IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC03-1704

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

Appellant,

vs.

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

Appellee.
_____/

ON APPEAL FROM THE FOURTH DISTRICT
COURT OF APPEAL, FLORIDA
CIVIL ACTION

THE ASSOCIATION OF RETAIL TRAVEL AGENTS' AND THE OUTSIDE SALES SUPPORT NETWORK'S BRIEF AS AMICI CURIAE

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INTRODUCTION AND STATEMENT OF INTEREST

While federal law appears to require enforcement of the agreement to arbitrate in this case,[1] to the extent the issue is to be determined on the basis of state public policy, as the Court of Appeal found, two conclusions are inescapable: the Court of Appeal erred in failing to consider fundamental rights and interests of preeminent importance to this matter, and erred in finding that state public policy considerations prohibited Molly Bruce Jacobs ("Jacobs"), a lawyer, from agreeing to arbitration on behalf of her son, Mark Garrity Shea ("Shea"), as a condition of his participation in a safari to Southern Africa. Three main factors central to the decision in this case -- the effect of the Court of Appeal's decision on businesses (particularly in the travel and tourism industry) within the state, the fundamental liberty interest of parents, and the federal and state policies favoring arbitration -- were ignored by the Court of Appeal. These factors strongly favor arbitration and certainly outweigh the single state

[1] This matter is governed by the Federal Arbitration Act and its preemptive policy of favoring arbitration. See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). See also Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 130 (2d Cir. 1997); Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984). Accordingly, consideration of state public policy factors as a basis for refusing to enforce an arbitration agreement is prohibited by the Federal Arbitration Act. The Association of Retail Travel Agents adopts the position of the Appellant as set forth in its opening Brief with respect to this issue.

interest relied on by the Court: the state interest in protecting non-resident children of non-resident parents even in the absence of a finding of demonstrable harm to the child.

This amicus curiae brief is being filed by the Association of Retail Travel Agents ("ARTA") and the Outside Sales Support Network ("OSSN"). ARTA is the largest travel agent only trade association within the United States. The membership of ARTA is primarily the "mom and pop" travel agencies that serve consumers and provide the most objective travel advice and information to consumers. Although many of ARTA's members are located within the state of Florida, Florida also is one of the top two domestic travel and tourism destinations to which ARTA members send consumers.

OSSN is an organization of "outside" sales agents in the travel agent industry. OSSN, the largest organization of its kind in the country, is based in Jupiter, Florida and has approximately 5,800 travel agent members. Its members book customers on thousands of trips to Florida annually.

It has been the experience of ARTA and OSSN that custom and practice in the industry has always been for one family member to make travel arrangements and reservations for the rest of the family. On those (typical) occasions where the family

includes children without the legal capacity to sign contracts, the family member purchasing the trip has always acted on behalf of themselves and other family members traveling with the group, including children, with the implied and/or express power and authority to do so.

ARTA and OSSN file this brief as friends of the court because a decision that parents and travel businesses cannot negotiate and agree to arbitrate or make similar agreements in those situations where the parents believe such agreements are in their families' best interests will cause serious harm. Among these harms, such a rule is likely to damage significantly the business of ARTA and OSSN members and other travel businesses. These businesses need to have the ability and flexibility to negotiate agreements to arbitrate and other similar contractual agreements where warranted and where desired by their customers. Prohibiting these agreements in the context of family travel, or in any contract involving children, will impact virtually all segments of the travel industry, and the traveling public by reducing choice, increasing prices and therefore reducing travel by families. Reduced travel will, of course, harm both families and the businesses which serve them.

SUMMARY OF ARGUMENT

The Court of Appeal erred in ignoring three central factors when deciding

that the arbitration agreement in this case was unenforceable on public policy grounds. First, the Court failed to consider the significant effects of its decision on the tourism industry and on all businesses that deal with minors. The tourism industry, Florida's largest, cannot but be severely damaged by a rule which prohibits or at least severely impedes the ability of families to go on vacations.

The Court similarly erred by ignoring completely the fundamental liberty interest and right of parents to direct and control the experiences and upbringing of their children. Instead, in direct contravention of the decisions of this Court and the U.S. Supreme Court, it substituted its judgment for the judgment of parents as to the best interests of a child. Such an approach is prohibited as a matter of law, both because the parental right to make these types of decisions is a fundamental, constitutionally guaranteed right, and because it is simply ludicrous to suppose that Courts are able to determine a child's best interests better than a parent.

Finally, the Court failed to give any weight to the state and federal policies of favoring arbitration. All of these factors weigh heavily in favor of arbitration and mandate enforcement of agreements such as the one at issue in this case.

Giving proper consideration to these factors, it is clear that public policy favors enforcement of the agreement to arbitrate.

ARGUMENT

There can be no doubt that the reasoning and methods of the Court of Appeal were flawed. Since its decision in this matter was based solely on its conclusion that prohibiting parents from agreeing to arbitration for children represents the best public policy, at a minimum the Court should have considered all of the costs and benefits to that choice and to each alternative. Thus, it should have asked not just whether the courts have an interest in this matter (the stated basis for its decision), but also whether the court's interest is greater than parents' interest in and ability to decide questions pertaining to the raising of their children. In so doing, it also should have considered the implications of its decision for fundamental parental rights.

Similarly, it should have considered the effect of its decision on the public interests implicated by this case; in particular the effects of its decision on the travel industry (explicitly covered by the decision) and other businesses that deal with minors and their parents (implicitly covered by the decision). Instead, the Court of Appeal ignored completely the effects of its decision on state businesses.

The Court of Appeal likewise ignored the strong state policy favoring arbitration and the state judgment that arbitration is an accepted and approved alternative to litigation. Had it considered these various interests, rather than focus exclusively on

the single factor of the state's interest in protecting children,[2] the Court would have determined that parental rights, not court interest, govern this matter, and that its decision in this case threatens severe harm to the state.

I. THE COURT OF APPEAL'S DECISION WILL CRIPPLE THE TOURISM AND TRAVEL INDUSTRIES AND WILL PREVENT CHILDREN FROM ENJOYING THE BENEFITS OF TRAVEL.

The Court gave no weight or consideration to the impact of its ruling on the travel and tourism industries, or on travel by families. This issue is of particular concern to ARTA and OSSN since their members, along with other companies involved in the travel and tourism industries, send millions of customers on trips and tours in the state of Florida every year. ARTA and OSSN believe that travel constitutes a highly valuable opportunity for childhood learning and for broadening the experiences and understanding of children.

For these and other reasons, state policy should encourage parents to travel with their children. Adoption of such a policy clearly supports state interests. Tourism is the state's largest industry. A state policy that harms this industry is one to be

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[2] Of course, the Court of Appeal's conclusion that the state interest in protecting children is best served by a rule prohibiting parents from making decisions for their children was itself incorrect since it presumes that the courts are better able than parents to determine and protect the interests of their children. Numerous courts have rejected that proposition. See Troxel v. Granville, 530 U.S. 57 (2000)

avoided. In addition, family travel offers valuable learning opportunities to children and should not be hampered by state policies which discourage travel to and within the state. As the Court of Appeal noted in its decision, the state of Florida has an interest in promoting the well-being of children. A policy supporting, not discouraging, family travel and other similar development opportunities for children will best promote that interest.

The policy announced by the Court of Appeal in this case will have precisely the opposite effect, chilling both travel opportunities for children and families. Travel agents, tour operators, and travel destinations need to have the opportunity and ability to negotiate, and families need the ability to agree to, agreements to arbitrate, forum selection clauses or similar provisions in those situations where such agreements are called for. For example, in order to be able to offer a variety of travel options at different prices and with varying services and amenities, travel companies should be able to offer and customers should be able to choose the option which best serves their family's needs: a trip priced to reflect the existence of an agreement to arbitrate, or one that excludes such an agreement and is priced accordingly. Under the Court of Appeal's decision, these choices will be foreclosed to families, and families unable to afford the more expensive trips mandated by the Court of Appeal will be unable to

travel at all.

Further impeding travel by families is that fact that under the rule announced by the Court of Appeal, travel-based businesses will be unable to enforce agreements to arbitrate and similar agreements signed by parents for their children, but will be able to enforce those agreements against adults. Such a rule creates a clear incentive to these businesses to cater only to adults, rather than to children and families. In addition, the Court's decision will encourage businesses that do continue to serve children and families to raise prices to compensate for increased litigation, higher costs of litigation, higher insurance costs, and increased uncertainty that will be created by the decision.

It is axiomatic that the higher prices for family vacations occasioned by all of the above factors will, in turn, result in less travel by families, and it may be expected that a reduction in travel will result in the failure of many travel-related businesses, including the many Florida entities which cater to families. This effect very likely will be magnified among travel agents, as many travel agencies already are struggling to remain in business and operate on very slim margins. Invalidating every agreement to arbitrate and forum selection clause agreed to by a parent on behalf of a minor therefore would have a substantial and devastating impact on travel agents, destinations

and other segments of the travel industry.

The impact of this decision will affect the behavior of tourism-related businesses both in and out of the state. Obviously, the state's businesses will be directly harmed for the reasons discussed above since their agreements will be per se invalid. Florida's tourism industry will be harmed further because travel agents in other states will have an incentive to send their customers to destinations where their agreements will be enforced, not to Florida. Similarly, since it may be expected that the cost of travel to Florida will rise, parents will have an incentive to plan vacations to other, relatively cheaper destinations.

II. PARENTS HAVE THE FUNDAMENTAL RIGHT TO DETERMINE THE BEST INTERESTS OF THEIR CHILDREN AND TO DECIDE WHEN IT IS IN A CHILD'S BEST INTEREST TO AGREE TO ARBITRATION OR OTHER CONTRACTUAL PROVISIONS.

In light of the profound impact on the tourism industry caused by ignoring the fundamental parental right to make the type of decisions usurped by the Court of Appeal, ARTA and OSSN are strongly interested in ensuring that the sanctity of these parental rights is maintained. There can be no question but that the Court of Appeal erred in failing to consider or give weight to, the fundamental parental interest in "the care, custody, and control of their children." See Troxel v. Granville, 530 U.S. 57 (2000) (holding that state laws must protect a parent's "fundamental constitutional

right to make decisions concerning the rearing of [his or her children]"). Both this Court and the United States Supreme Court repeatedly have stated that other interests, including the state's interest in protecting children is secondary to parental rights. In Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996), this Court held that parental decisions may be overruled by a court only where the court proves the existence of a compelling state interest by showing that it is acting "to prevent demonstrable harm to a child." Similarly, the U.S. Supreme Court stated in Troxel that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." 530 U.S. at 72-73.

The distnction the Court of Appeal and the Appellant apparently attempt to draw in this case is that the issue here does not relate to decision making by parents in the upbringing, experiences and education of their children, but only whether the parent can waive a right of the child, here the right to a jury trial instead of arbitration. This distinction is a false one. Without the ability to agree to arbitration, a forum selection clause, or similar provision, valuable experiences and opportunities may well be foreclosed to children. The Court in Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201 (Oh. 1998), recognized as much in enforcing a release signed by a parent

to allow a child to play in a youth soccer league. It did so because the activity offered to the child was a valuable one and because without an enforceable release, it was possible the activity would no longer be available. It recognized that refusing to enforce a contractual agreement that is a necessary condition to a child's participation in an activity is no different than prohibiting the child from participating in the activity in the first place.

Thus, while presented in terms of whether to enforce or allow a release or agreement to arbitrate, the real decision being made by the Court of Appeal was whether or not the experience or opportunity requiring the agreement to submit to arbitration was of sufficient value or import to the child to warrant the agreement. In this case, the Court concluded it was not, yet it found that it was likely other activities would be sufficiently important to all parents to waive a child's rights; for example "in cases of obtaining medical care or insurance or for participation in commonplace child oriented community or school supported activities." (4th DCA Decision, dated August 27, 2003).

But even in those situations where the Court of Appeal suggested it would allow parents to waive children's rights, its analysis was fatally flawed. Assuming, as the court does, that parents are incompetent to waive a child's jury right in some

situations, the Court of Appeal's approach does not and cannot explain why a parent suddenly becomes competent to decide whether a child should have cosmetic surgery, breast enlargement or reduction, a nose job or liposuction. Nor does it explain why a parent can approve a school field trip to a museum but cannot approve a family trip to a dude ranch. Indeed, one is hard pressed to understand why parental decisions to send the child to private school rather than public school or to allow the child to go to a theme park with his or her friends should not also require court approval.

Indeed, the obvious danger of the Court of Appeal's approach, and the reason its decision cannot be allowed to stand, is that once courts begin second guessing parents and deciding whether a given activity is sufficiently valuable or important to the child to warrant an agreement to arbitrate, or other waiver of rights by the child, there is no logical stopping point for the Court's intervention into family decision making. The Court of Appeal's decision here represents a clear statement that courts are better able than parents to determine the best interests of children not only in the case where the parent's interests are conflicted or where the parent is unfit in some way, but also in the context of everyday decision making.

Here the Court determined that family vacations are not sufficiently valuable to the development, education and experiences of children to allow these activities to go

forward if an agreement to arbitrate is involved. Yet there is no reason for the Court of Appeal to limit its decision making to just situations where an agreement to arbitrate is involved since, under the court's reasoning, it is best able to determine the needs of children. On the contrary, one would suppose that the court also should determine when and if a family vacation should be allowed at all, and what destinations are acceptable. Once it has usurped the parental role in this area, however, logically it also should do so in other areas, again on the grounds that it is acting to protect children and safeguard their best interests. Thus the courts, not parents, should decide not only where and if a family may take a child on a vacation, but also whether a child should take ballet lessons, what kind of clothes a child should wear to a party, and whether a teenager should be allowed to attend the school prom. Indeed, once we accept that courts know better than parents the needs of their children, there is absolutely no limit to what decision making a court should strip from parents and give to itself.

It hardly bears mentioning that such a role by the courts would be manifestly unconstitutional. "The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." Troxel, 530 U.S. at 72-73. Yet this

role is precisely the one assumed by the Court of Appeal in this case. Since the courts may not directly usurp the role of parents in daily decision making, so too they may not indirectly usurp that role under the guise of preventing parents from agreeing to arbitration or some other contract provision in order to "protect children."

III. THE STATE AND FEDERAL POLICIES FAVORING ARBITRATION SUPPORT ENFORCEMENT OF AGREEMENTS TO ARBITRATE SIGNED BY PARENTS.

As with the other factors relevant to this case, the Court of Appeal failed to give sufficient weight to the strong state and federal public policies in favor of arbitration. The Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("the FAA"), represents "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983).[3] Similarly, "[t]he Florida Arbitration Code is designed 'to encourage arbitration of disputes.'" K.P. Meiring Construction, Inc. v. Great American Ins. Co. v. Northbay I & E, Inc., 761 So. 2d

[3]The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. 201-208, also may apply to international travel agreements. The Convention requires that any written agreement to arbitrate in a commercial contract among citizens of signatory nations must be enforced. 9 U.S.C. 202. The Convention and its policies must be enforced broadly and over all prior inconsistent rules of law, as the highest law of the land. Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil Co., 767 F.2d 1140 (5th Cir. 1985); Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983).

1221 (Fla. 2d DCA 2000). These statements reflect clear public policy judgments by both federal and state legislators that arbitration agreements are fair and to be encouraged and that arbitration results in fair and equitable outcomes for those involved. Yet despite this preemptive federal and state policy decision to favor arbitration and the presumption of arbitrability which that policy creates, see Info Tech. & Eng'g Corp. v. Reno, 813 So. 2d 1053 (Fla. 4th DCA 2002), the Court of Appeal gave this state interest absolutely no weight. Instead, it dismissed the factor out of hand, stating that "the issue, here, is not one of scope, but of formation -- who may be bound by an agreement to arbitrate." (4th DCA Decision, dated August 27, 2003).

In so doing, the Court erred in two respects. First, the presumption of arbitrability applies not just to determinations of the scope of an agreement, but also to the question here: whether Mark Garrity Shea may be bound by an agreement to arbitrate. See MS Dealer Svc. Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999) (enforcing arbitration agreement against nonsignatory to agreement; "as a general rule, therefore, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability").

Second, even if the statutory presumption were not directly applicable, it was

still proper, and indeed virtually impossible not to, consider the strong state public policy to favor arbitration agreements in the course of determining whether the Court would, as a matter of public policy, enforce the agreement to arbitrate in this case. In failing to give this factor any weight, the Court of Appeal erred.

CONCLUSION

Both state interests and overriding parental rights mandate that parents be allowed to agree to arbitration for their child as a condition of participation in commercial travel. Failure to honor fundamental parental rights in this case not only effectively eviscerates those rights, but also threatens the state's vital tourism industry along with countless other facets of the Florida economy. Public policy favors the enforcement of the agreement to arbitrate in this case.

CERTIFICATES OF SERVICE AND COMPLIANCE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 21st day of November, 2003 to: All Counsel listed on attached list.

WE HEREBY CERTIFY that the foregoing brief was prepared in font New Times Roman, 14 Point.

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