SUPREME COURT OF FLORIDA

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

Petitioner,

v.

MANOR CARE OF FLORIDA, INC.; MANORCARE HEALTH SERVICES, INC.; MANORCARE OF AMERICA, INC.; MANOR CARE, INC.; BARBARA PARLATORE a/k/a BARBARA A. KOENING PARLATORE; and DAWN D. BRUNER a/k/a DAWN JONES DEBRUNNER (as to MANOR CARE OF CARROLLWOOD)

Respondents.

CASE NO.: SC09-768
DCA CASE NO. 2D07-1928
LTC: 05-7548

PETITIONER'S INITIAL BRIEF ON THE MERITS

Susan B. Morrison, Esquire
Florida Bar No.: 394424
LAW OFFICES of
SUSAN B. MORRISON, P.A.
1200 W. Platt Street, Suite 100
Tampa, Florida 33606
Telephone (813) 902-9293
Facsimile (813) 902-9275
Attorneys for Petitioner

Isaac R. Ruiz-Carus, Esquire
Florida Bar No.: 0017004
WILKES & McHUGH, P.A.
One North Dale Mabry Hwy.
Suite 800
Tampa, Florida 33609
Telephone (813) 873-0026
Facsimile (813) 286-8820
Attorneys for Petitioner

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Case **Page(s)**

TABLE OF AUTHORITIES

Case **Page(s)**

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Case **Page(s)**

TABLE OF AUTHORITIES

Case **Page(s)**

TABLE OF AUTHORITIES

Page(s)

Constitution and Statutes

Treatises

PRELIMINARY STATEMENT

This case presents an issue of statewide concern impacting a protected class of persons, namely, elderly, nursing home residents. The issues concern, first, whether it is for the courts in the first instance, or for the arbitrator, to decide the gateway issue of the enforceability of the arbitration agreement when the issue of whether the agreement is void as violative of the public policy of this state has been raised as an avoidance defense to the arbitration provision; and second, whether unenforceable arbitration provisions which defeat remedial remedies and violate public policy are severable or whether they go to the essence of the agreement to arbitrate thereby voiding the entire agreement.

The resolution of these issues by a panel of the Second District Court of Appeal in the instant case is in express and direct conflict with the decisions of this Court and the other districts on these points.

References to certain documents contained in the Record before this Court shall be followed by citations to the Index to the Record on Appeal as follows: "(R. Vol. __, Tab ___, pp.___)."

Petitioner, Angela I. Gessa, by and through Miriam G. Falatek, shall be referred to throughout as "Ms. Gessa." Respondents shall collectively be referred to as "Manor Care." Manor Care of Carrollwood , the nursing facility owned and

operated by Manor Care and in which Ms. Gessa resided shall be referred to as the "Nursing Home."

STATEMENT OF JURISDICTION

This Court accepted jurisdiction of this matter for discretionary review of the opinion of the Second District Court of Appeals in Case No. 2D07-1928 in *Gessa v. Manor Care of Florida, Inc., et al*, 4 So.3d 679 (Fla. 2DCA 2009), *rehearing denied* March 31, 2009 (R. Vol. III, pp.) (the "*Gessa* Opinion" or "*Gessa*"). The Florida Constitution grants this Court discretionary jurisdiction to review a district court decision that expressly and directly conflicts with a decision of another district court. Art. V, §3(b)(3), Fla. Const. (1980). Ms. Gessa seeks further review of the decision based on the Second District's express and direct conflict with the Fourth District's decisions in *Alterra Healthcare Corporation v. Bryant*, 937 So.2d 263 (Fla. 4th DCA 2006), and *Lacey v. Healthcare and Retirement Corporation of America*, 918 So.2d 333 (Fla. 4th DCA 2006); with the First District's opinion in *Alterra v. Linton*, 953 So.2d 574, 576 (Fla. 1st DCA 2007);and with the Fifth District's decision in *SA-PG-Ocala, LLC v. Stokes*, 935 So.2d 1242 (Fla. 5th DCA 2006), as well as with numerous other decisions cited throughout this brief.

Moreover, the Second District misapplied the decisional law of this Court and other districts. Misapplication of decisional law serves as the basis for conflict jurisdiction. *Aguilera v. Inservices, Inc.*, 905 So.2d 84, 87 (Fla. 2005) (misapplication of decisional law of Supreme Court is basis for conflict jurisdiction); *Spivey v. Battaglia*, 258 So.2d 815, 816 (Fla. 1972) (misapplication of decisional law of another district is basis for conflict jurisdiction).

STATEMENT OF THE STANDARD OF REVIEW

Findings of fact relating to the *Gessa* Panel's determination of the absence of procedural unconscionability are reviewed based upon the competent, substantial evidence standard. *Bay County v. Town of Cedar Grove,* 992 So.2d 164 (Fla. 2008). The *Gessa* Panel's conclusions of law are reviewed *de novo. Id.* The Court's interpretation of contracts, including the arbitration agreement and the limitation of liability provisions are reviewed *de novo. U.S. Fire Insur. Co. v. J.S.U.B., Inc.,* 979 So.2d 871 (Fla. 2007). Statutory interpretation is a question of law and is reviewed *de novo. Continental Cas. Co. v. Ryan Inc. Eastern,* 974 So.2d 368 (Fla. 2008).

STATEMENT OF THE CASE AND FACTS

When Angela I. Gessa was first admitted to Manor Care of Carrollwood on March 18, 2004, (R. Vol. I, Tab 1, p.46, Tab 3, p. 64), she was presented with a stack of papers consecutively numbered pages 1 through 44. The "Admission

Agreement," including attachments, was found at pages 1 through 39, and contains Ms. Gessa's initials (signature) numerous times throughout. (R. Vol. I, Tab. 3, pp. 64-102). Following it were five (5) pages of text numbered pages 40 through 44, which were untitled and contained a prefatory statement which read, "THIS AGREEMENT CONTAINS A WAIVER OF STATUTORY RIGHTS. PLEASE READ CAREFULLY." (R. Vol. I, Tab 3, pp. 103-107). These five (5) pages included paragraphs A, B, and C.

Paragraph A, was entitled "ARBITRATION PROVISIONS" and included (i) an agreement to arbitrate all claims relating to her stay at the Nursing Home, and (ii) a provision limiting discovery. The arbitration provision also included a clause stating that **"[t]he Limitation of Liability Provision below is incorporated by reference into this Arbitration Agreement."** *(emphasis added).* (R. Vol. I, Tab 3, p. 106).

Paragraph B was entitled "LIMITATION OF LIABILITY PROVISIONS," and included provisions (i) limiting recovery of noneconomic damages to $250,000, (ii) precluding recovery of prejudgment interest on unpaid nursing home charges, and (iii) precluding an award of punitive damages. (Vol. I, Tab 3, p. 106). Thereafter, Ms. Gessa executed a durable power of attorney naming her daughter, Miriam Falatek, her attorney-in-fact. (R. Vol. I, Tab 4, pp. 108-113).

While residing at Manor Care for less than a month, Ms. Gessa became severely dehydrated and malnourished and a pressure wound on her coccyx became infected and sepsis set in. (R. Vol. I, Tab 1, pp. 55-56). Accordingly, she was discharged from Manor Care and admitted to St. Joseph's Hospital. (R. Vol. I-Tab 6, p. 28). After receiving care at the hospital, Ms. Gessa was re-admitted to the Nursing Home on May 5, 2004. (R. Vol. I, Tab 6, p. 28). Ms. Falatek signed new admission papers as Ms. Gessa's attorney-in-fact. (R. Vol. I, Tab 5, pp. 114-157). The two sets of admission papers are substantively identical. The arbitration agreements ***do not include a severability clause, and both agreements incorporate by reference the limitations of liability provisions into the arbitration agreement.*** (R. Vol. I, Tab 3, pp. 104-40-44, A. 5, pp. 153-157).

Ms. Gessa filed a Complaint on August 23, 2005, against Manor Care seeking damages for negligence, residents' rights violations, and breach of fiduciary duty. (R. Vol. I, Tab 1). Manor Care responded by filing a Motion to Compel Arbitration on September 21, 2005. (R. Vol. I, Tab 2). Ms. Gessa filed a Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration on February 28, 2007. (R. Vol. I, Tab 7). Thereafter, a hearing was held on March 1, 2007 before the Honorable Ralph A. Stoddard. (R. Vol. II, Tab 8).

At the hearing, Ms. Gessa asserted that the arbitration agreement was unconscionable, as well as unenforceable as contrary to public policy. (R. Vol. II,

Tab 8, p. 257). Ms. Gessa further maintained that the limitation of liability provision went to the heart of the agreement and should not be severed. (R. Vol.II, Tab 8, p. 257). Additionally, Ms. Gessa argued that under existing case law the arbitration agreement's lack of a severability clause meant that the trial court should not blue pencil the agreement. (R. Vol. II, Tab 8, p. 257). Manor Care countered that the limitation of liability provision was separate and independent from the arbitration agreement and that any public policy issues implicated by the agreement should be addressed by the arbitrator. (R. Vol. II, Tab 8, pp. 262-267).

At the hearing, the trial court acknowledged that the limitation of liability provision might be contrary to public policy. (R. Vol.II, Tab 8, p. 284). The court stated that it was "comfortable that the Second [District] isn't contrary to the Fourth [District] about the cap and bar on punitive damages [being void as against public policy]." (R. Vol.II, Tab 8, p. 284). Nevertheless, the trial court compelled arbitration finding that the arbitration agreement was not procedurally unconscionable because "there was a three day right of rescission contained within the arbitration agreement." The court further found that the agreement was not substantively unconscionable "because offensive clauses can be severed, as they are not integral to the contract and are separate from the arbitration agreement." (R. Vol. II, Tab 9, para. 1).

Ms. Gessa filed a timely appeal to the Second District (R. Vol. I, pp. 1-5) asserting that the trial court erred and the order must be reversed because (i) the public policy voidness issue was a "gateway issue" which should have been decided by the court in the first instance, and not the arbitrator, (ii) the court should have ruled, consistently with all other district court precedent, that caps on non-economic damages and the preclusion of punitive damage claims under chapter 400, a remedial statute, violated public policy rendering such clauses void and unenforceable, and (iii) the offending clauses cannot be severed because they go to the heart of the arbitration agreement, and because the agreement contains no severability clause. (R. Vol. I, pp 19-41, Vol. III, pp. 363-383).

On January 30, 2009, the Second District rendered its opinion in *Gessa* affirming the trial court's order granting Manor Care's motion to compel arbitration.(R. Vol. III, pp. 401-406). The *Gessa* Panel noted that Ms. Gessa did not challenge the trial court's unconscionability ruling on appeal. The Panel stated that the trial court made a "factual finding" in determining that the limitation provision was not an integral part of the parties' agreement to settle claims by arbitration, and opined that "[t]his factual finding is supported by competent evidence." However, the Panel made no mention of what this evidence consisted of. (R. Vol. III, pp. 405-406).. Thus, the Panel affirmed the trial court's compel order, concluding that "the trial court, having found the limitations provision here

to be severable, properly directed that the case proceed to arbitration." (R. Vol. III, p. 406). The Second District denied Ms. Gessa's motions for rehearing, rehearing *en banc,* and certification (R. Vol. III pp. 407-415, p. 424). Ms. Gessa timely noticed the matter for discretionary conflicts review by this Court, and this Court subsequently accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The trial court intimated at the hearing that the limitation of liability provisions *might* be unenforceable as contrary to public policy, but it failed to rule on the issue, instead deferring the matter to the arbitrator to decide. The court erred in failing to resolve this gateway arbitrability issue as it was bound and authorized to do under the first prong of the arbitration enforceability test established by this Court some ten (10) years ago, cited in at least 175 reported appellate decisions, and unfailingly applied by Florida courts in hundreds, if not thousands, of cases throughout the state. Further, in the absence of any prior binding precedent from the Second District on this point at the time of the hearing and the trial court's subsequent order, the trial court erred in disregarding principles of *stare decisis* by failing to follow binding legal precedent from the other district courts which uniformly hold that it is for the court, and not the arbitrator, to decide whether a contract provision is void as violative of the public policy of this state.

Despite that Ms. Gessa raised the public policy voidness issue numerous times in the trial court and in her appeal (the issue was raised in her memorandum of law in opposition to the motion to compel arbitration; the point was argued at the hearing, and the point was argued at length in both her Initial and Reply Briefs to the Second District), the *Gessa* Panel failed to explicitly rule on the issue. Instead, the Panel incorrectly noted in a footnote that resolution of this complicated issue "is not before us here." *Gessa*, (R. Vol. III, p. 406). While noting the existence of conflicting authorities from the other districts in the opinion, the Panel failed to acknowledge the express conflicts or to certify the matter for resolution by this Court. The Panel's affirmance of the trial court's order, which clearly deferred resolution of the public policy issue to the arbitrator, itself creates the conflict despite the *dicta* in the footnote. In any event, once this Court accepted the case for discretionary review, it is authorized to examine every issue properly preserved below.

Since *Gessa*, the Second District has issued several other decisions uniformly opining that the arbitrators have the authority to determine whether offending limitations of remedy provisions are void as against public policy. One of these cases has likewise been accepted by this Court for discretionary review.

This Court must resolve the conflict between the Second District and all other districts on this issue of great importance to Florida's most fragile citizens, the

residents of the state's nursing homes and assisted living facilities ("ALFs"), who are currently experiencing disparate application of their statutory resident's rights depending solely upon where they live within the state.

The trial court, and thereafter the Second District, compounded their error by ruling that the offending clauses could be severed in the event that the arbitrator found them unenforceable. The agreement lacked a severability clause and there was no evidence of the parties' intent to enforce the remainder of the agreement in the event that a provision was found to be invalid. Rather, the intent of the parties, as determined from the plain and unambiguous language of the arbitration agreement itself, was that ***the limitations of remedies provisions were to be expressly incorporated by reference into the arbitration agreement,*** thereby ensuring that the limitations would be treated as an integral part of the agreement to arbitrate. In fact, the interrelatedness of the provisions and the fact that the offending provisions go to the essence of the agreement to arbitrate means that the contract is indivisible and should preclude a court from blue penciling the agreement. *Gessa* is in express and direct conflict with decisions from this Court and from the other districts on the issue of whether these provisions are integral, causing the entire arbitration provision to be void, or whether the offensive provisions are severable. Accordingly, this Court should resolve the conflict by disapproving *Gessa.*

ARGUMENT

I. THE PUBLIC POLICY VOIDNESS ISSUE IS A GATEWAY ISSUE OF ARBITRABILITY , WHICH DECISION MUST BE MADE BY THE COURT AND NOT THE ARBITRATOR.

It is abundantly clear from numerous cases from all districts other than the Second District, that when the issue is raised that a contract provision is violative of public policy and therefore void and unenforceable, it falls within the first prong of the test for arbitration established by this Court over ten (10) years ago in *Seifert v. U.S. Home Corporation,* 750 So.2d 633 (Fla. 1999), *to wit,* whether a valid agreement to arbitrate exists, and that it is therefore a ***gateway issue***. Florida courts, other than the Second District, have held that ***the trial court rather than the arbitrator*** must consider public policy when it is raised as a contract avoidance defense in a nursing home or ALF case.

In *Seifert,* this Court established that "[t]here 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 has been waived." *Id.* At 636. The issue of whether the limitations in the instant agreement are void as against public policy falls under the first prong of the *Seifert* test. *Seifert* mandates that the Court, in the first instance, must determine this issue in order to satisfy the Court's duty of determining "whether a valid written agreement to arbitrate exists." *Id.*

Yet, rather than resolve the public policy issue under the first prong of *Seifert*, as did the Courts in decisions from the other districts, the *Gessa* Panel instead took a 'pass' and deferred the matter to the arbitrator to decide. In so doing, the *Gessa* Panel disregarded and impermissibly delegated its duty under the first prong of *Seifert.* Despite that Ms. Gessa raised the public policy voidness issue numerous times in the trial court and in her appeal (the issue was raised in her memorandum of law in opposition to the motion to compel arbitration; the point was argued at the hearing, and the point was argued at length in both her Initial and Reply Briefs to the Second District), the *Gessa* Panel failed to explicitly rule on the issue. Instead, the Panel incorrectly noted in a footnote that resolution of this complicated issue "is not before us here." *Gessa*, (R. Vol. III, p. 406). While noting the existence of conflicting authorities from the other districts in the opinion, the Panel failed to acknowledge the express conflicts or to certify the matter for resolution by this Court. The Panel's affirmance of the trial court's order, which clearly deferred resolution of the public policy issue to the arbitrator, itself creates the conflict despite the *dicta* in the footnote. In any event, once this Court accepted the case for discretionary review, it is authorized to examine every issue properly preserved below.

In *Alterra Healthcare Corp. v. Linton*, 953 So.2d 574, 578 (Fla. 1st DCA 2007), the appellee attempted to make the same argument that Manor Care made

below that the arbitrator, in the first instance, should decide the issue of public policy. *Linton*, 953 So.2d at 576. The First District rejected the argument, and found that the trial court not only had the authority, but in fact had "a duty to determine the validity of the arbitration clause in light of its express limitations of liability." *Id*. The First District found that "Florida courts have expressly held that arbitration agreements eliminating punitive damages and capping noneconomic damages defeat the remedial purpose of the Nursing Home Residents Act and are therefore void as against public policy." *Id*.

> We reject the defendants's contention that the trial court lacked authority on a motion to compel arbitration to determine the validity of the arbitration clause. The trial court ruled that the exclusion of punitive damages and limit on non-economic damages were void as contrary to public policy, on the basis that chapter 400 is a remedial statute. In so doing, the court did not go beyond the three elements it had authority to consider in ruling on a motion to compel arbitration.*(footnote omitted). See Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla.1999). ***Rather, its conclusion that the damages limitations were void as against public policy was a determination of the validity of the arbitration agreement under step one of the Seifert analysis.***(*emphasis added).*

Id at 576-577; *accord Bryant; SA-PG Partnerss*.

> The arbitrability of statutory claims rests on the assumption that the arbitration clause permits relief equivalent to that available via the courts. An arbitration clause is thus unenforceable if its provisions deprive the plaintiff of the ability to obtain meaningful relief for alleged statutory violations

Id. at 578.

Although the other district courts which have found such limitations of the remedies available under chapter 400 violative of public policy had not expressly stated in their opinions that the Courts were discharging their duties under the *Seifert* arbitrability test, each such opinion expressly held that the provisions were void and unenforceable, matters each Court had the authority and duty to resolve and discharge under the first prong of *Seifert.* The Second District in *Gessa*, and in at least three subsequent opinions issued thereafter, improperly delegated to the arbitrator its duty and authority under *Seifert* to determine the enforceability of arbitration agreements under circumstances where the Court acknowledged that the remedy limitations at issue here *might* be violative of public policy.

A. The Nursing Home Resident's Rights Act Is a Remedial Statute Intended to Protect the Rights of Florida's Most Vulnerable Citizens.

The provisions of the agreement which limit noneconomic damages and preclude the recovery of punitive damages, which were expressly incorporated into the arbitration agreement, (R. Vol. 1, Tab 5, p. 157), violate public policy because they eviscerates the rights provided under a remedial statute. This Court and the Third and Fourth Districts have acknowledged that The Nursing Home Resident's Rights Act, found in chapter 400 of the Florida Statutes, is a remedial statute which was enacted by the Florida legislature to protect Florida's most

vulnerable citizens from abuse, neglect and exploitation. *See Knowles v. Beverly-Enterprise-Florida, Inc.,* 898 So.2d 1, 24 (Fla. 2005) (" The Nursing Home Act, properly interpreted, reflects the legislative plan to protect the interests of these citizens who are forced to avail themselves of nursing home care. *Garcia v. Brookwood Extended Care Ctr.*, 643 So.2d 715 (Fla. 3d DCA 1994)"); *accord Blankfeld v. Richmond Health Care, Inc.,* 902 So.2d 296, 297 (Fla. 4th DCA 2005) *en banc; Romano v. Manor Care, Inc.,* 861 So.2d 59 (Fla. 4th DCA 2003); *Prieto v. Healthcare Retirement Corp. of America,* 919 So.2d 531, 533 (Fla. 3d DCA 2005).

II. *GESSA* IS IN CONFLICT WITH DECISIONS FROM ALL OTHER DISTRICT COURTS WHICH HAVE UNIFORMLY REFUSED TO ENFORCE LIMITATIONS OF REMEDIES PROVISIONS IN NURSING HOME AND ALF RESIDENTS' ARBITRATION AGREEMENTS BECAUSE THEY DEFEAT THE REMEDIAL REMEDIES PROVIDED IN CHAPTER 400.

The First, Third, Fourth and Fifth Districts have all refused to enforce damages limitations provisions in nursing home arbitration agreements because these limitations abrogate rights specifically conferred upon nursing home residents by the Florida legislature. *Alterra Healthcare Corp. v. Linton*, 953 So.2d 574, 578 (Fla. 1st DCA 2007); *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296, 298-299 (Fla. 4th DCA 2005) *en banc*; *Lacey v. Healthcare & Retirement Corp. of America*, 918 So.2d 333, 334 (Fla. 4th DCA 2006); *Alterra Healthcare Corporation v. Bryant,* 937 So. 2d 263 (Fla. 4th DCA 2006); *SA-PG-Ocala, LLC v. Stokes*, 935 So.2d 1242 (Fla. 5th DCA 2006); *Fletcher v. Huntington Place, L.P.*,

952 So.2d 1225, 1226 (Fla. 5th DCA 2007); *Place at Vero Beach, Inc. v. Hansen*, 953 So.2d 773 (Fla. 5th DCA 2005).[1]

Thus, the Fourth District in a similar case to *Gessa* concluded, "that the trial court erred in ordering arbitration, because this arbitration agreement violates public policy by defeating the purposes of Florida's remedial Nursing Home Resident's Act." *Lacey*, 918 So.2d at 334.

In adopting the Nursing Home Residents' Act, Chapter 400, the Florida legislature was responding to widespread elder abuse. *Romano v. Manor Care, Inc.*, 861 So.2d 59, 62-63 (Fla. 4th DCA 2004). One of the primary purposes of enacting remedial legislation is to correct or remedy a problem or redress an injury. *Campus Communs., Inc. v. Earnhardt*, 821 So.2d 388, 396 (Fla. 5th DCA 2002). Accordingly, remedial statutes should be given their intended purposes, and as a result receive "special" treatment such as retroactive application. *City of Orlando v. Desjardins*, 493 So.2d 1027, 1028 (Fla. 1986). The legislature ***clearly and explicitly*** created a remedial statute under its police power in order to protect institutionalized Floridians and to discourage neglect and abuse.

This Court has demonstrated an unwillingness to allow a judicially created rule from abrogating remedies conferred under a remedial statute. *Comptech*

[1] The Third District has held that remedial limitations in a nursing home agreement are substantively unconscionable—a holding tantamount to finding the provision void as contrary to public policy. *Prieto v. Healthcare & Ret. Corp. of Am.*, 919 So.2d 531, 533 (Fla. 3d DCA 2005).

International, Inc. v. Milam Commerce Park, Ltd., 753 So.2d 1219, 1222 (Fla. 1999). ("Courts do not have the right to limit and, in essence, to abrogate, as the trial court did in this case, the expanded remedies granted…under this legislatively created scheme.") Similarly, the Court should likewise be unwilling to abrogate the remedies conferred on elderly nursing home residents under chapter 400 to enforce a contract drafted by one of the very entities for whose conduct the remedial statute was drafted to redress. As Judge Farmer wrote in his concurring opinion in *Blankfeld*:

> It is absurd to think that a regulatory scheme can be evaded by private contracts of the very person being controlled. It is absurd that an entire industry escape regulation by simply embedding choice of governing substantive law clauses in its contracts. What other police power regulation can be side-stepped by contracts eliminating it? Common carriers evading safety laws by form contracts for passage? Restaurants avoiding health codes by contractual provisions in the bill? Cigarette dealers canceling health warnings by provisions in the sales papers? Home builders modifying building codes in contracts for construction?

Blankfeld, 902 So.2d at 303.

In *Blankfeld*, the Fourth District held *en banc* that arbitration provisions which limit the remedies available under the Act are void as contrary to public policy. *Id.* at 297. The arbitration agreement in *Blankfeld* provided that the arbitrator may not award punitive damages unless there is "clear and convincing evidence that the party against whom such damages are awarded is guilty of conduct evincing an intentional or reckless disregard for the rights of another party

or fraud, actual, or presumed." *Id*. at 298. In striking the provision as contrary to public policy, the Court concluded that, "the remedies provided in the legislation would be substantially affected and, for all intents and purposes, eliminated." *Id*.

Similarly, in *SA-PG-Ocala, LLC v. Stokes*, 935 So.2d 1242 (Fla. 5th DCA 2006), the Fifth District adopted the *Blankfeld* rationale. The arbitration provisions in *SA-PG-Ocala* also raised the burden of proof needed in order for punitive damages to be awarded. *Id*. at 1242-1243. The Court held that such a provision was contrary to public policy. *Id*. at 1243. "It would be against public policy to permit a nursing home to dismantle the protections afforded patients by the Legislature through the use of an arbitration agreement." *Id*.

In two more decisions, the Fourth and Fifth Districts reaffirmed the reasoning of *Blankfeld* and *SA-PG-Ocala*. In *Fletcher v. Huntington Place, L.P.*, 952 So.2d 1225 (Fla. 5th DCA 2007) and in *The Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773 (Fla. 4th DCA 2007), the Courts expressly held that an arbitration agreement which required that the arbitration be administered by the AHLA rendered it unenforceable. In particular, the Courts found that "the inclusion of certain provisions in the [AHLA Rules] were void as against public policy because they had the effect of superseding or dismantling the protections afforded patients by the legislature in the Nursing Home Resident's Act, Chapter 400." *Fletcher*, 952 So.2d at 1226.

The facts in the instant case are even stronger than in *Blankfeld* and *SA-PG-Ocala*. The provision at issue in this case does not merely raise the burden of proof in order for punitive damages to be awarded, but instead punitive damages are completely eliminated. (R. Vol. I, Tab 5, p. 156). The purpose of the remedial legislation which expressly provides for punitive damages in order to achieve remedying elder abuse is obviated because the remedy provided in the legislation is eliminated. Moreover, the arbitration provision places a cap on the non-economic damages available. *Id.* These limitations on remedies provided for in the statute are contrary to public policy. *Accord Lacey*, 918 So.2d at 334(the Court found that provisions eliminating punitive damages and capping compensatory damages were void).

Gessa is completely at odds with the other districts on the issue of the voidness of the offending provisions on public policy grounds. By side-stepping the issue and delegating to various arbitrators the authority to make public policy decisions, the Second District is subjecting the very vulnerable Floridians whom the Act was enacted to protect to arbitrary an inequal, disparate application and protection of their statutory remedial rights. In addition to *Gessa*, the Second District has to date, has held, or in one case announced in *dicta*, in six other nursing home arbitration cases that it is not for the Courts to decide whether limitations of nursing home resident's rights are void as against public policy, but

rather for the arbitrator. *See Bland v. Healthcare and Retirement Corporation of America*, 927 So.2d 252 (Fla. 2d DCA 2006) *(dicta); Shotts v. OP Winter Haven,Inc.,* 958 So.2d 639 (Fla. 2d DCA 2008), *review granted ; Manor Care, Inc. v. Steihl* , ____So.2d____, 34 Fla. L. Weekly D1708 (Fla. 2d DCA August 21, 2009; *Candansk, LLC v. Estate of Hicks,* ___So.2d____, 34 Fla. L. Weekly D 2326 (Fla. 2d DCA November 13, 2009); *Jaylene, Inc. v. Steuer,* ___So.2d___, 34 Fla. L. Weekly D 2333 (Fla. 2d DCA November 13, 2009); and *Manor Care, Inc. v. Estate of Kuhn,* ___So.2d ___, 34 Fla. L. Weekly D 2433 (Fla. 2d DCA November 25, 2009).

The Second District's Judge Altenbernd, in a lengthy and well reasoned concurrence in *Steihl,* expressed his frustration at the proliferation of nursing home arbitration appeals in recent years, and the resultant disparate impact of an ever-changing body of law on the remedial rights of Florida's nursing home residents. Judge Altenbernd noted that as of the August, 2009, with the issuance of the *Steihl* opinion, there were 35 reported decisions in these matters. At present, only four (4) months after *Steihl,* there are 50 and counting. Instead of the professed reason for promoting the use of arbitration-streamlining dispute resolution and reducing litigation expenses, nursing home arbitrations have had quite the opposite effect, causing Judge Altenbernd to agree with the majority in *Steihl* based solely on the existence

of binding precedent, but changing his mind about the wisdom of allowing arbitrators to dictate or alter the public policy of this state.

> I have come to the conclusion, however, that ***it is both bad policy and bad law*** to allow an arbitrator to make case-specific, non-precedential, confidential decisions about the enforceability of clauses in an arbitration agreement when those clauses limit or eliminate rights specially created by the legislature to protect nursing home residents.*(emphasis added).*

Slip Op. at 5.

> [I]n the context of a dispute between a corporation that essentially has physical custody of an elderly person and that person's guardian, when the dispute arises not from contract law, but from special rights created by the legislature for the protection of the elderly, and when the contract is not a unique contract negotiated on a level playing field, but a form contract applicable to a large group of senior citizens, ***I think it is a mistake to delegate these legal decisions to the arbitrator***.*(footnote deleted) (emphasis added).*

Slip Op. At 6.

Judge Altenbernd noted the confidentiality requirements of such agreements, explaining the unfairness to residents of the same nursing home experiencing similar injuries where certain arbitrators enforce the limitations, others strike them as void and violative of public policy, and still others might determine the entire agreement to be void and allow the parties to return to court, with only the nursing home chain knowing the outcomes.

> ***Not only does this procedure prevent the creation of binding precedent, it creates nothing approaching the rule of law.. . .*** Only the nursing home corporation will know that the results were so different and resulted in vastly different awards. None of the rulings will bind any

> future claims. No one will have a right to appeal or challenge the different rules of law applied to the same circumstances under the same statutory and contractual law. ***In passing the bill of rights for nursing home residents, the Legislature cannot conceivably have envisioned such a result.*** *(emphasis added).*

Slip Op. at 7.

Although Judge Altenbernd suggested legislative action to resolve this problem, this Court can bring clarity and resolution to these issues by resolving the conflicts in the context of the Court's discretionary review of the instant case. So as to preserve the statutory protections and rights afforded to residents of the state's nursing homes and ALFs, by the legislature, this Court must resolve this issue of great importance to Florida's most fragile citizens, in favor of these institutionalized Floridians who are currently experiencing disparate application of their statutory resident's rights depending solely upon where they live within the state.

Lastly, Manor Care may attempt to argue that this Court should depart from *Blankfeld , Lacey* and their progeny in light of *Unicare v. Mort*, 553 So.2d 159 (Fla. 1989). The same argument was made unsuccessfully to the First District in *Linton*. In *Mort*, the Florida Supreme Court held that a party may waive her right to attorney's fees under Chapter 400 by accepting an offer of judgment that is silent as to attorney's fees. *Mort*, 553 So.2d at 161. As the First District pointed out in *Linton*, *Mort* is significantly different from the instant case, both

procedurally and substantively. *Linton*, 953 So.2d at 578. *Mort* did not involve arbitration. In fact, appellate decisions from three districts came after *Mort*, and held that remedial limitations identical to the ones present in the instant case were void as against public policy. *Lacey, Romano, Bryant, Blankfeld, Linton, SA-PG-Ocala, LLC,* and *Fletcher* were all decided after *Mort*.

III. *GESSA* IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS FROM THIS COURT AND OTHER DISTRICTS ON THE ISSUE OF WHETHER THE OFFENDING LIMITATIONS PROVISIONS ARE SEVERABLE.

This Court announced the considerations necessary to a court's analysis of whether a contract containing unenforceable provisions is indivisible or severable in the often-cited case of *Local No. 234 Of United Association Of Journeymen And Apprentices Of Plumbing And Pipefitting Industry Of United States And Canada V.Henley & Beckwith, Inc*., 66 So.2d 818 (Fla. 1953).

> As to when an illegal portion of a bilateral contract may or may not be eliminated leaving the remainder of the contract in force and effect, the authorities hold generally that a contract should be treated as entire when, by a consideration of its terms, nature, and purpose, each and all of its parts appear to be interdependent and common to one another and to the consideration. Stokes v. Baars, 18 Fla. 656; 12 Am.Jur., Contracts, sec. 316. Stated differently, a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement. Hyde & Gleises v. Booraem & Co., 16 Pet. 169, 10 L.Ed. 925. On the other hand, ***a bilateral contract is severable where the illegal portion of the contract does not go to its essence, and where, with the illegal portion eliminated, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other.*** Williston on Contracts, rev. ed., Vol. 6, sec.

1782. *(emphasis added).*

Id. At 821-822.

The offending limitations of remedy provisions at issue in the instant case are not severable from the arbitration agreement because by the express terms of the agreement, ***the limitations were incorporated by express reference into the arbitration provisions.*** Thus, the illegal portions of the contract go to the essence of the arbitration agreement rendering the contract indivisible under *Local No. 234.*

The *Gessa* Panel affirmed the trial court's erroneous ruling that the offending provisions (which the court ruminated *might* be void) were severable "as they are not integral to the contract and are separate from the arbitration provision." (R. Vol. III, pp. 296-297). The trial court's conclusion that the limitations provisions were separate from the arbitration agreement was simply wrong, as indicated by the aforementioned express language of the agreement. The Second District, noted the merger of the two agreements, and actually *quoted* in the opinion that, "[t]he document is composed of two sections: A. Arbitration Provisions and B. Limitation of Liability Provision.**The last paragraph of section A reads "The Limitation of Liability Provision below is incorporated by reference into this Arbitration Agreement."** *(emphasis added).*(R. Vol. III, p. 402).

Despite the Panel's acknowledgement that the offending ***limitation of remedies provision was subsumed within the arbitration agreement***, the Court curiously opined that the trial court's "factual finding that the limitations provision was not an integral part of the arbitration agreement supports its conclusion that the provision is severable." (R. Vol. III, p. 405). The *Gessa* Panel did not explain what the court's 'factual findings' consisted of, nor did the opinion reference the existence of any evidence of the parties' intent other than the agreement itself. The Panel did state, however, that "the trial court ***reviewed the document***. . .and determined that the limitation provision was not an integral part of the parties' agreement to settle claims by arbitration." *(emphasis added).* (R. Vol. III, p. 405). The Court thereafter opined that "[t]his factual finding is supported by competent evidence."

There simply was no evidence other than the document itself. And the parties' intentions, ***as expressed in the agreement*** were that the limitations provisions were to be integrated (hence *integral*) into the agreement to arbitrate. Florida law is well settled that "[t]he plain language of the agreement containing the arbitration clause is the best evidence of the parties' intent." *Royal Oak Landing Homeowners Assoc. v. Pellitier,* 620 So.2d 786, 788 (Fla. 4th DCA 1993). In the instant case, the plain language of the arbitration agreement clearly evidenced the parties' intention that the

limitation of remedies provisions be considered to be *intergral* and *essential* to the parties' agreement to arbitrate. To hold otherwise would ignore and render meaningless the last paragraph of section A. Arbitration Provisions that '[t]he Limitation of liability Provision below is incorporated by reference into this Arbitration Agreement." (R. Vol. III, p. 402). If the parties did not intend to treat the limitations as an integral part of the arbitration agreement, then why would they have included such an incorporation by reference provision?

The Panel's opinion on non-integrality and severability are in direct and express conflict with this Court's opinion in *Local No.* 234 and with the opinions of other districts including the Fourth District in *Royal Oak.*

The trial court compelled arbitration finding that the provision limiting liability could be severed notwithstanding the lack of a severability clause. (App. 1, Tab 9, p. 1). This Court should find that the *Gessa* Panel erred in affirming the trial court's ruling allowing the arbitrator to 'blue pencil' the agreement because the court and the arbitrator are both powerless to substitute their judgment for the intent of the parties when the agreement lacked a severability clause, and where the parties expressed their desire to treat the limitations as integral to the agreement to arbitrate.

IV. *GESSA* IS IN CONFLICT WITH DECISIONS FROM THIS COURT AND OTHER DISTRICTS ON THE ISSUE OF WHETHER AN ARBITRATION AGREEMENT CONTAINING UNENFORCEABLE TERMS WHICH VIOLATE PUBLIC POLICY RENDERS THE ENTIRE AGREEMENT VOID.

This Court has opined that "[a]greements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties." *Local 234*, 66 So.2d at 823. In *Local 234,* this Court, having determined an illegal provision to be violative of public policy and not severable, determined that the entire agreement was void.

While, as stated, all district courts other than the Second District have refused to enforce nursing home damages limitations on public policy grounds, the other districts have not all uniformly voided the entire agreements. The cases fall into three categories. The first group involves cases where the agreement had a severability clause and the district court struck the void provisions but compelled arbitration of the remaining agreement to arbitrate. *See Bryant.* In the second group, courts reviewing agreements which lacked a severability clause voided the entire agreement. *See Lacey; SA-PG Stokes.* In the third, the district court voided the entire agreement despite the existence of a severability clause, on the ground that the void limitations provisions went to the heart or essence of the agreement to arbitrate. *See Linton; Fletcher; Place at Vero Beach.* In a fourth stand alone

'group, the Fourth District *en banc* struck the entire agreement as void without addressing severability. *See Blankfeld.*

The *Gessa* opinion falls into an odd new 'fifth category' of decisions, in that the *Gessa* Panel reviewed an agreement that failed the severability test on two grounds, and yet the Court enforced the agreement anyway. First, the agreement had no severability provision whatsoever; and second, the intent of the parties ***as expressed in the arbitration agreement ,*** was that the limitations provisions would be treated as integrated and merged into the agreement to arbitrate. Under these circumstances, the entire agreement must be declared void and unenforceable as violative of the public policy of this state as codified in chapter 400 and the decisional authorities interpreting the Act. Based upon the foregoing, this Court must disapprove *Gessa.*

However, Ms. Gessa respectfully suggests that the Court can do more through the instant discretionary review than simply determine the voidness of the entire arbitration agreement at issue in *Gessa.* The Court can author a broader opinion which determines that agreements with nursing home residents which contain provisions which compromise or eliminate remedial rights and protections granted to them by the Florida legislature under a remedial statute enacted for their protection are void in their entireties, regardless of the presence or absence of a severability clause; and that it is for the Courts, in all cases, to decide the public

policy voidness issue under the enforceability first prong of *Seifert's arbitrability test.* Resolution of this issue would, in addition to resolving *Gessa* and the other cases which might fall into this category, resolve all cases which fall into the first, second, third and fourth categories of cases described above.

Some federal decisions are enlightening on this issue as well. In *Paladino v. Avnet Computer Techonologies*, 134 F.3d 1054, 1058 (11th Cir. 1998), the Eleventh Circuit held that, "the presence of an unlawful provision in an arbitration agreement may serve to taint the entire arbitration agreement, rendering the agreement completely unenforceable, not just subject to judicial reformation." In so holding, the Eleventh Circuit was merely reciting black-letter law that severance is inappropriate when the provision represents a scheme to contravene public policy. E. Allan Farnsworth, *Farnsworth on Contracts* §5.8, at 70 (1990). Accordingly, a court could not sever an offending, unlawful provision and yet enforce the rest of the agreement. Since *Paladino*, the case law that has developed places an emphasis on the existence of a severability clause in the agreement.

In *Anders v. Hometown Mortgage Services, Inc.*, 346 F.3d 1024 (11th Cir. 2003), the Eleventh Circuit limited the holding of *Paladino* to those cases where the contract does not contain a severability clause. The presence of a severability clause "evidences the parties' intention to enforce the remainder of the agreement in the event any portion of it is deemed invalid." *Id*. at 1031. It follows that if the

contract lacks a severability clause, then the parties have not intended that the remainder of the agreement be enforced in the event that any portion is deemed invalid. In that instance, a court should not blue pencil the agreement and substitute its judgment for the parties' intent.

Florida Courts have recognized *Paladino* and its progeny. In *Presidential Leasing, Inc. v. Krout*, 896 So.2d 938, 942 (Fla. 5th DCA 2005), the Fifth District cited *Paladino* approvingly in not enforcing an arbitration agreement. In *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, 898 So.2d 86, 88 (Fla. 2d DCA 2005), the Second District recognized the development of the Eleventh Circuit's jurisprudence from *Paladino* to *Anders*. The Second District also underscored the importance of the agreement containing a severability clause such that void or offending provisions might be severed without affecting the enforceability of the remaining arbitration provisions. *Rollins.*

In a case virtually identical to the instant case, the Fourth District found that limitations of liability in a nursing home arbitration agreement capping non-economic damages and eliminating punitive damages were void as against public policy. *Lacey*, 918 So.2d at 334. The Court found the entire arbitration agreement invalid, highlighting that the arbitration agreement contained no severability clause, and that the offensive limitations of liability went to the "essence of the contract." *Id.* at 335. The *Lacey* Court cited with approval the Fifth District's

opinion in *Presidential Leasing,* noting that its sister district refused to enforce as void an arbitration agreement which contained no severance clause, adding that,

> "The presence of an unlawful provision in an arbitration agreement may serve to taint the entire arbitration agreement, rendering the agreement completely unenforceable."

Lacey, 918 So.2d at 335, *quoting Presidential Leasing, Inc. v. Krout,* 896 So.2d 938, 942 (Fla. 5th DCA 2005).

In the instant case, the arbitration agreement, like the ones in *Lacey* and *Presidential Leasing* ***does not include a severability clause***. The parties, therefore, have not evidenced any intent that the remainder of the agreement be enforced in the event that a portion of the agreement is found to be invalid. Accordingly, the trial court erred in blue penciling the agreement and enforcing the nonoffending provisions.

Even if this Court should find that the lack of a severability clause is not dispositive, the agreement should still not be enforced as it is not severable. In *Slusher v. Greenfield,* 488 So.2d 579, 580 (Fla. 4th DCA 1986), the Fourth District reiterated the well-established principle that "a contract should be treated as entire when, by consideration of its terms, nature and purpose, each and all of its parts appear to be interdependent and common to one another and to the consideration." In order to determine if a contract is entire or divisible, a court must look at the intent of the parties as evidenced in the language of the agreement. *Id*. at 580. A contract is severable where "the illegal portion of the contract does not go to its

essence." *Gold, Vann & White, P.A. v. Friedenstab, M.D.*, 831 So.2d 692, 696 (4th DCA 2002).

This Court should refuse to sanction an arbitrator's authority to 'blue pencil' the agreement because the limitation of liability and arbitration provisions are interrelated and interdependent and go to the essence of the agreement. Indeed, the arbitration provision expressly incorporates by reference the limitations of liability and damages such that the provisions cannot be severed. As the Fourth District recently explained in *Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773, 775-776 (Fla. 4th DCA 2007), citing this Court's prior decision in *Healthcomp Evaluation Serv. Corp. v. O'Donnell*, 817 So.2d 1095, 1097 (Fla. 2d DCA 2002), blue penciling is only appropriate when there is no interdependence between the arbitration clause and the rest of the agreement.

In the instant case, the limitation of liability and arbitration clauses abrogate the resident's substantive rights, and therefore emasculate and make illusory the skilled nursing facility's contractual obligation to provide good care. These provisions are therefore interrelated and interdependent with the rest of the agreement and should not be blue penciled. The Fifth District has also recently refused to enforce a nursing home arbitration agreement by excising offending provisions notwithstanding that the agreement contained a severability clause. In *Fletcher v. Huntington Place, L.P.*, 952 So.2d 1225 (Fla. 5th DCA 2007), the Fifth

District rejected the nursing home defendant's suggestion that the Court sever the offending clauses "thereby salvaging the balance of the arbitration agreement.," *Id.*

> Nor does it make sense for a court to ***remake*** Huntington's agreement to excise the offending provisions. Given the nature of the relationship between a nursing home and its patient, the courts ought to expect nursing homes to proffer contracts that fully comply with Chapter 400, not to revise them when they are challenged to make them compliant. Otherwise, nursing homes have no incentive to proffer a fair form agreement.

Fletcher, 952 So.2d at 1226.

This Court should follow the Fifth District and refuse to blue pencil the agreement in order to ensure that this nursing home is incentivised to offer fair form agreements to its residents.

Florida district court opinions refusing to enforce remedy limitations agreements which contravene public policy are not limited to nursing home and ALF cases. In the very recent case of *Applegate v. Cable Water Ski, L.C.*, 974 So.2d 1 (Fla. 5th DCA 2008), the Fifth District addressed three competing public policy interests and ruled in favor of the overriding state interest of protecting minor children, which the Panel concluded had outweighed the other two. The Court was faced with the issue of whether to enforce an exculpatory waiver agreement signed by the parents of a minor who was thereafter injured in a wakeboarding accident at camp. The Panel noted, on the one hand, that the public

policy of this state disfavored exculpatory clauses which relieve one party of liability and shift the risk to the party least able to bear the burden of an unexpected injury. The Court also acknowledged, on the other hand, the public policy in favor of ensuring that a party's rights to freely contract away rights and remedies is honored. Nevertheless, the Court ruled that an unambiguous exculpatory clause in a contract between a minor's parents and a for-profit commercial entity is unenforceable as it contravenes the stronger state public policy *parens patriae* interests to protect minor children. *Id.* Likewise, the limitations incorporated in Manor Care's arbitration agreement, which completely exculpate it from liability for its punitive conduct and cap its exposure to liability for pain and suffering damages, deprived Ms. Gessa of a meaningful remedy under a remedial statute. Thus, the arbitration agreement violates public policy and is unenforceable.

In another case, the Third District in *S.D.S Autos, Inc. v. Chrzanowski*, 982 So.2d 1 (Fla. 1st DCA 2007), refused to enforce a contractual agreement which contravened public policy, opining that "we now hold that a contractual provision precluding class relief for small but numerous claims against motor vehicle dealers under s.501.976, Florida Statutes (2005) *impermissibly frustrates the remedial purposes of FDUTPA*." *Id. (emphasis added).*

As this Court has held, "[n]o valid agreement exists if the arbitration clause is unenforceable on public policy grounds. Thus, the issue in this case concerns competing interests: that of the state to protect children and that of the parties in raising their children. Where these interests clash on a concrete issue such as the enforceability of a contract entered into on behalf of a minor child, ***the issue becomes one for the courts."****(emphasis added).* *Global Travel Marketing, Inc. v. Shea*, 908 So.2d 392, 398 (Fla. 2005).

In the instant case the competing interests are the state's interest in protecting the rights of frail, institutionalized Florida citizens under a remedial statute versus a nursing home's right to freely contract. As the legislature has already provided statutory protection of these citizens rights under a remedial statute, it is for the courts to enforce those rights by declaring all contracts containing waivers of those rights to be void *ab initio* as violative of this state's public policy.

CONCLUSION

So as to preserve the statutory protections and rights afforded to residents of the state's nursing homes and ALFs, by the legislature, this Court must resolve the issues on review in this matter which are of great importance to Florida's most fragile citizens, by determining (i) that it is for the court, and not the arbitrator to decide gateway arbitrability issues involving public policy challenges, (ii) that limitations of rights and remedies under chapter 400 granted to institutionalized

Floridians by the legislature to ensure their protection are void as violative of the public policy of this state, and (iii) that void provisions are not severable from the remainder of the agreement because they are integral to the parties' agreement to arbitrate. Resolution of these issues in favor of these institutionalized Floridians who are currently experiencing disparate application of their statutory resident's rights depending solely upon where they live within the state, will result in an equal and uniform application of the remedial rights the legislature sought to protect. Accordingly, Ms. Gessa respectfully requests that the Court disapprove *Gessa* and approve those decisional authorities cited herein from the other districts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by FedEx to: **Aram P. Megerian, Esq.** and **Bryan Rotella, Esq.**, Cole, Scott & Kissane, P.A., 5201 W. Kennedy Blvd., Suite 750, Tampa, FL 33609, and **Matthew J. Conigliaro, Esq.**, Carlton Fields, 200 Central Ave, Suite 2300, St. Petersburg, Florida 33701, this 15th day of December, 2009.

Susan B. Morrison, Esquire
Florida Bar No. 394424
LAW OFFICES OF
SUSAN B. MORRISON, P.A.

1200 W. Platt Street, Suite 100
Tampa, Florida 33606
Telephone: (813)902-9293
Facsimile: (813)902-9275
Attorneys for Petitioner

and

Isaac R. Ruiz-Carus, Esquire

Florida Bar No. 0017004
WILKES & McHUGH, P.A.
One North Dale Mabry Hwy., Suite 800
Tampa, Florida 33609
Telephone: (813) 873-0026
Facsimile: (813) 286-8820
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the Florida Rules of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

_____

Susan B. Morrison, Esquire
Florida Bar No.: 394424