IN THE SUPREME COURT OF FLORIDA

GLOBAL TRAVEL MARKETING, INC., d/b/a THE AFRICA ADVENTURE COMPANY and d/b/a INTERNATIONAL ADVENTURES, LTD.,

Appellant,

v.

MARK R. SHEA, as Personal Representative of the Estate of MARK GARRITY SHEA, deceased minor,

Appellee.
_____/

CASE NO. SC03-1704

AMENDED AMICUS BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF INTEREST OF AMICUS

The Academy of Florida Trial Lawyers (the "Academy") is a voluntary statewide association of trial lawyers specializing in litigation in all areas of the law. The lawyer members of the Academy are pledged to the preservation of the American legal system, the evolution of the common law, and the protection of individual rights, liberties and access to courts. The Academy has been involved as amicus curiae in cases in all of the Florida appellate courts involving many issues of statewide importance. The appearance of the Academy as amicus curiae in this case of first impression may assist the Court in resolving the issues raised in this appeal.

The Academy is submitting this brief in support of the position of appellee Mark R. Shea, as personal representative of the Estate of Mark Garrity Shea, decedent.

SUMMARY OF ARGUMENT

Florida's courts have an inherent authority and duty to protect the welfare of minors. A parent may not waive a minor child's constitutional right of access to the courts and trial by jury unless supported by public policy. Public policy does not support a parent's waiver of these rights in a commercial travel contract.

The Fourth District's decision does not violate the Federal Arbitration Act, 9 U.S.C. § 1 (2003) (FAA). The FAA is not applicable to the minor child since he did

not enter into a binding agreement to arbitrate. Florida law determines whether a person is bound by an agreement to arbitrate, and the holding that the minor child was not bound by his parent's waiver of his rights meant that there was no agreement to arbitrate as to him.

The duty of Florida courts to protect a minor outweighs any policy of protecting commercial travel interests. Concern for a child's rights outweighs the traditional sanctity of a commercial travel contract. A minor's constitutional rights to access to the court and trial by jury in this context outweigh any alleged impact on commercial travel.

ARGUMENT

I. THE CERTIFIED QUESTION SHOULD BE ANSWERED "NO" AND THE DECISION OF THE FOURTH DISTRICT APPROVED.

A. A PARENT MAY NOT CONTRACTUALLY BIND HER MINOR CHILD TO ARBITRATE A TORT CLAIM ARISING IN THE COURSE OF COMMERCIAL TRAVEL.

Florida law is settled that a parent's right to control the care, custody, and companionship of her children is not absolute, but, instead, is subject to the prevailing principle that the best interests of the child are paramount. See, e.g., In re Camm, 294 So. 2d 318, 320 (Fla. 1974). Florida's courts have inherent authority and a duty to

protect the welfare of minors in a myriad of situations. See, e.g., In re Brock, 25 So. 2d 659, 660 (Fla. 1946).

A Florida's court's longstanding right and duty to protect minors has been recognized statutorily and judicially in a number of context. For example, a parent does not have the power to contract away or to waive her minor child's property rights. See, e.g., McKinnon v. First National Bank of Pensacola, 82 So. 748, 750 (Fla. 1919). Nor may a parent spend the assets of her minor child without first obtaining court approval (even though a trust purports to release the parent from doing so). See Valentine v. Kelner, 452 So. 2d 965, 966 (Fla. 3d DCA 1984). Judicial approval is necessary to waive a minor's right to file a compulsory counterclaim. See Romish v. Albo, 291 So. 2d 24, 26 (Fla. 3d DCA 1974). Thus, a parent as a general rule does not have the authority to compromise or settle a child's claim or to waive his substantive rights without court approval.

The Florida Legislature has recognized a parent's inability to contract for her children to resolve certain claims. For example, parents as natural guardians may not settle their minor child's damage claim in excess of $5,000.00 without appointment of a guardian and a judicial determination that settlement is in the child's best interests. See § 744.387(2), Fla. Stat. A settlement of a minor's claim for more than the statutory

amounts without complying with these statutes is unenforceable. See, e.g., Infinity Ins. Co. v. Berges, 806 So. 2d 504, 509-510 (Fla. 2d DCA 2002), rev. granted, 826 So. 2d 991 (Fla. 2002).

A minor child has a constitutional right to access to the courts and to a trial by jury. A minor cannot execute a binding contract by himself waiving these rights. See Dilallo Riding Safely, Inc., 687 So. 2d 353, 356-357 (Fla. 4th DCA 1997) (release executed by minor not binding), nor may a parent waive these rights for her minor child unless supported by public policy. See Harris v. Gonzales, 789 So. 2d 405, 409 (Fla. 4th DCA 2001) (right of parents to contract on behalf of their children determined on public policy grounds); see also Doe v. Sun International Hotels, Ltd., 20 F. Supp. 2d 1328, 1331 (D.C. S.D. Fla. 1998) (signature of step-father on resort's guest registration which contained fine-print forum selection clause was insufficient to bind guest or was voided by guest upon reaching age of majority).

Public policy supports a parent's authority to contract for their children to receive medical care, see, e.g., Variety Children's Hospital, Inc. v. Vigilotti, 385 So. 2d 1052, 1054 (Fla. 3d DCA 1980), and for a child to participate in commonplace child-oriented community or school supported activities. See Shea v. Global Travel Marketing, Inc., 2003 WL22014590, 4 (Fla. 4th DCA 2003). The public policy

concerns which recognize such parental authority as binding on minor child are not applicable to taking an 11-year-old child to Africa on a "high-risk" safari. An arbitration provision in a commercial travel contract which waives a child's rights to access to the courts and to a jury trial jeopardizes Florida courts' authority to protect children. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967); Affiliated Marketing, Inc. v. Dyco Chemicals & Coatings, Inc., 340 So. 2d 1240, 1243 (Fla. 2d DCA 1976). Allowing a parent to unilaterally waive these rights for her child is contrary to Florida's public policy of protecting children through its parens patriae powers.

B. THE FAA IS INAPPLICABLE SINCE THE MINOR WAS NOT BOUND BY THE ARBITRATION AGREEMENT.

Global Travel and amici contend that the Fourth District's decision in this case violates the FAA. However, the FAA does not make an arbitration agreement enforceable as a matter of federal policy against a party who has not agreed to arbitrate a dispute. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985). The purpose of the FAA is "to make arbitration agreements as enforceable as other contracts but not more so …." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n. 12, 87 S. Ct. 1801, 18 L.Ed.2d 1270 (1967). The FAA is not applicable to a minor unless he

entered into a binding agreement to arbitrate. See EEOC v. Waffle House, 534 U.S. 279, 122 S. Ct. 754, 764, 151 L.Ed.2d 755 (2002).

The Fourth District correctly ruled that the question whether the minor child entered into a binding arbitration agreement is determined under Florida state law governing the formation of contracts. See, e.g., First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L.Ed.2d 985 (1995). A minor child would not be bound by his own agreement to arbitrate a dispute. See, e.g., Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 356-357 (Fla. 4th DCA 1997) (minor child injured through negligence not bound by pre-injury contractual waiver of right to sue). Nor may a parent under Florida law generally enter into a binding contract which waives the substantive rights of her child. Since the Fourth District determined that parents could not contract away their child's right to litigate a dispute in a court of competent jurisdiction, no question arises as to whether the FAA is applicable.

Argument is made that failure to arbitrate this dispute violates Section 2 of the FAA. On the contrary, Section 2 of the FAA does not prevent a state from invalidating an arbitration clause unless the source of state law invalidating the provision is applicable only to arbitration clauses. See Doctors Assoc. v. Casarotto, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996). The Fourth District did

not hold that the public policy which supported its decision is applicable only to an arbitration clause. Instead, the decision below simply reflects longstanding Florida policy regarding the authority of a parent to bind her minor child to a private agreement. (Indeed, the arbitration agreement was binding upon the parent under the same public policy.) Under the circumstances, therefore, section 2 of the FAA is inapplicable.

C. THE PUBLIC POLICY TO PROTECT CHILDREN OUTWEIGHS AN INTEREST IN COMMERCIAL TRAVEL.

Global Travel and amici contend that the Fourth District erred when it held that protecting a child's rights, as a matter of public policy, was more important than protecting the commercial interests of Florida's travel industry. Preliminarily, it must be noted that the alleged effect on the Florida travel industry is not supported by any empirical evidence. Instead, the imagined effect of the lower court's decision on Florida tourism appears to be grossly exaggerated. Moreover, it cannot seriously be contended that Florida public policy should protect an industry's interest in commercial travel more than a child's rights.

Florida law is consistent with developing jurisprudence nationally. In Cooper v. The Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002), for example, the Colorado

Supreme Court reversed a ruling that a release signed by a child's mother barred his action against a ski resort for personal injuries. The Colorado Supreme Court held that Colorado public policy afforded protections to a minor that precluded a parent from releasing a minor's own potential claims for negligence. See Cooper, 48 P.3d at 1231. The Colorado Supreme Court reasoned:

> [t]o allow a parent . . . to execute exculpatory provisions on his minor child's behalf would render meaningless for all practical purposes the special protections historically accorded minors . . . [I]t has long been the rule that courts owe a duty to 'exercise a watchful and protecting care over [a minor's] interests, and not permit his rights to be waived, prejudiced or surrendered either by his own acts, or by the admissions or pleadings of those who act for him.'

Id. at 1234.

Similarly, in Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992), the Washington Supreme Court also considered whether a parent could waive his child's future personal injury action resulting from the negligence of a third party. Scott, 834 P.2d at 15. The Washington Supreme Court, like the Fourth District below, reasoned that a public policy concern for a child's rights outweighed the traditional sanctity of contract. Id. at 17. The Washington Supreme Court stated:

> it is settled law in many jurisdictions that, absent judicial or statutory authority, parents have no authority to release a cause of action belonging to their child.

Id. at 19-20.

The Scott Court also rejected a similar argument to one advanced here -- that failing to allow a parent to waive her minor child's substantive rights would destroy commercial travel involving children in Florida. The defendant ski school in Scott argued that holding that a parent could not waive its child's rights "would make sports engaged in by minors prohibitively expensive due to insurance costs." Id. at 21. The Court acknowledged this contention as a "valid concern", but noted that the same argument could be made in any area of tort law. Id. at 21. The Court stated that this valid concern was not a "legally sound reason . . for removing children's commercial sports from the normal tort system." Id. at 21.

The reasoning employed by the Washington and Colorado Supreme Courts also is applicable in Florida. Statutory and decisional authority clearly evince Florida's strong public policy to protect minors from the waiver of their rights in many areas. A minor's constitutional rights to access to the courts and to a jury trial under these limited facts must take priority over an alleged effect on commercial travel.

CONCLUSION

Accordingly, the question certified by the Fourth District Court of Appeal should be answered in the negative and its decision affirmed. Florida courts have a

longstanding inherent authority and duty to protect minors. The Florida public policy to protect children outweighs any commercial interest in binding a child to an arbitration clause in a commercial travel contract. The Fourth District's decision does not violate the FAA, since the minor child did not agree to arbitrate a dispute.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 9.210(a)(2) and 9.100(1), Fla.R.App.P., the undersigned hereby attests that this amicus brief is being submitted in Times New Roman 14 point font, and that footnotes and quotations are single spaced and submitted in Times New Roman 14 point font with the same spacing between characters as the text.

Dated: January ___, 2004

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Steven M. Goldsmith