STATE OF MICHIGAN

COURT OF APPEALS

SHEILA WOODMAN, as Next Friend of TRENT WOODMAN, a Minor, Plaintiff-Appellee, v KERA, L.L.C., d/b/a BOUNCE PARTY Defendant-Appellant.	FOR PUBLICATION August 12, 2008 No. 275079 Kent Circuit Court LC No. 06-000802-NO
SHEILA WOODMAN, as Next Friend of TRENT WOODMAN, a Minor, 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, P.J., and Talbot and Schuette, JJ.

BANDSTRA, P.J. (*concurring*).

I concur with the lead opinion's conclusions that the trial court erred by not dismissing plaintiff's claim of gross negligence and that the trial court also improperly failed to dismiss plaintiff's claim under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Further, I reluctantly concur with the decision that we cannot enforce the waiver signed by the child's father. However, I think that result is wrong and write separately hoping that either the Michigan Legislature or our Supreme Court will further address the issue.

As the lead opinion's overview of Michigan caselaw illustrates, the rule has long been settled that a parent does not have the authority to release existing claims that a child might have on the basis of events that have already occurred. This "postinjury" rule abrogating parental waivers has been extended to preinjury waivers, such as the one at issue here, by courts of some of our sister states who see little difference between the two contexts. See, e.g., *Cooper v Aspen*

Skiing Co, 48 P3d 1229, 1233 (Colo, 2002), quoting *Scott v Pacific West Mountain Resort*, 119 Wash 2d 484, 494; 834 P2d 6 (1992) ("'[S]ince 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.'").

There is no Michigan precedent explicitly discussing whether the postinjury rule against parental waivers should apply in a preinjury case. However, in a case involving a preinjury waiver, our Supreme Court in its analysis of whether that waiver should be enforced, recognized "the common-law rule that a parent has no authority to waive, release, or compromise claims by or against a child." *McKinstry v Valley Obstectrics-Gynecology Clinic, PC*, 428 Mich 167, 192; 405 NW2d 88 (1987). Considering that language to be binding on us, I am constrained to agree with the lead opinion that this result must apply in the matter before us.

Nonetheless, *McKinstry* certainly did not consider the logic of extending the postinjury waiver invalidation rule to preinjury waivers. Further, contrary to those courts who simply see no difference between the two contexts, other courts and commentators have suggested that important differences exist, making extension of the invalidation rule to preinjury cases inappropriate.

> "The concerns underlying the judiciary's reluctance to allow parents to dispose of a child's existing claim do not arise in the situation where a parent waives a child's future claim. A parent dealing with an existing claim is simultaneously coping with an injured child; such a situation creates a potential for parental action contrary to that child's ultimate best interests.
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> "A parent who signs a release before her child participates in a recreational activity, however, faces an entirely different situation. First, such a parent has no financial motivation to sign the release. To the contrary, because a parent must pay for medical care, she risks her financial interests by signing away the right to recover damages. Thus, the parent would better serve her financial interests by refusing to sign the release.
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> "A parent who dishonestly or maliciously signs a preinjury release in deliberate derogation of his child's best interests also seems unlikely. Presumably parents sign future releases to enable their children to participate in activities that the parents and children believe will be fun or educational. Common sense suggests that while a parent might misjudge or act carelessly in signing a release, he would have no reason to sign with malice aforethought.
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> "Moreover, parents are less vulnerable to coercion and fraud in a preinjury setting. A parent who contemplates signing a release as a prerequisite to her child's participation in some activity faces none of the emotional trauma and financial pressures that may arise with an existing claim. That parent has time to examine the release, consider its terms, and explore possible alternatives. A parent signing a future release is thus more able to reasonably assess the possible consequences of waiving the right to sue." [*Zivich v Mentor Soccer Club, Inc*, 82 Ohio St 3d 367, 373; 696 NE2d 201 (1998), quoting Note, Scott v Pacific West

> Mountain Resort: *Erroneously invalidating parental releases of a minor's future claim*, 68 Wash L R 457, 473-474 (1993).]

These considerations are persuasive and I would conclude that, whatever the merits of abrogating postinjury parental waivers, there is no reason to extend that abrogation to preinjury waivers.

Moreover, to do so further undermines the authority of parents to make judgments and decisions regarding the activities in which their children should participate. As the United States Supreme Court reasoned in *Parham v J R*, 442 US 584, 602; 99 S Ct 2493; 61 L Ed 2d 101 (1979), "[t]he law's concept of the family 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." Thus, a court should be extremely hesitant "to inject itself into the private realm of the family" by questioning the ability of a parent "to make the best decisions concerning the rearing of that parent's children." *Troxel v Granville*, 530 US 57, 68-69; 120 S Ct 2054; 147 L Ed 2d 49 (2000); accord *Sharon v City of Newton*, 437 Mass 99, 108; 769 NE2d 738 (2002) ("[W]ith respect to matters relating to [their children's] care, custody, and upbringing [parents] have a fundamental right to make those decisions for them."). Instead, that parental privilege and authority should be respected by the courts, as it was in *Zivich*:

> When Mrs. Zivich signed the release she did so because she wanted Bryan to play soccer. She made an important family decision and she assumed the risk of physical injury on behalf of her child and the financial risk on behalf of the family as a whole. Thus, her decision to release a volunteer on behalf of her child simply shifted the cost of injury to the parents. Apparently, she made a decision that the benefits to her child outweighed the risk of physical injury. *Mrs. Zivich did her best to protect Bryan's interests and we will not disturb her judgment.* [*Zivich*, *supra* at 374 (emphasis added).]

Similar decisions were made by the child's father here,[1] and we should not undermine them by allowing this lawsuit to proceed.

Finally, I agree with the lead opinion that our decision today has significant and farreaching implications. As this case amply demonstrates, ours is an extremely and increasingly litigious society.[2] Any entity that provides an educational, recreational, or entertainment opportunity to a minor does so at great risk of having to defend an expensive lawsuit, meritorious or not. To avoid some of that, preinjury waivers have become commonplace. If the law does not honor those waivers, the implications appear inevitable: the cost of providing opportunities will rise, some families who would like their children to participate will no longer be able to afford to, and, ultimately, some opportunities will simply become unavailable altogether. See, e.g.,

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[1] There is no argument that the waiver was unclear or that the child's father did not read and understand it.

[2] Children have routinely jumped off playground slides for generations; lawsuits seeking to impose damages on someone else for resulting injuries are only a recent phenomenon.

Hohe v San Diego Unified School Dist, 224 Cal App 3d 1559, 1564; 274 Cal Rptr 647 (1990) (upholding a parental waiver while noting that the availability of recreational and sports activities for children are steadily decreasing).

Because of the impact of today's decision and the compelling arguments against abrogating preinjury parental waivers, I encourage the Michigan Legislature or Supreme Court to further consider the issue.

/s/ Richard A. Bandstra