IN THE SUPREME COURT OF FLORIDA

ANGELA I. GESSA, by and through
MIRIAM G. FALATEK, her Attorney-
In-Fact,

Petitioner,

Case No.: SC09-768

v.

L.T. Case No. 2D07-1928

MANOR CARE OF FLORIDA, INC., et
al.

Respondents.
___________________________________/

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

In March 2004, Angela Gessa broke her hip and was admitted to a hospital. 2DCA App. Tab 6:10. A hospital social worker recommended to Gessa and her daughter that Gessa reside at Manor Care of Carrollwood (the "Carrollwood facility") for rehabilitation. 2DCA App. Tab 6:20. Gessa could have chosen a different facility and was not pressured in her decision. 2DCA App. Tab 6:22.

Gessa was admitted to the Carrollwood facility on March 18, 2004, with her daughter present. 2DCA App. Tab 6:21, 24. Gessa was cognizant and had never been declared mentally incapacitated. 2DCA App. Tab 6:26, 28. She signed an admission agreement, attachments thereto, and the arbitration agreement at issue here, on her own behalf. 2DCA App. Tab 3:1, 9, 12, 36-38, 44; 6:32. The admission agreement acknowledged that the facility participated in the federal Medicare and Medicaid programs, and Gessa executed a document authorizing a Medicaid Part B provider to provide Gessa with Medicaid Part B supplies. 2DCA App. Tab 3:2, 37; 5:2, 37.

Shortly after her admission, Gessa executed a power of attorney in favor of her daughter, and Gessa signed the document on her own behalf. 2DCA App. Tab 4; 6:15, 32. A lawyer prepared the document and explained it to Gessa. 2DCA App. Tab 6:17.

On April 21, 2004, Gessa was again hospitalized, allegedly due to a pressure

sore, infection, and dehydration. 2DCA App. Tab 7:7. Two weeks later, Gessa returned to the Carrollwood facility. 2DCA App. Tab 6:33, 45. She did not sign any papers on the day of her re-admission. However, two days later, Gessa's daughter signed a new admission agreement and a new arbitration agreement. 2DCA App. Tab 5:9, 12, 22, 36-38, 44. The daughter executed both documents as Gessa's attorney in fact. 2DCA App. Tab 5:9, 22; A6 35, 37, 45.

No one told Gessa's daughter that she had to sign the arbitration agreement for her mother to remain a resident at the facility, although the daughter later claimed she believed that to be the case. 2DCA App. Tab 6:44, 49. She had the opportunity to ask questions about the agreements and discuss them before signing, but she did not do so. 2DCA App. Tab 6:36, 38, 40. She was not rushed. 2DCA App. Tab 6:43. She could have asked for more time to review the documents, and she could have taken them home to review them. 2DCA App. Tab 6:42.

The arbitration agreements signed by Gessa and her daughter were identical five-page documents (together, the "Arbitration Agreement"). 2DCA App. Tab 3:40-44; 5:40-44. Their first provision manifests the parties' intent to resolve *all* of their disputes by arbitration. 2DCA App. Tab 3:40; 5:40. Other provisions direct the arbitrator to apply Florida evidence and civil procedure rules, require the award to be made consistent with Florida law, and provide for appeals only to the extent authorized by Florida law. 2DCA App. Tab 3:42-43; 5:42-43.

The Arbitration Agreement contains provisions that benefit the resident. For instance, the facility pays all of the arbitrator's fees and costs except in the case of a dispute involving non-payment of the facility's charges, in which case the costs are equally shared. 2DCA App. Tab 3:42-43; 5:42-43. Also, the arbitration hearing must be held within six months of any party's demand for arbitration and any award must be made within 30 days thereafter. 2DCA App. Tab 3:42; 5:42. The parties are to bear their own attorney's fees and expressly waive any right to recover fees, including under section 57.105 or proposals for settlement. 2DCA App. Tab 3:43; 5:43. The agreement gave Gessa the right to rescind it within three business days of execution. 2DCA App. Tab 3:43-44; 5:43-44.

The Arbitration Agreement also contains provisions that limit the remedies that may be awarded in an arbitration proceeding. For any claim brought by either party, non-economic damages are capped at $250,000 and the award of punitive damages is precluded. 2DCA App. Tab 3:43; 5:43. These remedial limitations are not hidden: the document states at the top of its first page, in bold type, that it contains a waiver of statutory rights. 2DCA App. Tab 3:40; 5:40.

In 2005, while still residing at the Carrollwood facility, Gessa filed suit under Chapter 400 against the facility, various affiliated companies, and two individuals who worked at the facility (collectively, "Manor Care"), alleging damages from the worsening of a pressure sore, infections, dehydration, and

malnutrition. 2DCA App. Tab 1:4-5; 6:9. Manor Care moved to compel arbitration, relying on the Arbitration Agreement executed by Gessa and her daughter. 2DCA App. Tab 2. Gessa opposed arbitration, arguing that the agreement was procedurally and substantively unconscionable and that its limitations on noneconomic and punitive damages rendered it unenforceable as a matter of public policy. 2DCA App. Tab 7:8.

The trial court held a hearing on Manor Care's motion. 2DCA App. Tab 8. Gessa focused on her claim that the Arbitration Agreement's remedial limitations rendered it unenforceable. *Id.* at 9-12, 21-27. Manor Care maintained that the agreement was not unconscionable, that the Federal Arbitration Act applied to the agreement, and that Gessa's public policy challenge to its remedial limitations should be addressed by the arbitrator. *Id.* at 15-21. Manor Care also contended that the challenged provisions were severable and did not go to the heart of the agreement. *Id.* at 35. Gessa responded that the parties "might be in a different position" on severability if the agreement contained a severability clause. *Id.* at 39. At the hearing's conclusion, the court announced that it would "study it further" and "give it a good analysis" before issuing a ruling. 2DCA App. 8:38, 42.

After the hearing, the trial court issued a written order granting the motion to compel arbitration. 2DCA App. Tab 9. The court found no procedural unconscionability in the agreement's execution. The court also found that the

challenged provisions were "not integral to the contract" and "separate from the arbitration provision," and thus the challenged provisions could be severed from the arbitration provision, which could thus be enforced. *Id.* The trial court left the remedial limitations' enforceability as an issue to be raised in the arbitration.

Gessa appealed to the Second District. There, she abandoned her unconscionability argument and instead rested on her public policy challenge. Opinion, at 3. She claimed that the trial court determined the challenged remedial limitations were void as a matter of public policy but erred in severing them because the Arbitration Agreement contains no severability clause. *Id.* at 3-5. Manor Care pointed out that the trial court did not rule on whether the remedial limitations were enforceable, nor did it sever them from the Arbitration Agreement. Rather, the trial court simply found the provisions were severable and ordered the parties to proceed to arbitration. *Id.* at 4.

The Second District agreed with Manor Care. The court rejected Gessa's characterization of the trial court's order as declaring the remedial limitations to be void and severing them. *Id.* at 4-5. To the contrary, the trial court never determined the validity of the remedial limitations and so did not sever them—the court determined only that those limitations were severable and allowed Gessa to raise her challenge in arbitration. *Id.* at 4-5. The court did not address the merits of Gessa's public policy challenge and so left that issue for the arbitrator.

The district court also rejected Gessa's argument that the trial court erred in finding the limitations severable in the absence of a severability provision. *Id.* at 5-6. The district court held that a provision expressly authorizing severance is not required for a contract's provisions to be severed and that competent substantial evidence supported the trial court's severability finding. *Id.* Accordingly, the district court affirmed the order directing the parties to arbitrate. *Id.* at 6.

The district court did not address the merits of Gessa's public policy challenge and instead left that issue to be raised with the arbitrator. The court explained that it was not reaching the issue of whether a trial court should determine the validity of a challenged provision and sever it before sending the case to arbitration or if the trial court should allow the arbitrator to determine the provision's enforceability if it becomes necessary. *Id.* at 6 n.1. The court then cited *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, 898 So. 2d 86 (Fla. 2d DCA 2005), where the Second District held the validity of remedial limitations to be an issue for the arbitrator. The court also noted *Alterra Healthcare Corp. v. Bryant,* 937 So. 2d 263 (Fla. 4th DCA 2006), where the Fourth District severed limitations it held invalid and compelled arbitration, and *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242 (Fla. 5th DCA 2006), where the Fifth District held such issues are for the court, did not sever, and refused to compel arbitration.

SUMMARY OF ARGUMENT

The Federal Arbitration Act and the Florida Arbitration Code apply to Gessa's challenges to the parties' Arbitration Agreement. Both laws use the identical analysis—the three-part gateway issues test set forth in *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999). Under that analysis, courts may address only gateway issues in resolving a motion to compel arbitration.

Gessa's public policy challenge to the Arbitration Agreement's remedial limitations does not present a legal issue for the court to resolve. *Seifert*'s first prong focuses on the arbitration clause in the parties' agreement, which is the language by which the parties agreed to arbitrate disputes, not the entire agreement as it relates to arbitration. The United States Supreme Court has held that this clause is legally independent from the remainder of the agreement. Unless a challenge attacks whether the parties made that independent agreement to arbitrate, the challenge is an issue for the arbitrator, not the court.

Consistent with these well established principles, numerous authorities from across the country have held that challenges to the enforceability of remedial limitations like those at issue in this case are not challenges to whether the parties made an agreement to arbitrate. Hence, they are to be resolved by the arbitrator if they become ripe in the arbitration. The Second District has long followed this established line of authority, and this Court should as well.

Additionally, a challenge to an agreement's terms is not a challenge to the agreement's validity where the challenged terms are severable. Here, the trial court found that the challenged terms were not integral and could be severed. The Second District correctly held that finding to be supported by competent substantial evidence and accordingly affirmed the order compelling arbitration. Consistent with the strong public policy favoring arbitration, this Court should affirm that decision.

Finally, should the Court reach the merits of Gessa's public policy challenge, that challenge should be rejected. Gessa voluntarily entered into the Arbitration Agreement, and its execution was not a condition of her receiving the home's services. The fundamental right to contract, including the right to waive personal rights to damages, permits an individual such as Gessa to contract for speedy arbitration, with the arbitrator's fees and costs paid by Manor Care and certain limitations on monetary damages.

The cases on which Gessa relies erroneously determined that residents cannot waive the right to seek any recovery potentially available under the Nursing Home Act. That is not the law. The Legislature knows how to prohibit persons from waiving remedies afforded by a statute, and the Legislature did not do so here. To the contrary, the Legislature expressly required nursing homes and

residents to enter written agreements and permitted those agreements to address any subject the parties "deem appropriate."

The waivers here relate only to monetary recoveries by the individual resident and in no way alter the facility's legal obligations to provide care to its residents. Indeed, nursing homes are heavily regulated under systems that provide substantial oversight, including the power to penalize misconduct swiftly and severely. Thus, Gessa has not waived any protections except her personal ability to recover certain monetary damages. The limitations should not be voided and certainly should not void Gessa's agreement to arbitrate this dispute.

STANDARD OF REVIEW

Whether an issue is a gateway issue for the court or an issue for the arbitrator is a question of law. This Court reviews questions of law de novo. *See State v. Glatzmayer*, 789 So. 2d 297, 301 n. 7 (Fla. 2001) ("If the ruling consists of a pure question of law, the ruling is subject to de novo review.").

Whether the challenged limitations are severable is a mixed question of law and fact. Whether the agreement can be enforced without the limitations is a question of law and the parties' intent is a question of fact. In reviewing mixed questions of law and fact, the Court employs a mixed standard of review—deferral to the factual findings of the trial court that are supported by competent, substantial evidence, but de novo review of legal conclusions. *E.g.*, *Floyd v. State*, 18 So. 3d 432, 443 (Fla. 2009).

Should the Court reach the issue of whether the challenged remedial limitations are unenforceable as a matter of public policy, that is a question of law. The Court would review it de novo. *See Glatzmayer*.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY AFFIRMED THE TRIAL COURT'S DECISION COMPELLING ARBITRATION.

Gessa contends that the trial court should have resolved her public policy challenge to the Arbitration Agreement's remedial limitations, rather than leaving her challenge for the arbitrator. She also contests the trial court's determination that those remedial limitations were severable. She is incorrect in both respects.

Gessa's Initial Brief ignores many of Manor Care's arguments why arbitration was properly compelled. In particular, she ignores entirely the applicability of the Federal Arbitration Act and the similarities between that act and Florida law. Gessa fails to acknowledge, much less confront, the controlling United States Supreme Court decisions establishing what constitutes a gateway issue for the court to resolve as well as the national body of case law specifically holding that a public policy challenge to an arbitration agreement's remedial limitations is not a gateway issue.

By all appearances, these authorities and their reasoning were not brought to the attention of the courts in the cases on which Gessa relies. When this Court examines these authorities and fully considers the proper analyses to be applied, including the proper analysis of the challenged provisions' severability, the Court should confirm that Gessa's challenges do not present a gateway issue for a court

to resolve. Accordingly, this Court should approve the decision below and disapprove the contrary decisions on which Gessa relies.

A. THE PARTIES' ARBITRATION AGREEMENT IS GOVERNED BY FEDERAL LAW AND FLORIDA LAW.

Arbitration is governed by federal and state law. Where an agreement calls for arbitration, a Florida court generally will apply the Florida Arbitration Code, which is codified at chapter 682, Florida Statutes. The Arbitration Agreement in this case expressly provides that the Florida Arbitration Code applies to its provisions. Florida case law recognizes that nursing home residents and facilities may enter agreements to arbitrate their disputes. *E.g., Richmond Healthcare, Inc. v. Digati*, 878 So. 2d 388, 390 (Fla. 4th DCA 2004) (upholding the enforceability of an agreement to arbitrate Chapter 400 claims).

In addition, the Federal Arbitration Act, 9 U.S.C. § 2 *et seq.*, applies to any arbitration agreement evidencing a transaction involving interstate commerce. 9 U.S.C. § 2. Congress intended that act to apply broadly, to the furthest reaches of the Commerce Clause. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). The federal act's central purpose is "to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). The federal act leaves parties "generally free to structure their arbitration agreements as they see fit." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

In the trial court and the district court of appeal, Manor Care maintained that the Federal Arbitration Act applies in this case because the parties' agreement evidences a transaction involving interstate commerce within the farthest reach of the Commerce Clause. Gessa's admission agreement expressly states that the facility participates in the federal government's Medicare and Medicaid programs, bringing the home within an extensive federal regulatory scheme. *See* 42 C.F.R. § 483.1 *et seq.* Also, Gessa and her daughter executed documents authorizing a third party to provide Gessa with supplies covered by Medicaid Part B. These circumstances connect the parties' agreement to a transaction involving interstate commerce.

Gessa has never disputed that her residency at the facility had a sufficient connection to interstate commerce to trigger application of the Federal Arbitration Act. She instead ignores the issue, just as she ignores the federal act and the cases applying that act to challenges such as the ones she brings in this case. The Federal Arbitration Act applies and fully supports the Second District's decision to compel arbitration in accordance with the parties' arbitration agreement.

B. BOTH FEDERAL LAW AND FLORIDA LAW LIMIT THE COURT'S INVOLVEMENT TO RESOLUTION OF GATEWAY ISSUES.

While the Federal Arbitration Act applies to this case, the result is the same under that act or the Florida Arbitration Code. The two acts are similar in all

material respects, including the operative language that governs the issue of what challenges to an arbitration agreement's enforcement should be heard by a court or an arbitrator.

Both federal and state arbitration law favor arbitration as a means of resolving disputes. This Court has recognized that the Federal Arbitration Act reflects a strong national public policy that favors enforcing arbitration agreements. *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 396 (Fla. 2005). Likewise, the Florida act reflects a Florida public policy that "favors resolving disputes through arbitration when the parties have agreed to arbitrate." *Maguire v. King*, 917 So. 2d 263, 266 (Fla. 5th DCA 2005). These laws were adopted to combat a perceived hostility from the judiciary toward arbitration agreements. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272 (1995) ("We therefore proceed to the basic interpretive questions aware that we are interpreting an Act that seeks broadly to overcome judicial hostility to arbitration agreements . . . ."); *Pierce v. J.W. Charles-Bush Sec., Inc.*, 603 So. 2d 625, 627-28 (Fla. 4th DCA 1992).

Where a party seeks to enforce an arbitration agreement, courts are to decide "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). Simply

put, the court's role is minimal. The court should resolve only gateway issues and, if an arbitrable issue exists, then arbitration should be compelled.

Florida law and federal law are the same on this point. In *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999), this Court held that under both the federal and state arbitration laws, "there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." *Id.* at 636; *see also Raymond James Fin. Servs. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005) (citing *Seifert* as setting forth the proper test under federal law and Florida law).

Thus, in determining whether an arbitration agreement requires a claim to be resolved by arbitration, Florida courts apply Florida and federal law in the same manner. This is entirely reasonable, since the critical language on this point from the Federal Arbitration Act is also found in the Florida Arbitration Code. *Compare* 9 U.S.C. § 4 ("The court shall hear the parties, and upon being satisfied that *the making* of the agreement for arbitration or the failure to comply therewith *is not in issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.") *with* § 682.03(1), Fla. Stat. ("If the court is satisfied that no substantial issue exists as to *the making* of the agreement or provision, it shall grant the application.") (emphasis added).

Indeed, *Seifert* adopted Florida's standard directly from the federal gateway analysis, and no Florida appellate decision has held that the federal and Florida gateway issue tests are different. They are not. Consequently, while federal law controls in this case, the result here is the same under Florida law and federal law. *E.g.*, *Auchter Co. v. Zagloul*, 949 So. 2d 1189, 1191 (Fla. 1st DCA 2007) ("[F]or purposes of this appeal, it is irrelevant which law applies because the analysis is the same in either case."). Gessa has never made any argument otherwise.

C. GESSA'S CHALLENGE TO THE AGREEMENT'S REMEDIAL LIMITATIONS IS NOT A GATEWAY ISSUE.

Gessa claims that her challenge to the validity of the Arbitration Agreement's remedial limitations is a challenge under *Seifert*'s first prong, which asks "whether a valid written agreement to arbitrate exists." Gessa contends that if the remedial limitations are invalid, they invalidate the entire Arbitration Agreement and thus no valid agreement to arbitrate exists. Gessa is incorrect for two independent reasons.

First and foremost, Gessa's challenge to the remedial limitations that could be applied in the arbitration is not one that attacks the "arbitration clause" itself and therefore does not come within *Seifert*'s first prong. As made clear by controlling United States Supreme Court decisions that define the gateway issues a court should address, the "arbitration clause" is the provision wherein the parties

mutually agreed to arbitrate claims. A challenge to an agreement's remedial limitations is not a challenge to the making of that agreement. This point is fully supported by case law specifically holding that remedial limitations challenges are not gateway issues for courts to resolve.

Second, even if the challenged provisions were invalid, their invalidation would not invalidate the parties' agreement because the challenged limitations are severable, as the trial court found. Thus, a valid agreement to arbitrate will remain in all events and arbitration should be compelled without reaching the merits of Gessa's challenge to other provisions of the agreement.

For each of these reasons, the Second District's decision to compel arbitration should be approved.

1. Gessa's Challenge Does Not Attack The Arbitration Clause And Thus Does Not Present A Gateway Issue.

The first prong of *Seifert* permits a court to examine whether a valid written agreement to arbitrate exists. Gessa argues this examination broadly encompasses a challenge to any provision within the parties' Arbitration Agreement, including her challenge to its remedial limitations. That expansive view of *Seifert*'s first prong, however, would contravene controlling federal law under the Federal Arbitration Act. The Court was previously led to apply that type of broad reading of *Seifert*'s first prong in *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005). The United States Supreme Court reversed that decision in

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006), a controlling decision that Gessa wholly ignores.

In *Buckeye*, the parties entered a check-cashing agreement that included an agreement to arbitrate disputes. The plaintiff opposed the defendant's effort to compel arbitration by asserting that the agreement's interest rate was usurious, thereby rendering the parties' entire agreement, including its arbitration clause, void. This Court agreed and held that, as a matter of Florida public policy and contract law, the parties' entire agreement was void and no valid arbitration agreement ever came into existence. *Cardegna*, 894 So. 2d 860 (Fla. 2005).

The United States Supreme Court reversed. It relied upon its prior decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), where it held a party's claim that it was fraudulently induced to enter an agreement containing an arbitration provision should be resolved by the arbitrator:

> [W]ith respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, *the federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration* or the failure to comply (with the arbitration agreement) *is not in issue*." Accordingly, if the claim is fraud in the inducement of the *arbitration clause* itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it.

388 U.S. at 403-04 (quoting 9 U.S.C. § 4) (footnotes omitted) (emphasis added).

Prima Paint established that the focus of whether the parties made an agreement to arbitrate belongs on the specific language where the parties agreed

they would arbitrate their claims:

> In the present case no claim has been advanced by *Prima Paint* that F & C fraudulently induced it to enter into the agreement to arbitrate "(a)ny controversy or claim arising out of or relating to this Agreement, or the breach thereof."

388 U.S. at 406. Because the fraudulent inducement challenge raised in *Prima Paint* was not directed at the arbitration clause, the challenge was not to the making of the agreement to arbitrate and was thus an issue for the arbitrator. *Id.*

Applying principles laid down in *Prima Paint*, *Buckeye* held that the arbitration clause in the parties' agreement is independent from the remainder of the agreement, including the allegedly usurious interest provision. Rejecting this Court's decision that the arbitration clause was invalidated by the inclusion of the challenged interest provision, the Supreme Court explained: "[W]e cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on 'Florida public policy and contract law . . . .'" 546 U.S. at 446. Because there was no contention that the arbitration clause itself was contrary to public policy, the public policy challenge to the interest provision was an issue for the arbitrator, not the court. *Id.*

Buckeye gave two examples of challenges that the Supreme Court previously held are challenges to the arbitration clause and thus for a court to resolve: (1) whether it is lawful to arbitrate the claim at issue, and (2) whether the specific arbitration clause itself, as opposed to the entire agreement, was fraudulently

induced. *Id.* at 444. *Buckeye* also gave three examples of challenges other courts have held are challenges to the arbitration clause and thus for a court to resolve: (1) whether the alleged obligor signed the contract, (2) whether the signor lacked capacity to bind the alleged principal, and (3) whether the signor lacked mental capacity to assent. *Id.* at 444 n.1.

In all of those examples, the challenge is to whether the parties in fact *made* an agreement to arbitrate a claim that can lawfully be arbitrated—*i.e.*, to the "arbitration clause" itself. None of them was a challenge, as here, to other terms in the agreement. None involved a mere challenge to terms that govern the remedies potentially available in the arbitration to a prevailing claimant.

Read together, as they must be, *Buckeye* and *Prima Paint* establish that a challenge to the "arbitration clause" is a challenge to whether the parties validly *made* an agreement they would arbitrate in the first place, and that challenge is for a court to resolve. In contrast, Gessa's challenge is not to the "arbitration clause" and whether the parties validly made an agreement they would arbitrate in the first place. She does not say that her claim cannot lawfully be arbitrated, that the agreement to arbitrate was fraudulently induced, that she never signed it, or that she lacked the capacity to sign it. As a result, her challenge is not for a court to resolve.

Simply put, the "arbitration clause," as that term was used in *Prima Paint*

and *Buckeye*, is the provision wherein the parties mutually assented to arbitrate certain disputes. Under *Prima Paint* and *Buckeye*, that clause is legally independent from the contract's other provisions, and arbitration should be compelled where that clause is not challenged. Challenges to portions of the agreement other than the arbitration clause itself are to be resolved by the arbitrator.

Following the U.S. Supreme Court's *Buckeye* decision, this Court adopted that analysis as the law of Florida. On remand, this Court expressly adopted the Fourth District's earlier *Buckeye* decision that this Court had previously quashed, *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228 (Fla. 4th DCA 2002). That decision expressly relied upon and quoted extensively from *Prima Paint*, as well as *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002), and *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992), to explain how to distinguish gateway validity issues to be decided by the court from other challenges to be decided by the arbitrator.

Specifically, this Court's adopted decision relied upon *Prima Paint*, *Bess* and *Chastain* to distinguish between (1) challenges to the *existence* of an agreement to arbitrate the claims at issue and (2) challenges to the *contents* of that agreement. *Buckeye*, 824 So. 2d at 230-32. Where a party challenges the contents of an agreement, but not the existence of mutual assent to arbitrate claims that may

lawfully be arbitrated, then the parties have validly agreed to arbitrate and the arbitrator should decide any issue as to the agreement's contents. *Id.* That legal analysis is the law of Florida and, under that analysis, the lower courts correctly compelled arbitration in this case.

Of special importance here, this analysis is fully consistent with a body of case law rooted in *Prima Paint* that specifically holds challenges to remedial limitations in arbitration agreements are *not* challenges to whether the parties made an agreement to arbitrate. For instance, in *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003), the Seventh Circuit held that, "[b]ecause the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of that agreement, these challenges must first be considered by the arbitrator." *See also Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004) ("We have established that, as a general matter, issues of remedy are for the arbitrator in the first instance."); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002); *Great Western Mtg. Corp. v. Peacock*, 110 F.3d 222, 230 (3d Cir. 1997); *Moore v. Ferrellgas, Inc.*, 533 F. Supp. 2d 740, 748 (W.D. Mich. 2008) ("[Q]uestions concerning remedy are outside the scope of review since the validity of the agreement to arbitrate is not affected.").

Thus, courts have squarely addressed challenges to an arbitration agreement's exclusion of punitive and other damages and held that their

enforceability is a matter for the arbitrator to resolve. *E.g.*, *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001); *see also Faust v. Command Ctr., Inc.*, 484 F. Supp. 2d 953, 955 (S.D. Iowa 2007) ("[T]he particular issue of whether a waiver of punitive damages violates public policy is, at least in the first instance, a matter for the arbitrator to decide."); *Siebert v. Amateur Athletic Union of the U.S., Inc.*, 422 F. Supp. 2d 1033, 1043-44 (D. Minn. 2006); *Defazio v. Expectec Corp.*, 2006 WL 162327 *3 (D.R.I. Jan. 20, 2006) ("Since the 'availability of punitive damages' is distinct from the issue of whether or not the parties have agreed to arbitrate, it 'is for the arbitrator to decide.'" (citation omitted)); *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 606 S.E. 2d 752, 759 (S.C. 2004) ("[W]e hold that the question of whether the clause preventing punitive damages violates public policy . . . is not yet ripe because an arbitrator has not ruled on the issue" and "any challenge that the clause violates public policy is premature").

The Second District has long followed this line of authority. For example, in *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, 898 So. 2d 86 (Fla. 2d DCA 2005), the Second District reversed a trial court's decision that an arbitration agreement's remedial limitations—including a punitive damages exclusion—rendered the agreement to arbitrate unenforceable and instead compelled arbitration. *Rollins* squarely held that "the determination of whether an arbitration provision is

unenforceable because it limits statutory remedies is for the arbitrator, not the trial court." *Id.* at 87. *Rollins* specifically relied upon numerous federal authorities, observing that "[t]he consensus among those courts is that the arbitrator should decide in the first instance whether particular remedial limitations are permissible." *Id.* at 88. *See also Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259 (Fla. 2d DCA 2004) (pre-*Rollins* decision that held a plaintiff's challenges to an arbitration agreement's restrictions on damages should be addressed by the arbitrator).

The Second District has followed *Rollins* on numerous occasions. *Jaylene, Inc. v. Steuer*, 22 So. 3d 711 (Fla. 2d DCA 2009); *Manor Care, Inc. v. Estate of Kuhn*, 23 So. 3d 773 (Fla. 2d DCA 2009); *ManorCare Health Services, Inc. v. Stiehl*, 22 So. 3d 96 (Fla. 2d DCA 2009); *Shotts v. OP Winter Haven*, 988 So. 2d 639, 644 (Fla. 2d DCA 2008); *Bland v. Health Care & Retirement Corp.*, 927 So. 2d 252 (Fla. 2d DCA 2006). *Jaylene*, *Kuhn*, *Stiehl*, and *Shotts* are pending before this Court.

By comparison, the First and Fourth Districts did not follow this established law when they erroneously held that such remedial limitations challenges are not issues for the arbitrator. *Alterra Healthcare Corp. v. Estate of Linton*, 953 So. 2d 574, 577 (Fla. 1st DCA 2007); *Alterra Healthcare Corp. v. Bryant*, 937 So. 2d 263, 268 (Fla. 4th DCA 2006). They failed to recognize the important distinction between a challenge to a remedial limitation, such as Gessa's challenge here, and a

challenge to the arbitration clause.

Indeed, from the courts' discussions in these decisions, it does not appear that the parties raised in any depth the principles and body of case law discussed above. *Bryant* and *Linton* said *Buckeye* did not require the remedial limitations to be addressed by the arbitrator, but it appears that the defendants cited *Buckeye* in isolation, without explaining its connection to *Prima Paint*, the body of case law holding such remedial limitations challenges are for the arbitrator, or that this Court adopted the Fourth District's previously quashed *Buckeye* decision which followed *Prima Paint*, *Bess*, and *Chastain*.

In effect, *Linton* and *Bryant* erroneously equated all provisions relating to arbitration with the "arbitration clause" identified in *Buckeye* and *Prima Paint*, thereby converting a challenge to a remedial limitation that might be applicable in an arbitration proceeding into a challenge to the arbitration clause. That approach contravenes the policies underlying the federal and Florida arbitration laws. It erroneously rejects altogether the use of arbitration where the parties have unequivocally agreed to arbitrate a dispute but also agreed to some limitation on remedies in the proceeding. As the Seventh Circuit held in *Hawkins*, "the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of that agreement," and thus such challenges "must first be considered by the arbitrator." 338 F.3d at 807.

Gessa mistakenly relies on this Court's decision in *Global Travel Marketing*. That decision involved a situation entirely distinct from the circumstances in this case and indeed highlights the distinction between gateway and non-gateway issues. *Global Travel Marketing* involved a challenge to a parent's authority to bind a minor child to arbitrate the child's claims. That challenge went directly to the power of a parent to agree to arbitrate the child's claims in the first place and thus was a challenge to the validity of the arbitration clause. In contrast, Gessa challenges the enforceability of limitations of the remedies an arbitrator may utilize, and where the particular limitations at issue—a cap on noneconomic damages and an exclusion of punitive damages—may not even be triggered by the arbitrator's findings.

It remains only to note that Gessa has never contended, let alone demonstrated, that the Arbitration Agreement's provisions eliminate her ability to obtain a meaningful recovery in arbitration, essentially making the proceeding a sham. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000) (holding that party seeking to invalidate arbitration agreement on grounds that costs will be prohibitively expensive must prove the likelihood of incurring such costs). Nor does she argue, let alone demonstrate, that the agreement's provisions are so harsh that the proceeding would violate fundamental concepts of fairness and could rightly be said not to amount to arbitration of her claims at all. *See, e.g.*, *Hooters*

of America, Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999) ("By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.").

Having made no such challenge, which would go to whether the parties agreed to resolve her claims in arbitration, Gessa misplaces her reliance on cases such as *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. 4th DCA 2005), *Fletcher v. Huntington Place Ltd. Partnership*, 952 So. 2d 1225 (Fla. 5th DCA 2007), and *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242 (Fla. 5th DCA 2006). Those cases did not deal with mere remedial limitations such as those challenged in this case. *Blankfeld* held that, by adopting a set of rules that preclude relief for consequential damages absent clear and convincing proof of intentional or reckless conduct, the arbitration agreement in that case "effectively eliminate[d] recovery for *negligence*." 902 So. 2d at 298 (emphasis added). *Fletcher* and *SA-PG-Ocala* involved the same rules at issue in *Blankfeld* and reached the same conclusion. No such rules are imposed by the parties' agreement in this case.

In sum, as a matter of controlling federal law, and under Florida's identical gateway issues analysis, Gessa's challenges to the Arbitration Agreement's remedial limitations on noneconomic and punitive damages do not contest that the parties made an agreement to arbitrate. The Second District correctly left Gessa's challenge to the agreed-upon arbitrator, who would be required to determine their

validity only if the arbitrator found that such additional remedies were warranted by the evidence.

2. In Addition, A Challenge To Severable Provisions Does Not Present A Gateway Issue.

Gessa's public policy challenge to the Arbitration Agreement's remedial limitations is not a gateway issue under *Seifert*'s first prong for a second, independent reason. If the challenged provisions are severable, then even a successful challenge will not render the agreement invalid for purposes of determining whether a valid written agreement to arbitrate exists. Consequently, a court should determine whether the challenged provisions can be severed, and, if so, then a public policy challenge to them is not a challenge to the agreement's *validity* and is therefore an issue for the arbitrator.

The Eleventh Circuit adopted this precise rationale in *Anders v. Hometown Mortgage Services, Inc.*, 346 F.3d 1024, 1032 (11th Cir. 2003), and the Second District has followed it in numerous cases. In *Anders*, an arbitration agreement provided that the arbitrator could not award punitive damages, treble damages, penalties, or attorney's fees. The plaintiff sued and the defendant sought to compel arbitration. The plaintiff argued that the remedial limitations were invalid because they negated potential statutory remedies and that this rendered the entire agreement invalid. The Eleventh Circuit rejected that argument and ordered arbitration to proceed.

Noting that severability is a matter of state contract law, the court held that where the challenged provisions are severable under state law, *no further analysis is required* under federal arbitration law to enforce the agreement to arbitrate. 346 F.3d at 1032. The court explained that whether the challenged provisions are valid or invalid will not invalidate the agreement as a whole because if they are invalid, they will be severed. Thus, the plaintiff's challenge to those limitations was an issue to be decided by the arbitrator—"if the arbitrator decides that Anders' claims have merit." *Id.* at 1033.

Anders distinguished the Eleventh Circuit's prior decision in *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054 (11th Cir. 1998), which held that an unenforceable limitation on damages rendered an entire arbitration agreement invalid, and limited *Paladino* to its specific facts and circumstances. *Id.* at 1031-32. *Paladino* never considered the challenged provision's severability. The agreement at issue in *Anders* contained a severability provision, and the court held that where state law on severability permits the challenged provision to be severed, the agreement to arbitrate will not be invalidated even if the challenge succeeds.

Gessa claims that *Anders* "limited the holding of *Paladino* to those cases where the contract does not contain a severability clause." Ini. Br., at 29. She is incorrect. *Anders* limited *Paladino* to its specific facts and circumstances, where severability was not addressed at all. *Paladino* is thus inapplicable here, where

severability was squarely raised in seeking arbitration. *Anders* even questioned whether *Paladino* applied the correct law, stating, "Whether we correctly applied the applicable state law in *Paladino*, we have an obligation to apply Alabama law correctly in this case." 346 F.3d at 1032.

Gessa also incorrectly claims that *Anders* stands for the proposition that absent a severability provision, "the parties have not intended that the remainder of the agreement be enforced in the event that any portion is deemed invalid." Ini. Br., at 29-30. *Anders* held no such thing. Rather, it held that where state law permits challenged provisions to be severed, the challenge cannot invalidate the agreement to arbitrate, since "[w]ith or without those provisions, the case goes to arbitration." 346 F.3d at 1032.

Under *Anders*, a court faced with a remedial limitations challenge should determine whether the challenged provisions are severable. If they are severable, then the arbitration agreement will survive as a valid agreement *regardless of whether the limitations are enforceable*, and that enforceability issue will be resolved by the arbitrator. The Second District expressly relied on *Anders* and these principles when it decided *Rollins* and left the public policy challenges in that case for the arbitrator. The decision below continued to adhere to these principles.

In contrast, the Fourth District's decision in *Bryant* did not address the severability issue before examining the merits of a challenged term's

enforceability. Instead, the court *first* addressed whether the limitations at issue there violated public policy, held they were unenforceable, and *then* proceeded to determine those provisions were severable and ordered arbitration. That procedure was backwards. Because the limitations were severable, their validity was *not* a gateway issue and should not have been decided by the court.

The point the Fourth District overlooked is that, where the challenged provision is severable, there is no need for a court to determine its enforceability. The enforceability issue of a remedial limitation may never even become ripe in the arbitration, as the Eleventh Circuit recognized in *Anders*. 346 F.3d at 1033 ("[T]he arbitrator should decide whether the remedial provisions of the arbitration agreement are invalid, if the arbitrator decides that Anders' claims have merit."). The Second District made this same observation in *Bland*, stating:

> [T]he evidence presented in arbitration could render these concerns moot. For example, a factual finding that noneconomic losses did not exceed $250,000 would render the contractual limitation irrelevant. Similarly, a finding that the evidence did not justify an award of punitive damages would eliminate the need to address the validity of a punitive damages bar.

927 So. 2d at 258. If the plaintiff proves entitlement to such relief, then the arbitrator can address the enforceability of the limitations.

In seeking to avoid arbitration here, Gessa points to Judge Altenbernd's concurrence in *Stiehl*, where he expressed frustration with the proliferation of appeals challenging arbitration agreements in nursing home cases and the notion

that arbitrators should make "case-specific, non-precedential, confidential decisions" regarding the validity of remedial limitations such as those at issue here. *Stiehl*, 22 So. 3d at 107 (Altenbernd, J., concurring). Judge Altenbernd's concern about arbitrators deciding the enforceability of remedial limitations overlooks the basic nature of arbitration as an alternative means of dispute resolution. Arbitration is intended to be a quick, inexpensive means to resolve disputes. That is especially important in a case such as this, where the party herself could get speedy relief, rather than protracted litigation that could wind up benefiting only her heirs.

Based on the established analysis set forth in *Anders* and *Rollins*, the Second District correctly considered only whether the trial court's decision on severability is supported by the record. As shown below, the record supports the severability findings, and Gessa's challenge should be resolved by the agreed-upon arbitrator, not the courts. A public policy challenge to severable limitations provision is not a gateway issue.

3. The Remedial Limitations Are Severable.

The Second District correctly affirmed the trial court's finding that the challenged limitations are severable. Under Florida law, whether a contract provision is severable depends on the intent of the parties, which is to be determined "by a fair construction of the terms and provisions of the contract itself,

and by the subject matter to which it has reference." *Wilderness Country Club Partnership, Ltd. v. Groves*, 458 So. 2d 769, 772 (Fla. 2d DCA 1984) (quoting *Local No. 234 v. Henley & Beckwith*, 66 So. 2d 818, 821-22 (Fla. 1953)).

Gessa argues that the remedial limitations at issue are not severable "because by the express terms of the agreement, the limitations were incorporated by express reference into the arbitration provisions." Ini. Br., at 24 (emphasis omitted). She further contends that "the parties' intentions, as expressed in the agreement were that the limitations provisions were to be integrated (hence *integral*) into the agreement to arbitrate." Ini. Br., at 25 (emphasis in original; some original emphasis omitted). Gessa misapprehends the governing standards.

A provision's severability is not determined by whether the provision is part of the agreement. By definition, a challenged term is always part of the agreement at issue. As set forth in *Wilderness Country Club Partnership*, severability is based on the parties' intent to have an agreement even without the challenged provisions.

In this case, the trial court applied a "fair construction" of the Arbitration Agreement and found that, based on the overall circumstances of this case and the agreement's particular language, the remedial limitations were not integral and thus were severable. The Second District affirmed that finding as based on competent

substantial evidence. Gessa does not show any error in these eminently correct decisions.

The focus of the Arbitration Agreement is on the use of arbitration to resolve any dispute between the parties. The Agreement is five pages long, and the damages limitations are only a single point on the agreement's fourth page. With the limitations simply removed, there is still a fully enforceable comprehensive bilateral agreement to arbitrate disputes between the parties.

Gessa does not contend, nor could she be heard to say, that she and her daughter would not have signed the Arbitration Agreement without these limitations on liability. Nor does Manor Care take the position that it would not have agreed to arbitrate without those limitations. Indeed, Manor Care argues that arbitration is the essence of the Arbitration Agreement, not the remedial limitations. As such, the limitations can be severed, as the trial court properly found.

Indeed, as discussed above, the Fourth District held in *Bryant* that provisions like the ones at issue here should be severed. 937 So. 2d at 270. While the agreement in that case contained a severability clause, the test employed by the court was that "contractual provisions are severable, where the illegal provisions do not go to the contract's essence, and, there remain valid legal obligations with the illegal provisions eliminated." *Id.* Even the presence of a severability clause does

not mean that all invalid provisions are severable, *see, e.g,*, *Place at Vero Beach, Inc. v. Hanson*, 953 So. 2d 773 (Fla. 4th DCA 2007), just as the lack of a severability clause does not mean that no provision is severable. As in *Bryant*, and as the Second District held in the decision below, when the provisions at issue here are examined in the context of the parties' entire agreement, the limitations are plainly severable.

Accordingly, a valid agreement to arbitrate exists, regardless of whether the limitations are enforceable. Since the severability finding is dispositive of Gessa's argument that her challenge to the remedial limitations renders the Arbitration Agreement invalid, the Second District correctly affirmed the trial court's decision to compel arbitration. The arbitrator can address Gessa's challenge to the agreement's remedial limitations, should that issue become ripe in the arbitration.

II. THE REMEDIAL LIMITATIONS AT ISSUE ARE ENFORCEABLE.

As demonstrated above, Gessa's public policy challenges to the Arbitration Agreement's remedial limitations are issues for the arbitrator, not the courts, in the first instance. Should this Court reach the merits of those challenges, the Court should reject them and hold that the remedial limitations are not void as a matter of public policy. Rather, they are voluntary waivers of potential remedies made in exchange for valuable consideration. The Court should confirm the proper

analysis to be used under Florida law when examining such public policy challenges.

Florida law is well-settled that contractual provisions may not be declared unenforceable on public policy grounds except in *extremely* limited circumstances:

> [Florida courts are to be] guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, unless it be made clearly to appear that there has been some *great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract between parties sui juris*.

Bituminous Cas. Corp. v. Williams, 17 So. 2d 98, 101-02 (Fla. 1944) (emphasis added). Applying *Bituminous Casualty*'s "rule of extreme caution," the Arbitration Agreement here is enforceable.

At the outset, there is no dispute that the agreement in this case is entirely voluntary. Gessa's admission to the Carrollwood facility was not conditioned on the agreement's execution, and she had three business days to cancel it. No services were conditioned on its execution. The issue is not whether nursing homes can escape some liability as a condition of offering care, but rather whether persons can voluntarily enter the agreement at issue. They are free to do so.

A resident who desires affordable nursing home services and an expeditious arbitration process to resolve disputes, with the arbitrator's fees and costs paid for by the facility, may voluntarily agree to cap noneconomic damages at $250,000—a

not insubstantial amount of money for the average person—and waive the potential recovery of punitive damages. Here, the Arbitration Agreement unquestionably calls for a speedy resolution of claims. Under the agreement, the arbitration hearing must be held within six months and the award made 30 days thereafter. The right to appeal is curtailed under both the Florida Arbitration Code and the Federal Arbitration Act. Thus, under the Arbitration Agreement, a resident with a damages claim may promptly recover any amount owed.

By comparison, the mere step of completing the merits briefing in this appeal alone will likely take as much time as would have been required to resolve the parties' entire dispute in arbitration. It is reasonable for persons who contract for nursing home services, who commonly are older than the general population, to opt for an award in their hands in a matter of months—albeit with limitations on non-economic and punitive remedies—rather than wait for years of litigation and appeals to conclude, with the risk that ultimately perhaps no award will be obtained or will be obtained by and benefit only the person's heirs.

This is not a case in which one person attempts to waive the rights of another. *Cf. Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008) (holding that pre-injury release executed by parent on behalf of minor is not enforceable against the minor of the minor's estate regarding injuries sustained from participation in a commercial activity). Gessa executed the Arbitration Agreement on her first

admission to the facility, and on her readmission, her daughter—whom Gessa had given her power of attorney—executed the same agreement as well.

Florida law has long recognized that a person may waive his or her personal rights, even rights expressly set forth in nothing less than the state constitution. *E.g.*, *In re Amendment to the R. Reg. the Fla. Bar—Rule 4-1.5(f)(4)(B) of the R. of Prof'l Conduct*, 939 So. 2d 1032, 1038 (Fla. 2006); *see also, e.g., City of Treasure Island v. Strong*, 215 So. 2d 473, 479 (Fla. 1968) ("[I]t is firmly established that such constitutional rights designed solely for the protection of the individual concerned may be lost through waiver . . . ."); *In re Shambow's Estate*, 153 Fla. 762, 15 So. 2d 837, 837 (1943) ("It is fundamental that constitutional rights which are personal may be waived.").

Given its fundamental nature, the "right to freedom of contract between parties sui juris" recognized in *Bituminous Casualty* has been overthrown only in the most onerous of cases, as where a person purports to waive a right that is designed to protect both the individual and the public. For instance, in *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007), the Court held that Florida's constitutional homestead right is *not* a personal right but a right that protects the security of Florida's families, a matter of great public interest. Thus, that right cannot be waived except in the case of a secured mortgage.

Likewise, in *American Casualty Co. v. Coastal Caisson Drill Co., Inc.*, 542 So. 2d 957 (Fla. 1989), the Court held that a contract for a public works project could not waive statutory requirements calling for a payment and performance bond. The court held that the bond requirements are intended to benefit not only subcontractors on a given project but the public as a whole. Based on the existence of direct public benefits from the bond requirement, the Court held that a waiver of that requirement violates Florida public policy and cannot be enforced. *See also Holt v. O'Brien Imports, Inc.*, 862 So. 2d 87 (Fla. 2d DCA 2003) (invalidating waiver of right to injunctive relief under the Florida Deceptive and Unfair Trade Practices Act, since injunctive relief under that act is designed to protect both the individual and the public by stopping the wrongful activity altogether).

Here, Gessa retained the right to seek injunctive relief. She waived only her personal right to recover monetary damages that she might herself receive. This Court has previously recognized that the monetary remedies available in a resident's rights claim under the Nursing Home Act are personal and can be waived. In *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989), the Court held that "[t]he attorney's fees provision of section 400.023 is merely a statutory right to seek fees." As the Court specifically explained, "Clearly, statutory rights can be waived." *Id.* This is likewise true for the damages limitations at issue in this case.

Nonetheless, the First and Fourth Districts have held that provisions similar to those challenged here violate Florida's public policy and are unenforceable. *See Linton*; *Bryant*; *Lacey v. Healthcare & Retirement Corp. of America*, 918 So. 2d 333 (Fla. 4th DCA 2005). They did so simply based on their belief that public policy absolutely prohibits a person from waiving relief that might possibly be available under a Chapter 400 resident's rights claim. Those decisions applied an incorrect legal analysis and thereby reached an incorrect result.

Neither the First District nor the Fourth District applied *Bituminous Casualty*'s "rule of extreme caution" or acknowledged the "fundamental public policy of the right to freedom of contract between parties sui juris." Neither court considered whether the limitations would affect only personal rights, rather than the rights of others. In fact, the limitations at issue here relate only to monetary recovery in an individual case.

Of importance to Gessa's public policy challenge, there is no waiver of any rights with respect to the home's care or conduct. The Nursing Home Act requires nursing facilities to guarantee nursing home residents numerous rights, and the Arbitration Agreement in no way waives the facility's obligation to assure those rights to all residents. Furthermore, under the agreement, the resident may seek full economic damages, injunctive relief, and non-economic damages up to $250,000. The resident also may pursue administrative remedies.

Accordingly, this is not a situation where a regulated person has attempted to use a contract to avoid having to conduct itself in the manner required by the Legislature. Gessa thus mistakenly quotes and relies upon Judge Farmer's concurrence from *Blankfeld*, where Judge Farmer stated, "It is absurd that a regulatory scheme can be evaded by private contracts of the very person being controlled." *Blankfeld*, 902 So. 2d at 303 (Farmer, J., concurring). The Arbitration Agreement does not allow Manor Care to evade any statute or regulation controlling its conduct. The parties here are merely agreeing to the speedy arbitration of claims, at the facility's expense, with noneconomic damages capped and without punitive damages.

Those limitations on remedies do not contradict any provision contained in Chapter 400, the Nursing Home Act. The Legislature has not established a right to recover punitive damages by making them automatic, unlike other statutory schemes that require compensatory damages to be doubled or trebled as a punitive measure. *See, e.g.,* § 542.22(1), Fla. Stat. (awarding treble damages for violations of Florida antitrust laws); *see also* § 68.082(2)(g), Fla. Stat. (awarding treble damages for violation of Florida False Claims Act); § 772.11(1), Fla. Stat. (awarding civil remedy of treble damages for victims of criminal theft). The Legislature knows how to assure a mandatory award of punitive damages for a statutory violation. It has not done so here.

By the same token, the Legislature also knows how to provide that statutory remedies may not be waived by contract and has done so in various areas of the law. *E.g.*, § 443.041, Fla. Stat. (providing that any agreement purporting to limit an individual's unemployment compensation rights "is void"); § 516.31, Fla. Stat. (providing that any waiver of statutory consumer protections "shall be void and unenforceable as contrary to public policy"); §§ 520.12-.13, Fla. Stat. (providing waiver of portions of Motor Vehicle Retail Sales Finance Act to be unenforceable and void); § 769.06, Fla. Stat. (providing contracts that limit liability under § 769.01 are "illegal and void").

That the Legislature has not done so in the Nursing Home Act is strong evidence that Florida's public policy does not prohibit the remedial limitations voluntarily agreed upon by the parties here. *See TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606 (Fla. 1995) (holding the Legislature's decision not to include a reasonableness test requirement in an attorney's fees statute supports that no such test is required, where the Legislature has shown in other statutes that it understands how to include such a test); *Tallahassee Mem. Reg. Med. Ctr. v. Kinsey*, 655 So. 2d 1191, 1198 (Fla. 1st DCA 1995) (stating that "[h]ad the legislature intended that posting of a satisfactory 'bond or security' would relieve defendants of all further liability for future economic damages, it would have been an easy matter for it to have said so. In our opinion, the absence of any such

language is strong evidence that the legislature did not intend the result urged by appellants.").

Indeed, not only has the Legislature not prohibited the waivers at issue here, the Legislature has expressly *authorized* nursing home facilities and residents to enter written agreements regarding any matter the parties "deem appropriate." § 400.151(2), Fla. Stat. Specifically, section 400.151(1) provides that "[t]he presence of each resident in a facility shall be covered by a contract." § 400.151(1), Fla. Stat. The contract must contain provisions regarding the services and accommodations to be provided, the rates to be charged, and other matters, and may also address "***any other matters which the parties deem appropriate***." §400.151(2) (emphasis added). The parties certainly could deem it "appropriate" to enter an arbitration agreement that provides for a speedy resolution, with the arbitrator's fees and costs paid by the facility, and with a reasonable cap on noneconomic damages and a waiver of any punitive damages claim. Importantly, while the Second District addressed section 400.151(1) in *Bland*, and then-Judge Polsten referenced *Bland*'s reliance on the statute in his partial dissent in *Linton*, neither the First District's nor the Fourth District's decisions holding the limitations violate public policy discussed the statute at all.

Regarding the non-economic damages waiver in particular, there is no public policy violation where two parties voluntarily agree to a cap of $250,000 for

noneconomic damages recoverable in arbitration. The Legislature has recognized that this exact figure is a reasonable cap on subjective, noneconomic damages for injured parties in other contexts. *See* § 766.207(7)(b), Fla. Stat. (establishing $250,000 cap on noneconomic damages in certain cases of medical malpractice). This substantial amount, coupled with a full award of all economic damages and the opportunity to seek injunctive relief, is wholly sufficient to vindicate the statutory rights of nursing home patients in their efforts to seek compensation for residents' rights violations.

Nor does a nursing home resident's voluntary waiver of punitive damages in arbitration violate public policy. Punitive damages are not required to make a plaintiff whole. *Dr. P. Phillips & Sons v. Kilgore*, 12 So. 2d 465, 467 (Fla. 1943). A plaintiff is not required to seek or obtain punitive damages in addition to compensatory damages, and thus can waive them in bringing her individual proceeding. She is equally free to waive them by a voluntary contract.

The waiver of punitive damages is also supportable in light of the heavily regulated environment in which nursing homes operate. Punitive damages are not necessary to deter future improper conduct by nursing homes. That prophylactic purpose is fulfilled by the very severe penalties available through the regulatory scheme imposed by state and federal law. Improper conduct by a nursing home—and certainly any conduct so egregious as to warrant a punitive damages award—

can result in substantial regulatory action by regulatory officials, including revocation or suspension of a license, temporary or permanent injunctive relief, or fines. *See* §§ 400.121-.126, Fla. Stat.; *see also* 42 C.F.R. §§ 483.1-.480. In fact, a facility may have its Medicaid eligibility revoked, which for many facilities could create extraordinary financial hardships.

A waiver of a private right to claim punitive damages against a nursing home thus does not deprive the public of the ability to regulate or punish that nursing home for improper conduct or to take action to deter such conduct in the future. A plaintiff who has waived a claim for punitive damages may still file a complaint with the state and have the force of the state's administrative procedures applied as a result of a nursing home's conduct. This regulatory remedy fully protects the public in a far more direct and immediate way than a private claim for punitive damages, which may not be imposed until years after the complained-of conduct and long after the conduct has been changed either voluntarily or by regulatory mandate.

In his partial dissent in *Linton*, then-Judge Polston explained that the same remedial limitations at issue in this case did not violate public policy. He relied on the general enforceability of contractual waivers, the lack of any statutory restriction on such waivers, and section 400.151(2)'s directive that the nursing home contract include "any other matters which the parties deem appropriate" to

conclude that "it is the Florida Legislature, rather than the court, who must decide Florida's public policy on this issue." *Linton*, 953 So. 2d at 579-82 (Polston, J., dissenting in part). That is exactly right—since punitive damages are a statutory right here, they may be waived in the absence of a contrary legislative directive.

Likewise, in *Bland*, where the public policy issue was left for the arbitrator to decide, the Second District relied on these same considerations to conclude that "a compelling argument can be made that, absent a legislative restriction, the courts should honor a party's decision to contract away statutory protections." 927 So. 2d at 258. As *Bland* pointed out, the challenged monetary waivers involve remedies only *potentially* available under the Nursing Home Act. They are not automatically available to all persons in all cases, even where valid claims exist, and the facts in any given case may make limitations on the damages remedies moot. *Id.* The Eleventh Circuit essentially made the same observation in *Anders* when it held that the plaintiff's challenge to an agreement's limitations was an issue to be decided by the arbitrator *if* the arbitrator decides that the claims have merit. 346 F.3d at 1033.

In sum, there is no violation of Florida public policy by the parties' agreement to arbitrate nursing home claims with an expeditious time frame for resolution, the arbitrator's fees and costs paid by the facility, and the remedial limitations at issue in this case. Should this Court reach the public policy

challenge on the merits, it should determine that the cap on noneconomic damages and the waiver of punitive damages do not violate Florida's public policy.

CONCLUSION

The Court should approve the Second District's decision below and disapprove the decisions in *Bryant* and *Linton* on the issue of whether the court or the arbitrator should address Gessa's challenge to the Arbitration Agreement's remedial limitations. The question should be for the arbitrator in the first instance, and the Court should disapprove the decisions in *Linton*, *Bryant*, and *Lacey* for addressing the issue without sending it to the arbitrator.

Should the Court reach the issue of whether the agreed-upon limitations on noneconomic and punitive damages violate Florida's public policy, the Court should reject Gessa's challenge and disapprove the decisions in *Linton*, *Bryant*, and *Lacey*. Absent a legislative restriction on agreements that limit noneconomic damages and waive punitive damages, the inclusion of such limitations in a voluntary arbitration agreement does not violate the public policy of this state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 10, 2010, a copy of the foregoing has been furnished by U.S. Mail to Susan B. Morrison, LAW OFFICE OF SUSAN B. MORRISON, P.A., 1200 W. Platt Street, Suite 1000, Tampa, Florida 33606, Isaac R. Ruiz-Carus and Amy J. Quezon, WILKES & McHUGH, P.A., One North Dale Mabry Hwy., Suite 800, Tampa, Florida, 33609 Counsel for Petitioners.

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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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