

2000

# Jessica Hawkins v. Blair Peart : Reply Brief

Utah Supreme Court

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## Recommended Citation

Reply Brief, *Hawkins v. Peart*, No. 20000562.00 (Utah Supreme Court, 2000).

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JESSICA HAWKINS through her	)	
guardians, Brian and Melinda Hawkins,	)	
	)	
Appellant-Cross Appellee,	)	
	)	Case No: 20000562-SC
vs.	)	
	)	Dist. Ct. Case No.: 980600017
BLAIR PEART,	)	
dba NAVAJO TRAILS,	)	
	)	
Appellee-Cross Appellant.	)	
	)	

APPEAL FROM SIXTH DISTRICT COURT ORDER  
GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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**PAT BARTHOLOMEW**

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**IN THE SUPREME COURT OF UTAH**

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JESSICA HAWKINS through her  
guardians, Brian and Melinda Hawkins,

Appellant-Cross Appellee,

vs.

BLAIR PEART,  
dba NAVAJO TRAILS,

Appellee-Cross Appellant.

Case No: 20000562-SC

Dist. Ct. Case No.: 980600017

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**RESPONDENT-CROSS APPELLANT'S REPLY BRIEF**

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**APPEAL FROM SIXTH DISTRICT COURT ORDER  
GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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**ORAL ARGUMENT REQUESTED**

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**REPLY BRIEF OF DEFENDANT-CROSS APPELLANT  
BLAIR PEART dba NAVAJO TRAILS**

The Plaintiff's arguments appear to fall into three general categories: a challenge to the role that the United States Constitution plays in protecting parent's rights concerning decisions regarding the custody, care and upbringing of their children; a reassertion of an attack upon the validity of release and indemnification clauses which parents sign on behalf of their children; and the belief that because insurance coverage is available, upholding the validity of exculpatory and indemnification clauses somehow encourages a lack of care by the providers of recreational activities. None of the arguments merits reversing the trial court's decision regarding the validity of the indemnity provision. This Court should affirm the lower court's decision regarding the indemnity provision, or alternatively reverse the decision concerning the release provision, thereby granting summary judgment to defendant.

**A. The Constitution protects a parent's right to make decisions concerning the custody, care and nurture of a child which the state can neither supply nor hinder. Consequently, parents may sign contracts with exculpatory and indemnification clauses binding their minor children as part of their rights and obligations as parents.**

In its arguments, plaintiff consistently has asserted that public policy requires invalidating the contract of release and indemnity which Jessica Hawkin's mother signed on her behalf before undertaking a horseback ride to dinner. By invoking public policy, plaintiffs have brought the Constitutional issues to the fore. To assert public policy in this case necessarily disputes Jessica's parent's judgment that the family activity was safe enough to risk and that Jessica, age 11, should accompany her family on a horseback ride. Peart and

Navajo Trails do not raise this argument on behalf of Jessica's parents. Rather, defendant raises the argument to call attention to the potential precedential consequences of Utah's adopting a rule permitting retrospectively setting aside signed contracts.

Parents have primary responsibility and freedom concerning the care, custody and nurture of a child. *Troxel v. Granville*, \_\_\_ U.S. \_\_\_, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000). The issue in *Troxel* involved a court's ordering grandparent visitation. The child's mother appealed. *Id.* at 2061. After noting that there was no allegation that the parent was unfit (and there is no such allegation in this case), the Supreme Court explained that there is a presumption that fit parents act in the best interest of their children:

[O]ur Constitutional system long ago rejected any notion that a child is a mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations....The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children.

*Id.*, citing, *Parham v. J. R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979)

(alteration in original)(internal quotation marks and citations omitted).

The Court noted that *Parham* recognized on numerous occasions that "the relationship between parent and child is constitutionally protected" and that American jurisprudence historically reflected Western civilization's concepts of the family as a unit with broad



parental authority over minor children. *Troxel*, 120 S.Ct. at 2060. The Court observed that, “so long as a parent adequately cares for his or her children, (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.” *Troxel*, 120 S.Ct. at 2061, *citing Reno v. Flores*, 507 U.S. 292, 304, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). Concluding that the Washington statute which permitted any person to petition the court for visitation rights at any time was unconstitutional, the Supreme Court determined that the due process clause did not permit the state to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believed a better decision could be made. 120 S.Ct. at 2063-64.

In this case, that fundamental child rearing decision involved permitting the minor child, Jessica Hawkins, to participate in a family recreational activity of horseback riding for which her mother signed a release and indemnity form. Implicit in the *Troxel* analysis is a recognition and honoring of the parents’ role in child rearing which extends beyond decisions dealing with medical treatment or the education of children. *Id.* Under that paradigm, and consistent with the rationale of the *Troxel* case, the contract which Jessica’s mother signed thereby allowing her daughter to participate in the family recreational activity was, as a matter of public policy, valid and enforceable. It is representative of the day-to-day decisions which parents routinely make. Such decisions include, for example, what activities their children will engage in, with whom and under what circumstances their children will play,

their children's travels to various places with or without them, their children's engaging in music, speech, little league, drama, soccer, skiing or ballet lessons, and their children's participation in a variety of youth organizations and programs. All these activities carry some potential of risk, including unforeseen consequences, but nonetheless are the kinds of decisions which parents routinely and rightfully make in raising their children free from interference or second-guessing on the basis of alleged public policy considerations. These day-to-day decisions are no less worthy of constitutional protection than those other decisions which the Court specifically enumerated in the *Troxel* decision, and the decisions fall under the penumbra of a parent's responsibility for the care, custody and nurture of a child. 120 S.Ct. at 2058-2063.

In this regard, plaintiff's argument that parents do not have unlimited rights to make choices for their children, using the example of parents entering into a contract for marriage of their children, is inapposite. The law does not consent to a minor's singular ability to enter into a contract nor to marry because the law requires consent for the effected parties to enter into a marriage relationship. UTAH CODE ANN. § 30-1-9 (2000). Moreover, a marriage creates a new family relationship and therefore it is not part of the parent-child relationship. *See generally*, UTAH CODE ANN. § 15-2-1 (1999); *T.G. v. State*, 987 P.2d 1272 (Utah Ct. App. 1999). In other words, parties to a marriage must themselves consent and parents no longer play a primary legal role in the custody, care and nurture of children in their marriage. Thus, a child's marriage to another stands on a very different footing than the relationship a

minor child has with her parents who are responsible for her custody, care, and nurture.

*Troxel*, 120 S.Ct. at 2060.

**B. This contract between adults is neither invalid nor violative of public policy.**

Contrary to plaintiff's assertions, the effect of upholding the exculpatory and indemnification contract in this case effects a mere contractual recognition that one party will assume the risk of a particular activity. It does not become a matter of eliminating accountability for a party's actions. Utah long has recognized the validity of release and indemnification clauses. *Freund v. Utah Power & Light Co.*, 793 P.2d 362, 372 (Utah 1990); *Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187, 1189 (Utah 1983). In *Shell Oil*, this Court considered whether an indemnity agreement might be invalidated as violative of public policy and concluded that unless duress, deception, a disparity of bargaining power or negotiations conducted at less than arm's length were present, the contracts would be valid. 658 P.2d at 1189. Plaintiff cannot claim that the contract meets any of those requirements for invalidity in this case. That is particularly so because Melinda Hawkins initialed or signed each part of the form. *See*, Defendant's Addendum to its Appellee's Cross-Appellant's Brief at 000002. Additionally, Utah long has recognized the rule that its citizens should be free to contract on their own terms "without the indulgence of paternalism by courts in the alleviation of one side or the other" from the effects of a contract from which one party wishes to be excused. *Carlson v. Hamilton*, 8 Utah.2d 272, 275, 332 P.2d 989, 990-91 (1958). It is not the function of the court to "renegotiate the contract of the parties."

*Id.* Thus, exculpatory clauses are valid. *See e.g., DuBois v. Nye*, 584 P.2d 823, 824-25 (Utah 1978).

The *Scott* decision from Washington does not control the outcome of this case. *See*, Appellee's Brief at 15-18 *citing Scott v. Pacific West Mountain Resort*, 834 P.2d 6 (Wash. 1992). The child's mother here had the opportunity to initial and sign a clear contract highlighting its effect and repeating its allocation of responsibility for indemnification. She had the option to decline the defendant's services, which were not of a public service nature, demonstrating the validity of the contract and the lack of factors which would invalidate the exculpatory or indemnification provisions. Offering horseback riding does not qualify as a required public service such as that the California court contemplated. *See, Tunkl v. Regents of University of California*, 383 P.2d 441 (Cal. 1963). When not engaged in a public service, parties may bargain against liability for harm caused by their ordinary negligence in the performance of their contractual duties. *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 904 (Utah Ct. App. 1995). Like building a home, providing trail riding opportunities is not a public service in Utah. *Russ*, 905 P.2d at 907. Further, parties can enforce releases even after an event, as commonly occurs in settling cases. *Simonson v. Travis*, 728 P.2d 999, 1002 (Utah 1996).

Other jurisdictions have recognized the validity of releases and indemnification provisions for spectators or participants in recreational activities. *See, e.g., Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781 (Colo. 1989); *Valley National Bank v. National*

*Association for Stock Car Auto Racing, Inc.*, 736 P.2d 1186 (Ariz.App. 1987). A Utah federal court also has done so. *Zollman v. Myers*, 797 F.Supp. 923, 927 (D.Utah 1992) (snowmobile activity). Other jurisdictions have recognized the validity of parents signing releases involving their minor children. *Cooper v. United States Ski Ass'n.*, 2000 WL 1159066 (Colo.App. 2000) (skiing activity); *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 204 (Ohio 1998) (soccer association); *Hohe v. San Diego Unified School District*, 224 Cal.App.3d 1559, 274 Cal.Rptr. 647, 649 (Cal.App. 4<sup>th</sup> Div. 1990) (release from injuries during a hypnotism show). Because parents may make decisions for their children concerning their custody, care, and upbringing, the law recognizes the validity of these types of exculpatory and indemnity agreements. Utah, consistent with its case law in other areas, should do likewise.

**C. The presence or absence of liability insurance plays no more role in determining liability when a child is involved than when an adult is involved.**

In its Cross-Respondent's Brief, plaintiff seems to suggest that the existence of insurance is somehow relevant concerning a determination of the contract's validity and the assessment of liability in this case. *See*, Brief at 8. It is not and the court and parties should avoid mention of insurance. Utah Rule of Evidence 411; *C.R. Owens Trucking Corp. v. Stewart*, 29 Utah 2d 353, 356, 509 P.2d 821, 823 (1973); *Robinson v. Hreinson*, 17 Utah 2d 261, 264-65, 409 P.2d 121, 123 (1965). However, if relevant, the existence of any potential insurance is no more dispositive of the issues in this case than if the injured person were an

adult rather than a child. The contract existed between competent adults with Melinda Hawkins signing on behalf of her daughter. *See*, Defendant's Addendum to its Appellee/Cross-Appellant's Brief at 000002. Consequently, the proper focus of the analysis is that of a contract between competent adults, not between a business and a minor child. The cost of doing business increases with the costs of judgments against the business, whether the business pays those costs directly or through increasing insurance payments. Insurers set premiums on the basis of their perception of the risks involved, and it is reasonable to conclude that the insurers consider what risks might be covered or excluded on the basis of contracts between the parties providing and receiving the services. Thus, presumably any insurance company would charge a premium based on its risk assessment including the insured's use of exculpatory or indemnity clauses. Nonetheless, plaintiff's discussion of this issue misses the mark. At issue is the validity of the contract entered into by two competent parties, one of whom acted as a parent for her minor child. By signing the contract, the parent allowed her child to engage in a family recreational activity. She should not now be able to escape the consequences of the contract she signed as a competent adult parent.

The types of release and indemnification contracts at issue in this case affect activities in which minors routinely engage. They include sports in school or with private organizations, youth recreational and organizational activities such as scouting, opportunities to learn various skills or to pursue various hobbies and talents such as music and speech, and

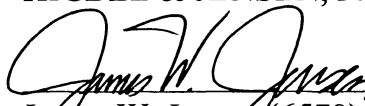
taking trips as part of a child's education or recreation. They effect the providing of services and activities for tourists, vacationers, and Utah families seeking to enjoy the natural wonders of this panoramic state. A child cannot sign an enforceable contract to engage in those activities or to bear the risks. Without a parent's or guardian's signature, the cost of enjoying and of providing these opportunities necessarily increases, perhaps beyond the point of their being reasonably available for most families and youth. Consequently, the implications of eliminating these releases which have served to help organizations provide various opportunities for youth and adults at a reasonable cost, could be substantially diminished if the Court holds invalid these types of routinely utilized forms.

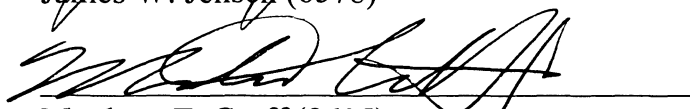
### **CONCLUSION**

For all of the above reasons, this Court should affirm the District Court's decision upholding the validity of the agreement's indemnity provisions or alternatively reverse the lower court's decision invalidating the release provision. This Court, therefore, should enter summary judgment in favor of defendant.

Respectfully submitted,

HIGBEE & JENSEN, P.C.

  
James W. Jensen (6578)

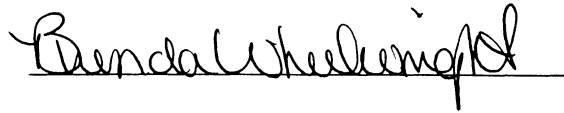
  
Matthew T. Graff (8605)

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## CERTIFICATE OF SERVICE

I hereby certify that on the 1 day of December, 2000, I mailed a copy of the foregoing REPLY BRIEF OF DEFENDANT/APPELLEE-CROSS APPELLANT, first class mail, postage prepaid to the following:

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A handwritten signature in black ink, appearing to read "Brenda Wheeling", is written over a horizontal line.