IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DEBRA LAIZURE, as Personal
Representative of the Estate
of HARRY LEE STEWART, deceased,

Petitioner,

CASE NO.: SC10-2132
5TH DCA NO.: 5D09-2049
L.T. NO.: 2008-CA-002619

vs.

AVANTE AT LEESBURG, INC.
a.k.a. AVANTE AT LEESBURG
OUTPATIENT REHAB, INC., AVANTE
ANCILLARY SERVICES, INC. and
AVANTE GROUP, INC.,

Respondents.

_________________________________/

FLORIDA HEALTH CARE ASSOCIATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The Florida Health Care Association ("FHCA") is a non-profit organization and represents more than 500 facilities which provide skilled nursing, post-acute and sub-acute care, short-term rehab, assisted living and other services in Florida. Established in 1956, FHCA provides supportive services and resources to its members, including administrative and clinical education and advocacy. FHCA serves as a liaison with government agencies and makes its legal, business and labor consultants available to all members. FHCA membership also includes more than 400 Associate Members, or companies, that provide products and/or services to long term care providers. Among the goals of FHCA are to advance of the quality of services, image, professional development, and financial stability of its members, support member providers, and assist the interests of government, the greater health care community, and the general public.

SUMMARY OF ARGUMENT

Amicus Curiae FHCA, in support of Respondent, requests that the certified question be answered in the negative and the decision of the Fifth District Court be affirmed: the execution of a valid nursing home arbitration agreement by a competent individual must operate to bind his or her Estate and statutory heirs in a subsequent wrongful death action arising from an alleged tort within the scope of that arbitration agreement.

Alternative dispute resolution benefits not only the parties to the dispute, but the public at large; arbitration, for example, conserves public resources and is frequently a more rapid and efficient means than the court system to determine a party's rights. For this reason, arbitration agreements are highly favored in Florida and United States law.

Additionally, wrongful death cases, by their very nature, are dependent on a wrong committed against the decedent, and accordingly, such claims should be subject to an otherwise valid arbitration agreement for which the decedent himself contracted. This is especially true where, as in the case at bar, the language of the agreement is inclusive and explicitly identifies the parties' intent that the estate and heirs be bound thereby.

Petitioner asks this Court to bestow upon statutory survivors and the decedent's estate greater legal rights than the decedent himself would have enjoyed, had he survived. Such an irrational ruling cannot co-exist with the well-established public policy of our state and federal governments in support of arbitration.

ARGUMENT

On October 1, 2010, the Fifth District Court of Appeal certified the following question as one of great public importance:

> WHETHER THE EXECUTION OF A NURSING HOME ARBITRATION AGREEMENT BY A PARTY WITH THE CAPACITY TO CONTRACT, BINDS THE PATIENT'S ESTATE AND STATUTORY HEIRS IN A SUBSEQUENT WRONGFUL DEATH ACTION ARISING FROM AN ALLEGED TORT WITHIN THE SCOPE OF AN OTHERWISE VALID ARBITRATION AGREEMENT.

Laizure v. Avante at Leesburg, 44 So.3d 1254, 1259 (Fla. 5th DCA 2010). While agreeing with the trial court's decision in the affirmative, the district court recognized the issue had never been definitively addressed by this Court.

In its opinion, the Fifth District Court of Appeal emphasized the following principle governing arbitration agreements in Florida: "arbitration clauses are enforceable and favored when the disagreement falls within the scope of the arbitration agreement." Laizure, 44 So.3d 1254, 1257, citing Sears Authorized Termite & Pest Control, Inc. v. Sullivan, 816 So.2d 603, 606 (Fla. 2002). The decision of both lower courts in this matter, that a nursing home arbitration agreement can bind the estate and statutory heirs in a wrongful death claim, comports with Florida's public policy favoring arbitration. Bland, ex rel. Coker v. Health Care & Ret. Corp. of Am., 927 So.2d 252, 258 (Fla. 2d DCA 2006).

Policy reasons for upholding, even encouraging, arbitration agreements are manifold. Arbitration agreements, in general, require disputes between parties to a contract to be resolved through binding arbitration. Such agreements do not deprive the parties of the legal process; rather, the parties elect an alternative, independent, more expedient, and often less costly process. In addition, alternative dispute resolution, including arbitration, effectively eases burdens on the court system and conserves government and public resources.

Further, in highly specialized areas of law, such as nursing home professional negligence, the parties themselves can participate in selection of arbiters with relevant knowledge and experience. Arbiter familiarity with, *e.g.*, nursing home community standards, medical terminology, complex corporate relationships, and federal and state regulations governing long term care can expedite the process and help ensure merit-based outcomes.

The many benefits of arbitration for would-be litigants and the public at large have been formally recognized by the federal government, in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-14. Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such

> grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The United States Supreme Court has recognized the FAA as "a congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to contrary." Perry v Thomas, 482 US 483 (1987); see also Bullseye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006)(holding the FAA "places arbitration agreements on equal footing with all other contracts"). In enacting the FAA, "Congress intended to foreclose state legislative attempts to undercut enforceability of arbitration agreements." Id. Anti-arbitration state law, therefore, has been effectively pre-empted by the FAA. See id.; Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984).

It is against this backdrop of federal and state policies favoring arbitration that this Court should consider the certified question.

In the case at bar, the Fifth District correctly noted that, although wrongful death actions "belong to the survivors of the decedent," by statute, such suits are nonetheless "derivative" in nature. Laizure, 44 So.2d at 1258. Focusing on the plain language of the Wrongful Death Act, the court explained:

> …such an action is predicated on the "wrongful act, negligence, default, or breach of contract or warranty" committed by the defendant which, as the result of the decedent's death, transformed a personal injury claim into one for wrongful death.

Id.; citing F.S. § 768.19. Because wrongful death cases are "dependent on a wrong committed against the decedent," the court reasoned, it is only logical to include such claims within the scope of an otherwise valid arbitration agreement, for which the decedent himself contracted. Id.

The Fifth District's rationale in this regard is entirely consistent with this Court's contemporary approach to wrongful death claims. The Florida Supreme Court has routinely held that survivors may not recover where the decedent himself could not have recovered. See, e.g., Toombs v. Alamo Rent-a-Car, Inc., 833 So.2d 109 (Fla. 2002); Valiant Ins. Co. v. Webster, 567 So.2d 408 (Fla. 1990). As thoroughly explained in Toombs, the Court's

> determination as to whether a right of action for wrongful death attaches in the statutory survivors has focused on the existence of a right of action in the decedent at his or her death...

833 So.2d at 115.

Under this same analysis, where a nursing home resident, voluntarily, knowingly, and with legal capacity, signs an otherwise valid arbitration agreement, he has effectively waived judicial proceedings in favor of alternative dispute resolution. Upon his death, the decedent's survivors cannot assert a right to jury trial the resident himself did not possess. To hold otherwise would inure survivors and the estate with greater legal rights, derivatively, than the decedent himself

would have, had he survived. Florida courts have rejected such absurd and unreasonable results in similar contexts. By way of example:

- A survivor's claim is reduced by the comparative negligence of the decedent. See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973);
- A prior judgment for personal injuries will bar a cause of action for wrongful death brought when the injured person subsequently dies. See Variety Children's Hosp. v. Perkins, 445 So.2d 1010 (Fla. 1983);
- The expiration of the statute of limitations applicable to the decedent's personal injury action likewise bars the wrongful death action based on the same tortuous conduct. See Hudson v. Keene Corp., 445 So.2d 1151 (Fla. 1st DCA 1984), *approved*, 472 So.2d 1142 (Fla. 1985).
- A decedent's survivors are not entitled to recover wrongful death damages resulting from a lethal automobile crash where the decedent's recovery, had he lived, would have been statutorily precluded due to his intoxication. See Griffis v. Wheeler, 18 So.3d 2, 5-6 (Fla. 1st DCA 2009).

As each of the foregoing cases plainly demonstrates, in the state of Florida, substantive defenses and other limitations to plaintiff's cause of action, in existence at the time of his death, carry over to the wrongful death claims of his survivors. Failing to apply the "procedural" boundaries established by an

otherwise valid arbitration agreement entered into by the decedent discounts both public policy and controlling case law.

Arguing to the contrary, the Petitioner in this case cites, *inter alia*, the recent Washington State case of Woodall v. Avalon Care Center, 231 P.3d 1252 (Wash. Ct. App. 2010) as instructive. In Woodall, the state appellate court held that wrongful death claims against a nursing home brought by the decedent's heirs, neither of whom signed the arbitration agreement, were not subject to arbitration. Notably, this decision was considered and rejected by the Fifth District Court of Appeal in its opinion below. Laizure, 44 So.2d at 1259. A better reasoned decision, one that is more compatible with Florida decisions and better exemplifies state and federal public policies favoring arbitration, was issued by a ***federal*** court in Washington State, in Eckstein v. Life Care Centers of America, Inc., 623 F.Supp.2d 1235 (E.D. Wash. 2009).

In Eckstein, one issue was the same as that presented in Woodall and the case at bar: whether an otherwise valid agreement for arbitration, executed by a nursing home resident or his representative on his behalf, can bind the statutory beneficiaries in the event of the resident's death. Id. at 1237. Holding in the affirmative, the court was persuaded by the public policy concerns underlying the FAA and state arbitration statutes, as well as cogent points raised by the defendant nursing home:

> Plaintiff's argument in this respect ignores the clear language of the Agreement…and the practicalities of arbitration agreements in the long term care context. More specifically, Defendants contend that ***to hold otherwise would essentially eviscerate a long term care provider's contractual rights when presented with a wrongful death claim of a resident, the very claim anticipated by the Agreement***.

Id. at 1239 (emphasis supplied). The reasoning of the federal district court in Eckstein should guide this Court's consideration of the instant certified question, as the decision demonstrates considerable regard for individual party rights, while appropriately balancing such rights against public policy interests. Id. at 1237.

By contrast, the position of the *amicus curiae* in support of Petitioner, AARP, is largely grounded in the belief that arbitration agreements, simply, should not be enforceable in the long-term care context. Reasons cited include the "tumultuous" character of the nursing home admissions process generally; it is suggested that decisions made in the midst of aging and/or the deterioration of health should not be honored. Brief *Amicus Curiae* of AARP in Support of Petitioner, pp. 3-6. This curious proposition not only ignores meaningful and effective safeguards available at law to contend with contracts which are truly unconscionable, but is dangerously susceptible to overbroad application, as transactions and events involving contracts containing arbitration agreements seldom proceed without some measure of stress or emotion.

CONCLUSION

Based on the foregoing, FHCA, on behalf of its members, adopts and advocates the arguments and analysis presented by Respondent in support of the Fifth District's ruling below, and respectfully requests that this Court answer the certified question in the Affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been sent via U.S. Mail to: Tom Valdez, Esquire and Teresa Arnold, Esquire, Quintairos, Prieto, Wood & Boyer, P.A., 4905 W. Laurel Street, Tampa, Florida 33607, Lisa J. Augspurger, Esquire, Bush & Augspurger, P.A., 411 E. Jackson Street, Orlando, Florida 32801, D. Paul McCaskill, David Law Group, 100 East Faith Terrace, Maitland, Florida 32751, Kelly Bagby, AARP Foundation Litigation, 601 E. NW, Washington, DC 20049, and George Vaka, Esquire, Vaka Law Group, P.L., 777 S. Harbour Island Boulevard, Suite 300, Tampa, Florida 33602 this ____ day of April, 2011.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing *Amicus Curiae* Brief of Florida Health Care Association in Support of Respondent complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure and is in the required font of Times New Roman 14.

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