SUPREME COURT OF FLORIDA

CASE NO.: SC10-2132
L.T. NO: 5D09-2049
CIRCUIT COURT CASE NO.: 2008-CA-2619

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.

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The Petitioner will be referred to as “Laizure.” Avante at Leesburg, Inc., shall be referred to as “AVL.” The remaining Respondents will be referred to as Avante Ancillary Services, Inc., or Avante Group, Inc.

The following designations will be used: (App.)-–Appendix.

STATEMENT OF THE CASE AND OF THE FACTS

This appeal stems from an Order on Defendants' Motions to Compel Arbitration, Motions to Dismiss Plaintiff's Amended Complaint and Motion to Stay Discovery dated May 7, 2009. (App. 1)

Harry Stewart had knee surgery at Leesburg Regional Medical Center on May 11, 2006. (App. 2 at p. 4) While he was still in the hospital following his surgery, Peggy Brennan, an admissions employee at AVL, approached Stewart in his room and persuaded him to begin his rehabilitation at its facility. (App. 3 at p. 13-15; App. 4 at p. 48) On May 14, 2006, Stewart was discharged from Leesburg Regional Medical Center and transferred to AVL. (App. 2 at pp. 4-5) At the time of his discharge from the hospital, Stewart's white blood count was normal and showed no signs of infection. (App. 2 at p. 4) It is undisputed that Brennan nor any other representative from AVL ever showed or discussed the Arbitration Agreement which is at issue in this case with Stewart while he was at Leesburg Regional Medical Center.

After he was transferred to AVL and had begun treatment there, Peggy Brennan[1] presented Stewart with an Agreement for Care which included an Arbitration Agreement as an Addendum.

[1] Counsel for Laizure took the deposition of Brennan on January 14, 2009. (App. 5)

(App. 6) This was this first time that anyone from AVL had mentioned anything to Stewart about an Arbitration Agreement or his need to sign one. (App. 5 at p. 46) Stewart signed the Agreement for Care and Arbitration Agreement on May 15, 2006. (App. 6 at p. 8) Brennan testified at her deposition that she presented Harry Stewart with the Agreement for Care and Arbitration Agreement on May 15, 2006, at AVL. (App. 5 at p. 46) She stated that this was not the date that Stewart was admitted at AVL, and that he in fact had been admitted there the day before, which was Sunday, May 14, 2006. (App. 5 at p. 46)

Debra Laizure, the Personal Representative of Harry Stewart's Estate, did not sign either the Agreement for Care or the Arbitration Agreement and neither did any other member of Stewart's family. The other two Respondents in these proceedings, Avante Ancillary Services, Inc., and Avante Group, Inc., did not sign the Arbitration Agreement nor are they mentioned in it.

On May 16, 2006, Harry Stewart's roommate told the staff at AVL that Stewart was sitting on the floor after having apparently fallen. (App. 2 at p. 5) Stewart developed a massive infection at AVL, and was transferred back to Leesburg Regional Medical Center on May 18, 2006, where his condition

rapidly deteriorated following the discovery that his white blood count was 48.8. (App. 2 at p. 6)

Harry Stewart died on May 18, 2006, roughly 4 days after he had arrived at the doorstep of AVL. (App. 2 at p. 6)

The Arbitration Agreement which Stewart signed at AVL is an addendum to an Agreement for Care dated May 15, 2006. (App. 6) The Arbitration Agreement, which contains no mention of wrongful death claims, states:

> This Agreement is made between Avante at Leesburg ("Facility") and Harry L. Stewart ("Resident" or "Resident's Authorized Representative") and is an addendum to and part of the Admission Agreement.
>
> The Facility and the Resident and/or Resident's Authorized Representative (hereinafter referred to collectively as the "Parties") understand and agree that any legal dispute, controversy, demand, or claim where the damages or other amount in controversy is/are alleged to exceed ten thousand dollars ($10,000.00), and that arises out of or relates to the Resident Admission Agreement 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. The parties understand that arbitration is a process in which a neutral third person or persons ("arbitrator(s)") considers the facts and arguments presented by the parties and renders a binding decision.
>
> This agreement to arbitrate shall include, but is not limited to, any claim based on payment, non- payment, refund for services rendered to the Resident by the Facility, breach of contract, breach of fiduciary duty, fraud or misrepresentation, common law or statutory negligence, gross negligence, malpractice or a claim based on any departure from accepted standards of medical or nursing care (collectively "Disputes"), where the damages or other amount in controversy is/are alleged to exceed ten thousand dollars ($10,000.00). This shall expressly include, without limitation, claims based on Chapter 400,

> Florida Statutes, which allege damages in excess of ten thousand dollars ($10,000.00)
>
> This agreement shall be binding upon, and shall include any claims brought by or against the Parties' representatives, agents, heirs, assigns, employees, managers, directors, shareholders, management companies, parent companies, subsidiary companies or related or affiliated business entities.

(emphasis added). (App. 6)

On June 16, 2008, Harry Stewart's daughter, Debra Laizure, as Personal Representative of the Estate of Harry Stewart filed a four-count Complaint and demand for jury trial against the Respondents. Laizure filed an Amended Complaint on June 18, 2008. (App. 2) AVL is the rehabilitation facility where Harry Stewart stayed following his knee operation at Leesburg Regional Medical Center. (App. 2 at pp. 4-5) Laizure's Amended Complaint also named as defendants Avante Ancillary Services, Inc., and Avante Group, Inc.

Count I of Laizure's Amended Complaint is for deprivation or infringement of a resident's rights pursuant to Chapter 400, Florida Statutes (2006), and is directed toward AVL. (App. 2 at p. 7) Count II is for wrongful death and is also directed toward AVL. (App. 2 at p. 10) Count III is for deprivation or infringement of resident's rights pursuant to Chapter 400, Florida Statutes (2006), and is directed toward Avante Ancillary Services, Inc. (App. 2 at p. 13) Count IV is for wrongful

death and is directed toward Avante at Ancillary Services, Inc. (App 2 at p. 15) Count V is for deprivation or infringement of resident's rights pursuant to Chapter 400, Florida Statutes (2006), and is directed towards Avante Group, Inc. (App. 2 at p. 18) Count VI is for Wrongful Death and is directed toward Avante Group, Inc. (App. 2 at p. 20)

At her deposition on January 14, 2009, Peggy Brennan testified that her job at AVL involves going to hospitals to sign up potential referrals. (App. 5 at p. 9) Although she presented Harry Stewart with the Agreement for Care and Arbitration Agreement at issue in this case, Brennan admitted that she has no memory of any statements he made to her. (App. 5 at p. 26) In fact, Brennan had no actual memory of Stewart. (App. 5 at p. 26) Brennan acknowledged that part of her job is to try to attract people to the rehabilitation facility run by AVL, and that she had a financial incentive to get patients admitted there. (App. 5 at pp. 34-35) She stated that the first time a patient sees an admissions packet is when they are at AVL, and not in the hospital from which they were transferred. (App. 5 at p. 30)

Laizure's attorney asked Brennan a series of questions regarding her understanding of the provisions of the Arbitration Agreement. Brennan stated that she has no legal training.

(App. 5 at p. 9) When asked what happens if a resident goes to arbitration and does not like the result, Brennan stated that she did not know. (App. 5 at p. 45) Brennan also did not know what was meant by binding arbitration. (App. 5 at p. 46)

When asked about an exculpatory clause which appears in the Agreement for Care presented to Stewart, Brennan answered that she believed its purpose was to release AVL from any liability that occurs after a resident leaves the nursing home. (App. 5 at pp. 51-52) She was unable to say, however, why such a clause might be important. (App. 5 at p. 53) The exculpatory clause about which Brennan was being questioned is contained within AVL's Agreement for Care dated May 15, 2006. (App. 6) It states:

> THE RESIDENT, HIS/HER LEGAL REPRESENTATIVE, HIS/HER DESIGNEE, IF ANY, AGREES TO:
>
> * * * * *
>
> 8. Accept full responsibility for and absolve and release the nursing home, it's personal [sic], and attending physician from any liability for any event, accident, or deterioration of medical condition while the resident is away from the nursing home and not under the direct care and supervision of the nursing home, or if the resident should leave the nursing home, or if the resident should leave the nursing home for any reason without first giving notice.

(App. 6)

Brennan was also questioned about a clause in the Arbitration Agreement which required that fraud claims be arbitrated. This provision states: "This Agreement to arbitrate shall include, but is not limited to, any claim based on . . . breach of fiduciary duty, fraud, misrepresentation. . . ." (App. 6) Brennan admitted that she did not know the significance of such a clause. (App. 5 at pp. 60-61) She did not remember whether she told Harry Stewart that he was giving up his right to have a fraud claim decided by a jury, nor did she know what was meant by statutory or common law negligence. (App. 5 at pp. 65-66)

Significantly, Brennan testified that if she was bringing a loved one to AVL she would not sign any agreement without first running it by her lawyer. (App. 5 at p. 64)

Following the filing of Laizure's Amended Complaint, the Respondents filed numerous motions to compel arbitration which are referenced in the Order on appeal. (App. 7) The trial court held a hearing as to these motions on April 21, 2009. (App. 4) On May 7, 2009, the trial court granted the Respondents' motions for arbitration and entered an Order on Defendants' Motions to Compel Arbitration, Motions to Dismiss Plaintiff's Amended Complaint and Motion to Stay Discovery. (App. 1) In this Order, the trial court found: (1) that on May

15, 2006, Harry Stewart signed several agreements including the Agreement for Care and Arbitration Agreement. (App. 1 at p. 2) The trial court also found that the Arbitration Agreement was a valid written arbitration agreement, that the claims brought by Laizure on behalf of the Estate were arbitrable issues, and that the defendants' right to arbitration had not been waived. (App. 1 at p. 2) Finally, the trial court found that although they did not sign and were not mentioned in the Arbitration Agreement, the beneficiaries of the Estate of Harry Stewart were bound by its terms as to any wrongful death action or violation of residents' rights because, in its view, these individuals were intended third-party beneficiaries of the Arbitration Agreement. (App. 1 at p. 3) The trial court then abated the proceedings below pending the resolution of the issues involved in this appeal. (App. 1 at p. 3)

At the conclusion of the hearing below, the trial court judge had this to say about his ruling:

> Well, the big issue is whether or not the heirs, as intended beneficiaries, are bound by it such that their independent cause of action for wrongful death is bound by the arbitration agreement. They're intended beneficiaries. You've got freedom to contract. I think they're bound by it.
>
> Quite candidly I don't know if I ruled the other way whether the defense could take an appeal now or they'd have to wait until the end of the suit. But freedom of contract, they're an intended beneficiary. . . . (emphasis added.)(App. 4 at pp. 90-91)

Laizure timely filed her Notice of Appeal on June 3, 2009. (App. 8) On October 1, 2010, the Fifth District Court of Appeal issued its written opinion affirming the ruling of the trial court and certifying the question on review in these proceedings. Laizure v. Avante at Leesburg, Inc., 44 So.2d 1254 (Fla. 5th DCA 2010). Ultimately 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, the Fifth District Court of Appeal certified the following as a question 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?

By Order dated December 14, 2010, this Court accepted jurisdiction of this case. (R. 29-30)

This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error in compelling arbitration. A wrongful death claim is not an arbitrable issue because it does not belong to the decedent. AVL's arbitration provision therefore cannot be used to compel the heirs of Harry Stewart to submit to binding arbitration.

A wrongful death claim cannot arise until after the decedent has died. It is not a derivative claim because under the Florida Wrongful Death Act a wrongful death claim is a cause of action which is independent of the decedent's claim. Not only are the parties in wrongful death case different from those involved in a decedent's underlying tort claim, the damages recoverable under section 768.21, Florida Statutes (2006), illustrate that the Wrongful Death Act is meant to compensate for the losses of the survivors rather than the decedent. These damages belong exclusively to the survivors. Accordingly, AVL's Arbitration Agreement cannot bind the Estate or Mr. Stewart's heirs to arbitrate a wrongful death claim which was not his to bind or limit, and which is composed of damages that exclusively belong to and benefit his survivors. Wrongful death claims are thus beyond the scope of AVL's Arbitration Agreement and do not present an arbitrable issue.

A critical weakness in the opinion of the Fifth District Court of Appeal is that it overlooks the central question in this case, which is who really “owns” a wrongful death claim. No serious contention was made either in the opinion below or in these proceedings that a wrongful death claim in Florida belongs to anyone other than the beneficiaries of the decedent. That defenses which could have been asserted against a decedent could be posed against his or her survivors does not alter this basic principle of law.

AVL’s Agreement for Care and the Arbitration Agreement contained within it are both procedurally and substantively unconscionable. The facts surrounding the execution of these documents show procedural unconscionability because of the lack of Harry Stewart’s bargaining power. These same facts reveal that Mr. Stewart did not have a meaningful opportunity to have understood their terms and conditions. AVL’s representative did not present these documents to Mr. Stewart until after he had already been admitted into AVL’s facility and had begun rehabilitation there. Mr. Stewart had little choice but to sign the Agreement for Care and Arbitration Agreement because had he not done so, he would have faced potential discontinuation of the relationships he had begun with the doctors, nurses and other staff members at AVL.

AVL's Agreement for Care and Arbitration Agreement are classic examples of adhesion contracts which were offered to Mr. Stewart on a "take it or leave it" basis without a realistic opportunity to bargain as to their terms and conditions. Peggy Brennan, the person who presented these documents to Mr. Stewart on behalf of AVL had no meaningful grasp of the legal rights that they were meant to bar a resident from asserting. She was therefore in no position to sufficiently explain the magnitude of what he was being asked to give up in a way that would allow him to properly evaluate the consequences of what he was signing.

AVL's Agreement for Care and Arbitration Agreement are also substantively unconscionable. An agreement is substantively unconscionable if its terms are unreasonable and unfair. Here, both agreements contain terms and conditions which run overwhelmingly to the benefit of AVL. The exculpatory clause in AVL's Agreement for Care requires that residents release AVL from any liability concerning their medical condition when the resident is away from the nursing home but not under its direct care and supervision. Similarly, this clause releases AVL if the resident leaves the nursing home for any reason without first giving notice. This clause would not even permit arbitration of tort claims or statutory causes of action such as

those set forth in the Nursing Home Resident Right's Act. This clause thus goes beyond merely defeating the remedial provisions of Chapter 400–-it attempts to bar such statutory claims entirely.

AVL's Arbitration Agreement also defeats the remedial purpose of Chapter 400 because it attempts to channel fraud claims, including those that arise under Chapter 400, into arbitration. Because arbitration is a closed process, such claims cannot be scrutinized or easily accessed by the public no matter how egregious the conduct of the nursing home might be. This defeats the remedial purpose of Chapter 400 because a nursing home's concealment and misrepresentation practices will remain hidden from the public eye. Thus, those who would entrust their loved ones to the care of a nursing home will likely never learn of that home's fraudulent practices.

The Estate of Harry Stewart was not an intended third-party beneficiary of the Arbitration Agreement. To have properly established this, AVL would have to have shown not only that it intended to benefit the Estate, but also that Harry Stewart intended to do so as well. These requirements were not met, as neither the Agreement for Care nor the Arbitration Agreement ever mention the Estate, much less attempt to benefit or bind it.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN COMPELLING ARBITRATION

A. STANDARD OF REVIEW

The standard of review governing an order granting a motion to compel arbitration is de novo. See Bacon Family Partners, L.P. v. Apollo Condo. Ass'n, 852 So.2d 882, 887 (Fla. 2d DCA 2003); Ocwen Federal Bank FSB v. LVWD, Ltd., 766 So.2d 248, 249 (Fla. 4th DCA 2000)("whether an issue is subject to arbitration is a matter of contract interpretation and our review is de novo.")

B. JURISDICTION

Jurisdiction is proper in these proceedings because this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance. . . ." Art., V, section 3(b)(4), Fla. Const.

C. THE ESTATE'S WRONGFUL DEATH CLAIM IS NOT AN ARBITRABLE ISSUE

The right to jury trial in Florida is guaranteed by Article I, section 22, of the Florida Constitution, which states that the "right of trial by jury shall be secure to all and remain inviolate." An effective waiver of a constitutional right must be voluntary, knowing, and intelligent. See Vetrick v. Hollander, 743 So.2d 1128, 1131 (Fla. 4th DCA 1999). Courts

will "indulge every reasonable presumption against waiver of fundamental constitutional rights. . . ." Perez v. State, 167 So.2d 313,314 (Fla. 2d DCA 1964). This case presents the issue of whether an arbitration agreement can defeat this basic right afforded to every citizen in Florida.

In Seifert v. U.S. Home Corp., 750 So.2d 633 (Fla. 1999), this Court set out a three-part test courts to consider in connection with a motion to compel arbitration: (1) whether valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; (3) whether the right to arbitrate was waived. Id. at 636. As will be seen, arbitration is improper in this case because AVL's Arbitration Agreement does not encompass wrongful death claims. Therefore, no "arbitrable issue" existed for the parties to arbitrate.

Seifert concerned a married couple's purchase of a home following which the husband died due to carbon monoxide poisoning. The wife filed a wrongful death claim against the builder, and the builder sought to enforce an arbitration clause by filing a motion to compel arbitration. This Court held that "an agreement to arbitrate in a purchase and sale agreement does not necessarily mandate arbitration of a subsequent and independent tort action based upon common law duties." Id. at 635. This Court stated that no party may be forced to submit a

dispute to arbitration that the party did not intend to and agree to arbitrate. Id. at 636.

In Seifert, this Court indicated that while arbitration clauses are generally favored by the courts, their construction is a matter of contract interpretation. "[T]he determination of whether an arbitration clause requires arbitration . . . 'rests on the intent of the parties.'" Id. (citations omitted).

Citing an earlier decision by the First District Court of Appeal, this Court reiterated in Seifert the general rule "that where an arbitration agreement exists between the parties, arbitration is required only of those controversies or disputes which the parties have agreed to submit to arbitration." Id. at 636 (quoting Regency Group, Inc. v. McDaniels, 647 So.2d 192, 193 (Fla. 1st DCA 1994)). This language is critical in this case because Mr. Stewart could never have agreed to submit a potential wrongful death claim to arbitration--even if he could have forseen what was to happen to him--because that claim was not in existence and did not belong to him. Such a claim belongs only to his estate, and only arose after he died. Thus, the wrongful death claim which the Estate filed in this case is not encompassed by AVL's Arbitration Agreement.

The Arbitration Agreement at issue is between Stewart and AVL, i.e., the "Resident" and the "Facility." (App. 6) The

Estate was not a party to the Agreement. The Arbitration Agreement does not address or mention wrongful death claims, but even if it did, it could not have effectively bound the Estate or its personal representative as to a claim that only arises after the death of a patient. Seifert establishes that to the extent an arbitration agreement is ambiguous it must be construed against the drafter. "Under a well-established rule of construction, we are constrained to construe the provisions of the U.S. Home contract against its drafter, U.S. Home." Seifert, 750 So.2d at 641. Because it does not address or discuss wrongful death claims, the Arbitration Agreement is at best ambiguous as to whether such a claim falls within its scope. Stated differently, if AVL had meant for its Arbitration Agreement to encompass claims such as wrongful death, it should have done so clearly and unambiguously. Moreover, "[c]ontractual arbitration is mandatory only where the subject matter of the controversy falls within what the parties have agreed will be submitted to arbitration." Ocwen Federal Bank FSB., supra,766 So.2d at 249 (citations omitted).

In the opinion below, the Fifth District Court of Appeal agreed[2] with Laizure that a "wrongful death action belongs to the

[2] As discussed infra, the Fifth District Court of Appeal also noted that a wrongful death action is predicated on the "wrongful act, negligence, default or breach of contract or warranty" which the defendant has committed which transforms a

survivors of the decedent . . . ." Laizure, 44 So.2d at 1258. Indeed, a wrongful death[3] claim is an independent claim pursuant to Chapter 768.20, which states that "[W]hen a personal injury to the decedent results in his death, no action for personal injuries shall survive, and any such action pending at the time of death shall abate." (emphasis added). The Fifth District Court of Appeal acknowledged this point in the opinion below[4] citing one of its own decisions, Taylor v. Orlando Clinic, 555 So.2d 876 (Fla. 5th DCA 1989).

In Martin v. United Security Services, Inc., 314 So. 2d 765 (Fla. 1975), this Court held that the Wrongful Death Act merges a survival action for personal injuries and a wrongful death action into one lawsuit. The decedent's "survivors," which are defined by statute, become beneficiaries in the wrongful death action. The "claim for pain and suffering of the decedent from the date of injury to the date of death was eliminated. Substituted therefore was a claim for pain and suffering of close relatives, the clear purpose being that any recovery should be for the living and not the dead." Id. at 769. See

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"personal injury claim into one for wrongful death." Laizure, 44 So.2d at 1258(citing section 768.19, Fla. Stat. (2009)).

[3] Section 768.16, Florida Statutes (2006), provides that sections "768.16-768.26 may be cited as 'The Florida Wrongful Death Act.'"

[4] Laizure, 44 So.3d at 1258.

also Smith v. Lusk, 356 So.2d 1309 (Fla. 2d DCA 1978)(wrongful death statute providing in part that where personal injury to decedent results in death, no action for personal injury shall survive did not impliedly abolish survival statute).

Moreover, Florida's Wrongful Death Act creates in the statutory beneficiaries an independent cause of action. See Variety Children's Hosp. v. Perkins, 445 So.2d 1010, 1013 (Fla.1983)(Ehrlich, J. concurring)(wrongful death action not derivative, but remedial and should be construed to fulfill its remedial function). A wrongful death action "is not a derivative action in a technical sense because it awards damages suffered by the parent independently of any right of action in the deceased minor." Stokes v. Liberty Mut. Ins. Co., 213 So.2d 695, 697 (Fla.1968). "Under section 768.02 the recoverable damages are those suffered by the party entitled to sue in his own right regardless of damages recoverable by the decedent. Hence the derivative aspect disappears." Id. at 698. See also Florida Clarklift, Inc. v. Reutimann, 323 So.2d 640, 641 (Fla. 2d DCA 1975)(philosophy of Florida's Wrongful Death Act is to allow recovery for pain and suffering of the living rather than the dead).

The Fifth District Court of Appeal stated in the opinion below that wrongful death actions are dependent on a wrong

committed against the decedent and that defenses available against the decedent had the decedent lived can be asserted by the defendant in a wrongful death action. Laizure, 44 So.2d at 1258. This notion, however, does not negate the independent nature of a wrongful death claim under the statutory and substantive law set forth above.

Section 768.20, Florida Statutes (2005), states: "The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death." (emphasis added). Under this statute, a wrongful death action belongs to the survivors, not the decedent. Here, the wrongful death claim belongs to the Estate of Mr. Stewart, and it is undisputed that neither the Estate's personal representative nor any of Mr. Stewart's children ever signed the Arbitration Agreement. This presents an important point which the Fifth District Court of Appeal missed in its analysis: the question here is who "owns" the wrongful death claim, and not whether defenses which could have been asserted against the decedent can be asserted against an estate. If a Florida wrongful death claim belongs to the decedent's survivors and does not even come into existence until after the decedent dies, then the decedent cannot bind an estate

to arbitration. Similarly, that a wrongful death claim arises from a wrong committed against the decedent cannot overcome the fact that the claim does not belong to the decedent in the first instance.

Although the Fifth District Court of Appeal cited Consolidated Resources Healthcare Fund I, Ltd. V. Fenelus, as "inferentially" supporting the "conclusion that a wrongful death claim is within the scope of an arbitration agreement," Laizure, 44 So.3d 1258, it is clear that the personal representative in Fenelus never challenged the arbitration provision as unenforceable on the grounds raised in this appeal, i.e., that a wrongful death claim does not belong to the decedent and thus cannot bind the decedent's estate. For similar reasons, Global Travel Marketing, Inc. v. Shea, 908 So.2d 392 (Fla. 2005)[5], is inapposite.

While Fenelus and Shea are not on point as to the central issue in this appeal, some of the legal authority from other jurisdictions which the Fifth District Court of Appeal cited is.

[5] The Fifth District Court of Appeal also cited Trinity Mission Health & Rehab. of Clinton v. Estate of Scott ex rel. Johnson, 19 So.3d 735 (Miss. Ct. App. 2008). Trinity is also factually dissimilar to the case at bar because the daughter of the decedent in that case had signed an arbitration agreement on behalf of her mother, Mary Scott. The court in Trinity went on to hold that the daughter had the authority to waive her mother's constitutional right to a trial by jury. In this case, however, it is undisputed that Laizure never signed the Arbitration Agreement.

Specifically, Woodall v. Avalon Care Ctr.-Fed. Way LLC, 231 P.3d 1252 (Wash. Ct. App. 2010), Peters v. Columbus Castings Co., 873 N.E. 2d 1258 (2007), Rhodes v. California Hospital Medical Center, 76 Cal. App. 3d 606 (Ct. App. 1978), and Lawrence v. Beverly Manor, 273 S.W. 3d 525 (Mo. App. 2009), are all decisions in which the issue in this appeal was squarely presented and in which the arbitration provisions therein were found to be unenforceable because the wrongful death claims at issue did not belong to the decedent.

The most recent of these decisions is Woodall. In Woodall, a Washington appellate court held that the heirs of a decedent who had died in a nursing home were not required to arbitrate their wrongful death claim against the operator of the nursing home. The decedent had signed an arbitration agreement upon admission to the nursing home. Like the agreement in this case, the provision in Woodall purported to bind "any spouse, children, or heirs of the Resident or Executor of the Resident's estate." Woodall, 231 P.3d at 1255. The nursing home operator moved to compel arbitration as to the wrongful death and survival actions which the heirs had brought. The trial court ruled that the wrongful death action was not subject to arbitration, but that the survival action was.

On appeal, the Washington appellate court affirmed the trial court's rulings as to both issues. The court in Woodall began its discussion by noting that while there is a strong public policy favoring arbitration, it is nevertheless subject to principles of contract law. Accordingly, parties cannot be required to submit to arbitration disputes to which they have not agreed to submit. Id. at 1254.

Significantly, the Woodall court rejected the argument that wrongful death claims are derivative. The court stated that the Washington wrongful death statutes created new causes of action which were meant to compensate the surviving relatives for their losses caused by the decedent's death. Id. at 1258. In the Woodall court's view, the cause of action for wrongful death never belonged "to the decedent." Id. For the reasons set forth above, the same conclusion is required under Florida statutory and case law regarding wrongful death actions. Quoting an earlier Washington case, Johnson v. Ottomeir, 275 P.2d 723,725 (Wash. 1954), the court in Woodall stated that "[T]he action for wrongful death is derivative **only in the sense that it derives from the wrongful act causing death**, rather than from the person of the deceased." Woodall, 231 P.3d at 1259 (emphasis in original). In this case, the estate's wrongful

death action derives from the wrongful acts which caused Mr. Stewart's death, and not from Mr. Stewart.

The Woodard court also identified a split in California decisions regarding whether an arbitration provision can bind non-signatory adult heirs. One line of cases follows Rhodes v. Calif. Hosp. Med Ctr., 143 Cal. Rptr. 59 (Cal. Ct. App. 1978)(patient's agreement to arbitrate possible cause of action against hospital was not effective to bar rights of patient's heirs in their independent wrongful death claim against hospital). The other follows Herbert v. Superior Court, 215 Cal. Rptr. 477 (Cal. Ct. App. 1985)(arbitration clause bound adult heirs who were not members of plan to arbitrate their wrongful death claims). Both decisions are cited in opinion of the Fifth District Court of Appeal.

The Woodall court declined to apply two other decisions which the Fifth District Court of Appeal cited in the opinion below, Ballard v. Southwest Detroit Hosp., 327 N.W.2d 370 (Mich. Ct. App. 1982), and In re Labatt Food Serv., L.P., 279 S.W.3d 640 (Tex. 2009), for the simple reason that these decisions were grounded on statutory schemes "which expressly conditioned beneficiaries' claims on the decedent's right to maintain his or her suit for injuries." Woodall, 231 P.3d at 1260.

In this case, the same distinction applies: both Florida statutory and case law establish the independent nature of a wrongful death cause of action in this state. As observed by the Texas Supreme Court in its review of case law[6] from other jurisdictions on this point, "a review of the cases decided based on statutory language indicates that courts in states where wrongful death actions are recognized as independent and separate causes of action are more likely to hold that the beneficiaries are not bound by a decedent's agreement to arbitrate." In re Labatt, 279 S.W.2d at 647. (citations omitted). Accordingly, neither Ballard nor In re Labatt should control the outcome of this appeal in light of the separate and independent nature of a wrongful death claim in Florida.

[6] Although not exhaustive, the Texas Supreme Court's review included the following decisions: Cleveland v. Mann, 942 So.2d 108 (Miss.2006)(beneficiaries bound by decedent's arbitration agreement because under Mississippi Wrongful Death Act, beneficiaries may bring suit only if decedent would have been entitled to bring action immediately before death); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661, 665 (Ala. 2004)(administrator of estate bringing wrongful death claim bound because administrator stands in legal shoes of decedent); Ballard v. S.W. Detroit Hosp., 119 Mich. App. 814, 327 N.W.2d 370, 372 (Mich. Ct. App. 1982)(administrator bringing wrongful death action bound by arbitration agreement because wrongful death is a derivative cause of action under Michigan law); but see Bybee v. Abdulla, 189 P.3d 40, 43 (Utah 2008)(beneficiaries not bound because wrongful death is an independent cause of action under Utah law); Finney v. Nat'l Healthcare Corp., 193 S.W.3d 393, 395 (Mo. Ct. App. 2006)(beneficiary not bound because under Missouri law wrongful death act creates a new cause of action belonging to the beneficiaries).

One of the cases which the Woodall court cited favorably was the Supreme Court of Ohio's decision in Peters v. Columbus Castings Co., 873 N.E. 2d 1258 (Ohio 2007). Peters holds that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim. In Peters, the decedent signed an arbitration agreement which allegedly applied to his heirs. The decedent, Peters, later died after a fall at work. When his estate brought causes of action for wrongful death and survival, the defendant moved to compel arbitration. The trial court denied the motion, and the defendant appealed. On appeal, the Ohio Supreme Court affirmed.

The Ohio Supreme Court began its analysis by stating that arbitration is a matter of contract law and that parties cannot be required to submit to arbitration any dispute which they have not agreed to submit. This, of course, is similar to the approach of Woodard, which was decided two years later. The Ohio Supreme Court also recognized the difference between wrongful death and survival claims. Although both claims "relate to the defendant's alleged negligence," a wrongful death claim belongs to the "decedent's beneficiaries." Peters, 873 N.E.2d at 1261.

The Supreme Court of Ohio concluded that heirs should not be bound to an arbitration agreement which they did not sign:

> The injured person cannot defeat the beneficiaries' right to have a wrongful death action brought on their behalf because the action has not yet arisen during the injured person's lifetime. Injured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves.

Peters, 873 N.E.2d at 1262 (quoting Thompson v. Wing, 637 N.E.2d 917, 922 (Ohio 1994)).

The Missouri Supreme Court recently held that an arbitration agreement in a nursing home admission contract did not bind a plaintiff in a wrongful death action against the nursing home because a wrongful death claim is not "derived through" an underlying tort claim of the decedent. See Lawrence v. Beverly Manor, 273 S.W. 3d 525 (Mo. App. 2009). Dorothy Lawrence moved into the Beverly Manor nursing home in March of 2003. Upon admittance to Beverly Manor, Lawrence's daughter, Phyllis Skoglund, acting under power of attorney for her mother, signed a form arbitration agreement. The agreement purported to compel arbitration by any party whose claim is "derived through or on behalf of [Dorothy Lawrence]. . . ." Id. at 526. Shortly after being admitted to Beverly Manor, Dorothy Lawrence died. Lawrence's son brought a wrongful death claim against Beverly Manor pursuant to the Missouri Wrongful Death Statute. Beverly Manor filed a motion to compel arbitration. The trial court denied the motion, and Beverly Manor appealed.

In affirming the trial court's ruling that the lawsuit could proceed without arbitration, the Supreme Court of Missouri noted that the wrongful death act created a "new cause of action where none had existed at common law and did not revive a cause of action belonging to the deceased. . . ." Id. at 527 (emphasis in original)(quoting O'Grady v. Brown, 654 S.W. 2d 904, 910 (Mo. banc 1983)). The court stated that "not only are the parties who may bring wrongful death distinct from those who may bring suit for an underlying tort, but its measure of damages is also different." Lawrence, 273 S.W. 3d at 528. Some damages, such as funeral expenses, the reasonable value of services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support were available to the survivors under the Missouri wrongful death act that were not available to the decedent. Id. at 528-529.

Similarly, section 768.21, Florida Statutes (2006), provides damages to the survivors in a manner which looks at the losses they have suffered as a result of a decedent's death. Section 768.21 states that damages in a wrongful death action may be awarded as follows:

> (1) Each survivor may recover the value of lost support and services from the date of decedent's injury to her or his death, with interest, and future losses of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the

> decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of minor children shall be considered.
>
> * * * * * *
>
> (5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.
>
> (6) The decedent's personal representative may recover for the decedent's estate the following:
>
> (a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. Loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered:
>
> 1. If the decedent's survivors include a surviving spouse or lineal descendants; or
>
> 2. If the decedent is not a minor child as defined in section 768.18(2), there are no lost support and services recoverable under subsection (1), and there is a surviving parent.
>
> (b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).
>
> * * * * * *

Plainly, the type of damages referenced above could never have belonged to Mr. Stewart as they are uniquely tailored to compensate the losses of survivors rather than decedents.

Based on the foregoing, the trial court committed reversible error in compelling arbitration, and this Court should reverse and remand with directions that this case be permitted to proceed to trial.

D. AVL'S ARBITRATION AGREEMENT IS BOTH PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE

AVL's Contract for Care and Arbitration Agreement are procedurally and substantively unconscionable[7] and thus do not bar the Estate from access to a jury trial. Both are part of the same agreement, which is composed of several documents that Brennan acknowledged were part of Harry Stewart's administrative file. (App. 5 at p. 35) At the top of the Arbitration Agreement appear the words "ADDENDUM TO ADMISSION AGREEMENT." (App. 6) The first sentence of the Arbitration Agreement reads: "This Agreement is made between Avante at Leesburg ("Facility") and Harry L. Stewart ("Resident" or "Resident's Authorized Representative") and is an addendum and part of the Admission Agreement." (emphasis added.)(App. 6) The Arbitration Agreement is therefore part of the Contract for Care and the other documents that AVL included in its admission packet.

Everything about the content of AVL's Agreement for Care and Arbitration Agreement is overwhelmingly tilted toward

[7] The opinion below concluded without elaboration that the Arbitration Agreement was not unconcscionable. Laizure, 44 So.3d at 1265 at fn 3.

Avante's benefit. One searches in vain for any indication of any rights or remedies that AVL gives up in these documents. The trial court's suggestion that the principle of "freedom to contract" has anything to do with the Agreement for Care and Arbitration Agreement is completely off target. In fact, "[f]reedom to contract is little more than a fiction when it comes to nursing homes admission contracts." See The Fiction of Freedom to Contract–Nursing Home Admission Contract Arbitration Agreements, 16 St. Thomas L. Rev. 319, 338 (Winter 2003).

An unconscionable contract or unconscionable term will be not be enforced by a court of equity. Steinhardt v. Ruldolph, 422 So.2d 884 (Fla. 3d DCA 1982). A determination that a contract is unconscionable is reviewable by a de novo standard. See Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th DCA 1985). "The procedural component of unconscionability relates to the manner in which the contract was entered into and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms." Powertel, Inc. v. Bexley, 743 So.2d 570, 574 (Fla. 1st DCA 1999).

In Steinhardt, one of the earlier cases regarding unconscionability in Florida, the Third District Court of Appeal affirmed a trial court's decision to strike down as

unconscionable a rent escalation clause. The Third District noted that most courts require a certain amount of procedural and substantive unconscionability to render a contract or term unenforceable. Steinhardt, 422 So.2d at 889. However, the court went on to state that the "Restatement (Second) of Contracts section 208 (1979) does not even attempt to define unconscionability in a black letter rule of law, whether in procedural-substantive terms or otherwise, because the legal concept involved here is so flexible and chameleon-like." Id. at 890. See also Hialeah Automotive, LLC v. Basulto, 2009 WL 187584 (Fla. 3d DCA 2009)(suggesting that requirement of finding that both procedural and substantive unconscionability[8] be present to invalidate an arbitration clause is illogical and inconsistent with Steinhardt.) Later cases have used a "sliding scale" approach. See Romano v. Manor Care, Inc., 861 So.2d 59 (Fla. 4th DCA 2004)(nursing home arbitration agreement unenforceable where contract was substantively unconscionable to

[8] The Estate acknowledges that a number of decisions in Florida have determined that both procedural and substantive unconscionability must be present to render a contract unenforceable. See, e.g., Powertel, Inc. v. Bexley, supra, 743 So.2d at 574)(to support a determination of unconscionability, the court must find that the contract is both procedurally and substantively unconscionable.) Nevertheless, the Estate questions the logic of such a standard for the reasons stated herein.

a great degree and where there was some irregularity in the contract formation amounting to procedural unconscionability.)

The Arbitration Agreement at issue in this case is procedurally unconscionable. AVL's representative, Peggy Brennan, did not present the Arbitration Agreement to Harry Stewart until he had already been discharged from Leesburg Regional Medical Center and transferred to AVL's facility where he had already begun his rehabilitation[9]. (App. 5 at pp. 29-30) The problem with this is that Mr. Stewart had already started treating at AVL when he was furnished with the Arbitration Agreement and Contract for Care. He had therefore begun a relationship with his treaters and healthcare providers at AVL–-doctors, nurses, and other staff members. Brennan admitted that the first time a prospective patient sees an admission packet is after they are admitted at AVL. For all Mr. Stewart knew, he faced being ousted from AVL if he did not sign the papers Brennan presented to him. There is no evidence in this record to show that he was ever told he would not be discharged, as

[9] Although Brennan had no specific memory of Mr. Stewart, AVL apparently conceded below that she approached him while he was in Leesburg Regional Medical Center. Brennan's job is to approach patients on behalf of AVL for the purpose of them later being admitted there. Her deposition testimony focused on her procedure for making initial visits to hospitalized clients and how she handled their admission. (App. 5 at pp. 28-35) Brennan's name appears throughout a number of Mr. Stewart's admission documents, including the Agreement for Care and Arbitration Agreement. (App. 5)

Brennan admitted she had no actual memory of Stewart and that she did not recall any statements which he made to her. (App. 5 at pp. 26; 55)

Facing this situation, Mr. Stewart had little choice but to sign the Contract for Care and Arbitration Agreement because had he not done so, he would potentially risk the discontinuation of the rehabilitation process he had begun. Mr. Stewart had little or no opportunity to understand the terms of the Contract for Care and Arbitration Agreement or to negotiate them. "One of the hallmarks of procedural unconscionability is the absence of any meaningful choice on the part of the consumer." See Powertel v. Baxley, 743 So.2d at 575.

The fair and logical time to have presented Mr. Stewart with the Agreement for Care and Arbitration Agreement would have been at Leesburg Regional Medical Center where Brennan initially approached him, i.e., before he started his rehabilitation at AVL. Brennan's admission that the first time a patient sees an admissions packet is after they have arrived at AVL (as opposed to in the hospital from which they were transferred) is telling. (App. 5 at p. 30) AVL's practice is no accident. AVL well knows that a patient who has already begun rehabilitation at its facility is in no position to negotiate the terms and conditions of any documents which are presented to them. AVL also knows

that the overwhelming likelihood in these circumstances is that the patient will sign the Agreement for Care and Arbitration Agreement in order to receive its rehabilitation services.

The trial court's invocation of the phrase "freedom to contract" thus does not realistically characterize the situation in which Harry Stewart was presented the documents at issue. Ms. Brennan's candid remark at her deposition is more on point: "The only answer I can give you is if I was bringing my loved one and putting them in a facility I would not sign any agreement without first running it by my lawyer." (App. 5 at p. 64)

The Arbitration Agreement and Agreement for Care which contains it are both adhesion contracts. An adhesion contract is:

> [a] standardized contract form offered to consumers of goods and services on essentially [a] 'take it or leave it' basis without affording [the] consumer [a] realistic opportunity to bargain and under such conditions that [the] consumer cannot obtain [the] desired product or services except by acquiescing in the form contract.

Powertel, 743 So.2d at 574 (quoting Black's Law Dictionary (6th Ed. 1990)). That AVL's Agreement for Care and Arbitration Agreement are adhesion contracts is a significant factor in the determination of procedural unconscionability. "Although not dispositive of this point, it is significant that the arbitration clause is an adhesion contract." Powertel, 743

So.2d at 574. AVL's Agreement for Care and Arbitration Agreement are undeniably form contracts which were presented to Mr. Stewart on a "take it or leave it basis" without a realistic opportunity to bargain. Once he had already begun his rehabilitation treatment at AVL, Mr. Stewart was hardly in a position to negotiate as to the terms and conditions of these documents, and it is clear that he could not have received AVL's "desired. . . services" unless he acquiesced to their form. Id. See also Romano v. Manor Care, 861 So.2d 59, supra (arbitration clause was procedurally unconscionable where elderly husband had been asked to sign admission documents on behalf of his wife after she had already been admitted to nursing home).

Further compounding the inequitable circumstances surrounding the Agreement for Care and Admission Agreement was the manner in which they were presented and explained to Mr. Stewart. The person presenting these documents, Ms. Brennan[10], had no legal training. (App. 5 at p. 9) She could not therefore have understood the magnitude of the legal rights that

[10] Because Ms. Brennan's testimony was presented at the hearing below by deposition, this Court is in the same position as the trial court in regard to how it views such testimony. See Metropolitan Dade County v. Pope, 615 So.2d 856 (Fla. 1st DCA 1993)(appellate court's vantage point in interpreting medical evidence pertaining to workers' compensation claimant's back injury was not inferior to that of JCC and, thus, deference to JCC's finding was not necessary, where all medical testimony was introduced by deposition).

the Agreement for Care and Arbitration Agreement are meant to curtail. Brennan did not know what happens if a resident goes to arbitration and does not like the result, nor did she know what was meant by binding arbitration. (App. 5 at pp. 45-46). She did not know why an exculpatory clause which released AVL from any liability for injuries while the resident was not under the direct care and supervision of the nursing home was important. (App. 5 at p. 53) Exculpatory clauses are plainly very important, and a resident deserves a meaningful explanation of such a clause.

AVL's Agreement for Care and Arbitration Agreement are also substantively unconscionable. A case is made out for substantive unconscionability by showing "that the terms of the contract are unreasonable and unfair." Kohl v. Bay Colony ClubCondominium, Inc., 398 So.2d 865, 868 (Fla. 4th DCA 1981). "One indicator of substantive unconscionability is that the agreement requires the customer to give up other legal remedies." Powertel, Inc. v. Bexley, supra, 743 So.2d at 576.

AVL's Agreement for Care and Arbitration Agreement would require Mr. Stewart and any other patient who signs it to give up significant legal remedies. Although parties may agree to arbitrate statutory claims, even ones involving important social policies, arbitration must provide the prospective litigant with

an effective way to vindicate his or her statutory cause of action in the arbitral forum. See Green Tree Fin. Corp-Ala. v. Randolph, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)(citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)).

The exculpatory clause which appears in the Agreement for Care would require that a resident "release the nursing home, it's personal [sic], and attending physician from any liability for any event, accident, or deterioration of medical condition while the resident is away from the nursing home and not under the direct care and supervision of the nursing home, or if the resident should leave the nursing home, or if the resident should leave the nursing home for any reason without first giving notice." (App. 6) Again, the Arbitration Agreement and Contract for Care are both part of the same agreement. What is striking about the foregoing language is that it encompasses not only common law tort claims, but also statutory causes of action such as those established by the Florida legislature under the Nursing Home Resident's Rights Act, Chapter 400, Florida Statutes. In this sense, it is equal in breadth to many of the other arbitration provisions which Florida courts have struck down on the grounds that they defeated the remedial provisions of a statute. See, e.g., Romano v. Manor Care, Inc., supra

(arbitration agreement did not provide adequate mechanisms for vindication of patient's statutory rights under Nursing Home Resident Rights Act); Alterra Healthcare Corp. v. Bryant, 937 So.2d 263 (Fla. 4th DCA 2006)(arbitration provision defeated remedial purpose of Assisted Living Facilities Act because of waiver of punitive damages and cap on non-economic damages). Similarly, the First District Court of Appeal in Powertel, Inc. v. Bexley, supra, found an arbitration clause substantively unconscionable where the where the clause forced customers to waive important statutory remedies, including injunctive or declaratory relief under the Florida Deceptive and Unfair Trade Practices Act. To the extent that there is any ambiguity as to the extent to which AVL's exculpatory clause defeats a resident's rights under Chapter 400, it should be construed against Avante. See Seifert, supra, 750 So.2d at 641.

The Arbitration Agreement attempts to defeat another remedial purpose of Chapter 400 because of the following language: "This agreement to arbitrate shall include. . . any claim based on payment, non-payment, refund for services rendered the Resident by the Facility, breach of contract, breach of fiduciary duty, fraud or misrepresentation . . . . This shall expressly include, without limitation, claims based on Chapter 400, Florida Statutes, which allege damages in excess

of $10,000.00." (App. 6)(emphasis added). This provision would steer fraud cases, including those which arise under Chapter 400, into the closed and private process of arbitration.

This clause would permit AVL to compel arbitration of the following practices: (1) intentionally overbilling patients; (2) billing for services not provided; (3) intentionally understaffing its facility to increase profit; (4) intentionally providing care by non-qualified or underpaid staff, such as using a Certified Nurse Assistant instead of using a Registered Nurse to cut expenses. In the context of fraud claims this is particularly troubling because these are the very types of claims that ought be part of the public record so that they can be accessed and scrutinized by any person who wishes to learn about them. Further, because of the special vulnerability of elderly residents and the nature of fraud, which entails concealment and misrepresentation, such practices go to the very root of Chapter 400's remedial purpose: "The Florida legislature recognized the special vulnerabilities of nursing home residents when it codified a wide array of substantive and procedural protections." The Fiction of Freedom to Contract–Nursing Home Admission Contract Arbitration Agreements, 16 St. Thomas L. Rev. 319, 328-329 (Winter 2003)(citing sections 400.022, 400.022(1)(a)-(v)(2003), and 400.023, Florida Statutes (2003)).

Any of the practices set forth above would defeat the remedial purposes of Chapter 400, which the Florida legislature established to protect the elderly.

If there were any question about AVL's Agreement for Care and Arbitration Agreement being overreaching and unfair, one would need to look no further than the following language: "In 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 a trial by jury and have their dispute decided only by a court of competent jurisdiction in the county and state in which the facility is located." (App. 6) In other words, even if a resident or their estate were successful in arguing to a trial court that a motion to compel arbitration should be denied, they are still denied the right to a jury trial. This is because if the provision were to be followed, a judge would be left to preside over the case in a bench trial. In other words, under AVL's provision, even if you win, you still lose.

II. THE ESTATE OF HARRY L. STEWART WAS NOT AN INTENDED THIRD-PARTY BENEFICIARY OF THE "ADDENDUM TO ADMISSION AGREEMENT–ARBITRATION AGREEMENT"

The trial court's finding that the Estate of Harry L. Stewart was an intended third-party beneficiary of the Arbitration Agreement was reversible error. (App. 1 at p. 3)

The standard of review as to this issue is de novo. See Ocwen, supra, 766 So.2d at 249 (whether particular issue is subject to arbitration is a matter of contract interpretation and standard of review is therefore de novo). As argued above, the Agreement for Care and the Arbitration Agreement are unenforceable because the Estate's wrongful death claims are not encompassed by these documents and also because they are unconscionable. Accordingly, this Court need not reach the issue of whether the Estate is an intended third-party beneficiary of the Arbitration Agreement.

A third-party is an "intended beneficiary" of a contract only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit a third party or a class of persons to which that third party claims to belong. Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Limited, 647 So.2d 1028 (Fla. 4th DCA 1994). To find the requisite intent that a contract directly or primarily benefit a third party, as will allow a third party to sue for breach, it must be shown that both contracting parties intended to benefit the third party; it is insufficient to show that only one party unilaterally intended to benefit a third party. Id. See also Aetna Casualty & Surety Co.v. Jelac Corp., 505 So.2d 37 (Fla. 4th DCA 1987)(affirming trial court's denial of motion to dismiss, abate and compel arbitration where insurance company

was at most incidental beneficiary to contract and thus had no right to enforce arbitration provision.)

Several facts are key to the application of these principles. First, the Estate of Harry Stewart is nowhere mentioned in either the Agreement for Care or Arbitration Agreement. Neither of these documents show any attempt by either party to benefit the Estate. No services or other consideration of any sort inure to the Estate's benefit. Indeed, being subject to an arbitration award is hardly an advantage to anyone but the Respondents in this case. It certainly is no benefit to the Estate since arbitration would deprive it of the right to a jury trial. Second, the best that can be said is that the Respondents may have intended that the arbitration clause apply to a third-party; however, as shown above, such unilateral intent is insufficient to confer the status of third-party beneficiary. Accordingly, the trial court's finding that the Estate of Harry L. Stewart was an intended third-party beneficiary of the "Addendum to Admission Agreement–Arbitration Agreement" finds no legal or factual support in the record and was reversible error.

For the reasons set forth above, the Arbitration Agreement at issue cannot bind Harry Stewart's beneficiaries or estate to arbitrate their claim for wrongful death. The use of

arbitration agreements in nursing home disputes is inherently a very questionable practice[11] given the vulnerability of the elderly, the relative lack of bargaining power between a resident and a nursing home, and the inevitable failure of a private forum such as arbitration to publicly vindicate statutory rights of obvious public interest such as those which appear in Chapter 400. In cases such as this one, where claims for wrongful death are involved, the levels of negligence committed at a nursing home are often egregious and result in real tragedy to individuals and families. These are the very types of claims which should be resolved in public view. Although the prevention of future death and injury is presumably one of the goals of our tort system, such a goal seems improbable as long as wrongful death cases are decided behind closed doors. There is no reason to believe private arbitration will ever successfully channel nursing homes into behavior which will give greater protection to residents. The best assurance for achieving this goal is a jury verdict in a public forum.

[11] Despite claims to the contrary, arbitration clauses have not reduced litigation in the context of nursing homes cases. See ManorCare Health Servs., Inc. v. Stiehl, 22 So.3d 96 (Fla. 2d DCA 2009), in which Judge Altenbernd lists 35 written decisions in Florida addressing arbitration agreements between nursing home operators and their residents.

CONCLUSION

This Court should quash the Fifth District Court of Appeals' decision and answer the certified question in the affirmative. The trial court's granting of the Respondents' motions to compel arbitration should be reversed, and this cause should be remanded with instructions that it be permitted to proceed to trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been by U.S. Mail this 9th day of February, 2011, to: Teresa A. Arnold-Simmons, Esquire, One Independent Drive, Suite 1650, Jacksonville, Florida 32202; and Lisa J. Augspurger, Esquire, Bush, Augspurger & Lynch, P.A., 411 East Jackson Street, Orlando, Florida 32801.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief was typed in Courier New 12-point font.

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