A20-1318

STATE OF MINNESOTA
IN SUPREME COURT

Carter Justice,
Appellant/Cross-Respondent,

v.

Marvel, LLC, d/b/a Pump It Up Parties,
Respondent/Cross-Appellant.

MINNESOTA DEFENSE LAWYERS ASSOCIATION'S AMICUS BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U.S. Supreme Court:

Minnesota Supreme Court:

Minnesota Court of Appeals:

Florida Supreme Court:

Statutes

Minnesota Statutes:

Laws

Minnesota Laws:

Florida Laws:

Rules

Minnesota Rules:

INTEREST OF THE AMICUS

This case implicates the rights, interests, and expectations of numerous potential litigants, particularly defendants. It threatens to alter Minnesota public policy in a manner that would make defense of litigation more difficult. Amicus The Minnesota Defense Lawyers Association (MDLA), a non-profit corporation comprised of civil-defense firms and individual attorneys, asks the Court to maintain the stability of longstanding law and public policy for the benefit of all litigants, including the clients of MDLA members.[1]

[1] Under Minn. R. Civ. App. P. 129.03, MDLA states that no counsel for any party authored any part of this brief and that no person or entity, other than amicus's counsel, made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. It is unnecessary to alter Minnesota's public policy and upset settled expectations when the Legislature has already spoken.

A. Plaintiff and his amici ask this Court to overturn the Legislature's public policy embodied in § 184B.20 and statutes pertaining to parents' ability to enter agreement on behalf of their children.

Plaintiff and his amici say that this case is about children.[2] They are partially correct. Consideration of the larger picture, however, shows that this case involves a weighing of the interests of many parties, including children: parents, businesses that serve families, and those who litigate cases when accidents occur. This case also involves *who* is best suited to weigh those interests and arrive at a proper balance. The members of the Minnesota Legislature have conducted this weighing of interests, an act that constitutes Minnesota's public policy. Plaintiff and his amici simply don't like what the Legislature has decided, and so seek to overturn it.

Three bedrock judicial principles should guide the outcome of this case. *First*, the public policy of Minnesota is what the Legislature says it is.[3] This Court has repeatedly acknowledged that the Legislature is best suited to decide public policy.[4] *Second*, this

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[2] App.'s Br. 14 ("this case is about the safety of children"); Minn. Assoc. for Justice's and Public Justice's Amicus Brief 1 ("this appeal is about protecting the rights of Minnesota's minor children").

[3] Dukowitz v. Hannon Sec. Servs., 841 N.W.2d 147, 153 (Minn. 2014) (citing State ex rel. Meehan v. Empie, 204 N.W. 572, 573-74 (Minn. 1925) ("Courts do not determine public policy when the legislature speaks.")).

[4] E.g., id. ("[T]his court has generally been reluctant to undertake the task of determining public policy since this role is usually better performed by the legislature.") (quotes omitted), Nelson v. Productive Alternatives, Inc., 715 N.W.2d 452, 457 (Minn. 2006) (stating that alterations to Minnesota's public policy, in areas where the Legislature has acted, "must be made by the legislature, if at all").

case involves an area of the law where "the Legislature has spoken,"[5] and has done so recently in its 2010 enactment of § 184B.20. This Court takes a cautious and hesitant posture when potentially altering the Legislature's expressed public policy.[6] *Third*, a law does not have retroactive effect "unless clearly and manifestly intended so by the Legislature."[7]

These fundamental principles dispose of nearly all of Plaintiff's arguments. Despite the Legislature's recently enacted laws, Plaintiff says, "*this Court* should reverse course."[8] Plaintiff would have this Court, not the Legislature, declare Minnesota's public policy on parental waivers.[9] Plaintiff would have this Court ignore longstanding statutory law on retroactivity.

In so advocating, Plaintiff would upset the long-settled expectations of many parties, expectations that the Minnesota Legislature has chosen to preserve. This is no light matter. As the U.S. Supreme Court has said:

> [T]he presumption against retroactiv[ity] is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.[10]

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[5] Dukowitz, 841 N.W.2d at 153.
[6] Id.
[7] MINN. STAT. § 645.21.
[8] App. Br. 13 (emphasis added).
[9] Id. at 31-32.
[10] Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994).

Judge Johnson's opinion for the court of appeals demonstrates that multiple Minnesota statutes presume parental authority to enter into agreements on behalf of their children, including liability waivers for recreational activities.[11] Families and the businesses that cater to them have made decisions based on this understanding.

The Legislature then considered the specific matter of parental waivers for inflatable amusement equipment in 2010, voiding them prospectively but not making their proscription retroactive. Plaintiff's 2007 waiver was unaffected, and the expectations of the parties involved in Plaintiff's waiver were left settled. This Court should follow the path of the Legislature.

B. A decision in Plaintiff's favor would unsettle rather than settle the law, as shown by the history of the Florida Supreme Court's sudden invalidation of parental waivers in 2008.

One of the functions of this Court is to promote stability in the law.[12] Deciding this case in Plaintiff's favor is likely to cause significant instability, potentially for years, as shown by Florida's history of dealing with the issues this case raises.

In 2008, the Florida Supreme Court, in a case of first impression, invalidated parental waivers for recreational activities. It did so in Kirton v. Fields, a case where a boy died while operating his all-terrain vehicle (ATV) after his father had signed a waiver of his son's tort liability in favor of a motor-sports park.[13] The Court did so over a

[11] Add. 49-55.
[12] See, e.g., Fleeger v. Wyeth, 771 N.W.2d 524 (Minn. 2009) (describing that this Court adheres to stare decisis because doing so "promotes stability, order, and predictability in the law").
[13] 997 So.2d 349 (Fla. 2008).

vigorous dissent that argued, "it is fundamentally unfair to now declare a new public policy and then apply it to the defendants in this case."[14] Both the majority and the dissent noted that the Florida legislature had not specifically spoken as to the enforceability of parental liability waivers.[15]

Far from settling anything, Kirton was extremely disruptive. Many Florida businesses stopped offering activities for children, unable to bear the increased costs of insurance and potential litigation.[16] For example, dive shops stopped offering junior scuba certification.[17] A business that took children on open-cockpit airplane rides saw its business "immediately plummet."[18] Kirton was concerning for major entities in Florida that offered family recreation, like Walt Disney World and SeaWorld.[19] The ruling ignited "a fierce turf war" between Florida's recreation/tourism industries and lobbyists for the state's plaintiff's bar.[20]

The upheaval and lobbying war that resulted from Kirton was put to an end in 2010 by the Florida Legislature. It enacted Florida Statute § 744.301(3), explicitly

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[14] Id. at 362.
[15] Id. at 353 (the majority) ("there is no [Florida] statutory scheme governing pre-injury releases"); id. at 364-65 (the dissent) ("[T]he questions presented by this case demonstrate a need for the Court to exercise judicial restraint, recognize that the Legislature is the policy-making branch of government, and defer to the Legislature by respecting the Legislature's non-action to date.").
[16] Ricardo Ramirez Buxeda, *Lawyers, Parks Spar on Waivers for Kids*, Orlando Sentinel, (Feb. 19, 2010), https://www.pressreader.com/usa/orlando-sentinel/ 20100219/ 283287453800739.
[17] Id.
[18] Id.
[19] Id.
[20] Id.

permitting parents to execute waivers on behalf of their children, effectively overruling Kirton.[21] The statute reflected a balancing of the interests of involved parties. Businesses benefitted from the ability to obtain waivers.[22] Parents and children benefitted from specific, "clearly distinguishable" language mandated by the statute that had to appear in every valid waiver.[23] And the lawyers and judges of Florida benefitted from guidance on the legal effect of an executed waiver should disputes arise.[24]

This Court, unlike the Florida Supreme Court, is not facing this case in the absence of input from the state's legislature. Not only has the Minnesota Legislature spoken as to pre-injury parental liability waivers, it has done so specifically in the context of inflatable amusement equipment.

Further, it is obvious that the Legislature has already considered most of Plaintiff's arguments. For example, Plaintiff makes much of the fact that the waiver at issue in this case was executed in favor of a for-profit entity—he mentions the point in his brief no fewer than nine times.[25] But the Legislature was fully aware of the for-profit/non-profit distinction when it passed § 184B.20—it specifically addresses "use of an inflatable *for profit*."[26] Plaintiff seeks to effectively make the Legislature's prohibition on inflatable-amusement waivers retroactive to 2007. But when the Legislature wants to make an

[21] 2010 Fla. Sess. Law. Serv. Ch. 2010-27 (C.S.S.B. 2440) (West).
[22] See Fla. Stat. § 744.301(3).
[23] See id. at (3)(b).
[24] See id. at (3)(c) (setting out presumptions established by a valid waiver and how those presumptions may be rebutted).
[25] App. Br. at 13, 14, 33, 38, 42 (thrice), and 48 (twice).
[26] § 184B.20, subd. 1(b) (emphasis added).

enactment retroactive, it knows how to do so[27] and is required to say so clearly and directly.[28]

The Legislature has shown that it is ready to act in this area if necessary. § 184B.20 is a relatively recent 2010 enactment. And the Legislature addressed liability waivers again in 2013 with the passage of certain consumer-service protections.[29] The Legislature's willingness to act is a further point that counsels restraint on the part of this Court.

The unmistakable conclusion of the Legislature's actions in passing § 184B.20 is that it intended to prospectively prohibit inflatable-amusement liability waivers but did not want to upset the past, settled expectations of those that would be affected by the new law. This weighing of interests was no accident. The Legislature's deliberations have resulted in a discernable public policy that this Court should not alter.

II. Accepting Plaintiff's arguments regarding § 184B.20 would implicate constitutional concerns and should be rejected based on the canon of constitutional avoidance.

Part V of Plaintiff's brief asks this Court to interpret § 184B.20 as encompassing the liability waiver at issue in this case.[30] While Plaintiff's proposed interpretation is strained to begin with, his argument should be rejected because it would raise constitutional concerns, which courts try to avoid.

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[27] E.g., 1997 Minn. Sess. Law. Serv. Ch. 7 (H.F. 35) (West) ("Sections 2 to 71 are effective retroactive to October 15, 1995.").
[28] § 645.21.
[29] See 2013 Minn. Laws Ch. 118 (codified at Minn. Stat. § 604.055).
[30] App. Br. 52.

The canon of constitutional avoidance obliges an appellate court to interpret an ambiguous statute so as to avoid raising constitutional issues, if possible.[31] The Minnesota Legislature has codified the canon in § 645.17: "the legislature does not intend to violate the Constitution of the United States or of this state."

The Contracts Clause of the U.S. Constitution restricts the ability of states to disrupt contracts: "No state shall . . . pass any . . .Law impairing the Obligation of Contracts."[32] The Clause has been held to apply to all kinds of contracts,[33] which would include the parental liability waivers at issue here. A state law violates the Clause if it "operate[s] as a substantial impairment of a contractual relationship," "undermines the contractual bargain," "interferes with a party's reasonable expectations," or prevents a party from safeguarding his contractual rights.[34]

Plaintiff's proposed interpretation of § 184B.20 would destroy a contract that existed at the time of the law's passage and would certainly alter the reasonable expectations of one of the contracting parties. It is possible that a concern over the Contracts Clause was a partial motivating factor in the Legislature's decision to not make § 184B.20 retroactive. Impairing existing contracts is a different matter than effectively prohibiting their creation in the first place, and the difference lies in the parties' expectations that arise from those contracts already executed.

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[31] See Hutchinson Tech., Inc. v. Comm'r of Rev., 698 N.W.2d 1, 18 (Minn. 2014)., Gustafson v. Comm'r of Human Servs., 884 N.W.2d 674, 681 (Minn. Ct. App. 2016).
[32] U.S. Const. Art. I, § 10, cl. 1.
[33] Sveen v. Melin, 138 S.Ct. 1815, 1821 (2018). This recent case happened to involve a Minnesota statute, Minn. Stat. § 524.2-804, subd. 1 (2016).
[34] Id. at 1821-22.

CONCLUSION

The Legislature decides what Minnesota's public policy is. The Legislature's recent action in this area of law counsels judicial restraint and is determinative of much of this case. Deciding this case contrary to what the Legislature has decided threatens the disruption that Florida experienced in 2008 when it suddenly invalidated parental waivers, to the surprise of numerous businesses that depended on them. Settled expectations and stability in both the law and public policy favor affirmance of the decision below.

MDLA respectfully asks that the judgment below be affirmed.

Respectfully submitted,

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Dated: February 25, 2022

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared with a proportional, 13-point font per Minn. R. Civ. App. P. 132.01, subd. 3, using Microsoft Word 365. I further certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(c), because it contains 2,070 words, exclusive of the caption, table of contents, table of authorities, and signature block.

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