmes, *The Common Law* 1 (1881). Thus, the foundation of the common law is the actual customs and practices of the people over time. "Indeed, it is contrary to our common-law experience not to bring the common law into accord with the *actual* customs and practices of its citizens . . . ." *Woodman*, 785 N.W.2d at 44 (Markman, J., concurring). There is no evidence in this record that demonstrates that the execution of an indemnification agreement by a parent on behalf of her child is inconsistent with the actual custom or practices of the citizenry of this state.

To "create" new extensions in the common law by invalidating an otherwise valid indemnity provision in the absence of any legislative guidance would be to impose a "preferable" or more "equitable" result by judicial fiat, to the detriment of the enforcement of a freely negotiated contract. As Justice Holmes once stated,

> Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. . . . The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.

Oliver Wendell Holmes Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897). As "harsh" as the result may appear, I find no legal reason to find the indemnity agreement unenforceable, and Ms. Locastro should therefore be liable to Claire's pursuant to the agreement she freely executed.

For all the foregoing reasons I would affirm the judgment of the trial court in its entirety.

MAY, C.J., DAMOORGIAN, GERBER and CONNER, JJ., concur.

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Appeal and cross-appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Diana Lewis, Judge; L.T. Case No. 50-2007-CA-006612AF.

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