IN THE FLORIDA SUPREME COURT

CASE NUMBER SC11-__________

Fourth DCA Case No: 4D10-1803

VISITING NURSE ASSOCIATION OF
FLORIDA, INC.,

Petitioner,

v.

JUPITER MEDICAL CENTER, INC.,

Respondent.

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

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STATEMENT OF THE CASE AND FACTS

Petitioner, Visiting Nurse Association of Florida, Inc. ("VNA"), seeks review of a September 14, 2011 Opinion of the Fourth District Court of Appeal of Florida. VNA is a Florida not-for-profit corporation which provides post-hospitalization home health care to patients in 17 Florida counties. VNA entered into a contract (the "contract") with Jupiter Medical Center, Inc. ("JMC") to purchase JMC's hospital-based home health agency. The contract was drafted by JMC's attorney and was specifically tailored to assure compliance with applicable federal and state laws.

Subsequently, VNA filed an arbitration claim alleging JMC breached the contract by failing to abide by the contract's discharge protocols and also by unilaterally terminating VNA's in-hospital office lease. Following a two-day arbitration hearing, in which JMC admitted the legality of the contract, a three-person arbitration panel determined JMC breached the contract and awarded the sum of $1,251,213.00 in damages to VNA.

Upon entry of the award against it, JMC immediately filed a motion for rehearing and, more importantly, a motion to re-open the arbitration proceeding itself. Having already admitted the contract's legality during arbitration, JMC raised a claim that the arbitrators' award interpreted the contract illegally and in violation of federal and state statutes governing referrals. The arbitrators granted

the motion to re-open the arbitration proceeding in order to consider JMC's illegality argument, but denied the motion on its merits.

As a result, JMC filed a motion to vacate the arbitration award in the U.S. District Court for the Southern District of Florida, again claiming illegality. But, after extensive briefing by the parties, the federal court dismissed JMC’s action by determining JMC's chief complaint involved the arbitration panel’s interpretation of a contract and was, therefore, a matter of state law. The federal court held it did not have subject matter jurisdiction. JMC also had simultaneously filed an identical action to vacate the arbitration award with the Palm Beach County Circuit Court. VNA ultimately filed a motion to dismiss JMC’s state court action and a motion to enforce the arbitration award. After a noticed hearing, the trial court denied JMC’s motion to vacate and entered a final judgment based upon the arbitration award in favor of VNA. JMC sought further review in the Fourth District Court of Appeal, which eventually ruled in favor of JMC. The Fourth District held that “when the issue of a contract’s legality is raised, the trial court must make that determination prior to deciding whether to enforce an arbitral award based thereon.” *See* Opinion, attached. The Fourth District Opinion explicitly ruled that arbitrators cannot determine issues of legality.

VNA timely filed its notice to invoke this Court's discretionary jurisdiction on December 2, 2011, after its Motion for Rehearing and Rehearing en banc was denied without further opinion.

SUMMARY OF THE ARGUMENT

The central question is whether an arbitrator can determine the legality of a contract or whether that determination is left for judicial review. The Fourth District, in the instant case, held that it is the trial court that must review the underlying contract for illegality before affirming an arbitration award. But, the district court's decision cannot be reconciled with the United States Supreme Court's holding in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) or this Court's holding in *Cardegna v. Buckeye Check Cashing, Inc.*, 930 So. 2d 610 (Fla. 2006). Furthermore, the Fourth District's opinion in the instant case directly conflicts with *Commercial Interiors Corp. of Boca Raton v. Pinkerton & Laws, Inc.,* 19 So. 3d 1062 (Fla. 5th DCA 2009) in which the Fifth District Court of Appeal specifically held that the trial court may not reconsider an arbitrator's decision regarding the legality of a contract. The Fourth District opinion also is contrary to the express statutory language of § 682.13, Fla. Stat. (2010), upon which the Fifth District's *Commercial Interiors* decision is based.

Florida's strong public policy supporting arbitration favors review. Parties to a contract select arbitration as an efficient and less expensive method of dispute resolution. Allowing a court to reconsider the substantive determinations made by arbitrators strips the contracting parties of the benefit of their chosen forum and nullifies the process itself.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE FOURTH DISTRICT'S VNA OPINION DIRECTLY CONFLICTS WITH THE FIFTH DISTRICT'S DECISION IN *COMMERCIAL INTERIORS OF BOCA RATON V. PINKERTON AND LAWS, INC.,* 19 SO. 3D 1062 (FLA. 5TH DCA 2009). THE FOURTH DISTRICT'S RULING ALSO CONFLICTS WITH THE FLORIDA SUPREME COURT DECISION IN *CARDEGNA V. BUCKEYE CHECK CASHING, INC*., 930 SO. 2D 610 (FLA. 2006) WHICH ADOPTED THE UNITED STATES SUPREME COURT DECISION OF *BUCKEYE CHECK CASHING, INC. V. CARDEGNA*, 546 U.S. 440 (2006).

In *Commercial Interiors Corp. of Boca Raton v. Pinckerton & Laws, Inc.,* 19 So. 3d 1062 (Fla. 5th DCA 2009), the parties submitted the issue of legality of a contract to arbitration. The defendant, Pinkerton & Laws, the party ultimately seeking to invalidate the contract, had drafted the agreement and asked the arbitrators to interpret it. The arbitrators determined the contract was legal.

Pinkerton & Laws then moved to vacate the arbitrator's decision in circuit court. The circuit court agreed with Pinkerton & Laws. The trial judge found the contract was illegal, vacated the arbitration determination and dismissed the case with prejudice. On appeal, however, the Fifth District Court of Appeal reversed and held that a trial court's disagreement with an arbitrator's interpretation was not a sufficient basis to set aside the arbitrator's determination. The Fifth District's decision is consistent with the general rule of law that an arbitration award may not be vacated on the basis that an arbitrator made an error of law.

The facts of *Commercial Interiors* are sufficiently identical to the instant case that the holdings cannot be reconciled. Here, as in *Commercial Interiors*, the contract was drafted by the party now claiming illegality. After its illegality argument failed with the arbitrators, the federal district court and the Palm Beach County Circuit Court, JMC persuaded the Fourth District to hold that a trial court, not arbitrators, must review the legality of the contract before an arbitration award can be approved. That determination conflicts directly with *Commercial Interiors*.

The Fourth District opinion also directly conflicts with the holding of this Court in *Cardegna v. Buckeye Check Cashing, Inc.*, 930 So. 2d 610 (Fla. 2006).[1] In *Buckeye,* borrowers brought a class action suit against a lender, claiming the

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[1] In fact, the Fourth District's instant opinion directly conflicts with that district court's own recent holdings on this issue. *See ATP Flight School, LLC v. Sax,* 44 So. 3d 248 (Fla. 4th DCA 2010)*; Roman v. Atl. Coast Constr. and Dev., Inc.,* 44 So. 3d 222 (Fla. 4th DCA 2010).

lender was making usurious loans disguised as check cashing transactions in violation of state law. The lender moved to compel arbitration which the trial judge denied. The Fourth District held the issue of whether the contract was an illegal usurious loan was for the arbitrator to decide. *Buckeye Check Cashing, Inc. v. Cardegna,* 824 So. 2d 228 (Fla. 4th DCA 2002) *approved,* 930 So. 2d 610 (Fla. 2006). This Court initially reversed the Fourth District, holding the issue of illegality requires judicial determination. *Cardegna v. Buckeye Check Cashing, Inc.,* 894 So. 2d 860 (Fla. 2005) *rev'd and remanded,* 546 U.S. 440 (2006) and *opinion withdrawn,* 930 So. 2d 610 (Fla. 2006). However, the United States Supreme Court reversed this Court's ruling, holding that the determination of whether the contract was illegal was for the arbitrator, not the court.

> We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006). This Court then withdrew its prior opinion and recognized that contract interpretation, including a contract's legality, is determined by the arbitrator. Again, the Fourth District's VNA opinion directly conflicts both with the U.S. Supreme Court precedent and this Court's precedent because it strips the arbitrator of the authority to determine the legality of a contract and requires a court to make that

determination. This opinion also engrafts a new, unwritten basis to vacate an arbitration award into the narrowly drawn provisions of § 682.13, Fla. Stat. (2010), where "the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." § 682.13(1)(e), Fla. Stat. (2010). Based upon the Fourth District's instant opinion, any party may now challenge and prolong the finality of an arbitration award by asserting the underlying contract is illegal.

Florida's strong public policy favoring arbitration lends great support to the Court's exercise of its discretionary jurisdiction to review the Fourth District's decision. In *Schnurmacher Holding, Inc. v. Noriega,* 542 So. 2d 1327 (Fla. 1989), the parties submitted to arbitration the issue of whether the landlord or the tenant were obligated to pay state taxes on the rental amount. The arbitrator arguably ruled incorrectly as a matter of law. But, this Court held the trial judge was not to revisit this issue because the parties agreed to the alternative forum, the issue was what they asked the arbitrator to decide, and finality of the decision is paramount, even if the arbitrator's legal determination was incorrect. The court stated:

> The reason for the high degree of conclusiveness which attaches to an award made by arbitrators is that the parties have by agreement substituted a tribunal of their own choosing for the one provided and established by law, to the end that the expense usually incurred by litigation may be avoided and the cause speedily and finally determined. To permit the dissatisfied party to set aside the award and invoke the judgment of the court upon the merits of the cause would

> be to render it merely a step in the settlement of the controversy, instead of a final determination of it.

Schnurmacher at 1328-29.

Likewise, pursuant to the contract, JMC and VNA selected arbitration as their forum and agreed to have the arbitration panel decide the contract's validity. In its motion to re-open arbitration, JMC specifically asked the arbitration panel to consider its claims of illegality. The panel considered those claims and denied them on the merits. Now this case has taken on an economic and procedural life never intended by the parties. JMC sought review in the federal district court for the Southern District of Florida, the state trial court, and the Fourth District Court of Appeal. Permitting such judicial challenges to an arbitrator's decision dramatically increases the expense of litigation, avoids the speed and finality contracted for between the parties and nullifies the arbitration process itself.

While there certainly are strong public policy reasons not to enforce illegal contracts, the cases relied upon by the district court in the instant case consider the issue in a vacuum. *Title & Trust Co. of Fla. v. Parker*, 468 So. 2d 520, 524 (Fla. 1st DCA 1985); *Gonzalez v. Trujillo*, 179 So. 2d 896, 897-98 (Fla. 3d DCA 1965); *Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th DCA 2001); *Local No. 234 of United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada v. Henley & Beckwith, Inc.,* 66 So. 2d 818, 821 (Fla. 1953). None of these cases analyze the competing policy and evolution of precedent allowing an

arbitrator to fully and finally decide issues of contract legality. Instead, these cases deal with the general historical rule of law that illegal contracts should not be enforced.

The Fourth District's reliance on *Party Yards, Inc. v. Templeton,* 751 So. 2d 121 (Fla. 5th DCA 2000) and *I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp*., 600 F. Supp. 92, 94 (S.D. Fla. 1984) also is misplaced. Each of these cases predates and directly conflicts with the U.S. Supreme Court's and this Court's resolution of the issue in *Buckeye* and also directly conflicts with the Fifth District's later holding in *Commercial Interiors.*

CONCLUSION

This Court has discretionary jurisdiction to review the district court's decision. Petitioner, Visiting Nurses Association of Florida, Inc., respectfully requests this court to exercise its jurisdiction to consider the merits of Petitioner's argument and resolve the conflict by quashing the instant decision of the district court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Petition has been furnished via U.S. Mail to Michael G. Austin, Esquire, 201 Biscayne Blvd., Suite 2200, Miami, Florida 33131 and via Federal Express and email (e-file@flcourts.org) (delivery scheduled for December 12, 2011) to the Florida Supreme Court, Attn.: Clerk's Office, 500 South Duval Street, Tallahassee, Florida 32399 on this 9th day of December, 2011.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2), i.e. Times New Roman 14 pt.

By: s/ David B. Earle
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