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)

Respondent.

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

PETITIONER'S JURISDICTIONAL BRIEF

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In accordance with Rule 9.120(d), the Appendix to this Brief contains a copy of the decision entered by the Second District. References to the Appendix shall be cited as: (App., p.___).

STATEMENT OF JURISDICTION

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 decision in *Alterra Healthcare Corporation v. Bryant*, 937 So.2d 263 (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), and numerous other decisions cited throughout this brief.

STATEMENT OF THE CASE AND FACTS

In her appeal to the Second District, Ms. Gessa challenged the trial court's order granting Manor Care's motion to compel arbitration in Ms. Gessa's action against Manor Care for negligence, violation of resident's rights, and breach of fiduciary duty. (App. at p. 2). The arbitration form, although not attached to the nursing home admissions agreement, was contained in the admissions packet presented for signing to Ms. Gessa. The 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." ***Id.***

Ms. Gessa argued to the trial court that the arbitration agreement was both substantively and procedurally unconscionable, and that the arbitration agreement was unenforceable because it was contrary to public policy. These arguments were premised on the terms of the limitation of liability provision contained in section B of the document that the parties signed during the admissions process which provision prohibited the award of punitive damages and capped any award of noneconomic damages at $250,000. Ms. Gessa argued that these limitations defeated her rights and remedies specifically granted by chapter 400 of the Florida Statutes, a remedial statute, and that they invalidated the entire agreement to arbitrate. (App. at p. 3).

The Second District affirmed the trial court's finding that the agreement was not unconscionable, and noted that the trial court correctly determined that the limitations of liability clause did not go to the essence of the agreement to arbitrate and were therefore severable in the event the arbitrator felt that the offending provisions were unenforceable, despite that the agreement did not contain a severance clause. (App. at pp. 5-6). The Panel noted that the trial court did not rule

upon, or "specifically determine" the public policy issue, nor did the court actually sever the clauses. (App. at p. 4).

Likewise, the Panel failed to opine on the public policy voidness issue, deferring resolution of the issue to the arbitrator, but the Court noted in a footnote that "the law is unsettled as to whether the trial court should first determine the provision to be contrary to public policy and unenforceable and then sever the provision before sending the issue to arbitration or whether, having determined the provision to be severable, the trial court should allow the arbitrator to determine, if necessary, whether the provision is enforceable." (App. at p. 6). At the close of the footnote, the Panel cited a case from the Second District, *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, 898 So.2d 86 (Fla. 2d DCA 2005) which is in conflict with the Fifth District's resolution of this issue in *SA-PG-Ocala, LLC v. Stokes*, 935 So.2d 1242 (Fla. 5th DCA 2006), as well as the Fourth District's decision in *Alterra Healthcare Corporation v. Bryant*, 937 So.2d 263 (Fla. 4th DCA 2006). However, the Panel did not feel that the *Gessa* decision created conflict on this issue, curiously stating that "resolution of this issue is not before us here. . . ." *Id.*

SUMMARY OF THE ARGUMENT

The *Gessa* decision is in direct and express conflict with decisions from the First, Fourth and Fifth Districts on the issue of whether a Court should decide

enforceability issues of an arbitration agreement under the first prong of *Seifert v. v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999), or whether the arbitrator should decide that issue, where only the arbitration provisions (rather than the entire admissions agreement)is challenged as being void as violative of public policy.

The *Gessa* decision is also in conflict with decisions from the other districts on the substantive issue of whether limitations of liability provisions which are, in fact, violative of public policy are severable, and if so, by whom? —the court, or the arbitrator. These multiple conflicts justify resolution by this Court by its exercise of discretionary conflicts jurisdiction. Further, an opinion from this Court explaining the applicability of this Court's opinion in *Cardegna v. Buckeye Check Cashing, Inc.*, 930 So.2d 610 (Fla. 2006) to the instant case would be instructive, where, as here, the arbitration agreement was a stand-alone document, but part of a packet of numerous forms which accompanied Ms. Gessa's admissions agreement, and Ms. Gessa sought only to avoid the arbitration agreement, not the admissions contract.

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS CONFLICT JURISDICTION TO BRING CLARITY AND UNIFORMITY TO FLORIDA DECISIONAL LAW BECAUSE THE *GESSA* DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH NUMEROUS DECISIONS OF THE OTHER DISTRICTS ON THE ISSUES OF:

(1.) WHO DECIDES WHETHER AN ARBITRATION AGREEMENT IS ENFORCEABLE WHEN CHALLENGED AS

VIOLATIVE OF PUBLIC POLICY, THE COURT OR THE ARBITRATOR?

(2.) WHETHER SUCH PROVISIONS, IF VOID AS VIOLATIVE OF PUBLIC POLICY, ARE SEVERABLE?

(3.) WHETHER THE LIMITATIONS PROVISIONS ARE INDEED VOID AS AGAINST THE PUBLIC POLICY OF THIS STATE?

Issues relating to the enforceability of nursing home arbitration clauses which cap economic damages, preclude punitive damages, preclude the right to appeal, or change the burden of proof have proliferated in recent years, and have resulted in numerous reported decisions from each of the five district courts. This Court should accept this case for discretionary review and resolve the conflicts between *Gessa* and cases in direct conflict from the other districts, to clarify Florida law on this subject and to ensure uniformity of decisional law on this subject throughout this state.In the instant case, this Court's resolution of the aforementioned conflicts between *Gessa* and decisions from the other districts is necessary to definitively resolve these conflicts, bring clarity to this area of law, and avoid duplicative and unnecessary appeals with differing outcomes in future cases.

A. *Gessa* is in Direct Conflict With Decisions from the First and Fourth Districts on the Issue of Whether the Court, or the Arbitrator, has Authority to Determine the Public Policy Voidness Issue.

Gessa is in direct conflict with the Fourth District's opinion in *Alterra*

Healthcare Corporation v. Bryant, 937 So.2d 263, 267 (Fla. 4th DCA 2006), on the issue of who decides the public policy issue. In *Bryant,* the Court opined that "Alterra argues further that the trial court had no authority to determine the validity of the limitation of liability provisions. Alterra contends this authority lies solely with the arbitrator. ***We disagree.*** "[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 was waived." *Seifert v. U.S. Home Corp.,* 750 So.2d 633, 636 (Fla.1999). ***"It is the court's obligation, in deciding a motion to compel arbitration, to determine whether a valid written agreement to arbitrate exists."*** *SA-PG-Ocala, LLC,* 935 So.2d at 1242 (citing *Global Travel Mktg., Inc. v. Shea,* 908 So.2d 392 (Fla.2005); *Seifert,* 750 So.2d at 633). Thus, the trial court properly considered whether the **arbitration** and limitation of liability provisions were valid."). *(emphasis added).*

Gessa is likewise in direct conflict with the First District on this issue. In *Alterra v. Linton,* 953 So.2d 574, 576 (Fla. 1st DCA 2007), the Court held that, "[w]e reject the defendants' 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.[FN1] *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."). This direct and express conflict vests this Court with jurisdiction to resolve this issue.

B. *Gessa* is in Direct Conflict With Decisions From the Fourth and Fifth Districts on Whether Void Limitations Provisions in an Arbitration Agreement Can Be Severed, or Whether They Render the Entire Arbitration Agreement Void.

The Panel's ruling that the arbitrator has authority to determine void as against public policy issues, is in direct conflict with the decisions of the other districts that the issue is a gateway issue which is to be decided by the courts, and not the arbitrators, under the first prong of *Seifert. See Lacey v. Healthcare & Retirement Corp. of America*, 918 So.2d 333, 334 (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(Fla. 5th DCA 2007); *Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773, 775 (Fla. 4th DCA 2007) ("[t]he trial judge determined. . . he would have to rewrite the terms of the Agreement to give it effect. We find the trial court correctly refused to sever portions of the arbitration clause."). This direct and express conflict vests this Court with jurisdiction.

C. *Gessa* is in Direct Conflict With Every Other District on the Issue of the Voidness as Violating Public Policy of Limitation Provisions Which Defeat Remedial Remedies.

Every district court *other than the Second,* has refused to allow enforcement of such limitations finding them to be void as against public policy. The Second

District has sidestepped resolution of this issue several times in recent cases, deferring the matter to the arbitrator. In so doing, the Second District shirked its responsibility to resolve the issue under the first prong of *Seifert,* and came in conflict with the following decisions on this issue. In some opinions, the Court severed the unenforceable clauses where the agreement had a severability clause. *See Alterra v. Linton*, 953 So.2d 574 (Fla. 1st DCA 2007); *Alterra Healthcare Corporation v. Bryant*, 937 So.2d 263 (Fla. 4th DCA 2006). In others, the Court found that the offending clauses went to the essence of the agreement such that they were not severable. *See Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773 (Fla. 4th DCA 2007); *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296 (Fla. 4th DCA 2005). In still others, the Courts refused to enforce the arbitration agreement because the agreement lacked a severability clause. *See SA-PG-Ocala, LLC v. Stokes*, 935 So.2d 1242 (Fla. 5th DCA 2006); *Lacey v. Healthcare & Retirement Corp. of America*, 918 So.2d 333, 334 (Fla. 4th DCA 2006). In one, the Court refused to enforce the arbitration agreement because the limitations of remedy clause was unconscionable. *See Prieto v. Healthcare and Ret. Corp.*, 919 So.2d 531 (Fla. 2005). But all districts, other than the Second, uniformly and consistently concur that caps on noneconomic damages and the elimination of punitive damage remedies under chapter 400, a remedial statute, render the limitations provisions void and unenforceable as against public policy.

In a prior similar case from the Second District which is now pending before this Court on conflicts review in Case No. SC08-1774, *Shotts v. Winter Haven, Inc.*, 988 So.2d 639 (Fla. 2d DCA 2008), the Court distinguished the aforementioned cases and enforced arbitration, suggesting like the *Gessa* Panel did, that ***if*** the limitations provisions were void, *the arbitrator* would have the authority to sever them ***because the agreement at issue in Shotts did, in fact, have a severability clause.***

> "We note that although the appellate courts determined that the arbitration agreements in *Place at Vero Beach, Fletcher, SA-PG-Ocala, Lacey,* and *Blankfeld* were invalid because they violated public policy, these cases are distinguishable. The arbitration agreements in those cases contained no severance agreement (*SA-PG-Ocala,* 935 So.2d at 1243; *Lacey*, 918 So.2d at 335), or the court determined that the "offending" provisions of the arbitration agreement were not severable (*Place at Vero Beach, Inc.*, 953 So.2d at 775; *Fletcher*, 952 So.2d at 1227), or the court did not reach the severability issue (*Blankfeld*, 902 So.2d at 299).

Shotts at p. 644.

This Court should resolve this issue consistently with the decisions of the other district that these limitations are void as against public policy.

Further, the *Gessa* Panel's own remark, in footnote 1 of the Opinion warrants this Court's resolution of this issue."The law is unsettled as to whether the trial court should first determine the provision to be contrary to public policy and unenforceable and then sever the provision before sending the issue to the

arbitrator . . . . and our affirmance . . . should not be read as a resolution of this very complicated issue." (App. at p. 6, footnote 1).

CONCLUSION

Due to the fact that *Gessa* is in direct conflict with decisions of the other districts on the issue of who decides issues of void as against public policy issues, the court or the arbitrator, and conflicts as to whether a limitation which defeats remedial remedies such that it is void as against public policy can be severed from an arbitration agreement which does not contain a severability clause, Petitioner respectfully requests that this Court accept jurisdiction and resolve the aforementioned conflicts.

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 _____day of May, 2009.

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CERTIFICATE OF FONT 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.

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