IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

CRYSTAL BLACKWELL, as next friend to JACOB BLACKWELL, a minor,	
Appellant,	
v.	**No. M2016-00447-COA-R9-CV**
SKY HIGH SPORTS NASHVILLE OPERATIONS, LLC,	**Circuit Court for Davidson County, Tennessee**
Appellee.	

BRIEF OF THE APPELLEE

Ben M. Rose (#21254)
Joshua D. Arters (#31340)
The Law Offices of Ben M. Rose, PLLC
Post Office Box 1108
Brentwood, Tennessee 37024
615-942-8295

Attorneys for the Appellee, Sky High Sports Nashville Operations, LLC

ORAL ARGUMENT REQUESTED

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

CRYSTAL BLACKWELL, as next friend to JACOB BLACKWELL, a minor,	)	
Appellant,	)	**No. M2016-00447-COA-R9-CV**
v.	)	**Circuit Court for Davidson County, Tennessee**
SKY HIGH SPORTS NASHVILLE OPERATIONS, LLC,	)	
Appellee.	)	

BRIEF OF THE APPELLEE

Ben M. Rose (#21254)
Joshua D. Arters (#31340)
The Law Offices of Ben M. Rose, PLLC
Post Office Box 1108
Brentwood, Tennessee 37024
615-942-8295

Attorneys for the Appellee, Sky High Sports Nashville Operations, LLC

ORAL ARGUMENT REQUESTED

INTRODUCTION

This is an interlocutory appeal from the Sixth Circuit Court for the Twentieth Judicial District at Nashville, Tennessee, the Honorable Thomas Brothers, presiding.

The Appellant, Crystal Blackwell, as next friend to Jacob Blackwell, a minor, will be referred to as "Ms. Blackwell" or "Appellant." Jacob Blackwell, a minor, will be referred to as "Mr. Blackwell." The Appellee, Sky High Sports Nashville Operations, LLC, will be referred to as "Sky High Nashville" or "Appellee."

The record on appeal consists of six (6) volumes comprising the Technical Record. References herein to the Technical Record will be by volume and page ("T.R. Vol. __ at __").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Circuit Court of Appeals Cases

United States District Court Cases

Tennessee Cases

Other State Cases

United States Constitional Provisions

Tennessee Constitutional Provisions

Tennessee Rules and Statutes

Other State Statutes

Secondary Authorities

ISSUES PRESENTED FOR REVIEW

The Appellee respectfully submits that the trial court erred in denying Sky High Nashville's Motion to Enforce the Contract Between the Parties, including, but not limited to, failing to enforce the forum selection provision, choice of law provision, and/or the pre-injury liability waiver. Furthermore, the trial court did not abuse its discretion in denying the Motion to Amend Complaint filed by Ms. Blackwell.

.

STATEMENT OF THE CASE

The Appellee respectfully submits that the relevant procedural history of this case can be stated as follows:

On February 5, 2014, Ms. Blackwell filed a Complaint against Sky High Sports Nashville, LLC, asserting her own claims and claims on behalf of her minor son, Mr. Blackwell. (T.R. Vo1. 1 at 1.)

On May 5, 2014, Sky High Sports Nashville, LLC, filed an Answer. (T.R. Vol. 1 at 8.)

On November 3, 2014, the trial court entered an Agreed Order and Stipulation Substituting Sky High Sports Nashville Operations, LLC as Proper Defendant, instructing Ms. Blackwell to file an amended complaint naming the correct corporate entity, Sky High Nashville, within ten days. (T.R. Vol. 1 at 23.)

On January 7, 2015, Ms. Blackwell filed an Amended Complaint, individually and on behalf of Mr. Blackwell, against Sky High Nashville, asserting claims on her own behalf and claims on behalf of Mr. Blackwell. (T.R. Vol. 1 at 25.)

On March 17, 2015, Sky High Nashville filed its Motion to Enforce the Contract Between the Parties. (T.R. Vol. 1 at 35.) Sky High Nashville's motion sought an Order to enforce the provisions contained in the "Customer Release of Liability and Assumption of Risk" contract ("Contract") signed by Ms. Blackwell on her own behalf and on behalf of Mr. Blackwell. (T.R. Vol. 1 at 35, 40.)

On May 4, 2015, Ms. Blackwell filed a Response to Sky High Nashville's Motion to Enforce the Contract Between the Parties. (T.R. Vol. 5 at 672.) On the same day, instead of responding on her own behalf to Sky High Nashville's motion, Ms. Blackwell summarily filed a Notice of Voluntary Dismissal of her individual capacity claims. (T.R. Vol. 5 at 689.)

In response, Sky High Nashville filed a separate Motion to Strike Ms. Blackwell's Notice, asserting that Ms. Blackwell should not be permitted to voluntarily dismiss her individual claims while Sky High Nashville's Motion to Enforce the Contract Between the Parties was pending. (T.R. Vol. 5 at 691).

On May 6, 2015, Sky High Nashville filed a Reply to Ms. Blackwell's Response to its Motion to Enforce the Contract Between the Parties. (T.R. Vol. 5 at 695.)

On May 8, 2015, Sky High Nashville's Motion to Enforce the Contract Between the Parties came to be heard before the trial court.[1]

On May 22, 2015, the trial court entered an Order denying Sky High Nashville's Motion to Enforce the Contract Between the Parties. (T.R. Vol. 5 at 712.) The trial court also denied Sky High Nashville's Motion to Strike Ms. Blackwell's Notice and entered Ms. Blackwell's Order of Voluntary Dismissal of her individual claims. (T.R. Vol. 5 at 710, 712.)

On June 22, 2015, Sky High Nashville filed a Motion to Alter/Amend or, in the Alternative, for Interlocutory Appeal of the trial court's denial of the Motion to Enforce the Contract Between the Parties. (T.R. Vol. 5 at 717.)

On July 31, 2015, Ms. Blackwell filed a Motion to Amend Complaint, which requested leave to add a claim, purportedly on Mr. Blackwell's behalf, for reimbursement of pre-majority medical expenses related to Mr. Blackwell's alleged injury. (T.R. Vol. 5 at 739, 743.)

On December 11, 2015, Ms. Blackwell, as next friend to Mr. Blackwell, filed a Response to Sky High Nashville's Motion to Alter/Amend or, in the Alternative, for Interlocutory Appeal. (T.R. Vol. 6 at 754.)

[1] The May 22, 2015, Order incorrectly states that this matter came to be heard on May 8, 2014. (T.R. Vol. 5 at 712.)

On December 14, 2015, Sky High Nashville filed a Response to Plaintiff's Motion to Amend Complaint. (T.R. Vol. 6 at 757.)

On December 18, 2015, both the Motion to Alter/Amend or, in the Alternative, for Interlocutory Appeal, and the Motion to Amend Complaint were heard.

On February 23, 2016, the trial court entered an Order regarding the motions. (T.R. Vol. 6 at 770-71.) The Order denied Sky High Nashville's request to alter/amend its previous Order inasmuch as it denied the Motion to Enforce the Contract Between the Parties. However, the trial court granted Sky High Nashville's request for permission to seek appellate review thereof with this Court. (T.R. Vol. 6 at 770-71.) In addition, the February 23, 2016, Order denied Ms. Blackwell's Motion to Amend Complaint to the extent she sought leave to add a claim, on Mr. Blackwell's behalf, for reimbursement of any pre-majority medical expenses related to Mr. Blackwell's alleged injury. (*Id.*) The trial court *sua sponte* granted permission to request appellate review of its ruling on the Motion to Amend Complaint.[2] (*Id.*)

On March 4, 2016, Sky High Nashville timely filed a Rule 9 Application for Permission to Appeal with this Court, requesting appellate review of only the trial court's denial of the Motion to Enforce the Contract Between the Parties. (Rule 9 App.)

On March 14, 2016, Ms. Blackwell filed a Response to Sky High Nashville's Rule 9 Application. (Answer to Rule 9 App.) In her Response, Ms. Blackwell requested that this Court also review the trial court's denial of the Motion to Amend Complaint.[3] (*Id.*)

---

[2] Sky High Nashville did not seek interlocutory review of the trial court's ruling on the Appellant's Motion to Amend Contract. (Rule 9 App. p. 2 fn. 7.) Sky High Nashville submits that the trial court's ruling in this regard was unequivocally correct. (*Id.*; *see infra*.)

[3] Ms. Blackwell did not file a separate Rule 9 Application in this regard.

On March 18, 2016, this Court entered an Order granting Sky High Nashville's request for permission to appeal the trial court's denial of the Motion to Enforce the Contract Between the Parties. (Order Granting Rule 9 Appeal.) The Court also granted Ms. Blackwell's request for interlocutory review of the trial court's ruling on the Motion to Amend Complaint.[4] (*Id.*)

On April 4, 2016, Sky High Nashville filed its Designation of Record on Appeal, designating additional documents to be included in the record on appeal. (T.R. Vol. 6 at 796.)

On April 11, 2016, Ms. Blackwell filed her Designation of Record, designating additional documents to be included in the record on appeal. (T.R. Vol. 6 at 798.)

On May 13, 2015, Ms. Blackwell filed her principal Appeal Brief on Behalf of the Appellant, Crystal Blackwell, As Next Friend to Jacob Blackwell, a Minor. (Brief of Appellant.)

[4] Accordingly, this is a cross-appeal with each party appealing separate rulings of the trial court. This Court designated Ms. Blackwell as the Appellant and Sky High Nashville as the Appellee. (Order Granting Rule 9 Appeal.)

STATEMENT OF THE FACTS

The factual recitation of this case submitted by the Appellant is generally insufficient. Sky High Nashville respectfully submits that a more accurate and complete recitation of the relevant facts in this case is as follows:

I. General Factual Allegations.

In the Amended Complaint, Ms. Blackwell alleged that on March 26, 2013, her minor son, Mr. Blackwell, participated in a trampoline dodgeball game at Sky High Nashville.[5] (T.R. Vol. 1 at 26, ¶ 5.) While playing in the game, Mr. Blackwell allegedly "awkward[ly]" landed on some "padding between trampolines." (T.R. Vol. 1 at 26-27, ¶¶ 5, 8.) When Mr. Blackwell landed, another participant allegedly "double bounced" Mr. Blackwell thereby contributing to his "awkward landing." (T.R. Vol. 1 at 27, ¶ 9.) Ms. Blackwell alleged that as a result, Mr. Blackwell tore a tendon in his knee and broke his tibia. (T.R. Vol. 1 at 27, ¶ 11.) Ms. Blackwell alleged that Mr. Blackwell's injury was the result of Sky High Nashville's negligence and that they were entitled to relief because, *inter alia*, "[a]ny warning, disclaimers, or waivers of liability which Defendant may have given to Jacob Blackwell and to which he or his mother may have agreed were void, invalid, and/or inadequate." (T.R. Vol. 1 at 29, ¶ 23.)

II. Sky High Nashville's Motion to Enforce the Contract Between the Parties.

In response to the Amended Complaint, Sky High Nashville filed its Motion to Enforce the Contract Between the Parties.[6] (T.R. Vol. 1 at 35.) Sky High Nashville sought to enforce

---

[5] Sky High Nashville is a recreational facility based on the emerging "indoor trampoline park" concept. (*See* T.R. Vol. 5 at 707.) It is a part of a larger national brand, Sky High Sports, which began in California. (*Id.*) At the time this lawsuit was filed, Sky High facilities were located in seven different states, including ten facilities in California; two facilities in Illinois; and one facility in Tennessee, North Carolina, Oregon, Texas, and Washington, respectively. (*Id.*)

[6] The trial court's denial of the Motion to Enforce the Contract Between the Parties is the subject of Sky High Nashville's appeal. *See infra*.

several provisions contained in the Contract Ms. Blackwell executed on her own behalf and on behalf of Mr. Blackwell.[7] (T.R. Vol. 1 at 40.) Specifically, Sky High Nashville sought to enforce the following combined forum selection, choice of law, and severability provision:

> ***In the event that I file a lawsuit against SKY HIGH SPORTS, I agree to do so solely in the state of California and I further agree that the substantive law of California shall apply in that action without regard to the conflict of the law rules of that state.*** I agree that if any portion of this agreement is found to be void or unenforceable, the remaining portions shall remain in full force and effect.

(T.R. Vol. 1 at 40, ¶ 6.) (emphasis added)

In addition, Sky High Nashville sought to enforce Ms. Blackwell's agreement that she understood and voluntarily assumed all of the risks associated with Mr. Blackwell's participation in Sky High Nashville's activities and agreed to release Sky High Nashville from any and all liability arising therefrom:

> [P]articipation in SKY HIGH SPORTS trampoline games entail known and unknown risks that could result in physical or emotional injury, paralysis, death, or damage to myself, to property or to third parties. I understand that such risks simply cannot be eliminated without jeopardizing the essential qualities of the activity.
>
> **The risks include, among other things** . . . the usual risk of cuts and bruises. Other more serious risks exist as well. Participants often fall off equipment, sprain or break wrists and ankles, and can suffer more serious injuries as well. Traveling to and from trampoline location raises the possibility of any manner of transportation accidents. ***Double bouncing, more than one person per trampoline, can create a rebound effect causing serious injury.*** Flipping and running and bouncing off the walls is dangerous and can cause serious injury and must be done at the participants own risk. Similar risks are also inherent in using the Foam Pit. In any event, if you or your child is injured, you or your child may require medical assistance, at your own expense.

[7] Ms. Blackwell executed the Contract on July 3, 2012, and it applied to all future visits to Sky High Nashville. (T.R. Vol. 1 at 40, ¶ 10.) It is undisputed that Mr. Blackwell had visited Sky High Nashville on numerous occasions prior to the one at issue in this case. (T.R. Vol. 1 at 691.)

> Furthermore, SKY HIGH SPORTS employees have difficult jobs to perform. They seek safety, but they are not infallible. They might be unaware of a participant's fitness or abilities. They may give incomplete warnings or instructions, and the equipment being used might become loose, out of adjustment, or malfunction. There is also a risk that SKY HIGH SPORTS employees may be negligent in, among other things, monitoring and supervising use of its equipment and facilities and in the maintenance and repair of its equipment and facilities.
>
> I expressly agree and promise to accept and assume all of the risks existing in this activity. My participation in this activity is purely voluntary, and I elect to participate in spite of the risks.
>
> **I hereby voluntarily release, forever discharge, and agree to defend, indemnify and hold harmless RELEASED PARTIES[8] from any and all claims, demands, or causes of action, which are in any way connected with my participation in this activity or my use of SKY HIGH SPORTS equipment or facilities, including any such claims which allege negligent acts or omissions of RELEASED PARTIES.**
>
> Should SKY HIGH SPORTS or anyone acting on their behalf, be required to incur attorney's fees and costs to enforce this agreement, I agree to indemnify and hold them harmless for all such fees and costs. This means that I will pay all of those attorney's fees and costs myself.
>
> I certify that I have adequate insurance to cover any injury or damage that I may cause or suffer while participating, or else I agree to bear the costs of such injury or damage myself. I further certify that I am willing to assume the risk of any medical or physical condition that I may have.

(T.R. Vol. 1 at 40, ¶¶ 1-5) (plain bold emphasis in original, numbering omitted, additional emphasis and footnote added).

[8] "Released Parties" is defined as "SKY HIGH SPORTS, its agents, owners, shareholders, directors, partners, employees, volunteers, manufacturers, participants, lessors, affiliates, its subsidiaries, related and affiliated entities, successors and assigns." (T.R. Vol. 1 at 40.)

Finally, Sky High Nashville sought to enforce Ms. Blackwell's agreement to all of the terms contained in the Contract ***on behalf of Mr. Blackwell***. In pertinent part, the Contract provided as follows:

> **If the participant is a minor, I agree that this Release of Liability and Assumption of Risk agreement ("RELEASE") is made on behalf of that minor participant and that all of the releases, waivers and promises herein are binding on that minor participant. I represent that I have full authority as Parent or Legal Guardian of the minor participant to bind the minor participant to this agreement.**
>
> **If the participant is a minor, I further agree to defend, indemnify and hold harmless SKY HIGH SPORTS from any and all claims or suits for personal injury, property damage or otherwise**, which are brought by, or on behalf of the minor, and which are in any way connected with such use or participation by the minor, including injuries or damages caused by the negligence of RELEASED PARTIES, except injuries or damages caused by the sole negligence or willful misconduct of the party seeking indemnity.
>
> * * *
>
> By signing this document, I acknowledge that if anyone is hurt or property damaged during my participation in this activity, I may be found by a court of law to have waived my or the minor participant's right to maintain a lawsuit against SKY HIGH SPORTS or any RELEASED PARTIES on the basis of any claim from which I have released them herein.

(T.R. Vol. 1 at 40, ¶ 8, 9 (plain bold and underlining in original, numbering omitted).)

Ms. Blackwell filed a response on Mr. Blackwell's behalf in opposition to the motion.[9] (T.R. Vol. 5 at 672.) Sky High Nashville timely filed a Reply to the Response, along with the Affidavit of Rolland Weddell as further support. (T.R. Vol. 5 at 695, 707.) In pertinent part, Mr. Weddell stated in his affidavit as follows:

> The "Customer Release of Liability and Assumption of Risk" contract (the "Contract"), which is attached to Sky High

[9] Instead of directly responding on her own behalf, Ms. Blackwell summarily nonsuited her individual claims in this case. (*See* T.R. Vol. 5 at 689, 710.)

> Nashville's Memorandum in Support of its Motion as Exhibit A, including the choice of law and forum selection provision stipulating California law as the applicable law and California courts as the appropriate forum for any disputes between the parties contracting thereto ("California Choice of Law and Forum Selection Provision"), is an agreement and stipulation that all Sky High Sports brand facilities use throughout the United States in their business operations.[10]
>
> The California Choice of Law and Forum Selection Provision was intentionally included in the Contract. All Sky High Sports brand facilities use the same type of contract throughout the United States in their business operations, including Sky High Nashville. The use of this provision by the stores is not merely a matter of form. This was done so the stores, like Sky High Nashville, may reasonably determine the state in which they might be subject to suit in court and the laws that will apply to the same.

(T.R. Vol. 5 at 708, ¶¶ 4-5) (footnote added).

III. Hearing on Sky High Nashville's Motion to Enforce the Contract Between the Parties and Order Subject to Sky High Nashville's Appeal.

Sky High Nashville's Motion to Enforce the Contract Between the Parties was heard on May 8, 2015. On May 22, 2015, the trial court entered an Order, which is the subject to Sky High Nashville's Appeal, denying Sky High Nashville's motion. (T.R. Vol. 5 at 712.) In its Order, the trial court made the following findings: (1) "[I]t would be a great hardship for Jacob Blackwell, a minor, to travel to California to bring this action;" (2) "Tennessee has the most reasonable relationship to the facts surrounding this case;" (3) "Simply running a business in California does not establish a more significant relationship than that which exists in Tennessee;" (4) "[T]he parties reside in Tennessee;" (4) "the conduct out of which the injury arose occurred

[10] Mr. Weddell later clarified that this was a reference to corporate stores, not stores owned by independent franchisees. *See infra.*

in Tennessee;" (5) "the injury occurred in Tennessee;" and, (6) "Tennessee also has a fundamental policy in favor of the protection of children."[11] (T.R. Vol. 5 at 713.)

Based on the foregoing findings, the trial court held as follows: (1) Tennessee law applies to this case; (2) Under *Childress v. Madison County*, 777 S.W.2d 1 (Tenn. Ct. App. 1989), an adult cannot waive a minor's claims and, therefore, Ms. Blackwell's signature on the liability waiver contained in the Contract "does not dismiss Jacob Blackwell's claims against the Defendant;" and, (3) Sky High Nashville's Motion to Enforce the Contract Between the Parties is denied. (*Id*.)

IV. Sky High Nashville's Motion to Alter/Amend or, in the Alternative, for Interlocutory Appeal.

On June 22, 2015, Sky High Nashville filed its Motion to Alter/Amend or, in the Alternative, for Interlocutory Appeal. (T.R. Vol. 5 at 717-18.) Sky High Nashville contended that the trial court applied a clearly erroneous legal standard in its determination of: (a) whether the Contract's forum selection provision is enforceable; (b) whether the Contract's choice of law provision is enforceable; and, (c) whether the Contract's pre-injury liability waiver is enforceable. (*Id.*)

Further, Sky High Nashville submitted that there was new evidence not previously before the trial court. (T.R. Vol. 5 at 718.) Specifically, contemporaneous with its Motion to Alter/Amend, Sky High Nashville filed the Second Affidavit of Rolland Weddell, which provided as follows:

> I have reviewed [the form releases from the Internet the attorney for the Plaintiffs produced at the hearing on Sky High Nashville's Motion to Enforce Contract Between the Parties], and they all

[11] In doing so, the trial court implicitly conceded that current Tennessee law may allow a parent to modify a minor's liability claims, at least with regard to forum selection and choice of law. Otherwise, no factor analysis would have been necessary, and the trial court could have simply relied upon *Childress v. Madison County*, 777 S.W.2d 1 (Tenn. Ct. App. 1989).

> relate to franchise stores using the Sky High Sports brand. My reference to the "Customer Release of Liability and Assumption of Risk" contract (the "Contract") including the choice of law and forum selection provision stipulating California law as the applicable law and California courts as the appropriate forum for any disputes between the parties contracting thereto ("California Choice of Law and Forum Selection Provision"), was with regard to our corporate stores. This is an agreement and stipulation that all Sky High Sports brand facilities use throughout the United States in their business operations for corporate stores. Sky High Nashville is a corporate store. The individual franchisees use their own provisions.
>
> To the extent I was unclear in my previous affidavit in this regard, I hope this affidavit resolves the confusion.

(T.R. Vol. 5 at 720-21, ¶¶ 3-4.)

On December 11, 2015, Ms. Blackwell filed a Response to Sky High Nashville's Motion to Alter/Amend or, in the Alternative, for Interlocutory Appeal. (T.R. Vol. 6 at 754.) Ms. Blackwell opposed Sky High Nashville's motion to alter/amend. (*Id.*) However, Ms. Blackwell did not oppose Sky High Nashville's request for interlocutory appeal of the Order. (T.R. Vol. 6 at 756.)

V. Ms. Blackwell's Motion to Amend Complaint.

Prior to filing her Response to Sky High Nashville's Motion to Alter/Amend or, in the Alternative, for Interlocutory Appeal, Ms. Blackwell filed a Motion to Amend Complaint on July 31, 2015.[12] (T.R. Vol. 5 at 739.) Specifically, Ms. Blackwell sought leave to file a Second Amended Complaint with the following amendments:

> a. Naming the correct Plaintiff as Crystal Blackwell, as next friend to Jacob Blackwell, a minor,
>
> b. Removing any claims Crystal Blackwell, individually was seeking; and,

[12] Over the objections of Sky High Nashville, Ms. Blackwell had previously voluntarily dismissed the claims she asserted on her own behalf. (T.R. Vol. 5 at 689, 710, 712.) Therefore, Ms. Blackwell sought to file a Second Amended Complaint on Mr. Blackwell's behalf.

> c. Asking for Crystal Blackwell, as next friend to Jacob Blackwell, a minor, to recover the medical expenses, both past and future, incurred by Jacob as a result of this incident.

(T.R. Vol. 5 at 740, ¶¶ 6, 9.)

On December 14, 2015, Sky High Nashville filed a Response to Plaintiff's Motion to Amend Complaint. (T.R. Vol. 6 at 757.) Sky High Nashville opposed Ms. Blackwell's motion, to the extent she requested to add a claim, purportedly on Mr. Blackwell's behalf, for reimbursement of pre-majority medical expenses related to Mr. Blackwell's alleged injury. (T.R. Vol. 6 at 760-65.) Specifically, Sky High Nashville's opposition was based on the following: (1) Ms. Blackwell's claim to recover medical expenses is her own separate and independent claim[13] (T.R. Vol. 6 at 760-61); (2) The Contract is enforceable against Ms. Blackwell[14] (T.R. Vol. 6 at 761-63); and, (3) Therefore, because Ms. Blackwell's claim for medical expenses was barred pursuant to the Contract, Mr. Blackwell cannot assert such a claim.[15] (T.R. Vol. 6 at 763-65.)

VI. Hearing on Motion to Alter/Amend or, in the Alternative, for Interlocutory Appeal, and Motion to Amend Complaint.

On December 18, 2015, the trial court heard both Sky High Nashville's Motion to Alter/Amend or, in the Alternative, for Interlocutory Appeal, and Ms. Blackwell's Motion to Amend Complaint. On February 23, 2016, the trial court entered the Order Related to Pending

---

[13] *See* Tenn. Code Ann. § 20-1-105 ("The father and mother of a minor child have equal rights to maintain an action for the expenses and the actual loss of service resulting from an injury to a minor child in the parents' service or living in the family . . ."); *Page v. Wilkinson*, 657 S.W.2d 422 (Tenn. Ct. App. 1983); *Frady v. Smith*, 519 S.W.2d 584 (Tenn. 1974); *Dudley v. Phillips*, 405 S.W.2d 468, 469 (Tenn. 1966) (Although considered as a "derivative" of the child's claim, "[w]hen a tort is committed against a child there arises ***two separate and distinct causes of action.***") (emphasis added)).

[14] *See Childress v. Madison County*, 777 S.W.2d 1, 6 (Tenn. Ct. App. 1989).

[15] *See Calaway v. Schucker*, 193 S.W.3d 509, 513 (Tenn. 2005) (where a parent's claim for medical expenses is barred, then her minor child does not have a claim for those same medical expenses); *Tennessee Farmers' Mut. Ins. Co. v. Rader*, 410 S.W.2d 171, 173 (Tenn. 1966) (subrogation contract entered into by the parent that assigned right to collect medical expenses to insurance company barred any claim for medical expenses, including the minor child's claim).

Motions and Granting of Interlocutory Review, which denied Sky High Nashville's request to alter/amend the Order, but granted its request for permission to seek immediate appellate review. (T.R. Vol. 6 at 770-71.) The trial court held that an immediate appeal in this regard would avoid protracted and expensive litigation, pursuant to Rule 9(a)(2) of the Tennessee Rules of Appellate Procedure. (*Id*.)

In addition, the trial court endeavored to clarify its previous ruling as to the enforceability of the choice of law and forum selection provision contained in the Contract:

> I do not, however, think [an interlocutory appeal is] needed for the purposes of clarifying the law. And I want to reiterate. Apparently there was some misunderstanding in my ruling before.
>
> With regard to the forum selection clause, the Court did consider the facts set forth in *Dyersburg Machine Works v. Rentenbach Engineering* in allowing the Court to find forum selection clause[s] invalid where the plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action, or the other state would be a substantially less convenient place for the trial of the action in this state, or that the agreement as to the place of the action was obtained by misrepresentation, duress, abuse of economic power, or other unconscionable means, or it would for some other reason be unfair or unreasonable to enforce the agreement.
>
> The Court found at the time I made my ruling that the second factor and the fourth factor are applicable here. It would be a great hardship for Mr. Blackwell, a minor, to travel to California to bring this action as a result of injuries that occurred in Tennessee based upon a forum selection clause agreement signed by his mother.
>
> And I find also that factor four applies to that as well.
>
> In regards to the choice of law provisions, the *lex loci contractus* rule is interpreted by the Court of Appeals in *Messer Griesheim Industry, Inc. v. Cryotech of Kingsport*, stated that if the parties manifest intent to instead apply the laws of another jurisdiction, then the intent will be honored provided certain requirements are met.

> One, the choice of law provisions must be execut[*ed*] in good faith. Two, the jurisdiction whose law is chosen must bear a material connection to the transaction. Three, the basis for the choice of another jurisdiction's law must be reasonable and not merely a sham or a subterfuge. And four, the parties choice of another jurisdiction's law must not [be] contrary to a fundamental policy of the state having a materially greater interest in whose law would otherwise govern.
>
> The Court finds that California does not bear a material connection for this accident. As stated in the May 22, 2015 Order, Tennessee has the most reasonable relationship to the facts surrounding this case. Simply running a business in California does not establish a more significant relationship than that which exists in Tennessee, the conduct out of which the injury arose occurred in Tennessee, and the injury occurred in Tennessee.
>
> So I do find that my ruling is an accurate – I believe to be an accurate statement of the current law in Tennessee.

(T.R. Vol. 6 at 777-79.)

Further, the trial court's February 23, 2016, Order denied Ms. Blackwell's Motion to Amend Complaint to the extent she sought leave to add a claim, purportedly on Mr. Blackwell's behalf, for reimbursement of any pre-majority medical expenses related to Mr. Blackwell's alleged injury.[16] (T.R. Vol. 6 at 788-89.) In pertinent part, the trial court held as follows:

> [T]he law in Tennessee as pointed out in cases and recognized in *Palanki* and others, is that for a minor's injuries claim for medical expenses are [*sic*] a separate and distinct claim of the parent because [of] the parental responsibility of providing care for their children. That can be waived under some circumstances. But here, I see this as more of [*sic*] akin to an assignment, frankly. Where essentially, Ms. Blackwell is assigning her rights to recover to her son and not choosing to pursue them.
>
> The problem is, Ms. Blackwell didn't really have anything to assign because she had already waived all her right to recover by a contractual agreement under which she had agreed not to hold them responsible for anything.

[16] The trial court's denial of the Motion to Amend Complaint in this regard is the subject of Ms. Blackwell's appeal. *See infra*.

> For those reasons, I am going to grant the motion to amend the complaint in all respects except pre-majority medical expenses.

(*Id.*) The trial court *sua sponte* granted permission to seek appellate review of its ruling on the Motion to Amend Complaint. (T.R. Vol. 6 at 790.) Sky High Nashville submits that the trial court's ruling in this regard was correct, and therefore did not request review of the trial court's ruling in this regard. (*See* Rule 9 App.)

Sky High Nashville timely filed its Rule 9 Application for Permission to Appeal with this Court requesting interlocutory review of only the trial court's denial of its Motion to Enforce the Contract Between the Parties. (*Id*.) In her Response to Sky High's Rule 9 Application, Ms. Blackwell requested that this Court also review the trial court's denial of the Motion to Amend Complaint. (Answer to Rule 9 App.)

On March 18, 2016, this Court granted both Sky High Nashville's request for permission to appeal the trial court's denial of the Motion to Enforce the Contract Between the Parties, and Ms. Blackwell's request for interlocutory review the trial court's ruling on the Motion to Amend Complaint. (Order Granting Rule 9 Appeal.)

STANDARD OF REVIEW

Tennessee appellate courts review questions of law *de novo*, without any presumption of correctness given to the legal conclusions of the courts below. *Sanders v. Traver*, 109 S.W.3d 282, 284 (Tenn. 2003) (citations omitted). The interpretation of a contract is a question of law, which is reviewed *de novo* with no presumption of correctness. *White v. Turnberry Homes, LLC*, 2015 WL 3429764, at *1 (Tenn. Ct. App. May 28, 2015) (citing *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999)). The enforceability of a forum selection provision is a question of law that is reviewed *de novo*. *Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 371 (6th Cir. 1999) (citing *Baker v. LeBoeuf, Lamb, Leiby & Macrae,* 105 F.3d 1102, 1104 (6th Cir. 1997); *Shell v. R.W. Sturge, Ltd.,* 55 F.3d 1227, 1229 (6th Cir. 1995)).

Further, a trial court's ruling on a motion for leave to file an amended complaint is reviewed under an abuse of discretion standard. *Riley v. Whybrew*, 185 S.W3d 383, 398 (Tenn. Ct. App. 2005). "An abuse of discretion occurs when the trial court reaches a decision against logic that causes a harm to the complaining party or when the trial court applies an incorrect legal standard." *Id.* (citing *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

LEGAL ARGUMENT

I. Overview.

This appeal raises questions regarding the enforceability and effect of a contract signed by a parent on behalf of her minor child. Respectfully, the trial court's Order denying Sky High Nashville's Motion to Enforce the Contract Between the Parties should be reversed for several reasons. As described *infra*, the Contract's forum selection and choice of law provisions should be enforced against Mr. Blackwell because they are *prima facie* valid, they otherwise satisfy Tennessee's baseline requirements for enforceability, and Ms. Blackwell has the authority to prospectively select the litigation forum and applicable law for Mr. Blackwell's claims.

Notwithstanding, the trial court also erred by not enforcing the Contract's liability waiver against the claims Ms. Blackwell has brought on Mr. Blackwell's behalf. In support of its denial in this regard, the trial court relied on this Court's ruling in *Childress v. Madison County*, 777 S.W.2d 1 (Tenn. Ct. App. 1989). However, the instant appeal involves a constitutional question not posed to this Court in *Childress* that is rooted in the recent recognition of a parent's fundamental constitutional right to make important decisions for her child.

Indeed, there has been a strong shift favoring the enforcement of parental pre-injury liability waivers in cases from other jurisdictions since *Childress*, which reflect an accurate state of the law applicable in this case. Accordingly, the relevant body of constitutional law that has developed in the nearly three decades since *Childress* now requires this Court to reverse the trial court and uphold Ms. Blackwell's decision to execute the Contract's liability waiver on Mr. Blackwell's behalf.

In the alternative, the trial court did not abuse its discretion in ruling on Ms. Blackwell's Motion to Amend Contract, and its ruling should be affirmed. Specifically, Ms. Blackwell may

not pursue a claim for medical expenses on Mr. Blackwell's behalf because her claims are barred by operation of the Contract between the parties. Therefore, she is prohibited from asserting those claims derivatively on Mr. Blackwell's behalf.

II. The Trial Court Erred by Not Enforcing the Contract's Forum Selection and Choice of Law Provisions.

A. The Contract's Forum Selection Should Provision Be Enforced.

The trial court did not enforce the Contract's forum selection provision based on Tennessee's traditional analysis as to the general enforceability of forum selection provisions.[17] In that regard, the trial court held that "it would be a great hardship for Jacob Blackwell, a minor, to travel to California to bring this action." (T.R. Vol. 1 at 713; T.R. Vol. 6 at 778.) In addition, when later endeavoring to clarify that ruling, the trial court held that "it would for some other reason be unfair or unreasonable to enforce [the Contract's form selection provision]." (T.R. Vol. 6 at 777-778) (stating that the fourth *Dyersburg* factor applies as well)). Respectfully, the trial court erred in this regard.

Notwithstanding the applicability of *Childress*, if any, Tennessee courts favor and routinely enforce forum selection provisions.[18] *Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co.*, 650 S.W.2d 378 (Tenn. 1983); *Thompson v. Terminix Intern. Co., L.P.*, 2006 WL 2380598 (Tenn. Ct. App. 2006). If a party brings an action in an unselected court and the other party resists jurisdiction citing the forum selection clause, a court will enforce the clause

[17] In other words, the trial court did not invalidate the Contract's forum selection provision because Mr. Blackwell is a minor, specifically. Notwithstanding, Sky High Nashville submits that such a fact does not render the Contract's forum selection provision unenforceable based on the reasons set forth in Section II(C), *infra*.

[18] Forum selection provisions are either mandatory or permissive. *See Thomas v. Costa Cruise Lines N.V.*, 892 S.W.2d 837 (Tenn. Ct. App. 1994). If the agreement has clear language that jurisdiction is appropriate ***only*** in the designated forum, the clause is mandatory and it bars subject matter jurisdiction of all forums not designated in the clause. *Id.* A permissive forum selection provision, on the other hand, does not prohibit litigation elsewhere. *Id.* The Contract's forum selection provision in this case is a mandatory forum selection provision. (T.R. Vol. 1 at 40, ¶ 6 (". . . I agree to [file suit] ***solely*** in the state of California") (emphasis added)).

consistent with the elements of fundamental fairness. *Long v. Dart Intern., Inc.*, 173 F. Supp. 2d 774 (W.D. Tenn. 2001). Nevertheless, a forum selection clause is *prima facie* valid, and the party seeking to avoid the clause has a heavy burden to show it is unfair or unreasonable. *Id.*

This Court thoughtfully summarized Tennessee's analysis of forum selection provisions in *Sevier Cnty. Bank v. Paymentech Merch. Servs., Inc.* 2006 WL 2423547 (Tenn. Ct. App. Aug. 23, 2006):

> [T]he more recent decisions hold that the validity or invalidity of such forum selection clauses depends upon whether they are fair and reasonable in light of all the surrounding circumstances attending their origin and application.
>
> The Model Choice of Forum Act provides that an unselected court must give effect to the choice of the parties and refuse to entertain the action unless (1) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action; (2) or the other state would be a substantially less convenient place for the trial of the action than this state; (3) or the agreement as to the place of the action was obtained by misrepresentation, duress, abuse of economic power, or other unconscionable means; (4) or it would for some other reason be unfair or unreasonable to enforce the agreement.
>
> Section 80 of the Restatement (2d) of Conflict of Laws (1971), provides:
>
> > "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."
>
> Courts which recognize the validity of forum selection clauses generally, nevertheless, have refused to enforce them against third parties who did not agree to the contract containing such clause and are not parties to the agreement.
>
> We conclude that the courts of this state should give consideration to the above mentioned factors and any others which bear upon the fundamental fairness of enforcing such a forum selection clause, and should enforce such a clause unless the party opposing enforcement demonstrates that it would be unfair and inequitable to do so.

Sevier Cnty. Bank, 2006 WL 2423547, at *4 (citing *Dyersburg*, 650 S.W.2d at 380) (internal citations omitted). Tennessee courts have long recognized it is reasonable to expect that a business would limit where it is subject to suit, and Tennessee courts will clearly allow it to do so. *See, e.g. Thomas v. Costa Cruise Lines N.V.*, 892 S.W.2d 837, 841 (Tenn. Ct. App. 1994).

Importantly, "[a] party resisting a forum selection clause ***must show more than*** inconvenience or annoyance such as ***increased litigation expenses."*** *Sevier Cnty. Bank*, 2006 WL 2423547, at *6 (emphasis in original) (citations omitted). Indeed, when a party claims that it would be an unreasonable expense and/or hardship for him to travel to the forum selected in the contract, Tennessee courts must necessarily probe whether such alleged expense/hardship could have been "reasonably foreseen when [the party] signed the contract." *Id.* Further, it is clear that "when evaluating the convenience of having a trial in one state versus another state, [courts] must look to the convenience of all the parties, not just the plaintiff(s) or the defendant(s)." *Id.* at *7 (citing *Signal Capital Corp. v. Signal One, LLC*, 2000 WL 1281322, *4 (Tenn. Ct. App. Sept. 7, 2000)); *Quist v. Empire Funding Corp.*, 1999 WL 982953 (N.D. Ill. Oct. 22, 1999).

Here, the trial court invalidated the Contract's forum selection provision based on its view that enforcement would cause Mr. Blackwell great hardship to travel to California to pursue his claims. (T.R. Vol. 1 at 713; T.R. Vol. 6 at 778.) However, the record does not contain any specific evidence that Mr. Blackwell would suffer "great hardship" to bring this lawsuit in California. Notwithstanding, even if there was evidence in the record by affidavit or otherwise supporting a finding of hardship – which there is not – such hardship was reasonably foreseen at the outset. *See Sevier Cnty. Bank*, 2006 WL 2423547, at *6. Accordingly, the Contract's forum selection provision should not be invalidated on that basis.

Moreover, when later endeavoring to clarify that ruling, the trial court held that "it would for some other reason be unfair or unreasonable to enforce [the Contract's form selection provision]." (T.R. Vol. 6 at 777-778) (stating that the fourth *Dyersburg* factor applies as well). Notwithstanding, there is likewise no evidence in the record that would support that holding. Indeed, Tennessee courts have long-held that forum selection provisions are *prima facie* valid, and the party seeking to avoid the clause has a heavy burden to show it is unfair or unreasonable. *Sevier Cnty. Bank*, 2006 WL 2423547, at *6.

Accordingly, Sky High Nashville respectfully submits that the Contract's forum selection provision should be enforced in this case.

B. The Contract's Choice of Law Provision Should Be Enforced.

The trial court similarly did not enforce the Contract's choice of law provision based on Tennessee's traditional analysis as to the general enforceability of choice of law provisions.[19] In that regard, the trial court held as follows:

> In regards to the choice of law provisions, the *lex loci contractus* rule is interpreted by the Court of Appeals in *Messer Griesheim Industry, Inc. v. Cryotech of Kingsport*, stated that if the parties manifest intent to instead apply the laws of another jurisdiction, then the intent will be honored provided certain requirements are met.
>
> One, the choice of law provisions must be execut[*ed*] in good faith. Two, the jurisdiction whose law is chosen must bear a material connection to the transaction. Three, the basis for the choice of another jurisdiction's law must be reasonable and not merely a sham or a subterfuge. And four, the parties choice of another jurisdiction's law must not [be] contrary to a fundamental policy of the state having a materially greater interest in whose law would otherwise govern.

[19] Like the Contract's forum selection provision, the trial court did not invalidate the Contract's choice of law provision because Mr. Blackwell is a minor, specifically. Notwithstanding, Sky High Nashville submits that such a fact does not render the Contract's choice of law provision unenforceable based on the reasons set forth in Section II(C), *infra*.

> The Court finds that California does not bear a material connection for this accident. As stated in the May 22, 2015 Order, Tennessee has the most reasonable relationship to the facts surrounding this case. Simply running a business in California does not establish a more significant relationship than that which exists in Tennessee, the conduct out of which the injury arose occurred in Tennessee, and the injury occurred in Tennessee.

(T.R. Vol. 6 at 778-79.) Respectfully, Sky High Nashville submits that the trial court erred in this regard.

It is well-settled in Tennessee that where parties express an intent for the laws of another jurisdiction to apply to a contract between them, such intent will be recognized. *See Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 465, 467 (Tenn. 1973). This Court has summarized Tennessee law as to choice of law provisions as follows:

> If the parties manifest an intent to instead apply the laws of another jurisdiction, then that intent will be honored provided certain requirements are met. The choice of law provision must be ***executed in good faith***. The jurisdiction whose law is chosen must ***bear a material connection to the transaction***. The basis for the choice of another jurisdiction's law ***must be reasonable and not merely a sham or subterfuge.*** Finally, the parties' choice of another jurisdiction's law ***must not be "contrary to 'a fundamental policy' of a state having [a] 'materially greater interest' and whose law would otherwise govern."***

Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc., 131 S.W.3d 457, 475 (Tenn. Ct. App. 2003) (emphasis added) (quoting *Vantage Technology, LLC v. Cross*, 17 S.W.3d 637 (Tenn. Ct. App. 1999) (internal citations omitted)) *See also Wright v. Rains*, 106 S.W.3d 678, 681 (Tenn. Ct. App. 2003) ("'Tennessee will honor a choice of law clause if the state whose law is chosen bears a reasonable relation to the transaction and absent a violation of the forum state's public policy.'") (quoting *Bright v. Spaghetti Warehouse, Inc.*, 1998 WL 205757, at *5 (Tenn. Ct. App. Apr. 29, 1998)). Like a forum selection provision, a choice of law provision is *prima*

facie valid and, therefore, a party bears the "heavy burden" of showing why such provisions are unfair or unreasonable. *See Security Watch, Inc. v. Sentinel Systems, Inc.*, 176 F.3d 369 (6th Cir. 1999).

Here, the Contract's choice of law provision selecting California law should be enforced. Specifically, there is no evidence in the record showing that the Contract was ***not*** executed in good faith. Accordingly, the "heavy burden" required to invalidate the choice of law provision has not been met in this regard. *Id.* Moreover, California bears a reasonable relation to the transaction in this case because Sky High Nashville is a business operating under a larger brand based in California. (*See* T.R. Vol. 5 at 707) (Sky High Nashville is part of a larger national brand, Sky High Sports, primarily based in California)). *See, e.g., Bright*, 1998 WL 205757, at *5; *Thomas*, 892 S.W.2d at 841 (Tennessee courts have long recognized it is reasonable to expect that a business would limit where it is subject to suit).

Accordingly, Sky High Nashville respectfully submits that the Contract's choice of law provision should be enforced in this case.

C. The Choice of Law and Forum Selection Provisions Are Enforceable Against Claims Brought on Mr. Blackwell's Behalf.

In addition to the foregoing reasons, the Contract's forum selection and choice of law provisions should be enforced as to the claims brought on Mr. Blackwell's behalf because Ms. Blackwell has the authority to bind Mr. Blackwell to such provisions.

One of the first cases that analyzed a parent's authority to prospectively select a forum for his or her minor child's claims was a 1965 California case dealing with a minor's rights under an arbitration provision in an insurance contract. *Doyle v. Guiliucci*, 401 P.2d 1 (Cal. 1965). The court enforced the arbitration provision against the minor child, holding that it did not unreasonably restrict the child's rights because it did "no more than specify a forum for the

settlement of disputes." *Id.* at 3. Thus, because a parent has a "right and duty to provide care for his child," he or she must be allowed to contract on behalf of his or her minor child in the context of medical services. *Id.*

Since *Doyle*, courts have routinely held that a parent has the authority to bind his or her minor child to arbitration provisions in lawsuits involving general negligence and other tort liability. *See, e.g., Global Travel Marketing, Inc. v. Shea*, 908 So. 2d 392 (Fla. 2005) (father's wrongful death action against a safari operator brought on behalf of his minor son after the minor was killed by hyenas while on a safari is subject to arbitration provision signed by the father); *Cross v. Carnes*, 724 N.E.2d 828 (Ohio 1998) (a child's defamation and fraud claims against the Sally Jessy Raphael Show are subject to an arbitration provision signed by the child's parents); *Hojnowski v. Vans Skate Park*, 868 A.2d 1087, 1092 (N.J. Sup. Ct. 2005) (a child's claim for bodily injuries he received at a skateboarding park is subject to an arbitration provision signed by the child's parents). *See also Leong v. Kaiser Found. Hosps.*, 788 P.2d 164 (Haw. 1990). Ultimately, an arbitration provision is really a forum selection provision and ***"only specifies the forum for resolution of the child's claim"*** and "does not extinguish the claim." *Cross*, 724 N.E.2d at 836 (emphasis added). *See also Shea*, 908 So.2d 392 (arbitration provision ***merely "constitutes a prospective choice of forum"***).

Moreover, a forum selection provision is enforced against minors outside of arbitration provision contexts because ***courts uphold arbitration provisions on the basis that they are essentially choice of law and forum selection provisions***.[20] *Cross*, 724 N.E.2d at 836; *Shea*, 908

[20] In addition, although laws generally allow minors to disaffirm their own contracts, those laws are ultimately "not intended to affect contracts entered into by adults on behalf of their children." *Hohe v. San Diego Unified School Dist.*, 224 Cal. App. 3d 1559, 1565 (Cal. Ct. App. 1990) (citing *Doyle v. Guiliucci*, 401 P.2d 1 (Cal 1965)). *See also, infra*. It is also not necessary to make a distinction between commercial versus non-commercial entities in the determination of whether a forum selection provision executed by a parent is enforceable against her minor child. *See Hojnowski v. Vans Skate Park*, 868 A.2d 1087, 1093 (N.J. Sup. Ct. 2005); *Global Travel*

So. 2d 392. ***"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."*** *Cross*, 724 N.E.2d at 836 (emphasis added). Importantly, it is immaterial that the selected forum is more preferable to one party over a minor child. *Shea*, 908 So. 2d 392; *Cross*, 724 N.E.2d at 836. ***Rather, the "real test" is whether the contracting parties intended that a minor should receive a benefit, thereby subjecting the minor to enforceable obligations.*** *Hojnowski*, 868 A.2d at 1092 (emphasis added) (citations omitted).

Recently, this Court seemed to arrive at a nearly identical result. In *Williams v. Smith*, 2014 WL 6065818 (Tenn. Ct. App. Nov. 6, 2014), the plaintiffs – a minor child and her parents – were involved in a car accident in Tennessee while driving from North Carolina to Missouri in a vehicle owned by North Carolina residents. *Id.* at *1. The vehicle was insured with an uninsured/underinsured motorist policy containing a Missouri choice of law provision. *Id.* The trial court granted the insurance company's motion to dismiss and dismissed all of plaintiffs' claims – including the minor's claims – on the basis of the choice of law provision.[21] *Id.* at *2. This Court affirmed the trial court, perhaps presaging the notion that a minor may be bound as a non-signatory to a choice of law and/or forum selection provision. *Id.* Indeed, if the minor in that case was not so bound, it would appear that the applicable coverage would have been determined through a conflicts of law analysis based on common law. *Id.*

In a nearly identical case to the one at bar, a Delaware Court upheld a California forum selection and choice of law provision against a minor's personal injury claims. *Doe v. Cedars*

Marketing, Inc. v. Shea, 908 So.2d 392 (Fla. 2005); *Cross v. Carnes*, 724 N.E.2d 828, 836 (Ohio 1998). *See also, infra*.

[21] If North Carolina law controlled, there was no uninsured motorist coverage; while if Missouri law controlled, there was such coverage. *Williams v. Smith*, 2014 WL 6065818 (Tenn. Ct. App. Nov. 6, 2014).

Academy, 2010 WL 5825343 (Del. Sup. Ct. Oct. 27, 2010). In *Cedars Academy*, a mother entered into a contract with a private boarding school to enroll her minor son as a student. *Id.* at *1. The mother executed the contract individually and on behalf of her minor son, which included a pre-injury liability waiver, a mandatory California forum selection provision, and a California choice of law provision.[22] *Id.* at *2.

After the minor was allegedly sexually assaulted on campus, the mother sued the private school individually and on behalf of her minor son. *Id*. The court first held that both the mother and her minor son were generally bound by the contract because the son would have not been able to go to that specific school without his mother contracting for such services. *Id.* The court held that to conclude the contract did not apply to the minor would be inconsistent with fundamental parental rights and practically unworkable:

> [Not enforcing the contract against the minor would be] tantamount to concluding that a parent can never contract with a private school or any other service provider on behalf and for the benefit of her child. As a practical matter, no service provider would ever agree to a contract with a parent if a child could ignore the provisions of the contract that pertain to him without recourse. Such a result is inconsistent with the 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.'

Id. at *4 (citations omitted). Because the choice of law and forum selection provisions did not "seriously impair[]" the plaintiff or the minor son's ability to pursue the cause of action, the court enforced the forum selection and choice of law provisions and dismissed the entire case in

[22] The contract also contained an arbitration provision, but that was ultimately a non-issue as the court dismissed the case in favor of either California courts or an arbitral forum in the state of California applying California law. *Doe v. Cedars Academy*, 2010 WL 5825343 (Del. Sup. Ct. Oct. 27, 2010).

favor of California jurisdiction.[23] *Id.* (***"Mere inconvenience or additional expense is not sufficient evidence of unreasonableness."***) (emphasis added); *see also Sevier Cnty. Bank*, 2006 WL 2423547, at *6 ("[a] party resisting a forum selection clause ***must show more than*** inconvenience or annoyance such as ***increased litigation expenses."***) (emphasis in original) (citations omitted).

Here, the Contract's choice of law and forum selection provisions must be enforced against Mr. Blackwell, specifically. Indeed, this Court recently appeared to affirm the principles justifying enforcement of such provisions against minor plaintiffs in *Williams*. Moreover, Tennessee recognizes a robust constitutional privacy right a parent has in raising her children, as did the *Cedars Academy* court and other courts enforcing such provisions.[24] *Hawk v. Hawk*, 855 S.W.2d 573, 576 (Tenn. 1993); *Parham v. J.R.*, 442 U.S. 584 (1979). Ultimately, if Ms. Blackwell has the authority to bring and conduct this lawsuit on behalf of Mr. Blackwell, she has the same authority to prospectively choose the applicable law and forum for litigation. *See Shea*, 908 So. 2d 392; *Cross*, 724 N.E.2d at 831. *Cf. Parham*, 442 U.S. 584. To hold otherwise would be inconsistent with the fundamental principles reserving Ms. Blackwell's authority to make

[23] The court's ruling applied regardless of whether California law could ostensibly be more favorable to the Cedars Academy. *See Hohe v. San Diego Unified School Dist.*, 224 Cal. App. 3d 1559 (Cal. Ct. App. 1990). The court also emphasized that the forum selection clause was valid and enforceable because the clause was not ambiguous and the parties "intended to consent to the exclusive jurisdiction of California courts or arbitration panels to litigate their claims." *Cedars Academy*, 2010 WL 5825343 at *7. The court did not rule on the validity of the liability waiver because the dispositive issue to dismissal was the choice of law and forum selection provision.

[24] The Tennessee Supreme Court has unequivocally held that these fundamental rights are protected by both the United States Constitution and the Tennessee Constitution. *Hawk v. Hawk*, 855 S.W.2d 573, 576 (Tenn. 1993); *Parham v. J.R.*, 442 U.S. 584 (1979). Similarly, Tennessee equally recognizes the presumption that, fundamentally, "a fit parent [acts] in [their] child's best interest." *See Wadkins v. Wadkins*, 2012 WL 6571044, at *5 (Tenn. Ct. App. Dec. 14, 2012).

"life's difficult decisions" on behalf of Mr. Blackwell.[25] *Cedars Academy*, 2010 WL 5825343 at *4; *Parham*, 442 U.S. 584; *Hawk*, 855 S.W.2d at 576.

Accordingly, enforcing the Contract's choice of law and forum selection provisions against Mr. Blackwell simply reflects the well-settled rule that he may be the third-party beneficiary of a contract to which he is a non-signatory. *Butler v. Eureka Sec. Fire & Marine Ins. Co.*, 105 S.W.2d 523 (Tenn. Ct. App. 1937); *Lopez v. Taylor*, 195 S.W.3d 627 (Tenn. Ct. App. 2005); *Cortez v. Alutech, Inc.*, 941 S.W.2d 891 (Tenn. Ct. App. 1996); *In re Justin A.H.*, 2014 WL 3058439 (Tenn. Ct. App. June 7, 2014). Indeed, as a third-party beneficiary who has sought to enforce rights under a contract, Mr. Blackwell is clearly bound by the obligations of that contract. *Benton v. Vanderbilt University*, 137 S.W.3d 614 (Tenn. 2004); *Hojnowski*, 868 A.2d 1087. To hold otherwise would be contrary to the general principles of equity and well-settled Tennessee law. *Id.*

Based on all of the foregoing reasons, this Court should reverse the trial court because Mr. Blackwell's claims are subject to the Contract's choice of law and forum selection provisions.

III. The Trial Court Erred by Not Enforcing the Contract's Liability Waiver Against Mr. Blackwell.

Notwithstanding, the trial court erred by not enforcing the Contract's liability waiver against Mr. Blackwell. In that regard, the trial court held that the liability waiver was unenforceable as to Mr. Blackwell under this Court's ruling in *Childress v. Madison County*, 777

[25] Further, enforcing the Contract's choice of law and forum selection provisions is not unreasonable because it does not *per se* extinguish Mr. Blackwell's claims. *Cedars Academy*, 2010 WL 582534; *Shea*, 908 So. 2d 392. *See, e.g., Gavin W. v. YMCA of Metropolitan Los Angeles*, 106 Cal. App. 4th 662 (2d Dist. 2003) (where a prospective exculpatory agreement executed by a parent on behalf of a minor child was invalid because it violated public policy in the specific context of that case). Indeed, enforcement in this case compliments Tennessee's approval of a business's choice to limit where it may be subject to suit and what substantive law will apply there. *See Thomas*, 892 S.W.2d at 841.

S.W.2d 1 (Tenn. Ct. App. 1989). (T.R. Vol. 5 at 713.) Respectfully, the trial court should be reversed, and the Contract's liability waiver should be enforced against Mr. Blackwell.

A. The Contract's Liability Waiver Satisfies Tennessee's General Baseline Requirements for Enforceability.

First, the trial court held that the Contract's liability waiver satisfies Tennessee's baseline requirements for enforceability in its ruling on Ms. Blackwell's Motion to Amend Complaint.[26] (T.R. Vol. 6 at 789 (enforcing the liability waiver against Ms. Blackwell)). Accordingly, for the reasons set forth *infra*, this Court should begin its inquiry by affirming the trial court's determination in that regard, and hold that the Contract's liability waiver satisfies Tennessee's general baseline requirements for enforceability.[27] *See, e.g.*, *Childress*, 777 S.W.2d 1 (first assessing a parental pre-injury liability waiver's general enforceability).

Under Tennessee law, it is well-settled that the freedom to contract outweighs the policy favoring the enforcement of tort liability and, therefore, liability waivers are not *per se* invalid.[28] *Planters Gin Co. v. Fed. Compress & Warehouse Co*., 78 S.W.3d 885, 892 (Tenn. 2002); *Crawford v. Buckner*, 839 S.W.2d 754, 756 (Tenn. 1992); *Webster v. Psychemedics Corp.*, 2011 WL 2520157 (Tenn. Ct. App. 2011). Accordingly, Tennessee courts have long enforced liability waivers.[29] *Cincinnati, N. O. & T. P. Ry. Co. v. Saulsbury*, 90 S.W. 624 (Tenn. 1905); *Houghland*

---

[26] In its Order denying Sky High Nashville's Motion to Enforce the Contract, *Childress* was the sole basis upon which the trial court held that the liability waiver was unenforceable against Mr. Blackwell's claims. (T.R. Vol. 5 at 713.) In other words, the trial court did not rule that the liability waiver violated any other general requirements for the enforceability of liability waivers under Tennessee law. (*Id.*)

[27] The separate question of whether the pre-injury liability waiver signed by Ms. Blackwell is enforceable against Mr. Blackwell, specifically, is addressed *infra*.

[28] Pre-injury liability waivers are hybrids of contract and tort law and stem from the inevitable junction of two competing interests: (1) the freedom to contract; and, (2) one's duty to take responsibility for his or her actions. *See, e.g.*, Blake D. Morant, Contracts Limiting Liability: A Paradox with Tacit Solutions, 69 TUL. L.REV. 715, 716 (1995).

[29] However, courts have been wary of such contracts since their inception leading to ambiguity and unpredictability in their construction and application. *See* Joseph H. King, Jr., Exculpatory Agreements for

v. Security Alarms & Services, Inc., 755 S.W.2d 769, 773 (Tenn. 1988) (liability of burglar alarm service was limited by an exculpatory clause); *Evco Corp. v. Ross*, 528 S.W.2d 20, 23 (Tenn. 1975) (agreed allocation of risk by parties with equivalent bargaining powers in a commercial setting serves a valid purpose where the agreement explains the parties' duty to obtain and bear the cost of insurance); *Kellogg Co. v. Sanitors, Inc.*, 496 S.W.2d 472, 473 (Tenn. 1973) (same); *Health & Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188, 191 (Tenn. 1973) (customer assumed the risk of injury from negligence of a health spa); *Chazen v. Trailmobile, Inc.*, 384 S.W.2d 1 (Tenn. 1964) (commercial lease absolved both landlord and tenant from liability for a loss resulting from fire); *Moss v. Fortune*, 340 S.W.2d 902 (Tenn. 1960) (renter assumed the risk incident to injury from the hiring and riding of a horse).

Notwithstanding, the enforceability of a pre-injury liability waiver is governed by certain considerations relevant to the case at bar.[30] *Planters Gin Co.*, 78 S.W.3d at 892). Importantly, when addressing whether a specific pre-injury liability wavier violates public policy considerations, the majority of jurisdictions, including Tennessee, have modeled their analytical

---

Volunteers in Youth Activities-the Alternative to "Nerf (r)" Tiddlywinks, 53 OHIO ST. L.J. 683, 710 (1992) (*see* T.R. Vol. 2 at 285). This is true in Tennessee because although the law is now well-settled that liability waivers are to be construed using a reasonable interpretation rather than a strict approach, Tennessee case law arguably reveals different approaches. *See, e.g., Empress Health and Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188 (Tenn. 1973) (enforcing plain, complete, and unambiguous meaning); *Chazen v. Trailmobile, Inc.*, 384 S.W.2d 1 (Tenn. 1964) (where the terms of an exculpatory provision were strictly construed); *Petry v. Cosmopolitan Spa Intern., Inc.*, 641 S.W.2d 202, 204 (Tenn. Ct. App. 1982) (Goddard, J., dissenting) (arguing that exculpatory clauses should not be favored, should be strictly construed, and are not assignable unless expressly authorized); *Tate v. Trialco Scrap, Inc.*, 745 F. Supp. 458 (M.D. Tenn. 1989) *aff'd*, 908 F.2d 974 (6th Cir. 1990) (highlighting inconsistencies in Tennessee law on whether a reasonable or strict construction should apply to exculpatory clauses).

[30] Generally, these considerations are rooted in contract law principles, public policy considerations, or both. *See, e.g., Burks v. Belz-Wilson Properties*, 958 S.W.2d 773, 777 (Tenn. Ct. App. 1997) (general contract law: ambiguity); *Adams v. Roark*, 686 S.W.2d 73, 75-76 (Tenn. 1985) (general contract law: fraud and duress; and public policy: cannot waive gross negligence or intentional conduct); *Miller v. Hembree*, 1998 WL 209016, at *3 (Tenn. Ct. App. Apr. 30, 1998) (general contract law: rules of construction); *Memphis & Charleston Railroad Co. v. Jones*, 39 Tenn. (2 Head) 517 (Tenn. 1859) (same).

framework after California precedent.[31] *See Olson v. Molzen*, 558 S.W.2d 429, 431 (Tenn. 1977). In *Olson*, the Tennessee Supreme Court adopted the reasoning in the seminal case, *Tunkl v. Regents of University of California*, 383 P.2d 441 (Cal. 1963), promulgating six criteria for determining whether a liability waiver impairs the public interest. *Id.* In short, these criteria consider whether the waiver involves a business which is subject to public regulation, whether the released party performs a public necessity and/or essential service, whether the released party has superior bargaining power,[32] and whether the transaction places the person releasing the other from liability in control of the released party. *Id.* at 431.

In the case at bar, the Contract's liability waiver is not generally against public policy, first, because it is clear and unambiguous. (T.R. Vol 1 at 40.) *See Childress*, 777 S.W.2d 1 (a liability waiver is generally valid where its language is clear and unambiguous). In that regard, the Contract expressly conveys that Ms. Blackwell agreed to hold Sky High Nashville harmless for "any and all claims or suits for personal injury . . . which are brought by, or on behalf of [Mr. Blackwell]."[33] (T.R. Vol 1 at 40, ¶ 8) Further, the Contract clearly conveys to Ms. Blackwell that if Mr. Blackwell was injured at Sky High Nashville, she "may be found by a court of law to have waived [her] right to maintain a lawsuit" against Sky High Nashville, including claims she would bring on Mr. Blackwell's behalf. (T.R. Vol 1 at 40, ¶ 9.) This language is clear, unambiguous, and must generally be enforced. *Adams v. Roark*, 686 S.W.2d 73, 75-76 (Tenn. 1985).

---

[31] The public interest consideration is important because the trial court invalidated the parental pre-injury liability waiver in this case based on this Court's ruling in *Childress*, which ultimately held such waivers are unenforceable as against Tennessee's public policy. (*See* T.R. Vol. 5 at 713) (citing *Childress*, 777 S.W.2d 1). As addressed *infra*, California courts now hold that parental pre-injury liability waivers do not violate public policy.

[32] Regardless, it is clear that legitimate pecuniary motivations will not automatically invalidate an exculpatory clause. *See Childress*, 777 S.W.2d at 4.

[33] Moreover, the Contract clearly informed Ms. Blackwell that she agreed that it was also made "on behalf of [Mr. Blackwell] and that all releases, waivers and promises [therein] are binding on [Mr. Blackwell]." (T.R. Vol. 1 at 40, ¶ 8.)

In addition, the Contract's liability waiver does not violate *Olson*'s general public policy criteria because, *inter alia*, Mr. Blackwell voluntarily participated in a recreational activity offered by Sky High Nashville – dodgeball – and Ms. Blackwell voluntarily allowed him to do the same. (T.R. Vol. 1 at 26, ¶ 5.) *See Olson*, 558 S.W.2d at 431. In other words, Sky High Nashville was not providing an essential service, did not have superior bargaining power, and was not in "control" of either Ms. Blackwell or Mr. Blackwell. *Id.*

Thus, the *Olson* criteria would not invalidate the Contract's liability waiver on the basis of general public policy alone.[34] *See also, Childress*, 777 S.W.2d 1 (the Special Olympics organization does not have a general public duty and, therefore, generally may enter into contracts with parties wherein the parties have agreed to release it from damages for its own negligence). Accordingly, the Contract's liability waiver is generally valid and should be enforced unless it violates some other public policy concerns.

Therefore, the ultimate inquiry for this Court is whether the Contract's liability waiver signed by Ms. Blackwell is enforceable against Mr. Blackwell, specifically. As described *infra*, Sky High Nashville respectfully submits that the trial court should be reversed, and the Contract's liability waiver should be enforced against Mr. Blackwell.

[34] Moreover, Ms. Blackwell has alleged only basic negligence and no other conduct that is non-releasable, such as gross negligence or willful misconduct. (*See generally*, T.R. Vol. 1 at 25.) *See Adams*, 686 S.W.2d at 75-76.

B. The Parental Liability Waiver Should Be Enforced Against Mr. Blackwell Based on Ms. Blackwell's Constitutionally Guaranteed Parental Rights Recognized Since *Childress*.

As articulated in *Childress*,[35] courts have traditionally held that a parent is prevented from executing an enforceable pre-injury liability waiver on her child's behalf.[36] However, Sky High Nashville respectfully submits that the instant appeal involves a constitutional question not posed to this Court in *Childress* and prior case law. Rather, recent cases from both the Tennessee and United States Supreme Courts that have expressly recognized a parent's fundamental constitutional right to make important decisions for her child pose a different question in this case.

Specifically, the question now posed is whether a Tennessee court, such as the trial court, can overturn Ms. Blackwell's constitutionally protected parental decision to release Sky High Nashville from the risk of being sued by her minor son, so that he may participate in a recreational activity – dodgeball – she considered worthwhile. In other words, this case balances the state's inherent *parens patriae*[37] interests against Ms. Blackwell's now expressly recognized fundamental right to make important decisions on Mr. Blackwell's behalf.

Indeed, there has been a strong shift favoring the enforcement of parental pre-injury liability waivers in cases from other jurisdictions since *Childress*, which reflect an accurate state of the law applicable in this case. In that regard, Ms. Blackwell's decision to execute the

---

[35] As noted, the trial court's refusal to enforce the Contract's liability waiver was exclusively based on this Court's ruling in *Childress*. (T.R. Vol. 5 at 713.)

[36] Indeed, at the time *Childress* was decided, not a single case from any other jurisdiction had ruled that a parental pre-injury liability waiver was enforceable against a minor.

[37] *Parens patriae* is Latin for "parent of his or her country" and describes "the state in its capacity as provider of protection to those unable to care for themselves." *See* Black's Law Dictionary, 1144 (8th ed. 2004).

Contract's liability waiver on Mr. Blackwell's behalf is now constitutionally protected, fundamental in character, and superior to Tennessee's *parens patriae* interests.

Accordingly, Sky High Nashville respectfully submits that the relevant body of constitutional law that has developed in the nearly three decades since *Childress* now requires a Tennessee court to uphold Ms. Blackwell's decision to execute the Contract's liability waiver on Mr. Blackwell's behalf.

1. *Childress v. Madison County*, 777 S.W.2d 1 (Tenn. Ct. App. 1989).

In 1989, this Court held that a pre-injury liability waiver a mother executed on behalf of her mentally handicapped son was unenforceable. *Childress*, 777 S.W.2d 1, 7. *Childress*, involved an injury sustained by a mentally handicapped 20-year-old while he was training for the Special Olympics at a Y.M.C.A.[38] *Id.* at 1. The parents filed a lawsuit against Madison County asserting both individual claims and claims on their son's behalf. *Id.* On appeal, this Court evaluated the enforceability of a pre-injury liability waiver that the mother executed individually and on her son's behalf.[39] *Id.* at 3. After first having determined that the liability waiver did not otherwise violate general public policy,[40] this Court addressed the ultimate question of whether a

[38] While under the supervision of Madison County employees, William Childress was found face down in the pool and nearly drowned. *Childress*, 777 S.W. at 7.

[39] The trial court found that Madison County was not negligent. *Id.* This Court reversed the trial court's findings, which consequently implicated the validity of the parental pre-injury liability waiver. *Id.* at 3.

[40] This Court first addressed the general public policy criteria outlined in *Olson* and held that the Special Olympics does not normally operate under a public duty and, therefore, does not fall into the public policy exception prohibiting exculpatory clauses. *Id.* (citing *Olson v, Molzen*, 558 S.W.2d 429, 431 (Tenn. 1997)). Thus, this Court unequivocally held that the liability waiver applied to the mother's claims individually – just as the Contract's liability waiver in this case bars any claims Ms. Blackwell might have against Sky High Nashville. *Id.* at 5-6 (citing *Dodge v. Nashville Chattanooga & St. Louis Railway Co.*, 215 S.W. 274 (Tenn. 1919) (a party's failure to read does not constitute lack of notice to that party); *Dixon v. Manier*, 545 S.W.2d 948, 949 (Tenn. Ct. App. 1976)).

parent may execute an enforceable pre-injury liability waiver on behalf of her incompetent child – a matter of first impression at that time. *Id.*

This Court held that the mother did not have the authority to bind her son to the liability waiver because her relationship to him as his parent was essentially the same as that of a legal guardian to a ward. *Id.* (citing 44 C.J.S. Insane Persons § 49 (1945)). This Court reasoned that because a guardian may not generally waive the rights of a ward and because a guardian cannot settle an existing lawsuit on behalf of a ward apart from court approval or statutory authority, a parent cannot execute a valid pre-injury waiver as to the rights of her minor or incompetent child. *Id.* (citing 39 Am.Jur.2d, Guardian & Ward, § 102 (1968); 42 Am.Jur.2d, Infants § 152 (1969); *Miles v. Kaigler*, 18 Tenn. (10 Yerg. 1836); *Spitzer v. Knoxville Iron, Co.*, 180 S.W. 163 (Tenn. 1915); *Tune v. Louisville & Nashville Railroad Co.*, 223 F. Supp. 928 (M.D. Tenn. 1963)).

The last time any Tennessee appellate court has addressed the enforceability of a pre-injury parental liability waiver was only one year after *Childress* in *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242 (Tenn. Ct. App. 1990). There, the parents of a deceased minor brought a wrongful death action against the organizers of a horserace. *Rogers*, 807 S.W.2d at 243. After the parties ultimately conceded to the general *Childress* rule,[41] this Court held that the pre-injury liability waiver the minor's mother had executed on the minor's behalf was unenforceable as to the minor.[42] *Id.*

[41] The parties in *Rogers* conceded that a parental pre-injury liability waiver was, generally, invalid under *Childress* because the primary issue in that regard was whether a wrongful death claim was the minor child's claim or the parent's claim. The parties agreed that if it were the child's claim, *Childress* would invalidate the exculpatory clause – which is what this Court ultimately decided in *Rogers*. *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242 (Tenn. Ct. App. 1990).

[42] However, this Court held that the liability waiver was valid with respect to the mother's claims, just as the Contract's liability waiver in this case would bar any claim Ms. Blackwell might have against Sky High

Since *Rogers*, *Childress* has not been developed any further, as there have not been any published Tennessee appellate court cases analyzing the *Childress* rule. Similarly, there are only two unpublished cases from United States District Courts in Tennessee that have relied on *Childress* and *Rogers*, but contain relatively little analysis. *See Bonne v. Premier Athletics, LLC*, 2006 WL 3030776 (E.D. Tenn. Oct. 23, 2006); *Albert v. Ober Gatlinburg, Inc.*, 2006 WL 208580 (E.D. Tenn. Jan. 25, 2006).

2. Since *Childress*, Both the Tennessee and United States Supreme Courts Have Recognized a Parent's Constitutionally Protected Decision-Making Authority.

In the nearly three decades since *Childress*, both the Tennessee and United States Supreme Courts have expressly recognized for the first time that a parent has a fundamental right to make important decisions for her children pursuant to the Tennessee and United States Constitutions. *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993); *Troxel v. Granville*, 530 U.S. 57 (2000). Accordingly, Sky High Nashville respectfully submits that after *Hawk* and *Troxel*, *Childress* does not illustrate the proper standard for determining whether the state may overturn a parent's decision to execute a pre-injury liability waiver on her child's behalf.

i. *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

Four years after *Childress*, the Tennessee Supreme Court recognized, for the first time, that a parent has a right to make important decisions for her children, and that such a right is a fundamental liberty interest protected by both the Tennessee and United States Constitutions.[43]

Nashville – including her claim for medical expenses. *Id.* *See also Childress*, 777 S.W.2d at 6 ("[t]he trial judge was correct in dismissing this case as to Mrs. Childress individually.")

[43] At the time of the *Hawk* decision, the United States Supreme Court had not yet expressly recognized the specific character of a parent's fundamental liberty interest protected by the U.S. Constitution – a decision that would come seven years later in *Troxel v. Granville*, 530 U.S. 57 (2000). However, the Tennessee Supreme Court thoughtfully recognized that a parent's authority to make important family decisions is firmly rooted in United States jurisprudence: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their

Hawk, 855 S.W.2d 573; TENN. CONST. art I, § 8. *Hawk* involved a parent's constitutional challenge to a Tennessee statute that allowed a court to order visitation to her child's grandparents if a court deemed such visitation to be "in the best interests of the minor child." *Id.* at 576. The trial court awarded visitation to the grandparents over the parents' wishes, thereby exercising the state's *parens patriae* power to impose "its own opinion of the 'best interests' of the children over the opinion of the parents." *Id.*

On appeal, the Tennessee Supreme Court reversed and unequivocally recognized, for the first time, that parenting decisions are protected from unwarranted state intrusion by Article I, Section 8 of the Tennessee Constitution:

> Tennessee's historically strong protection of parental rights and the reasoning of federal constitutional cases convince us that parental rights constitute a fundamental liberty interest under Article I, Section 8 of the Tennessee Constitution. In *Davis v. Davis,* 842 S.W.2d 588 (1992), we recognized that although "[t]he right to privacy is not specifically mentioned in either the federal or the Tennessee state constitution, . . . there can be little doubt about its grounding in the concept of liberty reflected in those two documents." *Id.* at 598. We explained that "the notion of individual liberty is . . . deeply embedded in the Tennessee Constitution . . . ," and we explicitly found that "[t]he right to privacy, or personal autonomy ('the right to be let alone'), while not mentioned explicitly in our state constitution, is nevertheless reflected in several sections of the Tennessee Declaration of Rights...." *Id.* at 599–600. Citing a wealth of rights that protect personal privacy, rights such as the freedom of worship, freedom of speech, freedom from unreasonable searches and seizures, and the regulation of the quartering of soldiers, we had "no hesitation in drawing the conclusion that there is a right of individual privacy guaranteed under and protected by the liberty clauses of the Tennessee Declaration of Rights." *Id.* Finding the right to procreational

---

children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Moreover, "[f]or centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle that the Constitution itself may compel a State to respect it." *Parham*, 442 U.S. at 621 (Stewart, J., concurring) (citations omitted). Accordingly, "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). In that way, the Tennessee Supreme Court was arguably ahead of its time and accurately predicted the outcome of *Troxel v. Granville* recognizing the continuing shift toward strengthening parental privacy.

> autonomy to be part of this right to privacy, we noted that the right to procreational autonomy is evidence by the same concepts that uphold "parental rights and responsibilities with respect to children." *Id.* at 601. Thus, ***we conclude that the same right to privacy espoused in* Davis *fully protects the right of parents to care for their children without unwarranted state intervention.***

Hawk, 855 S.W.2d at 579 (emphasis added, footnote omitted); *see* TENN. CONST. art I, § 8; *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

Accordingly, ***the Tennessee Supreme Court established a new standard for determining when parenting decisions warrant state oversight.*** *Hawk*, 855 S.W.2d at 580. After *Hawk*, a party must now show more than the "best interests of the child" to overcome a parent's fundamental right to make parenting decisions.[44] *Id.* (emphasis added). Indeed, the state may intrude upon parenting decisions ***only where such intrusion is "necessary to prevent serious harm to a child."***[45] *Id.* (emphasis added) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 402-03 (1923)). The Tennessee Supreme Court considered a finding of "serious harm to a child" as "an individualized finding of parental neglect." *Id.* (citing *Stanley v. Illinois*, 405 U.S. 645 (1972)).

---

[44] The Court affirmed the application of the strict-scrutiny test for the fundamental right to make parenting decisions: "'[w]here certain fundamental rights are involved . . . , regulations limiting these rights may be justified only by a 'compelling state interest,' . . . and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.'" *Hawk*, 855 S.W.2d at 579 fn. 8 (quoting *Roe v. Wade*, 410 U.S. 113, 155 (1973)).

[45] Requiring a court to make an initial finding of harm to the child before intervening in a parental decision and evaluating the "best interest of the child" works to "prevent judicial second-guessing of parental decisions." *Hawk*, 855 S.W.2d at 581. *See also Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995). Indeed, the Tennessee Supreme Court recognized that "[i]mplicit in Tennessee case and statutory law has always been the insistence that a child's welfare must be threatened ***before*** the state may intervene in parental decision-making." (emphasis added). *See, e.g.*, Tenn. Code Ann. § 36-6-101 (In a divorce case, the ***harm*** from the discontinuity of the parents' relationship compels the court to determine child custody "as the welfare and interest of the child or children may demand"); *In re Hamilton*, 658 S.W.2d 425 (Tenn. Ct. App. 1983) (child was declared "dependent and neglected" when her father refused cancer treatment for her on religious grounds, and such neglect exposed the child to serious harm). *See also Yoder*, 406 U.S. at 230 (where the fact that Amish children would not be harmed by receiving an Amish education rather than a public education); *Pierce*, 268 U.S. at 534 (parents' decisions to send their children to private schools were "not inherently harmful," as there was "nothing in the . . . records to indicate that [the private schools] have failed to discharge their obligations to patrons, students, or the state"); *Stanley v. Illinois*, 405 U.S. 645 (1972).

ii. *Troxel v. Granville*, 530 U.S. 57 (2000).

Seven years after the Tennessee Supreme Court's decision in *Hawk* – and eleven years after *Childress* – the United States Supreme Court issued its landmark ruling in *Troxel v. Granville*, 530 U.S. 57 (2000). Echoing the Tennessee Supreme Court seven years earlier, *Troxel* officially recognized that a parent's right to make important decisions for her child free from unwarranted state intrusion is a fundamental liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment. *Troxel*, 530 U.S. at 66; U.S. CONST. amend XIV.

Similar to *Hawk*, *Troxel* involved an action for visitation rights brought by the grandparents of two young girls pursuant to a Washington statute which provided that such visitation may be awarded over the parents' wishes if the court believes that it "may serve the best interest of the child[.]" *Troxel*, 530 U.S. at 66. After the Washington Supreme Court held that the statute unconstitutionally infringed upon the fundamental rights of parents, the United States Supreme Court granted *certiorari* and affirmed. *Id.* In doing so, the Court expressly recognized for the first time a parent's robust constitutional right to control the upbringing of her child free from unwarranted state oversight:

> ***"[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."***

Id. at 66 (emphasis added). *See also Lovelace v. Copley*, 418 S.W.3d 1 (Tenn. 2013) (affirming the principles of *Hawk* as supplemented by *Troxel*).

In addition, *Troxel* confirmed that the state cannot interfere with a parental decision without first finding harm or potential harm to the child. *Troxel*, 530 U.S. at 63. Indeed, it is now clear that after *Troxel*, a court is constitutionally prohibited from overturning a parental

decision based on its subjective notion of a child's best interests, even if the court believes that a "better" decision could have been made:

> The problem here is not that the Superior Court intervened, but that when it did so, it gave no special weight to Granville's determination of her daughters' best interests. More importantly, that court appears to have applied the opposite presumption, favoring grandparent visitation.
>
> * * *
>
> ***[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made.***

Id. at 58, 72-73 (emphasis added).

The foregoing limitation on state intrusion is now firmly rooted in a presumption that "fit parents act in the best interests of their children." *Id.* at 68, 70. Indeed, this Court has recognized and applied this presumption. *See Wadkins v. Wadkins*, 2012 WL 6571044, at *5 (Tenn. Ct. App. Dec. 14, 2012). Accordingly, Sky High Nashville respectfully submits that after *Hawk* and *Troxel*, the *Childress* rule no longer accurately reflects the relevant body of constitutional law that has developed over the last three decades.

Significantly, there has been a strong shift favoring the enforcement of parental pre-injury liability waivers in other jurisdictions since *Childress*. As outlined *infra*, these cases have made clear that overturning a parent's decision to execute a pre-injury liability waiver on behalf of her minor child constitutes an unwarranted intrusion into the parent's fundamental constitutional rights.

3. There Has Been a Strong Shift Toward Enforcing Parental Pre-Injury Liability Waivers Based on Constitutionally Guaranteed Parenting Rights.

As described *supra*, pivotal constitutional precedent has developed in the nearly three decades since *Childress*. In that period of time, there has been a strong shift toward enforcing parental liability waivers, which began shortly after *Childress* in 1990 with the seminal case of *Hohe v. San Diego Unified School Dist.*, 224 Cal. App. 3d 1559 (Cal. Ct. App. 1990).[46] *Hohe* involved a 15-year-old girl who was injured while under the effects of hypnosis at a school assembly. *Id.* The girl's father sued on behalf of his daughter, despite having previously executed a pre-injury liability waiver on her behalf. *Id.*

On appeal, the court first held that no public policy generally opposes private, voluntary transactions in which one party agrees to shoulder a risk which the law would otherwise have placed upon the other contracting party. *Id.* (citing *Tunkl*, 383 P.2d 441). Next, as to the ultimate issue of parental pre-injury liability waivers, the court unequivocally held that "[a] parent may contract on behalf of his or her children" in that context. *Id.* (*citing Doyle*, 62 Cal. 2d. at. 609). California courts now routinely enforce parental pre-injury liability waivers. *See, e.g., Aaris v. Las Virgenes Unified School Dist.*, 64 Cal. App. 4th 1112 (1998); *Pulford v. County of Los Angeles*, 2004 WL 2106545 (Cal. Ct. App. Sept. 22, 2004).

Since *Hohe*, many other jurisdictions have enforced parental pre-injury liability waivers in a wide variety of contexts, including both commercial and non-commercial settings. *See, e.g., Zivich v. Mentor Soccer Club, Inc*, 696 N.E.2d 201 (Ohio 1998) (parental pre-injury liability waiver in the context of a minor's injury while participating in a youth soccer club); *Fischer v.*

[46] Notably, California was also the state which ultimately designed the general public policy architecture relating to the validity of liability waivers for the majority of jurisdictions, including Tennessee. *See Tunkl*, 383 P.2d 441; *Olson*, 558 S.W.2d 429.

Rivest, 2002 WL 31126288 (Conn. Super. Ct. 2002) (affirming the parental principles outlined in *Zivich*, and enforcing a parental pre-injury liability waiver in the context of a youth hockey); *Sharon v. City of Newton*, 769 N.E.2d 738, 749 (Mass. 2002) (enforcing a parental pre-injury liability waiver in the context of a cheerleading program); *Lehmann v. Har-Con Corp.*, 76 S.W.3d 555 (Tex. App. 2002) (parents had the authority to execute a prospective liability waiver that binds their minor child's future claims); *Osborn v. Cascade Mountain, Inc.*, 655 N.W.2d 546 (Wi. Ct. App. 2002) (parental pre-injury liability waiver as a condition of the minor's participation in skiing is enforceable against the minor); *Quirk v. Walker's Gymnastics & Dance*, 2003 WL 21781387, at *2 (Mass. Super. July 25, 2003) (parental pre-injury liability waiver as a condition of the minor child's participation in gymnastics is enforceable against the minor because "[s]uch releases are clearly enforceable even when signed by a parent on behalf of their child"); *Saccente v. LaFlamme*, 2003 WL 21716586 (Conn. Super. Ct. July 11, 2003) (parental pre-injury liability waiver as a condition of the minor child's participation in horseback-riding lesson is enforceable against the minor); *Kondrad v. Bismarck Park Dist.*, 655 N.W.2d 411 (N.D. 2003) (parental pre-injury liability waiver as a condition of the minor child's participation in an after-school child care program is enforceable against the minor); *Kelly v. U.S.*, 809 F. Supp. 2d 429 (E.D. N.C. 2011) (parental pre-injury liability waiver as a condition of the minor child's participation in the Navy Junior Reserve Officer Training Corps is enforceable against the minor); *BJ's Wholesale Club, Inc. v. Rosen*, 80 A.3d 345 (Md. Ct. App. 2013) (parental pre-injury liability waiver as a condition of the minor child's use of a supervised play area offered by a wholesale retail store is enforceable against the minor).[47]

[47] Notably, at least three other states – Georgia, Idaho, and Mississippi – have precedent which implies that a parental pre-injury liability waiver is enforceable against a minor child. *See DeKalb County School System v. White*, 260 S.E.2d 853 (Ga. 1979) (upholding an athletic eligibility release signed by a parent against a minor child); *Smoky, Inc. v. McCray*, 396 S.E.2d 794, 797 (Ga. Ct. App. 1990) (a parental pre-injury liability waiver

***Importantly, courts that have enforced parental pre-injury liability waivers principally rely upon the constitutionally protected parental rights expressly recognized after* Childress.**

For example, the Ohio Supreme Court reasoned as follows:

> [T]he right of a parent to raise his or her child is a natural right subject to the protections of due process. Additionally, parents have a fundamental liberty interest in the care, custody, and management of their offspring. Further, the existence of a fundamental, privacy-oriented right of personal choice in family matters has been recognized under the Due Process Clause by the United States Supreme Court.
>
> [M]any decisions made by parents 'fall within the penumbra of parental authority, e.g., the school that the child will attend, the religion that the child will practice, the medical care that the child will receive, and the manner in which the child will be disciplined.
>
> * * *
>
> ***[We believe] that invalidating the release as to the minor's claim is inconsistent with conferring other powers on parents to make important life choices for their children.***

Zivich, 696 N.E.2d at 206 (emphasis added) (citing *Meyer*, 262 U.S. 390; *Santosky v. Kramer*, 455 U.S. 745 (1982)).

Similarly, the court in *Saccente v. LaFlamme* expressly relied on *Troxel* when upholding a parental pre-injury liability waiver. *Saccente*, 2003 WL 21716586 at *6. There, the court reflected that "the essence of parenthood is the companionship of the child and the right to make decisions regarding his or her care, control, education health, religion and association." *Id.* *Saccente* made clear that the ability of a parent to execute a liability waiver on behalf of his or her child "clearly" comports with both the essence of parenthood and the constitutional principles outlined in *Troxel*. *Id.* (citing *Zivich*, 696 N.E.2d 201)).

---

invalidated because only the minor executed the release and "was fourteen years old and unaccompanied by any adult or guardian"); *Davis v. Sun Valley Ski Education Foundation, Inc.*, 941 P.2d 1301 (Id. 1997) (a parental pre-injury liability waiver invalidated because it was not drafted properly); *Quinn v. Mississippi State University*, 720 So.2d 843 (Miss. 1998)) (Mississippi Supreme Court held that reasonable minds could differ as to the risks that the plaintiffs were assuming and did not suggest that parental pre-injury liability waivers violate public policy).

Moreover, the constitutional bases upon which the foregoing courts have upheld parental pre-injury liability waivers are nearly mirror-images of the constitutional rights recognized in post-*Childress *Tennessee decisions. *Compare*, *Sharon*, 769 N.E.2d at 746-47 (a parental pre-injury liability waiver should be enforced because ***"the law presumes that fit parents act in furtherance of the welfare and best interests of their children***, and with respect to matters relating to their care, custody, and upbringing have a fundamental right to make those decisions for them") (emphasis added); *Saccente*, 2003 WL 21716586, at *6 (same); *Rosen*, 80 A.3d at 362 (a parent's decision to execute a pre-injury liability waiver on her child's behalf should not be invalidated because it was "made by a parent on behalf of her child in the course of the parenting role"), *with, Davis*, 842 S.W.2d 588 ("without a substantial danger of harm to the child," a court may not constitutionally exercise the state's *parens patriae* interest by imposing its own subjective notions of the "best interests of the child"); *Wadkins*, 2012 WL 6571044, at *5 (Tenn. Ct. App. Dec. 14, 2012) (***"a fit parent [acts] in [their] child's best interest"***) (emphasis added).

4. This Court Should Enforce the Contract's Liability Waiver Against Mr. Blackwell in This Case.

Based on all of the foregoing, Sky High Nashville respectfully submits that the trial court's ruling should be reversed because it does not accurately reflect the relevant body of constitutional law developed after *Childress*. Indeed, Ms. Blackwell's decision to execute the Contract's liability waiver on behalf of Mr. Blackwell is a constitutionally guaranteed parenting right under the Tennessee and United States Constitutions.

Since this Court's decision in *Childress*, Ms. Blackwell is now deemed to have made her decision to release Sky High Nashville from the risk of being sued by Mr. Blackwell with her son's best interests in mind. Respectfully, the Due Process Clause and the Tennessee

Constitution prohibit Tennessee courts, such as the trial court, from intruding upon her decision absent an initial finding of substantial harm – even if it appears that she could have made a "better" decision. *Troxel*, 530 U.S. at 73; *Sharon*, 769 N.E.2d at 746-47. Indeed, Ms. Blackwell's decision to execute the pre-injury liability waiver did not harm Mr. Blackwell.[48] To the contrary, the Contract's liability waiver actually benefitted Mr. Blackwell because he had the opportunity to participate in recreation, to "develop coordination skills," and to potentially learn other valuable life skills, all from playing dodgeball at Sky High Nashville's facility. *Zivich*, 696 N.E.2d at 205. Moreover, Mr. Blackwell benefited from the liability waiver, on more than one occasion,[49] because it enabled Sky High Nashville to offer Mr. Blackwell "affordable recreation . . . without the risks and overwhelming costs of litigation" should an injury occur. *Id.*

Accordingly, by executing the pre-injury liability waiver on Mr. Blackwell's behalf, Ms. Blackwell was making "an important family decision cognizant of the risk of physical injuries to [Mr. Blackwell] and the financial risk to the family as a whole." *Sharon*, 769 N.E.2d at 746-47. This Court should respect and uphold that decision. The trial court should therefore be reversed and the Contract's liability waiver should be enforced against Mr. Blackwell.

Moreover, as described *infra*, such a ruling would also be congruent with other Tennessee laws, public policies, and societal shifts in the three decades since *Childress*.

---

[48] Even if Ms. Blackwell's decision to shoulder the risk of a potential injury to Mr. Blackwell turned out to be a bad financial decision, "***[t]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made.*** *Troxel*, 530 U.S. at 58, 72-73 (emphasis added).

[49] It is undisputed that Mr. Blackwell had visited Sky High Nashville on numerous occasions prior to the one at issue in this case. *See* fn. 7, *supra*.

C. Enforcing the Contract's Liability Waiver Against Mr. Blackwell Comports With Other Tennessee Laws.

Childress was founded upon (1) the rule that a guardian cannot settle a minor's existing tort claim apart from court approval or statutory authority; and, (2) the rule that minors cannot waive anything themselves, so their parents cannot waive anything for them.[50] *Childress*, 777 S.W.2d at 6-7 (citations omitted). However, as discussed *infra*, Ms. Blackwell's constitutional right to execute the the Contract's liability waiver on Mr. Blackwell's behalf is congruent with the foregoing rules and other Tennessee laws and public policies.

1. No Conflict With Ms. Blackwell's Incapability of Settling Mr. Blackwell's Existing Tort Claims.

As this Court is keenly aware, Tennessee has long-required court approval for minor settlements. *See* Tenn. Code Ann. § 29-34-105; *Busby v. Massey*, 686 S.W.2d 60, 63 (Tenn. 1984); *Wade v. Baybarz*, 660 S.W.2d 493 (Tenn. Ct. App. 1983). Simply stated, the policy for disallowing parents from settling their children's existing tort claims is rooted in concern that the parent might place her own financial motivations over her child's interests. *See id.* However, laws which permit state intrusion into a parent's decision to settle her minor's ***existing*** tort claim fit precisely within the framework promulgated by *Hawk*, *Troxel*, and other authorities cited *supra*.

This is because a parent's decision to settle her child's existing tort claim involves a myriad of interests which conflict with those of her child – ***most significantly, a financial***

[50] Candidly, the Washington Supreme Court issued an opinion three years after *Childress* which invalidated a parental pre-injury liability waiver based on the same reasoning as *Childress*: "a parent generally may not release a child's cause of action after injury, [so] it makes little sense, if any sense, to conclude a parent has the authority to release a child's cause of action prior to an injury." *Scott v. Pacific West Mountain Resort*, 834 P.2d 6, 11-12 (Wash. 1992). However, as described at length, *supra*, the court in *Scott* was without the important constitutional precedent recognizing a parent's fundamental right to make the decision to execute a parental pre-injury liability waiver – just as this Court was in *Childress*. As described *supra*, Sky High Nashville respectfully submits that the foregoing reasoning is incongruent with fundamental constitutional parenting rights recognized in *Hawk*, *Troxel*, and other post-*Childress* authorities.

interest – which naturally rebut the presumption that she acts in her child's best interests. *Zivich*, 696 N.E.2d at 206 ("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.") (quoting Angeline Purdy, Scott v. Pacific West Mountain Resort: Erroneously Invalidating Parental Releases of A Minor's Future Claim, 68 WASH. L. REV. 457, 474 (1993) (*see* T.R. Vol. 5 at 626)). In other words, *Hawk* and *Troxel* certainly permit judicial oversight in a minor settlement based on the conflict of interest created by a parent's potential financial motivations to settle her child's lawsuit – which rebut the presumption that her decision to settle a claim serves her child's best interests.[51]

However, when a parent signs a pre-injury liability waiver on her child's behalf, her interests do not conflict with her child's – in fact, they fall squarely in-line with her child's interest. Therefore, the constitutional presumption that she acts in her child's best interest remains. As the court in *Zivich* reflected:

> "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 who signs a release before her child participates in a recreational activity . . . 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.***
>
> 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***

[51] Indeed, even Tennessee's minor settlement statute reflects these concerns. *See* Tenn. Code Ann. § 29-34-105 (requiring more thorough judicial oversight for larger settlements – a minor settlement that is less than $10,000.00 can be approved by a court without a hearing, relying solely on affidavits from legal guardians, while settlements over $10,000.00 require a greater judicial oversight and a hearing before the court).

> ***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.***
>
> 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, 696 N.E.2d at 206 (emphasis added) (quoting Purdy, *supra* at 474 (*see* T.R. Vol. 5 at 626)).

Accordingly, laws prohibiting Ms. Blackwell from settling Mr. Blackwell's existing tort claim without court approval do not conflict with her constitutionally protected right to make the decision to execute the Contract's liability waiver on Mr. Blackwell's behalf.

2. No Conflict With Mr. Blackwell's Right to Avoid/Disaffirm Contracts.

As this Court is similarly well-aware, Tennessee law allows minors to avoid and/or disaffirm contracts. *See, e.g.*, *Dodson by Dodson v. Shrader*, 824 S.W.2d 545, 547 (Tenn. 1992). That right is "based upon the underlying purpose of the 'infancy doctrine' which is to protect minors from their lack of judgment." *Id.* at 547. In that regard, ***the state has an interest in protecting minors "from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace."*** *Id.* (emphasis added) (quoting *Halbman v. Lemke*, 298 N.W.2d 562, 564 (Wis. 1980)).

However, parenting decisions are unique because "the 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." *Parham.*, 442 U.S. at 602. Indeed, disallowing a parent to exercise her fundamental right to make a decision to execute an enforceable contract on her child's behalf could be as harmful to her child as it would be practically unworkable. *See, e.g., Cedars Academy*, 2010 WL 5825343, * 4 ("As a practical matter, no service provider would ever agree to a contract with a parent if a child could ignore the provisions of the contract that pertain to him without recourse.")

Moreover, ***"judicial attitudes toward [invalidating] exculpatory agreements signed by parents on behalf of their minor children seem inconsistent with the powers conferred on parents respecting other important life choices."*** Joseph H. King, Jr., Exculpatory Agreements for Volunteers in Youth Activities--The Alternative to "Nerf (register) " Tiddlywinks, 53 OHIO ST. L.J. 683, 716 (1992) (*see* T.R. Vol. 2 at 285) (emphasis added). Indeed, the public policy for allowing a parent to make the decision to execute an enforceable pre-injury liability waiver on her child's behalf is reflected in a vast number of Tennessee laws giving a parent the right to make difficult decisions which significantly affect her child.[52] *See, e.g.*, Tenn. Code Ann. § 34-

[52] The *Rosen* court found this position persuasive. *Rosen*, 80 A.3d at 353-54. There, the court upheld a parental pre-injury liability waiver and recognized that such a broad parental authority is reflected by all of the Maryland laws enacted that are rooted in the "societal expectation that parents should make significant decisions pertaining to a child's welfare" and enable parents to "exercise their authority on behalf of their minor child in the most important aspects of a child's life," ***like important health decisions***, (citing Md. Code Ann., Health-Gen. § 20-101(b), Md. Code Ann., Health-Gen. §102 (parental consent to having their children give blood); Md. Code Ann., Health-Gen. § 20-106(b) (parental consent to the use of a tanning bed); Md. Code Ann., Health-Gen. § 18-4A-02(a) (familial consent to immunization of minor family member); Md. Code Ann., Health-Gen. § 10-610 (parental authority to commit child for mental treatment); Md. Code Ann., Health-Gen. § 10-923 (parental consent for therapeutic group home services)), ***important educational and employment decisions***, (citing Md. Code Ann., Education § 7-301(a)(1) (parental choice to home school children); *Id.* § 7-301(a)(2) (parental decision to defer compulsory schooling for one year if parent determines child is not mature enough); Md. Code Ann., Education § 7-305(c) (parent may meet with school superintendent if child is suspended for more than ten days or is expelled from school); Md. Code Ann., Labor and Employment § 3-211(b)(1) (child may not work more than is statutorily permitted without a parent giving written consent); Md. Code Ann., Labor and Employment § 3-403(a)(7) (wage and hour restrictions do not apply when child works for parent)), ***and important familial and societal decisions***. (citing Md. Code Ann., Family Law § 2-301 (parental permission for child to marry); Md. Code Ann., Family Law § 4-501(b)(2) (parental decision to use corporal punishment to discipline children); Md. Code Ann., Family Law § 4-522(a)(2) (parental authority to apply on behalf of minor to address confidentiality program); Md. Code Ann., Family Law § 10-314 (authority to bring action on behalf of minor child for unpaid child support); Md. Code Ann., Natural Resources § 10-301(h) (consent to a child obtaining a hunting license)).

6-307 (a parental authority to refuse medical treatment for minor child); Tenn. Code Ann. § 37-10-303 (parental authority to consent to an abortion procedure); Tenn. Code Ann. § 49-2-124 (parental authority to submit minor child to involuntary mental health or socioemotional screening); Tenn. Code Ann. § 33-8-303 (parental authority to submit minor child to convulsive therapy); Tenn. Code Ann. § 36-3-106 (parental authority to allow her minor child to be legally married); Tenn. Code Ann. § 68-1-118 (parental authority to release protected health information); Tenn. Code Ann. § 49-7-1103 (parental authority to release confidential education records); Tenn. Code Ann. § 38-1-302 (parental consent required for a physician to report a pregnancy believed to be the result of statutory rape); Tenn. Code Ann. § 68-32-101 (parental authority to allow minor child to donate blood); Tenn. Code Ann. § 68-34-107 (parental authority to have physicians furnish information regarding contraceptive supplies to minor child); Tenn. Code Ann. § 50-5-105 (parental authority to allow minor child to be employed); Tenn. Code Ann. § 47-25-1105 (parental authority to solicit minor child's name, photograph, or likeness); Tenn. Code Ann. § 62-38-305 (parental authority to allow minor child to get a body piercing); Tenn. Code Ann. § 68-117-104 (parental authority to allow minor child to use a tanning device); Tenn. Code Ann. § 36-6-304 (parental consent to expose minor child to clothing optional beaches). *See also State v. Goodman*, 90 S.W.3d 557 (Tenn. 2002) (a minor child may be removed and/or confined against her will, absent force, threat, or fraud, and such removal/confinement would not constitute kidnapping given parental consent).

The California Court of Appeals rejected the contention that the policy behind a minor's right to disaffirm contracts conflicts with enforcing parental pre-injury liability waivers, as early as the *Hohe* case: "[a] parent may contract on behalf of his or her children" and the laws allowing minors to disaffirm their own contracts were "not intended to affect contracts entered

into by adults on behalf of their children." *Hohe*, 224 Cal. App. 3d at 1565 (*citing Doyle*, 62 Cal. 2d. at. 609). Indeed, courts in the nearly thirty years since *Childress* have routinely recognized that the public policy permitting minors to avoid and/or disaffirm their contracts is congruent with allowing a parent to exercise his or her parental authority to execute a pre-injury liability waiver on behalf of her minor child:

> ***[A minor's right to avoid a contract is founded on a policy] to afford protection to minors from their own improvidence and want of sound judgment [and such a purpose] comports with common sense and experience and is not defeated by permitting parents to exercise their own providence and sound judgment on behalf of their minor children.***

Sharon, 769 N.E.2d at 746 (emphasis added) (upholding parental pre-injury liability waiver) (citing *Parham*, 442 U.S. 584; *Frye v. Yasi*, 101 N.E.2d 128 (Mass. 1951)). *See also* Elisa Lintemuth, Parental Rights v. Parens Patriae: Determining the Correct Limitations on the Validity of Pre-Injury Waivers Effectuated by Parents on Behalf of Minor Children, 2010 MICH. ST. L. REV. 169 (2010) (*see* T.R. Vol. 4 at 533). (Parents have the fundamental right to make decisions for their child and do so every day. . . . There is a presumption that in doing so, parents act in their child's best interests. . . . "[And when executing a liability waiver on behalf of their child], in the circumstance of a voluntary, nonessential activity, [courts] will not disturb this parental judgment.") (citing *Parham*, 422 U.S. at 602; *Sharon*, 769 N.E.2d at 747).

Accordingly, the infancy doctrine does not conflict with Ms. Blackwell's authority to bind Mr. Blackwell to the Contract's liability waiver in this case.

D. Enforcing the Contract's Liability Waiver Against Mr. Blackwell Is Supported by Other Public Policies.

Finally, enforcing a parental pre-injury liability waiver promotes other important public policies. For instance, enforcing a pre-injury liability waiver executed by a parent on behalf of

her minor child encourages the availability of affordable recreational activities. The California Court of Appeals emphasized this benefit as follows:

> Hohe volunteered to be part of a [school] activity because it would be "fun." There was no essential service or good being withheld by [the school]. Hohe, like thousands of children participating in recreational activities sponsored by groups of volunteers and parents, was asked to give up her right to sue. The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. ***Thousands of children benefit from the availability of recreational and sports activities.*** Those options are steadily decreasing—victims of decreasing financial and tax support for other than the bare essentials of an education. ***Every learning experience involves risk. In this instance Hohe agreed to shoulder the risk. No public policy forbids the shifting of that burden.***

Hohe, 224 Cal. App. 3d at 1564 (emphasis added).

Moreover, although parental pre-injury liability waivers have been enforced in cases involving non-commercial settings, even those cases emphasize the primary importance of promoting opportunities for children to "learn valuable life skills . . . to work as a team and how to operate within an organizational structure . . . and to exercise and develop coordination skills." *Zivich*, 696 N.E.2d at 205. Accordingly, the public policy behind enforcing parental pre-injury liability waivers is nevertheless furthered when commercial activity is involved. *See, e.g.*, *Saccente*, 2003 WL 21716586 (enforcing a parental pre-injury liability waiver in a case involving a contract for a child's horseback riding lessons).

Indeed, courts have expressly analyzed and rejected the commercial vs. non-commercial distinction, emphasizing that such a distinction has absolutely no basis in common law:

> ***Whether a child's judgment renders him less capable of looking out for his own welfare heeds true whether or not he or she is playing on a school playground or in a commercial setting.*** As we have explained, parents are charged with protecting the welfare

> of their children, and we will defer to a parent's determination that the potential risks of an activity are outweighed by the perceived benefit to the child when she executes an exculpation agreement.

Rosen, 80 A.3d at 360 (emphasis added) (enforcing a parental pre-injury liability waiver in a case involving a contract between a mother and a retailer). *See also Lehmann*, 76 S.W.3d 555 (enforcing a parental pre-injury liability waiver in a case involving a commercial entity); *Osborn*, 655 N.W.2d 546 (enforcing a parental pre-injury liability waiver in a case involving a contract between a mother and a ski resort).

Moreover, a rejection of the commercial vs. non-commercial distinction is supported by scholarly publications analyzing that precise issue:

> "[A court which invalidated a parental pre-injury liability waiver] reached a flawed decision which threatens children's organized recreational activities. Such activities already suffer from severe pressures. Increased costs and the fear of litigation threaten to drive recreation activities for children out of the market. Given the virtues of and need for children's recreational programs, courts should do what they can to encourage such programs. Because recreation providers will take care of their customers in order to assure their continued patronage, validating releases that protect a recreation provider would help to keep children's recreational programs available and affordable without diminishing the safety of such programs.

Purdy, *supra* at 474 (*see* T.R. Vol. 5 at 626); *See also* Robert S. Nelson, The Theory of the Waiver Scale: An Argument Why Parents Should be Able to Waive their Children's Tort Liability Claims, 36 U.S.F. L. REV. 535 (2002) (*see* T.R. Vol. 5 at 642); Doyice J. Cotten, Sport Risk Consulting & Sarah J. Young, Effectiveness of Parental Waivers, Parental Indemnification Agreements, and Parental Arbitration Agreements as Risk Management Tools, 17 J. LEGAL ASPECTS OF SPORT 53 (2007) (*see* T.R. Vol. 4 at 589); Allison M. Foley, We, the Parents and Participant, Promise not to Sue . . . Until There is an Accident. The Ability of High School

Students and their Parents to Waive Liability for Participation in School-Sponsored Athletics, 37 SUFFOLK U. L. REV. 439 (2004) (*see* T.R. Vol. 5 at 607).

In addition to an outright rejection of the commercial vs. non-commercial distinction, other courts have emphasized that such a distinction would necessarily render an unclear application of the law:

> For example, is a Boy Scout or Girl Scout, YMCA, or church camp a commercial establishment or a community-based activity? Is a band trip to participate in the Macy's Thanksgiving Day parade a school or commercial activity? What definition of commercial is to be applied?
>
> The importance of this issue cannot be overstated because it affects so many youth activities and involves so much monetary exposure. Bands, cheerleading squads, sports teams, church choirs, and other groups that often charge for their activities and performances will not know whether they are a commercial activity because of the fees and ticket sales. How can these groups carry on their activities that are so needed by youth if the groups face exposure to large damage claims either by paying defense costs or damages? Insuring against such claims is not a realistic answer for many activity providers because insurance costs deplete already very scarce resources.

Rosen, 80 A.3d at 360 (citing *Kirton v. Fields*, 997 So. 2d 349, 363 (Fla. 2012) (Wells, J., dissenting)).

Accordingly, Sky High Nashville submits that the ultimate issue is a threat of litigation that often "strongly deters" the availability of recreational activities for children in ***any setting***. *Id.*; *Zivich*, 696 N.E.2d at 205. Ultimately, public policy has a strong preference for protecting opportunities to provide children "***affordable*** recreation." *Id.* (emphasis added). Here, the simple game of dodgeball. Simply stated, the risk of overwhelming costs of litigation constrains those opportunities:

> [W]here parents are no longer able to sign preinjury waivers allowing their minor children to participate in commercial activities, businesses across [that] state have become weary of exposure to total liability. Even businesses whose customer base is comprised mostly of adults have wheezed at the potential legal implications affecting their patrons. These companies also cater to the children accompanying their parents. . . . [Rulings that invalidate parental pre-injury liability waivers] have several long-lasting impacts on the manner in which corporations, both in and out of the state, anticipate risks that were previously immunized by exculpatory agreements. First, corporate risk management offices must undertake a careful analysis of the consequences exposed by the invalidation of parental waivers. Second, corporations will likely need to carry additional insurance to cover lawsuits by minors, which are now unleashed by the blanket of voidance of certain preinjury waivers. This will lead to the eventual rise in prices charged to customers, as businesses receive the bills from the insurance contracts. In the end, the consumer will face a higher cost to engage in certain activities as a result of the delicate balance between the state's role as *parens patriae* and the parent's right to assess the perils awaiting her child.

Jordan A. Desnick, The Minefield of Liability for Minors: Running Afoul of Corporate Risk Management in Florida, 64 U. MIAMI L. REV. 1031 (2010) (*see* T.R. Vol. 4 at 563). *See also Fischer*, 2002 WL 31126288, *14 (enforcing a liability waiver signed by a parent against his child in conjunction with his participation in a hockey league because a contrary holding would deprive "thousands of children . . . of the valuable opportunity to play organized sports").

Accordingly, enforcing the Contract's liability waiver against Mr. Blackwell in this case is not only required by the constitutional authority developed since *Childress*, but also promotes Tennessee public policy.

IV. Notwithstanding, the Trial Court's Ruling on Ms. Blackwell's Motion to Amend Was Correct.

The trial court denied Ms. Blackwell's Motion to Amend Complaint to the extent she sought leave to add a claim, on Mr. Blackwell's behalf, for reimbursement of pre-majority

medical expenses. Sky High Nashville unequivocally submits that the trial court did not abuse its discretion in this regard.

A. Ms. Blackwell's Claim to Recover Medical Expenses is her Own Separate and Independent Claim.

First, any claim for medical expenses asserted by Ms. Blackwell is her own separate and independent claim for relief. Indeed, it is well-settled that a parent's claim for medical expenses related to an injury to her minor child is separate and distinct and independent of the minor's claim. Tenn. Code Ann. § 20-1-105 ("The father and mother of a minor child have equal rights to maintain an action for the expenses and the actual loss of service resulting from an injury to a minor child in the parents' service or living in the family . . ."); *Page v. Wilkinson*, 657 S.W.2d 422 (Tenn. Ct. App. 1983); *Frady v. Smith*, 519 S.W.2d 584 (Tenn. 1974); *Dudley v. Phillips*, 405 S.W.2d 468, (Tenn. 1966). Although considered as a "derivative" of the child's claim, "[w]hen a tort is committed against a child there arises ***two separate and distinct causes of action."*** *Dudley*, 405 S.W.2d at 469 (emphasis added); *see also Rogers*, 807 S.W.2d at 247; *Boring v. Miller*, 386 S.W.2d 521 (Tenn. 1966) ("It is the rule in this State that the cause of action of the minor for personal injuries and the cause of action for loss of services by the parent are separate and distinct . . .").

A parent's claim for medical expenses is the rational result of her role as the natural guardian of her child who is charged with the "care, nurture, welfare, education, and support" of her child. Tenn. Code Ann. § 34-1-102. *See also In re Ray*, 545 S.E.2d 617 (Ga. App. 2001) (the right to recover damages for loss of a child's services and medical expenses vests solely in the child's parents, which is consonant with a parent's statutory obligation to support her child, including responsibility for his medical expenses); *McBride v. Shutt*, 2002 WL 1477211, at *5 (W.D. Tenn. 2002) (because parents are legally responsible for the medical expenses incurred by

their children, a cause of action to recover pre-majority medical expenses properly belongs to the parents having custody and/or providing for the support of the minor child).

Accordingly, any request by Ms. Blackwell to recover medical expenses is clearly her own, independent claim. As explained *infra*, Ms. Blackwell's claim for medical expenses is barred pursuant to the Contract.

B. The Contract Is Enforceable Against Ms. Blackwell.

It is well-settled in Tennessee that a parent is bound by a contract in which she agreed to release a party for her child's future injuries. *Childress*, 777 S.W.2d at 6. In that regard, *Childress* remains controlling authority: the trial court "was correct in dismissing [the] case as to Mrs. Childress individually." *Id.*

Here, Ms. Blackwell executed the contract with legal capacity to do so, and a reasonable person would conclude that she objectively manifested her assent to be bound by the Contract. *See Doe v. HCA Health Services, Inc.*, 46 S.W.3d 191 (Tenn. 2001). The Contract must therefore be enforced against Ms. Blackwell because it is clearly a binding, enforceable contract between her and Sky High Nashville. *Id. Childress*, 777 S.W.2d at 3. *See also Sharon*, 769 N.E.2d at 749 (a parent allowing his minor child to participate in activity is adequate consideration for a contract); Restatement (Second) of Torts § 496B; *T.R. Mills Contractors, Inc. v. WRH Enterprises, LLC*, 93 S.W.3d 861 (Tenn. Ct. App. 2002); *Moody Realty Co., Inc. v. Huestis*, 237 S.W.3d 666 (Tenn. Ct. App. 2007). Indeed, courts enforce nearly identical choice of law and forum selection provisions against parents in similar contexts. *See, e.g.*, *Williams*, 2014 WL 6065818; *Cedars Academy*, 2010 WL 5825343.

Accordingly, Ms. Blackwell's claims, which are distinct and independent of Mr. Blackwell's claims, are barred pursuant to the Contract. Therefore, the trial court's ruling on Ms. Blackwell's Motion to Amend Complaint was correct in this regard.

C. There is No Claim for Medical Expenses for Ms. Blackwell to Assert on Mr. Blackwell's Behalf Because Mr. Blackwell Has No Cognizable Claim Therefore.

Further, Ms. Blackwell cannot now assert a claim for medical expenses on Mr. Blackwell's behalf. Indeed, it is well-settled in Tennessee that where the claim for medical expenses held by a parent of a minor is barred – as is Ms. Blackwell's claim – then the minor child does not have a claim for those same medical expenses. *Calaway v. Schucker*, 193 S.W.3d 509, 513 (Tenn. 2005). *See also Bauer ex rel. Bauer v. Memorial Hosp.*, 879 N.E.2d 478 (Ill. Ct. App. 5th Dist. 2007) (any of cause of action for medical expenses of a child from a tortfeasor is that of the parents, and if the parents are not entitled to recover, neither is the child).

Permitting a minor plaintiff to sue for the medical expenses on the ground that the parent has waived the claim or has transferred the right to the child gives way to allowing claims which the parent could not himself or herself make successfully. In such a situations, courts hold that the child may not recover the medical expenses. *See, e.g., McManus v. Arnold Taxi Corp.*, 255 P. 755 (Cal. App. 1927) (parent's claim is barred because the parent was guilty of contributory negligence in permitting the child to play in a place of danger); *Calaway*, 193 S.W.3d at 519 (a minor does not have a personal claim for medical expenses arising out of an injury caused by a third party where the claim of the minor's parents for medical expenses is barred by the statute of limitations or repose).

In *Smith v. King*, 1984 WL 586817 (Tenn. Ct. App. Sept. 21, 1984), this Court held that a minor's parents could "waive" their cause of action for recovery of medical expenses and, as a

result, a claim for medical expenses could be properly maintained by the minor. *Smith*, 1984 WL 586817, at *1. There, the minor suffered a personal injury when her school bus was struck by the defendant's vehicle. *Id.* The minor plaintiff filed a lawsuit by and through her parents more than one year after the accident. *Id.* The trial court excluded any evidence of the minor's medical bills on the grounds that they were relevant to the parents' claims only, neither of whom were parties. *Id.*

On appeal, the minor contended that Tenn. Code Ann. § 20-1-105 and *Burke v. Ellis*, 58 S.W. 855 (Tenn. 1900), supported the trial court's ruling, but that the parents "bringing the action seeking medical expenses in the name of their child" effectively waived their cause of action, and "as a consequence it is properly maintainable by the child." *Id.* This Court acknowledged that the question presented was an issue of first impression in Tennessee, but recognized that courts in other jurisdictions "permit a recovery on behalf of the child where the suit is brought by a parent as next friend." *Id.* This Court explained that those cases rely on two theories for recovery: waiver or presumptive emancipation. *Id.* The *Smith* Court also recognized that the principal concern in this regard was that "the tortfeasor not be required to respond twice for the same damages, and the courts make it clear that recovery on behalf of the child precludes one on behalf of the parent." *Id.* at *2. Based on the foregoing rationale, this Court concluded that Tennessee had adopted the waiver rule:

> [W]e are persuaded that Tennessee has adopted the waiver rule and that a child under circumstances where the parent has acted as next friend may maintain an action for his medical expenses provided that he has paid them[.]"

Id. (citing *Burke*, 58 S.W.2d 631).

This Court applied *Smith* in *Palanki v. Vanderbilt University*, 215 S.W.3d 380 (Tenn. Ct. App. 2006). There, the defendant contended that the trial court erred in admitting evidence of

the minor plaintiff's pre-majority medical expenses because the minor's parent was not a party to the suit, individually. *Palanki*, 215 S.W.3d at 394. This Court held that "a child under circumstances where a parent has acted as next friend may maintain an action for his medical expenses provided that [the parent] has paid for them . . . or is legally obligated to pay for them." *Id.* (quoting *Smith*, 1984 WL 586817, at *2). Further, "the parent by bringing the suit on behalf of the minor has waived any claim that he might have" thereby eliminating the concern of double recoveries for pre-majority medical expenses." *Id* (citing *Smith*, 1984 WL 586817, at *2).

This case is different than *Smith* and *Palanki*. First, those cases involve a parent's ***"separate and distinct cause[] of action"*** (*Dudley*, 405 S.W.2d at 469) for medical expenses that ***existed*** at the time the lawsuit was filed. *Id.*; *Smith*, 1984 WL 586817. Indeed, *Smith* and *Palanki* made clear that courts are ultimately concerned about ***double recovery*** – that is, ***two-recoveries on a parent's existing claim for medical expenses***. *Id.* However, in this case, Ms. Blackwell's claim for medical expenses never existed in the first place. Therefore, Ms. Blackwell neither has any claim for medical expenses to assert individually, nor any claim for medical expenses to essentially "assign" to Mr. Blackwell.

Indeed, the law is clear in Tennessee that where a parent does not have a claim for medical expenses in her own right by contract, then the minor may not recover medical expenses. *See Tennessee Farmers' Mut. Ins. Co. v. Rader*, 410 S.W.2d 171, 173 (Tenn. 1966) (subrogation contract entered into by the parent that assigned right to collect medical expenses to insurance company barred any claim for medical expenses, including the minor child's claim). A similar result was reached by the Wisconsin Court of Appeals in *David v. Hamburg Mut. Ins. Co.*, 514 N.W.2d 421 (Wis. Ct. App. 1993), where the court held that a minor's claim for pre-

majority medical expenses is barred where his parents had previously executed a settlement and release.

In *David*, a minor was injured in a motor vehicle accident. *David*, 514 N.W.2d at 412. The minor's pre-majority medical expenses were paid by his father's insurance company. *Id.* When the minor reached the age of majority, he and his parents joined as plaintiffs in a lawsuit against the third party. *Id.* The parents asserted an individual claim for medical expenses. *Id.* However, prior to trial, the parents settled all of their claims with the third party, and dismissed their claims. *Id.* Later, their son asserted that he was nevertheless entitled to recover his pre-majority medical expenses. *Id.* The court rejected his assertion because such a right ultimately belonged to his parents, who had previously extinguished their claim pursuant to a settlement and release prior to trial. *Id.*

This case presents a similar situation. Here, Ms. Blackwell had a separate and independent right to recover medical expenses associated with any of Mr. Blackwell's future injuries. *Dudley*, 405 S.W.2d at 469. However, Ms. Blackwell executed the Contract's liability waiver in which she "voluntarily release[d], forever discharge[d], and agree[d] to defend, indemnify and hold harmless [Sky High Nashville] from ***any and all claims, demands, or causes of action which are in any way connected"*** to Mr. Blackwell's use of Sky High Nashville's facilities. (T.R. Vol. 1 at 40, ¶¶ 1-5). Accordingly, because Ms. Blackwell extinguished her claim and released her own right to recover from Sky High Nashville, she has no ability to assign such a right to Mr. Blackwell. In other words, no cognizable claim ever existed for her to "waive" – just as in *Rader* and *David*.

In her principal Brief of the Appellant, Ms. Blackwell relies on this Court's ruling in *Kingston Neale b/n/f Dion Russell v. United Way of Greater Kingsport*, 2015 WL 4537119

(Tenn. Ct. App. July 28, 2015), as support for the argument that she may pursue a claim for medical expenses on Mr. Blackwell's behalf. However, *Russell* simply does not support Ms. Blackwell's position. Conversely, to the extent *Russell* is applicable, if at all, it supports Sky High Nashville's position.

In *Russell*, a father filed a lawsuit as next friend to his minor son. *Russell*, 2015 WL 4537119, at *1. The defendant averred that the father lacked standing to bring the case because he lived apart from the mother, was not the primary residential parent, and had not alleged that he paid for the child's medical expenses. *Id.* Therefore, the defendant asserted that the father's claim should be dismissed pursuant to Tenn. Code Ann. § 20-1-105(b). *Id.* The trial court held that the father's claim was barred and dismissed the complaint. *Id.* On appeal, this Court affirmed as to the dismissal of the father's claim for medical expenses, but reversed as to the father's right to pursue the child's negligence claim only pertaining to "the Child's averments of permanent impairment, pain and suffering, and loss of earning capacity in adulthood." *Id.* at *9.

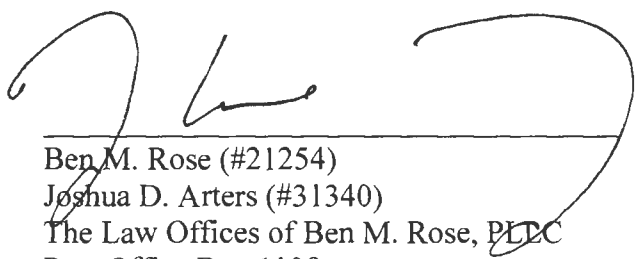
Indeed, *Calaway*, *Russell*, and *David* indicate that, where a parent – such as Ms. Blackwell in this case – has no individual right to seek reimbursement of medical expenses she was obligated to pay, such a parent cannot simply pursue that claim derivatively through her child. *Id.* In fact, doing so would permit Ms. Blackwell to assert a claim through Mr. Blackwell that she could not herself have made successfully, which the law does not allow. *See McManus*, 255 P. 755; *Calaway*, 193 S.W.3d at 519.

Accordingly, because Ms. Blackwell extinguished her claim for medical expenses by signing the Contract's liability waiver, she may not now attempt to recover such medical expenses derivatively through Mr. Blackwell.

CONCLUSION

Based upon the foregoing, this Court should reverse the trial court's denial of Sky High Nashville's Motion to Enforce the Contract Between the Parties. In the alternative, this Court should affirm the trial court's ruling on Ms. Blackwell's Motion to Amend Complaint.

Respectfully submitted,



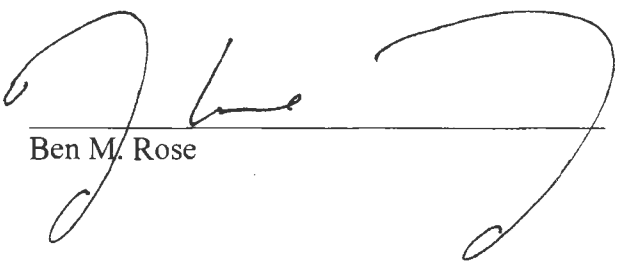
Ben M. Rose (#21254)
Joshua D. Arters (#31340)
The Law Offices of Ben M. Rose, PLLC
Post Office Box 1108
Brentwood, Tennessee 37024
615-942-8295

Attorneys for the Appellee, Sky High Sports Nashville Operations, LLC

CERTIFICATE OF SERVICE

I do hereby certify that a true and exact copy of the foregoing has been sent by U.S. Mail, postage pre-paid, to the following on this 17th day of June, 2016:

David J. Weissman
Raybin & Weissman, P.C.
Fifth Third Center, Suite 2200
424 Church Street
Nashville, Tennessee 37219



Ben M. Rose