STATE OF MICHIGAN

COURT OF APPEALS

TRENT WOODMAN, a Minor, Through his Next Friend, SHEILA WOODMAN Plaintiff-Appellee,	FOR PUBLICATION August 12, 2008 9:00 a.m.
V KERA, L.L.C., d/b/a BOUNCE PARTY Defendant-Appellant.	No. 275079 Kent Circuit Court LC No. 06-000802-NO
TRENT WOODMAN, a Minor, Through his Next Friend, SHEILA WOODMAN Plaintiff-Appellant,	
v KERA, L.L.C., d/b/a BOUNCE PARTY Defendant-Appellee.	No. 275882 Kent Circuit Court LC No. 06-000802-NO Advance Sheets Version

Before: Bandstra, PJ, and Talbot and Schuette, JJ.

TALBOT, J.

Trent Woodman, a minor, through this mother and next friend, Sheila Woodman, appeals the orders granting defendant's motion for summary disposition of plaintiff's negligence claim and denying plaintiff's motion for summary disposition with regard to defendant's affirmative defense of waiver. Defendant appeals the order denying defendant's motion for summary disposition of plaintiff's claims of gross negligence and violation of the Consumer Protection Act.[1] I would reverse and remand to the trial court.

[1] This Court granted each party's respective applications for leave to appeal and consolidated the two appeals. *Woodman v Kera LLC*, unpublished orders of the Court of Appeals, entered April
(continued…)

I. Factual History

Sheila Woodman rented defendant's facility, which contains large, inflatable play equipment, for her son's fifth birthday party. Defendant provided invitations to Sheila Woodman, which she subsequently forwarded to the party guests. The content of the invitation was as follows:

> _____ has been invited to a _____ party
> for _____.
> The party will be held at **Bounce Party**
> on _____, _____ from _____ to _____.
> Please RSVP at _____ before _____.

> We are hosting our party at Bounce Party in Kentwood. We will have chaperon[e]s present to ensure that this is a safe and enjoyable party. We need a parent/guardian to review and sign the information below and send it with your child on party day. Please have your child at Bounce Party 15 minutes before the party start time.
>
> Thank you, _____
>
> Your Host
>
> Bounce Party is an indoor inflatable play arena with interactive inflatables. Your child may have the opportunity to bounce, slide, maneuver mazes, run challenge courses, bouncy box, bungee basketball and joust. Your hosts will have chaperon[e]s on site and we will have staff members present. To ensure a safe and enjoyable party please be sure that your child follows these few simple rules prior to attending the party.
>
> ◊ Please RSVP to your host. We really hope you will be able to attend the party.
>
> ◊ Wear CLEAN socks. No shoes or bare feet are allowed in the play arena.
>
> ◊ Wear comfortable clothes.
>
> ◊ Leave all jewelry, sharp objects, keys, hair bands, pencils, watches, etc. at home.
>
> ◊ Let your child know that good manners are expected and inappropriate behavior will result in removal.

(…continued)

13, 2007 (Docket Nos. 275079 and 275882).

◊ Be sure that the parent/guardian of the guest signs this release and the guest brings it with them to the party. Anyone without parent/guardian approval will not be able to participate in the arena games. If you have multiple guests in your family, you can list all their names on this one form.

THE UNDERSIGNED, by his/her signature herein affixed does acknowledge that any physical activities involve some element of personal risk and that, accordingly, in consideration for the undersigned waiving his/her claim against BOUNCE PARTY, and their agents, the undersigned will be allowed to participate in any of the physical activities.

By engaging in this activity, the undersigned acknowledges that he/she assumes the element of inherent risk, in consideration for being allowed to engage in the activity, agrees to indemnify and hold BOUNCE PARTY, and their agents, harmless from any liability for personal injury, property damage or wrongful death caused by participation in this activity. Further, the undersigned agrees to indemnify and hold BOUNCE PARTY, and their agents, harmless from any and all costs incurred including, but not limited to, actual attorney's fees that BOUNCE PARTY, and their agents, may suffer by an action or claim brought against it by anyone as a result of the undersigned's use of such facility.

Participant: _____Signature: _____
PRINTED NAME Parent or Legal Guardian's signature if participate [sic] is under age 18.

Date: _____

BE SURE YOU COMPLETE THIS CARD AND SEND IT WITH THE PARTY GUEST!

On the day of the party, plaintiff's father, Jeffrey Woodman, signed the above document on plaintiff's behalf. An employee of defendant conducted a "safety talk" before the party started, which defendant asserted specifically included an instruction not to jump from the slide. In addition, written rules posted on the slide and the wall informed guests not to jump from the slide. However, after correctly using the slide five times, plaintiff jumped from the top of the slide, fell to the ground, and broke his leg.

II. Lower-Court Procedural History

Plaintiff, through his mother and next friend, filed a three-count complaint against defendant, alleging gross negligence, negligence, and violation of Michigan's Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Plaintiff alleged that defendant knowingly failed

to provide supervision, ignored the slide's manufacturer's warnings and safety instructions, did not properly equip the slide with available safety devices, and failed to have an attendant to monitor the slide. Plaintiff contended that these failures and omissions were the direct and proximate causes of his injuries. With respect to the MCPA claim, plaintiff alleged that defendant falsely advertised itself as providing a safe play environment when, in fact, defendant knew it failed to install appropriate safety equipment and provide adequate supervision. Defendant filed an answer to the complaint, denying plaintiff's claims and asserting affirmative defenses, including the defense of waiver.

On July 27, 2006, pursuant to MCR 2.116(C)(7), (8), and (10), defendant moved for summary disposition of all three counts. Defendant argued that plaintiff's father signed a valid release on behalf of plaintiff and waived all of plaintiff's potential claims against defendant and that plaintiff could not prove gross negligence. Further, even if gross negligence could be demonstrated, defendant contended that liability was precluded because the danger of jumping from the slide constituted an open and obvious hazard. Defendant asserted that it had no duty to supervise plaintiff because his parents were with him at the time of the accident. Defendant urged the trial court to dismiss plaintiff's MCPA claim because defendant did not make any misrepresentations and the allegations made in the complaint do not comprise the type of case the MCPA was designed to remedy. Concurrently, plaintiff moved for summary disposition on defendant's affirmative defense of waiver, pursuant to MCR 2.116(C)(8) and (10). Plaintiff argued that the purported waiver was invalid as a matter of law because a parent may not waive, release, or compromise claims by or against his or her child.

The trial court conducted a hearing on the summary-disposition motions on September 14, 2006. The trial court determined that the waiver, signed by plaintiff's parent, was valid and should be given effect. When granting summary disposition on the waiver issue, the trial court noted the absence of "any Michigan case which says that a parent who signs a waiver like this one prior to a child engaging in an activity is engaging in an act which is a legal nullity." The trial court further opined that it concurred with the general proposition that a parent can validly execute a waiver approving his or her child's participation in an activity and dismissed plaintiff's claim of ordinary negligence.

Considering plaintiff's gross-negligence claim, the trial court opined that plaintiff's counsel provided a sufficient demonstration that defendant ignored specific instructions or recommendations regarding use and staffing for the slide. The trial court denied defendant's motion to dismiss plaintiff's gross-negligence claim because it found that "a reasonable finder of fact could conclude from that conduct that it constitutes a substantial indifference to whether an injury results from the operation of the slide."

Addressing defendant's defense of open and obvious danger, the trial court questioned whether a five-year-old had the intellectual capacity to comprehend the dangers inherent in jumping off a slide. Recognizing that negligence cannot be imputed to a child under the age of seven, the trial court reasoned that "[i]f negligence can't be imputed to them, I'm not really sure how they can be barred from proceeding by the open and obvious doctrine." The trial court further rejected defendant's assertion that it had no duty to supervise plaintiff because of the presence of his parents, ruling that "the nature of the defendant's business is such that they have an inherent obligation in that regard." Because the scope of defendant's duty and whether it

breached an existent duty comprised questions of fact for the jury, the trial court declined to grant defendant's request for summary disposition on this issue. Although the trial court questioned the applicability of the MCPA to plaintiff's claim, it declined to dismiss the claim until the issue could be further developed.

On November 6, 2006, pursuant to MCR 2.116(C)(8) and (10), plaintiff again moved for summary disposition regarding defendant's affirmative defense of waiver, asserting that the invitation language was insufficient to constitute a waiver. Plaintiff argued that the invitation did not waive or indemnify negligence claims against defendant because the document only addressed risks inherent in participating in the activities at defendant's facility. Defendant responded that the invitation constituted a valid waiver and barred all claims by plaintiff of ordinary negligence. The trial court concluded that the language contained in the waiver sufficiently apprised the signatory of the inherent risks involved in the activities and the assumption of those risks. Finding the language of the waiver provided clear notice, the trial court declined plaintiff's request to invalidate the waiver and also rejected plaintiff's assertion that defendant violated public policy through false advertising or claims regarding the safety of the facility. The trial court's rulings were subsequently memorialized in an order entered November 27, 2006.

Plaintiff moved for reconsideration of the trial court's decision to uphold the validity of the invitation as a valid waiver of the negligence claim. Plaintiff argued that the trial court should reconsider its ruling because courts in other jurisdictions have invalidated similar provisions purporting to waive the negligence of for-profit businesses. However, plaintiff acknowledged that other state courts have upheld waivers to preclude negligence claims in situations involving nonprofit organizations or schools. The trial court denied plaintiff's motion for reconsideration, and this appeal ensued.

III. Issues on Appeal

In Docket No. 275079, defendant challenges the failure of the trial court to dismiss plaintiff's claims of gross negligence and violation of the MCPA. Defendant additionally asserts that the danger posed by jumping off the high point of a slide constitutes an open and obvious danger and contends that it did not have a duty to supervise plaintiff given the presence and proximity of his father to the slide when plaintiff was injured.

In Docket No. 275882, plaintiff poses the question whether the law and public policy of this state preclude effectuation of a preinjury waiver signed by a parent on behalf of his or her minor child. Plaintiff specifically queries the applicability of such a waiver to preclude liability of a for-profit business such as that engaged in by defendant.

IV. Standard of Review

This Court reviews a trial court's grant or denial of summary disposition de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Issues of statutory interpretation also comprise questions of law, which we review de novo. *Newton v Bank West*, 262 Mich App 434, 437; 686 NW2d 491 (2004).

In accordance with MCR 2.116(C)(7), a litigant may seek dismissal of a claim on the basis that it is barred because of a release. The filing of supportive materials or documents is not required. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). However, if documentation is provided in conjunction with a motion for dismissal under this subsection of the court rule, the materials provided must constitute admissible evidence and require consideration by the court. MCR 2.116(G)(5). All the plaintiff's well-pleaded factual allegations and other admissible documentary evidence must be accepted as true and construed in favor of the plaintiff, unless contradicted by documentation filed by the movant. *Maiden, supra* at 119.

As discussed in *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007):

> Summary disposition under either MCR 2.116(C)(8) or (C)(10) presents an issue of law for [the Court's] determination and, thus, [the Court] review[s] a trial court's ruling on a motion for summary disposition de novo. Where the parties rely on documentary evidence, appellate courts proceed under the standards of review applicable to a motion made under MCR 2.116(C)(10).
>
> A motion made under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ.
>
> When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. But such materials "shall only be considered to the extent that [they] would be admissible as evidence . . . ." [Internal quotation marks and citations omitted.]

V. Other Jurisdictions

A. General/Overview

At its most basic level, the predominant issue presented in this case concerns the authority of a parent to bind his or her minor child to an exculpatory agreement, which functions to preclude a defendant's liability for negligence, before an injury has even occurred. In its most general sense the issue juxtaposes the inherent rights and fundamental authority of a parent to make determinations for his or her minor child pursuant to the Fourteenth Amendment against

public-policy concerns and the state's authority in accordance with the doctrine of *parens patriae*.[2]

The United States Supreme Court has recognized the fundamental right of parents to make decisions pertaining to the care, custody, and control of their minor children. See *Troxel v Granville,* 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000). The recognition of this right is based, in part, on

> [t]he law's concept of the family [which] rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. [*Parham v J R,* 442 US 584, 602; 99 S Ct 2493; 61 L Ed 2d 101 (1979).]

In addition, a presumption exists that "fit parents act in the best interests of their children." *Troxel, supra* at 68. Consequently, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69. Historically, this is consistent with rulings by the United States Supreme Court indicating that the inherent nature of parenthood is comprised of the companionship of a child and the right to make decisions pertaining to the child's care, control, health, education, religious affiliations, and associations. See *Pierce v Society of Sisters*, 268 US 510, 534-535; 45 S Ct 571; 69 L Ed 1070 (1925); *Meyer v Nebraska,* 262 US 390, 399; 43 S Ct 625; 67 L Ed 1042 (1923).

Some jurisdictions have used these precepts regarding the dominance of parental authority to validate preinjury waivers to preclude liability. By way of example, the United States District Court for the District of Colorado has upheld the enforceability of a waiver signed by a parent on behalf of his minor child. *Brooks v Timberline Tours, Inc,* 941 F Supp 959 (D Colo, 1996). See, also, *Lantz v Iron Horse Saloon, Inc,* 717 So 2d 590 (Fla App, 1998). In Massachusetts, upholding a parental waiver permitting a minor to participate in a school cheerleading program, it was held: "In the circumstance of a voluntary, nonessential activity, we will not disturb this parental judgment. This comports with the fundamental liberty interest of parents in the rearing of their children, and is not inconsistent with the purpose behind our public policy permitting minors to void their contracts." *Sharon v City of Newton,* 437 Mass 99, 109; 769 NE2d 738 (2002). Specifically, the court noted "[t]he enforcement of the release is consistent with the Commonwealth's policy of encouraging athletic programs for youth and does not contravene the responsibility that schools have to protect their students." *Id.* at 110-111.

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[2] "'Parens patriae,' which is Latin for 'parent of his or her country,' describes 'the state in its capacity as provider of protection to those unable to care for themselves.'" *Global Travel Marketing, Inc v Shea,* 908 So 2d 392, 399 (Fla, 2005), quoting Black's Law Dictionary (8th ed), p 1144.

The *Sharon* court indicated that its decision to uphold the validity of the waiver was consistent with specific exceptions based on public policy embodied in statutory provisions exempting nonprofit and volunteer organizations from negligence liability for similar activities. *Id.* at 109.

Other jurisdictions, relying on public-policy concerns pertaining to the protection of the best interests of minors, have ruled preinjury exculpatory agreements invalid. Rejecting "the argument that a parental release of liability on behalf of a minor child implicates a parent's fundamental right to direct the upbringing of his or her child," the New Jersey Supreme Court, in *Hojnowski v Vans Skate Park*, 187 NJ 323, 339; 901 A2d 381 (2006), instead emphasized that "the question whether a parent may release a minor's future tort claims implicates wider public policy concerns and the *parens patriae* duty to protect the best interests of children." The court opined that the need to protect children was not at odds and did not unnecessarily interfere "with the constitutionally protected right of a parent to permit or deny a child's participation in any or all of the recreational activities that may be available." *Id.* (internal quotation marks and citation omitted). Relying on the legislative enactments historically providing protection to children's interests, coupled with the need to "discourage negligent activity on the part of commercial enterprises attracting children," the court held "that a parent's execution of a pre-injury release of a minor's future tort claims arising out of the use of a commercial recreational facility is unenforceable." *Id.* at 338.

The Utah Supreme Court, in *Hawkins v Peart*, 37 P3d 1062, 1066 (Utah, 2001), citing *Scott v Pacific West Mountain Resort*, 119 Wash 2d 484; 834 P2d 6 (1992), relied on the "premise that a parent may not unilaterally release a child's claims *after* a child's injury" to support its "conclusion that a parent does not have the authority to release a child's claims *before* an injury." (Emphasis in original.) Refusing to attribute validity to an executed release on the basis of the timing of the injury, the court explained its reasoning, stating, in relevant part:

> An exculpatory clause that relieves a party from future liability may remove an important incentive to act with reasonable care. These clauses are also 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 and 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 even greater force in the preinjury, exculpatory clause scenario. [*Hawkins, supra* at 1066.]

Similarly, the Colorado Supreme Court, in *Cooper v Aspen Skiing Co*, 48 P3d 1229, 1232 (Colo, 2002),[3] while recognizing the dissonance created between the "well-settled principle that '[a]

[3] We note that the *Cooper* case has subsequently been superseded by statute. See *Pollock v* (continued…)

minor during his minority, and acting timely on reaching his majority, may disaffirm any contract that he may have entered into during his minority'" and "'our traditional regard for freedom of contract,'" ruled in accordance with public-policy concerns, which established "protections which preclude parents or guardians from releasing a minor's own prospective claim for negligence." *Id.* (citations omitted). The court opined, "'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.'" *Id.* at 1233 (citation omitted). As a result, the court ruled, in relevant part:

> Colorado's public policy disallows a parent or guardian to execute exculpatory provisions on behalf of his minor child for a prospective claim based on negligence. Specifically, we hold that a parent or guardian may not release a minor's prospective claim for negligence and may not indemnify a tortfeasor for negligence committed against his minor child. [*Id.* at 1237.]

B. Waiver Exceptions

There appear to be two types of cases that recognize exceptions to the preclusion of a parent's unilateral authority to waive or release a child's claims before or even after an injury. The first type of case deals with specific, statutorily created exceptions, which restrict the forum for bringing a claim rather than provide an absolute waiver of any negligence. Typically, "a waiver executed by a parent on behalf of a minor is supported by public policy when it relates to obtaining medical care, insurance, or participation in school or community sponsored activities." *Fields v Kirton*, 961 So 2d 1127, 1129 (Fla App, 2007).[4] Distinguishing between the restriction or preclusion of "parents from deciding what activities may be appropriate for their minor children's participation" from "the effect of [a] release insulating the provider of the activity from liability for negligence inflicted upon the minor" the court in *Fields* opined that "[t]he 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." *Id.* Consequently, on the basis of the potential effect resulting from a parent's determination to execute a preinjury release of a minor child's property rights, the *Fields* court determined that the child's "rights cannot be waived by the parent absent a basis in common law or statute." *Id.* at 1130. Often, these cases involve waivers regarding the right to mediate or arbitrate disputes for potential or future injuries and have identified an important distinction between "[w]hether a parent may waive his or her child's substantive rights" and "whether a parent may agree that any dispute arising from the contract may be arbitrated rather than decided in a court of law." *Global Travel Marketing, Inc v Shea*, 908 So 2d 392, 401 (Fla, 2005). In these instances, the courts distinguish arbitration clauses from releases of liability:

(…continued)

Highlands Ranch Community Ass'n, Inc, 140 P3d 351 (Colo App, 2006).

[4] We note that the Florida Supreme Court accepted jurisdiction in this matter to address the question certified by the Florida District Court of Appeal:"Whether a parent may bind a minor's estate by the pre-injury execution of a release." *Fields, supra* at 1130; *Kirton v Fields*, 973 So 2d 1121 (Fla, 2007).

> "[W]e note that the parent's consent and release to arbitration only specifies the forum for resolution of the child's claim; it does not extinguish the claim. Logically, if a parent has the authority to bring and conduct a lawsuit on behalf of the child, he or she has the same authority to choose arbitration as the litigation forum." [*Id.* at 402, quoting *Cross v Carnes*, 132 Ohio App 3d 157, 169; 724 NE2d 828 (1998).]

The second type of exception used to uphold the validity of a preinjury waiver is reliant on public-policy arguments. Our research indicates that many jurisdictions engage in this type of compromise or hybrid, upholding the validity of certain releases or exculpatory agreements in limited or defined circumstances involving schools, religious organizations, and other public, nonprofit, or voluntary functions provided to children within communities. Courts have attempted to define the standards or elements to be used in making these determinations. By way of example, in *Tunkl v Univ of California Regents*, 60 Cal 2d 92, 99-101; 32 Cal Rptr 33; 383 P2d 441 (1963) (footnotes omitted), the court listed the criteria to be used for determining public-policy limitations on releases as follows:

> [T]he attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. [1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

A more abbreviated version of the elements to be considered in these circumstances is provided in *Jones v Dressel*, 623 P2d 370, 376 (Colo, 1981), which states, in relevant part:

> In determining whether an exculpatory agreement is valid, there are four factors which a court must consider: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.

Notably, *Jones* cited the standard elucidated in *Tunkl* for determining "the existence of a duty to the public." *Id.*

In this line of cases, the focus of the courts is directed "not [on] whether the release violates public policy; but rather that public policy itself justifies the enforcement of [the] agreement." *Zivich v Mentor Soccer Club, Inc,* 82 Ohio St 3d 367, 370; 696 NE2d 201 (1998). Specifically, in *Zivich* the court summarized its concerns as follows:

> It cannot be disputed that volunteers in community recreational activities serve an important function. Organized recreational activities offer children the opportunity to learn valuable life skills. It is here that many children learn how to work as a team and how to operate within an organizational structure. Children also are given the chance to exercise and develop coordination skills. Due in great part to the assistance of volunteers, nonprofit organizations are able to offer these activities at minimal cost. . . . Clearly, without the work of its volunteers, these nonprofit organizations could not exist, and scores of children would be without the benefit and enjoyment of organized sports. Yet, the threat of liability strongly deters many individuals from volunteering for nonprofit organizations. Insurance for the organizations is not the answer, because individual volunteers may still find themselves potentially liable when an injury occurs. Thus, although volunteers offer their services without receiving any financial return, they place their personal assets at risk.
>
> Therefore, faced with the very real threat of a lawsuit, and the potential for substantial damage awards, nonprofit organizations and their volunteers could very well decide that the risks are not worth the effort. Hence, invalidation of exculpatory agreements would reduce the number of activities made possible through the uncompensated services of volunteers and their sponsoring organizations. [*Id.* at 371-372 (citations omitted).]

On the basis of this reasoning, the *Zivich* court opined that "public policy justifies giving parents authority to enter into these types of binding agreements on behalf of their minor children" and that "enforcement of these agreements may well promote more active involvement by participants and their families, which, in turn, promotes the overall quality and safety of these activities." *Id.* at 372. Consequently, the court, defining the parameters of the ruling, stated, in relevant part, that "parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence. These agreements may not be disaffirmed by the child on whose behalf they were executed." *Id.* at 374. This same reasoning was acknowledged and adopted in *In re Royal Caribbean Cruises Ltd,* 459 F Supp 2d 1275, 1279-1280 (SD Fla, 2006), when the court refused to exonerate Royal Caribbean from liability on the basis of the execution of a waiver by the parent of a minor child. Citing with approval *Zivich* and other preinjury cases in various jurisdictions, the court distinguished their holdings from the circumstances in the present action as involving "parental pre-injury releases executed for purposes of a minor's participation in nonprofit, community based, and/or school related activities rather than parental pre-injury releases related to private for profit activities." *Id*. at 1280.

VI. Michigan

A. Overview

In analyzing the current status of the law in Michigan, our starting point is the well-recognized common-law premise, cited and adopted through a prolonged history of caselaw 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." *Tuer v Niedoliwka*, 92 Mich App 694, 698-699; 285 NW2d 424 (1979). Caselaw in Michigan demonstrates adherence to this common-law precept, which places strict limitations on a parent's authority to compromise claims on behalf of the parent's minor child. By way of example, we note our Supreme Court's ruling in *O'Brien v Loeb*, 229 Mich 405, 408; 201 NW 488 (1924), involving injuries sustained by a 10-year-old child in a collision between an automobile and a horse-drawn wagon. Before initiation of trial, the child's mother purportedly accepted a sum in full settlement of her child's claims arising from the accident. Noting the absence of a "contract by the infant," the Court stated, in relevant part:

> 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.* (internal quotation marks and citation omitted).]

Despite recognition by our Court that "[t]he status of a parent is one of guardian by nature," courts in this state have consistently ruled that "[u]nless authorized by statute, a guardian is without power to bind the infant or his estate." *Reliance Ins Co v Haney*, 54 Mich App 237, 242; 220 NW2d 728 (1974). In *Reliance Ins Co*, this Court specifically determined that even the "natural guardian," or parent of the minor child, "may not consent to the surrender of life insurance which has been taken out for the benefit of the child." *Id.* This Court's ruling reflects public-policy concerns regarding the need to protect the rights of minor children as predominant to the inherent rights of their parents at least to the extent that a "guardian has no authority to do any act which is detrimental to his ward." *Id.* A detrimental act is construed as one that effectively abandons or compromises any right or interest belonging exclusively to the minor child. *Id.* at 243 (finding "[t]he very fact that [the child] was injured by an uninsured motorist and the insurer denies coverage on the basis of the father's waiver for the son indicates a detrimental act").

Limitations on parental authority, consistent with this common-law rule, have also been imposed in cases involving support of a minor child. For instance, "an illegitimate child's right to support from a putative father cannot be contracted away by its mother, and that any release or compromise executed by the mother is invalid to the extent that it purports to affect the rights of the child." *Tuer, supra* at 699. Caselaw has further emphasized restrictions on parental authority by recognizing a parent's right to stipulate or approve an "annulment judgment" but precluding that agreement from affecting the rights of the minor children involved to a full hearing on the issue of paternity. *In re Kinsella Estate,* 120 Mich App 199, 203; 327 NW2d 437 (1982).

Referencing public policy, this Court "has taken a dim view of agreements purporting to sign away the rights of a child, particularly when the result of such an agreement may be that the child becomes a public charge . . . ." *Van Laar v Rozema,* 94 Mich App 619, 624; 288 NW2d 667 (1980).

This overriding public-policy concern is demonstrated in procedures and rules mandating court oversight, which have been implemented to assure the protection of minors and their rights in postinjury cases. For example, MCR 2.420(A), consistently with the doctrine of *parens patriae*, delineates strict limitations on parental authority regarding settlements and judgments for minors. Specifically:

> . . . MCR 2.420(A) provides that the rule applies only to settlements in cases "brought for a minor by a next friend, guardian, or conservator," which we read as further support for our holding that a parent has no authority to compromise an *unliquidated claim* or to liquidate a claim on behalf of a child absent the formal procedures and proper supervision suggested by the court rule. The obvious basis for such a rule is to ensure that the best interests of the minor child are protected by (1) the appointment of a next friend, guardian, or conservator to represent the minor *and* (2) the oversight of the trial court, or probate court, before an action is commenced, to scrutinize any proposal that compromises the minor's rights. [*Smith v YMCA of Benton Harbor/St Jospeh*, 216 Mich App 552, 556; 550 NW2d 262 (1996) (emphasis in original).]

We note that even when court-imposed protections, such as the appointment of a guardian or next friend are in place, "[i]f the next friend . . . is a person who has made a claim in the same action and will share in the settlement or judgment of the minor . . . then a guardian ad litem for the minor . . . must be appointed . . . to approve the settlement or judgment." MCR 2.420(B)(2). The implementation of such safeguards further demonstrates the overriding importance attributed to assuring the best interest of the child is maintained and is not compromised by any potential conflict of interest. See *Bowden v Hutzel Hosp,* 252 Mich App 566, 572-573; 652 NW2d 529 (2002), mod 468 Mich 851 (2003).

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.

These provisions function as checks on parental authority in an effort to ensure the protection of a minor child's interest by requiring the appointment of a conservator or guardian approved by the court to handle the minor's affairs, or by provision of additional time following attainment of the age of majority by a minor to exercise certain rights, rather than the automatic assumption of this role by a parent. The implementation of these provisions is indicative of an adherence to public policy, which favors the protection of the contractual rights of minors

consistent with the common-law limitations placed on parental authority to compromise claims belonging to their children.

B. Waiver Exceptions

Michigan, consistently with other jurisdictions, does permit specific statutory exceptions to the common-law rule of preclusion of parental authority regarding the release or waiver of children's rights. We note that such legislatively created exceptions are limited and strictly construed. "Because the common law may be abrogated by statute, a child can be bound by a parent's act when a statute grants that authority to a parent." *Benson v Granowicz,* 140 Mich App 167, 169; 363 NW2d 283 (1984). See, also, *Osborne v Arrington*, 152 Mich App 676, 679-680; 394 NW2d 67 (1986); *McKinstry v Valley Obstetrics-Gynecology Clinic, PC,* 428 Mich 167, 192-193; 405 NW2d 88 (1987) (recognizing the enactment of former MCL 600.5046(2) "changes the common law to permit a parent to bind a child to an arbitration agreement").

Currently, our Legislature has clearly identified certain, very specific situations in which parents are allowed to compromise the rights of their minor child. However, nothing has been discovered in the current statutory scheme that would permit a parent to release the property rights of his or her child in circumstances similar to those in this litigation. Specifically, this Court is aware of no legislative enactments upholding exculpatory agreements, executed by parents on behalf of their minor children before injury, that waive liability for injuries incurred in either commercial or nonprofit settings. Rather, given the preclusion of parental authority to compromise postinjury claims initiated on behalf of children without significant court oversight or the institution of legislatively created safeguards, it is counterintuitive to believe it acceptable or justifiable that inchoate rights or preinjury claims could be waived by parents, particularly given the absence of sufficient factual information or informed negotiation in such preinjury circumstances.[5] Given the caselaw and the 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. Hence, in the absence of a clear or specific legislative directive, we can neither judicially assume nor construct exceptions to the common law extending or granting the authority to

[5] Contrary to the concurrences, I find the arguments validating preinjury waivers less persuasive than those regarding postinjury waivers based on (a) the absence of sufficient information to make informed decisions regarding waiver when an injury has not yet occurred, and (b) the importance of affording minors greater, or at least equivalent, protections, to those afforded in postinjury cases and to adults. In addition, I do not agree that our determination regarding the invalidation of preinjury waivers serves to undermine parental authority. Parents continue to retain decision-making authority regarding their child's participation in select activities. Our ruling only serves to assure that such determinations are fully informed in order to effectively balance any risks and benefits inherent in the chosen activities and to afford adequate protections from negligent behavior in the conduct of those activities.

parents to bind their children to exculpatory agreements. Thus, the designation or imposition of any waiver exceptions is solely within the purview of the Legislature.[6]

I am particularly cognizant of the fact that to uphold the validity of preinjury waivers would afford minor children fewer protections than provided for postinjury claims, which statutorily require court oversight or approval for settlement. Concurrently, I acknowledge the public-policy concerns and reasoning underlying distinctions developed in other jurisdictions pertaining to the validity of such waivers dependent on the nature of the activity engaged in regarding for-profit and nonprofit activities or services. However, even following the reasoning of other jurisdictions, the exceptions recognized in those cases are not applicable given the for-profit nature of defendant's business. Without specific legislative direction this Court is precluded from defining or implementing any such divergence from the common-law preclusion regarding the validity of any form of waiver by a parent on behalf of his or her minor child. Although there exists in this state a clear intention to give predominance to protecting the rights of minor children, "[t]he Michigan Legislature is the proper institution in which to make such public policy determinations, not the courts." *Huron Ridge LP v Ypsilanti Twp,* 275 Mich App 23, 45; 737 NW2d 187 (2007).

While this ruling has significant and far-reaching implications regarding practices routinely engaged in by organizations and businesses providing valuable services and activities for minor children and has the potential to increase litigation and affect the availability of programs to younger members of the community, I have no alternative but to recognize the current status of our law and follow its precepts. "It is not the function of the courts to usurp the constitutional role of the legislature and judicially legislate that which necessarily must originate, if it is to be law, with the legislature." *Fields, supra* at 1130.

C. Concurrences

Contrary to the concerns expressed in my colleagues' respective concurrences, I welcome the potential for discourse and examination that may be occasioned by our ruling in this case. While certain organizations may be required to reevaluate their services and delivery of activities as a result of our determination, I believe this is a small price to pay to protect the interests of the most vulnerable members of our society. Hopefully, our ruling will serve to disrupt the complacency, which has developed over the years, from the proliferation and pro forma acceptance of preinjury waivers and will serve to refocus and place liability where it belongs by removing the artificial protections afforded to organizations or businesses that are negligent in the provision of services to children. Further, while it may, from a social-policy perspective, be beneficial to exempt nonprofit and other specified organizations from preinjury liability, the establishment of protections for such groups is easily provided if our Legislature chooses to act. Our ruling is not significant because it may result in a disruption of the status quo regarding the

[6] Further, I would strongly encourage the Legislature to evaluate this issue, including any distinctions to be acknowledged regarding treatment of preinjury waivers involving for-profit versus nonprofit organizations or programs.

complacent acceptance of the use of preinjury waivers for minors. Rather, the decision in this case is important because it serves as an affirmation of the priority we place on the protection of the health and well-being of our children.

D. Conclusion

Therefore, I would determine that preinjury waivers effectuated by parents on behalf of their minor children are not presumptively enforceable. Specifically, within the context of our state's overriding policy, and in the absence of any specific legislative exceptions permitting the waiver of liability by parents in these situations, the release signed on behalf of plaintiff's son cannot be construed as valid. Consequently, I would reverse the trial court's determination regarding the validity of the challenged waiver and remand the case for reinstatement of plaintiff's negligence claim. Because our ruling determines that the waiver is invalid, I need not address the parties' contentions pertaining to the scope or parameters of the waiver's language and content.

VII. Gross Negligence

Defendant contends that the trial court erred in refusing to dismiss plaintiff's claim of gross negligence. "Gross negligence" is conduct that is so reckless that it demonstrates a substantial lack of concern for whether an injury results. *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). Evidence of ordinary negligence is insufficient to create a material question of fact regarding the existence of gross negligence. *Maiden, supra* at 122-123. The issue of gross negligence may be determined by summary disposition only where reasonable minds could not differ. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998).

Plaintiff contends that the failure of defendant to follow or implement the manufacturer's instructions regarding equipment to be used in conjunction with the slide and recommendations pertaining to adult supervision of its use constituted evidence of gross negligence. However, plaintiff ignores the fact that defendant did undertake certain actions to ensure the safety of its guests. It is undisputed that defendant's staff provided verbal instructions to the participants regarding safety and appropriate conduct or behavior before permitting use of the equipment and that certain rules regarding safe use of the equipment were posted. Further, plaintiff does not allege the minor children attending the party were completely unsupervised, only that insufficient supervision was provided. Considering the fact that defendant did undertake certain steps or precautions to prevent injury, there has been no demonstration that defendant possessed a substantial lack of concern for the minor child's safety or well-being. Therefore, I would hold that the trial court erred by failing to grant summary disposition on plaintiff's claim of gross negligence. *Id.* at 151. Because I would determine that plaintiff's claim of gross negligence is not viable, I find no need to address defendant's assertion that it is entitled to summary disposition on the basis of a lack of proximate causation.

Subsumed within this issue are defendant's concomitant assertions that (1) the danger posed by jumping off the top of a slide is an open-and-obvious hazard, precluding the imposition of liability and (2) defendant did not have a duty to supervise the minor child given the presence of the child's parents at the time the injury occurred. I first address the assertion regarding the applicability of the open-and-obvious-danger doctrine.

As previously discussed by this Court, the applicability of the open-and-obvious-danger doctrine is dependent on the theory of liability presented and the nature of the duty that is at issue. *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). We have determined that this doctrine is applicable only to premises-liability actions and certain cases involving a failure to warn in products-liability cases. We have explicitly held the doctrine not to be applicable to claims of ordinary negligence. *Id.* at 615-616. When an injury develops from a condition of the land, rather than emanating from an activity or conduct that created the condition on the property, the action sounds in premises liability. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). Because this case comprises a claim of negligence and does not meet the definitional requirements of either a premises-liability or a products-liability action, the open-and-obvious-hazard doctrine is inapplicable. Because I find the doctrine inapplicable, I need not reach a determination regarding the trial court's ruling precluding the use of the doctrine with regard to minor children below the age of seven on the basis of the legal precept that precludes the ability to impute negligence to individuals within this young age group.

Defendant also contends that the trial court erred in finding it had a duty to protect the minor child given the presence of his parents at the site at the time of the injury. I concur with the trial court's denial of summary disposition on this basis because the presence of the minor child's parents did not serve to abrogate defendant of its duty as the premises owner. Generally, "'a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.'" *Bragan v Symanzik*, 263 Mich App 324, 330-331; 687 NW2d 881 (2004), quoting *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). Landowners owe minor invitees the highest duty of care. *Bragan, supra* at 335. Accordingly, defendant had a duty to exercise reasonable care to protect plaintiff's son and all the children attending the party from dangerous conditions, regardless of whether adults related to the children were present. However, I find that defendant's argument is misplaced because the cause of action arises in negligence rather than premises liability.

VIII. Michigan Consumer Protection Act

Lastly, defendant argues that the trial court improperly failed to dismiss plaintiff's claim under the MCPA. Notably, plaintiff's complaint does not identify the specific sections of the MCPA claimed to have been violated. In general, plaintiff's allegations comprise assertions of misrepresentation or "deceptive representations" regarding the safety of its facility or equipment and the availability of supervision. Plaintiff further implied fraud or purposeful misrepresentation by suggesting defendant's purported waiver of liability was improperly "disguised in the form of an invitation." While not specified by plaintiff in his complaint, these allegations were discussed in greater detail in plaintiff's appellate brief, in which she asserted that defendant's misrepresentations pertaining to the safety of the facility, equipment, and supervision constituted violations of multiple subsections of MCL 445.903(1).

In general, the MCPA precludes the use of "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce . . . ." MCL 445.903(1). "Trade or commerce" is defined as the "conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible,

real, personal, or mixed, or any other article, or a business opportunity." MCL 445.902(1)(g). The intention underlying the act is "'to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes.'" *Zine v Chrysler Corp*, 236 Mich App 261, 271; 600 NW2d 384 (1999) (citation omitted). "The MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals." *Forton v Laszar*, 239 Mich App 711, 715; 609 NW2d 850 (2000), overruled in part on other grounds *Liss v Lewiston-Richards, Inc*, 478 Mich 203 (2007). In order to have a valid MCPA claim presented, the "courts must examine the nature of the conduct complained of case by case and determine whether it relates to the entrepreneurial, commercial, or business" aspects of the defendant's profession. *Nelson v Ho*, 222 Mich App 74, 84; 564 NW2d 482 (1997).

Plaintiff contends that defendant advertised itself as a safe and supervised facility, even though it purportedly knowingly violated safety recommendations set forth by the manufacturer of its equipment, and tried to deceptively obtain a waiver by providing free invitations that contained the waiver, in violation of the MCPA. The gravamen of plaintiff's claim is negligence because the allegations center on the way defendant operated the slide, not the manner by which it solicited or advertised its business. See *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (the gravamen of an action is determined by reading the claim as a whole). Further, plaintiff's claim that defendant tried to deceptively obtain a waiver is without merit. Plaintiff's mother received a copy of the document containing the waiver well in advance of the party and had ample opportunity to review it. Defendant made no attempt to disguise the waiver language. The wording of the invitation was sufficiently clear that no one would be permitted to participate in the event without a signed waiver. Therefore, I find that the trial court erred as a matter of law by failing to grant defendant summary disposition on this claim because the MCPA is not an appropriate basis upon which plaintiff can recover.

I would reverse and remand to the trial court for further proceedings consistent with this opinion. I would not retain jurisdiction.

/s/ Michael J. Talbot