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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2468

Lower Tribunal Case No.: 4D10-1803, 502009CA028465

VISITING NURSE ASSOCIATION OF FLORIDA, INC.,

Appellant,

v.

JUPITER MEDICAL CENTER, INC.,

Appellee.

ON DISCRETIONARY REVIEW OF AN OPINION
OF THE FOURTH DISTRICT COURT OF APPEAL

APPELLANT'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF USAGE

The Appellant and Claimant in the arbitration below is Visiting Nurse Association of Florida, Inc. referred to herein as "VNA."

The Appellee and Respondent in the arbitration below is Jupiter Medical Center, Inc. referred to herein as "JMC."

The Record on Appeal is cited herein as "R.v.x.z" with "v" representing the volume, "x" representing the page number(s), and in selected citations, the "z" further describing the material. Any Supplemental Record will follow the same format, but be designated SR.v.x.z.

The term "Award" will reference the Interim Award issued by the Arbitrators on May 20, 2009.

The term "Attorney's Fee Award" will reference the award for attorney's fees entered by the Arbitrators on October 7, 2009.

The term "Clarification Award" will reference the Clarification entered by the Arbitrators on November 5, 2009.

STATEMENT OF CASE AND FACTS

This action arises from Visiting Nurse Association of Florida, Inc.'s ("VNA") February 2005 purchase of a hospital-based home health care agency from Jupiter Medical Center, Inc. ("JMC"). At issue is whether a court must reconsider the legality of the underlying contract before enforcing an arbitration award where the contract was found to be valid. (R.1.27-40).

A. The Parties.

VNA is a Florida not-for-profit corporation which provides home health care services in a number of Florida counties, including Palm Beach County. JMC is a Florida not-for-profit corporation operating a community hospital located in Palm Beach County since the 1970's.

B. The Purchase.

During 2004, JMC and VNA entered into discussions which led to JMC's agreement to sell its wholly-owned home health care agency. (R.1.27-31). VNA found the opportunity to purchase JMC's well-established home health care business attractive. A lengthy period ensued during which due diligence was conducted. In particular, JMC shared financial information including 2005 income and expense projections for its hospital-based health care agency. (R.1.28-29). When it became clear that the parties would proceed with the purchase, JMC's outside general counsel, Timothy Monaghan, Esquire, a health care specialist

practicing in Palm Beach County, Florida, undertook the responsibility of drafting the purchase and sale documents. (R.1.29-30, 48)(SR.1.520). After closing of the purchase, the parties contemplated that the business would continue just as JMC had been conducting it for more than 20 years. (R.1.30).

C. **The Documents.**

The negotiations between these two long-established health care providers resulted in a multi-tiered purchase agreement, memorialized by several documents (collectively referred to as the "Agreement"). (R.1.30.FN4).

The central document was entitled "Home Health Care Agreement" (R.1.41-51) and it included provisions for the purchase price and related terms, and also an agreement that JMC would not compete with VNA. Executed simultaneously therewith were separate documents for the assumption of an off-campus lease (the "off-campus lease") where JMC housed the bulk of its home health care operations, the creation of a lease for VNA within the hospital premises to facilitate home health care admissions, and transition-related documents for existing patients, employees and billing/accounts. (R.1.41-69). Significantly, the Home Health Care Agreement included a broad provision requiring arbitration of all disputes. (R.1.50.¶32). Neither party has challenged the validity of the arbitration provision.

Given the highly regulated nature of the home health care industry, JMC's attorney drafted the Home Health Care Agreement, and the related documents, with an eye towards compliance with federal and state law. (R.1.6-9,34)(SR.1.520). In particular, he drafted an Exhibit "D" to the Home Health Care Agreement (R.1.66)(SR.1.522) which set out procedures for the discharge of patients requiring home health care. (R.1.29-30). JMC's attorney also drafted contractual language confirming the parties' intent that the Agreement be construed consistently with all governing regulatory statutes and rules. (R.1.49.¶28). JMC's attorney also prepared a hospital-based "office lease" which provided space for VNA's admission coordinators within the hospital's premises. (R.1.29,67-69). These admission coordinators were allowed to have access to JMC's discharge planners. (R.1.67-69). This mirrored the long-time practice of JMC's home health agency and it was considered a material part of the transaction. (R.1.35-36). The office lease included a market value rental payment. (R.1.67-69).

During the course of the negotiations, JMC's attorney had an appraisal conducted of the existing home health agency. (R.1.29). To avoid any suggestion that the transaction constituted a payment for referrals, and as a result of that appraisal, the purchase price was actually raised. (R.1.29).

In February of 2005, the purchase closed. (R.1.30,41). VNA paid the purchase price, assumed or undertook the various leases, hired most of the JMC's

home health agency employees, moved VNA's admissions coordinator into leased space in the hospital and commenced providing home health care to discharged patients referred to VNA. (R.1.29-31). JMC surrendered its home health agency license. (R.1.30). The parties intended the transition to be seamless. (R.1.30)(SR.1.522).

D. The Breach.

After a period of time, VNA's employees began to perceive actions by JMC's employees that were contrary to the terms of the Agreement. (R.1.31). These actions included a complete disregard of the discharge protocol outlined in Exhibit "D" and the gradual reduction (and eventual elimination) of access between VNA's admission coordinators and JMC's discharge planners. (R.1.31-33). VNA's initial attempts to amicably resolve these matters directly with JMC's representatives were unsuccessful. (R.1.31-33). Instead, on September 10, 2007, JMC sent VNA a letter which essentially nullified the Agreement and evicted VNA from its leased space inside the hospital. (R.1.33-34).

E. The Arbitration.

As a result of JMC's actions, VNA ceased payment of the off-campus lease and vacated those premises. (R.1.32-34). On October 15, 2007, VNA filed an arbitration claim for breach of contract with the American Arbitration Association ("AAA"). (R.2.259). JMC never challenged the validity of the arbitration

provision. Instead, JMC responded to the AAA claim by denying it and seeking an award of attorney's fees and costs for defending. (R.2.262). Separately, however, JMC filed an action for damages in the Circuit Court for Palm Beach County solely directed towards VNA's alleged breach of the off-campus lease, which had been assumed as part of the purchase transaction. (SR.1.528). The Circuit Court granted VNA's motion to compel arbitration because the off-campus lease was deemed an integral part of the underlying contract subject to the arbitration agreement. (SR.1.528). JMC did not appeal the order compelling arbitration. Rather, JMC amended its arbitration pleadings to include a counter-claim for damages regarding the off-campus lease. (SR.1.528).

After a period of document exchange, discovery and depositions, in February of 2009, a three-member Panel of the American Arbitration Association (the "Panel") received evidence, including live testimony, at a hearing held in Palm Beach Gardens, Florida. (R.1.28). The parties filed written closing arguments after conclusion of the hearing. At no time leading up to the final hearing, nor during the final hearing itself, did JMC contend the Agreement was illegal, invalid or contrary to public policy. (R.2.280-281)(SR.1.545-46). Instead, during the arbitration, JMC specifically acknowledged the agreement was legal. (SR.1.533,542-43,545-46).

On May 20, 2009, the Panel issued an Award (R.1.27-40) finding that JMC breached the Agreement by: (a) failing to follow the specific procedures set forth in Exhibit "D" as drafted by JMC's attorney; and, perhaps more importantly, (b) by improperly "evicting" VNA from its leased space in the hospital. (R.1.34-36). The Panel awarded damages in the sum of $1,251,213.00 to VNA, along with prejudgment interest at the legal rate established by Florida law, and reserved jurisdiction to consider an award of attorneys fees and costs. (R.1.39). The only remaining issue for the Panel after entry of the Award was a determination of the collateral issue of attorney's fees and costs to be awarded to VNA. (R.1.39). The Panel expressly stated that the Award was "in full settlement of all claims on the merits submitted to this arbitration." (R.1.40).

F. <u>The Reconsideration.</u>

JMC timely filed a Motion for Rehearing/Reconsideration with the Arbitration Panel after entry of the Award. (R.2.264-77). Thereafter, JMC filed a Motion to Re-Open the Arbitration which, for the first time, raised issues of illegality. These arguments of illegality were directed at the Award itself and the Panel's interpretation of the Agreement, rather than the underlying Agreement. (R.2.278-91).

From the inception of the Agreement (and its various components) until the time the Award was entered against JMC, neither party contended the Agreement

itself was illegal. (SR.1.533,542-43,545-46). Indeed, both parties relied upon its legality and enforceability primarily based upon their respective knowledge of this highly regulated industry, and through JMC's attorney's efforts, draftsmanship and execution. (SR.1.522,533,542-43,545-46). During the arbitration hearing, the Panel specifically asked JMC's counsel whether JMC was challenging the legality of the Agreement, and JMC's counsel acknowledged the Agreement was a legal document. (SR.1.533, 542-43, 545-46). It wasn't until June of 2009: more than four (4) years after accepting the benefits of the purchase and sale transaction; slightly less than two (2) years after an arbitration had been filed; more than a year after the off-campus lease lawsuit filed by JMC had been referred to the pending arbitration; after completion of the arbitration proceedings, including a final hearing with live testimony; after the filing of post-hearing briefs; and, after a $1,251,213.00 Award had been entered against it; that JMC hired new legal counsel and raised (for the very first time) an argument of illegality (but directed it at the Award, rather than the Agreement itself). VNA contends this was done solely to avoid the significant damage award entered against JMC. (R.2.278-91).

The Panel considered JMC's motions for rehearing/reconsideration and to re-open the arbitration, but it eventually denied those motions. (R.2.308). The Panel specifically responded that it had previously considered issues regarding illegality in determining the Award. (R.2.308).

G. The Federal Court Action.

On July 31, 2009, JMC filed a petition with the federal District Court for the Southern District of Florida seeking to vacate the Award. (R.2.313-17). The arguments raised were the same as raised in the prior motion to re-open denied by the Panel. As to subject matter jurisdiction, JMC urged the federal court to vacate the Award based upon a "federal" question and claimed the Award violated federal Medicare and Medicaid laws. VNA filed a motion to dismiss and the matter was fully briefed by the parties in accordance with the local rules of the federal court. On November 24, 2009, Judge William Dimitrouleas dismissed JMC's petition because of a lack of subject matter jurisdiction. (R.2.313-17). In doing so, the federal judge determined a substantial federal question did not exist. Even though JMC sought federal intervention by arguing the underlying contract, as construed by the arbitrators, violated federal anti-kickback laws which necessarily would invoke federal jurisdiction, Judge Dimitrouleas held JMC's claim of illegality was nothing more than a direct challenge to the Panel's "interpretation and construction" of the Agreement, which was a matter of state law. (R.2.315-17).

H. The State Trial Court Action.

Without providing notice to VNA or the federal court (which was considering issues of subject matter jurisdiction), JMC also filed a motion to vacate the Award in the Circuit Court of Palm Beach County. (R.1.1-26). The state court

action was filed on Friday, August 21, 2009; exactly 93 days after the May 20, 2009 Award. (R.1.1). On December 8, 2009 (after the federal court dismissed JMC's petition), JMC amended its motion to vacate, and it served VNA with a summons on December 10, 2009. (R.2.318). The amended motion was, in all material respects, the same as the original. (R.1.118-44). The grounds mirror the arguments made to both the Panel and the federal court. So, VNA responded with another motion to dismiss. (R.2.234-318). Given the state court setting, VNA also filed a motion to confirm the Award. (R.2.319-49). By this time, VNA had received an award from the Panel on the collateral issue of attorney's fees and costs (the "Attorney's Fees Award"). (R.1.159-62). A one-hour hearing was scheduled in Palm Beach County Circuit Court to hear all outstanding motions. The hearing took place on March 30, 2010. The parties had a full opportunity to brief and present any issues desired. (SR.1.515). After hearing arguments from counsel and considering the issues raised, the Circuit Court granted VNA's motion to dismiss, confirmed the Award and retained jurisdiction to award further attorney's fees and costs. (R.3.505-508)(SR.1.569-72).

I. The Fourth District Appeal.

On April 28, 2010, JMC timely filed its appeal to the Fourth District Court of Appeal. (R.3.509-14). Both parties fully briefed the issues. On September 14, 2011, the Fourth District rendered its opinion holding that Florida Courts should

not enforce an arbitrator's award until the Court resolves any claims regarding the legality of the underlying contract. *Jupiter Medical Center, Inc. v. Visiting Nurse Association of Florida, Inc.*, 72 So.3d 184, 187 (Fla. 4th DCA 2011). Believing the decision to be a departure from the Florida Supreme Court's prior rulings, and to be in conflict with other cases from the Fourth District Court of Appeal itself, VNA timely filed a Motion for Rehearing and Rehearing *En Banc*. VNA also filed a Notice of Supplemental Authority which disclosed a conflict with the Fifth District Court of Appeal. The Fourth District Court of Appeal eventually denied the rehearing motions without opinion.

J. The Petition for Review.

On December 6, 2011, VNA timely sought discretionary review in this Court asserting that the Fourth District opinion conflicts with the decisions of the United States Supreme Court, the Florida Supreme Court and the Fifth District Court of Appeal. The Florida Supreme Court accepted discretionary jurisdiction on March 7, 2013 to review the instant case as an appeal from the Fourth District's opinion 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).

STANDARD OF REVIEW

Whether an arbitrator can determine the legality of a contract as a whole, or whether that determination is left for judicial review, is a pure question of law, subject to de novo review. *See Shotts v. OP Winter Haven, Inc.*, 86 So.3d 456, 461 (Fla. 2011).

SUMMARY OF ARGUMENT

The primary issue is whether the Fourth District Court of Appeal erred when it held the trial court must consider the legality of an underlying commercial contract before enforcing an arbitration award in which the arbitrators determined the contract to be enforceable and valid.

The United States Supreme Court, the Florida Supreme Court, and various appellate courts in Florida have held that the decision as to the legality of the contract, as a whole, is for the arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006); *Cardegna v. Buckeye Check Cashing, Inc.,* 930 So.2d 610 (Fla. 2006); *Felger v. Mock,* 65 So.3d 625 (Fla. 1st DCA 2011); *Commercial Interiors Corporation of Boca Raton v. Pinkerton & Laws, Inc.,* 19 So.3d 1062 (Fla. 5th DCA 2009). Conversely, the Fourth District Court of Appeal held, in the underlying case, that it is for the court, not the arbitrator, to determine the issue of the legality of the contract before enforcing an arbitration award. *Jupiter Medical Center, Inc. v. Visiting Nurse Association of Florida, Inc.*, 72 So.3d 184, 187 (Fla. 4th DCA 2011). The Fourth District Court of Appeal failed to consider *Buckeye* and its progeny, and instead primarily relied on cases in which an arbitrator's determination of a contract's validity was not an issue (most did not deal with arbitration at all). The Fourth District's requirement that parties to a valid arbitration agreement re-litigate the validity of the underlying contract in

court following a full arbitration hearing, which construed and ruled upon the underlying contract, extinguishes the benefits of arbitration and is contrary to the law. It should be reversed. Such a procedure transforms arbitration into a meaningless additional step in a lengthy and expensive litigation process.

Moreover, throughout the entire arbitration process leading up to the Award, JMC never challenged the legality of the contract itself. Rather, JMC specifically stated the contract was legal and compliant with the law. JMC's specific, knowing acknowledgement of the contract's legitimacy undermines its arguments to vacate the Award because it makes clear that JMC's attack is directed to the arbitrators' decision-making which is impermissible under the law.

The Fourth District did not expressly address VNA's argument that JMC's initial state court motion to vacate, filed 93 days after the Award, is procedurally defective. Pursuant to Section 682.13(2), Florida Statutes, a motion to vacate must be filed no later than 90 days after entry of the award.

Finally, the Fourth District did not address the public policy that underlies the arbitration process. Here, the Panel determined that the underlying contract is legal. JMC is challenging the Panel's construction of that contract. The Fourth District erroneously ruled that the ultimate decision on contract construction and validity is for the courts, not the arbitrators. This decision ignores the long standing public policy supporting arbitration as an efficient and less expensive

means of resolving disputes. Permitting a disgruntled participant in arbitration to challenge an underlying contract's legality, after the arbitrators have determined such issues, is contrary to public policy embodied in the growing body of arbitration law and the federal and Florida arbitration statutes.

ARGUMENT

In Florida, a contract involving interstate commerce that includes an arbitration agreement or clause is subject to the Florida Arbitration Code ("FAC") to the extent the Florida statutory scheme is not in conflict with the Federal Arbitration Act ("FAA"). *See Shotts v. OP Winter Haven, Inc.*, 86 So.3d 456, 463-464 (Fla. 2011). Under both federal and Florida law, legal challenges involving arbitration agreements have generally taken two distinct forms; each with a decidedly different path. One type of challenge is directed to the validity of an agreement to arbitrate; or, more simply stated, a specific challenge to an arbitration clause. The other is a challenge to the contract as a whole; either on grounds that affect the entire agreement (such as legality) or on grounds that a particular provision renders the whole contract invalid. *See Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 444 (2006). An essential distinction between these two types of challenges is the question of "who" decides: the Court or the Arbitrator. In cases involving a challenge solely directed to the validity of an arbitration clause, Florida law requires a court determination. *See Shotts, supra*. However, where the challenge is directed to the contract as a whole, it is the arbitrator who decides. *Cardegna v. Buckeye Check Cashing*, 930 So.2d 610, 611 (Fla. 2006)(adopting the U.S. Supreme Court's determination noted above). Thus, the *Buckeye* rationale – that it is an arbitrator, rather than a Court, who determines the underlying legality

of a contract – governs under both the FAA and the FAC. *See Charles Boyd Construction, Inc. v. Vacation Beach, Inc.* 959 So.2d 1227, 1231-32 (Fla. 5th DCA 2007)(FAA and the FAC are "virtually" identical).

The instant case involves a challenge to the underlying contract (actually argued by JMC's counsel in terms of an "illegal interpretation" by the arbitrators of the contract as a whole). There is no challenge to the validity of the arbitration clause, itself. Therefore, the *Buckeye* rationale should control and the Fourth District Court of Appeal's decision is flawed.

I. The Fourth District Court of Appeal Incorrectly Ruled that the Trial Court Must Determine the Legality of a Contract Prior To Enforcement of an Arbitration Award – Arbitrators, Not the Courts, Determine Whether the Underlying Contract is Valid.

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the United States Supreme Court held that determination of whether a commercial contract, as a whole, is legal should be made by 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., 546 U.S. at 449.

The Florida Supreme Court subsequently recognized that a "challenge to the legality of a contract based upon Florida law and public policy must be resolved by arbitration where there is no separate claim that the arbitration provision in the

contract itself was unenforceable." *Cardegna v. Buckeye Check Cashing, Inc.*, 930 So.2d. 610, 611 (Fla. 2006); *see also CFC of Delaware LLC v. Santalucia,* 91 So.3d 899, 902 (Fla. 4th DCA 2012); *ATP Flight School, LLC v. Sax*, 44 So.3d 248, 251-252 (Fla. 4th DCA 2012); *Charles Boyd Construction, Inc. v. Vacation Beach, Inc.*, 959 So.2d 1227, 1232 (Fla. 5th DCA 2007).

Here, there is no claim that the arbitration provision in VNA's contract with JMC is unenforceable. Therefore, based on *Cardegna*, the Fourth District incorrectly ruled when it held that a court – not an arbitrator – must determine the legality of the contract before enforcing an arbitration award; particularly where the arbitrators acknowledge they considered the legality of the underlying contract and found it enforceable. (R.2.308)

The case of *Commercial Interiors Corporation of Boca Raton v. Pinkerton & Laws, Inc.,* 19 So.3d 1062 (Fla. 5th DCA 2009) is analogous. In *Commercial Interiors*, the defendant drafted the contract, but later asked the arbitrator to find it illegal. Instead, the arbitrator determined the contract was enforceable. The defendant then moved to vacate the arbitrator's decision in circuit court. The circuit court found the contract to be illegal, vacated the arbitration decision and dismissed the case with prejudice. However, on appeal, the Fifth District Court of Appeal reversed. The appeals court held that a trial court's disagreement with an arbitrator's application of law is not a sufficient basis on which to vacate an

arbitration ruling. The *Commercial Interiors* appeals court's holding was based, in part, on the rule of law that an arbitration award may not be vacated on the basis that arbitrator made an error of law. The appeals court also held that since the arbitrator's allegedly erroneous conclusion regarding contract legality was not one of the statutory grounds upon which a court may vacate an arbitration award (set forth in §682.13, Florida Statutes), the trial court was not permitted to vacate the arbitration determination. 19 So.3d at 1064-1065.

In the instant case, as in *Commercial Interiors*, the contract at issue was drafted by JMC, the party now raising an illegality argument. Just as with the *Pinkerton* case, the arbitrators considered the illegality issue and discarded it. In the instant case, however, the Circuit Court refused to overturn the decision of the arbitrators and would not second guess their determination regarding JMC's illegality argument. That determination is consistent with the U.S. Supreme Court's, and the Florida Supreme Court's, decisions in the *Buckeye* cases. However, in direct contrast to these precedents, a panel of the Fourth District Court of Appeal below determined that a court – not an arbitrator – must review the legality of the instant contract as a whole before enforcing the Award.

Other Florida appellate decisions are consistent with *Buckeye* and its progeny. The First District Court of Appeal, in *Felger v. Mock,* 65 So.3d 625 (Fla. 1st DCA 2011), determined that review of an arbitrator's decision is limited to the

five factors set forth in §682.13(1), Florida Statutes. The *Felger* appeals court held that the arbitrator's improper application of law is not grounds for vacating or refusing to confirm an arbitrator's award. The First District made it clear that a court's disagreement with an arbitrator's application of law to the facts, or an arbitrator's obvious and apparent error of law in awarding damages, or even an arbitrator's mere error of judgment as to law or fact are not valid grounds to refuse to enforce an arbitration award. Providing "'[i]f the award was in the scope of the submission, and the arbitrators are not guilty of acts of misconduct set forth in the statute [referring to §682.13(1), Florida Statutes], the award operates as a final and conclusive judgment.'" *Felger,* 65 So.3d at 627 (quoting *Charbonneau v. Morse Operations, Inc.*, 727 So.2d 1017, 1020 (Fla. 4th DCA 1999)). Similarly, in *Roman v. Atlantic Coast Construction and Development, Inc.*, 44 So.3d 222, 225 (Fla. 4th DCA 2010), a panel of the Fourth District Court of Appeal itself recognized that the determination as to whether an entire underlying contract is invalid rests with the arbitrators alone. *See also Alterra Heathcare Corp. v. Bryant,* 937 So.2d 263, 267-269 (Fla. 4th DCA 2006).

Contrary to this clear body of law specifically directed to arbitration, the instant Fourth District Court of Appeal opinion is based upon the general premise that Florida courts should not enforce illegal contracts. The opinion relies on *Title and Trust Company of Florida v. Parker,* 468 So.2d 520 (Fla. 1st DCA 1985),

Gonzalez v. Trujillo, 179 So.2d 896 (Fla. 3d DCA 1965); *Harris v. Gonzalez*, 789 So.2d 405 (Fla. 4th DCA 2001); *Local No. 234, etc. v Henley & Beckwith, Inc.*, 66 So.2d 818 (Fla. 1953). VNA does not dispute the general rule of law that illegal contracts should not be enforced. However, in the context of arbitration, a legally recognized method of alternative dispute resolution, the real question is *who* will determine the legality or illegality of an underlying contract; the courts or arbitrators? None of the above cases relied upon by the Fourth District Court of Appeal involved a prior determination by arbitrators that the underlying contract was valid and enforceable. Moreover, none of those cases stand for the proposition that, following a full arbitration hearing, courts must reconsider the arbitrators' determination regarding legality.

In fact, the only case relied upon by the Fourth District Court of Appeal below which involves arbitration is *Party Yards, Inc. v. Templeton,* 751 So.2d 121 (Fla. 5th DCA 2000). That case has been indirectly disapproved by this Court. *Party Yards* stood for the proposition that prior to ordering the parties to resolve their dispute through arbitration, the trial court should determine the issue of the underlying contract's validity when challenged. *Party Yards* was later reaffirmed and applied in *Fastfunding the Company, Inc. v. Betts*, 758 So.2d 1143 (Fla. 5th DCA 2000). But, once the United States Supreme Court disagreed with this proposition in *Buckeye*, the Florida Supreme Court acknowledged that *Fastfunding*

was no longer good law. *See Cardegna v. Buckeye Check Cashing, Inc.*, 930 So.2d 610, 611 (Fla. 2006). One can reasonably conclude that *Party Yards* is no longer good law.

Here, the arbitration panel's determination of the Agreement's enforceability should be final.

II. The Fourth District Court of Appeal Failed to Consider Whether JMC's Motion to Vacate has a Procedural Defect.

Although not addressed in the Fourth District Court of Appeal decision, despite being briefed by the parties, JMC's Motion to Vacate was procedurally defective. It was filed late. Therefore, it is a nullity.

Pursuant to Section 682.13(2), Florida Statutes:

> An application under this section **shall be made within 90 days** after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known. (emphasis added).

Here, JMC's initial Motion to Vacate was filed after the 90-day deadline and the Amended Motion does not cure that defect. Both the initial Motion to Vacate and the Amended Motion to Vacate make it clear that JMC is challenging the May 20, 2009 Award. The Motion to Vacate, dated Friday August 21, 2009, was filed 93 days after the principal arbitration award. The statute uses the word "shall" which creates a mandatory deadline. JMC is without discretion to extend the time

on its own. It appears JMC is seeking to correct this defect in its Amended Motion by relying on a subsequent arbitration ruling on the issue of attorney's fees and costs. However, the Amended Motion also is too late. It is directed at the Award which was dated May 20th. The Attorney's Fee Award did not alter, modify, or change the Award.[1] As such, the Amended Motion to Vacate, filed seven (7) months after the Award does not cure JMC's violation of the 90-day requirement. An award resolving all principal (but not collateral) issues submitted to arbitration and determining each such issue fully so that no further litigation is necessary to finalize the obligations of the parties under that award should be sufficiently "final". *See Nu-Best Franchising, Inc. v Motion Dynamics, Inc.*, 2006 WL 1428319, *4 (M.D. Fla. May 17, 2006)(an arbitration award is final even though attorney fee issues have not been resolved); *In re Rollins, Inc.*, 552 F.Supp.2d 1318, 1324-1325 (M.D. Fla. 2004)(holding that an arbitration award labeled "interim" was a final award because it disposed of all issues except for the determination of attorneys fees).

[1] For that matter, the Clarification Award also does not alter, modify or change the Award.

III. Relitigating the Arbitrator's Determination Regarding the Contract Enforceability is Contrary to Public Policy. Great Deference Should be Accorded the Arbitrator's Findings of Fact, Conclusions of Law and Contractual Interpretation.

Arbitration decisions are entitled to great deference and should not be lightly or easily set aside. The State Legislature articulated the public policy supporting arbitration in enacting Chapter 682, Florida Statutes, and liberally endorses and encourages arbitration as an alternative to litigation because it relieves the congestion in the courts and provides parties with a speedier and less costly alternative dispute resolution method. The rationale for this great deference is set out in *Communications Workers of America v. Indian River County School Board*:

> *The reason for the high degree of conclusiveness 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. (emphasis added)*

888 So.2d 96, 99 (Fla. 4th DCA 2004).

As a result, the great deference provided to arbitration awards means that a court may not vacate such awards based on errors of law or errors associated with the interpretation of contracts. *See Schnurmacher Holding, Inc. v. Noriega*, 542

So.2d 1327, 1329-1330 (Fla. 1989); *Cochran v. Broward County Police Benevolent Association, Inc.*, 693 So.2d 134, 135 (Fla. 4th DCA 1997).

The above rationale applies here. The parties mutually agreed to forego adjudication in court in favor of a less expensive and more expeditious resolution through the American Arbitration Association. JMC seeks to change the parties' agreed-upon dispute resolution method because of its dissatisfaction with the Panel's interpretation of the contract. Once decided by the arbitrators, this issue is not appropriate for judicial review. A "never-say-die" approach to litigation following arbitration was criticized in *B.L. Harbert International, LLC v. Hercules Steel Company*, where the federal Eleventh Circuit stated:

> *The laudatory goals of [arbitration] will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest. If we permit parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less. This case is a good example of the poor loser problem and it provides us with an opportunity to discuss a potential solution.*

441 F.3d 905, 907 (11th Cir. 2006).

The *Harbert* Court found the motion to vacate, and the subsequent appeal, was nothing more than a disguised allegation that the arbitrators had misinterpreted the contract or the law. Since misinterpretation of the law, or misconstruction of a

contract, are not grounds upon which to set aside an arbitrator's decision, the *Harbert* court refused to do so. Like in *Harbert,* the public policy of Florida also is not served by questioning the finality of arbitration.

Moreover, in the instant case, there is no real concern that the contract is illegal. Enforceability has already been determined by the arbitration panel.[2] Florida law does not require that this decision be made a second time through independent judicial review. The arbitrators heard evidence that JMC operated the same hospital-based home health care agency for twenty (20) years, presumably without violating anti-kickback statutes. VNA operated the home health care agency from an office in the hospital under the same procedures with a "seamless" transition. JMC's lawyer drafted the contract to comply with the law. JMC acknowledged during the arbitration that the contract is legal. The arbitration panel found JMC had breached an enforceable contract and awarded damages. After that award, JMC, for the very first time, launched the parties into the instant legal quagmire by claiming the arbitrators' construction of the contract was illegal. The Panel rejected that very argument and responded that they had considered any issues related to illegality. Now, nearly four years after the arbitrators ruled, at a cost of thousands of dollars in additional fees and costs, VNA has not received the benefit of the parties' chosen dispute resolution forum. This result is the antithesis

[2] The arbitration panel was selected by the parties due to their knowledge and skill regarding the health care industry and contracts. (R.2.262)

of Florida's public policy favoring arbitration as a speedy, less expensive method of resolving disputes.

CONCLUSION

For the foregoing reasons, the Opinion of the Fourth District Court of Appeal should be reversed and the decision of the Circuit Court of Palm Beach County, confirming the Award in favor of VNA, should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on the Merits of Appellant has been furnished via email to Michael G. Austin, Esquire, DLA Piper LLP, 200 South Biscayne Blvd, Suite 2300, Miami, FL 33132 (michael.austin@dlapiper.com) on this 1st day of April 2013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief of the Appellant complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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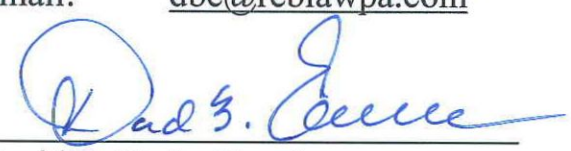
By: 

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