**SUPREME COURT OF FLORIDA**

**CASE NO.: SC10-2132**

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

Petitioner

Lower Tribunal No. 5D09-2049
2008-CA-2619

v.

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

Respondents

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# BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

PAGE

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Other Authorities**

## STATEMENT OF INTEREST

### AARP

AARP is a nonpartisan, nonprofit organization dedicated to addressing the needs and interests of people age fifty and older. Through education, advocacy and service, AARP seeks to enhance the quality of life for all by promoting independence, dignity, and purpose. As the country's largest membership organization, AARP advocates for access to affordable healthcare and for controlling costs without compromising quality. AARP supports laws and policies designed to protect the rights of healthcare consumers to go to court and obtain redress when they have been victims of neglect or abuse.

## SUMMARY OF ARGUMENT

Decisions regarding admission into a long-term care facility are typically made in the midst of a crisis brought on by a precipitous deterioration in health, disability level, or the deterioration (or even death) of a spouse or other caregiver. It is in the midst of such an emotionally charged situation that nursing home residents or their families are required to sign the stack of documents placed in front of them, and only learn later that the contract included provisions requiring the resident to forego the use of the court system to resolve future disputes. Most of these disputes are beyond the resident's contemplation on the day of the

admission and include disputes arising from issues like abuse, assault, malnutrition, neglect, and even death. In light of the draconian consequences for the nursing home resident, several state courts have concluded that mandatory pre-dispute arbitration clauses are so intrusive that the court will not permit a third party to bind the resident to the agreement absent express authority to make such a contract. Such rulings are consistent with the Supreme Court determination that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed to submit." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Similarly, wrongful death beneficiaries cannot be bound by an arbitration agreement entered into by their deceased relative because they were not a party to that agreement and did not agree to submit their independent claims to arbitration.

## ARGUMENT

### I. COURTS CONSTRUE NURSING FACILITY ARBITRATION PROVISIONS NARROWLY BECAUSE OF THE INHERENTLY UNEQUAL BARGAINING POSITION OF THE NURSING HOME RESIDENT COMPARED TO THE NURSING HOME CORPORATION.

#### A. The Tumult Surrounding the Nursing Home Admission Process Makes Meaningful Review of the Arbitration Provisions Impossible.

The circumstances that exist when admission to a long-term care facility becomes necessary make it difficult for residents and their family members to make informed decisions about all of the numerous provisions contained in an admissions contract - especially provisions requiring the nursing home resident to waive his or her right to access the courts and trial by jury for future disputes. Nursing home residents or their families sign the stack of documents placed in front of them, and only learn later that the contract included provisions requiring the resident and his family to forego the use of the court system to resolve a wide range of future disputes which, all too often, involve abuse, assault, malnutrition, neglect, and even death. Laura M. Owings and Mark N. Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts*, 43 Tenn. B.J. 20, 22-23 (2007) [hereafter *Unfairness of Arbitration Agreements*].

These arbitration agreements are having the effect desired by the nursing home industry, as highlighted in the Wall Street Journal:

> Nursing-home patients and their families are increasingly giving up their right to sue over disputes about care, including those involving deaths, as the homes write binding arbitration into their standard contracts. The clause can have profound implications. Nursing homes' average costs to settle cases have begun dropping, according to an industry study, even as claims of poor treatment are on the rise.

Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits --- Big Payouts Fade As Arbitration Rises; Ms. Hight Falls Ill*, Wall St. J., Apr. 11, 2008, at A1 [hereinafter Wall St. J.].[1]

Decisions regarding admission into a nursing home or assisted living facility are "emotionally-charged, stress-laden event[s]," typically made in the midst of a crisis brought on by a precipitous deterioration in health, disability level, or the deterioration (or even death) of a spouse or other caregiver. *See, e.g., Podolsky v.*

[1] The article quotes former Sen. Mel Martinez, '"[i]t is an unfair practice given the unequal bargaining position between someone desperate to find a place for their loved ones and a large corporate entity like a nursing home.'" Moreover, the article notes that "[t]he biggest arbitration provider, the American Arbitration Association, frowns on agreements requiring arbitration in disputes over nursing-home care and generally refuses such cases. Some patients 'really are not in an appropriate state of mind to evaluate an agreement like an arbitration clause,' says Eric Tuchmann, the association's general counsel. A second group, the American Health Lawyers Ass'n, also avoids them." Wall St. J., Apr. 11, 2008, at A1.

*First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 101 (Ct. App. 1996) (*citing* Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 255, 258 (1990)); Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 New Eng. J. on Crim. & Civ. Confinement 1, 3 (1998) (explaining that an older person's move to a nursing home often follows a period of acute hospitalization when she and/or her family cannot manage the home care demands).

The need to find a long-term care placement arises quickly and often is unplanned, leaving little time to investigate options or to wait for an opening at a facility of one's choice.[2] Denese Ashbaugh Vlosky, et al., *"Say-so" As A Predictor of Nursing Home Readiness*, 93 J. of Fam. & Consumer Scis. 59 (2001). Time pressure significantly impairs the ability to seek and carefully consider alternatives, and the critical need for services almost always overshadows any

[2] In the 1980s, the federal government changed the way hospitals are paid for their Medicare patients; since that change, hospital discharge planning occurs "quicker and sicker." Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. Mental Health & Aging 145, 148 (2000) [hereinafter *Navigating the Hazards*]. One danger is that the hospitalization itself debilitates patients and the assessment of the type of care and facility they need after discharge is made before they have fully recovered and are able to make informed decisions on these critical issues. *Id.* at 150-51.

other consideration.[3] Consequently, both the resident and family members are unable to review the contract and contemplate the meaning and ramifications of its provisions, particularly those that have nothing to do with care and related services and costs. *See also Unfairness of Arbitration Agreements, supra*, at 22-23.

People seeking admission to a long-term care facility are focusing on the quality and range of services available, and perhaps the costs, but are not thinking about possible future disputes. *See, e.g.*, Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DePaul J. Health Care L. 263, 280 (2004) ("[a]dmitting a loved one to a nursing home is an overwhelming and stressful undertaking for families . . . . If families give any thought to the admissions agreement they are signing, they probably do not consider whether it contains a mandatory arbitration agreement"). When they are presented with admissions contracts, residents and family typically do not know that an arbitration provision is buried in the multi-page document. In the rare instance in which prospective residents or their families are aware that the admissions contract contains an arbitration provision, they do not understand what it means and the many rights and protections they will lose in arbitration.

[3] Potential residents and their family members panic when they feel there is insufficient time to consider different facilities and they may choose a facility they would not have chosen if they had more time to weigh their options. *Navigating the Hazards*, *supra*, note 2, at 150.

### B. Courts have Refused to Enforce Arbitration Provisions Against a Non-Signatory Nursing Resident Unless the Person Signing the Agreement Has Express Authority.

The Supreme Court has indicated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed to submit." *Howsam,* 537 U.S. at 83. Several state courts have concluded that mandatory arbitration clauses are so intrusive for nursing home residents that the third party signatory must have express authority to make such a contract.

The Nebraska Supreme Court refused to enforce an arbitration clause in *Koricic v. Beverly Enters.- Neb., Inc*., 773 N.W.2d 145 (Neb. 2009). There, Frank Koricic signed the nursing home admissions contact on behalf of his mother, Manda Baker. The contract contained an arbitration clause that expressly stated it was not a condition of care in the facility. The court found that because Frank Koricic had acted as actual agent to make his mother's medical decisions for ten years, and his mother authorized him to admit her to the nursing home, Frank Koricic had authority to sign the admission contract. *Id*. at 151. However, the court refused to enforce the arbitration clause finding that "his actual authority did not extend to signing the arbitration agreement that would waive Manda's right to access to the courts and to trial by jury." *Id*. The court also concluded that

although Manda Baker expected her son to sign the nursing home documents on her behalf and even ratified those documents, "nothing in the record suggests that a reasonable person should have expected an arbitration agreement to be included with the admissions documents for a nursing home." *Id*. at 152.

In *Beverly Enters., Inc. v. Stivers*, No. 2008-CA-000284, 2009 WL 723002 (Ky. Ct. App. 2009), the Kentucky Court of Appeals found that the relative of the deceased nursing home resident had actual authority to sign the nursing home admissions documents, but did not have authority to bind the deceased to the arbitration provisions. *Id*. at 2. The court relied upon the title of the arbitration document signed by the relative -- "Resident and Facility Arbitration Agreement (Not a Condition of Admission—Read Carefully)"-- and found that the arbitration document, unlike the medical forms signed by the relative, was not specifically related or necessary to the decedent's admission into the nursing facility. *Id*. Therefore, the court found that the relative's authority as an agent was not broad enough to bind her to the arbitration provisions that were not required for her nursing home admission. *Id.* at 7-8.

In *Dickerson v. Longoria*, 995 A.2d 721 (Md. 2010), the Maryland Court of Appeals found that a deceased nursing home resident's estate could not be compelled to arbitrate its medical malpractice case because the signatory to the

arbitration agreement lacked express authority to waive the nursing home resident's right to access the courts and right to trial by jury. *Id*. at 744. Despite the fact that the signatory to the arbitration agreement had some authority to assist the decedent with medical decisions, the court found that she lacked express, implied or apparent authority to sign the arbitration agreement. *Id.* at 740-41.

Even when a written power of attorney exists, courts are careful to construe that authority narrowly when arbitration provisions are involved. The Georgia Court of Appeals recently held that a daughter who was the duly appointed medical power of attorney could not bind her mother to an arbitration agreement contained in a nursing home admission contract. *Life Care Ctrs. of America v. Smith,* 681 S.E.2d 182, 185 (Ga. 2009). As in *Koricic*, the court found that "the agreement to arbitrate was optional and it [was] not contended in this case that in order for the [decedent] to be admitted to Life Care, Smith was required to sign the agreement to arbitrate." *Id*. Even though Smith's health care power of attorney was written very broadly, the Court found that the daughter's authority was limited to making decisions "related to health care and not decisions related to the handling of potential contractual or negligence claims that might accrue." *Id*. at 184.

## II. ARBITRATION MUST NOT BE COMPELLED FOR A CLAIM OF A THIRD PARTY WHEN THE THIRD PARTY'S CLAIM IS SEPARATE AND INDEPENDENT OF THE CLAIM THAT WOULD HAVE BEEN BROUGHT BY A DECEDENT.

When evaluating a motion to compel arbitration, a trial court must consider three elements: "(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); *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303, 306 (Fla. 2d DCA 2003). At stake in this matter is the question of whether the arbitration agreement signed by the decedent is valid against his heirs.[4] Although few courts have examined this issue, other state's courts have determined that arbitration agreements in wrongful death actions are not enforceable against an heir and have found that the action resulting from the death of signatory to the agreement is an independent action from the tort claims that would have belonged to the decedent.

For example, the Missouri Supreme Court in *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009), found that the adult children of a nursing home

[4] If the Court determines that a valid contract exists, Section 2 of the Federal Arbitration Act states that an arbitration clause can be invalidated on such grounds as exist "at law or in equity for the revocation of a contract." 9 U.S.C. § 2. The Supreme Court has found that "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

resident were not subject to the decedent's arbitration agreement. That court construed the state's wrongful death statute as creating "a new cause of action" that did not "belong to the deceased." *Id*. at 526. The court found that wrongful death suits are distinct from a suit for the underlying tort that could have been brought by the decedent and stressed that the measure of damages was different for the wrongful death beneficiary than it would have been if the tort action had been brought by the nursing home resident. *Id.* Because parties bringing a wrongful death suit can claim damages for loss of consortium and funeral expenses, the Court determined that the wrongful death action was an independent cause of action from a tort action. *Id*. at 529.

In *Woodall v. Avalon*, 231 P.3d 1252 (Wash. App. 2010), the Washington Court of Appeals ruled that the wrongful death claims brought by heirs of a nursing home resident were not subject to binding arbitration. *Id*. at 1261. The court went on to say that the arbitration agreement between a long term care resident cannot not be binding on wrongful death beneficiaries because they did not also signed the agreement. *Id.* Although the nursing facility argued that public policy considerations favoring arbitration should govern, the court found that, "[t]he strong policy favoring arbitration does not overcome the policy that one who

is not a party to an agreement to arbitrate cannot generally be required to arbitrate." *Id.*

Under the Florida Wrongful Death Act, §§ 768.16-768.26, Florida Statutes (2009), the claims of the decedent die with him as the claims of the wrongful death beneficiaries come into existence. Even the lower court agreed that the Florida statute's construction demonstrates that the claims that were the subject of the arbitration agreement no longer existed after the death of the nursing home resident. *Laizure v. Avante at Leesburg, Inc.*, Case No. 5D09-2049, 2010 WL 5662965 (Fla. 2010). That court mistakenly goes on to apply the arbitration agreement's language barring heirs from proceeding against the nursing facility when it should have concluded that the wrongful death beneficiaries are not subject to the agreement, whatsoever. Petitioner was not a party to the arbitration agreement and cannot be forced to arbitrate claims that she never agreed to submit to arbitration.

## III. BECAUSE THE REGULATORY ENFORCEMENT PROCESS IS INADEQUATE TO PROTECT NURSING HOME RESIDENTS FROM ABUSE AND NEGLECT, PLAINTIFFS MUST BE ABLE TO HOLD NURSING HOMES ACCOUNTABLE IF THEY PROVIDE ABUSIVE OR NEGLECTFUL CARE.

Nursing home residents all too often are subjected to abuse and neglect while in the care of their nursing home. Kim A. Collins, MD, *Elder Maltreatment:*

*A Review*, 130 Arch Pathol Lab Med. 1290-1296 (2006) (reporting that a random sample survey of nursing home staff members in one state found that 10% of nurses aides reported that they had committed at least one act of physical abuse in the proceeding year and 40% reported committing at least one act of psychological abuse). Because of the prevalence of the problems plaguing nursing home residents, it is imperative that all avenues to deter bad conduct be fully utilized—particularly when the bad conduct results in the suffering and death of a vulnerable person.

Federal and state regulatory enforcement efforts are inadequate to remedy the problem as demonstrated by the fact that many nursing facilities cited for abuse and neglect continue the practices that harm and sometimes kill residents. U.S. Gov't Accountability Office, GAO-07-241, *Nursing Homes: Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents* at 68 (2007), [hereinafter GAO Nursing Home Federal Enforcement Report], *available at* http://www.gao.gov/new.items/d07241.pdf.

Nursing homes must comply with the 1987 Omnibus Budget Reconciliation Act (OBRA) and its implementing regulations, which set forth minimum standards of care for long-term care facilities that receive federal funding. 42 U.S.C. §§ 1395i-3, 1396r; 42 CFR § 483, *et seq*. Nonetheless, in 2007, more than 91% of

nursing homes in the country were cited for violations of federal health and safety standards. Dept. of Health and Human Services, Office of Inspector General, OEI-02-08-00140, *Memorandum Rept.: Trends in Nursing Home Deficiencies and Complaints* at 1, 6 (Sept. 2008) [hereinafter *OIG Report*], *available at* http://oig.hhs.gov/oei/reports/oei-02-08-00140.pdf. Critically, Florida nursing homes fared even worse than the national average with 97.2% of Florida's nursing homes having deficiencies. *OIG Report* at Appendix A.

For-profit homes were more likely to have problems than other types of nursing homes. *Id.* at 6-7. About 17% of nursing homes had deficiencies that caused "actual harm or immediate jeopardy" to patients. *Id.* at 9. The OIG found that the number of nursing homes that were cited for the most serious deficiencies, referred to as "immediate jeopardy," has increased over the last several years, particularly in for-profit and multi-facility nursing home chains. *Id.* at 9-10.

The Director of Health Care for the United States Government Accountability Office (GAO) testified before Congress that "[a] small but significant proportion of nursing homes nationwide continue to experience quality-of-care problems – as evidenced by the almost 1 in 5 nursing homes nationwide

that were cited for serious deficiencies in 2006. . . ."[5] These are "deficiencies that cause actual harm or place residents in immediate jeopardy."[6] In addition, "[d]espite CMS's [Centers for Medicare & Medicaid Services] efforts to strengthen federal enforcement policy, it has not deterred some homes from repeatedly harming residents. . . . [S]anctions may have induced only temporary compliance in these homes because surveyors found that many of the homes with implemented sanctions were again out of compliance on subsequent surveys."[7] *Id.* at 15-16. A GAO report on federal enforcement efforts published in 2007 states "almost half of the homes we reviewed – homes with prior serious quality problems – continued to cycle in and out of compliance, continuing to harm residents." GAO Nursing Home Federal Enforcement Report at 26. The types of deficiencies found in the homes that cycled in and out of compliance included

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[5] *Nursing Home Reform: Continued Attention is Needed to Improve Quality of Care in Small But Significant Share of Homes Before the S. Special Comm. on Aging*, 110th Cong. at 9 (2007) (statement of Kathryn G. Allen, Director, Health Care, GAO) *available at* http://www.gao.gov/new.items/d07794t.pdf.

[6] *Id.* at 3.

[7] Every nursing home that receives Medicare or Medicaid payments must undergo a standard state survey not less than once every 15 months. CMS uses federal comparative surveys, which are conducted in at least five percent of state-surveyed nursing homes in each state, to ensure the quality of state surveys.

inadequate treatment or prevention of pressure sores, resident abuse, medication errors, and employing convicted abusers. *Id.* at 68.

The scope of the problem is greater than these federal reports show, as state surveys of compliance with federal quality standards repeatedly understate serious care problems. U.S. Gov't Accountability Office, GAO-08-517, *Nursing Homes: Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses*, at 11 (2008), *available at* http://www.gao.gov/new. items/d08517.pdf (noting that "[f]rom fiscal year 2002 through 2007, about 15 percent of federal comparative surveys nationwide identified state surveys that failed to cite at least one deficiency at the most serious levels of noncompliance – the actual harm and immediate jeopardy levels . . .").

## CONCLUSION

This case has far-reaching implications for people requiring admission to long-term care facilities and their families. Because of the well-established contract law principles requiring that a court not compel arbitration upon a person who has not agreed to arbitrate, this Court should find that a nursing home resident's heirs are not subject to the terms of a decedent's nursing home arbitration agreement.

February 15, 2011

Respectfully submitted,

/s/ Kelly Bagby_____

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## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2011, that an electronic copy of the above has been filed with the Florida Supreme Court and hard copies of same were served via U.S. Mail to all parties herein to the following address:

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## CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I certify that the foregoing Brief *Amicus Curiae* of AARP In Support of Petitioner has been prepared utilizing Times New Roman 14-point font.

/s/ Kelly Bagby