IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

Petitioners,

CASE NO.: SC03-1704
Lower Tribunal No.: 4D02-910

vs.

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

Respondent.

_____/

THE LEGAL AID SOCIETY OF PALM BEACH COUNTY, INC.'S BRIEF AS AMICUS CURIAE

Michelle Hankey, Esquire
William Booth, Esquire
Maxine Williams, Esquire
Barbara B. Briggs, Esquire
Legal Aid Society of Palm
Beach County, Inc.
Juvenile Advocacy Project
423 Fern Street, Suite 200
West Palm Beach, FL 33401
Phone: (561) 655-8944

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHERS:

SUMMARY OF THE ARGUMENT

In reversing the trial court, the Fourth District Court of Appeal held an arbitration agreement entered into by a parent on behalf of his or her child in a commercial context is unenforceable against the child. By doing so, the court upheld the state's public policy of protecting and promoting children's rights versus those of commercial interests.

Specifically, the Fourth District Court of Appeal held that a parent cannot bind his or her child to an agreement to arbitrate potential personal injury claims. Shea v. Global Travel Marketing, Inc., 28 Fla. L. Weekly D2004, D2005 (Fla. 4th DCA 2003). The court determined the issue to be one of formation of an arbitration agreement rather than one involving the scope of an arbitration agreement as scope is considered only if a valid, enforceable arbitration agreement already exists. Id. On public policy grounds, the court found the subject arbitration agreement violated the state's policy of protecting the rights of children. Id. at D2006.

The Fourth District Court of Appeal properly placed individual rights ahead of commercial interests. The court adopted the analysis pronounced by the Supreme Court of Colorado, relying in large part on the analysis of the supreme

courts of Washington and Utah. Id. at D2005. In Cooper v. The Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002), the Colorado Supreme Court held

> we agree with the Washington Supreme Court that 'there are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract.' Accordingly, we hold that Colorado's public policy affords minors significant protections which preclude parents or guardians from releasing a minor's own prospective claim for negligence. We base our holding on our understanding of Colorado's public policy to protect children as reflected by legislation protecting minors as well as decisions from other jurisdictions, which we find persuasive.

Cooper, 48 P.3d at 1232-33. The Colorado Supreme Court, along with Washington and Maine courts, rejected the argument that individual rights should succumb to that of commercial enterprise. Id. at 1232; Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992); Rice v. American Skiing Co., No. CV-99-06, 2000 Me. Super. LEXIS 90 (Me. May 8, 2000). These states, like Florida, rely on tourism for revenue.

Florida has accorded special protections of children's rights which the courts have exercised jurisdiction to safeguard and promote. Both court decisions and statutory law demonstrate Florida's commitment to children. For example, children have the right to invoke the psychotherapist/patient privilege against a parent's wishes, Attorney Ad Litem for D.K. v. The Parents of D.K., 780 So.2d 301 (Fla. 4th DCA

2001), a parent cannot relinquish child support, Gammon v. Cobb, 335 So.2d 261 (Fla. 1976), and a parent must obtain court approval for any settlement of his or her child's lawsuit over $15,000. Fla. Stat. §§ 744.1012, 744.301, 744.387(2) (2002). Based on a review of Florida's policy of protecting children, a parent cannot bind a child to an arbitration agreement.

Petitioners argue that public policy is not relevant to the formation of an arbitration agreement contending that the Federal Arbitration Act prohibits a consideration on a policy other than that favoring arbitration. Petitioners misinterpret the thrust of this case and the application of the Federal Arbitration Act [FAA]. The FAA applies only if an arbitration agreement has been formed pursuant to state contract principles. A contract is not formed unless mutual assent is present. A consideration of public policy in the formation of an arbitration agreement is allowed by law. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); Chastain v. Robinson-Humphrey Co., 957 F.2d 851 (11th Cir. 1992). As a result, the Petitioners' assertion is incorrect.

Further, Petitioners and amicus contend that the court

must consider a policy of encouraging tourism in determining whether minors are bound by arbitration agreements. Adherence to

this reasoning places commercial interests superior to individual rights.

The Fourth District Court of Appeal's decision is consistent with the public policy of this state to protect the rights of children. Therefore, this Court should affirm the Fourth District Court of Appeal's decision.

ARGUMENT

I. THE PUBLIC POLICY OF PROTECTING CHILDREN'S RIGHTS AND OF MAINTAINING THE COURT'S PARENS PATRIAE JURISDICTION IS CONSISTENT WITH THE FOURTH DISTRICT COURT OF APPEAL'S HOLDING THAT A PARENT CANNOT BIND A CHILD TO AN ARBITRATION AGREEMENT.

The evolution of children having constitutional rights is not new. Children's rights issues have been ongoing and expanding steadily in scope over the years with most of the courts of this country, including the United States Supreme Court, having played a role in establishing a myriad of children's rights. Consequently, children are no longer spectators in the enforcement of their own rights.

Among the well-established rights of children put in

place by the United States Supreme Court are the rights to free speech, Tinker v. Des Moines School District, 393 U.S. 503 (1969), religious freedom in school, Board of Education v. Mergers, 496 U.S. 226 (1990), free and equal public education, Goss v. Lopez, 419 U.S. 565 (1975); Brown v. Board of Education, 347 U.S. 483 (1954), an attorney, notice, confrontation, cross-examination, freedom of self-incrimination, and all other protections provided to adults by the constitution in criminal proceedings, In re Gault, 387 U.S. 1 (1967), freedom from unreasonable searches and seizures, New Jersey v. T.L.O., 469 U.S. 325 (1985), and waive their rights to be silent and to an attorney. Fare v. Michael C., 442 U.S. 707 (1979). The federal circuit courts also have contributed to establishing the rights of children including the rights to freedom from harm while in state care and/or custody, Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), and to sue for damages when injured by a child welfare agency's failure to protect or failure to provide necessary care. Doe v. New York City Dept. of Social Services, 649 F.2d 134 (2d Cir. 1981)

Similarly, Florida courts have been strong proponents in establishing and expanding children's rights. Florida has provided children with the ability to make healthcare

decisions for themselves in an emergency, Fla. Stat. § 743.064 (2002), as well as providing that minor females may make medical or surgical healthcare decisions for themselves and children born to them prior to adulthood. Fla. Stat. § 743.065 (2002). Children may sue their parents for negligence in a tort action arising from an accident where the parent has liability insurance, Ard v. Ard, 414 So.2d 1066 (Fla. 1982), minors may act as trustees, Persons v. Pflum, 135 So. 878 (Fla. 1931), and minors can enter into binding contracts for necessities. Lee v. Thompson, 168 So. 848 (1936). Unmarried children may execute valid consents to adoption, Pugh v. Barwick, 56 So.2d 124 (Fla. 1952), or sign consents terminating their parental rights to their children. E.L. v. Department of Health and Rehabilitative Services, 700 So.2d 3 (Fla. 1st DCA 1997). Children may acquire property or be the grantee of a deed, Watkins v. Watkins, 166 So. 577 (Fla. 1936), and children of any age have the ability to work in the entertainment industry or as pages for the Florida Legislature. Fla. Stat. § 450.021 (2002).

The further intention of this state to not only expand children's rights but to hold children to a higher standard with regard to personal responsibility is reflected in the state's expectations for children. For example, at any age a

child may be prosecuted as a juvenile delinquent, Fla. Stat. § 985.201 (2002), be tried as an adult as young as the age of 14, Fla. Stat. § 985.227 (2002), be convicted of offenses punishable by death or life imprisonment, Duke v. State, 541 So.2d 1170 (Fla. 1989), and be expected to maintain a relationship with their attorney and participate in their defense as would any adult defendant. Fla. Stat. § 985.203 (2002).

Historically, it is the courts in this state that have been responsible for ensuring that children are treated fairly and that their rights are protected.[1] The courts have established that children may invoke or waive constitutional or statutory rights. The intention of the courts to continue this trend is found in Attorney Ad Litem for D.K. v. The Parents of D.K., 780 So.2d 301 (Fla. 4th DCA 2001)(child can protect his or her mental health records from disclosure to parents). In addition, children also possess a constitutional right to access the courts as provided by Article 1, section 21 of the Florida Constitution, which states "[t]he courts

[1] This authority originates from the doctrine of parens patriae and the courts' inherent authority to protect children. In re Beverly, 342 So.2d 481, 484 (Fla. 1977).

shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." S.C. v. Guardian Ad Litem, 845 So.2d 953, 958 (Fla. 4th DCA 2003) citing In re T.W., 551 So.2d 1186 (Fla. 1989)(the constitutional right to privacy is afforded "to every natural person irrespective of age.").

The arbitration clause which the Petitioners purport to be valid contradicts the doctrine of parens patriae and the courts' inherent authority to protect children. Arbitration clauses executed by a parent on behalf of his or her child, but for the ability of the parent to fulfill his or her legal obligation arising from the parent/child relationship, operate to jeopardize the courts' authority to protect children. In Prima Paint Corp v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967), the dissenting judge recognized that arbitrators who are designated to adjudicate the legal validity of issues "need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so."[2]

---

[2] "When parties agree to arbitration, they [give] up some of the safeguards which are traditionally afforded to those who go to court.... One of [which] is the right to have the evidence weighed in accordance with legal principles." Affiliated Marketing, Inc. v. Dyco Chemicals & Coatings, Inc., 340 So.2d 1240, 1243 (Fla. 2d DCA 1976). One of the

Therefore, a child's rights will not be sufficiently protected by lay persons. The courts, charged with the responsibility of protecting children, possess the knowledge, training, and ethical responsibility to fulfil this duty.

Since courts are charged with the responsibility of protecting children, a parent should not be able to contract away a child's right to have his or her controversy heard by a court of competent jurisdiction. Holding that a parent cannot bind his or her child to an arbitration agreement enforces this state's public policy of protecting children's rights and maintaining the court's parens patriae jurisdiction. Even though a parent enjoys broad discretion with regard to his or her child, this discretion is not without its limitations. See, e.g. Attorney Ad Litem for D.K. vs. The Parents of D.K., 780 So.2d 301 (Fla. 4th DCA 2001). In D.K., the Fourth District Court of Appeal held that a child has the right to

---

features of arbitration is that the decision-maker is not a judge and is not even required, unless the parties so specify, to be an attorney. Pierce v. J. W. Charles-Busch Secur, Inc., 603 So.2d 625, 630 (Fla. 4th DCA 1992). In addition, "[t]he standard of judicial review applicable to challenges of awards made by arbitrators is very limited and 'a high degree of conclusiveness attaches to an arbitration award because the parties themselves have chosen to go this route in order to avoid the expense and delay of litigation....'" West Palm Beach v. Palm Beach County Police Benevolent Assoc., 387 So.2d 533, 534 (Fla. 4th DCA 1980).

prevent his or her parents from obtaining and disclosing the child's mental health records. 780 So.2d at 307. The court reasoned that "parents cannot in all circumstances control the exercise of their child's rights [as] not all decisions are removed from a minor." Id. at 304-05.

In addition, the United States Supreme Court has recognized that a parent's rights to the care, custody, and control of his or her child are not always superior to his or her child's individual rights.

> It is cardinal...that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.... But the family itself is not beyond regulation in the public interest.... And... rights of parenthood are [not] beyond limitation.

Prince v. Massachusetts, 321 U.S. 158 (1944) (emphasis added and citations omitted). Similarly, the Colorado Supreme Court has held, in a case upon which the Fourth District Court of Appeal relied,

> While we certainly agree that parents have a liberty interest in the 'care, custody and control of their children,' we do not believe that right encompasses a parent's decision to disclaim a minor's possible future recovery for injuries caused by negligence by signing a release on the minor's behalf [thereby] effectively eliminating a child's right to sue an allegedly negligent party for torts committed against him. It is, thus, not of the same character and quality as those rights recognized as implicating a parents' [sic] fundamental liberty interest in the 'care, custody and control' of their children.

Cooper v. The Aspen Skiing Co., 48 P.3d 1229, 1235 (2002). As the Fourth District Court of Appeal decided in this case, the state as parens patriae may restrict a parent's control over his or her child's rights to sue a tortfeasor in a court of law. Consequently, this Court should affirm the court's decision.

II. THIS COURT SHOULD AFFIRM THE FOURTH DISTRICT COURT OF APPEAL'S DECISION SINCE A PARENT DOES NOT HAVE THE AUTHORITY TO CREATE A BINDING ARBITRATION AGREEMENT ON BEHALF OF HIS OR HER CHILD.

The Fourth District Court of Appeal held that "a parent...does not have the authority to bind a minor child to arbitrate potential personal injury claims." Shea v. Global Travel Marketing, Inc., 28 Fla. L. Weekly D2004, D2005 (Fla. 4th DCA 2003). In reaching this conclusion, the court applied "ordinary principles of contract law" and adjudged the issue to be a question of formation of an arbitration agreement, not one of scope. Id. The court further stated that a consideration of public policy grounds is proper in a determination of formation of an arbitration agreement. Id.

The Fourth District Court of Appeal's holding that the issue in this case is one of formation is confirmed by a review of case law. In Florida, "[a]n arbitration clause can

be invalidated on such grounds as exist 'at law or in equity'...and can be defeated by any defense existing under the state law of contracts." Powertel, Inc. v. Bexley, 743 So.2d 570, 574 (Fla. 1st DCA 1999). Likewise, the United States Supreme Court has recognized that the validity of an arbitration agreement is determined by considering issues relating to the making and performance of the arbitration agreement. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967). The "making of the arbitration agreement" concerns "'the question of the very existence of the [contract] which embodies the arbitration agreement....'" PMC, Inc. v. Atomergic Chemetals Corp., 844 F.Supp. 177 (S.D.N.Y. 1994) citing Interocean Shipping Co. v. National Shipping & Trading Corp., 462 F.2d 673 (2d Cir. 1972). The "very existence" of a contract is determined by basic state-law contract principles. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)("[w]hen deciding whether the parties agreed to arbitrate a certain matter...courts generally...should apply ordinary state-law principles that govern the formation of contracts."). "[B]efore sending any...grievances to arbitration, the district court itself must first decide whether or not [a] non-signing party can nonetheless be bound by the contractual language [because]

[i]f a party has not signed an agreement containing arbitration language, such a party may not have agreed to submit grievances to arbitration at all." Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992)(emphasis in original). When there is a dispute as to the "very existence" of a contract, "there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration...." Id.

No contract is created unless all parties have agreed to its terms. Acevedo v. Caribbean Transportation, Inc., 673 So.2d 170, 173 (Fla. 3d DCA 1996)("[c]ourts are powerless to compel arbitration in the absence of a contract in which both parties have agreed to submit their grievances to arbitration"). "It is hornbook law that to be bound one must be a party to a contract, and there is no arbitration exception to this principle of law."[3] Liberty Communications, Inc. v. MCI Telecommunications Corp., 733 So.2d 571, 574 (Fla. 5th DCA 1999). Generally, one is a party to a written contract if he or she has signed the contract. Coleman v.

---

[3] Petitioners and amicus assert that the Federal Arbitration Act (FAA) applies. However, petitioners and amicus misconstrue the FAA's application by mixing scope of a contract with formation of a contract. The FAA governs the arbitration process only if an arbitration agreement has been formed according to state-law contract principles.

State, 174 So. 829 (Fla. 1937). However, parties affixing their signatures to a contract must have the capacity to do so. Hogan v. Supreme Camp of American Woodmen, 1 So.2d 256 (Fla. 1941). If one has the capacity to sign, one then has "the power to agree to settlement of disputes under the contract by arbitration." Paid Prescriptions, Inc. v. Department of Health & Rehabilitative Services, 350 So.2d 100, 102 (Fla. 1st DCA 1977). A minor lacks capacity to sign a contract due to the minor's age. Dilallo v. Riding Safely, Inc., 687 So.2d 353 (Fla. 4th DCA 1997); Lee v. Thompson, 168 So. 848 (Fla. 1936); Byrne v. Simco Sales Service, 179 F.Supp. 569 (E.D. Pa. 1960); Smoky, Inc. v. McCray, 396 S.E.2d 794 (Ga. Ct. App. 1990); Del Santo v. Bristol County Stadium, Inc., 273 F.2d 605 (1st Cir. 1960); Celli v. Sports Car Club of Am., Inc., 29 Cal. App. 3d 511 (Cal. Ct. App. 1972). Therefore, the issue becomes whether a parent's signing of an arbitration agreement on behalf of his or her child creates a binding contract upon the child.[4] The Fourth District Court

---

[4] The issue presented in this case is not the same as that presented in Buckeye Check Cashing, Inc. v. Cardegna, 824 So.2d 228 (Fla. 4th DCA 2002), which is pending for review before this Court. In Buckeye, the issue is whether the court can determine if a contract mutually assented to and containing an arbitration agreement is nevertheless illegal and therefore unenforceable. 824 So.2d at 230. The present case is distinguishable from

of Appeal concluded that an arbitration agreement executed by a parent on his or her child's behalf violated Florida's "public policy favoring protection of minors." Shea, 28 Fla. L. Weekly at D2006.

Petitioners and amicus argue parental rights to the care, custody, and management of children absolutely supersede a child's rights. This proposition is incorrect. Ample authority exists evidencing Florida's legal protection of children from their parents' potentially inopportune decisions on their behalf. In Florida, a parent cannot settle a child's lawsuit over $15,000 without first obtaining court approval. See Fla. Stat. §§ 744.1012, 744.301, 744.387(2) (2002). Also, a minor child has the right to invoke the psychotherapist/patient privilege to prevent the child's parents from obtaining and disclosing the child's psychotherapy records. Attorney Ad Litem for D.K. vs. The Parents of D.K., 780 So.2d 301 (4th DCA 2001). The Fourth District Court of Appeal stated

> [i]t is generally presumed that when children lack the capacity to make certain decisions, their parents as their natural guardians make those decisions for them. However, not all decisions are removed from a minor....

> Buckeye in that the child questions the very existence of the arbitration agreement, contending the element of assent to the contract is not present and therefore no contract was formed.

> Thus, parents cannot in all circumstances control the exercise of their child's rights. Minors may also invoke and waive constitutional rights without their parents.... The parents both assert that they can waive this claim for their child. In the instant case, it is questionable whether either or both parents are acting solely on their daughter's behalf in attempting to waive the privilege and obtain the records of confidential communications, when each has his or her own interests at stake in this lawsuit.

Id. at 304-06 (emphasis added).

Further, a parent does not have the right to contract away a child's support rights. In Gammon v. Cobb, 335 So.2d 261, 266-67 (Fla. 1976), this Court held

> [a]n illegitimate child's right to support cannot be contracted away by its mother. A release executed by her is invalid to the extent that it purports to affect the rights of the child. The mother is merely the trustee to receive the funds and simply convert them into relief for the children. The obligation of support is for the benefit of the child. Being only a conduit, she has no right to control benefits due and owing to the child by its natural father by fixing her marital status.

Id. at 266-67.[5] See also Bush v. Bush, 590 So.2d 531, (Fla.

---

[5] See also Fleming v. Brown, 581 So.2d 202 (Fla. 5th DCA 1991); Department of Health and Rehabilitative Services v. Morley, 570 So.2d 402 (Fla. 5th DCA 1990); Wilkes v. Wilkes, 768 So.2d 1150 (Fla. 2d DCA 2000)("A child's right to support may not be waived by a parent...nor may that right be contracted away."); Strickland v. Strickland, 344 So.2d 931 (Fla. 2d DCA 1977); Finch v. Finch, 640 So.2d 1243 (Fla. 5th DCA 1994)(the finding that the issue of child support was waived by the ex-husband and ex-wife due to their failure to address the issue in a marital settlement agreement was erroneous because child support cannot be contracted away).

5th DCA 1991)("there is a profound question as to whether [a parent] should be allowed to waive [a child's] procedural rights."); Romish v. Albo, 291 So.2d 24 (Fla. 3d DCA 1974)(a parent is prohibited from waiving his or her child's counterclaim absent a court order). Thus, Florida courts have restricted a parent's ability to waive entitlements of children.

The Fourth District Court of Appeal, in considering the impact of a waiver executed by a parent on behalf of his or her child in relation to Florida's public policy of protecting children, applied a similar analysis as that used by courts in Colorado, Washington, and Utah. Shea, 28 Fla. L. Weekly at D2005. In Cooper v. The Aspen Skiing Co., 48 P.3d 1229, 1230-31 (Colo. 2002), the Colorado Supreme Court "granted certiorari to determine whether Colorado's public policy allows a parent to validate exculpatory provisions on behalf of [her] minor child." Specifically, the court determined it had to resolve the issues of (1) "whether a parent may release the claims of a minor child for future injuries and" (2) "whether a parent may enter into an indemnification agreement that shifts the source of compensation for a minor's claim from a tortfeasor to the parent." Id. at 1231. The case arose when a child suffered injuries while training on a ski

race course. Id. Prior to the child becoming injured, both the mother and the child signed a release of liability. Id. Both the trial court and appellate court held the mother's signature on the release barred the child from seeking recovery from the ski course owners and instructor. Id. at 1232. The appellate court reasoned that "a parent's fundamental liberty interest in the care, custody, and control of her child [gives the] mother...the right to release [the child's] claims. Id. The Colorado Supreme Court reversed holding

> we agree with the Washington Supreme Court that 'there are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract.' Accordingly, we hold that Colorado's public policy affords minors significant protections which preclude parents or guardians from releasing a minor's own prospective claim for negligence. We base our holding on our understanding of Colorado's public policy to protect children as reflected by legislation protecting minors as well as decisions from other jurisdictions, which we find persuasive.

Id. at 1232-33 (citation omitted). Additionally, the court noted that

> [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. The Fourth District Court of Appeal was persuaded by the reasoning of the Colorado Supreme Court in Cooper as this Court should be. Shea, Fla. L. Weekly at D2005.

Similarly, the Washington Supreme Court, in Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992), reviewed an exculpatory clause in a ski school application to determine whether the defendant was entitled to be relieved from any liability for its own negligence in a lawsuit brought by a minor and his parents for injuries the minor sustained in a skiing accident. The court addressed the issue of whether a parent may "legally waive a child's future potential cause of action for personal injuries resulting from a third party's negligence". Id. at 15. As a case of first impression, the court held that "[a] parent does not have legal authority to waive a child's own future cause of action for personal injuries from a third party's negligence." Id. The court stated that "[t]here are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract." Id. at 17. The court refuted the ski school argument that the court "should allow a parent to release a cause of action...since Washington law allows a parent to sue

on behalf of the child." Id. at 18. The court held

> [c]ontrary to the ski school's argument, 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. Under Washington law parents may not settle or release a child's claim without prior court approval. Further, in any settlement of a minor's claim, Washington law provides that a guardian ad litem must be appointed (unless independent counsel represents the child) and a hearing held to approve the settlement.... In situations where parents are unwilling or unable to provide for a seriously injured child, the child would have no recourse against a negligent party to acquire resources needed for care and this is true regardless of when relinquishment of the child's rights might occur.

Id. at 19-20 (emphasis added). The court also addressed the ski school's concern that the court's holding "would make sports engaged in by minors prohibitively expensive due to insurance costs." Id. at 21. The court rejected this argument by holding that "[w]hile this is a valid concern...the same argument can be made in many areas of tort law.... No legally sound reason is advanced for removing the children's athletics from the normal tort system." Id. The Fourth District Court of Appeal's reliance on Scott validates Florida's public policy of requiring traditional freedoms of contract to yield to safeguarding that of the duty of care a parent owes his or her child. The marketplace will adjust to the costs of doing business based upon the articulated public policy of protecting children's rights. See Rice v. American

Skiing Co., No. CV-99-06, 2000 Me. Super. LEXIS 90, at *9 (Me. May 8, 2000).

In addition, the Utah Supreme Court followed the Scott decision in holding that a parent does not have the authority to enter into a contract on behalf of his or her child which releases the child's potential personal injury claims. Hawkins v. Peart, 37 P.3d 1062, 1066 (Utah 2001). The court recognized that the state's general statutory provisions are "indicative of public policies favoring protection of minors with respect to contractual obligations.... Utah law provides various checks on parental authority to ensure a child's interests are protected." Id. As in Utah, Florida law contains numerous protections of a child's rights from a parent's waiver of those rights. See pp. 14-16. Based on the review of these Colorado, Washington, and Utah cases, there should not be a different result in Florida. The Fourth District Court of Appeal found that "Florida's public policy favoring protection of minors in analogous circumstances is evidenced by both case law and statutory provisions."[6] Shea,

---

[6] See, e.g., Gammon v. Cobb, 335 So.2d 261 (Fla. 1976); Romish v. Albo, 291 So.2d 24 (Fla. 3d DCA 1974); Attorney Ad Litem for D.K. v. Parents of D.K., 780 So.2d 301 (Fla. 4th DCA 2001); Dilallo v. Riding Safely, Inc., 687 So.2d 353 (Fla. 4th DCA 1997); Fla. Stat. §§ 744.387(2), 744.301(1) (2002).

Fla. L. Weekly at D2005. This Court should affirm that decision.

Petitioners and amicus erroneously contend that this Court should adopt the rationale, espoused in Cross v. Carnes, 724 N.E.2d 828 (Ohio Ct. App. 1998), that a parent has the authority to bind his or her child to an arbitration agreement in a for-profit commercial setting. The Cross decision is essentially a stand-alone case to which this Court should not adhere. The Cross court reached its decision after reviewing Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201 (Ohio 1998), which involved a parent's authority to bind his or her minor child to an exculpatory agreement regarding a non-profit sporting activity.[7] The Cross court neglected to recognize that the Zivich court, based on public policy, carved out an exception for sporting events organized by non-profit agencies. Zivich, 696 N.E. 2d at 205. The Zivich court found

---

[7] Cases from New York, California, and Hawaii were also presented to the court for review. The Cross court stated "a minor is generally not legally-bound by a contract executed by a parent on behalf of the minor" citing to unnamed New York cases. 724 N.E. 2d at 836. The court, however, elected not to give credence to these New York cases, and instead decided to follow California and Hawaii cases concerning health care contracts which held "that a parent has the authority to consent to arbitration on behalf of his or her child and to bind that child to resolve his or her claims through arbitration." Id.

"as a whole [the public] received the benefit of these exculpatory agreements", essentially stating that without these agreements there would be no sports available to the public. Id.

Subsequently, in Rice v. American Skiing Co., No. CV-99-06, 2000 Me. Super. LEXIS 90, at *9-*10 (Me. May 8, 2000), the defendant, as in Cross, relied on Zivich for the proposition that a parent could release his or her child's negligence claim in a commercial setting. The defendant reasoned "[i]f releases on behalf of minors are unenforceable, ski areas will be reluctant to offer training and instructions to children, whose safety will be as (sic) risk." Id. The Maine Superior Court, in rejecting this contention, stated

> Zivich stands for the more limited proposition 'that parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sports activities where the cause of action sounds in negligence.' The decision was grounded on two public policy considerations: first, nonprofit sports organizations would be unable to get volunteers without such releases and would go out of existence; and, second, parental authority to make and give such releases is of constitutional importance."

Id. (citation omitted). The court continued by concluding

> the point in Zivich, which involves a volunteer, is distinguishable from this case, which involves a paid employee. While a volunteer may reasonably expect that he should suffer no penalty for the consequences of his gratuitous acts, a paid employee...may not.... This is not an inconsequential point. However, it is a risk against which a for-profit business may insure itself.

> This court cannot conclude that the public policy consideration espoused by the defendants is paramount to the right of the infant to his negligence claim.

Id. at *10 (emphasis added). The Fourth District Court of Appeal's decision in Shea accurately recognizes the rationale of distinguishing the issue in terms of for-profit and non-profit sports activities for children. 28 Fla. L. Weekly at D2006.

The Cross court additionally failed to recognize that other states had held a parent could not waive a substantive right of a child. See Munoz v. Il Jaz, Inc., 863 S.W.2d 207, 209-10 (Tx. Ct. App. 1993); Fitzgerald v. Newark Morning Ledger Co., 267 A.2d 557, 558-59 (N.J. 1970); Scott v. Pacific West Mountain Resort, 834 P.2d 6, 11-12 (Wash. 1992); Fedor v. Mauwehu Council, 143 A.2d 466, 468 (Conn. 1958); Childress v. Madison County, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989); Doyle v. Bowdoin College, 403 A.2d 1206, 1208 n.3 (Me. 1979); Rogers v. Donelson-Hermitage Chamber of Commerce, 807 S.W.2d 242 (Tenn. Ct. App. 1990); Meyer v. Naperville Manor, Inc., 634 N.E.2d 411, 414-15 (Ill. App. Ct. 1994); Santangelo v. The City of New York, 66 A.D.2d 880, 881 (N.Y. Sup. Ct. 1978); Apicella v. Valley Forge Military Academy and Junior College, 630 F.Supp. 20, 24 (E.D. Pa. 1985); International Union v. Johnson Controls, Inc.,499 U.S. 187, 213 (1991)(White, J.,

concurring) (stating the general rule that parents cannot waive causes of action on behalf of their children); Tuer v. Niedoliwka, 285 N.W.2d 424 (Mich. Ct. App. 1979)("in Michigan a parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims of his or her child. Generally speaking, the natural guardian has no authority to do an act which is detrimental to the child. Authorization by statute is necessary to give the mother power to bind the child.").

Petitioners, in further support of the proposition that a parent can waive a child's rights, cite to cases involving the power of a parent to bind his or her child to arbitrate a dispute under a group medical service contract. These health care cases are an exception because implicit in the parent/child relationship is the duty of the parent to provide care for his or her child. See Variety Children's Hospital v. Vigliotti, 385 So.2d 1052 (Fla. 3d DCA 1980); State v. Winters, 346 So.2d 991 (Fla. 1977); State v. Joyce, 361 So.2d 406 (Fla. 1978); Fla. Stat. § 827.03(3)(a)1. (2002). Unless the parent can contract for medical benefits the child will be denied such benefits. Florida statutory law requires parents to provide their children with necessary medical services by

virtue of the fact that failure to do so constitutes neglect. Fla. Stat. § 39.01(45) (2002). As such, the Fourth District Court of Appeal stated that "parents have authority to contract for their children when it comes to medical care [as] [p]atently, there is a common sense basis for such medical service or medical insurance exception." Shea, 28 Fla. L. Weekly at D2005. (citation omitted).

Petitioner's and the trial court's reliance on a third party beneficiary contract theory is invalid in that the element of consideration in the contract at issue was illusory. Typically, the benefit of a third party beneficiary contract flows to the third party. In the present case, however, an independent third person such as an attorney ad litem or guardian ad litem would not have entered into a contract that compromised a child's cause of action for damages arising in tort. Likewise, a court would not have compromised a child's claim. See Hawkins v. Peart, 37 P.3d 1062, 1067 (Utah 2001)("where a parent has a duty to protect the best interests of a child, an agreement to insure a third party against any consequences for that third party's negligent behavior toward the child can only serve to undermine the parent's fundamental obligations to the child."). A parent's duty to act "for the benefit of his

child [is] not fully discharged where the parent enters into a bargain which gives rise to conflicting interests." Ohio Cas. Ins. Co. v. Mallison, 354 P.2d 800, 802 (Or. 1960). "'We are extremely wary of a transaction that puts parent and child at cross-purposes and...tends to quiet the legitimate complaint of a minor child.... The end result is...the outright thwarting of our protective policy [towards children].'" Hawkins, 37 P.3d at 1067. Any benefit of the bargain to the child in the purported contract was an illusion in that the benefit did not flow to the third party beneficiary, but instead to one of the two contracting parties, i.e., the mother's interest to go on safari. It was a matter of convenience for the mother because without having executed the release on behalf of the minor child, the mother could not have taken her child on her excursion.

Finally, the public policy of protecting individual rights of children must prevail over the market concerns of commercial enterprise. Petitioners and amicus contend that the court must consider a policy of encouraging tourism in determining whether minors are bound by arbitration agreements. The courts are not charged with the responsibility of protecting the profit margins of commercial enterprises. The Fourth District Court of Appeal's decision

to protect the rights of children as a matter of public policy should be ratified by this Court.

CONCLUSION

In reversing the trial court, the Fourth District Court of Appeal held an arbitration agreement entered into by a parent on behalf of his or her child in a commercial context is unenforceable against the child. In so doing, the court upheld the state's public policy of protecting and promoting children's rights versus those of commercial interests. Florida has accorded special protections for children's rights to which the courts have exercised jurisdiction to safeguard and promote. Based on a review of Florida's policy of protecting children, a parent cannot bind a child to an arbitration agreement. Therefore, the Fourth District Court of Appeal's decision is consistent with the public policy of this state. Consequently, this Court should affirm the Fourth District Court of Appeal's decision. By doing so, the public policy of protecting children's rights is maintained as paramount importance to the people of this state.

Respectfully submitted by:

Legal Aid Society of Palm Beach County, Inc.

Juvenile Advocacy Project
423 Fern Street, Suite 200
West Palm Beach, FL 33401
Phone: (561) 655-8944

_____
Michelle Hankey, Esquire
Florida Bar No. 0827835

_____
William W. Booth, Esquire
Florida Bar No. 0948519

_____
Maxine Williams, Esquire
Florida Bar No. 0001759

_____
Barbara B. Briggs, Esquire
Florida Bar No. 0978670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of January, 2004 to Rodney E. Gould, Esquire, Rubin Hay & Gould, 205 Newbury Street, Fourth Floor, Framingham, MA 01701; Edward S. Polk, Esquire, Conroy, Simberg, Ganon, Krevans & Abel, P.A., 3440 Hollywood Blvd., Second Floor, Hollywood, FL 33021; Robert

B. Stoler, Esquire, 501 E. Kennedy Boulevard, Suite 1700, P.O. Box 1438, Tampa, FL 33601-1438; Edward M. Ricci and Scott C. Murray, Esquires, Ricci Leopold, 1645 Palm Beach Lakes Boulevard, Suite 250, West Palm Beach, FL 33401; Philip M. Burlington, Esquire, Caruso, Burlington, Bohn & Campiani, Barristers Building, Suite 3A, 1615 Forum Place, West Palm Beach, FL 33401; Paul D. Jess, Esquire, Academy of Florida Trial Lawyers, 210 South Monroe Street, Tallahassee, FL 32301; and Steven M. Goldsmith, Esquire, 5355 Town Center Road, Boca Raton, FL 33486.

William W. Booth, Esquire
Florida Bar No. 0948519

CERTIFICATE OF FONT COMPLIANCE

The undersigned certifies that this Amicus Curiae Brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P.

William W. Booth, Esquire
Florida Bar No. 0948519