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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 REPLY BRIEF ON THE MERITS

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I. The Contract is Legal

It bears repeating that the Home Health Care Agreement ("Agreement") is a legal contract. (R.1.41-81) This is acknowledged by no less than JMC itself, whose legal counsel devotes at least eight (8) pages of the Answer Brief to an exposition of the Agreement's legality (*see* Answer Brief, pp. 3-10). Notwithstanding, JMC's arguments are based almost entirely on an inapplicable premise that courts should not enforce illegal contracts. One is left to wonder why such an argument would be presented at all. A simple answer rings true. JMC, faced with a significantly adverse award from the Arbitration Panel, is attempting to bootstrap the premise of "illegality" onto an admittedly legal contract by attacking the Arbitration Panel's "construction" of the Agreement. JMC attempts to patch all these separate arguments together in order to infer that the whole Agreement is "illegal" and avoid the damages award. In doing so, JMC seeks to have this Court focus almost exclusively on the general law associated with illegal contracts (which is inapplicable) to the exclusion of: (a) the well-settled law that an arbitrator's interpretation of the facts and law are not subject to a later challenge in court; and, (b) that an arbitration award can be vacated only under limited circumstances. Although seemingly harsh, the circuit judge below described JMC's arguments as "disingenuous" and rejected them by confirming the Award. (SR.1.570). As noted

in *State Department of Insurance v. First Floridian Auto and Home Insurance Co.*, 803 So.2d 771, 777 (Fla. 4th DCA 2001), a party seeking to vacate an arbitration award "may not do indirectly what it is forbidden to do directly." Here, JMC impermissibly seeks to bypass the statutory limitations on setting aside arbitration awards. JMC's arguments amount to little more than an insinuation that the Award, based upon an admittedly legal and enforceable contract, is now somehow transformed into something illegal because of a supposed faulty contract construction by arbitrators. This Court should reject JMC's argument.

II. Buckeye Provides a Proper Direction

JMC argues that VNA has offered "misguided" arguments about the precedent of *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006) and *Cardegna v. Buckeye Check Cashing, Inc.,* 930 So.2d 610 (Fla. 2006)(hereinafter the *Buckeye* cases)(*see* Answer Brief at pp. 23-24). JMC is wrong. The Fourth District Court of Appeal below relied almost exclusively on *Party Yards, Inc. v. Templeton,* 751 So.2d 121 (Fla. 5th DCA 2000) as its Florida arbitration precedent. The Fourth District's decision included the following statement attributed to *Party Yards*: "[a] claim that a contract is illegal and, as in this case, criminal in nature, is not a matter which can be determined by an arbitrator." *Jupiter Medical Center, Inc. v. Visiting Nurse Association of Florida, Inc.,* 72 So.3d 184, 186 (Fla. 4th DCA 2011). The procedural posture of *Party Yards* involved a case where the

contract was alleged to be illegal based upon Florida's usury statutes. The appeals court refused to compel arbitration of the "illegal" contract because sending an "illegal" contract to arbitration would be an "absurd" result. *Party Yards*, 751 So.2d at 123-24. As a result of the *Buckeye* cases, this is no longer the prevailing law. While JMC *is* correct to say that the procedural posture of the *Buckeye* cases (and *Party Yards*, for that matter) are different than the instant case (i.e. prior to arbitration vs. subsequent to arbitration), the principle of *Buckeye* that pertains to this case is that arbitrators can and do decide issues related to the legality of contracts. Moreover, in Florida, once issues are addressed and decided by an arbitrator, there is a statutory procedure which governs the limited grounds upon which an arbitrator's decision may be vacated. The analogous cases of *Commercial Interiors Corporation of Boca Raton v. Pinkerton & Laws, Inc.,* 19 So.3d 1062 (Fla. 5th DCA 2009) and *Felger v. Mock*, 65 So.3d 625 (Fla. 1st DCA 2011) recognize this procedure. But, JMC would like to ignore these very important public policies and case precedents in favor of engrafting a whole new standard of judicial review for arbitration decisions in Florida; one created virtually out of whole cloth. This Court should not adopt such an expansive change to Florida law because it would nullify Chapter 682, Florida Statutes, and result in arbitration becoming yet another costly layer in the long and winding litigation process. Florida's public policy is intended to avoid such a result.

III. The Arbitrators Did Not Exceed Their Authority

JMC's argument that the arbitrators "exceeded their authority" is without merit. JMC fails to recognize or acknowledge the difference between the parties' "jurisdictional" delegation of authority to the arbitrators and the "substantive" issues of contract construction and interpretation by the arbitrators. Under Section 682.13(1)(c), Florida Statutes, an arbitrator exceeds that arbitrator's power only when exceeding the authority the parties granted the arbitrator in the agreement to arbitrate. *Nucci v. Storm Football Partners*, 82 So.3d 180, 183 (Fla. 2d DCA 2012)(*citing Schnurmacher Holding, Inc. v. Noriega*, 542 So.2d 1327, 1328 (Fla. 1989).

Here, the arbitration clause drafted by JMC's own lawyer granted extremely broad jurisdictional authority to the arbitrators to decide any and all disputes arising out of, or related to, the parties' agreement:

> 32. Arbitration. Any dispute, controversy or claim arising out of or related to this Agreement or the breach hereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. [emphasis added]. (R.1.50).

All issues arising between the parties and related to the Agreement were intended to be decided by the arbitrators. This clearly includes a breach of the Agreement itself.

JMC's argument that the arbitrators exceeded their authority does not relate to arbitrators' jurisdiction. Instead, JMC contends the Panel's *construction* and *interpretation* of the whole Agreement "exceeded" their authority. JMC claims the Award should be vacated, pursuant to Section 682.13(l)(c), Florida Statutes, because the arbitrators allegedly "misconstrued" the contract in an "illegal" fashion. (*See* Answer Brief at pp. 45-47). However, JMC's disagreement with the panel's construction of the contract is *not* one of the five statutorily prescribed grounds for vacating an arbitration award. Even if the arbitrators departed from the rule of law in interpreting the contract (which VNA contends they did not), that does not constitute "exceeding" authority as contemplated under Section 682.13(1)(c), Florida Statutes. *See Schnurmacher Holding, Inc. v. Noriega,* 542 So.2d 1327, 1328 (Fla. 1989); *see also Commercial Interiors Corp. of Boca Raton v. Pinkerton & Laws, Inc.*, 19 So.3d 1062, 1064 (Fla. 5th DCA 2009)(trial court's disagreement with arbitrator's application of the law to the facts of the case not sufficient basis to vacate award).

Moreover, as recognized in under Florida law, "the fact that the relief granted by an arbitration award could not, or would not, be granted by a court of law or equity is not grounds for vacating or modifying the award." *Marr v. Webb*, 930 So.2d 734, 738 (Fla. 3d DCA 2006)(internal citations omitted). Therefore, even if the Arbitration Panel misunderstood or misconstrued the law (which VNA

contends did not happen), it does not constitute "exceeding authority" under the statute. *See* Section 682.13(1), Florida Statutes ("But 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.").

JMC does offer some citations to case authority for the proposition that the instant arbitrators "exceeded" their authority. However, JMC's reliance and citation to *Soler v. Secondary Holdings, Inc.,* 832 So.2d 893 (Fla. 3d DCA 2002) and *Edstrom Industries, Inc. v Companion Life Insurance Co.,* 516 F.3d 546 (11th Cir. 2008) is misplaced. In *Soler,* the agreement to arbitrate was specifically limited to the issue of whether a joint venture existed between the parties. The arbitrator in *Soler* found the joint venture existed, and then proceeded to determine damages. Since the parties had not agreed to have the arbitrator determine damages, the arbitrator exceeded his authority. 832 So.2d at 896. No similar limitation exists in the instant case. In *Edstrom,* the arbitration clause directed the arbitrators to strictly apply Wisconsin law. The award was vacated when the panel applied New York law; violating a direct instruction contained in the jurisdictional arbitration clause. 516 F.3d at 552. That situation does not exist in this case.

JMC also cites to *Advanced Medical Resources, Inc. v. Inland Empire Outpatient Surgery Center, Inc.,* 2005 WL 3007980 (Cal. App. 4th Dist. Nov. 10,

2005), an unpublished opinion[1]. In *Advanced Medical,* the arbitrator found the underlying contract to be illegal and refused to award contract damages. Instead, the arbitrator granted relief on a *quantum meruit* basis. The California appellate court accepted the arbitrator's determination and affirmed the arbitrator's award. *Advanced Medical* does not involve an arbitration panel "exceeding" its power by enforcing an illegal contract. Rather, it is a case where the court accepted the arbitrator's determination of contract illegality.

JMC also offers federal cases which do not interpret Florida law and some of which engraft, on an extremely limited basis, a non-statutory public policy basis to vacate arbitration awards. To the extent a public policy basis for vacating an arbitration awards even survives in federal jurisprudence, that policy has not been embraced by Florida. Instead, Florida courts look solely to the five express statutory grounds enumerated in Section 682.13(1) to determine whether to vacate an arbitration award. *See LeNeve v. Via South Florida, LLC*, 908 So.2d 530, 534 (Fla. 4th DCA 2005).

JMC's argument that the arbitrators exceeded their authority is further undermined when the non-arbitration provisions referenced by JMC are viewed in their entirety. For example, in its Answer Brief, JMC argued that the parties

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[1] California's rules of procedure prohibit reliance on unpublished opinions, except in very limited circumstances, none of which apply to the instant case. *See* Cal. R. of Court, Rule 8.1115.

specifically limited the arbitrator's authority in Section 28 of the Agreement and recited that "under no circumstances shall any provision of this Agreement be construed . . . in a manner that would violate any such laws or regulations." (*See* Answer Brief at pp. 47). But, this is neither a limitation of authority or direction to the arbitrators, nor is it a complete and accurate quote. The missing words represented by the ellipses are "by the parties." Therefore, a complete recitation of that section of the Agreement is: "under no circumstances shall any provision of this agreement be construed by the parties in a manner that would violate any such laws or regulations" (emphasis added). Similarly, Section 24 of the Agreement and Section 20 of the Lease are directed to the parties. These sections do not constitute jurisdictional limitations on the arbitrators. This language is not contained within the arbitration provisions of the Agreement. Here, the arbitrators construed the whole contract as legal and enforceable, determined that JMC breached the contract and awarded damages as a result. This result is fully consistent with the plain language and requirements of the Agreement.

IV. JMC's Motion to Vacate was Untimely

There is no dispute JMC filed its state court initial motion to vacate 93 days after the arbitrators issued their May 20, 2008 Award. This Court should decide if the May 20, 2008 Award was sufficiently final to start the 90-day statutory clock identified in Section 682.13(2), Florida Statutes.

JMC argues the May 20th Award, which resolved all issues other than attorney's fees, was an "interim award" akin to the arbitrator's ruling in *Air Conditioning Equipment, Inc. v. Rogers,* 551 So.2d 554 (Fla. 4th DCA 1989) and, therefore, JMC was not obligated to file the motion. (*See* Answer Brief at pp. 48-49). *Air Conditioning Equipment* provides little assistance to JMC's claim. In that case, it was clear the arbitrator had not resolved all the financial issues assigned to him by the parties. Further, the "unresolved issues were not severable and were not independent of those addressed" in the interim award. *Id.* at *557.* Therefore, the *Air Conditioning Equipment* Court did not have authority to confirm the arbitrator's award.

Conversely, in the instant case, the only issue remaining for the Arbitration Panel after the May 20th Award was the severable and collateral issue of attorney's fees. *See Nu-Best Franchising, Inc. v Motion Dynamics, Inc.*, 2006 WL 1428319, at *4 (M.D. Fla. May 17, 2006)(an arbitration award is final even though attorney fee issues have not been resolved).

The finality of the May 20th Award also can be determined by JMC's own conduct. On July 31, 2009, JMC filed a Motion to Vacate in federal court based upon the May 20th Award. (R.2.313-17). JMC also filed an initial Motion to Vacate in state court 93 days after the May 20th Award. (R.1.1). Both state and federal motions were directed to the May 20th Award. Since the May 20th Award

treated as final by JMC, the state court motion to vacate was untimely.

CONCLUSION

In the instant case, the parties agreed to arbitrate any and all disputes arising out of, or related to, the Agreement. Therefore, they were bound by the decision of the arbitrators. Under Section 682.13(1), Florida Statutes, and the applicable case law, the standard of judicial review associated with an arbitration award is extremely limited. In the absence of one of the five grounds set forth in the statute, the award operates as a final and conclusive judgment. However disappointing that might be, JMC must abide by it. This Court should adhere to the long standing principle of the finality of arbitration awards in order to preserve the integrity of the arbitration process as a meaningful method of alternative dispute resolution. For the foregoing reasons, the Opinion of the Fourth District Court of Appeal should be reversed and the decision of the Circuit Court, in and for Palm Beach County, Florida, which confirmed the arbitration award in favor of Visiting Nurse Association of Florida, Inc., should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief on the Merits 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 10th day of May 2013.

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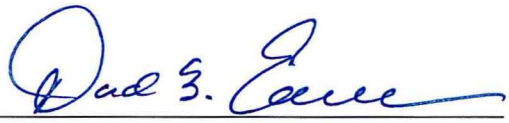
By: 

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CERTIFICATE OF COMPLIANCE

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

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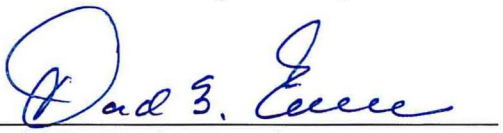
By: 

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