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 REPLY 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 AUTHORITIES

Case **Page(s)**

TABLE OF AUTHORITIES

Case **Page(s)**

TABLE OF AUTHORITIES

Case **Page(s)**

Statutes

ARGUMENT

I. STRIPPING THE COURTS OF THEIR AUTHORITY TO DETERMINE WHETHER A VALID, ENFORCEABLE AGREEMENT TO ARBITRATE EXISTS PRIOR TO SENDING THE MATTER TO THE ARBITRATOR VIOLATES *SEIFERT*, THE FLORIDA ARBITRATION ACT AND THE FEDERAL ARBITRATION ACT.

The gravamen of Manor Care's Argument is that Gessa's challenge does not go to 'the making of the arbitration agreement', thus her challenge does not come under the first prong of *Seifert v. U.S. Home Corp.,* 750 So.2d 633 (1999), but rather is a contract interpretation issue for the arbitrator to resolve. In support of this theory, Manor Care relies almost exclusively upon the U.S. Supreme Court's decisions in *Prima Paint Corp. v. Flood & Conklin Mfg., Co.,* 388 U.S. 395 (1967), and *Buckeye Check Cashing, Inc.v. Cardegna,* 546 U.S. 440 (2006). Manor Care asserts that these two decisions, when read together, are binding precedent in the instant case, and Respondents criticize Gessa for failing to cite or distinguish them in her Initial Brief. Gessa respectfully asserts that Manor Care misreads these decisions, and engages in a tortuous reading of the arbitration agreement at issue here in an attempt to make it 'fit' within the paramenters of the aforementioned cases.

Stated simply, *Buckeye* holds that where an *otherwise enforceable* arbitration agreement is contained in an agreement which is itself potentially illegal or void, and where the *challenge is to the underlying agreement as a whole* and

not to the arbitration provision contained within it, then it is for the arbitrator to decide the challenge to enforcement of the underlying agreement. "[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye,* 546 U.S. at 440, *citing Prima Paint*, 388 U.S. at 403-404. The Court's use of the phrase "in the first instance" means that because the parties intended to arbitrate and neither challenged the validity of the arbitration clause, the arbitrator should be the one to decide the issue of the underlying contract's validity. In the event the arbitrator decided the usurious rate referenced in the underlying agreement rendered the entire agreement void, then the parties could look to the courts for a review of the arbitrator's decision to determine if it is in accord, or derivation, of existing law.

The arbitration provision at issue here, which expressly incorporates by reference the limitations of remedies provisions which follow it (collectively, the "Arbitration Agreement"), is found at pages 40 through 44 of an agreement entitled "ADMISSION AGREEMENT." (R. Vol. I, Tab 3, p. 64,R. Vol. I, Tab 3, pp. 103-107). Gessa challenged the validity and enforceability of the Arbitration Agreement. *She raised no objection or avoidance defense whatsoever directed to the Admission Agreement <u>as a whole</u>.* As the U.S. Supreme Court explained in *Buckeye,*

> Challenges to the validity of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" can be

> divided into two types. ***One type challenges specifically the validity of the agreement to arbitrate.*** See, *e.g., Southland Corp. v. Keating*, 465 U.S. 1, 4-5, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (challenging the agreement to arbitrate as void under California law insofar as it purported to cover claims brought under the state Franchise Investment Law). The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid. *(emphasis added, footnote omitted).*

Buckeye, 546 U.S. at 444.

Gessa's challenge falls under the 'first type' of challenge referenced by the Court, *to wit,* a challenge specifically addressed "to the validity of the agreement to arbitrate." *Id.* Because *Buckeye* involved a challenge of the 'second type,' directed to the contract as a whole, the case does not support Manor Care's assertion that *Buckeye* controls and mandates that the arbitration enforceability challenge must go to the arbitrator. In fact, as the Ninth Circuit recently explained in *Jackson v. Rent-A-Center West, Inc.* , 581 F.3d 912 (9th Cir. 2009), [1]*Buckeye* actually supports the opposite corollary that the court is charged with the duty of deciding challenges to the validity and enforceability of the Arbitration Agreement.

> The Supreme Court has held that, as a matter of federal substantive arbitration law, when a party challenges the validity of a contract

---

[1] Rent-A-Center petitioned the U.S. Supreme Court for a writ of certiorari. The Court accepted jurisdiction and the matter is currently pending before the high court. *Rent-A-Center West, Inc. v. Jackson* ,___U.S.___, 130 S. Ct. 1133 (January 15, 2010).

> between the parties, but "not specifically its arbitration provisions," the challenge to the contract's validity should be considered by an arbitrator, not a court. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). ***The flip side of this rule, however, is that when a party specifically challenges the validity of arbitration provisions within a larger contract, apart from the validity of the contract as a whole, a court decides the threshold question of the enforceability of the arbitration provisions.****(emphasis added).*

Jackson, 581 F.3d at 915.

Jackson involved a challenge to the enforceability of an arbitration agreement contained within an employment agreement on the ground of unconscionability. The Ninth Circuit cited another U.S. Supreme Court decision in support of the *Jackson* Court's holding that the threshold determination of validity of the arbitration agreement is for the court and not the arbitrator.

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the ... agreement does in fact create such a duty." *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964).

Jackson, 581 F.3d at 916.

Jackson's interpretation of the 'flip side' of the holding in *Buckeye* is in harmony with U. S. Supreme Court precedent, with state and federal arbitration laws, and with this Court's decision in *Seifert.* This case, like *Jackson,* turns on the fundamental principle of state and federal arbitration law that it is for the court to determine that an arbitration clause is *valid and enforceable* before referring the issue to the arbitrator for enforcement.

Indeed, Florida law could not be more clear on this issue. Section 684.22 of the Florida Statutes states that an order compelling arbitration shall issue unless the court finds that the agreement to arbitrate was fraudulently induced, or "[t]hat submission of the dispute to arbitration would be contrary to the public policy of this state or of the United States.. . ." Because Gessa challenged the arbitration agreement (and not the underlying Admission Agreement) as being violative of public policy, the court has the duty to determine the validity of the Arbitration Agreement under the first prong of Seifert and under s. 684.22.

Manor Care's reliance on *Prima Paint* to support its assertion that the arbitrator should resolve the challenge to the validity of the Arbitration Agreement is likewise misplaced, and IS based upon a misinterpretation of the holding of that decision. *Prima Paint,* like *Buckeye,* involved a challenge to the validity *of the contract as a whole.* The U.S. Supreme Court explained that,

> ***"if the claim is fraud in the inducement of the arbitration clause itself- an issue which goes to the 'making' of the agreement to arbitrate-the federal court may proceed to adjudicate it.*** But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. *(emphasis added).*

Prima Paint, 388 U.S. at 403-404.

Because the fraudulent inducement challenge in *Prima* was not directed to the arbitration agreement but rather to the entirety of the larger agreement in which it was found, the U.S. Supreme Court held that the issue was for the arbitrator to decide.

In contradistinction to the facts in *Prima*, Gessa's challenge is to voidness on public policy grounds of the Arbitration Agreement---not the Admission Agreement, which challenge goes to *the making* of the arbitration agreement itself. This Court noted in *Global Travel Marketing, Inc. v. Shea*, 908 So.2d 392 (Fla. 2005), that the issue of whether an arbitration agreement is void as violative of public policy goes to the very existence and making of the agreement itself, and is for the court to decide under the first prong of *Seifert.* " No valid agreement exists if the arbitration clause is unenforceable on public policy grounds." *Global*, 908 So.2d at 398. The court has the duty to decide public policy voidness issues, regardless of whether the public policy is established by legislation or judicial precedent. *Global*, 908 So.2d at 396-7, *citing Perry v. Thomas,* 482 U.S. 483, 492 n. 9, (1987) (citations omitted); *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687 (1996). As this Court has acknowledged, it is certainly within the jurisdiction, authority and province of the judiciary to refuse to enforce agreements which contravene the public policy of this state *as interpreted by the courts* or codified by the legislature. This is true, notwithstanding Manor Care's and Amici's

assertions to the contrary that the legislature's silence in chapter 400 on prohibiting waivers' of remedial statutory rights means unequivocally that such waivers do not run afoul of public policy concerns.

Further, Gessa not only challenged the validity and enforceability of the Arbitration Agreement based on public policy grounds, but she also raised unconscionability as an avoidance defense, which likewise goes to the making of the agreement, and must be resolved by the court.

Manor Care asserts that the limitations of remedies provision and the agreement to arbitrate are "legally independent" from one another, and suggests that Gessa improperly seeks judicial resolution of challenges to the *contents* of the limitations provisions rather than the *existence* of the agreement to arbitrate. This conclusion is unsound and is not supported by the U.S. Supreme Court cases nor by this Court's approval on remand of the Fourth District's decision in *Buckeye Check Cashing, Inc.v. Cardegna,* 824 So.2d 228 (Fla. 4th DCA 2002). It is without peradventure that voidness challenges based upon arbitration agreements which violate public policy goes to the very existence—or making, of the Arbitration Agreement. *See also Barker v. Golf U.S.A., Inc.,* 154 F.3d 788, 791 (8th Cir. 1998) *citing Prima* (claims regarding lack of mutuality, unconscionability, and *violations of public policy* go to the making of the agreement and must be decided by the court.).

As the Second Circuit noted in *Telenormobile Communications AS v. Storm, LLC,* 584 F.3d 396, 406 (2d Cir. 2009), "[W]hen the doubt concerns who should decide arbitrability ... [t]he law [presumptively] favor[s] judicial rather than arbitral resolution." *Citing First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944-5 (1995) . The Second Circuit opined that a presumption in favor of the court ruling on defenses to enforcement can be rebutted only by "clear and unmistakable evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." *Citing Bell v. Cendant Corp.,* 293 F.3d 563, 566 (2d Cir.2002). Manor Care made no such showing of any evidence, much less clear and unmistakable evidence, that the parties intended that the arbitrator assume the court's duty of determining whether a valid enforceable arbitration agreement existed.

Gessa's position is also in accord with the Federal Arbitration Act, 9 U.S.C. ss. 2, et seq. ("FAA") and decisional authorities interpreting same. Section 2 of FAA is the "primary substantive provision of the Act." *Moses H. Cone Mem'l Hosp. V. Mercury Constr.,* 460 U.S. 1, 24 (1983). Section 2 provides, in part:

> A written provision in . . .a contract evidencing a transaction involving commerce to settle by arbitration . . .an existing controvery arising out of such a contract. . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract. (emphasis added).*

9 U.S.C. s. 2

Section 2 sets out three requirements for enforcement, *to wit*, (1) a written agreement, (2) a transaction involving interstate commerce, and (3) a determination that the arbitration clause is not invalid on ordinary contract grounds. This latter prong compels a finding that the court, under section 2, under *Seifert*, and under 684.22(1), must decide all arbitration contract avoidance challenges based upon unconscionability and public policy violations, regardless of whether those public policy issues were established by the legislature or by the courts.

II. THE LIMITATIONS OF REMEDIES PROVISIONS ARE INCORPORATED BY REFERENCE AS PART OF THE ARBITRATION AGREEMENT, THEY ARE INTEGRAL THERETO, THEY GO TO THE ESSENCE OF THE AGREEMENT TO ARBITRATE, AND THEY MAY THEREFORE NOT BE SEVERED.

Respectfully, the *Gessa* Panel has muddied the distinction between validity and enforceability in the context of public policy under the first prong of *Seifert*, with a separate, discrete, but related issue of, assuming an arbitration provision has been determined by the district court to be void and unenforceable, whether it is severable, or whether it is so integral to the heart or essence of the agreement as to render the entire agreement void and unenforceable. Petitioner respectfully suggests that this issue also falls under the first prong of *Seifert*, and it is for the court, and not the arbitrator, to decide. Stated simply, if the court were to pass on the issue of severability, and the arbitrator later determined that the void provisions

were so integral as to render the entire agreement unenforceable, then in essence, the arbitrator would have been performing the court's duty (*albeit*, after-the-fact) to determine whether a valid, enforceable agreement existed under the first prong of *Seifert.* Alternatively, if the arbitrator were to 'get it wrong,' severing out an offending provision which was, indeed, integral to the parties' agreement to arbitrate, and allowing an arbitration agreement which truly defeats public policy to go forward, the aggrieved litigant would again have no recourse to right this injustice. Both the issue of who decides the gateway issue of voidness for public policy, and who decides whether void provisions are severable or are so essential to the agreement so as to void the entire Arbitration Agreement, are issues for the court to decide under the first prong of *Seifert*, as *they are integral to the determination of whether the arbitration agreement is valid and enforceable.*

Manor Care disingenuously suggests that the arbitration agreement and the limitation of remedies provision are separate and independent. This ignores the intent of the parties as clearly expressed in the Arbitration Agreement:

> "A. Arbitration Agreement.
>
> 2.3 The Limitation of Liability Provision below ***is incorporated by reference into this Arbitration Agreement.*** *(emphasis added).*

The offending limitation of remedies provisions at issue in the instant case are not severable from the arbitration agreement because (i) the agreement lacked a

severability clause, (ii) ***the limitations were incorporated by express reference into the arbitration provision,*** and (iii) the limitations of remedies are integral to 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 Of United Association Of Journeymen And Apprentices Of Plumbing And Pipefitting Industry Of United States And Canada v O. Henley & Beckwith, Inc*., 66 So.2d 818 (Fla. 1953) **(“**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.”*** *Citing* Williston on Contracts, rev. ed., Vol. 6, sec. 1782. *(emphasis added).*

The *Gessa* Panel erroneously concluded that substantial competent evidence supported the trial court’s conclusion that the parties intended that any offending provisions of the Arbitration Agreement could be severed in arbitration. There simply is no evidence, substantial or insubstantial, to support such a finding. Further, the only evidence of the parties’ intentions—the terms of the Arbitration Agreement itself, support the opposite conclusion. To conclude otherwise would be to ignore, and render meaningless, section A. para. 2.3 where the parties expressly stated their intention that the limitations of liability merge into, and become integral with, the arbitration provision.

Further evidence of the integrality of the remedies limitation is found in the Arbitration Agreement itself, which provides that the arbitrator shall apply the Florida Rules of Evidence to the arbitration proceedings. Without the ability to assert a claim for punitive damages, Gessa would be precluded from attempting to admit evidence of Manor Care's similar prior acts of resident neglect, survey deficiencies and the like, which would be proferred to show prior notice, knowledge and a motive of placing profits over the welfare of residents. This type of evidence would, of course, be admissible in an arbitration proceeding which allowed punitive claims. Thus, prohibition of punitive claims has a direct nexus to the prosecution of Gessa's claims and the evidentiary presentation of her case in chief. 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, and therefore not severable.

Manor Care and Amicus Florida Health Care Association ("FHCA") erroneously argue that the availability of punitive damages is not necessary as a deterrent to grossly negligent treatment of nursing home residents like Gessa.

These cavalier statements fly in the face of the avowed purpose of the Nursing home Resident's Right's Act (inclusive of its statutory provision authorizing punitive damage claims) which was enacted to police widespread elder abuse and exploitation. *See,* s. 400. 0061 of the Florida Statutes. ("The Legislature finds that conditions in long-term care facilities in this state are such that the rights, health, safety and welfare of residents is not ensured . . .."). It is without dispute that chapter 400 is a remedial statute and that the residents of all long-term care facilities in this state are entitled to the full benefits and protections of this remedial statute. *See, Knowles v. Beverly Enterprises-Florida, Inc.,* 898 So.2d 1 (Fla. 2005); *Fonte v. AT&T Wireless, Inc.,* 903 So.2d 1019, 1024 (Fla. 4th DCA 2005); *Blankfeld v. Richmond Health Care, Inc.,* 902 So. 2d 296 (Fla. 4th DCA 2005); and *Romano v. Manor Care, Inc.,* 861 So.2d 59 (Fla. 4th DCA 2003).

Amicus FHCA also suggests that punitive claims are not necessary as a deterrent because the regulatory sanctions and fines process are sufficiently severe to encourage the provision of adequate nursing home care. FHCA engages in 'scare tactics,' by tacitly suggesting that punitive awards would "only increase the cost of care," and that punitive awards would be paid from Medicare/Medicaid benefits (as opposed to being funded from the nursing home's hefty annual net profits). If the threat of fines truly worked as a deterrent, then neither Manor Care nor Amici could be heard to complain about soaring insurance premiums and the

questionable continued viability of Florida nursing homes.

Further, the prohibition against punitive claims in the Arbitration Agreement not only harms Gessa, but also the Florida nursing home and assisted living facility ("ALF") resident population at large, as the legislature has enacted section 400.0238 of the Florida Statutes, which provides for the Florida Quality of Long-Term Care Facility Improvement Trust Fund (the "Fund") to share equally with a prevailing nursing home resident-litigant in the recovered punitive damages award. Punitive awards deposited into the Fund are to be used to improve conditions in Florida's nursing homes and ALFs and to improve resident care, support and family involvement. Thus, Gessa's right to pursue a punitive damage remedy is not a right exclusively personal to her, but is also a matter of great public interest, and the cases cited by Manor Care where courts have refused to enforce waivers of public rights, are actually supportive, not of Manor Care's position, but of Gessa's. *See Chames v. DeMayo,* 972 So.2d 850 (Fla. 2007); *American Casualty Co. v. Coastal Caisson Drill Co., Inc.,* 542 So.2d 957 (Fla. 1989); *and Holt v. O'Brien Imports, Inc.*, 862 So.2d 87 (Fla. 2d DCA 2003). Likewise, the cases cited by Amicus Pacific Legal Foundation for the proposition that courts are loathe to interfere in private citizen's rights to freely contract unless "enforcement conflicts with dominant public interests," are actually supportive of Gessa's position. Because Gessa's rights to pursue punitive damages claims inures to Gessa's

benefit, and serves to simultaneously satisfy the dominant public interest of funding programs intended to improve nursing home care and living conditions throughout the state. Surely, in enacting s. 400.0238, the legislature could not have intended that a party's right to freely contract could be asserted to defeat codified public policy and the legislative intent to improve care provided to Florida's most vulnerable institutionalized elders.

To quote the Second District's Judge Altenbernd's special concurrence in Steihl,

> 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).*

Manor Care, Inc. v. Steihl , 22 So.3d 96, 101 (Fla. 2d DCA 2009).

This Court can resolve the conflicts among the Second District and all Florida districts be holding that the courts must decide public policy and other contract avoidance challenges before sending the case to the arbitrator.

CONCLUSION

Gessa respectfully prayers for an order disapproving *Gessa* and approving the cases from the other districts with which it conflicts on the issues of who decides public policy challenges and whether offending limitations are severable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by UPS overnight delivery to: **Aram P. Megerian, Esq.** and **Bryan Rotella, Esq.**, Cole, Scott & Kissane, P.A., 5201 W. Kennedy Blvd., Suite 750, Tampa, FL 33609, and **Sylvia H. Walbolt, Esq.** and **Matthew J. Conigliaro, Esq.**, Carlton Fields, 200 Central Ave, Suite 2300, St. Petersburg, Florida 33701, **Karen L. Goldsmith, Esq.** and **Jonathan S. Grout, Esq,** Goldsmith & Grout, P.A., 2160 Park Ave. No., Winter Park, FL 32789, **Steven Geoffrey Giesler, Esq.** Pacific Legal Foundation, 1002 SE Monterey Commons Blvd., Suite 102, Stuart, FL 34996, and **Cynthia S. Tunnincliff, Esq.,** and **Ashley P. Mayer, Esq.,** Pennington, Moore, Wilkeinson, Bell & Dunbar, P.A., 215 So. Monroe St.-2d Floor (32301), Tallahassee, FL 32302-2095, this 29th day of March, 2010.

_____

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