IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

V.

MANOR CARE OF FLORIDA, INC., et al.

Respondents.
_____/

CASE NO. SC09-768
L.T. CASE NO. 2D07-1928

BRIEF OF *AMICUS CURIAE* FLORIDA JUSTICE REFORM INSTITUTE AND FLORIDA MEDICAL ASSOCIATION

CYNTHIA S. TUNNICLIFF (FBN 0134939)
ASHLEY P. MAYER (FBN 0067968)
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
215 South Monroe Street – 2nd Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: (850) 222-3533
Facsimile: (850) 222-2126

TABLE OF CONTENTS

PAGE

TABLEOF CONTENTS continued

PAGE

CITATION OF AUTHORITIES

CASE **PAGE**

CITATION OF AUTHORITIES continued

PAGE

CITATION OF AUTHORITIES continued

PAGE

OTHER AUTHORITIES

FLORIDA STATUTES

ARTICLES

CITATION OF AUTHORITIES continued

PAGE

STATEMENT OF IDENTITY AND INTEREST OF AMICUS

The Florida Justice Reform Institute ("Institute") is an advocacy organization for civil justice and tort reform, representing numerous member organizations aligned in their mission to promote fair and equitable legal practices within Florida's civil justice system. The Institute works to ensure that Florida's legal framework prevents the social and economic tolls of unnecessary and unbridled litigation. Moreover, individual members of the Institute rely on arbitration clauses in their business practices, as an efficient tool to fairly protect the rights of affected parties, while helping businesses—large and small—predict and manage risks inherent to their operations.

The Florida Medical Association ("FMA") is a professional association dedicated to the representation of more than 19,000 physicians on issues of legislation and regulatory affairs, medical economics and education, public health, and ethical and legal issues. The FMA, as an advocate for physicians statewide, is concerned about the viability of arbitration agreements, which are used in a variety of medical settings. The FMA is also concerned about the ability of parties, in good faith, to prospectively limit the availability of specified damages.

Both the Institute and the FMA believe that arbitration is the appropriate forum in which to determine a public policy challenge to remedial limitations. To hold otherwise would undermine the purpose of arbitration, which is to minimize

the need to resort to courts and to fairly and expeditiously resolve the subject matter of the parties' dispute. Both arbitration agreements and contractual limitations on remedial statutes are used in many industries, and creating uncertainty as to their validity would have an enormous adverse effect on the business and medical communities.

SUMMARY OF THE ARGUMENT

This case presents a question as to the appropriate forum for resolving a public policy challenge to an arbitration agreement's remedial limitations. Arbitration is a valuable and efficient tool for the resolution of disputes, and helps avoid the high costs associated with litigation. Public policy at the federal and state level favors arbitration, which produces demonstrable positive effects for many industries, including nursing homes. This state's jurisprudence also respects the freedom of contract, and exhibits a reluctance to interfere with contracts absent unconscionability or illegality. Nothing in the Nursing Home Residents Rights Act prohibits the contractual limitation of statutory remedies provided in Section 400.23, Florida Statutes, and the power to make such a proclamation is exclusively the Legislature's. Arbitration is the appropriate forum for determining whether provisions in an arbitration agreement are enforceable and/or severable, particularly when the grounds for such a challenge are rooted in public policy considerations that, arguably, do not exist. To hold otherwise would ignore the

fact that the Legislature has not declared such limitations to be violative of public policy, and would subvert the entire purpose of arbitration as an *alternative* form of dispute resolution.

ARGUMENT

I. FEDERAL AND STATE POLICY FAVOR ARBITRATION, AND THE FLORIDA LEGISLATURE HAS NOT EXPRESSED THAT LIMITATIONS ON SECTION 400.23 REMEDIES ARE CONTRARY TO THIS PUBLIC POLICY.

Arbitration is an efficient method of alternative dispute resolution, which helps to resolve claims quickly and fairly while alleviating overburdened dockets. Whether to defer to this state's preference for arbitration is the only public policy issue before this Court, as the Legislature has refrained from invalidating limitations on Chapter 400 remedies.

A. Public policy favors arbitration as an effective tool for the resolution of disputes.

Arbitration agreements are "valid, enforceable, and irrevocable without regard to the justiciable character of the controversy." *Fla. Stat.* § 682.02. This Court has reinforced this public policy preference, recognizing the value of arbitration for "enhancing the effective and efficient resolution of disputes." *Global Travel Marketing, Inc. v. Shea*, 908 So. 2d 392, 398 (Fla. 2005); *Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005). In addition to state policy, national policy also favors arbitration, as evidenced by

Congress' enactment of the Federal Arbitration Act. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

On the other hand, litigation is typically slower and more expensive, resulting in adverse economic and administrative costs. The nursing home industry is just one example of litigation's toll on business. It exemplifies, as a microcosm, the superiority of arbitration as a means of efficient dispute resolution.

Claims experience and jury awards have increased significantly for nursing homes over the years, and the American Health Care Association found that nursing homes are forced to devote more and more of their budgets to litigation expenses. David G. Stevenson & David M. Studdert, *The Rise of Nursing Home Litigation: Findings from a National Survey of Attorneys*, 22 Health Aff. 219, 219-23 (2003). Nursing homes have seen their insurance premiums rise and their ability to secure general and professional liability coverage become severely limited as a result of increased claims and awards. Joseph E. Casson & Julia McMillen, *Protecting Nursing Home Companies: Limiting Liability Through Corporate Restructuring*, 36 J. Health L. 557, 584 (2003). The plaintiffs' bar has progressively devoted more attention to lawsuits against nursing homes, particularly in Florida, devising methods to successfully challenge nursing home arbitration agreements. Stevenson, 22 Health Aff. at 219-23; Robert Hornstein, *The Fiction of Freedom of Contract—Nursing Home Admission Contract Arbitration*

Agreements: A Primer on Preserving the Right of Access to Court Under Florida Law, 16 St. Thomas L. Rev. 319 (2003). Unfortunately, the costs associated with defending frequent claims and paying large jury verdicts does not just affect the nursing home industry—such costs are also borne by nursing home patients and taxpayers generally, given the large portion of Medicaid and Medicare funding for this industry. Casson at 583.

The United States Department of Justice is also supportive of arbitration agreements between nursing homes and residents. In the face of proposed legislation entitled the "Fairness in Nursing Home Arbitration Act of 2008," the Office of Legislative Affairs voiced its opposition because the bill sought to invalidate arbitration agreements in the nursing home setting, and because "[a]rbitration is typically a less expensive and quicker method of resolving disputes than civil litigation and is generally viewed as leading to fair outcomes." Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, United States Department of Justice to Senator Patrick Leahy, Chairman, Committee on the Judiciary, United States Senate, http://www.citizen.org/documents/DOJ%20-%2007-30-08%20Ltr.pdf.

The benefits of arbitration agreements for nursing homes, the fairness arbitration preserves for residents, and this state's general respect for the enforceability and irrevocability of arbitration agreements provide a necessary

backdrop for emphasizing the importance of arbitration as an alternative dispute resolution process.

B. Remedial limitations within arbitration agreements are permissible, and holding otherwise would constitute an improper infringement on separation of powers.

Section 400.23, Florida Statutes, is remedial in nature, as it provides a cause of action for violations of nursing home residents' rights. *Knowles v. Beverly Enterprises*, 898 So. 2d 1, 7 (Fla. 2004). Nursing homes will often provide patients with arbitration agreements, which contain limitations on remedies provided by governing statutes. Limitations on statutory remedies are completely acceptable when contained within a valid agreement, *infra*.

"Generally speaking, there is no common law basis to refuse to enforce valid agreements to arbitrate by competent parties merely because they involve a waiver of statutory rights and remedies." *Richmond Healthcare, Inc. v. Digati*, 878 So. 2d 388, 390 (Fla. 4th DCA 2004). Moreover, the Legislature chose not to regulate arbitration provisions in nursing home admissions contracts, leaving no statutory basis upon which to impose such regulation. *Id.* at 391.

In error, some courts have declared limitations of remedies for nursing home negligence invalid. *See Alterra Healthcare Corporation v. Linton*, 953 So. 2d 574, 577 (Fla. 1st DCA 2007); *Alterra Healthcare Corporation v. Bryant*, 937 So. 2d 263, 266 (Fla. 4th DCA 2006); *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242,

1243 (Fla. 5th DCA 2006)*; Blankfeld v. Richmond Health*, 902 So. 2d 296, 298 (Fla. 4th DCA 2005). However, this judicial declaration of invalidity should not be imposed absent statutory guidance to that effect. *Bland v. Health Care and Retirment Corporation of America*, 927 So. 2d 252, 258 (Fla. 2d DCA 2006); *Linton*, 953 So. 2d at 580-82 (Polston, J., dissenting) (disagreeing with the majority's ruling that limitations of remedies under Chapter 400 are void on public policy grounds).

"[A]bsent a legislative restriction, the courts should honor a party's decision to contract away statutory protections." *Bland*, 927 So. 2d at 258. In *Bland*, the daughter of a nursing home resident sued for wrongful death, and the court, finding that the arbitration agreement was not unconscionable, sent the plaintiff's public policy challenge to arbitration. *Id*. at 254, 256-57. Reasoning that the arbitration agreement's limitations were not unconscionable, the court found no basis for striking the limitations on public policy grounds. *Id*. at 258 *citing Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989); *Kaplan v. Kimball Homes Fla., Inc.*, 915 So. 2d 755 (Fla. 2d DCA 2005); *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 261-63 (Fla. 2d DCA 2004).

In fact, judicially abolishing the ability to contractually limit damages for violations of Chapter 400, Florida Statutes, may run afoul of the doctrine of separation of powers. *Linton*, 953 So. 2d at 581-82 (Polston, J., dissenting). The

Legislature's prohibition on waivers of statutory remedies in other contexts is significant. *Miller v. Scottsdale Insurance Company*, 932 So. 2d 1028, 1030 (Fla. 2006); *Linton*, 953 So. 2d at 581 *citing Fla. Stat. §§ 443.041; 520.13; 769.06*; *see also Richmond*, 878 So. 2d at 391 ("We do know from other statutes that when the legislature wants to require specific contractual provisions waiving civil remedies, they know how to do so."). By demonstrating its ability to place restraints on certain waivers and limitations and refraining to do so here, the Legislature's silence is arguably just as significant as if it had chosen to speak on this issue.

Reasonable caps on damages help "stabilize the nursing home and liability insurance markets without eliminating the incentives that litigation may provide to deliver high-quality care." Stevenson, at 226. Limiting available damages for nursing home negligence in no way suspends or alters nursing home regulation. *Contra Blankfeld*, 902 So. 2d at 303 (Farmer, J., dissenting) (arguing that limitations on Chapter 400, Florida Statues, is akin "common carriers evading safety laws," "restaurants avoiding health codes," "cigarette dealers canceling health warnings," and "home buildings modifying building codes."). Limitations similar to the ones in this case provide a deterrent effect against violations of nursing home laws and regulations, and are crucial to the management of risk and the predictability of costs and expenses.

Lastly, the Petitioner's attempt to draw a parallel between the instant case and *Comptech International, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1222 (Fla. 1999) is inapposite. Ini. Br., at 16-17. In *Comptech*, this Court held that the economic loss rule does not bar statutory causes of action. *Id.* at 1222. While the Petitioner analogizes this Court's unwillingness to "abrogate…remedies granted…under [a] legislative created scheme," to the "unwilling[ness] to abrogate the remedies conferred on elderly nursing home residents," this analogy fails to recognize that the judicial limitation of legislative remedies is entirely different than the contractual limitation of such remedies. Ini. Bri., at 17. In fact, the *Comptech* opinion notes that interference with "legislative enactments through judicial policies," creates separation of powers issues, and "that tension must be resolved in favor of the Legislature's right to act in this area." *Id. citing Holly v. Auld*, 450 So. 2d 217 (Fla. 1984); *City of Jacksonville v. Bowden*, 64 So. 769 (Fla. 1914). Contrary to the Petitioner's argument, this Court's opinion in *Comptech* only reinforces the need for judicial restraint when examining the merits of such limitations, particularly when the Legislature has demonstrated its ability to regulate a particular issue, but has abstained from doing so in a particular area.

In the same way that this Court refused to "limit or abrogate…legislative enactments through judicial politics" in *Comptech*, this Court should similarly endeavor to avoid extending legislative enactments by adding words to a statute.

See Lawnwood Medical Center, Inc. v. Seeger, 990 So. 2d 503, 512 (Fla. 2008) (writing that courts are not at liberty to add words to a statute that were not placed there by the Legislature). Declaring contractual limitations of Chapter 400 remedies invalid would involve precisely this kind of extension, and invokes policy choices that are most appropriately within the ambit of the legislative branch.

II. ARBITRATORS CAN AND SHOULD DECIDE WHETHER AN ARBITRATION AGREEMENT'S REMEDIAL LIMITATIONS VIOLATE PUBLIC POLICY, AS HOLDING OTHERWISE WOULD UNDERMINE THE VERY PURPOSE OF ARBITRATION.

Federal and state courts prevent parties from challenging an arbitration agreement outside of the arbitration process unless a "gateway issue" requires resolution. Case law has consistently held that gateway issues relate only to the validity of the arbitration clause, and departing from this precedent would undermine the very purpose of arbitration.

A. Public policy challenges to an arbitration agreement's remedial limitations should be decided by the arbitrator.

The narrow issue before this Court is whether a public policy challenge to an arbitration agreement's remedial limitations is to be decided by a court or an arbitrator. Once a court appropriately performs the *Seifert* test, the remaining issues should be left to the arbitrator.

Upon a motion to compel arbitration, a court must consider (1) whether a valid agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration was waived. *Seifert v. U.S. Home Corporation*, 750 So. 2d 633 (Fla. 1999). Other challenges to an arbitration agreement should be addressed by the arbitrator. *Rollins v. Lighthouse Bay Holdings, Ltd.*, 898 So. 2d 86, 87 (Fla. 2d DCA 2005); *accord Bland v. Health Care and Retirement Corporation of America*, 927 So. 2d 252, 255 (Fla. 2d DCA 2006); *Jaylene, Inc. v. Steur*, 22 So. 3d 711, 713 (Fla. 2d DCA 2009); *Manor Care, Inc. v. Kuhn*, 23 So. 3d 773, 774 (Fla. 2d DCA 2009); *Manorcare Health Services v. Stiehl*, 22 So. 3d 96, 97 (Fla. 2d DCA 2009); *Shotts v. OP Winter Haven, Inc.*, 988 So. 2d 639, 643-44 (Fla. 2d DCA 2008).

A court's role in ruling on a motion to compel is to decide only the aforementioned "gateway issues" which pertain to the arbitration agreement itself, not the contract as a whole. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *Stiehl*, 22 So. 3d at 99. In *Stiehl*, the personal representative of a deceased's estate sued for wrongful death under the Nursing Home Residents Act. *Id.* at 97-98. The agreement contained remedial limitations, which the plaintiff argued should result in the trial court's declaration of invalidity. *Id.* at 99. Holding that the validity of remedial limitations does not constitute a gateway issue, the court sent the case to arbitration, where the arbitrator could determine,

based on the facts, whether the remedial limitations were enforceable. *Id.* at 100-01.

The Second District Court of Appeal has consistently ruled that public policy challenges, which do not qualify as gateway issues, must be reserved for the arbitrator. *Jaylene*, 22 So. 3d at 713; *Kuhn*, 23 So. 3d at 774; *Shotts*, 988 So. 2d at 643-44. The First, Fourth, and Fifth District Courts of Appeal have disagreed with this assessment, reasoning the resolution of public policy challenges to remedial limitations within an agreement is necessary to determine validity of the agreement itself. *Bryant*, 937 So. 2d at 268; *Linton*, 953 So. 2d at 577; *Ocala*, 935 So. 2d at 1243.

For example, in *Bryant*, a former nursing home resident sued for negligence arising out of her stay in the home, and challenged not only the arbitration provisions of her agreement, but also the limitation of liability provisions. *Bryant*, 937 So. 2d at 268. Ruling that it was appropriate for the trial court to determine the validity of the contract, the court reasoned that the limitation of liability provision *was* an arbitration provision, and that unconscionability *was* at issue. *Id.* This reasoning is flawed, as an arbitration clause and a limitation of liability clause, regardless of how closely they may be situated to each other on a piece of paper, are *different* provisions, exhibited most notably by their different names, which by the *Bryant* court's reasoning, are superfluous. Additionally, the issue of

the validity of an arbitration clause is separate and apart from whether certain provisions are harmonious with public policy. This is even more so when limitations that run contrary to public policy can be severed from the agreement. *Contra Bryant*, 267-68.

Lastly, even if a limitation of liability is found to be within an arbitration provision, the only basis on which to invalidate such limitations would be for fraud, duress, or unconscionability. *Rollins*, 898 So. 2d at 87. Without a common law or statutory basis for holding limitations on Chapter 400 remedies unconscionable, a party is left with only a public policy challenge, which should be decided by an arbitrator.

B. Requiring courts to resolve a public policy challenge to an arbitration agreement's remedial limitations defeats the entire purpose of arbitration.

The purpose of arbitration—to minimize judicial intervention—would be severely undercut if this Court rules that an enforceability determination for limitations of liability should be made by a trial court. *See* Nelson Blank & Lansing Scriven, *Alternative Dispute Resolution: 1994 Survey of Florida Law*, 19 Nova L. Rev. 33, 32 (1994). Further, allowing courts to make determinations of public policy when no such policy exists would require courts to step outside of the ambit of the judicial branch.

A ripple effect of increased litigation would likely ensue as plaintiff's attorneys would identify new provisions that are questionably contrary to public policy. Plaintiffs could find new grounds for challenging arbitration agreements, forcing courts to perform line-by-line examinations of arbitration agreements in order to find at least one ground on which to refuse to enforce an arbitration agreement. Such havoc would be detrimental not only to nursing homes, but to this state's business and medical communities as a whole.

CONCLUSION

The Court should approve the Second District Court of Appeal's ruling that public policy challenges to an arbitration agreement are to be heard and decided in the context of arbitration. By requiring such challenges to be decided by an arbitrator, this state's policy favoring the enforceability and irrevocability of valid arbitration agreements is preserved, and the integrity of the arbitration process is safeguarded.

In the event this Court wishes to also rule on the propriety of limitations on Chapter 400 remedies, this Court should also hold that such limitations are valid and enforceable absent legislative intervention.

Respectfully submitted,

CYNTHIA S. TUNNICLIFF (FBN 0134939)
ASHLEY P. MAYER (FBN 0067968)
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
215 South Monroe Street – 2nd Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: (850) 222-3533
Facsimile: (850) 222-2126

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to SUSAN B. MORRISON, ESQUIRE, of the Law Office of Susan B. Morrison, P.A., 1200 West Platt Street, Suite 1000, Tampa, Florida 33606; ISAAC R. RUIZ-CARUS, ESQUIRE, and AMY J. QUEZON, ESQUIRE, of Wilkes & McHugh, P.A., One North Dale Mabry Highway, Suite 800, Tampa, Florida, 33609; and SYLVIA H. WALBOLT, ESQUIRE, and MATTHEW J. CONIGLIARO, ESQUIRE, of Carlton Fields, P.A., Post Office Box 2861, St. Petersburg, Florida 33731, this _____ day of February, 2010.

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CERTIFICATE OF COMPLIANCE

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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