IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC03-1704

GLOBAL TRAVEL
MARKETING, INC., etc.,

Petitioner,

-vs-

MARK R. SHEA, etc.,

Respondent.
_____/

BRIEF OF RESPONDENT ON THE MERITS

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PREFACE

This proceeding involves a petition to review a decision of the District Court of Appeal for the Fourth District, which certified a question of great public importance. The parties will be referred to by their proper names, or as they appeared in the trial court. The following designations will be used:

(A) - Shea's Appendix in the Fourth District (i.e., complete record)

(AA) - Shea's Appendix attached to Answer Brief (Fourth District Decision)

(IB) - Global Travel's Initial Brief

STATEMENT OF THE CASE AND FACTS

Mark R. Shea, as Personal Representative of the Estate of Mark Garrity Shea (hereafter "Garrit"), filed a complaint naming as a Defendant Global Travel Marketing, Inc. d/b/a The Africa Adventure Company and d/b/a International Adventures, Ltd. (hereafter Defendant or "Global Travel") (A1-5).[1] The Complaint alleged a claim for wrongful death pursuant to §768.16, Fla. Stat., et seq., and sought damages on behalf of Garrit's estate, Mark Shea, his surviving father, and Molly Bruce Jacobs (hereafter "Jacobs"), his surviving mother (A1-5). It is undisputed that at all times relevant to this lawsuit, Mark Shea and Molly Jacobs were divorced (A1-5).

The Complaint alleged that Jacobs purchased from Global Travel an African safari trip for approximately $39,000, for herself and Garrit only, who at that time was eleven years old (A1-5). The safari began on July 3, 2000, and was scheduled to end on July 28, 2000 (A1-5). The Complaint alleged that on or about July 19, 2000, in Botswana, Garrit was sleeping alone in a tent at the campsite when one or more hyenas entered his tent and dragged him away, subsequently mauling him to death (A1-5).

[1]/Mark Shea was appointed Personal Representative of Garrit's Estate by the State of Maryland, and a copy of the Letters of Administration is attached to the Complaint as Ex. A (A5).

The Complaint alleged that the Defendant, through its employees and agents, owed a duty to use reasonable care in, inter alia, arranging and operating the subject safari, and that they negligently, recklessly, and willfully breached that duty to the decedent by, inter alia, wrongfully permitting Garrit to sleep in a tent by himself on the outer perimeter of the campsite, and otherwise failing to ensure the campsite was maintained in a reasonably safe manner (A1-5). The Defendant's negligence included failing to ensure that the tents were resistant to tampering by animals, not using other animal resistant devices such as fences or barriers, and failing to monitor, supervise, and train its employees and agents to ensure that the safari was conducted in a reasonably safe manner (A1-5).

Plaintiff alleged that as a proximate result of the Defendant's negligent, reckless, and willful conduct, Garrit was killed (A1-5). The Plaintiff sought economic damages on behalf of the estate, and intangible damages on behalf of each of Garrit's survivors, his mother and father (A1-5).

Defendant responded to the Complaint by filing, inter alia, a Motion to Transfer the action to the Honorable Estella May Moriarty, who had presided over a prior action brought by Molly Jacobs, individually, against the Defendant, arising out of the same facts (A6-8). Judge Moriarty denied that motion, stating (A9):

> The motion to transfer is denied, the present cause of action being separate and distinct from the [Molly] Jacobs case.

Defendant also filed a Motion to Stay these proceedings pending arbitration or, in the alternative, to dismiss pursuant to the parties' agreement to arbitrate (A10-12). Attached to that motion was the affidavit of Mark Nolting, president of The Africa Adventure Company, which stated that the safari booked by Jacobs was not a standard "off-the-rack" safari routinely booked by tourists, but was a "high risk, high adventure trip," and that she specifically selected each element (A13-17).[2] His affidavit acknowledged that Garrit was "tragically killed by hyenas" while staying at a "mobile camp" during the safari (A13-17).

Attached to Nolting's affidavit was a copy of the contract for the safari, which was signed by Jacobs only on her own behalf (A19). Nolting's affidavit notes that Jacobs also signed a document entitled Release of Liability and Assumption of Risk (hereafter "Release/Arbitration Agreement") in which she agreed to "release, waive, indemnify, and agree not to sue The Africa Adventure Company," and expressly

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[2]/Nolting's affidavit consistently refers to "the Plaintiff and her son," even though the Plaintiff in the case sub judice was Mark R. Shea, and it is undisputed that he was not a signatory to any contract with the Defendant and did not participate in any aspect of the planning of the safari (A13-17). It appears that this affidavit may have been utilized in the action brought by Jacobs, individually, and that it was simply modified (incompletely) for use in this case.

assumed all risks of the safari (A18). Jacobs also signed that document under a sentence stating (A18):

> I, as parent or legal guardian of the below named minor, hereby give my permission for this child or legal ward to participate in the trip and further agree, individually and on behalf of my child or ward, to the terms of the above.

Garrit's name was written under that signature (A18).

The Release of Liability and Assumption of Risk document contained extensive language releasing and waiving any possible claims for, inter alia, negligence against the Defendant. It also contained a provision addressing arbitration, as follows (A18):

> Any controversy or claim arising out of or relating to this Agreement, or the making, performance or interpretation thereof, shall be settled by binding arbitration in Fort Lauderdale, FL, in accordance with the rules of the American Arbitration association then existing, and judgment on the arbitration award may be entered in any court having jurisdiction over the subject matter of the controversy.

A hearing was held before the Honorable Charles M. Greene on Defendant's motion (A56-80). At that hearing, Defendant argued that Garrit's mother had authority to bind him in the Release of Liability and Assumption of Risk document and, thereby, also to the arbitration provision contained therein (A57-63). Defendant argued that the estate "stood in the shoes" of Garrit and, therefore, was bound by the arbitration

provision, even with respect to the survival claim of Mark Shea, who was not a signatory to the release nor the safari contract (A63).

Plaintiff's counsel argued that a parent has no authority to contract or waive a child's rights without statutory authority or court approval and, therefore, the release and arbitration provision was not valid nor enforceable (A65-75). Plaintiff also argued that Jacobs did not have authority to agree to arbitrate her ex-husband's independent statutory survivor claim under the Florida Wrongful Death Act and, therefore, even assuming arguendo the enforceability of the arbitration provision, it could not be extended to Mark Shea's claim (A65-75). The trial court took the motion under advisement and permitted the parties to submit additional memoranda (A78-79). The parties did so (A81-100, 101-09, 110-16).

Defendant never argued below that Maryland law applied, nor did it present any evidence sufficient to warrant a conflict of law determination by the trial court.[3] In fact, the only evidence in the record consists of Mark Nolting's affidavit, which contains no facts relevant to a conflict of law analysis (A13-14). In fact, in its

[3]/While the complaint stated that the survivors and the decedent were residents of Maryland (A1), there is absolutely no evidence that the release/arbitration agreement at issue was executed in Maryland, nor that the parties ever considered that Maryland law would apply to it. The Defendant is a Florida corporation, and the forum selection clause in the release specified the arbitration to be in Ft. Lauderdale, Florida (A18).

numerous memos, Global Travel consistently relied upon Florida law as to the enforceability of the arbitration provision (A30, 82) and whether the estate and Mark Shea were bound by the release and arbitration provision (A113). The trial court's order, which Defendant drafted, also does not contain any reference to Maryland law (A117-25).

Subsequently, the trial court entered an order granting Defendant's motion and ruling that Jacobs had authority to execute, on Garrit's behalf, the release containing the arbitration provision, and that Mark Shea was bound by that arbitration provision because as Personal Representative "he stands in the shoes of the decedent" (A117-25). The Plaintiff appealed that ruling to the District Court of Appeal for the Fourth District.

The Fourth District reversed, but noted that this was a question of first impression in Florida (AA1-5). The court rejected Global Travel's assertion that Maryland law applied, noting that issue was raised for the first time on appeal (AA2). While recognizing that doubts as to the scope of an arbitration agreement are generally resolved in favor of arbitration, the Fourth District stated that the issue here was one of contract formation, not the scope of the agreement (AA2). The court relied upon Florida case law and statutes which severely restrict a parent's authority to contract away or waive a child's rights, and also prohibit a child from being bound by a

contractual release of claims (AA3). The court distinguished cases involving parents' contracts for medical care for their children, since they have the authority (if not the obligation) to enter such agreements (AA3). The court concluded (AA4-5):

> Here, we can discern no common sense reason to depart from the public policy favoring the protection of children from waiver of their basic rights by a parent.
>
> * * *
>
> Although we recognize that it is impractical for a parent to obtain a court order before entering into pre-injury contracts, we cannot accept the notion that parents may, carte blanche, waive the litigation rights of their children in the absence of circumstances supported by public policy. Circumstances in which a waiver would be supported by a recognized public policy include waivers in cases of obtaining medical care or insurance or for participation in commonplace child oriented community or school supported activities. We need not decide, here, what additional circumstances might support such a waiver; it is sufficient to state that commercial travel opportunities are not in that category.

Based on that conclusion, the Fourth District ruled that Garrit was not bound by the arbitration agreement, nor was his father as to his survivor claim (AA5).

Subsequently, the Fourth District amended its opinion by certifying the following as a question of great public importance (AA5):

> WHETHER A PARENT'S AGREEMENT IN A COMMERCIAL TRAVEL CONTRACT TO BINDING ARBITRATION ON BEHALF OF A MINOR CHILD

> WITH RESPECT TO PROSPECTIVE TORT CLAIMS ARISING IN THE COURSE OF SUCH TRAVEL IS ENFORCEABLE AS TO THE MINOR.

Response to Global Travel's Statement of Jurisdiction

Global Travel provides a lengthy "Statement of Jurisdiction" which overstates the significance of this case. This is due, in large measure, to its failure to focus on the actual question of great public importance which was certified by the Fourth District. That question is (AA5):

> WHETHER A PARENT'S AGREEMENT IN A COMMERCIAL TRAVEL CONTRACT TO BINDING ARBITRATION ON BEHALF OF A MINOR CHILD WITH RESPECT TO PROSPECTIVE TORT CLAIMS ARISING IN THE COURSE OF SUCH TRAVEL IS ENFORCEABLE AS TO THE MINOR.

The Fourth District's holding is also limited to commercial travel contracts and prospective tort claims arising therefrom. The court specifically declined to address situations involving community recreational activities and non-profit organizations (Slip Op. 4).

Nonetheless, the Defendant describes the issue to be decided by this Court as having a "deep impact to the fundamental rights of parents" as well as "the role of the

family."[4] Clearly, based on the limitation in the certified question and the Fourth District Opinion, that characterization is exaggerated. Additionally, the limitation to torts arising from commercial travel opportunities eliminates the "parade of horribles" argument that approval of the Fourth District's Opinion will result in the courts being inundated on a daily basis with requests to determine the best interests of children.

Defendant and the amici which support it also contend that Florida businesses are significantly affected, and suggests that many businesses will refuse to serve children or families, or will cease operating because of an inability to obtain insurance coverage. There is absolutely no empirical basis for those arguments, and on their face they strain credulity.[5] Furthermore, the supposed effect on businesses would be a matter for the legislature to consider; it is not a valid justification for the courts to ignore their duty to protect the interests of children. To accept Defendant's position

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[4]/As to the rights of parents and the family, it is important to note that the certified question addresses a "parent's" [i.e. singular] ability to bind a minor child to arbitration. In the case sub judice, the parents were divorced, and only one parent signed the Release/Arbitration Agreement for the "high risk" safari. The legislature has established, however, that "the mother and father jointly are natural guardians of their own children," §744.301(1), Fla. Stat.

[5]/It is also interesting to note that Defendant suggests that this Court should exercise jurisdiction because, otherwise, businesses (IB 8), "will not know if their releases and agreements to arbitrate are valid...." This is surprising, since Global Travel specifically argues that this Court cannot consider the validity of the release, but is limited solely to considering the arbitration provision (IB 16).

would constitute an abandonment of the long-standing doctrine of parens patriae by permitting one parent to unilaterally eliminate the authority of any court to protect the best interests of a child. That result cannot be justified under federal law, state law, public policy, or practical considerations.

SUMMARY OF ARGUMENT

The certified question should be answered "no" based on well-settled law which prevents minor's rights and property from being disposed of or waived without judicial oversight. To rule otherwise would permit parties to contractually eliminate the courts parens patriae role to protect children. This issue should not be influenced by the federal policy favoring arbitration, because the question involves the formation of the contract, not the interpretation of an arbitration provision. The determination whether a non-party is bound to a contract is governed by state law and common law principles, unaffected by federal policy considerations.

The common law, and Florida jurisprudence particularly, has severely restricted a parent's authority to waive or contractually limit substantive rights of their children. The parents' role as natural guardians does not grant them that right, and the Florida legislature has only deviated from that prohibition in very limited contexts. One area in which the legislature has maintained restrictions on parents' authority involves agreements to compromise claims of minors which, in most circumstances, require court approval. Here, the mother's execution of the Release/Arbitration Agreement not only attempted to relinquish prospective claims, but also to waive substantive rights such as the right to jury trial and the right to access to the courts. The latter is particularly significant, because the contract was essentially an attempt to divest the

courts of its parens patriae role, and to delegate the best interest of the child to contractual remedies. This is clearly prohibited by the common law, and the Florida Legislature has not authorized a deviation from those principles.

Contrary to Defendant's contention, the Fourth District's analysis did not implement a policy specifically disfavoring arbitration in violation of the Federal Arbitration Act. The principles upon which the Fourth District relied applied to contracts generally, i.e., parents' attempts to waive or dispose of their children's rights by contract. Furthermore, there is no interference with the fundamental rights of parents to raise their children. The Fourth District's decision only affects third parties' attempts to enforce contractual arbitration provisions against minors, where the underlying contract was signed by a single parent. There is no interference with any decision of a parent regarding the educational, social, or psychological welfare of the child. Therefore, the Fourth District's decision should be approved, and the certified question answered in the negative.

ARGUMENT

QUESTION PRESENTED

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

The Answer to the Certified Question Is Controlled by State Law

Whether analyzed under Florida law addressing arbitration or the Federal Arbitration Act, 9 U.S.C. §1 et seq. (hereafter "FAA"), the threshold determination is whether the parties to the lawsuit have entered into a valid arbitration agreement, Estate of Blanchard v. Central Park Lodges, Inc., 805 So.2d 6 (Fla. 2d DCA 2001); Fleetwood Enterprises, Inc. v. Gaskamp, 280 F.3d 1069 (5th Cir. 2002). This required the lower court to determine whether Garrit was bound by the Release/Arbitration Agreement executed by Jacobs. This issue is governed by state law, and its resolution is not to be influenced by the federal policy favoring arbitration.

The United States Supreme Court has stated that 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). This mandates that the determination of who is bound to such agreements be determined by generally applicable contract principles. In EEOC

v. Waffle House, 122 S.Ct. 754, 764 (2002), 534 U.S. 279, 151 L.Ed.2d 755, the Court stated:

> The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it "does not require parties to arbitrate when they have not agreed to do so." [Citations omitted.] Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 625, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement. Id., at 626, 105 S.Ct. 3346.
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> * * *
>
> It goes without saying that a contract cannot bind a nonparty. [Emphasis supplied.]
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> * * *

The Supreme Court also stated in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985 (1995), that the determination of who is bound to an arbitration provision is made based on "ordinary state-law principles that govern the formation of contracts." Since that issue is governed solely by ordinary state law contract principles, the federal policy favoring arbitration is irrelevant. This was clearly explained in Grunstad v. Ritt, 106 F.3d 201, 205, n.5 (7th Cir. 1997):

> [Appellee] Ritt makes passing reference to the policy embodied in the Federal Arbitration Act, 9 U.S.C. §§1-14, that where a contract contains an arbitration clause, "doubts should be resolved in favor of coverage." [Citations omitted.] However, this reference misconstrues the breadth of what has been called the "federal policy favoring arbitration." [Citations omitted.] As the First Circuit aptly observed in McCarthy v. Azure, 22 F.3d 351 (1st Cir. 1994), the federal policy favoring arbitration applies to issues concerning the *scope* of an arbitration agreement entered into consensually by contracting parties; it does not serve to extend the reach of an arbitration provision to parties who never agreed to arbitrate in the first place.

Other federal circuit courts agree with that analysis. McCarthy v. Azur, supra, 22 F.3d at 355; Daisy Manufacturing Co., Inc. v. NCR Corp., 29 F.3d 389, 392 (8th Cir. 1994); Fleetwood Enterprises v. Gaskamp, supra, 280 F.3d at 1074, n.5.

In the case sub judice, the trial court relied on Mitsubishi Motors v. Soler Chrysler-Plymouth, supra, for the proposition that the issue whether Jacobs could bind Garrit is governed by federal substantive law of arbitrability (A119). That is wrong, as a matter of law, because there was no issue in Mitsubishi regarding who was bound to the arbitration provision; the only issue was the scope of the arbitration provision, i.e., whether antitrust claims were arbitrable. As the United States Supreme Court made clear in First Options of Chicago, supra, and EEOC v. Waffle House, supra, the issue regarding who is bound to an arbitration agreement is determined under state law. Therefore, Mitsubishi, supra, does not support Defendant's position.

The authorities relied upon by the Defendant for the proposition that the federal policy favoring arbitration must affect the determination of whether a non-signatory is bound by an arbitration clause, do not survive scrutiny. First, all the cases cited in the first two paragraphs of Point IA of Global Travel's Initial Brief address the interpretation of the scope of a valid arbitration provision; not whether a non-signatory can be bound to the contract. The cases cited thereafter do not support Defendant's position either.

Global Travel cites Employers Ins. of Wausau v. Bright Metal Specialities, Inc., 251 F.3d 1316 (11th Cir. 2001). However, the court there stated that:

> Federal law establishes the enforceability of arbitration agreements, while state law governs the interpretation and formation of such agreements. [Citations omitted. Emphasis supplied.]

Furthermore, in determining whether the insurer in that case was bound to arbitrate, the Eleventh Circuit specifically analyzed the issue under "common law principles of contract and agency law," and specifically relied on state law to resolve it (251 F.3d at 1322-23).

Global Travel cites three state court decisions as applying the federal presumption in favor of arbitration to resolve the issue of whether a non-signatory was bound to arbitrate. However, none of those cases relied on federal law to determine

that issue. The opinions in Doyle v. Giuliucci, 401 P.2d 1 (Cal. 1965), and Leong v. Kaiser Foundation Hospitals, 788 P.2d 164 (Haw. 1990), did not cite any federal authority, but relied solely on state law. In Cross v. Carnes, 724 N.E.2d 828 (Oh.App. 1998), while the court cited federal authority regarding the arbitrability of the issue, when discussing the question of whether the mother had the authority to bind her daughter to arbitration, the court specifically stated "we will apply the law of the forum state, Ohio, in our discussion of this issue," 724 N.E.2d at 836. No federal authority was mentioned in its discussion on that question.

The final case cited by Global Travel for this proposition is MS Dealer Service Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999), in which the issue was whether a non-party to a contract could enforce an arbitration provision against a party who was a signatory to the agreement. There, after noting the policy favoring arbitration agreements, the court stated (177 F.3d at 947):

> Notwithstanding this strong federal policy, however, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (internal quotation marks omitted).

The court th ereafter determined that the party seeking to compel arbitration had standing to do so, because the opposing party was equitably estopped from rejecting

an applicable arbitration provision in an agreement she had indisputably signed. Thus, the court in MS Dealer applied a common law equitable concept to resolve the issue, not a federal statute or policy consideration.

In conclusion, case law is clear that federal policy favoring arbitration cannot be relied upon to skew the analysis of whether a non-party, in this case a child, is bound to an arbitration agreement. This determination is based solely on state law, which compels the conclusion that Molly Jacobs did not have authority to bind her minor son to the release which contained the arbitration provision at issue here.

Under Florida Law, Jacobs Had No Authority to Contractually Bind Garrit to Arbitration

The right of parental control over children, while fundamental, has always been "subject to the paramount right of the state as parens patriae"[6] to protect minors, Hancock v. Dupree, 129 So. 822, 823 (Fla. 1930). Parents' rights to the care,

[6]/Parens patriae means "parent of his or her country," and refers to the role of the state as sovereign and guardian of persons under legal disability, such as children, see Black's Law Dictionary (7 Ed. 1999) 1137.

custody, and companionship of their children are not absolute, but are subject to the overriding principle that the ultimate welfare or best interest of the child must prevail, In Re Interest of Camm, 294 So.2d 318, 320 (Fla. 1974). In Florida, minors are wards of the court and the circuit courts have the inherent authority and responsibility to protect their welfare. In Re Brock, 25 So.2d 659 (Fla. 1946); Phillips v. Nationwide Mutual Ins. Co., 347 So.2d 465 (Fla. 2d DCA 1977); Interest of Peterson, 364 So.2d 98 (Fla. 4th DCA 1978). This principle is not unique to Florida, but is commonly accepted throughout the United States, 42 Am.Jur.2d Infants §151 p.117:

> Historically, courts have possessed inherent and statutory authority to protect children, and minors are wards of the court with inherent power in the court to protect them. Thus, the courts have plenary jurisdiction over the persons and estates of infants which derives from the common law and is independent of any authority given by the legislature. Public policy dictates that courts should guard carefully the rights of infants, and that an infant should not be precluded from enforcing his or her rights unless clearly debarred from doing so by a statute or constitutional provision. [Emphasis supplied. Footnote deleted]

Parents, as natural guardians of their offspring, do not have the authority to contract away or waive their children's rights or property.[7] In McKinnon v. First

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[7]/Global Travel states that "it is well-settled in most contracts parents may contract on behalf of their children" (IB 19). That is clearly false, and the only Florida case cited in support of it is Phillips v. Nationwide Mutual Ins. Co., supra. In Phillips, the court held that while the next friend of a minor may conduct litigation on behalf of

(continued...)

National Bank of Pensacola, 82 So. 748, 750 (Fla. 1919), a father made deposits into savings accounts in the names of his four minor children. An issue arose regarding his right to dispose of that property. This Court stated (82 So. at 750):

> This case hinges upon the question whether the father at the time he made the deposits to the credit of his children intended them as free gifts as of the dates of the deposits. If so, the funds became the property of the infants, and he lost dominion over it and it passed completely out of his control as their natural guardian. This guardianship confers no right to intermeddle with the property of the infant, but is a mere personal right in the father or other ancestor to the custody of the person of his heir apparent or presumptive until attaining 21 years of age. [Citation and internal quotation marks omitted. Emphasis supplied.]

See also, Valentine v. Kelner, 452 So.2d 965 (Fla. 3d DCA 1984) (natural guardian must obtain court approval prior to expending assets of ward notwithstanding trust provision purporting to release natural guardian of legal duties).

This limitation on a parent's authority to control a child's property extends to dispositions of the child's rights. The general rule is that a guardian does not have authority to waive the rights of an infant, 42 Am.Jur.2d Infants §187, pp.146-47;

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[7](...continued)
the ward, a contingency fee contract entered into on behalf of the minor would only be binding if the trial court determined that it was reasonably necessary to employ an attorney, and that the contract was fair and reasonable. The court stressed that it had the inherent jurisdiction and right to protect minors and their property, and that authority included determining whether a contract on behalf of a minor was reasonable. Thus, that case hardly stands for the proposition that "in most contexts parents may contract on behalf of their children" (IB 19).

Childress v. Madison County, 777 S.W.2d 1 (Tenn. 1989); Fedor v. Mauwehu Council, Boy Scouts of America, 143 A.2d 466 (Conn.S.Ct. 1958). More particularly, the natural guardian has no authority to contract to compromise or settle a child's claim, or to waive substantive rights of the child without court approval, 59 Am.Jur.2d Parent and Child §40 p.183; see Romish v. Albo, 291 So.2d 24 (Fla. 3d DCA 1974) (neither a minor's attorney nor his father could waive his right to file a compulsory counterclaim, absent a court order).

More particularly, under the common law, a guardian ad litem or next friend, had no authority to bind his or her minor ward to arbitration, Millsaps v. Estes, 50 S.E. 227 (N.C. 1905) (and cases cited therein); see also, Fort v. Battle, 21 Miss. 133 (Miss.Err.App. 1849); Tucker v. Dabbs, 59 Tenn. 18 (Tenn. 1873). The rationale of those cases was twofold: First, that an agreement of an infant to submit to arbitration is voidable, as any other contract of an infant; and, second, that the court had the duty to protect the minor's interests, and should not permit that responsibility to be delegated to arbitrators, see Millsaps v. Estes, supra, 50 S.E. at 229.

The Florida Legislature has addressed the disability of non-age of minors, removing the contractual limitation, with parental participation, in specific contexts, see §743.01, Fla. Stat., et seq. For example, the legislature has authorized minors who have been married or divorced from entering into contracts, §743.01, Fla. Stat.;

permitted persons sixteen years of age and older to enter into contracts for borrowing money for higher educational expenses, §743.05, Fla. Stat.; and, of course, lowered the age of minority from 21 to 18 years, §743.07, Fla. Stat. Additionally, the legislature has established means by which contracts of minors relating to artistic or creative services, participation in professional or semi-professional athletics, endorsement of a product or service, and other similar subjects, can be approved by the probate division of the circuit court, §743.08, Fla. Stat.

The Florida Legislature has also granted natural guardians certain limited rights to contract on behalf of their children to resolve claims. For example, §744.301, Fla. Stat.[8] provides that the natural guardians are authorized to settle any claim or cause of action accruing to their minor child for damages when the amount does not exceed $5,000, without the necessity of court approval, §744.301(2), Fla. Stat. Any settlement in excess of $5,000 requires a court-appointed guardian, as well as a specific determination by the court that the settlement is in the best interest of the minor,

[8]/§744.301(1), Fla. Stat., provides that: "The mother and father jointly are natural guardians of their own children..." [Emphasis supplied.] Here, only Jacobs signed the release on behalf of Garrit.

§744.387(2), Fla. Stat.[9] A settlement agreement made in violation of these statutes is unenforceable, Infinity Ins. Co. v. Berges, 806 So.2d 504 (Fla. 2d DCA August 1, 2002), rev. granted., 826 So.2d 991 (Fla. 2002); even if all other parties to the agreement have performed it, Hernandez v. United Contractors Corp., 766 So.2d 1249 (Fla. 2d DCA 2000).

The authority granted in §744.301, Fla. Stat., is the only authority of the natural guardians to affect their children's property rights. In the case of In Re Estate of Fisher, 503 So.2d 962, 964 (Fla. 1st DCA 1987), the court stated:

> A "guardian of the property" is not the same as a "natural guardian." Except to the extent provided in Section 744.301, Florida Statutes, a natural guardian is entitled to the charge only of the person, not of the estate of the ward. [Citations omitted.]

That statute does not grant natural guardians any authority to execute releases, agree to arbitration, or otherwise compromise their children's rights regarding claims that have not accrued. Thus, only under very limited circumstances does a parent have the authority to contract away the substantive rights of a child.

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[9]/When the settlement amount exceeds $10,000, the court is authorized to appoint a guardian ad litem to represent the minor's interest and must do so if the settlement exceeds $25,000, §744.301(4)(a), Fla. Stat.

It is also clear that Garrit himself could not have executed a binding contract, even if he had signed the Release/Arbitration Agreement. In Dilallo v. Riding Safely, Inc., 687 So.2d 353 (Fla. 4th DCA 1997), the Fourth District held that a minor child who was injured by a defendant's negligence was not bound by her pre-injury contractual waiver of her right to file a lawsuit. The Fourth District cited with approval Byrne v. Simco Sales Service of Pennsylvania, Inc., 179 F.Supp. 569 (E.D.Pa. 1960), where the court noted that the state's policy of protecting minors by denying enforcement of their contracts was especially applicable where the minor had contracted away the right to recover damages (687 So.2d at 356-57). In Dilallo, the court stated that Florida has the same policy and that, since a contract executed by an infant is voidable (with the exception of contracts for necessities), the minor's act of filing the personal injury lawsuit rendered her contractual waiver to be unenforceable.

This principle has been applied in the context of arbitration provisions. In Wilkie v. Hoke, 609 F.Supp. 241 (W.D.N.C. 1985), the court held that an arbitration provision in a contract for medical services, executed by a minor, was voidable at the election of the minor. The court held that the agreement to arbitrate was not a necessity, as opposed to the contract for the abortion, and, therefore, the common law rule rendering minor's contracts voidable applied to it.

Here, Jacobs' attempt to bind Garrit to the Release/Arbitration Agreement constituted an invalid attempt to bind him contractually, and to waive his substantive rights. Even focusing solely on the arbitration provision, Jacobs was thereby attempting to waive Garrit's constitutional rights to a jury trial, as well as his constitutional right to access to courts provided by the Florida Constitution, Article I, §21. The latter right is particularly important here since, if the Release/Arbitration Agreement is deemed binding, Garrit will have been deprived of the parens patriae protection of the courts.

In Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, Inc., 753 So.2d 55 (Fla. 2000), this Court held that a state statute mandating that medical providers, as assignees of personal injury benefits, arbitrate disputes with insurance providers violated their constitutional right to access to courts. This Court stated that since any arbitration award in that context would only be reviewable pursuant to §682.20, Fla. Stat., which permits appeals in limited circumstances and grants a high degree of conclusiveness to the award, the medical providers' rights to access to courts was essentially eliminated. That is the same review mechanism that would apply to Garrit in the case sub judice. Therefore, Jacobs' attempt to bind Garrit to arbitrate any claims against the Defendant similarly violated his constitutional right to access to the courts. The authority to waive that constitutional right is not granted to a natural

guardian under common law, nor is it provided in §744.301, Fla. Stat., or any other statute.

It is well-established in Florida that parents cannot enter into contracts that attempt to preclude the court from exercising its inherent authority to protect minors. Florida courts have consistently held that parents have no authority to agree to compromise child custody or support issues without court approval, McKenna v. McKenna, 220 So.2d 433, 435 (Fla. 3d DCA 1969); Gammon v. Cobb, 335 So.2d 261, 266-67 (Fla. 1976). Florida's legislature has expressly recognized this limitation by its enactment of §44.104, Fla. Stat. That statute provides for the enforceability of voluntary binding arbitration agreements between parties in litigation, but specifically states that such arbitration shall not apply to child custody, visitation, or child support issues, §44.104(14), Fla. Stat.[10]

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[10]/In a different context, one court rejected a proposed investment plan for funds awarded to minor children arising from a wrongful death action, because the investment trust document provided that any disputes or claims would be settled by means of arbitration. The court found that provision objectionable, because:

> This deprives the Surrogate's Court of jurisdiction over litigation concerning the infants' funds. It serves to nullify the Court's ability to protect the assets and best interest of the children.

Estate of Mede, 677 N.Y.S.2d 707, 712 (N.Y.S.Ct. 1998).

Three principles preclude parents from contracting away child support obligation, and two of them apply with particular force under the circumstances of the case sub judice. First, child support is a right which belongs to the child, not the parents and, thus, cannot be compromised by the parents, see Gammon v. Cobb, supra, 335 So.2d at 266-67; Armour v. Allen, 377 So.2d 798 (Fla. 3d DCA 1979). That identical consideration applies here. The second is that the courts have the ultimate authority and duty to protect the child's interests, and parents cannot unilaterally deprive the court of that power.[11]

In Kelm v. Kelm, 749 N.E.2d 299 (Oh. 2001), the Supreme Court of Ohio held that matters of child custody and parental visitation are not subject to arbitration, because it would interfere with the court's obligation to protect minors under the doctrine of parens patriae. The court stated (749 N.E.2d at 303):

> The duty owed by the courts to children under the doctrine of parens patriae cannot be severed by agreement of the parties. It stands to reason that "[i]f parents cannot bind the court by an agreement affecting the interests of their children, they cannot bind the court by agreeing to let someone else, an arbitrator, make such a decision for them." Kovacs, 98 Md.App. at 300, 633 A.2d at 431. "As the representative of the State, the [court's] responsibility

[11]/The third principle is that a parent's duty to support the child is a non-delegable obligation imposed by the state and, therefore, cannot be avoided by contract.

> to ensure the best interests of the children supersedes that of the parents." Id. at 301, 633 A.2d at 431.

Similarly here, Garrit's mother and Global Travel cannot, by contract, deprive the court of its inherent authority to protect Garrit's substantive rights in matters of contract and in the resolution of his claims.

Clearly, a parent's right to contractually bind his or her child to arbitration must be restricted consistent with the limited authority granted to natural guardians, and subject to the court's inherent authority to protect minors. Since a natural guardian in Florida has no authority to compromise or waive the property rights of a child with respect to future claims, Jacobs had no authority to bind Garrit to release or arbitrate all potential claims against the Defendant, or to waive his constitutional rights to access to courts and a jury trial.

Defendant suggests that Garrit was a third party beneficiary to the contract and, therefore, can be bound to the arbitration provision. However, it is important to emphasize that the only contract that was signed on his behalf was the Release/Arbitration Agreement. Garrit was not a party to the travel contract, which was executed solely by, and on behalf of, his mother. Properly construed, he cannot be considered a third party beneficiary of the Release/Arbitration Agreement, since that contract did nothing but relinquish his rights, without providing him any benefit.

More importantly, this argument should fail on the rationale that a court should not permit something to happen by indirection, which is clearly prohibited if done directly. That is, the Court should not permit the waiver of a significant substantive rights of a minor without court evaluation and approval. Only two of the cases relied upon by the Defendant involve minors, and they are easily distinguishable. In Allgor v. Traveler's Ins. Co., 654 A.2d 1375 (N.J.App. 1995), a minor was injured in an automobile accident and sought to obtain benefits under his father's insurance policy. That policy provided for an arbitration proceeding, and the court held that since the minor was seeking benefits under the contract, he was bound to follow the procedures established therein, and could not have greater rights than the insured. Here, clearly Garrit's estate is not seeking a contractual benefit by bringing this wrongful death action.

Leong v. Keiser Foundation Hospitals, 788 P.2d 164 (Haw. 1990), involved arbitration under a group health policy, and those contracts are treated differently because a parent has authority to contract on behalf of a minor for necessities. Therefore, that case does not justify characterizing Garrit as a third party beneficiary of the Release/Arbitration Agreement.

The Fourth District's Decision Is Not Based on a State Policy Disfavoring Arbitration

Defendant also claims the Fourth District's decision does not comply with the Federal Arbitration Act, relying on United States Supreme Court decisions holding that only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening section two," Doctors Assoc., Inc. v. Casarotto, 517 U.S. 681 (1996), 116 S.Ct. 1652, 134 L.Ed.2d 902 (IB 25). Global Travel states that the Fourth District based its decision on "public policy specifically regarding agreements to arbitrate" (IB 25, emphasis in original). That contention is meritless. The issue in the case sub judice involves whether a valid contract was formed with Garitt, which is a threshold issue to enforcement of any contractual right. As noted previously, the United States Supreme Court and federal circuit courts clearly hold that issue is determined by state law, unaffected by federal policy considerations. Moreover, the decision below is not based on any state public policy relating particularly to arbitration.

Defendant's argument is predicated on the provision of the Federal Arbitration Act which states that an arbitration clause in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law

or in equity for the revocation of any contract," 9 U.S.C. §2. In Perry v. Thomas, 482 U.S. 483, 492, n.9 (1987), 107 S.Ct. 2520, 96 L.Ed.2d 426, the Supreme Court stated:

> [S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability and enforce ability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of §2].
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> * * *
>
> [O]ur observation in Perry, the text of §2 declares that state law may be applied "if that law arose to govern issues concerning the validity, revocability, and enforce ability of contracts generally."

See also, Southland Corp. v. Keating, 465 U.S. 1, 11 (1984), 104 S.Ct. 852, 79 L.Ed.2d 1. The Court clarified this analysis in Doctors Assoc. v. Casarotto, supra, 517 U.S. at 687, where the Court stated:

> Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions. [Citations omitted.] By enacting §2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed "upon the same footing as other contracts."

The Fourth District's decision did not violate §2 of the Federal Arbitration Act, nor the Supreme Court cases construing it. Clearly, the District Court's analysis was not based on any policy specifically directed at arbitration, since the court noted that

the issue of whether a parent could bind a child to arbitration was a matter of first impression in Florida (AA2). Additionally, the court's determination that Jacobs could not bind Garrit under these circumstances was based on long-settled principles of contract law that had been established in case law and by statute. This same policy has been applied to hold that a parent has no authority to bind a minor to a private agreement relating to child support or custody, Gammon v. Cobb, supra; that a parent had no authority to waive their child's right to file a compulsory counterclaim, see Romish v. Albo, supra; and that a natural guardian's right to bind a minor child to settlement contracts is extremely limited, see §744.301(1), Fla. Stat., and §744.387(2), Fla. Stat. Thus, there is no valid basis for claiming that the Fourth District's decision was based on a state policy specifically relating to arbitration.

The facts underlying the Supreme Court's decision in Doctors Assoc. v. Cassorato, supra, exemplifies the type of state court decision which is barred by 9 U.S.C. §2. In that case, there was a Montana statute that declared any arbitration clause unenforceable, unless a notice was typed in capital letters, and underlined, on the first page of the contract, stating that it was subject to arbitration. Consistent with the rationale discussed above, the Supreme Court held that statutory requirement, which specifically addressed contracts subject to arbitration, conflicted with the Federal Arbitration Act and, therefore, was preempted by federal law. Clearly, that is

not the case here; the Fourth District applied generally applicable principles limiting the authority of a parent to contractually bind or waive rights of his or her child. Even assuming arguendo that federal policy was relevant to the Fourth District's decision whether Garrit, a non-party to the contract, was bound, clearly the court's decision did not violate 9 U.S.C. §2.

The Fundamental Rights of the Parents Do Not Justify Enforcement of the Arbitration Agreement

Defendant contends that the Fourth District's holding violates the fundamental rights of parents to control the upbringing of their children. However, properly viewed in context, the Fourth District's decision did not address any aspect of child rearing, nor does it have any impact on the family unit. The opinion only addresses the ability of a single parent to contractually waive substantive rights of a child, which does not affect the privacy or sanctity of the family in any respect. Its only affect is upon third parties' ability to enforce arbitration provisions against children in the context of commercial travel. Defendant's attempt to inject the fundamental rights of parents into this case is based on the unsupported assumption that, without arbitration provisions, commercial travel opportunities for families with children will disappear. There is

absolutely no factual basis in this record for that premise, and the self-serving assertions of the amici are similarly unsupported. As a result, Defendant's contention that the Fourth District's decision (IB 36), "paves the way for the state to reverse a parent's judgment on everything from whether a child should receive braces...to whether the child can go to a theme park with his or her friends" is simply hyperbole.

Nonetheless, in an abundance of caution, Plaintiff will address the authorities relied upon by Defendant in this section of its brief to demonstrate that they do not justify deviation from the Fourth District's analysis. The decisions of the United States Supreme Court relied upon by the Defendant are either inapposite or weigh heavily against its position. In Troxel v. Granville, 530 U.S. 57 (2000), 120 S.Ct. 2054, 147 L.Ed.2d 49, the Court addressed whether a state could compel parents to permit grandparents to visit their children. That issue was also addressed in this Court's decision in Von Eiff v. Azicri, 720 So.2d 510 (Fla. 1998). Those cases involved the fundamental rights of parents to raise their children, not whether parents are authorized to contract away or waive substantive rights of a child. The Fourth District's decision does not have any influence on a parent's choice regarding social contact, or any interaction with the child; it only affects the disposition of contractual and substantive rights of the child.

Defendant overstates the holding in Parham v. J.R., 442 U.S. 584 (1978), 99 S.Ct. 2493, 61 L.Ed.2d 101, by stating that it upheld the constitutionality of procedures allowing parents to involuntarily commit a child to a psychiatric institution against the child's wishes. In fact, that opinion addresses limitations on the parent's right to do so, specifically noting that it was not unbridled, but was subject to the physician's independent examination and medical judgment. Additionally, there was a requirement for some inquiry by a neutral fact finder prior to permitting the commitment. Thus, that case does not justify a court's abandonment of its traditional parens patriae role of protecting the legal interest of children.

In Pierce v. Society of Sisters, 268 U.S. 510 (1925), 45 S.Ct. 571, 69 L.Ed. 1070, the Court simply struck down a state law that prohibited parents from choosing private education over public schooling for their children. Of course, a parent's fundamental right to raise his or her child is not unlimited in that context, as the state is entitled to require certain education for children. However, again, the considerations which affect that analysis do not relate to the limitation on the parent's right to contract away or waive substantive rights of a child.

Defendant cites Prince v. Massachusetts, 321 U.S. 158 (1944), 64 S.Ct. 438, 88 L.Ed. 645, which is a singularly unpersuasive case for its position. In Prince, an aunt had her niece (over whom she had legal custody) distributing newspapers

published by the Jehovah's Witnesses. This violated a state statute prohibiting children from engaging in such conduct. The aunt defended by asserting her constitutional right to freedom of religion and the fundamental rights of parents. The United States Supreme Court rejected that reliance, and specifically noted that neither the fundamental rights of parents nor their freedom of religion could prevail over the state's interest in protecting children under the parens patriae doctrine. When one compares the factual context of Prince to the case sub judice, it is clear that the fundamental rights of parents could not support this arbitration provision. One needs only compare the difference between having a child distribute newspapers in a public place with sending an 11-year-old child on a "high risk" safari to reach that conclusion.

Prior to addressing the state court opinions relied upon by Defendant, an additional point should be made regarding the fundamental rights of parents. This case does not involve a situation where both parents executed an agreement for a child which would justify balancing their joint interests against other considerations. This is a case in which the parents were divorced and the mother alone signed the agreement. Moreover, the mother wished to go on the "high risk" safari and, thus, there exists the possibility of a conflict of interest to the extent that she had to release her child's future claims, and bind him to arbitration, in order to effectuate her own

desires.[12] Even the cases relied upon by the Defendant note that a potential conflict alters the analysis,[13] see Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201, 206 (Oh. 1998); Sharon v. City of Newton, 769 N.E.2d 738, 747, n.10 (Mass. 2002). However, none of the cases relied upon by the Defendant actually involved that situation. Additionally, the Fourth District distinguished the types of cases upon which Defendant relies, and specifically limited its holding, and the certified question, to commercial travel situations, which none of Defendant's cases address.

Defendant relies on a line of California cases holding that an arbitration provision contained in a group medical insurance policy obtained by a parent could bind a child for disputes arising therefrom, Doyle v. Giuliucci, supra; Pietrelli v. Peacock, 16 Cal.Rptr.2d 688 (Cal. 1st App. Dist. 1993). Those cases bear no application here, because they are premised on a parent's obligation to provide the necessities for their

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[12]/Defendant states that Garrit became "enthralled with Africa" and had been on a previous safari (IB 39). There is absolutely no record basis for those assertions and, even assuming arguendo their truth, the desires of an eleven year old boy cannot control the appropriate legal analysis.

[13]/Defendant also contends that because Jacobs is an attorney, there is "no question" that her waiver of Garrit's rights was "intelligent and knowing" (IB 33). As an attorney, the undersigned is predisposed to accept that contention, but cannot do so. Attorneys can be just as selfish, myopic, and foolish as any other person (maybe more so). It is those very human qualities which require that, at least as to legal matters, the Court's parens patriae role must be paramount.

children, and involve different policy considerations. Florida recognizes that parents are required to provide and authorized to contract for necessary medical services for their children, see §39.01(45), Fla. Stat.; Variety Childrens 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); §827.03(3)(a)1, Fla. Stat. Additionally, even though a contract executed by an infant is voidable (Dilallo v. Riding Safely, Inc., supra), a minor's contract for necessities is enforceable, see Lee v. Thompson, 168 So. 848, 850 (Fla. 1936). Clearly, a contract for a "high risk" safari cannot be reasonably classified as a contract for necessities.

The California courts recognize that their holdings on this issue relate solely to situations in which parents have contracted to provide for health services for their minors, as noted in County of Contra Costa v. Kaiser Foundation Health Plan, Inc., 54 Cal.Rptr.2d 628, 632 (Cal.App. 1st Dist. 1996):

> All nonsignatory arbitration cases are grounded in the authority of the signatory to contract for medical services on behalf of a nonsignatory - - to bind the nonsignatory in some manner.

In fact, in the seminal California case on this issue, its Supreme Court noted that it was addressing the issue in a limited context and was not intending to address the power

of parents to bind minors to arbitration in other contexts, see Doyle, supra, 401 P.2d at 2, n.1.[14]

Defendant relies heavily on Sharon v. City of Newton, supra, which involved execution of a release by parents and a child relating to the child's participation in cheerleading. That case and Hohe v. San Diego Unified School District, 224 Cal.App.3d 1559 (1990), involved recreational or educational activities which were specifically distinguished in the Fourth District's decision, and are not within the scope of the certified question. The considerations involving commercial travel activities, such as an admittedly "high risk" safari, in which the one parent who signed the release/arbitration agreement wished to participate, are far removed from those discussed in Sharon and Hohe.

Defendant also relies on Cross v. Carnes, 724 N.E.2d 828 (Ohio App. 1998). The court ruled there, as a matter of first impression in Ohio, that a parent had authority to consent to arbitration on behalf of her child relating to a release executed pursuant to the child's appearance on the Sally Jesse Raphael television show. The only arbitration cases relied on in Cross are Doyle, supra, and Leong, supra, which

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[14]/Defendant also cites Leong v. Kaiser Foundation Hospitals, supra, which also arose out of a group health insurance policy providing coverage for the minor, and specifically relied on the California cases discussed above.

involved group health insurance policies. Moreover, the rationale of the Ohio court was summarized as follows (724 N.E.2d 828, 836):

> Logically, if a parent has the authority to bring and conduct a lawsuit on behalf of the child, he or she has the same authority to choose arbitration as the litigation form.

No citation was provided for that statement, and clearly it is not the law in Florida. As noted previously, in Florida a parent does not have the right to waive or compromise a child's rights in litigation, without court approval, save in the limited situation noted in §744.301, Fla. Stat., see Romish v. Albo, supra. Thus, the rationale of Cross cannot apply in Florida.

Additionally, the court in Cross relied heavily on the decision of its Supreme Court in Zivich v. Mentor Soccer Club, Inc., supra, which held that a parent had the authority to bind his or her minor child to a release/exculpatory clause regarding potential negligence claims. That case is aberrational, since the "clear majority" of jurisdictions in the United States hold that a parent may not release a minor's prospective claim for negligence, see Hawkins v. Peart, 37 P.3d 1062, 1065 (Utah 2001) (and cases cited therein), see also, 59 Am.Jur.2d Parent and Child §40 at 183 (1987); 67A C.J.S. Parent and Child §114 at 469 (1978). The majority view is consistent with Florida law and supports the conclusion that Jacobs' execution of the Release/Arbitration Agreement on Garrit's behalf was invalid.

In Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992), the court held that a parent's execution of a waiver of their child's future claims for personal injuries against a ski school was unenforceable. After noting the majority view that a parent's execution of a release on behalf of their child for an existing claim is unenforceable, the court concluded that the same must apply to future claims, stating (834 P.2d at 494):

> Since a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has the authority to release a child's cause of action prior to an injury. 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.

Other courts have reached the same conclusion under that rationale, e.g. Cooper v. Aspen Skiing Co., 48 P.3d 1229, 1231 (Colo. 2002); Meyer v. Naperville Manner, Inc., 634 N.E.2d 411 (Ill.App. 1994).

In Munoz v. II Jaz, Inc., 863 S.W.2d 207 (Tex.App. 1993), the court held that it was against public policy to permit a parent to waive a child's cause of action for personal injuries, even though there was a state statute which empowered a parent to make "decisions of substantial legal significance" concerning their children. The court based its conclusion on its Supreme Court's recognition of the "strong, long-standing

policy of this state to protect the interests of its children," 863 S.W.2d at 210, citing Williams v. Patton, 821 S.W.2d 141, 145 (Tex. 1991). That same policy exists in Florida, see Phillips, supra.

CONCLUSION

In summary, the certified question should be answered in the negative, because otherwise the Court would be abandoning its parens patriae role to protect children. The common law and the Florida Legislature have long recognized strict limitations on parents' rights to bind their children to contracts or to waive their rights. The Defendant's arguments do not overcome those well-established principles, and its attempt to invoke the fundamental rights of parents is without any valid basis. Therefore, the certified question should be answered in the negative and the Fourth District's Opinion should be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to RODNEY E. GOULD, ESQ., P.O. Box 786, Framingham, MA 01701; EDWARD S. POLK, ESQ., 3440 Hollywood Blvd., 2nd FL, Hollywood, FL 33121; ROBERT M. STOLER, ESQ., 501 E. Kennedy Blvd., Ste. 1700, Tampa, FL 33602; LOUISE McMURRAY, ESQ., 19 W. Flagler St., Ste. 520, Miami, FL 33130; STEVE GOLDSMITH, ESQ., 5355 Town Center Rd., Ste. 801, Boca Raton, FL 33486; MICHELLE HANKEY, ESQ., Legal Aid Society, 423 Fern Street, Ste. 200, West Palm Beach, FL 33401, by mail, on January 15, 2004.

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Respondent hereby certifies that the type size and style of the Brief of Petitioner on the Merits is Times New Roman 14pt.

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