No. A20-1318

State of Minnesota

In Supreme Court

Carter Justice,

Appellant / Cross-Respondent,

vs.

Marvel, LLC
d/b/a Pump It Up Parties,

Respondent / Cross-Appellant.

APPELLANT CARTER JUSTICE'S PRINCIPAL BRIEF & ADDENDUM

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   How Issue Was Raised Below: Marvel, LLC sought summary judgment based on a parental pre-injury liability waiver. (Doc.32 at 8-10.) Carter Justice objected. (Doc.41 at 6-7, 8-17 & nn.1-2.)

   Lower Court Rulings: The district court (Add.5-6) and court of appeals (Add.49-55) each held that Minnesota law authorizes the enforcement of parental pre-injury liability waivers.

   How Issue Was Preserved for Appeal: Carter preserved this issue by timely appeal to the court of appeals (Doc.70) and then a timely petition-for-review (PFR) of the court of appeals' decision.

   Apposite Authorities:

   Mattson v. Minn. & N. Wis. R.R. Co., 95 Minn. 477 (1905)

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2. **Does Minn. Stat. §184B.20, subd. 5(b)—the Legislature's child-protective ban on inflatable-amusement liability waivers—deny this safeguard to injured children whose claims are subject to waivers signed before the ban's effective date?**

   How Issue Was Raised Below: Marvel sought summary judgment based on a parental pre-injury liability waiver. (Doc.32 at 8-10.) Carter objected. (Doc.41 at 6-7, 8-17 & nn.1-2.)

   Lower Court Rulings: The district court (Add.8) and court of appeals (Add.55-57) each held that §184B.20's waiver ban does not reach pre-injury liability waivers signed before §184B.20's effective date.

   How Issue Was Preserved for Appeal: Carter preserved this issue through his timely appeal (Doc.70) and his timely PFR.

Apposite Authorities:

Tapia v. Leslie, 950 N.W.2d 59 (Minn. 2020)

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3. Does Minnesota let courts 'save' overbroad liability waivers, contrary to the well-settled rule of strict construction?

How Issue Was Raised Below: Marvel sought summary judgment based on a parental pre-injury liability waiver. (Doc.32 at 8-10.) Carter objected. (Doc.41 at 6-7, 8-17 & nn.1-2.)

Lower Court Rulings: The district court held that Marvel's liability waiver was not overbroad in that the waiver "did not purport to release" PIU from "liability for intentional, willful or wanton acts." (Add.6-7.) The court of appeals disagreed, concluding the waiver was "overly broad" in purporting to release "'any and all claims.'" (Add.61-62.) But the court of appeals held that such overbreadth did not bar Marvel from taking advantage of the rule that a waiver may release ordinary-negligence claims. (Add.62-63.)

How Issue Was Preserved for Appeal: Carter preserved this issue through his timely appeal (Doc.70) and his timely PFR.

Apposite Authorities:

Dewitt v. London Road Rental Ctr., Inc., 910 N.W.2d 412 (Minn. 2018)

Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920 (Minn. 1982)

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4. Do public-amusement liability waivers violate public policy?

How Issue Was Raised Below: Marvel (a public amusement) sought summary judgment based on a parental pre-injury liability waiver. (Doc.32 at 8-10.) Carter objected. (Doc.41 at 6-7, 8-17 & nn.1-2.)

Lower Court Rulings: The district court held that Marvel's provision of inflatable amusements was not "an essential or public service," disregarding the long-settled duty of public amusements to protect their patrons. (Add.8.) The court of appeals did the same, deeming Marvel to be a mere provider of "recreational activities" that owed no greater public duty-of-care. (Add.59-60.)

How Issue Was Preserved for Appeal: Carter preserved this issue through his timely appeal (Doc.70) and his timely PFR.

Apposite Authorities:

Yang v. Voyagaire Houseboats, Inc., 701 N.W.2d 783 (2005)

Lindgren v. Voge, 260 Minn. 262 (1961)

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Statement of the Case

Carter Justice ("Carter") sued Marvel, LLC, d/b/a Pump It Up Parties[1] ("PIU") in Hennepin County District Court (4th Judicial District), Judge Jamie L. Anderson presiding. (Add.1, 18-21.)

Carter's suit alleged that when Carter was 7-years-old, he fell while playing on an amusement at Marvel's PIU franchise, a commercial play area. (Add.18 at ¶5.) Colliding with a concrete floor lacking safety mats, Carter cracked his skull—an injury that years later developed into what proved to be permanent brain trauma. (Add.18, 20 at ¶¶1,13.)

Based on these facts—and having become an adult able to sue in his own right—Carter asserted a personal-injury claim against Marvel for negligence and "deliberate disregard" for child safety. (Add.19-20 at ¶¶7-15.) Carter sought damages in excess of $50,000. (Add.21 at ¶1.)

Marvel answered Carter's complaint. (Add.22-26.)

After discovery and a district court order denying Carter's request for leave to seek punitive damages (Add.12-17), Marvel filed a motion for summary judgment. (Add.1.) Marvel argued that a liability waiver signed by Carter's mother before Carter's fall released Carter's claims. (Doc.32 at 8-10.) Carter objected. (Doc.41 at 6-7, 8-17 & nn.1-2.)

The district court agreed with Marvel and entered judgment against Carter. (Add.5-11.) Carter timely appealed (Doc. 70). The court of appeals affirmed. (Add.44-67.) This Court then granted further review.

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[1] This statement omits all defendants dismissed by party stipulation.

Statement of Facts

A. Marvel ran a Pump It Up (PIU) franchise—a commercial play area featuring inflatable amusements without safety mats.

Marvel, LLC is "an inactive Minnesota company." (Doc.36 at ¶1.) From 2004 to 2009, Marvel did business as a "Pump It Up [PIU] franchise … in Plymouth, Minnesota." (Doc.36 at ¶2.) PIU is a chain of commercial play areas with "100s of locations" across the nation.[2] PIU invites parents to reserve PIU play areas "for birthday parties." (Doc.36 at ¶2.)

PIU play areas feature inflatables. (*Id.*) Inflatables are "amusement device[s]" (e.g., obstacle courses, slides, etc.) for children to "bounce or otherwise play on." Minn. Stat. §184B.20, subd. 1(c). Inflatables consist of a "high-strength fabric or film" that "achieves its strength, shape, and stability by tensioning from internal air pressure." *Id.*

Inflatables present a substantial risk of "injuries from falls." *Id.* §184B.20, subd. 3. In keeping with this risk, PIU instructed franchisees that the "safety of Pump It Up guests … is of paramount importance." (Add.29.) PIU also identified an "approved vendor" that would "create custom safety mats … for Pump It Up franchisees." (Add.30.)

Marvel's PIU franchise, however, took no steps to order safety mats or conduct any kind of "formal safety analysis." (Add.32.) Marvel instead allowed its inflatable amusements to remain surrounded by "commercial grade carpet laid over concrete flooring." (Add.23 at ¶5.)

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2 *Franchise Opportunities,* PUMP IT UP, https://bit.ly/3DPvAHM.

B. Marvel's lack of safety mats injures Carter Justice (age 7) for life when Carter visits Marvel's PIU franchise.

In February 2007, Carter Justice (age 7) attended a friend's birthday party at Marvel's PIU franchise. (Add.19 at ¶5.) Before that day, neither Carter nor his mother, Michelle, had ever visited a PIU play area. (Add.39 at ¶2.) They also did not know that Marvel's featured inflatables "did not have sufficient flooring material to protect children." (*Id.*)

1. A Marvel employee has Carter's mother "check in" Carter by signing a waiver of "all claims" without explaining the waiver or disclosing Marvel's lack of safety mats.

Michelle dropped Carter off at the birthday party. (Doc.56 at 34-35:12-5.[3]) One of Marvel's employees, a "high school kid," had Michelle sign a liability waiver to "check in" Carter and allow a "head count." (Doc.56 at 35-36:11-6, 37:11-14.) The employee "spun [the waiver] very lightly" and "did not go into detail."(Doc.56 at 36:5-6, 37:11-14.)

When Michelle asked for more information, Marvel's employee did not say the waiver meant injuries suffered by Carter were "not going to be … [Marvel's] responsibility." (Doc.56 at 36:21-24.) The employee also did not invite Michelle to inspect the play area or disclose that the play area's inflatables lacked safety mats. (Doc.56 at 35-37:11-16.)

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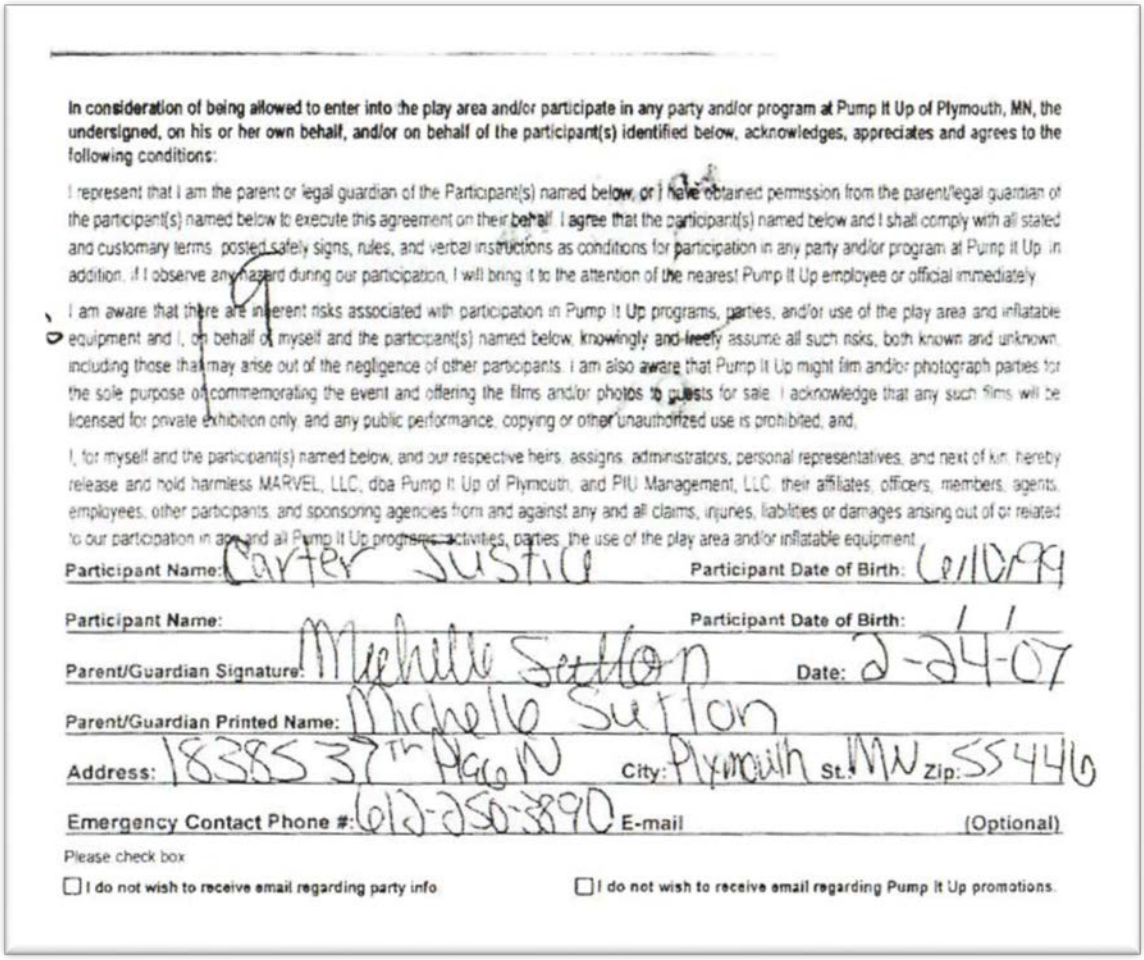
[3] These facts appear in Michelle's deposition, which Carter presented below in opposing Marvel's motion for summary judgment. The Court is bound to "view the[se] facts in the light most favorable" to Carter—"the party against whom summary judgment" was granted. *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 788 (Minn. 2005). The same goes for the facts presented in this brief about Carter's injuries from his fall.

Marvel's employee merely established that the waiver had "to be done to have [Carter] signed in." (Doc.56 at 37:18-20.) Carter "couldn't go in and play" unless Michelle "signed." (Doc.56 at 37:21-23.). Marvel's employee was "more or less trying to rush everybody through" in order "to get the birthday party started." (Doc.56 at 39:1-3.)

So Michelle signed the waiver (Add.27), reproduced below. This was Michelle's "first time" doing this, having "never [previously] sent [Carter] to a birthday party" that required a waiver. (Doc.56 at 35:14-15, 37:23-25.) Michelle assumed the waiver was about if "something minor happens" and not "anything life or death." (Doc.56 at 40:3-10.)



In consideration of being allowed to enter into the play area and/or participate in any party and/or program at Pump It Up of Plymouth, MN, the undersigned, on his or her own behalf, and/or on behalf of the participant(s) identified below, acknowledges, appreciates and agrees to the following conditions:

I represent that I am the parent or legal guardian of the Participant(s) named below, or I have obtained permission from the parent/legal guardian of the participant(s) named below to execute this agreement on their behalf. I agree that the participant(s) named below and I shall comply with all stated and customary terms, posted safety signs, rules, and verbal instructions as conditions for participation in any party and/or program at Pump It Up. In addition, if I observe any hazard during our participation, I will bring it to the attention of the nearest Pump It Up employee or official immediately.

I am aware that there are inherent risks associated with participation in Pump It Up programs, parties, and/or use of the play area and inflatable equipment and I, on behalf of myself and the participant(s) named below, knowingly and freely assume all such risks, both known and unknown, including those that may arise out of the negligence of other participants. I am also aware that Pump It Up might film and/or photograph parties for the sole purpose of commemorating the event and offering the films and/or photos to guests for sale. I acknowledge that any such films will be licensed for private exhibition only and any public performance, copying or other unauthorized use is prohibited; and,

I, for myself and the participant(s) named below, and our respective heirs, assigns, administrators, personal representatives, and next of kin, hereby release and hold harmless MARVEL, LLC, dba Pump It Up of Plymouth, and PIU Management, LLC, their affiliates, officers, members, agents, employees, other participants, and sponsoring agencies from and against any and all claims, injuries, liabilities or damages arising out of or related to our participation in any and all Pump It Up programs, activities, parties, the use of the play area and/or inflatable equipment.

Participant Name: Carter Justice Participant Date of Birth: 6/11/99

Participant Name: Participant Date of Birth: / /

Parent/Guardian Signature: Michelle Sutton Date: 2-24-07

Parent/Guardian Printed Name: Michelle Sutton

Address: 18385 37th Place N City: Plymouth St: MN Zip: 55446

Emergency Contact Phone #: 612-250-3890 E-mail (Optional)

Please check box

☐ I do not wish to receive email regarding party info ☐ I do not wish to receive email regarding Pump It Up promotions.

2. While playing on an inflatable, Carter falls onto Marvel's unpadded concrete floor, cracking his skull and suffering what years later proves to be permanent brain trauma.

After Michelle signed the Marvel/PIU liability waiver, Carter entered the play area. Then, while Carter was "bouncing" on one of the inflatables, he "fell completely off backwards." (Doc.56 at 57:12-16.) Carter's body dropped "six feet" (Doc.43 at PDF p.2) before his skull hit the surrounding unpadded concrete floor (Doc.56 at 57:12-16).

A Marvel employee phoned Michelle and for an ambulance. (Doc.56 at 37:2-7, 57:1-10.) When Michelle arrived, paramedics informed her that Carter had suffered a seizure. (Doc.47 at PDF p.2.) The paramedics then drove Carter and Michelle to North Memorial (*see* Doc.43 at PDF p.5) as Carter faded "in and out of consciousness" (Doc.47 at PDF p.25).

Carter arrived at North Memorial's ER "confused and in quite severe distress." (Doc.43 at PDF p.5.) A CT scan revealed "multiple skull fractures" and a "hemorrhagic contusion." (Doc.43 at PDF p.3.) Doctors admitted Carter to North Memorial's ICU and called for an "emergency neurosurgical consultation." (Doc.43 at PDF p.2-3.)

A neurosurgeon subsequently observed that Carter's fall had left Carter with a cracked skull, a seizure, a frontal contusion (brain bleed), a temporary loss-of-consciousness, and brain swelling. (Doc.43 at PDF p.4.) The neurosurgeon directed Carter "be kept in the [ICU]." (*Id.*)

After a week in the ICU, Carter underwent physical and speech therapy. (Doc.47 at PDF p.25; Doc.34 at PDF p.47.) Carter's therapists

noted possible "impairment." (Doc.35 at PDF p.4.) The hospital echoed this concern upon Carter's discharge. "A follow-up CT scan seemed to show some brain swelling." (Doc.34 at PDF p.47.)

Carter's return home did not mark the end of his ordeal. An April 2007 CT scan revealed "minimal … healing" of Carter's skull fractures and an "evolution" of his contusions. (Doc.35 at PDF p.6.) A November 2007 school note observed Carter had become prone to "mood swings" and "increased physical and verbal aggression." (Doc.55.)

Carter's parents struggled to cope. Michelle found that Carter "completely change[d]" after the fall. (Doc.56 at 45:6-21.) Carter went from a "happy" child to one who "wreck[ed] any relationships he had." (Doc.56 at 44:16-23.) Carter's life was now "one doctor's appointment after another trying to seek help."[4] (Doc.56 at 45:17-21.)

For instance, in March 2008, Carter visited the Nolan Neurological Clinic after experiencing "a two-week history of multiple times per day episodes … of dizziness." (Doc.53.) Carter underwent MRI scans that revealed certain brain damage. (Doc.54 ("Multifocal cortical gray matter encephalomalacia and gliosis in … the right temporal lobe.").)

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[4] In November 2007, Marvel agreed to pay $1,500 towards Carter's fall-related medical expenses. (Add.28.) In exchange, Carter's mother and stepfather agreed to execute a "complete release" of all claims related to Carter's fall so long as Carter suffered "no new medical complications" before March 12, 2008. (*Id.*) This brief omits further discussion of these facts because they do not affect Carter's claims against Marvel. As the court of appeals ruled—and Marvel does not dispute—these facts entail no agreement "between Marvel and [Carter] Justice." (Add.66.)

In October 2015, psychologist Michael Richardson evaluated Carter to help address Carter's "worsening" misbehavior. (Doc.49 at PDF p.30.) Richardson found the "residual effects" of a traumatic brain injury (TBI), as opposed to a "diagnosis of ADHD." (Doc.49 at PDF p.33.). Richardson also predicted that this "could be a lifelong condition." (*Id.*)

In April 2020, Dr. Randal Benson, M.D. confirmed Richardson's prediction. (Doc.47 at PDF pp.8-44.) Dr. Benson is a renowned TBI expert, writing and lecturing extensively on the subject. (Doc.48 at PDF pp.21-25.) He also performs TBI research for various organizations, including both the NFL and the U.S. Army. (Doc.48 at PDF pp.25-26.)

Dr. Benson performed a "comprehensive medical evaluation" of Carter that included "advanced brain imaging." (Doc.47 at PDF p.8.) Dr. Benson found "seven lines of evidence" establishing that Carter's fall caused a TBI. (Doc.47 at PDF p.37.) Dr. Benson also found Carter's TBI had resulted in "permanent" injury. (Doc.47 at PDF p.38-39.)

The permanent injury from Carter's TBI included cognitive deficits, physical ailments, and psychological issues. (*Id.*) Carter must now live with a myriad of life-impeding conditions, including: short-term memory problems; frequent headaches; "ringing in his ears"; sleep problems; "panic attacks"; and "excessive anger." (*Id.*) Carter will also require a lifetime of psychological and psychiatric assistance, as well as needing to be prepared in his later years for "a substantially higher risk for cognitive decline and dementia." (Doc.47 at PDF p.43.) Finally, "absent his TBI," Carter would have outgrown his childhood ADHD. (*Id.*)

C. Upon turning 18, Carter sues Marvel.

Permanently injured by his childhood fall at Marvel's PIU play area, Carter sued. After turning 18 on June 11, 2017 and hiring counsel, Carter served a complaint on June 7, 2018 that asserted a personal-injury claim. (Docs.1, 2.) Carter also moved to add a punitive-damages claim. (Docs.18, 19, 20.) The district court denied Carter's motion. (Add.12-17.)

1. The district court grants summary judgment against Carter based on the liability waiver that Carter's mother signed.

Marvel sought summary judgment based on the waiver signed by Carter's mother. (Doc.32 at 8-12.) Carter objected on a variety of grounds. (*See* Doc.41 at 6-7, 8-17 & nn.1-2.) Carter supported these objections with evidence demonstrating material issues of fact. (Docs.42 to 59.)

The district court granted Marvel's motion. (Add.1.) The court held that: (1) parents may waive their child's tort claims; (2) the waiver here was not overbroad and otherwise passed muster under the common law; and (3) Minn. Stat. §184B.20 did not govern the waiver, as this would be an improper retroactive application of the statute. (Add.1-11.)

2. The court of appeals affirms.

Carter timely appealed. (Doc.70.) The court of appeals affirmed the summary-judgment grant with one exception: the court found Marvel's waiver was overbroad and then adopted a saving construction. (Add.44-67.) The court finally held that its summary-judgment affirmance mooted Carter's appeal of the punitive-damages denial. (Add.66-67.)

Standard of Review

This case comes to the Court on a grant of summary judgment that the court of appeals affirmed. Review of this judgment requires the Court to: (1) construe a liability waiver (a contract); (2) determine the operation of common-law principles and public policy relevant to this context; and (3) interpret Minnesota statutes relevant to this context.

Summary Judgment: "On appeal from summary judgment," the Court analyzes "whether there are any genuine issues of material fact" and "whether a party is entitled to judgment as a matter of law." *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 788 (Minn. 2005). The Court takes "the facts in the light most favorable to … the party against whom summary judgment has been granted"—here, Carter. *Id.*

Contract Interpretation: The Court reviews "de novo" the question of whether "a contract provision … is ambiguous." *Id.* The same goes for the "construction and effect of an unambiguous contract." *Id.*

Common Law Questions: The Court reviews "de novo" questions concerning the "application or extension of [Minnesota] common law." *Soderberg v. Anderson*, 922 N.W.2d 200, 203 (Minn. 2019).

Statutory Interpretation: The Court reviews "de novo" the proper "interpretation of statutes." *Boutin v. LaFleur,* 591 N.W.2d 711, 714 (Minn. 1999). The Court is "not bound by a lower court's interpretation." *Id.* "The object of all interpretation … of laws … is to ascertain and effectuate the intention of the [L]egislature." Minn. Stat. §645.16.

Summary of Argument

Time and again, the Court has recognized the "extreme solicitude of the law for the protection of minors." *Minnesota Debenture Co. v. Dean*, 85 Minn. 473, 479 (1902). The future of this principle is now at risk. The courts below held that Minnesota common law supports the enforcement of overbroad parent-signed liability waivers that release for-profit public amusements from the high degree of care they owe children.

Left standing, this holding would make Minnesota the least child-protective jurisdiction in the nation. Because that outcome cannot be squared with Minnesota's core regard for "the welfare of the child," this Court should reverse course. *State ex. rel. Flint v. Flint*, 63 Minn. 187, 189 (1895). The Court should reach the following conclusions:

First, Minnesota does not enforce overbroad liability waivers.

Second, public amusements cannot contract away their duty of care.

Third, Minnesota rejects parent-signed liability waivers for minors.

Fourth, Minnesota's ban on inflatable-amusement liability waivers protects all children, no matter when a given waiver was signed.

These conclusions may then help to ensure that what happened to Carter Justice here does not happen to others. When Carter was 7-years-old, he fell while playing on an inflatable amusement at a commercial play area. Carter cracked his skull because the play area saw no reason to install safety mats. Carter sued and now asks this Court to conclude that Minnesota puts child welfare first—not liability waivers.

Argument

I. The big picture.

A. This case is about the safety of children and their families.

Seven-year-old Carter Justice cracked his skull because a commercial play area run by Marvel, LLC invited children to bounce on inflatables that lacked safety mats. Marvel had all the tools it needed to prevent this injury, including an approved vendor of custom safety mats. (Add.30.) Marvel instead devoted its employees to hurrying Carter's mother and parents like her into signing pre-injury liability waivers.

That is the big picture here. Families expect amusements like play areas to be "reasonably safe" especially when the amusement's "patrons are minor children." *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 336 (2006). Upholding these facilities' use of liability waivers means "remov[ing] a significant incentive for … commercial enterprises that attract children to take reasonable precautions to protect [child] safety." *Id.*

It is then no exaggeration to say that upholding the waiver at issue here would make Minnesota the least child-protective state in the nation. Carter's counsel has been unable locate another state high court decision enforcing a parental waiver materially like Marvel's—one that no statute authorizes; that releases a for-profit public amusement's negligence; and that is plainly overbroad (i.e., purporting to reach "all claims").

Rather, "the general rule is that parents cannot waive causes of action on behalf of their children." *Auto. Workers v. Johnson Controls, Inc.*,

499 U.S. 187, 213 (1991) (White, J., concurring).[5] For good reason: when a parent executes a pre-injury release, "the parent is not protecting the welfare of the child, but is instead protecting the interests of the activity provider." *Kirton v. Fields*, 997 So. 2d 349, 357 (Fla. 2008).

This Court, in turn, has long placed the welfare of children first. As early as 1895, the Court made it clear that: "[w]hile the courts will not lightly interfere with what may be termed the 'natural rights' of parents, **the primary object of all courts … is to secure the welfare of the child**." *State ex rel. Flint v. Flint*, 63 Minn. 187, 189 (1895) (bold added).

Enforcement of parental pre-injury liability waivers does not secure the welfare of children—or parents. When a parent signs such a waiver, "[the wrongdoer] escapes liability while the parent is left to deal with the financial burden" and care "of an injured child." *Kirton*, 997 So. 2d at 357. Parents who "cannot afford to bear that burden" may then lose custody of their children by divorce or a state finding of neglect. *Id.*

By contrast, rejecting parental pre-injury liability waivers does not mean any diminution of parental autonomy or recreational activities for children. This may be seen nationwide, from Utah to Iowa to Michigan to Kentucky to New York to Maine. All these states recognize that tort claims are a "nonbargainable interest of … children." *Kaiser v. Kaiser*, 290 Minn. 173, 180 (1971). This Court should now do the same.

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[5] *See generally* George Blum, Annotation, *Release or Compromise or Waiver by Parent of Cause of Action for Injuries to Child as Affecting Right of Child*, 75 A.L.R. 6th 1 (2021) (collecting cases).

B. Mindful of the Court's duty to avoid advisory opinions, Carter's principal brief addresses the issues before the Court from the narrowest ground-for-reversal to the broadest.

Carter recognizes that the Court is bound "to refrain from deciding any issue not essential" to a case. *Lipka v. Minn. Sch. Emps. Ass'n, Local 1980*, 550 N.W.2d 618, 621-22 (Minn. 1996). This duty ensures that parties are not given "the power to exact advisory opinions." *Id.*

The Court granted four issues here. If the Court agrees with Carter on any one of them, Marvel's liability waiver falls and the Court need not decide the other issues. So Carter argues the four issues from narrowest (common-law principles) to broadest (statutory interpretation).

Carter also submits the Court should vacate the decisions below in regard to any issues the Court does not decide. Doing so "clears the path for future relitigation" of vital issues affecting child safety. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950). Vacatur also prevents the "spawning" of any unintended "legal consequences." *Id.*

C. If the Court reverses, the Court should remand to the court of appeals for review of Carter's punitive-damages claim.

The court of appeals elected not to reach Carter's argument that the district court erred in denying Carter's punitive-damages leave motion. (Add.66-67.) Carter then preserved this issue through his PFR. *See* PFR.3-4 (Issue #5). If the Court reverses summary judgment against Carter, the Court should remand-in-part to the court of appeals so Carter may finally receive appellate review of his punitive-damages claim.

II. Minnesota courts may not 'save' overbroad liability waivers.

A. Minnesota law disfavors liability waivers, bars overbroad waivers, and requires strict construction of waivers.

Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920 (Minn. 1982) dictates when "[a] clause exonerating a party from liability" may be enforced under Minnesota common law. *Id.* at 923. *Schlobohm* sets forth three basic rules that Minnesota courts must follow in determining the proper effect of a liability waiver (also known as an exculpatory clause). *Id.*

First, liability waivers "are not favored" under Minnesota law." *Id.* **Second**, if a liability waiver is "either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced." **Third and finally**, liability waivers must be "strictly construed against the benefited party." *Id.*

Regarding the rule of strict construction, it is important to consider what preceded this rule. In 1963, the Court considered the argument that "an exculpating provision must clearly express the intention of the parties" and that "the language used is subject to strict construction." *ISD No. 877 v. Loberg Plumbing & Heating Co.*, 266 Minn. 426, 434 (1963). The Court was unable to find "support[] [for] such a rule." *Id.*

This led the Court to conclude that when "the parties' intention to exonerate reasonably appears" in a contractual provision, "public policy dictates that they be bound by the agreement made." *Id.* Liability waivers merited "a **fair construction** that will accomplish … [the waiver's] stated purpose"—i.e., a "rule of fair construction." *Id.* (bold added).

A decade later, the Court began to change its mind. The Court held in *Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc.* that "[i]ndemnity agreements are to be strictly construed." 281 N.W.2d 838, 842 (Minn. 1979). This principle meant that only "an express provision … to indemnify the indemnitee for … its own negligence" would suffice—"such an obligation will not be found by implication." *Id.*

Next came *Solidification, Inc. v. Minter*, 305 N.W.2d 871 (Minn. 1981). The Court noted that "[s]ince *Farmington* … we have held that indemnity clauses are to be strictly construed." *Id.* at 873. The Court then declared: "the same rule … applies to exculpatory clauses." *Id.* This rule doomed the "ambiguous" exculpatory clause in *Solidification*: "[c]onstruing the clause strictly against … the party seeking exoneration, we cannot say [that] Solidification is relieved from its own negligence." *Id.*

A year later, the Court decided *Schlobohm*, which recaps this history. 326 N.W.2d at 923. Three lessons follow. **First**, strict construction differs from fair construction. **Second**, strict construction demands an "express" waiver of a given party's negligence. **Third**, strict construction dictates that for "ambiguous" waivers, a court "cannot say … a party is relieved from its own negligence." *Solidification*, 305 N.W.2d at 873.

B. The court of appeals correctly held that the liability waiver here was overbroad because the waiver expressly releases "all claims" without any qualification whatsoever.

The Marvel liability waiver signed by Carter's mother—and naming Carter as the "participant"—provides in relevant part:

> I, for myself and the participant(s) named below … hereby release and hold harmless MARVEL, LLC dba Pump It Up of Plymouth and PIU Management LLC … from and against **any and all claims, injuries, liabilities or damages** arising out of or related to … the use of the play area and/or inflatable equipment.

(Add.27 (bold added).)

Based on this text, the court of appeals correctly held that Marvel's liability waiver was "overly broad." (Add.61-62.) As the court explains, the waiver's text "expansively refers to 'any and all claims,' which means that it purports to release Marvel from claims arising from its intentional, willful or wanton acts." (*Id.*) The waiver "does not make any reference to claims of 'ordinary negligence' or simply 'negligence.'" (*Id.*)

Minnesota cases support this conclusion. Consider *McCarthy Well Co. v. St. Peter Creamery, Inc.*, 389 N.W.2d 514 (Minn. App. 1986), *aff'd in relevant part on different grounds*, 410 N.W.2d 312 (Minn. 1987). At issue was a liability waiver that declared McCarthy Well not liable for "**any … damage or liability of any nature whatsoever** arising or growing out of [McCarthy Well's] work." 389 N.W.2d at 518 (bold added). The court of appeals held that the "wording of this clause apparently covers damages arising from even recklessness or intentional conduct." *Id.*

Other jurisdictions concur. In *Alexander v. Kendall Central School District*, a New York appellate court reviewed a parent-signed liability waiver that purported to release "any and all injuries." 634 N.Y.S.2d 318,

319-20 (N.Y. App. Div. 1995). The court found this "sweeping language" did not exonerate the defendant's own negligent acts. *Id.*

Against these authorities, Marvel argued below that use of broad language in a liability waiver does not equal overbreadth. (*See* Marvel-COA-Br.31.) Marvel cited: (1) *Schlobohm;* (2) *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727 (Minn. App. 1986); and (3) *Anderson v. McOskar Enters., Inc.*, 712 N.W.2d 796 (Minn. App. 2006).

The court of appeals correctly rejected Marvel's argument. (Add.61.) In each case, the court addressed waivers with two exculpatory clauses: an overbroad clause (reaching 'all' claims) and a narrow one (specifically mentioning 'negligence'). Each court then enforced the narrow clause while disregarding the overbroad one. *See Schlobohm,* 326 N.W.2d at 923; *Malecha*, 392 N.W.2d at 729-30; *Anderson,* 712 N.W.2d at 801.

Marvel's liability waiver, however, has just one exculpatory clause: an overbroad one ("all claims"). To the extent Marvel insists otherwise, Marvel is asking the Court to add a second, narrow exculpatory clause to Marvel's waiver."[But] it is not for this [C]ourt to create or add exceptions to [a] contract or to remake it in behalf of … the contracting parties." *Telex Corp. v. Data Prods. Corp.*, 271 Minn. 288, 295 (1965).

C. The court of appeals systematically erred in adopting a 'saving' construction of the liability waiver here.

Upon recognizing the plain overbreadth of Marvel's liability waiver, the court of appeals proceeded to save the waiver. The court declared the

waiver "enforceable to the extent that [Carter] asserts a claim of ordinary negligence" and "unenforceable to the extent that [Carter] asserts a claim of greater-than-ordinary [GTO] negligence." (Add.62-63.)

1. The court of appeals denied strict construction.

In saving Marvel's overbroad liability waiver, the court of appeals violated the rule of strict construction on every level:

First, the court failed to read Marvel's waiver against the benefited party—i.e., Marvel. The court recognized that the waiver's overbreadth raised the "question" of whether the waiver was best read as "completely unenforceable … or unenforceable only … [against] a claim of … [GTO] negligence." (Add.62.) Strict construction then required the court to pick the answer that disfavored Marvel: completely unenforceable.

The court rejected this answer to vindicate the waiver's "intent." (Add.62.) The court thus resurrected Minnesota's one-time "rule of fair construction," which works to save "the parties' intention to exonerate." *ISD No. 877*, 266 Minn. at 434. But Minnesota has long since rejected this rule for strict construction. *Solidification, Inc.*, 305 N.W.2d at 873.

The particular use of fair construction here, in turn, abridges other long-settled law. In *Simmer v. Simmer*, a party argued that a contract's "illegal promises" were "severable" from the contract's legal promises and "therefore [did] not invalidate the whole contract." 195 Minn. 1, 5 (1935). The Court disagreed: the illegal promises were "by their own terms … made in consideration 'of all the conditions of this agreement.'"

Id. This made severability impossible because "[if] a promise is made by A to do something lawful while B promises to do two things, one lawful and one unlawful, there can be no recovery on either side." *Id.*

Marvel's liability waiver fits this bill. All the waiver's terms—lawful and unlawful—are made "[i]n consideration of being allowed to enter into the play area." (Add.27.) Put another way, under the waiver, Marvel ("A") promises to do something lawful (allow entry into its play area) while the customer ("B") promises to do two things: one lawful (release Marvel's ordinary negligence), and one unlawful (release Marvel's GTO negligence). The "result is a seamless fabric" that was "beyond [the court of appeals'] power to divide so as to sever the lawful from the inhibition attending what is unlawful." *Simmer*, 195 Minn. at 6.

Second, the court of appeals improperly engaged in exculpation-by-implication. In *Schlobohm*, the Court invokes *Farmington* for the rule that "indemnity clauses [are] to be strictly construed against the purported indemnitee, and that **indemnity will not be created by implication**." 326 N.W.2d at 923 (bold added). The Court then makes clear it has "**extended that rule** of strict construction **to exculpatory clauses**." *Id.*

The Court recently expanded upon these principles in *Dewitt v. London Road Rental Center, Inc.*, 910 N.W.2d 412 (Minn. 2018). London Road (a rental company) sought to be indemnified by Tower Tap (a restaurant) for injuries that London Road's negligence caused to third parties. Under the contract-at-issue, Tower Tap "agree[d] to indemnify [London Road] … against any and all … claims." *Id.* at 418.

The Court began with its "general rule" of strict construction "from *Farmington*": an "indemnity clause must use express language … to transfer liability" for negligence. *Id.* at 416. London Road's indemnity clause failed this test—it neither "expressly refer[red] to 'negligence'" nor "expressly state[d] that Tower Tap agreed to indemnify London Road for London Road's own acts or omissions." *Id.* at 418-19.

The Court bolstered this point by comparing the indemnity clause to the parties' liability waiver, which expressly released London Road "from … [its] negligence (other than [its] intentional misconduct)." *Id.* at 420. London Road's indemnity claim, on the other hand, depended on "implication": a "two-step process" of "(1) reading express language; and (2) inferring a conclusion that is not expressly stated." *Id.* at 418.

Applying *DeWitt*'s strict-construction analysis to Marvel's liability waiver (as *Schlobohm* directs), the court of appeals' saving interpretation cannot stand. The court improperly creates exculpation by "implication": (1) reading express language ("any and all claims"); and then (2) inferring a conclusion that is not expressly stated (i.e., "any and all claims" covers Marvel's ordinary negligence, but not GTO negligence). The court admits as much. (Add.61-62 (conceding that Marvel's waiver does not "reference … 'ordinary negligence' or [even] simpl[e] 'negligence'").)

New York's highest court has explained why such exculpation-by-implication is a problem. Addressing a general release of "any and all claims" against a parachute-jumping school, the court held the release did not bar a student from "suing for personal injuries … incurred as a

result of [the school's] negligence." *Gross v. Sweet*, 49 N.Y.2d 102, 105, 109 (1979). The court found the student could have "reasonably" assumed he was releasing only "injuries that **ordinarily and inevitably would occur, without any fault of the [school]**." *Id.* at 109-10 (bold added).

The release, after all, did not express "any intention to exempt the [school] from liability … result[ing] from [the school's] failure to use due care"—i.e., an "*enhanced* exposure to injury." *Id.* (italics in original). That was the point: "instead of specifying to prospective students that they would have to abide any consequences attributable to the instructor's own carelessness, the [school] … preferred the use of opaque terminology rather than suffer the possibility of lower enrollment." *Id.*

Here too. Instead of telling parents that their children might be injured by Marvel's own negligence, Marvel preferred opaque terms ("all claims") to the risk of losing parents. Strict construction then renders these terms unenforceable. *Dewitt*, 910 N.W.2d at 420. This is true even under the court of appeals' saving view of the waiver, for "excepting 'intentional misconduct' from [Marvel's] broad provision does not make the provision any more express regarding negligence." *Id.* at 419.

Third, the court of appeals failed to apply the rule that "ambiguous" liability waivers "will not be enforced." *Schlobohm*, 326 N.W.2d at 923. The court recognized that the overbreadth of Marvel's waiver made it "arguably ambiguous." (Add.62.) But the court reasoned an overbroad waiver still "clearly release[s]" ordinary negligence. (*Id.*)

Not so. "[Any] contract that purports to relieve a party from any and all claims but does not actually do so is duplicitous, indistinct and uncertain." *Alack v. Vic Tanny Int'l, Inc.*, 923 S.W.2d 330, 337 (Mo. 1996). Marvel's liability waiver covers "any and all claims." (Add.27.) There is "no question that one may never exonerate … intentional torts." *Alack*, 923 S.W.2d at 337. But the "words used" in Marvel's waiver "would purport to include these claims." *Id.* There lies the ambiguity of Marvel's waiver, even if the non-waivable claims are "not asserted." *Id.*

For this reason (and others), the Missouri Supreme Court held that an overbroad gym release worded like Marvel's waiver was ambiguous and unenforceable. *Id.* at 337-38. The release's "[g]eneral language" did not provide sufficient notice that signing meant "releasing the other party from claims arising from the other party's own negligence." *Id.* The court stressed: "[t]here must be no doubt that a reasonable person … actually understands what future claims he or she is waiving." *Id.*

Just so: "[any] provision that would exempt its drafter from any liability occasioned by his fault should not compel resort to a magnifying glass and lexicon." *Gross*, 49 N.Y.2d at 107. Either "negligence" or words "of a similar import" must appear. *Id.* Without such words, an overbroad liability waiver is inherently ambiguous (and unenforceable).

This analysis is supported by *Anderson*—the court of appeals' sole authority for its saving construction of Marvel's overbroad waiver. (*See* Add.61-62.) *Anderson* concerned a release covering "any act or omission, including negligence by Curves® representatives." 712 N.W.2d at 798-99.

Recognizing the release's "broader language" (i.e., "any act or omission, including") created an "arguabl[e] ambigu[ity]," the *Anderson* court held this language "unenforceable." *Id.* at 801 (citation omitted). This left the phrase "negligence by Curves® representatives"—language that clearly "manifested … a release of liability for negligence." *Id.*

Marvel's liability waiver does not support the same determination. After striking this waiver's overbroad language ("any and all claims …"), there is nothing left to enforce. (Add.27.) The court of appeals could not then assume the parties meant to release Marvel's negligence (Add.62)—a point that legislative testimony by PIU corroborates.

2. The court of appeals' analysis conflicts with PIU's testimony that PIU-authored waivers do not release injuries caused by a PIU franchise's negligence.

In May 2010, the Legislature enacted a comprehensive regulation of inflatable amusements, including liability waivers. Act of May 14, 2010, ch. 347, art. 3, §2, 2010 Minn. Laws 1, 44 (codified at Minn. Stat. §184B.20). Three months before the law's passage, the Senate Judiciary Committee held a hearing on the underlying legislation (S.F. 1590).[6]

During this hearing, the Committee received testimony from Randy Baker, "director of safety and site development for PIU Management."[7]

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[6] Hearing on S.F. 1590, Minn. S. Judiciary Comm., 86th Minn. Leg., Mar. 11, 2010 (online audio split into two files), https://bit.ly/3F8VCar (file 1) (hearing on S.F. 1590 begins at 01:56:54), https://bit.ly/3FmqzrT (file 2) (hearing on S.F. 1590 resumes at start of recording).

[7] *Id*. at 02:25:25 to 02:25:34 (file 1).

PIU Management is the "parent company and franchisor" of the Pump It Up brand.[8] In this capacity, PIU authored the liability waivers used by PIU franchises, including Marvel's PIU franchise. (Add.27.)

Baker introduced himself to the Committee as follows: "I'm here today representing not only the national brand but also … the owners of the five individual Pump It Up businesses that are in the metropolitan area."[9] Baker then spent much of his testimony explaining the intent of the PIU-authored liability waivers used by PIU franchises.

Baker testified the waivers existed "to inform the consumer, and to indemnify" PIU franchise "owners from the negligent acts of others":[10] "[w]hat our waiver stipulates is that in the unlikely event that somebody outside of our specific control—in other words, a non-employee or a guest that we have no control over—does something injurious to another party in our building, that we are not responsible."[11]

Finally, in his initial remarks, Baker testified no less than three times that PIU-authored waivers did not release the negligent acts of PIU or its franchisees, and did not bar suits based on such negligence:

- "There is nothing that a parent can sign to sign away the rights of not only a minor but of anyone to sue or to

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8 *Id.* at 02:25:34 to 02:25:39 (file 1).

9 *Id.*, at 02:25:56 to 02:26:07 (file 1).

10 *Id.* at 02:38:23 to 02:38:35 (file 1).

11 *Id.* at 02:32:26 to 02:32:45 (file 1).

file litigation or a claim for negligent acts. Quite frankly, that's not what our waiver does."[12]

- "The waiver doesn't necessarily mean I will not sue or I cannot sue. It simply indemnifies our owners from the negligent acts of others."[13]

- "Nowhere in our waiver does it state that you can't sue us if we're negligent. Certainly, if we do something wrong, we need to be held accountable."[14]

Baker's testimony elicited the following exchange:

> Sen. Moua: Mr. Baker … you are in agreement that when parents sign these permission slips or waivers, they're not signing away a cause of action against, you know, an employee or the company that are acting negligently.
>
> Mr. Baker: Madam Chair that would be correct.
>
> * * * * * *
>
> **Certainly our intention is not to even imply that the waiver says you can't sue us for our negligent acts.**[15]

The preceding testimony[16] is fatal to the court of appeals' opinion. Courts may "examine extrinsic evidence of intent" if a contract provision

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12 Hearing on S.F. 1590, *supra* note 6, at 02:32:13 to 02:32:27 (file 1).

13 *Id.* at 02:33:00 to 02:33:08 (file 1).

14 *Id.* at 02:33:08 to 02:33:15 (file 1).

15 *Id.* at 00:12:14 to 00:12:58 (file 2).

16 The Legislature's audio recording of Baker's testimony is a public record subject to judicial notice. *See Eagan Econ. Dev. Auth. v. U-Haul Co.*, 787 N.W.2d 523, 530 (Minn. 2010) ("[W]e have taken judicial notice of public records and … have the 'inherent power to look beyond the record where the orderly administration of justice commends it.'").

"is susceptible to more than one interpretation based on its language alone." *Hous. & Redev. Auth. v. Norman*, 696 N.W.2d 329, 337 (Minn. 2005). A general release of "any and all claims" allows more than one reading based on its language alone. *See Alack,* 923 S.W.2d at 337-38.

Marvel's liability waiver is a general release of "any and all claims." (Add.27.) The correct way to read this ambiguous language is then settled by Baker's consistent, emphatic pro-accountability testimony. The waiver "simply indemnifies … [PIU franchise] owners from the negligent acts of others."[17] The waiver does "not … even imply" that a person who signs the waiver "can't sue" for a PIU franchise's "negligent acts."[18]

In reaching the opposite conclusion, the court of appeals' decision "subvert[s] the parties' manifested intent." (Add.62.) The court elevates its own assumptions about what Marvel's waiver was meant to achieve above the express, publicly-stated intentions of the waiver's author: "if we do something wrong, we need to be held accountable."[19]

3. The court of appeals elided material fact issues about the parties' contract intentions raised by the deposition testimony of Carter's mother.

Besides incorrectly presuming Marvel/PIU's intent, the court of appeals' saving construction of Marvel's liability waiver elides the intent of Carter's mother. This is a problem: "general clauses exempting the

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17 Hearing on S.F. 1590, *supra* note 6, at 02:33:00 to 02:33:08 (file 1).

18 *Id.* at 00:12:14 to 00:12:58 (file 2).

19 *Id.* at 02:33:08 to 02:33:15 (file 1).

defendant from all liability for loss or damage will not be construed to include … negligent … misconduct, **unless the circumstances clearly indicate that such was the plaintiff's understanding and intention**." RESTATEMENT (SECOND) OF TORTS §496B cmt. d (1965).

Marvel's liability waiver releases "all claims, injuries, liabilities, or damages." (Add.27.) This general clause exempting Marvel from all liability cannot then be read to include Marvel's own negligence unless the circumstances clearly indicate that this was the understanding and intention of Carter's mother Michelle (who signed the waiver).

Michelle's deposition indicates no such understanding. (Doc.56.)

Michelle's undisputed testimony establishes that Marvel never explained their liability waiver to her. (*See* Doc.56 at 36:21-24.) Instead, a teenage Marvel employee "spun [the waiver] very lightly" and "did not go into detail" as he worked "to rush everybody through." (Doc.56 at 35-36:11-6, 37:11-14, 39:1-3.) This was also Michelle's "first time" signing a liability waiver of this nature. (Doc.56 at 35:14-15, 37:23-25.)

The full document containing Marvel's liability waiver corroborates Michelle's manifest lack-of-understanding. The document makes signers "aware" of all "inherent risks" and the "negligence of other participants." (Add.27.) The document does not disclose—much less require signers to assume—the risk of Marvel's own negligence or "failure to use due care" (i.e., an "*enhanced* exposure to injury"). *Gross*, 49 N.Y.2d at 109.

The document is also formatted "in tiny print (what appears to be about 3-point type), with no highlighting of the various sections and subsections as to their contents." *McCarthy Well Co. v. St. Peter Creamery,* 410 N.W.2d 312, 315-16 (Minn. 1987). The Court has observed that under these kinds of circumstances, "any degree of comprehension is difficult, exceedingly tedious, and even physically painful." *Id.*

Ignoring all this record evidence, the court of appeals concluded that it was Michelle's "manifest[] intent" (together with Marvel) to release Marvel's own negligence. (Add.62.) The court failed to observe that in Minnesota, "[w]hether a party possessed an intent to waive is generally a question of fact that rarely should be inferred as a matter of law." *State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 819 (Minn. 2014).

That goes double here given the court of appeals' obligation to take "the facts in the light most favorable" to Carter. *Yang,* 701 N.W.2d at 788. Under that standard, Carter raised material fact issues about his mother's intent-to-waive—issues that precluded the court of appeals from holding that Marvel's overbroad waiver supported partial enforcement.

III. Public-amusement liability waivers violate public policy.

A. The Court has ruled that liability waivers purporting to release public duties of care violate public policy.

In *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783 (Minn. 2005), this Court invalidated a liability waiver in a houseboat rental agreement. The Court found that renting houseboats resembled inn-keeping. *See id.*

at 790-91. And under Minnesota common law, innkeepers had a public duty "to take reasonable action to protect their guests." *Id.*

As a result, houseboat-rental liability waivers violated public policy, because once a party is "bound by a public or quasi-public duty," they may not "contract away liability for negligence." *Id.* at 791. A houseboat rental firm could not then "circumvent [its] duty to protect its guests by requiring [their] guests to sign" liability waivers. *Id.*

The bottom line: in Minnesota, anyone who owes a public duty-of-care may not relieve or circumvent this duty through a liability waiver. Did Marvel then owe any public duty here that would render the liability waiver signed by Carter's mother unenforceable? The answer is 'yes,' because Marvel's PIU franchise was a public amusement.

B. Minnesota law requires public amusements to exercise a "high degree of care" for the safety of their patrons.

Public amusements have long been specially regulated under Minnesota law. *See generally* 34 DUNNELL MINN. DIGEST NEGLIGENCE §5.03 (2021). Since the early 1900s, this Court has repeatedly made clear "[t]he law requires of the owners of paid public amusement places care and active vigilance in protecting their patrons against perils." *Poppleston v. Pantages Minneapolis Theatre Co.*, 175 Minn. 153, 155 (1928).

Moreover, in enforcing this standard, the Court has stressed the close resemblance that exists between public amusements and common carriers. Consider *Bibeau v. Fred W. Pearce Corp.*, 173 Minn. 331 (1928).

While riding a roller-coaster, a minor child "experienced an unusually violent jerk" resulting in a "depressed fracture of [her] nose." *Id.* at 332. The Court reversed both a directed verdict for the roller-coaster owner and a denial of the father's new-trial motion. *Id.* at 336.

The Court emphasized that "place[s] of amusement" are required to "use due care"—especially in the "operation of a roller-coaster," which carries "additional dangers and risks." *Id.* at 335. The "mere fact that the passenger rides for pleasure" made no difference: "[m]any people ride on railway trains on pleasure trips" and like a railroad, the roller-coaster was "operated for profit." *Id.* It then made sense to "subject the roller-coaster and the common carrier to the same degree of care." *Id.* at 336.

The Court fortified these principles in *Lindgren v. Voge*, 260 Minn. 262 (1961). Affirming a judgment in favor of a patron hurt at a racetrack by a negligently-maintained toilet, *see id.* at 262-63, the Court reaffirmed that: "a place of public entertainment or amusement **must exercise a high degree of care for the safety of invited guests**." *Id.* at 266 (bold added). For an amusement's "stairways, platforms, walks, and other structures," this duty-of-care "resemble[d] that of common carriers." *Id.*

The Court borrowed from the common law of other states to expand on these principles. *See id.* at 266-67. While public amusements are not "insurers of the safety of their patrons," numerous cases "support the conclusion" that operating a public amusement "requires a higher degree of diligence than … a store, bank or such like place of business." *Id.* at 266. In a nutshell, public amusements owe a duty of "reasonable care, but

reasonable care in this connection calls for **a high degree of care—a care commensurate with the risks involved**." *Id.* (bold added).

Three sound considerations support this strong public duty:

First, for most public amusements, neither paying customers nor the public in general "would be expected to examine the [amusement] and judge of its safety." *Lindgren*, 260 Minn. at 26. A "high degree of care" is then vital on the part of the amusement's "profiting persons" so as to "prevent disaster." *Id.* Patrons have "a right to assume that they are not to be exposed to those risks which might have been reasonably anticipated" by a public amusement operator. *Bibeau*, 173 Minn. at 336.

Second, because public amusements come in many different shapes and forms, a more proactive duty-of-care is essential. "Where the danger is great the utmost care and diligence must be employed. " *Id.* at 335. In *Danielson v. Reeves*, 211 Minn. 491 (1942), the Court highlighted this point in affirming a jury verdict in favor of a plaintiff injured by the "new and exciting" amusement of "hobbyhorse races." *Id.* at 494-95.

The Court "examined" a hobbyhorse and found that its "intricacies and bad behavior" warned against "experiment[ing] with it." *Id.* Added to record evidence of the plaintiff's inexperience with hobbyhorses, the Court found ample justification for the jury's finding of negligence. *Id.* at 496. The Court stressed that "places of amusement … are held to a more strict accountability for injury," owing patrons what "*under the particular circumstances*, is … 'reasonable' care" *Id.* (italics-in-original).

Third, public amusements attract children. In *Attebury v. Jones*, the Court reviewed a defendant's "failure to use due care to keep … premises in a safe condition … as a place of amusement." 161 Minn. 295, 297 (1925). Defendant Longfellow Gardens featured a slot machine that a 3-year-old girl tried to play, causing the device to fall on her. *Id.* at 295-96. Reversing a directed verdict in the Gardens' favor, the Court held the "defendant's negligence … should have gone to the jury." *Id.* at 296.

The "important circumstance" requiring this conclusion was the fact that the Gardens "catered to children." *Id.* at 298. In particular, the Gardens featured "many things attractive to the instincts of childhood" and "large numbers" of children assembled there. *Id.* Given these facts, the Court refused to restrict a jury's ability to find a public amusement was obligated to "secure[]" attractions "likely to become the object of a child's curiosity" and then cause injury to the child. *Id.*

Minnesota law thus imposes a duty-of-care on public amusements that is "not merely passive" but an "active obligation to guard" against reasonably-anticipated risks. *Hanson v. C.J. Christensen*, 275 Minn. 204 (1966); *see also Yogerst v. Janish*, 303 Minn. 33, 35 (1975) ("no doubt" that "the phrases 'high degree of care' and 'active vigilance' correctly states the law of Minnesota" on public amusements). Public amusements may not then contract away that duty through liability waivers.

C. Liability waivers purporting to release the public duty of care owed by public amusements violate public policy.

Under *Lindgren*, public amusements owe "a high degree of care for the safety of invited guests"—a duty that governs roller-coasters and inflatables alike. 260 Minn. at 266. *Yang* then establishes "as a matter of public policy" that a public amusement "**cannot circumvent its duty** to protect its guests by requiring the guests to sign an agreement containing [a waiver] that purports to release [the amusement] from liability for the [amusement's] negligence." 701 N.W.2d at 791 (bold added).

Marvel's PIU franchise was a public amusement—one marketed to children. (Doc.36 at ¶¶1, 2.) Marvel could not then circumvent the high degree of care that it owed to its vulnerable child patrons by requiring their parents to sign a waiver purporting to release liability for Marvel's negligence. *Yang,* 701 N.W.2d at 791. Therefore, Marvel's liability waiver here "is contrary to public policy and is not enforceable." *Id.*

The court of appeals, however, settled for the conclusion that "[a] business that provides inflatable amusement equipment is well within the category of recreational activities for which exculpatory clauses are not prohibited." (Add.60.) But this elides the actual nature of Marvel's business. Marvel was not selling inflatables—it was "a public amusement place" with "attractions … especially tempting to children, who visit[ed] the place in large numbers." *Attebury,* 161 Minn. at 295.

The court of appeals' oversimplified view of Marvel then mirrors analysis in *Yang* this Court rejected. Voyagaire Houseboats insisted that

its business of renting houseboats was "purely recreational" and "not a necessary or public service." 701 N.W.2d at 790. The Court recognized this was not Voyagaire's business: "[b]y offering houseboats for daily and weekly rental … **Voyagaire was furnishing sleeping accommodations** to members of the public seeking recreation." *Id.* (bold added).

There lies the ultimate problem with the court of appeals' decision on this point: allowing Marvel to escape its status as a public amusement would compromise public duties of care that have protected Minnesotans for decades. For example, in *Johnson v. Amphitheatre Corp.*, a jury held a roller-rink liable for its negligent failure to prevent unsafe skating in the rink's lobby, leading to a collision with an innocent patron that severely fractured the patron's ankle. 206 Minn. 282, 283-84 (1939).

This Court affirmed. *Id.* at 287. The rink had signs reading "No Skating in Lobby" and told rink employees the same. *Id.* at 284. It was then "evident" that the rink "anticipated [the] danger" but still hired "no one person … to maintain order." *Id.* at 285. The Court held "the jury could well find" that the rink failed in its public duty-of-care—an "active obligation to guard against the very risk" that the rink's "own evidence show[ed] might reasonably have been anticipated." *Id.* at 286.

Marvel had the same duty here: an active obligation to guard against those risks to public safety that Marvel should have expected, especially as shown by Marvel's own documents. Yet, despite deeming guest safety to be of "paramount importance" and having a safety-mat vendor at its disposal, Marvel left the floor around its inflatables unpadded. (Add.29-

36.) Public policy does not then allow Marvel to use a liability waiver to defeat that high degree-of-care it owed as a public amusement.

IV. The Court should reject parental pre-injury liability waivers.

This Court has a duty "to develop the common law." *Cent. Housing Assocs., L.P. v. Olson*, 929 N.W.2d 398, 409 (Minn. 2019). In keeping with this duty, the Court should hold "parents may not bind their children to pre-injury liability waivers"—at least not with for-profits (like Marvel). *J.T. ex rel. Thode v. Monster Mtn.*, LLC, 754 F. Supp. 2d 1323, 1326 (M.D. Ala. 2010). This is the "majority rule in the United States." *Id.*

A. The overwhelming rule is unless a statute allows it, parents may not bind children to releases or waivers of liability.

To "determine the common law," the Court "look[s] to other states." *Lake v. Wal-Mart Stores*, 582 N.W.2d 231, 234 (Minn. 1998). The "general rule" among the states (some for decades) has been that "a parent cannot compromise or release a minor child's cause of action absent statutory authority."[20] *See* 59 AM.JUR.2D *Parent and Child* §41 (2021).

1. The common law of twenty-one states follows or has been predicted to follow the national rule.

Here are twenty-one states in question:

1	**Alabama**	*J.T. ex rel. Thode v. Monster Mountain, LLC*, 754 F. Supp. 2d 1323, 1327-28 (M.D. Ala. 2010)

[20] Blum, *supra* note 5, at *2.

2	**Arizona**	*Gomez v. Maricopa Cnty.*, 857 P.2d 1323, 1325-26 (Ariz. Ct. App. 1993)
3	**Arkansas**	*Walker v. Stephens*, 3 Ark. App. 205, 213 (1981)
4	**Colorado**	*Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1232-35 (Colo. 2002), *superseded by* C.R.S. §13-22-107
5	**Florida**	*Kirton v. Fields*, 997 So. 2d 349, 352-58 (Fla. 2008), *superseded by* Fla. Stat. §744.301
6	**Illinois**	*Meyer ex rel. Meyer v. Naperville Manner, Inc.*, 262 Ill. App. 3d 141, 146-47 (1994)
7	**Iowa**	*Galloway v. State*, 790 N.W.2d 252, 254-59 (Iowa 2010)
8	**Kentucky**	*E.M. v. House of Boom Ky., LLC*, 575 S.W.3d 656, 659-63 (Ky. 2019)
9	**Maine**	*Doyle v. Bowdoin Coll.*, 403 A.2d 1206, 1208 n.3 (Me. 1979)
10	**Michigan**	*Woodman ex. rel Woodman v. Kera LLC*, 486 Mich. 228, 237-58 (2010)
11	**Missouri**	*Y.W. ex rel. Smith v. Nat'l Super Markets, Inc.*, 876 S.W.2d 785, 787-89 (Mo. Ct. App. 1994)
12	**New Jersey**	*Hojnowski v. Vans Skate Park*, 187 N.J. 323, 331-41 (2006)
13	**New York**	*Alexander v. Kendall Cent. Sch. Dist.*, 634 N.Y.S.2d 318, 319 (N.Y. App. Div. 1995).
14	**Oklahoma**	*Wethington v. Swainson*, 155 F. Supp. 3d 1173, 1178-79 (W.D. Okla. 2015)
15	**Pennsylvania**	*Apicella v. Valley Forge Military Academy & Junior College*, 630 F. Supp. 20, 24 (E.D. Pa. 1985)

16	**Rhode Island**	*Julian v. Zayre Corp.*, 388 A.2d 813, 815 (R.I. 1978)
17	**Tennessee**	*Blackwell ex rel. Blackwell v. Sky High Sports Nashville Operations, LLC*, 523 S.W.3d 624, 633-56 (Tenn. Ct. App. 2017)
18	**Texas**	*Munoz v. II Jaz, Inc.*, 863 S.W.2d 207, 209-10 (Tex. App. 1993); *Paz v. Life Time Fitness, Inc.*, 757 F. Supp. 2d 658, 661-63 (S.D. Tex. 2010)
19	**Utah**	*Rutherford v. Talisker Canyons Fin., Co.,* 2019 UT 27, ¶¶18-23 (2019); *Hawkins v. Peart*, 2001 UT 94, ¶¶4-13 (2001)
20	**Vermont**	*Whitcomb v. Dancer*, 140 Vt. 580, 584-87 (1982)
21	**Washington**	*Scott v. Pac. W. Mtn. Resort*, 834 P.2d 6, 492-95 (Wash. 1992)

The above common-law decisions give a broad array of reasons for following the national rule against parental pre-injury liability waivers. These reasons include the following five key points:

First: "[A]t the time a parent decides to release the potential tort claims of his or her child, the parent may not fully understand the consequences of that action and may not have even read the waiver before signing." *Hojnowkski*, 187 N.J. at 334.

Second: "Even if a parent exercises reasonable care in investigating the potential risks of injury before signing a waiver … the parent [often] is not present with the child during the subsequent activity." *Galloway*, 790 N.W.2d at 258. "The parent … perhaps believes her child will be safe

… but if she does not participate in the activity with her child, she has no ability to protect her child once the activity begins." *Id.*

Third: The parent who signs a liability waiver "is left to deal with the financial burden of an injured child." *Kirton*, 997 So. 2d at 357. "If the parent cannot afford to bear that burden, the parties who suffer are the child, other family members, and the people of the State who will be called on to bear th[e] [parent's] financial burden." *Id.*

Fourth: If parental pre-injury releases are permitted for commercial entities, "the incentive to take reasonable precautions to protect the safety of minor children would be removed." *Id.* "A child has no similar ability to protect himself from the negligence of others within the confines of a commercial establishment." *E.M.*, 575 S.W.3d at 662-63.

Fifth: Under the preceding circumstances, public policy compels "courts to act as *parens patriae* to protect a child's financial interests"—as well as the safety of all children—against commercial negligence. *Blackwell ex rel. Blackwell*, 523 S.W.3d at 649; *see also Hojnowkski*, 187 N.J. at 339 (parental releases implicate "the *parens patriae* duty").

In sum: for the above reasons (and more), Marvel's liability waiver here would not be enforceable in twenty-one states.

2. The few states that depart from the majority rule do not support enforcement of the waiver here.

The common law of Massachusetts, Ohio, California, and Maryland allows the enforcement of parental pre-injury liability waivers in some

form. As explained below, each of these jurisdictions is distinguishable from the circumstances of Marvel's liability waiver.

Massachusetts: In *Sharon v. City of Newton*, the Supreme Judicial Court of Massachusetts upheld a parent-signed liability waiver allowing a child to participate in cheerleading. 437 Mass. 99, 108-09 (2002). The court emphasized that holding otherwise "would expose public schools … to financial costs" that would curtail youth sports. *Id.* at 110. Marvel is a for-profit public amusement—not a public school.

Ohio: In *Zivich v. Mentor Soccer Club*, the Ohio Supreme Court upheld a parent-signed liability waiver allowing a child to participate on a nonprofit soccer team. 696 N.E.2d 201, 204-05 (Ohio 1998). The court reasoned the waiver had to be enforced or else "nonprofit organizations … could very well decide that the risks are not worth the effort." *Id.* That conclusion does not help Marvel (a for-profit entity).

California: In *Hohe v. San Diego Unified School District*, a California appellate court upheld a parent-signed liability waiver allowing a child to attend a school event. 224 Cal. App. 3d 1559, 1562-63 (Cal. Ct. App. 1990). The court found enforcement benefited nonprofits "such as Boy and Girl Scouts, Little League, and parent-teacher associations." *Id.* at 1564. Once again, such a conclusion does not help *for-profit* Marvel.

Maryland: In *BJ's Wholesale Club, Inc. v. Rosen*, Maryland's high court upheld a parent-signed liability waiver allowing a child to use a retailer's play area. 435 Md. 714, 716, 742 (2013). The court rested this conclusion

on "6-405(a) of the [Maryland] Courts and Judicial Proceedings Article," which allowed "a parent to settle a child's existing claims without judicial interference." *Id.* at 732-33. Minnesota lacks any similar statute.

B. Minnesota law supports adoption of the national rule.

1. *Mattson* holds that a minor's tort claim is a property right, and under the common law, parents have no right to unilaterally dispose of their children's property.

In *Mattson v. Minnesota & N. Wis. R.R. Co.*, this Court establishes that "[t]he right of an infant to damages for injuries to his person caused by the wrongful act of others is a property right." 95 Minn. 477, 488 (1905). This right is additionally "entitled to the same protection in the courts as is accorded other property held or owned by [the child]." *Id.*

Mattson then bars parental pre-injury liability waivers. Such waivers presume parents may dispose of a minor's tort claim. But at common law, "property acquired by the child in any way except by its own labor or services belongs to the child … and the parental relation gives the parent no right to receive, use, or dispose of such property."[21]

This rule is of ancient origin. In 1690, John Locke noted that while a "a father[22] may dispose of his own possessions as he pleases … *his power*

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21 29 CYCLOPEDIA OF LAW & PROCEDURE 1654-55 (Wm. Mack ed. 1908).

22 "At common law, all the rights of the family group were vested in the father." *Salin v. Kloempken*, 322 N.W.2d 736, 738 (Minn. 1982).

extends not to the lives or goods" of his children.[23] Blackstone later noted that while a father "may receive the profits" of his son's estate, the father "must account for them when [the son] comes of age."[24]

American courts followed this lead. *See, e.g., May v. Calder*, 2 Mass. 55, 55 (1806) ("father, as natural guardian" had "no … authority" to lease an infant's land); *McCloskey v. Cyphert*, 27 Pa. 220, 224 (1856) (when any property belongs to infant "in his own right," parent has "no more right to take it (for any purpose beyond that of safe keeping) than a stranger"); *Kreigh v. Cogswell*, 45 Wyo. 531, 537-40 (1933) (collecting cases).

As a result, "if a child bec[omes] vested with personal property … in the lifetime of the father," there is "no person strictly entitled to take it as guardian, until a guardian [is] … duly appointed by some public authority."[25] *See, e.g., Masche v. Haas*, 169 Minn. 294, 297 (1926) ("sale of a minor's property" allowed by "license of the probate court").

Minnesota follows these principles. Where "the property rights of infants are concerned," Minnesota courts are bound to "exercise the most vigilant care" and hold all guardians of an infant's property to a "strict performance of every duty." *Johnson v. Avery*, 60 Minn. 262, 264 (1895). And from this precept springs Minnesota's statutory requirement that a minor's tort claim cannot be settled without court approval.

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[23] JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT, Second Treatise, §65, p.311 (P. Laslett ed. 2002) (emphasis-in-original).

[24] 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1765).

[25] 2 KENT, COMMENTARIES ON AMERICAN LAW *219-20 (1873).

2. The Legislature has never allowed parental pre-injury liability waivers, instead allowing parents to serve only as court-supervised trustees of a minor's tort claims.

At common law, "[a]n injury to a child gives rise to two causes of action, one on behalf of the parent, the other on behalf of the child, and the two … cannot be joined."[26] To overcome this difficulty, §34 (ch. 70) of Minnesota's earliest laws provided "[a] father … may maintain an action for the injury of the child." Minn. Rev. Stat. ch. 70, §34 (1851).

Based on §34, the Court found it "undoubtedly correct" that "in the absence of any statut[e]," a father could not sue. *Gardener v. Kellogg*, 23 Minn. 463, 467 (1877). The Court also emphasized that §34-based actions were "solely for the benefit of the child." *Bamka v. Chi., St. Paul, Minneapolis & Omaha R.R. Co.*, 61 Minn. 549, 551 (1895).

Section 34 "treat[ed] the father substantially as a statutory trustee." *Hannula v. Duluth & Iron Range R.R. Co.*, 130 Minn. 3, 8-9 (1915). And with "[a] trusteeship having been created," state courts retained "jurisdiction of the matter and of the trustee" for "the protection of the ward." *Picciano v. Duluth, Missabe & N. Ry. Co.*, 102 Minn. 21, 25 (1907).

With these safeguards in place, the Court saw no problem deeming §34 to afford parents the "right" to "settle[]" a child's tort claims "without litigation." *Johnson v. Minneapolis & St. Louis R.R. Co.,* 101 Minn. 396, 398 (1907). It was enough for the Court that such settlements, no matter how

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[26] 29 CYCLOPEDIA, *supra* note 26, at 1642.

achieved, always remained privy to "the equitable powers of the court, which, if necessary, will be exercised." *Bamka*, 61 Minn. at 551.

The Legislature felt differently: in 1907, it revised §34 (then called Rev. Law. §4060 (1905)) to dictate that: **"[n]o settlement or compromise** of the [child's] action **is valid unless it is approved by a judge** of the court in which the action is pending." Act of March 23, 1907, ch. 58, §1, 1907 Minn. Laws 68, 68. This amendment confirms Minnesota does not allow settlement of child tort claims without judicial review.

The same text appears today in Minn. Stat. §540.08—the present iteration of Minnesota's statutory requirements for litigation of a minor's tort claims. Interpreting the statute, the Court has acknowledged the law "constitutes the parent [as a] statutory trustee" and creates "jurisdiction to approve a settlement … **although no suit has actually been begun**." *Ernst v. Daily*, 202 Minn. 358, 360 (1938) (bold added).

Section §540.08 is then a complete expression of how much power a parent (as trustee) may exercise over a child's tort claim. Parents may sue and, with court approval, settle. But §540.08 does not authorize unilateral parental waivers of a child's tort claims—nor does any other Minnesota statute. Taken together, these realities closely align Minnesota with the national rule against parental pre-injury liability waivers.

3. Minnesota has long protected minors by allowing them to disaffirm their contracts upon adulthood—even ones entered by their parents on their behalf.

For generations, the Court has enforced the "principle of protection" underlying "the law pertaining to the … contracts of infants." *Miller v. Smith*, 26 Minn. 248, 251 (1879). This principle guarantees minors the "right to affirm or disaffirm" contracts upon their "arriv[al] at majority." *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 470-71 (1884).

The right-to-disaffirm applies even when an adult (e.g., a guardian) exercises a minor's power-of-attorney. The "power of attorney of an infant, and the acts and contracts made under it" are "voidable in the same manner as [the infant's] personal acts and contracts are considered voidable." *Coursolle v. Weyerhauser*, 69 Minn. 328, 333 (1897).

In *Miles v. Wann*, 27 Minn. 56 (1880), the Court enforced these rules. John Wann, "as guardian of Thomas L. Wann, his minor son" signed "sealed articles of partnership between … Thomas and one Von Deyn." *Id.* at 58. The articles declared John had the "power, as the guardian of Thomas, to represent [Thomas]" and act on Thomas's behalf. *Id.*

The Court treated none of this as dispositive, instead recognizing that John Wann was acting "**nominally** (**but without any authority**) **for his minor son**, **who never ratified or adopted** what was assumed to be done for him." *Id.* at 59. This analysis guaranteed Thomas Wann's right to decide for himself whether he would "abide by or avoid" the actions that his father took on his behalf. *Goodnow,* 31 Minn. at 470-71.

Miles then confirms Minnesota has not (at least by common law) given parents the power to "bind the minor" in a way "*superior* to that the minor himself enjoys." *Woodman*, 486 Mich. at 255. Minnesota follows the common law: "a parent has no right to bind his infant child by contract." 31 CORPUS JURIS §148 at p.1060 (1923). Minnesota thus belongs among the 21 states that reject parental pre-injury liability waivers.

C. The court of appeals presents no compelling reason that Minnesota should depart from the national rule.

According to the court of appeals here, "it is clear" that Minnesota law allows parents to bind their children to pre-injury liability waivers. (Add.52.) The court's basis for this conclusion, however, rests on a host of legal errors, beginning with the overall state of the law.

1. The court of appeals disregards the national rule.

The court of appeals contends other states treat parental pre-injury liability waivers in "various ways." (Add.49 n.2.). In reality, "it is well-recognized that the majority of state courts" reject them. *Wethington*, 155 F. Supp. 3d at 1178; *see, e.g., Hojnowski*, 187 N.J. at 336 ("overwhelming majority"); *Galloway*, 790 N.W.2d at 258 ("clear majority").

This broad consensus is even more definitive when one accounts for Marvel's for-profit status. "Indeed, where the liability waiver is in the context of a for-profit activity, it is almost certainly unenforceable." *Kelly v. United States*, 809 F. Supp. 2d 429, 436 n.7 (E.D.N.C. 2011); *see E.M.*, 575 S.W.3d at 659 & n.3 (cataloguing authorities that show this).

2. The court of appeals misreads the common law.

The court of appeals maintains that "care, custody, and control … impl[y] that a parent has authority to act on behalf of a minor child when interacting with third parties." (Add.50.) The court supports this view by citing various state laws that authorize parents to make binding decisions for children related to education and healthcare. (Add.51.)

This analysis commits two critical errors. First, signing away the "right of an infant to [tort] damages" is no mere interaction with a third party—it is the disposal of "a property right." *Mattson*, 95 Minn. at 488. Second, custody of a child's *person* (e.g., education and medical decisions) is not the same thing in the law as custody of a child's *property*.

"[P]arents are natural guardians of the person but not the property of an infant." RESTATEMENT (SECOND) OF CONTRACTS §13 cmt. c (1981). At common law, parents could not "bind the minor by contracts made in his behalf," and had "no authority to sell, pledge, or transfer the [minor's] property." *Bombardier v. Goodrich*, 94 Vt. 208, 209 (1920).

Indeed, "[t]he relation … of parent and child did not involve at any stage of the common law any conception of legal identity of the two." RESTATEMENT (SECOND) OF TORTS §895G, cmt. b (1979). While "the parent had custody of the child," the child "remained a separate legal person" at common law "entitled to the benefits of his own property." *Id.*

The court of appeals' conflation of custodial rights with property rights then raises a host of difficult questions here. Parents with "joint

legal custody" have "equal rights." Minn. Stat. §518.003, subd. 3(b). In this circumstance, is a liability waiver enforceable if only one parent signs—or if one parent signs over the other's objection?

Now consider divorced parents. Is a liability waiver enforceable if the signing parent has only "physical custody" (i.e. "routine daily care")? *Id.* §518.003, subd. 3(c). What if the signing parent is not the one who will pay the medical bills if the child is hurt? *Cf. Murphy v. Bergo*, 400 N.W.2d 387, 389 (Minn. App. 1987) (observing that parent had "separate interest" in a child's tort claim "because he paid [the] medical bills").

Finally, even if the court of appeals' view of custodial rights were correct, "[i]n all controversies involving … custody," the "welfare and best interests of the child are the chief consideration and prevail over the natural right of the parent." *In re Maloney's Guardianship*, 234 Minn. 1, 10 (1951). And as most states have found, parental liability waivers do "not protect[] the welfare of the child." *Kirton*, 997 So. 2d at 357.

3. The court of appeals misapplies Minnesota statutes.

The court of appeals asserts that Minn. Stat. §184B.20, subd. 5(b) and Minn. Stat. §604.055 each imply that parents may bind children to liability waivers. (Add.51-52.) Noting each law specifically bars liability waivers signed *on behalf of* children, the court reasons that such bars are "unnecessary unless another person—such as a parent—has authority to sign a waiver of liability on behalf of a minor child." (*Id.*)

This analysis proves too much. Section 604.055 bars releases of GTO negligence. Under the court of appeals' logic, §604.055's bar implies that Minnesota generally allows releases of GTO negligence—hence the need for a bar. But that is wrong: the state has never allowed such releases. *See Beehner v. Cragun Corp.*, 636 N.W.2d 821, 829 (Minn. App. 2001).

The court of appeals also ignores §604.055's express declaration that: "[t]his section does not prevent a court from finding that an agreement is void and unenforceable as against public policy on other grounds or under other law." *Id.* §604.055, subd. 3. This text cautions against reading §604.055 to endorse any kind of conduct, as what §604.055 restricts may also be invalid "on other grounds or under other law." *Id.*

Section 184B.20 also does not support the court of appeals' thesis. The statute liberates minors from having to disaffirm waivers "signed by [them] or on [their] behalf," changing these waivers from voidable to "void." Section 184B.20 then accords with the law of infant's contracts and the protection it provides minors. *Miller,* 26 Minn. at 251.

Finally, the court of appeals contends that Minn. Stat. §540.08's regulation of child tort claims does not cut against parental preinjury liability waivers. (Add.53-54.) In the court's view, §540.08 is meant to "guard[] against the risk" of "an improvident settlement," and that risk is "not present" when "no injury has yet occurred." (*Id.*)

This analysis misses the point. Section 540.08 is the Legislature's decisive word on child tort claims, carefully limiting the role of parents as

trustees of these claims. The statute says "[a] parent may maintain an action"—not 'a parent may maintain or waive an action.' *Id.* By then casting §540.08 aside, the court of appeals in effect amends the statute to grant powers that the Legislature has so far refused to grant.

V. Minn. Stat. §184B.20 reaches the liability waiver here.

A. Application of §184B.20's liability-waiver-voiding provision in Carter's case is prospective.

Minnesota Statutes §184B.20 regulates inflatable amusements. The law states: "[a] waiver of liability signed by or on behalf of a minor for injuries arising out of the negligence of the [inflatable] owner or the owner's employee or designee is void." *Id.* § 184B.20, subd. 5(b).

The Legislature enacted §184B.20 in 2010—three years after Carter's mother signed Marvel's liability waiver. *See* Act of May 14, 2010, ch. 347, art. 3, §2, 2010 Minn. Laws 1, 44. But this does not automatically mean that applying §184B.20 in Carter's case would be a retroactive application of the law. A "statute does not operate 'retrospectively' merely because" a court applies it in a case involving "conduct antedat[ing] the statute's enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

A good example is *Tapia v. Leslie*, 950 N.W.2d 59 (Minn. 2020). A county sheriff denied Benjamin Tapia's 2017 application for a pistol-carry permit because Tapia was "adjudicated delinquent for theft of a motor vehicle in 1998." *Id.* In 1998, motor-vehicle theft was a "crime of violence" that barred issuance of a pistol-carry permit. *See id.* at 2–3.

In 2014, however, the Legislature removed motor-vehicle theft from the definition of a "crime of violence." *Id.* Tapia argued this change saved his 2017 application. The court of appeals disagreed, holding the 2014 change could not be "construed to retroactively change Tapia's eligibility status." *Tapia v. Leslie*, 939 N.W.2d 320, 324 (Minn. App. 2020).

This Court reversed. *See Tapia,* 950 N.W.2d at 65. The Court explained Tapia's case was not about rewriting the past but respecting the present state of Minnesota law. Tapia was arguing that the 2014 change "applie[d] to his current eligibility to possess a firearm"—"not" that the 2014 change "retroactively applie[d]." *Id.* at 62 n.2.

This critical distinction then made Tapia's case simple to decide. The Legislature declared the 2014 change "effective August 1, 2014." *Id.* at 63. Tapia "applied for a permit in 2017." *Id.* The Sheriff was then bound to grant Tapia's application given "the definition of 'crime of violence' **in effect at the time [Tapia] applied**." *Id.* (bold added).

Here too. The Legislature declared §184B.20 "effective August 1, 2010." *See* Act of May 14, 2010, ch. 347, art. 3, §2. Marvel sought to enforce its liability waiver in 2020. (Doc. 32 at 8.) Marvel's waiver is then void because the waiver "must be reviewed under" the law "in effect at the time" that Marvel "applied." *Tapia,* 950 N.W.2d at 63.

Put another way, §184B.20's prospective effect on liability waivers signed (but not enforced) before §184B.20 is like the prospective effect of a "new law banning gambling" on a person who just finishes building a

casino right before the gambling ban takes effect. *See Landgraf*, 511 U.S. at 269 n.24. "Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct." *Id.*

B. Alternatively, §184B.20's text and purpose evince a clear-and-manifest legislative intent that §184B.20 retroactively void waivers signed before §184B.20's effective date.

In the event that the Court disagrees with Carter's assertion of the prospective operation of Minn. Stat. §184B.20 here, the statute's text and purpose alternatively support retroactive application. The Court has established that "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." *In re Individual 35W Bridge Litig.*, 806 N.W.2d 811, 819 (Minn. 2011).

In *Grimes v. Byrne*, the Court concluded that the following statute was retroactive: "[n]o property hereinafter mentioned or represented shall be liable to … any final process …." 2 Minn. 89, 95 (1858). The Court explained that the statute's "language was full and broad enough to cover everything which existed at the time of its passage." *Id.* So the Court ruled that the statute "was intended to include process issued upon antecedent as well as subsequent demands." *Id.*

Next, in *Burwell v. Tullis*, 12 Minn. 572 (1867), the Court evaluated the asserted retroactivity of an 1862 statutory amendment that read: "but when no execution shall have been issued and levied … the lien of the judgment shall be determined …." *Id.* at 575. The Court found it had "no

doubt" the legislature "did intend" for this statutory amendment to be "applicable to judgments rendered prior to its passage." *Id.*

The Court recited the "well-settled rule that a law is to be presumed to have only a prospective operation, unless the contrary clearly appears to have been the intention of the legislature." *Id.* The Court then declared: (1) the 1862 amendment used the same broad statutory language as its predecessor-host provision; and (2) "prior judgments [came] within the reason as well as the letter of the [amendment]." *Id.* at 576.

Grimes and *Burwell* then teach three lessons for identifying clear-and-manifest retroactivity. First, a statute may be clearly retroactive without using the word 'retroactive' or similar terminology. Second, a statute's use of broad, all-inclusive language may demonstrate intended retroactivity. Third, the equal applicability of a statute's purpose to past and future events may demonstrate intended retroactivity.

1. Plain text

Applying the above lessons to §184B.20's liability-waiver-voiding provision, the legislature clearly intended for this law to be retroactive. While §184B.20 does not use the word 'retroactive,' the provision speaks in "language … full and broad enough to cover everything which existed at the time of its passage." *Grimes,* 2 Minn. at 95. The provision declares "[a] waiver of liability" meeting the relevant criteria "is void" (present tense). This language contains no temporal qualifiers at all.

By contrast, other statutes performing the same contract-voiding function as §184B.20 do contain key temporal qualifiers. For example, §604.055, which "voids" liability waivers releasing greater-than-ordinary negligence, provides: "This section is effective August 1, 2013, **and applies to agreements signed or accepted on or after that date**." Act of May 24, 2013, ch. 118, 2013 Minn. Laws 1, 1 (bold added).

Section 604.055 is not the only contract-voiding law that reads like this. Minnesota Statutes §337.05, subd. 1(b) "void[s]" certain contracts requiring "a party to provide insurance coverage" for "negligence or intentional acts." The legislature declared this law "effective August 1, 2013, and **applies to agreements entered into on or after that date."** Act of May 24, 2013, ch. 88, 2013 Minn. Laws 1, 1 (bold added).[27]

Section 184B.20's effective date has no similar temporal qualifier. "[A]ction in one statute but inaction in another shows that the Legislature 'knows how' to accomplish a particular objective …." *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 154 n.4 (Minn. 2014). The Court cannot then "add words" to §184B.20 through "statutory interpretation." *328 Barry Ave. v. Nolan Props. Grp.*, 871 N.W.2d 745, 750 (Minn. 2015).

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[27] *E.g.,* Act of May 30, 2003, ch. 12, art. 3, §2, 2003 Minn. Laws 1691, 1695 ("This section is effective the day following final enactment and **applies to agreements in effect or entered into after that date**." (bold added)); Act of May 16, 2014, ch. 272, art. 3, §42, 2014 Minn. Laws 1, 79 ("This section is effective the day following final enactment and **applies to all leases and affiliated building company finance agreements entered into or modified after that date**." (bold added)).

Minnesota law instead requires that "statutes relating to the same subject matter" be read "together." *Cent. Hous. Assocs, LP, v. Olson*, 929 N.W.2d 398, 406 (Minn. 2019). That means §184B.20 may be retroactively applied. Otherwise, the legislature's deliberate inclusion of prospective-enforcement-directing text in §604.055 and other contract-voiding laws is rendered irrelevant, "violat[ing] the canon against surplusage." *Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016).

2. Legislative purpose

The Legislature enacted §184B.20 to protect children. As Senator Sieben, the law's sponsor, explained: "this bill attempts to … put in place safety standards."[28] Two mothers, Lisa Schmitt and Jennifer Rosenberger, expressed the same point in testifying about the harrowing injuries that their children suffered while playing at PIU franchises.[29]

In this capacity, Schmitt warned the Legislature that "[f]amilies are unknowingly signing waivers"[30] and provided accounts of many other injured children (including Carter). Rosenberger stressed that when her child was injured: "I was not there, but I signed a waiver that said there was going to be trained people watching out for my children."[31]

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28 Hearing on S.F. 1590, *supra* note 6, at 01:57:31 to 01:57:38 (file 1).

29 *See id.* at 02:12:12 to 02:25:05 (file 1) (Schmitt & Rosenberger)

30 *Id.* at 02:14:18 to 02:14:28 (file 1) (Schmitt)

31 *Id.* at 02:18:05 to 02:18:11 (file 1) (Rosenberger)

It then falls "within the reason as well as the letter" of §184B.20 to conclude this statute's broad text protects all these parents. *Burwell*, 12 Minn. at 576. The alternative is to conclude that in passing §184B.20, the Legislature intended to disadvantage the very mothers whose injured children (and waivers) inspired §184B.20 in the first place.

Conclusion

The Court should reverse the judgments below, remand to the court of appeals for review of Carter's punitive-damages claim, and otherwise direct further proceedings consistent with this decision.

Respectfully submitted,

Dated: December 20, 2021

By: /s/Mahesha P. Subbaraman
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Certification of Brief Length

The undersigned counsel certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01. This brief is printed in 13–point, proportionately-spaced fonts. This brief's total length is 13,994 words (including headings, footnotes, and quotations), according to the Word Count feature of the word-processing software that was used to prepare this brief (Microsoft Word 2010).

Respectfully submitted,

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