IN THE FLORIDA SUPREME COURT

CASE NO. SC11-2468

FOURTH D.C.A. CASE NO. 4D10-1803
L.T. CASE NO. 502009-CA-028465XXXXMB

VISITING NURSE ASSOCIATION OF FLORIDA, INC.,

Petitioner,

vs.

JUPITER MEDICAL CENTER, INC.,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION
On Discretionary Review from the Fourth District Court of Appeal

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STATEMENT OF USAGE

The Respondent and Appellant below is Jupiter Medical Center, Inc. referred to herein as "JMC" or "Respondent."

The Petitioner and Appellee below is Visiting Nurses Association of Florida, Inc. referred to herein as "VNA" or "Petitioner."

The Fourth District Court of Appeal's opinion below, published at 72 So. 3d 184, is cited herein as "Opinion."

Petitioner Visiting Nurses Association of Florida, Inc.'s Brief on Jurisdiction is cited herein as "Pet. Br. on Juris."

The term "Award" will be used herein to collectively refer to the Final Award of Arbitrators entered by the arbitrators on October 7, 2009, and the Clarification/Modification of Award entered by the arbitrators on November 5, 2009

STATEMENT OF THE CASE AND FACTS

JMC is a non-profit corporation which operates a not-for-profit community hospital located in Jupiter, Florida. VNA is a corporation which owns and operates home health agencies throughout Florida, and provides home health care services within a patient's home after the patient is discharged from the hospital setting. The dispute between JMC and VNA arises from a transaction between the parties in 2005, whereby VNA acquired certain specified assets relating to JMC's then existing home health agency business. The parties' purchase/sale agreement was memorialized in the Home Health Agreement entered into on February 28, 2005 (the "Purchase Agreement"), and the total amount of the purchase price paid by VNA to JMC was $639,000.

Consistent with the governing state and federal laws and regulations strictly prohibiting the sale/purchase of patient referrals and/or Medicare patient referrals, the language in the Purchase Agreement did not include any reference, requirement or suggestion that JMC was promising to sell, make or otherwise influence any *future* home health agency patient referrals to VNA.[1]

[1] As briefed in detail before the 4th DCA, any such agreement to promise, influence or sell future patient referrals and Medicare patient referrals would be illegal and criminal in direct violation of multiple state and federal laws, rules and regulations including: (i) Fla. Stat. § 456.054 ("Kickbacks prohibited"), Fla. Stat. § 817.505, ("Florida Patient Brokering Act"), and Fla. Stat. § 395.0185 ("Rebates prohibited"); (ii) 42 C.F.R. § 482.43 relating to Medicare Hospital Conditions of

(continued…)

VNA subsequently became dissatisfied with the level of profitability of the home health agency business that it had purchased from JMC, and VNA began complaining about the lack of Medicare patient referrals and patient referrals from JMC. VNA proceeded to commence the underlying arbitration proceeding against JMC, wherein VNA asserted breach of contract claims against JMC. In the arbitration proceeding, VNA was seeking to recover millions of dollars of damages from JMC based upon allegations VNA did not receive a sufficient flow of *future Medicare patient referrals and patient referrals* from JMC. Notably, the illegality issue was not raised, addressed or argued during the course of the underlying arbitration proceeding because JMC had assumed that it was understood and undisputed that the Purchase Agreement did not require (and could not require) JMC to make, influence and/or steer *illegal* future patient referrals to VNA.

After the arbitration proceeding was conducted, the Arbitration Panel issued a facially illegal 14 page written award (the "Award"), wherein the Panel improperly construed the Purchase Agreement so as to make it an ***illegal and criminal contract*** purportedly requiring JMC to make, steer and/or influence illegal future Medicare patient referrals and patient referrals to VNA's home health agency in exchange for the direct monetary remuneration (in the form of the

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Participation: Discharge Planning; (iii) 42 USC § 1320a-7b(b), the Federal Anti-Kickback Statute; and (iv) 42 USC § 1320a-7a , Civil Monetary Penalties Law.

$639,000 acquisition purchase price and other consideration). See Award. The Panel also proceeded to award VNA monetary damages in "the sum of $1,251,213.00" (along with substantial attorneys' fees and costs) based upon the purported loss of the illegal Medicare patient referrals. Id.

JMC promptly moved to re-open the arbitration proceeding to address the illegality issues, but the Panel summarily denied JMC's motion to re-open, and the Panel did not address the illegality issues. JMC sought appropriate judicial relief in the lower trial court by moving to vacate the Award, and by opposing the judicial confirmation of the Award, based upon the deeply rooted legal principle that courts cannot judicially condone illegal contracts and/or criminal acts. Specifically, JMC challenged the Award on the grounds that the Award imposed illegal contractual obligations upon the parties in direct violation of multiple state and federal laws, rules and regulations prohibiting any such agreement to promise, influence or sell future patient referrals. The lower trial court did not even consider the critical illegality issues, and the trial court suggested that the issue be submitted to the 4th DCA for resolution. As such, JMC filed its appeal with the 4th DCA raising the core issue as to whether the lower court erred by refusing to vacate, and by judicially condoning/enforcing, the Award which was facially illegal and based upon a contract which, as construed by the Panel, was illegal and criminal in nature. See Appellate Brief.

The 4th DCA rendered its well reasoned Opinion in this case, and ruled that "Florida courts should not enforce an arbitrator's award based on an illegal contract and therefore the trial court erred in refusing to consider the issue." See Opinion at pg. 2. The 4th DCA relied upon the deeply rooted and well established legal principle that "courts will not enforce illegal contracts," and that there "rests upon the courts the affirmative duty of refusing to sustain" acts and/or contracts which are illegal, criminal and/or in violation of Florida law. Id. at 2-3.

VNA then moved for rehearing and rehearing *en banc* by arguing that there was a "conflict" in decisions and a need "to maintain uniformity in the court's decisions." The 4th DCA rejected VNA's arguments, and denied the motions for rehearing and rehearing *en banc*. VNA is now once again making the same meritless arguments regarding purported "conflicts" with other decisions, and VNA is making over generalized arguments in a strained attempt to suggest that there is an "express and direct" conflict as necessary to establish jurisdiction.

SUMMARY OF THE ARGUMENT

In this case, there is no "express and direct" conflict between the 4th DCA's Opinion and any other decision referenced by VNA. Not only did the 4th DCA address the illegality issue in a fundamentally different procedural and factual context, but no conflict exists with the other decisions because the ruling in the Opinion was based upon the well established and undeniable principle that a

Florida court cannot judicially condone criminal conduct and/or an illegal contract. Therefore, conflict jurisdiction does not exist.

ARGUMENT

I. THE LIMITED GROUNDS FOR CONFLICT JURISDICTION WHERE "EXPRESS AND DIRECT" CONFLICT EXISTS

This Court's conflict jurisdiction is limited to review of "any decision of a district court of appeal that . . . *expressly and directly conflicts* with a decision of another district court of appeal or of the Supreme Court on the same question of law." See Fla. Const. art. V, § 3(b)(3) (emphasis added). "Conflict jurisdiction between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." See Dep't of Health v. Nat'l Adoption Counseling, 498 So. 2d 888, 889 (Fla. 1986) (dismissing petition for review because there was no express and direct conflict). "[I]nherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." Id. Significantly, the alleged conflict "must be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court; in other words, ***the decisions must be based practically on the same state of facts and announce antagonistic conclusions***." Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958) (emphasis added) (conflict jurisdiction is limited to "where there is a real and embarrassing conflict of opinion

and authority between decisions"). Conflict jurisdiction does not exist here because there are no "express and direct" conflicts with the 4th DCA's Opinion.

II. THE OPINION BY THE FOURTH DISTRICT COURT APPEALS DOES NOT "EXPRESSLY AND DIRECTLY CONFLICT" WITH ANY OF THE CLEARLY DISTINGUISHABLE DECISIONS RELIED UPON BY PETITIONER.

A. There Is No "Express And Direct" Conflict Between The 4th DCA's Opinion In This Case, And The Two Cardegna Decisions Or With The 5th DCA's Commercial Interiors Case

Despite VNA's generalized arguments, there is no "express and direct conflict" between the 4th DCA's Opinion, and the decisions in Buckeye Check Cashing, Inc. v. Cardegna , 546 U.S. 440, 449 (2006) and Cardegna v. Buckeye Check Cashing, Inc., 930 So. 2d 610 (Fla. 2006) (collectively referred to as the "Cardegna Decisions"), nor is there any "express or direct conflict" with the 5th DCA's opinion in Commercial Interiors Corp. of Boca Raton v. Pinkerton & Laws, Inc., 19 So. 3d 1062 (5th DCA 2009). The various decisions referenced by VNA dealt with different factual and procedural circumstances, addressed different legal issues, and do not support conflict jurisdiction.

1. No Express and Direct Conflict With The Cardegna Decisions

Unlike the instant case where the illegality issue is being raised after the *completion* of the arbitration process and after the issuance of an illegal arbitration Award, the Cardegna Decisions dealt with the clearly distinguishable and inapposite situation where one party was opposing the other party's ***motion to***

compel arbitration at the inception of the dispute (i.e., pre-arbitration) by arguing that the underlying contracts and/or certain provisions of the contracts (other than the arbitration provisions) were either illegal, unconscionable or otherwise unenforceable. See Buckeye Check Cashing v. Cardegna, 824 So. 2d. 228, 232 (Fla. 4th DCA 2002), *approved* 930 So. 2d 610 (Fla. 2006) (explaining that "we reverse the trial court's order denying appellant's *motion to compel arbitration* and remand this cause for further proceedings" because "appellees did not argue that they did not enter into the arbitration agreement, nor did they challenge the validity of the terms of the arbitration agreement.") (emphasis added).

In actuality, the holdings in Cardegna Decisions merely provide that where a party is attempting to avoid arbitration at the inception of a case by challenging the "validity of the contract as a whole, and not specifically to the arbitration clause," then the arbitrator must consider the challenge to the validity of the contract "in the first instance." Cardegna, 546 U.S. at 445-446, 449 (explaining that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator *in the first instance*.") (emphasis added). This holding is not even applicable to the facts and procedural circumstances in the instant case, and it certainly does not conflict with the 4th DCA's decision.

The Cardegna Decisions did not deal with a situation, such as this, where *after* the completion of arbitration, a party (such as JMC) is properly challenging

the proposed *judicial enforcement* of an illegal arbitration Award based upon a contract which, as construed by the arbitrators, is illegal/criminal in nature.[2] See Opinion at pgs. 1, 3. The Cardegna Decisions did not address a situation where, as here, a party asked a Florida court to judicially condone an illegal contract and an illegal award after the completion of arbitration. Accordingly, the four corners of the 4th DCA's Opinion illustrate that the factual, procedural and legal issues in this case are vastly different than those in the Cardegna Decisions, and there is no direct and express conflict with the clearly distinguishable Cardegna Decisions.

2. No Direct And Express Conflict With Commercial Interiors

There is also no "express and direct conflict" between the 4th DCA's Opinion in this case, and the 5th DCA's opinion in Commercial Interiors. Once again, the factual, procedural and legal issues are entirely different between the two cases, and there is simply no conflict. Unlike the unique factual circumstances in the instant case involving healthcare laws and patient self-referral laws, the Commercial Interiors case merely involved a straightforward determination of a contract's enforceability under Fla. Stat. § 489.128, which requires that contractors be "licensed" in order to enforce their rights under the contract. Commercial

[2] In this case, the judicial challenge is being made after the completion of the arbitration proceeding, and the arbitration Panel has already issued the improper and illegal Award.

Interiors, 19 So. 3d at 1063.[3] In Commercial Interiors, a party was challenging the enforceability/legality of a subcontract *in the arbitration proceeding* by arguing that the other party was not a properly "licensed" contractor, and therefore was not entitled to any payment whatsoever under the subcontracts. Id. at 1063. The arbitrator conducted an "evidentiary hearing" on that specific legality issue, and determined that the plaintiff "did not violate section 489.128," and that the defendant was "estopped from asserting the claimed illegality of the subcontracts." Id. Importantly, unlike Commercial Interiors, in this case, the arbitration Panel did not (and could not) consider the illegality issues in the "first instance," and the Panel did not conduct any "evidentiary hearing" on the illegality issues because the serious illegality issues first arose ***after***, and as a result of, the Panel's issuance of the illegal arbitration Award, and improper construction the Purchase Agreement so as to impose illegal and criminal contractual obligations upon the parties.

Unlike Commercial Interiors, the Panel in this case did not make any factual findings or legal conclusion regarding the illegality issue because "[t]he issue was initially raised with the arbitration panel, *though not until after the award was entered*," and "JMC's motion to reopen the arbitration was denied." See Opinion at pgs. 1, 3. In Commercial Interiors, the 5th DCA explained that "the arbitrator

[3] See also Fla. Stat. § 489.128(1) (2011) ("As a matter of public policy, contracts entered into . . . by an unlicensed contractor shall be unenforceable in law or in equity by the unlicensed contractor.").

properly considered the illegality of the subject contract in the 'first instance,'" and that "[t]he issue we must now confront is what standard the trial court should use if asked to review the arbitrator's ruling on illegality." Id. at 1064. Here, the critical illegality issue had not been properly addressed in any forum, and this was certainly not a case where there are concerns that "the trial court simply disagreed with the arbitrator's application of the law to the facts of this case." Id.

Finally, VNA also argues that the 4th DCA made a mistake by relying upon two cases which purportedly predate and conflict with the Cardegna Decisions and Commercial Interiors. However, "[t]he issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before [the Court] for review, not whether there is conflict in a prior written opinion which is now cited for authority." Dodi Publ'g v. Editorial Am., S.A., 385 So. 2d 1369, 1369 (Fla. 1980). Furthermore, the actual aspects of those two decisions referenced by the 4th DCA in the Opinion (i.e., that "[a]n arbitrator cannot order a party to perform an illegal act") does not conflict with any decisions referenced by VNA, and is established law.

CONCLUSION

Because VNA has failed to establish that the 4th DCA's Opinion expressly and directly conflicts with any decisions, this Court must dismiss the petition and decline to exercise its discretionary jurisdiction over this matter.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Brief on Jurisdiction complies this the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered via U.S. Mail to counsel for Petitioner, David B. Earle, Ross, Earle & Bonan, P.A., P.O. Box 2401, Stuart, Florida 34995 this 23rd day of January, 2012.

/s/ Matthew D. Grosack
Matthew D. Grosack