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.,

Petitioner,

vs.

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

Respondent.
_____/

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

REPLY BRIEF OF PETITIONER GLOBAL TRAVEL MARKETING, INC.

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I. INTRODUCTION

There exists an established framework for determining whether a case is arbitrable under the Federal Arbitration Act (the "FAA"). Two distinct inquiries must be made. First, a court must determine whether the person against whom arbitration is sought may be considered a party to the agreement to arbitrate based on general contract and agency principles. See E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187, 194 (3d Cir. 2001). If so, a court next asks whether there are reasons to refuse to enforce the agreement to arbitrate based upon generally applicable contract law principles. See Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681 (1996).

Rather than follow this approach, Respondent ("Shea") conflates the two steps. Though presented as falling under step one of the FAA analysis, Shea's arguments are purely putative policy reasons for refusing to enforce the agreement under step two, and therefore are wholly subservient to the FAA's policy favoring arbitration agreements and its preemption of contrary state laws. See Doctor's Assocs., 517 U.S. at 681. In fact, Mark Garrity Shea ("Garrit") agreed to arbitrate, and the FAA preempts the Respondent's asserted public policy reasons for declining to enforce that agreement.

II. GARRIT WAS A PARTY TO THE AGREEMENT TO ARBITRATE.

Garrit was a party to the agreement to arbitrate under general contract and agency principles because he was a third-party beneficiary of the contract and because parents may enter into contracts for their children.[1]

A. GARRIT WAS BOUND AS A THIRD-PARTY BENEFICIARY.

Shea argues that Garrit was not a third-party beneficiary because he was not a party to the travel contract[2] and because the agreement containing the arbitration provision "did nothing but relinquish his rights, without providing him any benefit." (Respondent's Brief, p. 30). There is no basis for either assertion. Garrit was an intended third-party beneficiary of the "travel contract" as a whole since he was one of the two people participating in the safari that was the subject of the contract. The contract was formed and services were provided by Africa

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[1]Pursuant to the FAA, in deciding this question, doubts should be resolved in favor of finding the person or entity was a party to the agreement to arbitrate. See e.g., McBro Planning & Dev. Co. v. Elec. Constr. Co., Inc., 741 F.2d 342 (11th Cir. 1984)(binding nonsignatory); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993) (same).

[2]Shea distinguishes the "travel contract," by which he apparently means the agreement that Africa Adventure would arrange and book a safari for Molly Bruce Jacobs ("Jacobs") and her son, Garrit, and the Release of Liability/Agreement to Arbitrate. No such distinction exists. Both documents were signed by Jacobs at the same time, were for her and Garrit's participation in the safari, and are part of the same agreement. The Release was an integral part of the "travel contract" as a whole because execution of that document was a requirement for Garrit's participation in the safari.

Adventure for the specific and intended purpose of benefitting Garrit and Jacobs.

It is equally inaccurate to say that the arbitration agreement did not benefit Garrit. His participation in the safari was conditioned on his agreeing, through Jacobs,[3] to the terms and conditions set forth in the agreement. Thus, he received adequate consideration for agreeing to arbitrate his claims.

In fact, there is no question but that Garrit was an intended third-party beneficiary of the contract (if he was not, via his mother, an actual party to the contract). A person is an intended third-party beneficiary of a contract "if the parties express, or the contract clearly expresses, the intention to primarily and directly benefit the third party." Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corporation, 850 So. 2d 536, 544 (Fla. 5th DCA 2003). A third-party beneficiary is bound to the contract's terms, including arbitration provisions. See Zac

[3] Shea notes that Jacobs signed the Release, while he did not, suggesting that it is invalid because "the legislature has established that 'the mother and father jointly are natural guardians of their own children.'" (Respondent's Brief, n.4, citing Fla. Stat. § 744.301(1)). While Shea does not quote it, § 744.301(1) also provides that if, as here, the parents are divorced, "the natural guardianship shall belong to the parent to whom the custody of the child is awarded." The record in this case does not reflect whether Jacobs alone had custody of Garrit, or whether custody was joint, although it appears that, in fact, Jacobs had custody. In any event, this argument is raised here for the first time and therefore has been waived.

Smith & Co., Inc. v. Moonspinner Condominium Assoc., Inc., 472 So. 2d 1324 (Fla. 1st DCA 1985). Here, Garrit was specifically named in the agreement to arbitrate signed by his mother as part of the contract. He was an express beneficiary of the contract as one of the two participants in the trip, he was specifically named as one of the trip participants, and he was identified in trip documents and tickets. As a result, in asserting that Africa Adventure failed to provide and/or negligently provided a contractually owed duty, Garrit is bound by the arbitration agreement as a third-party beneficiary.

Case law specifically recognizes that parents may bind their children as third-party beneficiaries, see e.g., Allgor v. Traveler's Ins. Co., 654 A.2d 1375 (N.J. Super. Ct. App. Div. 1995);[4] Leong v. Keiser Foundation Hospitals, 788 P.2d 164 (Haw. 1990),[5] and numerous cases hold that parents or family members

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[4]Shea attempts to distinguish Allgor, in which a minor sought benefits under a parent's insurance policy, on the grounds that the minor was seeking benefits under the contract. This fact does not distinguish Allgor since here Garrit received the benefits of the contract by participating in the safari and the claims against Africa Adventure are based on duties that exist, if at all, solely as a result of the contractual relationship (i.e., arranging the safari) between the parties.

[5]Shea distinguishes Leong on the grounds that it involves a contract for a necessity, which he asserts is treated differently from other contracts made by parents. He cites no authority for this proposition, which the Massachusetts Supreme Judicial Court rejected in Sharon v. City of Newton, 769 N.E.2d 738, 746 (Mass. 2002). Similarly, in Cross v. Carnes, 724 N.E.2d 828 (Ohio Ct. App. 1998), involving

can bind other family members in the context of these types of agreements. See e.g., Fischer v. Rivest, 2002 Conn. Super. LEXIS 2778 (Conn. Super. Ct. Aug. 15, 2002) (release signed by father as part of child's participation in hockey league enforced against minor); Premier Cruise Lines, Ltd. v. Superior Court, 1997 AMC 2797, 2809 (Cal. Ct. App. 1996) (enforcing forum selection clause against minor). Thus, it is clear Garrit may be bound as a third- party beneficiary.

B. PARENTS MAY CONTRACT ON BEHALF OF THEIR CHILDREN.

Garrit was a party to the agreement to arbitrate because parents are empowered to agree to such contracts on behalf of their children as a matter of established law. The Court in Sharon, *supra*, recognized that parents have a fundamental right to decide the care, custody and upbringing of their children, and that these fundamental rights allow parents to agree to a release and are consistent with the longstanding rule that parents may enter into contracts on behalf of their children. Sharon, 769 N.E.2d at 73 (citing Parham v. J.R., 442 U.S. 584, 602 (1879)); Parham, 442 U.S. at 602 ("the law's concept of family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's

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participation on a TV show, the court held that a parent could agree to arbitrate a child's tort claims.

difficult decisions"); 1 W. Blackstone Commentaries 452 (9th ed. 1783) (minor's consent to marriage void unless accompanied by parental consent; one of many means by which parents can protect children "from the snares of artful and designing persons").

The law in Florida, Maryland and under the U.S. Constitution is the same. See Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998) (recognizing fundamental parental rights that may be abrogated only where state has a compelling interest); Boswell v. Boswell, 721 A.2d 662, 668-69 (Md. 1998) ("A parent has a fundamental right to the care and custody of his or her child . . . . In accordance with the Supreme Court, Maryland has declared that a parent's interest in raising a child is a fundamental right that cannot be taken away unless clearly justified").[6]

Shea, however, argues that parents generally may not enter into contracts for the benefit of their children because the

[6]It is not at all clear why Florida's interests are relevant to this case. The plaintiff resides in Maryland, Garrit and Jacobs were both Maryland residents at all relevant times, and the Estate is being administered in Maryland. Thus Maryland, not Florida, has an interest in seeing its policies enforced. Despite this, the District Court found that Florida law would apply and that Africa Adventure had waived the choice of law issue. This finding was incorrect since Africa Adventure has argued throughout that federal law applies, and that state law is relevant and should only be considered under the auspices of the FAA. No choice of law analysis was required before the trial court because the *parens patriae* issue that makes choice of law relevant was not raised by the Respondent or briefed by the parties until the matter was before the District Court.

state acts as *parens patriae*. He insists that parental rights are secondary to the state's right to protect children, and that "the ultimate or best interests of the child must prevail."[7] (Respondent's Brief, p. 20) This position fundamentally misconstrues the *parens patriae* concept. Simply arguing that the best interests of the child must prevail does not, of course, answer the more important question of who should decide what is in the best interests of a child. Shea asserts that, generally, the state and the courts should decide this question and parents may make decisions affecting the rights and interests of their children only where expressly allowed by the courts and legislature.[8] Common sense suggests this interpretation does

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[7]This Court has expressly rejected reliance on a "best interests" rationale to justify state intervention in parental decisionmaking. In Von Eiff, this Court stated:

> [t]here is an inherent problem with utilizing a best interest analysis as the basis for government interference in the private lives of a family . . . it permits the State to substitute its own views regarding how a child should be raised for those of the parent . . . stripping [parents] of their right to control in parenting decisions.

Id. at 516.

[8]Shea and the District Court distinguish Sharon, *supra*, Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201 (Ohio 1998), Doyle v. Giuliucci, 401 P.2d 1 (Cal. 1965), and similar cases enforcing agreements signed by parents on this ground because those cases involved school activities, community programs, medical treatment or something other than commercial travel. They argue that those facts are somehow different from this case and constitute "common sense" "exceptions" to the general rule that parents cannot contract for their

not remotely reflect the law in this country since parents, not the courts, make the vast majority of all decisions on behalf of their children.[9]

Moreover, this view of the *parens patriae* doctrine provides no rationale to limit or constrain the state's power to supplant the role of parents and cannot be reconciled with the numerous decisions recognizing the fundamental role of parents in raising their children. If, as Shea argues, the state bears primary responsibility for protecting the best interests of children and those interests "must prevail," it follows that the state can and should make all decisions on behalf of children, not just

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children. Shea v. Global Travel Marketing, Inc., 2003 WL 22014590 (Fla. 4th DCA 2003). This reasoning is flawed. As we argue in our initial brief (pp. 42-43), there is no reasonable basis for distinguishing between arbitration agreements signed for commercial travel, such as a safari, and for a school field trip to the zoo or a high school trip to Spain. In addition, it is incorrect to characterize these cases as exceptions to the court's power as *parens patriae*. As discussed at pp. 9-16, *infra*, *parens patriae* power may be exercised to supplant the rights of parents only when a compelling state interest exists, not vice versa.

[9]Shea skirts this obvious flaw in his theory by arguing that this case does not implicate the fundamental rights of parents to direct the upbringing of their children, and that decisions concerning upbringing and the waiver of children's rights are entirely separate and distinct matters. There is no basis for such an argument. Obviously, if parents cannot make decisions which implicate any right of their children, the range of experiences and opportunities that parents will be entitled to expose their children to will be greatly limited. Inevitably, decisions affecting a child's upbringing and his or her "rights" are intertwined. See our initial brief beginning at page 35.

decisions whether to agree to arbitration or relating to substantive rights, and that parents may take virtually no action for their children without court approval. If Shea is correct, the power of the state in this area is almost unlimited.

C. THE STATE MAY INTERVENE ONLY WHERE THERE IS A COMPELLING NEED TO DO SO BECAUSE OF A SERIOUS RISK THAT PARENTS MAY BE UNABLE TO ACT IN THE BEST INTERESTS OF THEIR CHILDREN.

In fact, even broad, much less unlimited, state interference in child rearing is not the law. Case law recognizes that parents typically are better equipped than the state to make decisions about what is best for their children. See Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996). The state may intervene in this role only where there is a compelling need to do so occasioned by a serious risk that parents will not or may be unable to act in the best interests of their children. See Von Eiff, 720 So. 2d at 516.

None of the cases cited by Shea hold that courts can simply declare that parents may no longer make certain decisions for their children, such as the type of family vacation to enjoy, because the state acts as *parens patriae*. Rather, all of his cases reflect the fact that the state may supplant parental decision making in a particular area pursuant to its authority as

parens patriae only where compelling grounds exist to set aside the fundamental rights of parents. Indeed, these areas are clearly defined and sharply limited –- the plundering of a child's assets, the compromise and resolution of a minor's pending litigation, and custody and other domestic relations issues.

McKinnon v. First National Bank of Pensacola, 82 So. 748 (Fla. 1919), for example, dealt with a parent's right to dispose of property (money in a savings account) belonging to a child. The Court intervened on behalf of the child because the state has a valid interest in seeing that parents do not steal their children's assets.[10] Obviously, where a potential, meaningful conflict exists between the self-interest of a parent and the interests of a child, the courts may supplant parental rights.[11]

McKenna v. McKenna, 220 So. 2d 433 (Fla. 3d DCA 1969), Gammon v. Cobb, 335 So. 2d 261 (Fla. 1976), and Armour v. Allen,

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[10]Valentine v. Kelner, 452 So. 2d 965 (Fla. 3d DCA 1984), also cited by Shea, involved the same policy considerations.

[11]Shea and his amicus curiae speculate that a conflict of interest exists in this case because Jacobs might have agreed to arbitration for her son just so she could go on the safari. Imagined conflict with no basis in reality cannot justify court intervention in parental decision making. Had Jacobs, as Shea theorizes, been solely interested in going on a safari herself, she could have gone without her son and saved herself thousands of dollars. Signing the Release and agreement to arbitrate on his behalf did nothing to further her own interests.

377 So. 2d 798 (Fla. 3d DCA 1979) are consistent with this understanding. These cases prohibit the compromise of child custody and support issues in the context of divorce proceedings without court approval and follow from a clear public policy concern that parents involved in a divorce and consumed with the pressures inherent in such a proceeding face a conflict of interest and may give insufficient consideration to the best interests of their children.[12]

Fla. Stat. § 744.301, requiring court approval of any settlement over $15,000, and Romish v. Albo, 291 So. 2d 24 (Fla. 3d DCA 1974), wherein the Court held that a parent could not waive the filing of a compulsory counterclaim without a court order, similarly are based on the universal practice of the courts in overseeing substantive aspects of a minor's lawsuit after that lawsuit is properly in court. They are based on the policy concern that in conducting and settling litigation on behalf of a child, parents may face financial pressures and conflicts that could cause them to elevate their own needs over those of their children.

These same conflicts do not exist in the context of a pre-injury release, as was recognized in Sharon:

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[12]This same concern explains the legislature's enactment of Fla. Stat. § 744.104(14), which prohibits parties in divorce litigation from arbitrating child custody, visitation and child support issues.

> Our conclusion that parents may execute an enforceable preinjury release on behalf of their minor children is not inconsistent with our policy regarding discretionary court approval of settlement releases signed by minors. . . . A parent asked to sign a preinjury release has no financial motivation to comply and is not subject to the types of conflicts and financial pressures that may arise in the postinjury settlement context, when simultaneously coping with an injured child. Such pressure can create the potential for parental action contrary to the child's ultimate best interests. In short, in the preinjury context, there is little risk that a parent will mismanage or misappropriate his child's property.

769 N.E.2d at n.10 (emphasis added).[13]

[13]Shea asserts that § 744.301 constitutes "the only authority of natural guardians to affect their children's property rights," and cites In re Estate of Fisher, 503 So. 2d 962 (Fla. 1st DCA 1987). But Estate of Fisher simply reviewed the state's rules governing the appointment of a personal representative of an estate, and it only construed the specific provisions set forth in Fla. Stat. § 744.301 as that statute applies to vested property rights. Certainly, Estate of Fisher does not contemplate parents' roles with respect to purely prospective claims of the type at issue here, and Shea's *ipse dixit* that the dicta was so meant to apply is incorrect. As we discuss above, for example, the decision whether or not to file a lawsuit lies squarely with a child's parents, not with the courts.

No case stands for the proposition that courts, rather than parents, must make all decisions relating to childrens' rights, much less their vacations. While courts review decisions to waive compulsory counterclaims or accept settlements, virtually all other decisions affecting the rights, property, and experiences of children remain in the hands of parents. Indeed, even the decision whether or not a child will bring suit for injuries caused by the negligence of another is left to the child's parents although a decision not to sue often has the practical effect of waiving a child's rights. Likewise, we know of no case holding that parents, in commencing a litigation for a child, need court approval to waive the right to a jury, which of course is the essential issue here.[14]

Shea surprisingly cites Kelm v. Kelm, 749 N.E.2d 299 (Ohio 2001), which mirrors Florida's law that matters of child custody, because of the inherent conflicts, financial pressures and other issues in that unique arena, are not subject to arbitration. Kelm does not support Shea. On the contrary, read in conjunction with other Ohio decisions, Kelm supports our position that parents generally may waive the rights of their children and that

[14]We note that federal courts recognize parents may waive the rights of their children regarding criminal proceedings. See McBride v. Jacobs, 247 F.2d 595, 596 (U.S. App. D.C. 1957).

courts may intervene only where there is a specific reason to doubt parents' ability to decide issues on behalf of their children.

While Kelm prohibits arbitration of custody disputes, Ohio explicitly permits parents to agree to arbitration and general releases of liability where, as here, no compelling state interest or conflict of interest exists. See Cross, 724 N.E.2d at 828 (parental agreement to arbitration as part of appearance on television show enforceable); Zivich, 696 N.E.2d at 201. Florida law mirrors the reasoning of these cases. See Von Eiff, 720 So. 2d at 510 (parental decision making on behalf of children "may not be intruded upon absent a compelling state interest"); Beagle, 678 So. 2d at 1275 (Fla. 1996) ("neither the legislature nor the courts may properly intervene in parental decisionmaking absent significant harm to the child").

Finally, Shea makes a number of arguments that simply are irrelevant to this case. For example, he cites various Florida statutes which allow minors themselves to enter into certain types of contracts.[15] But these statutes are simple exceptions to the common law rule that minors are not competent to enter into

[15]See Fla. Stat. §743.01 (permitting minors who are married to enter into contracts); §743.05 (permitting minors to enter into contracts to borrow money for higher education), and §743.08 (allowing minors to enter into contracts for participation in professional athletics, artistic endeavors, etc.)

contracts. They do not otherwise limit the areas where parents can contract for their children, and the fact that minors themselves cannot enter into contracts to arbitrate is irrelevant. Indeed, it is precisely because of this rule that parents must be able to contract for their children, and it is why Africa Adventure requires that parents agree to arbitration on their children's behalf. See Sharon, 769 N.E.2d at 746 (recognizing that parents may contract for their child though the child cannot because parents possess the maturity, experience and judgment children lack).

Shea also cites Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, Inc., 753 So. 2d 55 (Fla. 2000), which held that a state statute mandating arbitration in certain disputes was an unconstitutional denial of the parties' right to access to the courts. But the case at bar does not involve state-mandated arbitration.

Shea next cites non-Florida, non-Maryland cases such as Cooper v. The Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002); Scott v. Pacific West Mountain Resort, 843 P.2d 6 (Wash. 1992); Childress v. Madison County, 777 S.W.2d 1 (Tenn. 1989), and Fedor v. Mauwehu Council, Boy Scouts of America, 143 A.2d 466 (Conn. 1958), as holding that parents do not have the authority to waive the rights of a child. None of those cases, however, hold that parents may not contract for their children (the relevant issue

here), but deal solely with the enforceability of certain exculpatory clauses and were based on policy considerations particular to exculpatory clauses. Cooper, for example, explicitly relied on state policy disfavoring exculpatory agreements and on the conclusion that "public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract." Cooper, 48 P.3d at 1232.[16]

These same policy concerns do not exist with agreements to arbitrate, which involve a purely procedural right: the forum for resolving a dispute. See Cross, 724 N.E.2d at 836. Indeed, public policy with respect to arbitration is precisely opposite to the policy considerations at play in Cooper, since both state and federal policy favor the enforcement of arbitration agreements. Moreover, court intervention in the area of substantive exculpatory clauses is not subject to the constraints imposed by the FAA and its preemption of state laws disfavoring arbitration. For these reasons, Cooper, Scott, and the public

[16]Courts that have decided the exculpatory clause issue are split, with some states, including Florida, allowing parents to agree to substantive exculpatory agreements and some prohibiting such agreements. See O'Connell v. Walt Disney World Co., 413 So. 2d 444 (Fla. 5th DCA 1982) (finding that a release signed by parent on behalf of child for participation in a horseback riding trip was enforceable, but was not broad enough to encompass the plaintiff's injuries); Sharon, 769 N.E.2d at 738; Zivich, 696 N.E.2d at 201; Platzer v. Mammoth Mountain Ski Area, 104 Cal. App. 4th 1253 (2002).

policy grounds relied on in those and similar cases are irrelevant.

Finally, Shea asserts that the ancient cases of Millsaps v. Estes, 50 S.E. 227 (N.C. 1905), Fort v. Battle, 21 Miss. 133 (Miss. Err. App. 1849), and Tucker v. Dabbs, 59 Tenn. 18 (1873), hold that a guardian ad litem cannot bind a minor ward to arbitration. These cases all predate the enactment of the FAA in 1925, and therefore do not take into consideration the FAA-mandated presumption of arbitrability or its preemption of contrary state law.[17]

III. THERE IS NO BASIS TO REFUSE TO ENFORCE THE CONTRACT.

Parents make most decisions on behalf of their children and may be second-guessed by the courts only where a compelling state interest warrants such intervention. To justify his position for court intervention into a parent's right to agree to arbitration, Shea therefore must identify a compelling state interest (not of a type the FAA prohibits states from relying upon in invalidating arbitration agreements). He has not done so. None of the cases he cites provide a justification for state intervention in this case since the concerns in those cases are irrelevant to arbitration agreements.

[17]In addition, these cases dealt with a guardian ad litem appointed by the court for the conduct of pending litigation and do not implicate the fundamental rights of parents.

The only potential reason Shea offers for supplanting the role of parents is that arbitration waives a child's right to a jury trial. This fact does not constitute a compelling state interest for three reasons. First, Congress, in enacting the FAA, and the Florida legislature, in adopting the Florida Arbitration Act, explicitly rejected the argument that the waiver of the right to a jury trial is a valid policy reason to refuse to enforce arbitration agreements. Both found that arbitration adequately protects parties' interests, and both state and federal policy actively favors arbitration. See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); K.P. Meiring Construction, Inc. v. Great American Ins. Co., 761 So. 2d 1221 (Fla. 2d DCA 2000).

Second, reliance on this fact to invalidate the arbitration agreement would constitute a policy decision specifically directed toward "commercial activity" arbitration agreements involving children. Clearly, such a rule is not a "generally applicable contract defense, such as fraud, duress or unconscionability," Doctor's Assoc., 517 U.S. at 687, and it is therefore preempted by the FAA. See Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984).

Third, if parents can waive a jury right in bringing litigation on behalf of their children, how can they not be able to waive it in the context of arbitration?

IV. THERE IS NO COMPELLING INTEREST THAT PERMITS THE STATE TO SUPPLANT THE FUNDAMENTAL RIGHTS OF PARENTS.

In our initial Brief, we argued that to the extent it was proper for the Court to base its decision on state public policy interests, those interests favored allowing parents to agree to arbitration on behalf of their children. Primary among the relevant interests is the fundamental right of parents to direct the care, custody and upbringing of their children. This fundamental right outweighs any contrary interests.

Shea fails adequately to distinguish the many cases we cite supporting the primacy of parental rights. First, he denies that this case even implicates the fundamental rights of parents because the District Court's decision "did not address any aspect of child rearing." (Respondent's Brief, p. 35) This argument is not remotely plausible. Deciding whether children are able to participate in a family vacation with immense educational value obviously constitutes an aspect of child rearing just as the countless other decisions made by parents for their children on a daily basis which have the result of waiving some right or foregoing some opportunity for their children do.

Moreover, this Court's decision in this case will not exist in a vacuum. While Shea pretends this case is limited to its facts, it is clear this case will have profound implications for parental decision making in a broad array of circumstances (not

just for agreements to arbitrate claims arising out of safaris) and, as noted in the amicus briefs filed in support of Africa Adventure's position, for the entire Florida tourism and travel industry.

Shea attempts to distinguish cases such as Parham v. J.R., 442 U.S. 584 (1978) and Pierce v. Society of Sisters, 268 U.S. 510 (1925) on the grounds that those cases recognize that parents' fundamental rights may in appropriate circumstances be restricted by courts or the legislature. But that fact does not distinguish those cases from this case. We have argued throughout that the state may intrude upon parents' fundamental rights pursuant to its power as *parens patriae*, only where "a compelling state interest" exists. Von Eiff, 720 So. 2d at 510. No such compelling need exists with respect to procedural arbitration agreements (nor to forum selection clauses or jury-waived litigation) and since Shea does not and cannot identify a valid, specific and compelling need for state intervention in this case, fundamental parental rights must be honored.

Finally, Shea argues that Prince v. Massachusetts, 321 U.S. 158 (1944), which upheld a state statute prohibiting children from preaching on busy highways, supports his position. In Prince, the state interest justifying intervention in parental decision making was the interest in keeping children from being

killed while standing alone in the middle of busy highways.[18] Shea suggests the relevant state interest here is in protecting children from participating in "high risk safaris." But no state outlaws taking children on safaris, to dude ranches or on any other family vacation. In any event, the state's interest in protecting children from "high risk safaris," to the extent it exists, is not furthered by a rule that parents cannot agree to resolve their children's claims by arbitration. While such an interest might, conceivably, be used in attempting to justify a statute prohibiting parents from taking their children on safaris or any other trip involving any risk (e.g., white water rafting, horseback riding, or ballet lessons), the interest is irrelevant to the issue of whether parents can agree to arbitration.[19] Simply put, the state furthers no interest, much less a compelling one, by prohibiting parents from agreeing to arbitration. In a word it is prohibited from doing so.

V. CONCLUSION

For the foregoing reasons and for the reasons set forth in

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[18]Shea might as well have cited more general child labor laws. In any event, the financial conflict issue may be present when a parent allows a child to accept certain jobs.

[19]To the extent courts may intervene in parental decision making any time a decision involves some degree of risk to a child or any time a court may disagree with a parent's decision, every decision relating to children (e.g., "hanging out" at a mall, playing pick up football, or dating) should be made by courts instead of parents.

our initial brief and the briefs of the amicus curiae in support of Petitioner’s position, the decision of the Fourth District Court of Appeal should be reversed and the Respondent should be required to arbitrate his claims against Africa Adventure.

Dated: February ___, 2004.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of February, 2004, a true and accurate copy of the foregoing has been served upon each other party in that action by first class mail, postage prepaid.

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