IN THE SUPREME COURT OF FLORIDA
Case No. SC10-2132
DCA Case No.: 5D09-2049
Circuit Court Case No.: 2008-CA-002619

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

Petitioner,

vs.

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

Respondents.
_____/

RESPONDENTS' ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner's Initial Brief will be cited as "IB at ___." References to documents in Petitioner's Appendix or Respondents' Supplemental Appendix will be cited as "App. ___." or "Supp. App. ___.", respectively.

JURISDICTION

This Court has jurisdiction to review the question certified by the Fifth District Court of Appeal as a question of "great public importance". See Art. V, § 3(b)(4), Fla. Const.; see also Fla. R. App. P. 9.030(a)(2)(v).

STANDARD OF REVIEW

The standard of review regarding the trial court's factual findings is limited to determining whether those findings are supported by competent, substantial evidence. The standard of review regarding the construction of the arbitration agreement and the trial court's application of the law to the facts is *de novo*.

STATEMENT OF THE CASE AND FACTS

Harry L. Stewart was admitted to the Leesburg Regional Medical Center ("Hospital") on or about Thursday, May 11, 2006 and underwent knee surgery that same day. He remained in the Hospital until Sunday, May 14, 2006 (IB at 1), when he was transferred to Avante at Leesburg, Inc. ("AVL"), a skilled nursing facility licensed under Chapter 400, Florida Statutes. Mr. Stewart signed the admission documents, including the Arbitration Agreement at issue here, on Monday, May

15, 2006 (Supp. App. 1 at 100014-100041). Mr. Stewart signed all of the documents on his own. As evidenced by his numerous signatures, and specific notations upon several of the pages (accepting or rejecting certain options), Mr. Stewart was actively engaged in the process of completing and signing these documents and exercising his free will (Supp. App. 1 at 100014-100041).

On May 18, 2006, Mr. Stewart was transferred back to the Hospital, where he died that same day. Subsequently, Debra Laizure, as Personal Representative of Mr. Stewart's Estate, sued "AVL", Avante Group, Inc. ("Avante Group"), and Avante Care Ancillary Services, Inc. ("ACAS"). In response, those entities all filed Motions to Compel Arbitration (App. 7). The trial court held evidentiary hearings on those motions on February 11, 2009 (App. 3) and April 21, 2009 (App. 4). The trial court granted the motions following the second hearing (App. 4, pg. 90, l. 14-25, p. 91-94); and entered an order compelling arbitration (App. 1). Petitioner appealed this order to the Fifth District Court of Appeal, which affirmed the trial court's order compelling arbitration and certified the following question as one of great public importance:

> DOES THE EXECUTION OF A NURSING HOME ARBITRATION AGREEMENT BY A PARTY WITH THE CAPACITY TO CONTRACT, BIND 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?

Petitioner subsequently filed this appeal; and the Court accepted jurisdiction.

It must be noted that, in its statement of the facts, Petitioner claims the Fifth District certified this question because it was "[u]ltimately unable to reconcile aspects of a Florida wrongful death claim which establish its independent nature with other features which, in its view, suggested that such a claim is derivative." This is absolutely false. The Fifth District made a definitive and well reasoned ruling in this case; and did not certify the question based on an inability to reconcile any legal issue or principle. As indicated in its opinion, the Fifth District certified the question solely because it believed "[t]he concern raised in this case will not finally be resolved until the Florida Supreme Court addresses the issue." In other words, it certified the question because it recognized the issue at bar (like other arbitration issues litigated in recent history) is likely to be appealed repeatedly in the District Courts of Appeal of this State absent a ruling by this Court definitively resolving the issue.

SUMMARY OF ARGUMENT

This Court should answer the certified question presented in this case in the Affirmative; and affirm the decisions of both of the lower courts in this case.

The wrongful death claims alleged by Petitioner in this case fall squarely within the unambiguous, broad and inclusive language of the Arbitration Agreement, which requires the arbitration of any claims based on common law or statutory negligence, gross negligence, or malpractice; and makes it clear the

Arbitration Agreement is binding on Mr. Stewart's heirs and Estate just as it would have been binding on Mr. Stewart if he had not passed away.

There is no legitimate basis for Petitioner's argument that, notwithstanding the plain language of the Arbitration Agreement, the wrongful death claims asserted in this case are not arbitrable because they are "independent" actions that "belong" to Mr. Stewart's Estate and survivors. The Fifth District directly addressed Petitioner's wrongheaded contention and correctly explained that wrongful death claims, while "independent" claims, are "derivative" in the sense that they are "dependent on a wrong committed against the decedent;" and, as such, are arbitrable pursuant to the terms of the Arbitration Agreement here.

The Fifth District's ruling in this case is supported by the decisions of this and other Florida Appellate Courts that have tacitly acknowledged that wrongful death claims are arbitrable where they fall within the scope of a valid arbitration agreement by ordering such claims to arbitration. These decisions obviously recognize that, due to the derivative nature of wrongful death claims, an arbitration agreement that would have required the decedent to arbitrate a personal injury action based on alleged wrongful conduct (if he had survived) will require the decedent's Estate and survivors to arbitrate a claim for wrongful death based on that same alleged wrongful conduct.

The decisions in these cases, like the Fifth District's ruling in this case, are consistent with the well established principle that affirmative defenses that could have been asserted against a decedent to limit or even bar him from maintaining or recovering in a personal injury action based on alleged wrongful conduct (if he had survived) will limit or bar the decedent's Estate and survivors to the same extent it would have limited or barred the decedent. There are numerous cases that apply this principle and support the Fifth District's decision in this case.

The cases most analogous to the case at bar are those that deal with an affirmative defense based on the existence of a valid General Release. Those cases hold that a valid General Release which by its terms completely bars a decedent's Estate and survivors from bringing a wrongful death claim, will bind the decedent's Estate and survivors. Given the rationale and conclusions in these cases, it stands to reason that a decedent can, by agreeing to an Arbitration Agreement (contract), bind his Estate and survivors to arbitrate any wrongful death claims they may choose to bring. To hold differently would lead to an incongruous and absurd result; particularly given that an arbitration agreement requires that the Estate and survivors submit their claims to "resolution in an arbitral, rather than judicial forum;" but (unlike a general release) does not bar or otherwise limit such claims.

The Fifth District's ruling in this case is supported by the decisions of other state courts, with statutory wrongful death schemes similar to the one that exists in Florida, that have addressed the issue raised in this case.

The Fifth District's ruling is supported by Florida's strong public policy in favor of arbitration; and does not impact the fundamental purpose of the Wrongful Death Act, which is to prevent a tortfeasor from escaping liability when its wrongful conduct causes an individual's death.

The Fifth District's ruling is supported by the fact the Florida Legislature has chosen not to prohibit wrongful death claims from being arbitrated and has not imposed any limitations or conditions on the enforcement of arbitration agreements in wrongful death cases.

There is no legitimate basis for Petitioner's assertion that the Arbitration Agreement should be invalidated as unconscionable.

ARGUMENT

This Court should answer the certified question presented in this case in the *Affirmative*; hold that the execution of a valid nursing home arbitration agreement by an individual with the capacity to contract binds that individual's Estate and statutory heirs in a subsequent wrongful death action or actions arising from an alleged tort that falls within the scope of that arbitration agreement; and that the alternative bases Petitioner asserts in support of her argument for reversal are

without merit. In accordance with that holding, this Court should affirm the decision of both lower courts; and require that all of Petitioner's claims be arbitrated pursuant to the terms of the Arbitration Agreement at issue in this case.

I. BY ITS EXPRESS TERMS, THE ARBITRATION AGREEMENT ENCOMPASSES THE WRONGFUL DEATH CLAIMS RAISED BY PETITIONER AND IS BINDING ON MR. STEWART'S ESTATE AND HEIRS

A. THE WRONGFUL DEATH CLAIMS ALLEGED BY PETITIONER IN THIS CASE ARE UNDENIABLY ENCOMPASSED WITHIN THE BROAD SCOPE OF THE ARBITRATION AGREEMENT

Petitioner's wrongful death claims undeniably fall within the scope of the Arbitration Agreement at issue here. That Agreement provides in clear, broad, inclusive language:

> any legal dispute, controversy, demand, or claim … that arises out of or relates to the Resident Agreement for Care or is in any way connected to the Resident's stay at the Facility shall be resolved exclusively by binding Arbitration; and not by a lawsuit or resort to other court process…[including but not limited to] any claim based on … common law or statutory negligence, gross negligence, malpractice or a claim based on any departure from accepted standards of medical or nursing care … This shall expressly include, without limitation, claims based on Chapter 400, Florida Statutes...

(Supp. App. 1 at 100026)

This express language makes it undeniably clear that the Arbitration Agreement was intended to (and does) encompass all of the claims alleged by Petitioner in this case, including the wrongful death claims.

As a preliminary matter, the Arbitration Agreement expressly states that "any legal dispute, controversy, demand, or claim … that arises out of or relates to the Resident Agreement for Care or is in any way connected to the Resident's stay at the Facility shall be resolved exclusively by binding Arbitration; and not by a lawsuit or resort to other court process." Based on the prior decisions of this Court, the language cited above, without more, would be more than sufficient to establish that the intent of the parties to the Arbitration Agreement at issue here was to include Petitioner's wrongful death claims within the scope of that agreement. This is because there is a sufficient "nexus" or relationship between Petitioner's claims (claims premised on alleged negligent care) and the contract that includes the Arbitration Agreement as an addendum (the "Agreement for Care" from which those claims arose). See Seifert v. U.S. Home Corp., 750 So.2d 633 (Fla. 1999); Sears Authorized Termite & Pest Control, Inc. v. Sullivan, 816 So.2d 603 (Fla. 2002); Five Points Health Care, Ltd., v. Alberts, 867 So.2d 520 (Fla. 1st DCA 2004). However, this is not the only language in the Arbitration Agreement that makes it unequivocally clear the parties intended it to encompass a wide variety of claims including the wrongful death claims alleged by Petitioner.

In addition to the above cited language, the Arbitration Agreement goes on to expressly state that "any claim based on … common law or statutory negligence, gross negligence, malpractice or a claim based on any departure from accepted

standards of medical or nursing care." As recognized by this Court in Seifert v. U.S. Home Corp., 750 So.2d 633 (Fla. 1999), by its very nature a wrongful death claim is a claim sounding in (i.e. is based on or "predicated" on) a tort. Seifert at 640 (stating the wrongful death claims in that case were based or predicated on common law negligence). Here, as in Seifert, the wrongful death claims at issue are "based on" the alleged "negligence" of Respondents (i.e. alleged actions or inactions which allegedly resulted in breaches of the prevailing standard of care for nursing homes and therapy providers). Specifically, they are based on Respondents' alleged breaches of alleged duties "to render care treatment or services in a reasonably prudent manner and in accordance with accepted standards of care and practice in the nursing home facilities industry" (App. 2 at para. 28-29). As an aside, these wrongful death claims could also be characterized as "malpractice" claims or claims "based on any departure from accepted standards of medical or nursing care," and that fact only further supports the decision of the Fifth District. Given the cited language of the Arbitration Agreement, whether these claims are classified as claims based on negligence, malpractice, departures from accepted standards of medical or nursing care, or all three, these claims are undeniably included within the scope of the Arbitration Agreement.

Finally, the Arbitration Agreement expressly includes any claims based on Chapter 400, Florida Statutes. Because Mr. Stewart was a nursing home resident,

both the violation of nursing home resident rights and wrongful death claims Petitioner is asserting are controlled by the provisions of Florida's Nursing Home Residents' Right Act ("FNRRA"), Chapter 400, Sections 400.023-400.0238, Florida Statutes. The FNRRA provides that a nursing home resident shall have a cause of action for the recovery of damages for personal injury or death arising out of **negligence** or a violation of that resident's rights specified in Section 400.022, Florida Statutes. See Section 400.023(1), Florida Statutes. Further, and importantly for purposes of this case, the FNRRA expressly states that "sections 400.023-400.0238 provide the "**exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in s. 400.022.**" See Section 400.023(1), Florida Statutes (emphasis added).

The FNNRA also provides that "[i]f [an action brought pursuant to the FNNRA] alleges a claim for the resident's rights or for negligence that caused the death of the resident, the claimant shall be required to elect either survival damages pursuant to s. 46.021 or wrongful death damages pursuant to s. 768.21." In other words, the FNRRA incorporates pertinent sections of the wrongful death and survival statutes within its framework to define the specific types of damages that may be recoverable in an action brought under the auspices of the FNRRA.

Taken together, what this means is that any case involving a nursing home

resident, including a wrongful death claim for "personal injury or death" based on common law or statutory negligence (i.e. violation of resident's rights) must be brought under the auspices of the FNRRA or "Chapter 400." Thus, though Petitioner has styled one set of claims against Petitioners as "wrongful death" claims, without reference to Chapter 400, those wrongful death claims nonetheless fall under the auspices of the FNRRA.

This does not change the fundamental character of the claims. The claims are still based or predicated on a theory of negligence. However, it technically brings the claims within the scope of the FNRRA and qualifies them as "claims based on Chapter 400, Florida Statutes." This is important because, in addition to its other inclusive language, the Arbitration Agreement expressly includes within its scope "claims based on Chapter 400, Florida Statutes." The wrongful death claims in this case are, amongst other things, "claims based on Chapter 400."

In sum, based on the allegation in Petitioner's Amended Complaint (App. 2), which sets out the claims in this case, it is clear the wrongful death claims arise out of or are related to the resident Agreement for Care titled "Agreement for Care" (App. 6; p. 1) and have a sufficient nexus or connection to Mr. Stewart's stay at AVL; are based on negligence, malpractice, and/or departures from accepted standards of medical or nursing care; and qualify as "claims based on Chapter 400, Florida Statutes." Thus, no matter how one looks at the Arbitration Agreement, it

is undeniable that all of the claims alleged by Petitioner in this case, including the wrongful death claims, fall within the scope of that Agreement.

B. IN ADDITION, MR. STEWART'S ESTATE AND HEIRS ARE BOUND BY THE ARBITRATION AGREEMENT WHICH EXPRESSLY APPLIES TO THEM JUST AS IT WOULD HAVE APPLIED TO MR. STEWART

In addition to clearly encompassing the wrongful death claims asserted by Petitioner in this case, the Arbitration Agreement puts to rest any possible remaining argument that it was not meant to apply to claims brought by Mr. Stewart's Estate or heirs, by expressly stating that it binds them. The fact that Harry L. Stewart signed the Arbitration Agreement clearly indicates that Mr. Stewart intended for himself to be bound by the terms of that Agreement. Moreover, given that the broad Arbitration Agreement specifically includes a term which states "this Agreement shall be binding upon, and shall include any claims, brought by or against the parties' representative, agents, heirs, . . ." (App. 6 and Supp. App. 1 at 100026), it is clear that it was Mr. Stewart's intent that his Estate and heirs be bound by the Arbitration Agreement just as he would have been.

Courts have recognized that non-signatories to an arbitration agreement may be bound by an arbitration agreement if dictated by normal principles of contract law and agency. See Doctors Associates, Inc. v. Thomas, 898 So.2d 159 (Fla. 4th DCA 2005); Martha A. Gottfried, Inc., v. Paulette Koch Real Estate, 778 So.2d 1089 (Fla. 4th DCA 2001). Thus, non-signatories to an arbitration agreement can be

bound by the agreement **where they have claims arising out of or relating to the subject matter of the arbitration agreement**. See Cunningham Hamilton Quitter, P.A. v. B.L. of Miami, Inc., 776 So. 2d 940 (Fla. 3d DCA 2000).

As discussed in great detail elsewhere in this brief, the wrongful death claims of Mr. Stewart's Estate and heirs (non-signatories to the Arbitration Agreement) are claims arising out of or relating to the subject matter of the arbitration agreement. Accordingly, his heirs and Estate are bound by that Arbitration Agreement to the same extent Mr. Stewart would have been bound by its terms had he survived and sought to bring a personal injury claim based on the alleged negligence of Respondents. As an important aside, the Arbitration Agreement similarly binds Avante Group, Inc. and ACAS, Inc., (which were also non-signatories to the Arbitration Agreement) to the same extent it binds AVL, pursuant to express language that makes it applicable to the facility's "shareholders, management companies, parent companies, subsidiary companies or related or affiliated business entities." (Supp. App. 1 at 100026).

On a related note, it is particularly absurd for Petitioner to suggest that the Arbitration Agreement cannot apply to Mr. Stewart's Estate. First, an Estate could never be a signatory to a contract such as an arbitration agreement any more than it could be a signatory to a Will. Nonetheless an Estate can be bound by a contract just as it is bound by a Will. The entire body of probate law that exists in this and

every other state would be turned on its ear if the courts were to hold that individuals do not have the right to make binding arrangements during their lives that will control their Estates and the disposition of any assets contained in those Estates after their deaths.

C. THE FACT THE ARBITRATION AGREEMENT ENCOMPASSES THE WRONGFUL DEATH CLAIMS RAISED BY PETITIONER AND IS BINDING ON MR. STEWART'S ESTATE AND HEIRS IS NOT IMPACTED BY PETITIONER'S COUNTER ARGUMENTS

Notwithstanding the express terms of the Arbitration Agreement, in an effort to convince this Court to reverse the decision of the Fifth District in this case, Petitioner asserts that despite its unambiguous, broad, blatantly inclusive language, the Arbitration Agreement does not encompass wrongful death claims. This assertion, which Petitioner sets out in two separate but related arguments, is completely without merit. First, almost inconceivably, Petitioner argues that the Arbitration Agreement does not "address," "mention" or "discuss," and therefore does not encompass, wrongful death claims. See IB at 17. This argument completely ignores the facts discussed in the foregoing paragraphs. Unfortunately for Petitioner, the facts discussed in those paragraphs cannot be ignored. When those facts are taken into account, it is clear that Petitioner's argument on this point is completely without merit. While wrongful death claims are not mentioned by name, as explained in detail above, they are most certainly "addressed" by and "encompassed" within the unambiguous and broadly inclusive terms of the

Arbitration Agreement in this case. In essence, it appears Petitioner is asserting the wrongful death claims in this case should be found to fall outside the scope of the Arbitration Agreement because the agreement does not expressly mention wrongful death claims by name. There is absolutely no legal authority for this position. On the contrary, as explained above, the prevailing law makes it clear that the Arbitration Agreement, in its current form, is more than sufficient to encompass Petitioner's wrongful death claims.

Alternatively, Petitioner argues that the Arbitration Agreement is ambiguous as to whether wrongful death claims fall within its scope; and that it should therefore be construed against Petitioners. One of the seminal cases on the issue of whether an arbitration clause included within a contract will be held to encompass particular claims is the decision of this Court in Seifert v. U.S. Home Corp., 750 So.2d 633 (Fla. 1999). In Seifert a home purchaser whose husband died after the home's air conditioning system picked up carbon monoxide from the garage and distributed it into the house brought a wrongful death claim against the home builder. The builder moved to compel arbitration of the claim pursuant to the terms of an arbitration clause contained in the home purchase and sale contract. The trial court denied the motion; the Second District reversed the trial court's decision; and the matter was appealed to this Court. This Court ultimately held that the wrongful death claim against the home builder was not subject to arbitration pursuant to the

terms of the arbitration agreement in the home purchase and sale contract, which required arbitration of "[a]ny controversy arising under or related to [the home purchase and sale contract]…" Seifert at 635.

Despite any argument or implication to the contrary by Petitioner, the holding in Seifert was based on the specific facts of the Seifert case and **does not** stand for the proposition that wrongful death claims are not arbitrable absent the express mention of the term "wrongful death" in the arbitration agreement. The Seifert case involved an arbitration clause which required arbitration of "[a]ny controversy arising under or related to [the home purchase and sale contract]…" It did not include any mention of the parties' rights in the event of personal injuries or death arising out of alleged tortious conduct such as that alleged in the complaint at issue here. Accordingly, this Court's analysis in Seifert was focused on determining whether the wrongful death claim in that case ("a claim sounding in tort, i.e., negligence") bore such a significant relationship to the contract between the parties as to mandate arbitration of that claim pursuant to the arbitration agreement.

This Court ultimately determined that the wrongful death claim in that case did not bear a significant relationship to the contract between the parties (i.e. that there was not a sufficient "nexus" between the claims and the contract). Accordingly, it refused to mandate arbitration of that claim in the absence of

express language in the arbitration agreement indicating that the parties had intended to include claims premised on common law tort, (such as the plaintiff's wrongful death claim in that case,) and that claims of that type were meant to fall within the scope of the arbitration provision. Id. at 640-42. It reasoned that compelling arbitration of the plaintiff's wrongful death claim in that case would have been unjust because the language of the arbitration agreement contained in the home purchase and sale contract in that case provided "no indication" tort claims were meant to be included within the scope of the agreement.

Ultimately, Seifert stands mainly for the proposition that the intent of the parties to an arbitration agreement will control whether a particular claim or dispute between them is subject to arbitration. In this case, unlike Seifert, there is a significant relationship (i.e. sufficient "nexus") between the claims and the contract ("Agreement for Care"). Moreover, there is express language indicating the parties meant to include all claims based on negligence (which as noted by this Court in Seifert includes wrongful death claims) and all Chapter 400 claims within the scope of the agreement at issue. In short, in this case, there is every indication the parties to the Arbitration Agreement intended to include all of the types of claims alleged by Petitioner in this case, including wrongful death claims, within the scope of the Arbitration Agreement. Therefore, Seifert does nothing to call into question the decision of the Fifth District or to support Petitioner's position.

These facts notwithstanding, in her Initial Brief, Petitioner relies heavily on certain language contained in Seifert, as well as the outcome in that case, as alleged support for her tenuous position in this case. First, Petitioner points to Seifert as being supportive of her assertion that the Arbitration Agreement is ambiguous and should, therefore, be construed against Respondents (its drafters). This is simply inaccurate. While Seifert does affirm the well established rule that an ambiguous contract should be construed against its drafter, it **does not** support Petitioner's assertion that the Arbitration Agreement at issue in this case is ambiguous. In fact, it does exactly the opposite.

The Seifert Court found that "ambiguity and uncertainty" regarding the scope of the arbitration agreement in that case was created by the "absence of any mention of the parties rights in the event of any alleged tortious (i.e. negligent) conduct" such as that alleged in support of the wrongful death claim in that case; and therefore construed the clause against its drafter. Seifert at 641. Seifert can hardly be used to support Petitioner's assertion that the Arbitration Agreement at issue here is ambiguous, where that Arbitration Agreement goes to great lengths to define with certainty and clarity the intent of the parties to submit to arbitration any claims involving alleged negligent conduct such as the alleged conduct on which Petitioners wrongful death claims are based. Thus, when read in conjunction with the express terms of the Arbitration Agreement, it is clear that Seifert does not

support Petitioner's claim that the Arbitration Agreement should be construed against Petitioners. On the contrary, Seifert proves that Petitioner's assertion of ambiguity has no legitimate basis.

Moreover, even a cursory review of Seifert reveals that the result in that case was driven by a unique set of facts, which are different from those at issue in this case in every conceivable respect. Given the facts of this case, the result reached by the Court in Seifert has no precedential value in this factually dissimilar case; and should have no impact here. As explained previously, despite any argument or implication to the contrary by Petitioner, the result in Seifert (refusal to find that the wrongful death claim in that case fell within the scope of the arbitration agreement in that case) was based on the specific facts of the Seifert case; and **does not** stand for the proposition that wrongful death claims are not arbitrable absent the express mention of the term "wrongful death" in the arbitration agreement.

There can be no doubt of this fact. However, even if there were, given that arbitration agreements are a favored means of dispute resolution, numerous cases have held that any doubts concerning their scope should generally be resolved in favor of arbitration. See e.g. Auchter Co. v. Zagloul, 949 So.2d 1189 (Fla. 1st DCA 2007), review denied, 968. So.2d 559 (Fla. 2007). Thus, as stated previosuly, it is undeniable that all of the claims alleged by Petitioner in this case, including the wrongful death claims, fall squarely within the scope of the Arbitration Agreement.

D. ALTERNATIVELY, AT A MINIMUM, MR. STEWART'S ESTATE AND HEIRS ARE BOUND TO ARBITRATE ALL CLAIMS AT ISSUE IN THIS CASE AS THIRD PARTY BENEFICIARIES OF THE ARBITRATION AGREEMENT

Alternatively, the Estate and heirs of Harry L. Stewart are bound to arbitrate the claims at issue in this case as intended third party beneficiaries of the Arbitration Agreement. Arbitration provisions of a contract are binding on the parties to the contract, as well as on intended third-party beneficiaries of the contract. See International Bullion and Metal Brokers, Inc. v. West Pointe Land, LLC, 846 So. 2d 1276 (Fla. 4th DCA 2003). Third party beneficiaries are bound by such arbitration provisions to the same extent the parties to the contract are bound. See Martha A. Gottfried, Inc. v. Paulette Koch Real Estate, 778 So. 2d 1089 (Fla. 4th DCA 2001); Zac Smith & Co., Inc. v. Moonspinner Condominium Ass'n, Inc., 472 So. 2d 1324 (Fla. 1st DCA 1985). A non-signatory to an arbitration agreement will be bound to arbitrate as a third party beneficiary where the non-signatory is the intended third-party beneficiary of the contract. See Germann v. Age Institute of Florida, Inc., 912 So. 2d 590 (Fla. 2nd DCA 2005). In this case, the language discussed previously which specifically made the Arbitration Agreement applicable to Mr. Stewart's representative and heirs, makes it clear Mr. Stewart's Estate and heirs are, at a minimum, intended third party beneficiaries of the Arbitration Agreement; and are therefore bound by it.

II. BECAUSE THE ARBITRATION AGREEMENT ENCOMPASSES THE WRONGFUL DEATH CLAIMS ALLEGED BY PETITIONER AND BINDS MR. STEWART'S ESTATE AND HEIRS, THOSE CLAIMS ARE ARBITRABLE AS A MATTER OF FLORIDA LAW

Wrongful death claims that fall within the scope of a valid arbitration agreement are arbitrable as a matter of law; particularly where the Arbitration Agreement is, by its terms, binding on a decedent, his estate, and heirs. The rulings of this and the other courts of this state regarding the enforceability of arbitration agreements and the viability of wrongful death claims, support this bedrock principle, and support the correct conclusions of the trial court and Fifth District based on that principle.

Petitioner's main argument is that an individual can "never" bind his Estate or his heirs to arbitrate potential future wrongful death claims via the execution of an arbitration agreement. Petitioner's argument is premised on the idea that the Wrongful Death Act creates an "independent" claim that "belongs" to an individual's Estate and statutory survivors. Based on this premise, Petitioner erroneously concludes that an individual has no authority to contractually bind his Estate and heirs to an Arbitration Agreement; and that a wrongful death claim can "never" fall within the scope of an Arbitration Agreement executed by an individual/decedent, regardless of the terms of that agreement.

Based on her rationale and her conclusion, it is clear Petitioner either fails to understand or has chosen to ignore the statutory framework of the Wrongful Death

Act and the entire body of law that sets forth this Court's contemporary approach to wrongful death claims, which affirmatively and uniformly hold that, while wrongful death claims are independent, they are also derivative, at least in the sense that they are dependent on a wrong committed against the decedent; and that they may, therefore, be precluded via the assertion of applicable and valid affirmative defenses such as the existence of a valid arbitration agreement.

A. GIVEN FLORIDA'S STRONG PUBLIC POLICY FAVORING ARBITRATION AND THE FACTS OF THIS CASE THERE IS NO BASIS UPON WHICH THE LOWER COURTS COULD HAVE FOUND PETITIONER'S WRONGFUL DEATH CLAIMS WERE NOT ARBITRABLE

As noted by the Fifth District in its opinion in this case, Florida courts favor arbitration as a means of alternative dispute resolution where claims fall within the express scope of the agreement. Laizure at 1257 (citing Sears Authorized Termite and Pest Control, Inc. v. Sullivan, at 606 for the proposition "arbitration clauses [or agreements] are enforceable and favored when the disagreement falls within the scope of the arbitration agreement"). In fact, any time a contract contains an arbitration agreement or clause, there is a presumption of arbitrability in the sense that an order to arbitrate the grievance should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute." See 3A Fla. Jur. 2d Arbitration and Award § 30 (citing Morton v. Polivchak, 931 So.2d 935 (Fla. 2d DCA 2006). Further, in

the case of a particularly broad arbitration clause or agreement, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. Id.

For the reasons explained in the preceding section, it is clear Respondents' motions to compel enforcement of the Arbitration Agreement could not have been denied by the trial court or Fifth District unless it could be said "with positive assurance that the arbitration [agreement] is not susceptible to an interpretation that covers [those claims]." Obviously, in light of the discussion in the foregoing section, it cannot be said "with positive assurance" that the Arbitration Agreement at issue here "is not susceptible to an interpretation that covers [the wrongful death claims at issue here]." Further, given the undeniably broad nature of the Arbitration Agreement at issue here "only the most forceful evidence of a purpose to exclude the claim[s] from arbitration" could have allowed for a finding that the wrongful death claims were not arbitrable. The fact of the matter is Petitioner has put forward no evidence of a purpose to exclude the claim from arbitration. Given the broad and inclusive nature of the Arbitration Agreement and the absence of any language in the Arbitration Agreement or in any applicable statutory provision or case law that would evidence a purpose to exclude the wrongful death claims from arbitration, there is no legitimate basis upon which the trial court or Fifth District could have found that the wrongful death claims at issue are not arbitrable.

B. THIS COURT'S CONSISTENT APPROACH TO THE SCOPE AND ENFORCEABILITY OF ARBITRATION AGREEMENTS AND THE VIABILITY OF WRONGFUL DEATH CLAIMS, SUPPORTS THE CONCLUSION THAT WRONGFUL DEATH CLAIMS THAT FALL WITHIN THE SCOPE OF A VALID ARBITRATION AGREEMENT ARE ARBITRABLE AS A MATTER OF LAW

1. Numerous Florida courts, including this one, have tacitly acknowledged that wrongful death claims that fall within the scope of valid arbitration agreements are arbitrable

As a preliminary matter, though no Florida court has expressly addressed the issue, numerous courts, including this one, have tacitly acknowledged that wrongful death claims that fall within the scope of valid arbitration agreements are arbitrable (i.e. present arbitrable issues) by expressly and repeatedly ordering such claims to be arbitrated. See e.g. Global Travel Marketing, Inc., v. Shea, 908 So.2d 392 (Fla. 2005); see also Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus, 853 So.2d 500 (Fla. 4th DCA 2003); ManorCare Health Servs., Inc. v. Stiehl, 22 So.3d 96 (Fla. 2d DCA 2009); Carrington Place of St. Pete, LLC v. Estate of Milo ex rel. Brito, 19 So.3d 340 (Fla. 2d DCA 2009); Sovereign Healthcare of Tampa, LLC v. Estate of Huerta ex rel. Huerta, 14 So.3d 1033 (Fla. 2d DCA 2009); Estate of Orlanis ex rel. Marks v. Oakwood Terrace Skilled Nursing & Rehab. Ctr., 971 So.2d 811 (Fla. 3d DCA 2007); Extendicare Health Servs., Inc. v. Estate of Patterson, 898 So.2d 989 (Fla. 5th DCA 2005). This is not surprising given the general law governing wrongful death claims, which is absolutely consistent with and supportive of the Fifth District's decision here.

2. Because a wrongful death claim is dependent on a wrong committed against the decedent, the ability of survivors to seek recovery will be limited to the same extent the decedent's ability to seek recovery would have been limited if he had survived

Section 768.19, Florida Statutes (2006), expressly provides that a wrongful death action may be brought if the death of the decedent was caused by the negligence or other wrongful conduct of the defendant or defendants "and the event would have entitled the decedent to maintain an action and recover damages if death had not ensued." As a result, the courts of this state have repeatedly held that wrongful death claims, while independent claims, are derivative in nature, at least in the sense that they are dependent on a wrong committed against the decedent. See Toombs v. Alamo Rent-A-Car, Inc., 833 So.2d 109 (Fla. 2002); Valiant Ins. Co. v. Webster, 567 So.2d 408, 411 (Fla. 1990), receded from on other grounds; Gov't Employees Ins. Co. v. Douglas, 654 So.2d 118 (Fla.1995); Celotex Corp. v. Meehan, 523 So.2d 141, 147 (Fla.1988).

Because wrongful death claims are "derivative" in nature (i.e. dependent on a wrong committed against the decedent) a survivor may not maintain or recover on a wrongful death claim where the decedent himself could not have maintained a claim and recovered. This issue was addressed in great detail by this Court in Toombs, *supra*. In Toombs, this Court held the application of the "dangerous instrumentality doctrine," which would have barred the decedent from recovering damages for her injuries if she had survived (due to her status as a co-bailee),

barred a wrongful death action by her survivors). Explaining its decision, the Toombs Court stated:

> [a]lthough we have long emphasized that an action for wrongful death is distinct from the decedent's action for personal injuries had he or she survived because it involves different rights of recovery and damages, the language of the Act makes clear a cause of action for wrongful death that is predicated on the decedent's entitlement to "maintain an action and recover damages" if death had not ensued.

Toombs at 118 (citing Valiant Ins. Co. v. Webster, at 411). Based on this reasoning, consistent with its prior decisions, this Court held no cause of action for wrongful death survived the decedent in Toombs because she had no right of action (i.e. no right to enforce a cause of action for personal injury) at the time of her death. Toombs at 118; see also 1 Fla. Jur. Actions § 3 (a right of action is a right to enforce a cause of action)(citing Am. Jur. 2d, Actions § 2)

3. Employing the same rationale employed by this Court in Toombs, numerous courts have barred survivors from maintaining or recovering on wrongful death claims based on affirmative defenses that would have barred the decedent from recovering if he had survived

The connection between a wrongful death action and the underlying tort (i.e. the wrongful death action's dependence on a wrong committed against the decedent) also permits defenses that would have been available to a defendant had the decedent lived, to be equally available to that defendant in a wrongful death action brought by the decedent's Estate or survivors. See Laizure (citing generally Thomas D. Sawaya, *Fla. Personal Injury Law & Practice with Wrongful Death*

Actions, §§ 22.1-.11 (2008-2009 ed.). The defenses alluded to by the Fifth District include but are not limited to comparative negligence, the seat belt defense, the statute of limitations (when it expires before the death of the decedent), the Worker's Compensation as an exclusive remedy, sovereign immunity, the dangerous instrumentality doctrine, prior action litigated to judgment, Settlement and Release, and Arbitration and Award.

4. General Releases executed by individuals/decedents prior to their deaths are similar in many respects to Arbitration Agreements and have routinely been held to bar wrongful death actions by survivors and estates

The cases that deal with a situation most analogous to the one at bar are those which discuss affirmative defenses based on a general release. Florida follows the majority view that a general release executed by the decedent during his lifetime in settlement or resolution of a personal injury action bars any subsequent wrongful death action. See Warren v. Cohen, 363 So.2d 129 (Fla. 3d DCA 1978); Ryter v. Brennan, 291 So.2d 55 (Fla. 1st DCA 1974); see also Thomas v. Sports Car Club of America, Inc., 386 So. 2d 272 (Fla. 4th DCA 1980)(holding general release executed by race car driver prior to race in which he was killed barred his wife from bringing a wrongful death action against the parties named in the release agreement). **This general rule applies even though the courts recognize that a deceased's right of action during his lifetime is separate and distinct from a survivor's right of action**. Id. The rationale behind

this rule is that public policy favors the settlement of lawsuits and upholding the express intent and language of release agreements. Warren v. Cohen, *supra*; Ryter v. Brennan, *supra*; Thomas v. Sports Car Club of America, Inc., *supra*.

An arbitration agreement, like a general release, is a contract. The courts have held that an individual has the legal right to enter into a general release, a contract which prospectively, absolutely bars his Estate and heirs from bringing a future wrongful death claim (i.e. eliminates their rights to recover). If an individual can, by agreeing to a general release (contract) bind his Estate and survivors such that they are completely barred from bringing a wrongful death claim, it only stands to reason that a decedent can, by agreeing to an Arbitration Agreement (contract) bind his Estate and survivors to arbitrate any wrongful death claims they may choose to bring. This is particularly true where: (1) an arbitration agreement merely changes the forum in which a wrongful death claim can be brought without impacting the substantive rights of the individual's Estate or heirs to pursue such a claim (unlike a general release which bars a decedent's estate or survivors from bringing such a claim entirely); and (2) Florida has a strong public policy favoring arbitration and the enforcement of the express intent of valid arbitration agreements (much like the policy that supports the upholding of general releases).

Thus, there is no legitimate reason to distinguish the Arbitration Agreement in this case from the general releases in the cited cases. In fact, to come to a

different result in this case than the courts have come to in general release cases would be an arbitrarily incongruous and, ultimately, absurd result.

5. The decisions of courts in other states with statutory wrongful death schemes similar to Florida's have reached the same result as the Fifth District in this case

It appears that courts in other jurisdictions with statutory wrongful death schemes similar to Florida's have reached the same result as the Fifth District in this case. See e.g., In re Labatt Food Serv., L.P., 279 S.W.3d 640 (Tex.2009) (holding decedent's survivors, who were not signatories to decedent's arbitration agreement with employer, were bound to arbitrate wrongful death claim brought against employer); Trinity Mission Health & Rehab. of Clinton v. Estate of Scott ex rel. Johnson, 19 So.3d 735 (Miss.Ct.App.2008) (holding that arbitration provision between resident and facility encompassed wrongful death action brought by deceased resident's daughter as claim arose out of the care which nursing facility agreed to provide in the contract); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala.2004); Ballard v. Southwest Detroit Hosp., 327 N.W.2d 370 (1982)(explaining that wrongful death action is derivative and **representative stands in shoes of decedent** so that arbitration agreement is binding on personal representative in subsequent wrongful death action)(emphasis added); Herbert v. Superior Court, 169 Cal.App.3d 718 (1985).

All of these cases were cited by the Fifth District as support for its decision

in this case; and all of them do, in fact, support that decision. The Fifth District also noted that there were some courts which had ruled in a contrary manor. See Woodall v. Avalon Care Ctr.-Fed. Way, LLC, 231 P.3d 1252 (2010); Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo.2009); Rhodes v. Calif. Hosp. Med. Ctr., 76 Cal.App.3d 606 (1978). Not surprisingly, Petitioner asserts these cases should control here.

First, Petitioner notes the Woodall court rejected the argument that wrongful death claims are derivative, found that the cause of action for wrongful death never "belonged" to the decedent and refused, on that basis, to compel the arbitration of the wrongful death claim in that case. Petitioner states the same conclusion is "required" under Florida law. Nothing could be further from the truth.

As stated previously herein, unlike the Woodall court, this Court and the District Courts of this state have uniformly agreed that the Wrongful Death Act creates new and independent claims for the statutory survivors of the decedent but that such claims are derivative in nature in the sense that they are dependent on a wrong committed against another person (the decedent); and that, as such, defenses that would have been available to a defendant had the decedent lived, are equally available to a defendant in a wrongful death action. See Laizure at 1258 (citing generally Thomas D. Sawaya, *Fla. Personal Injury Law & Practice with Wrongful Death Actions*, §§ 22.1-.11 (2008-2009 ed.). In other words, unlike the Woodall

court, this Court and the District Courts of this state have embraced the idea that wrongful death claims are derivative; and have relied on the derivative nature of wrongful death claims (rather than the independent nature of such claims) as the driver of whether a particular wrongful death claim will be viable in any given scenario where an affirmative defense (like arbitration) has been raised.

The position of this Court and the other appellate courts of this state on this issue is undoubtedly based primarily on the fact that Section 768.19, Florida Statutes (2006), expressly provides that a wrongful death action may be brought if the death of the decedent was caused by the negligence or other wrongful conduct of the defendant or defendants "**and the event would have entitled the decedent to maintain an action and recover damages if death had not ensued.**"

This is particularly significant given that the Woodall court declined to apply In re Labatt Food Serv., L.P., *supra* and Ballard v. Southwest Detroit Hosp., *supra*, two of the decisions the Fifth District cited in support of its decision. Per Petitioner, the Woodall Court declined to apply those two cases "for the simple reason that these decisions were grounded on statutory schemes 'which expressly conditioned beneficiaries' claims on a decedent's right to maintain his or her suit for injuries' ." I.B. at 24.

The clear implication of the Woodall Court's stated basis for refusing to apply In re Labatt and Ballard is that the statutory scheme at issue in Woodall **did**

not expressly condition beneficiaries' claims on a decedent's right to maintain his or her suit for injuries. This conclusively establishes Woodall is neither dispositive nor persuasive in this case, which involves a wrongful death statutory scheme that **is** conditioned on the decedent's right to maintain his or her suit for injuries. See 768.19, Florida Statutes (2006)(expressly providing that a wrongful death action may be brought only in cases where "**the event would have entitled the decedent to maintain an action and recover damages if death had not ensued**").

For similar reasons, Petitioner's arguments based on Peters v. Columbus Castings Co., 873 N.E 2d 1258 (Ohio 2007) and Lawrence v. Beverly Manor, *supra* are neither applicable nor persuasive here. Thus, like its other arguments, Petitioner's argument based on Woodall, Peters, and Lawrence is without merit.

6. Limitations and conditions on the enforcement of arbitration agreements are appropriate only where the Legislature has by statute plainly imposed them

The Fifth District's decision is supported by the fact that the Florida Legislature has chosen not to prohibit wrongful death claims from being arbitrated. As noted in Richmond Healthcare v. Digati, 878 So.2d 388 (4th DCA 2004), "the present day rule in Florida is that limitations and conditions on the enforcement of arbitration agreements are appropriate only where the Legislature has by statute plainly imposed them." Digati at 391. Applying that rule, the Court examined FNRRA and stated "[w]e are unable to find anything in the nursing home statutes

imposing any such limitations or conditions on the enforcement of arbitration agreements in nursing home admission agreements. Nor has either of the parties called our attention to a statute indisputably doing so. We do know from other statutes that when the legislature wants to require specific contractual provisions waiving civil remedies, they know how to do so (citation omitted)." Id. Further, the Digati Court noted "[c]learly nothing in this statute purports to regulate how arbitration provisions shall be done in admission contracts. We are therefore unable to find any statutory authority allowing judges to refuse to enforce [otherwise] valid arbitration provisions in nursing home admission contracts of competent parties…". Id.

A review of the Wrongful Death Act and the FNRRA, demonstrates that there is nothing in either that would impose limitations or conditions on the enforcement of arbitration agreements in wrongful death cases (in a nursing home or any other setting). In other words neither Act contains any statutory authority that would allow judges to refuse to enforce otherwise valid arbitration agreements of competent parties simply because those agreements include wrongful death claims within their scope.

7. Answering the certified question in the affirmative and affirming the decision the Fifth District and trial court would honor this State's strong policy in favor of arbitration as well as the policy underlying the Wrongful Death Act

In addition to all of the foregoing, a holding in this case that a valid Arbitration Agreement entered into by an individual with the capacity to contract is binding on that individual's heirs and Estate would be necessary to support the public policy in favor of upholding valid arbitration agreements; and the purpose of the Wrongful Death Act. That is particularly true where upholding that policy would not in any way negatively impact the policy behind, or the fundamental purpose of, the Wrongful Death Act.

Sections 768.16 – 768.26, Florida Statutes, are referred to collectively as the "Florida Wrongful Death Act." Section 768.16, Florida Statutes (2006) states, in pertinent part: "It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoers." This section of the Act addresses one of the fundamental purposes of the Act: to prevent a tortfeasor from escaping liability when his wrongful conduct causes death. Neither the policy nor the purpose of the Act would be negatively impacted in any way if this Court were to answer the certified question in the affirmative and uphold the decision of the Fifth District in this case.

III. THE ARBITRATION AGREEMENT AT ISSUE IN THIS CASE IS NOT UNCONSCIONABLE

In addition to her argument regarding the certified question, Petitioner argues that the Arbitration Agreement at issue in this case should be invalidated as unconscionable. The Arbitration Agreement at issue in this case is substantively

fair and legally sound in every respect; and is not even arguably subject to invalidation on unconscionability grounds. Accordingly, Petitioner's unconscionability argument should be rejected by this Court just as it was rejected by both lower courts.

Though Florida courts have long recognized the concept of unconscionability, they have emphasized that the concept is to be used with great caution. As explained by the court in Steinhardt v. Rudolph, 422 So.2d 884, 890 (Fla. 3d DCA 1982)(quoting from 14 Williston, A Treatise on the Law of Contracts § 1763A (3d. Ed. 1972), and reiterated more recently in the case of Gainesville Health Care Center v. Weston, 857 So. 2d 278, 284 (1st DCA 2003):

> [The concept of unconscionability] does not mean, however, that a court will relieve a party of his obligations under a contract because he has made a bad bargain containing contractual terms which are unreasonable or impose an onerous hardship on him. Indeed, the entire law of contracts, as well as the commercial value of contractual arrangements, would be substantially undermined if parties could back out of their contractual undertakings on that basis. People should be able to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fair-minded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.

The burden for establishing unconscionability is a heavy one. Under Florida law, a party who seeks to have a court overturn a contract provision, such as an

arbitration clause, on the grounds of unconscionability bears the burden of establishing that the contract provision is ***both*** substantively and procedurally unconscionable. See e.g. Kohl v. Bay Colony Club Condo., Inc., 398 So.2d 865, 867-68 (Fla. 4th DCA 1981)(stating the authorities appear to be "virtually unanimous" in declaring both substantive and procedural unconscionability must coalesce before a case for unconscionability is made out). A review of the record evidence in this case makes it clear Petitioner failed to meet this heavy burden. More specifically, Petitioner failed to come forward with competent substantial evidence that would have supported a finding of either procedural or substantive unconscionability in this case. It provided only unsupported or irrelevant argument and pure, self-serving, speculation. As such, the trial court and Fifth District correctly rejected Petitioner's unconscionability argument.

A. THE ARBITRATION AGREEMENT IS NOT SUBSTANTIVELY UNCONSCIONABLE

The Arbitration Agreement in this case is **not** substantively unconscionable. To determine whether a contract is substantively unconscionable, a court must look to the terms of the contract itself and determine whether they are so "outrageously unfair" as to "shock the judicial conscience." Weston at 284-285 (citing as an example Belcher v. Kier, 558 So.2d 1039, 1043 (Fla. 2d DCA 1990) in which the court declined to equate "unconscionability" with mere "unreasonableness").

Petitioner has failed to point to a single provision of the Arbitration

Agreement that can even arguably said to be "outrageously unfair" or of such a character that it would "shock the judicial conscience." That is because the Arbitration Agreement does not contain a single provision that could be characterized as unfair, much less as "outrageously unfair" or "shocking to the judicial conscience." In an effort to avoid or obscure this fact, Petitioner argues that "[e]verything about the content of AVL's Agreement for Care and Arbitration is overwhelmingly tilted toward Avante" but fails to support that claim. Instead, Petitioner puts forward three arguments which are completely meritless.

First, Petitioner asserts that a provision contained in the Agreement for Care (paragraph 8, page 3 of 9) that absolves AVL of liability for any events that might occur when the resident is away from AVL and not under the care of AVL somehow renders the Arbitration Agreement substantively unconscionable. As a preliminary matter, the referenced provision is not a part of and is not contained or referenced in the Arbitration Agreement. Therefore, it is quite a reach for Petitioner to argue that it renders the Arbitration Agreement substantively unconscionable. Moreover, there is nothing "outrageously unfair" or "shocking" about this provision. This provision does not take away any rights a resident or his Estate or heirs may have. It simply makes clear that AVL cannot be held liable for incidents or accidents that might occur under circumstances which it would clearly not be legally liable in any event (i.e. incidents that might occur during a home

visit or dinner trip with family or after the resident has chosen to leave or been discharged from AVL).

Even if the Court were to give this provision the same expansive interpretation Petitioner self-servingly does (in an effort to maintain its unviable substantive unconscionability argument), and were to further interpret it as part of the Arbitration Agreement **even though it is not a part of, not included in, and not even referenced in the Arbitration Agreement**, the provision would be required to be severed pursuant to the severability clause contained in the Arbitration Agreement in order to give effect to the intent of the parties to submit all claims within the scope of the Arbitration Agreement to arbitration. Even if any terms of the Arbitration Agreement at issue in this case were found to be substantively unconscionable, they would be severable pursuant to the terms of the severability clause contained in the Arbitration Agreement. See Alterra v. Bryant, 937 So.2d 263 (Fla. 4th DCA 2006); Voice Stream Wireless Communications v. U.S. Communications, Inc., 912 So.2d 34 (Fla. 4th DCA 2005). Any such term would cease to be a part of the Arbitration Agreement; and, therefore, could not possibly form a basis for a finding the agreement is substantively unconscionable. Based on the foregoing, Petitioner's argument that this provision renders the Arbitration Agreement substantively unconscionable should be rejected.

Second, Petitioner asserts the fact that fraud claims are included within the

scope of the Arbitration Agreement somehow renders the Agreement substantively unconscionable. As a preliminary matter, this argument is completely irrelevant, given that this case does not involve fraud claims (as evidenced by the Amended Complaint in this case which lacks any allegations of fraud). In any case, however, fraud claims are arbitrable. See Doctor's Associates, Inc., v. Thomas, 898 So.2d 159 (Fla. 4th DCA 2005); Information Technology & Engineering Corp. v. Reno, 813 So.2d 1053 (Fla. 4th DCA 2002); Hirshenson v. Spaccio, 800 So.2d 670 (Fla. 5th DCA 2001). Even a claim that a contract containing an arbitration clause was induced by fraud is arbitrable, so long as no claim is made that the fraud was directed to the arbitration clause itself. See e.g. Beaver Coaches, Inc. v. Revels Nationwide R.V. Sales, Inc., 543 So.2d 359 (Fla. 1st DCA 1989); Physicians Weight Loss Centers of America, Inc. v. Payne, 461 So.2d 977 (Fla. 1st DCA 1984). The types of claims that are potentially subject to resolution via arbitration are virtually limitless. See Pierce v. J.W. Charles-Bush Sec. Inc., 603 So.2d 625 (4th DCA 1992), approved in Turnberry Assoc. v. Service Station Aid, Inc., 651 So.2d 1173 (Fla.1995)(stating "[i]f civil rights, antitrust and securities fraud claims are not inappropriate for arbitration, it is very difficult to imagine a civil claim in which an agreement to arbitrate would not be enforced").

The fact that fraud claims are, as a matter of law, arbitrable is unchanged by Petitioner's assertion that allowing the arbitration of fraud claims would defeat the

remedial purpose of Chapter 400 (the "FNRRA") because it would allow such claims to be addressed in the closed and private process of arbitration. Petitioner asserts that fraud claims should be "part of the public record so that they can be accessed and scrutinized by any person who wishes to learn about them." Unfortunately for Petitioner, there is nothing in the FNRRA that requires fraud claims or any other types of claims to be resolved via the public process of litigation or precludes them from being resolved via arbitration.

In short, this assertion is pure argument and opinion without factual or legal support. Therefore, it cannot form a basis for finding substantive unconscionability in this case. Allowing fraud claims to be resolved via arbitration would have absolutely no impact on a resident's substantive rights under the statute (i.e. it would only require that such claims be resolved in an arbitral forum); and, therefore, cannot even arguably said to be a remedial limitation that would support a finding of substantive unconscionability. Based on the foregoing, Petitioner's argument that the private nature of arbitration renders the Arbitration Agreement here substantively unconscionable should be rejected.

Finally, Petitioner asserts that the Arbitration Agreement should be held to be substantively unconscionable because it contains an alternative provision which states that, "[i]n the event a court of competent jurisdiction shall rule that a dispute between the parties is not subject to arbitration, then the resident and facility

acknowledge and agree to waive all right to jury trial and have their dispute decided only by a court of competent jurisdiction in the county and state where AVL is located." In sum, Petitioner argues that a provision that requires that any dispute between the parties that is not subject to arbitration be resolved via a bench trial is outrageous, grossly unfair, and shocking to the judicial conscience. This argument defies reason. As numerous arbitration and other cases that have been decided establish, a party may waive his right to jury trial in favor of arbitration, a non-jury trial, a private trial, or settlement. The idea that allowing a judge of one of the circuit courts of this state to resolve a case via a non-jury trial (something specifically allowed for under Florida law) is "outrageously unfair" or "shocking to the judicial conscience" is ridiculous. Thus, like Petitioner's other arguments, her argument that this provision renders the Arbitration Agreement substantively unconscionable should be rejected.

In light of the foregoing, it is clear that nothing regarding the Arbitration Agreement is substantively unconscionable. Given the absence of substantive unconscionability in this case, it is not necessary for this Court to even consider the issue of procedural unconscionability - as both substantive and procedural unconscionability must exist before a contract can be invalidated on unconscionability grounds. Therefore, the Court can and should, without the necessity of any further analysis, reject Petitioner's unconscionability argument.

B. THE ARBITRATION AGREEMENT IS NOT PROCEDURALLY UNCONSCIONABLE

Even if Petitioner had established the existence of substantive unconscionability in this case (which she did not and cannot), her unconscionability argument would still fail to provide a legitimate basis for invalidating the Arbitration Agreement in this case because the Agreement is **not** procedurally unconscionable. To determine whether a contract is procedurally unconscionable, a court must look to the "circumstances surrounding the transaction" to determine whether the complaining party had a "meaningful choice" at the time the contract was entered. See Weston at 284. Among the factors to be considered are whether the complaining party had a realistic opportunity to bargain regarding the terms of the contract, or whether the terms were merely presented on a "take-it-or-leave-it" basis; and whether he or she had a reasonable opportunity to understand the terms of the contract. Id. While this may require an examination into a myriad of details, the basic concept is "an absence of meaningful choice." Id. (citing Kohl at 869).

The evidence regarding the circumstances surrounding the execution of the Arbitration Agreement fails to establish that there was procedural unconscionability in this case; it fails to establish that Mr. Stewart was forced to sign the Arbitration Agreement due to "an absence of meaningful choice." Mr. Stewart, the person executing the Arbitration Agreement, was a competent party

who, prior to his admission to AVL had been managing all of his own affairs and continued to do so at the time of his admission. On May 15, 2006, Mr. Stewart signed a number of admission documents at AVL (App. 6 and Supp. App. 5 at 100014-100041). A review of those documents demonstrates that Harry Stewart made conscious and thoughtful decisions on the forms he signed on May 15, 2006; and agreed to several options he had while specifically refusing others. This and the other record evidence suggests he had adequate time to review the agreement, had the opportunity to ask questions about its terms, had the option to consult with others, including an attorney, about its contents, ultimately had the power to accept or reject its terms outright and remain in AVL, rescind his agreement to it within three days of executing it, or seek a similar service elsewhere.

Petitioner argues, based on an eight year old law review article, that "freedom to contract" is little more than a "fiction" when it comes to a nursing home admission contract. The numerous Florida appellate cases that have rejected unconscionability arguments and similar arguments and compelled arbitration in nursing home cases since this article was written clearly refute this proposition as a matter of law. Yet Petitioner asserts, based on this refuted proposition that "freedom to contract," which was one of the principles mentioned by the Fifth District in its opinion in this case, has nothing to do with the Arbitration Agreement in this case. IB at 31. There is obviously no merit to this assertion;

especially given the specific facts of this case, which defeat each of the bases Petitioner has asserted in support of her procedural unconscionability claim.

First, Petitioner asserts that the agreement is procedurally unconscionable because it was not presented to Mr. Stewart until after he was transferred to AVL. Petitioner, or course, downplays the fact that Mr. Stewart was transferred to AVL on a Sunday and signed the Arbitration and other admission documents only one (1) day later on Monday (the first business day after his transfer). This very brief delay has no impact on the validity of the Arbitration Agreement and does not establish the existence of procedural unconscionability. See Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 287-88 (Fla. 1st DCA 2003)(upholding validity of arbitration agreement executed by nursing home resident's legal representative forty eight (48) days after resident's admission to facility); Rocky Creek Retirement Properties, Inc. v. Estate of Fox, 19 So.3d 1105, 1107 (Fla. 2nd DCA 2009)(upholding validity of arbitration agreement executed by assisted living facility resident **nine** (9) years after her admission to the Facility).

Second, Petitioner argues that Mr. Stewart had little choice but to sign the agreement because "[f]or all [he] knew, he faced being ousted from AVL and potentially risk the discontinuation of his rehabilitation process if he did not sign the Arbitration Agreement." IB at 34. This is pure unsupported conjecture and speculation. Petitioner asserts there is nothing in the record to show that Mr.

Stewart was ever told he would not be discharged if he declined to sign the Arbitration Agreement. However, she ignores the fact there is no evidence that anyone ever told Mr. Stewart he would be discharged if he declined to sign the Arbitration Agreement. Moreover, she ignores the fact there is evidence (discussed further below) that established that Mr. Stewart would not have been discharged if he had declined to sign the Arbitration Agreement. Finally, she ignores the fact that Mr. Stewart understood and agreed that he was not required to use AVL for his healthcare needs and that there were numerous other health care providers that were qualified to provide him with rehabilitative care (memorialized in the last paragraph of the Arbitration Agreement). Therefore, it cannot reasonably be argued that Mr. Stewart had to agree to the Arbitration Agreement and other admission documents or potentially risk the discontinuation of his rehabilitation process. On the contrary, the evidence suggests he knew he could go elsewhere to receive the same rehabilitation services (i.e. he had a meaningful choice).

On a related note, Petitioner suggests that the Arbitration Agreement was an "adhesion contract" presented to Mr. Stewart on a "take-it-or leave-it" basis. The evidence does not support this assertion. Mr. Stewart had the option of rejecting or refusing the Arbitration Agreement. Margaret Brennan, an employee of AVL who assisted with completion of admissions documentation as a portion of her employment, testified to the optional nature of the Arbitration Agreement when

she testified that residents have been admitted to AVL and cared for without first, or ever, entering into an Arbitration Agreement with AVL (App. 5 at pg. 75, ll. 2-10). In short, Mr. Stewart was not required to sign the agreement. Moreover, by the express terms of the Arbitration Agreement, he was made aware of his right to have the Arbitration Agreement reviewed by an attorney and of his right to unilaterally "rescind" the agreement within three (3) days of executing it if he had a change of heart. These facts, combined with those explained above, clearly establish that the Arbitration Agreement was not an adhesion contract.

Finally, Petitioner suggests Mr. Stewart had little or no opportunity to understand the terms of the Arbitration Agreement. IB at 34. Again, there is no factual basis for Petitioner's position. There is no procedural unconscionability where, as in this case, the person executing the Agreement for Care and the Arbitration Agreement was a competent party who had adequate time to review the agreement, had the opportunity to ask questions about its terms, had the option to consult with others, including an attorney, about its contents, and ultimately had the power to accept or reject its terms and remain at AVL or seek a similar service elsewhere. See Frantz v. Shedden, 974 So.2d 1193, 1197 (Fla. 2nd DCA 2008).

Mr. Stewart had the capacity to read and understand the Arbitration Agreement; the opportunity to ask for additional time to review the contract if needed; the opportunity to ask questions about the contract; and the opportunity to

take the contract to an attorney. Given its simple, straightforward, understandable terms, the only way Mr. Stewart could have failed to know the contents of the Arbitration Agreement would be if he had chosen not to read the agreement in spite of the fact he was given the opportunity to do so. This cannot form the basis of a procedural unconscionability claim. See e.g. See Allied Van Lines, Inc. v. Bratton, 351 So.2d 344, 347 (Fla.1977); Gainesville Health Care Center, Inc. v. Weston, 857 So.2d 278 (Fla. 1st DCA 2003).

In Weston, the Resident's legal representative met with the admissions person and executed the admissions paperwork, including the arbitration agreement. Id. at 281. During that time, the party did not ask questions about the contents of the agreement, whether she could take the agreement home, if she could have an attorney review it on her behalf, or whether the terms were unchangeable. Id. at 281-282. In reaching its decision, the Weston, court held there was no procedural unconscionability because the plaintiff could not prove she did not have a reasonable opportunity to review and understand the contents of the documents she executed. Id. at 287-288. In this case, as in Weston, Petitioner has asserted, but **did not and cannot prove**, that Mr. Stewart did not have a reasonable opportunity to review and understand the contents of the documents he executed.

In Rocky Creek, *supra*, the Plaintiff argued no one had explained the arbitration agreement to the resident and that even if the resident had read the

agreement she would not have understood that she was waiving her right to jury trial. On that basis, they argued the agreement was not valid and enforceable even though the resident signed it freely without reading it. The Rocky Creek Court rejected that argument stating the alleged inability to understand the agreement did not "vitiate [the resident's] assent to [the arbitration agreement at issue in that case] in the absence of some evidence she was prevented from knowing its contents." Id. at 1108-09. It went on to reiterate the venerable principle that a party to a contract is "conclusively presumed to know and understand the contents, terms, and conditions of the contract" and held that "once [the resident] signed the Agreement she was presumed to know, understand, and agree to its contents" (i.e. there was "standard consent"). Id. at 1109.

Based on the foregoing cases, Mr. Stewart, his Estate and heirs should be bound by the Arbitration Agreement where there is no evidence that the Arbitration Agreement was procedurally unconscionable.

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court answer the certified question in the Affirmative; reject Petitioners meritless alternative arguments; and affirm the decisions of both of the lower courts in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished via U.S. Mail this _____ day of April 2011 to: D. Paul McCaskill, Esquire, David Law Group, P.A., 100 E. Faith Terrace, P O Box 940218, Maitland, FL 32794-0218; Kelly Bagby, Esquire, AARP Foundation Litigation, 301 E Street, NW, Washington, DC 20049; George Vaka, Esquire, Vaka Law Group, P.L., 777 Harbour Place, Suite 300, Tampa, FL 33602 and Kari Aasheim, Esquire, Mancuso & Dias, P.A., 5102 W Laurel Street, Suite 700, Tampa, FL 33607.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this Answer Brief 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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