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SUPREME COURT OF FLORIDA
CASE Nº SC14-1349

L.T. 3D13-1855

THE ESTATE OF JUAN MENDEZ, SR.,
by and through Juan Mendez, Jr.,

Petitioner,

v.

HAMPTON COURT NURSING CENTER, LLC,

Respondent.

PETITIONER'S AMENDED JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

The Estate of Juan Mendez Sr. will be referred to as Mr. Mendez. Mr. Mendez' son, Juan Mendez Jr. will be referred to as Mendez, Jr. Hampton Court Nursing Center, LLC will be referred to as Hampton. In accordance with Rule 9.120(d), the Appendix to this Brief contains a copy of the decision rendered by the Third District. References to the Appendix are designated as [A. #].

STATEMENT OF THE CASE AND FACTS

This case presents an issue of statewide concern impacting on the fundamental constitutional rights of a protected class of persons, namely elderly nursing home residents. The issue in this case is whether a nursing home resident's personal, constitutional rights to access to the courts and trial by a jury of one's peers can be waived by someone, anyone, notwithstanding their lack of legal right or authority to do so, executing a nursing home admission agreement containing an arbitration clause, solely on the basis that the nonsignatory resident benefited from the residency.

Mr. Mendez was a resident at Hampton. [A. 1]. His son, Juan Mendez, Jr., signed the admission agreement as the person in control of his assets and, in doing so, agreed to use those assets to pay Mr. Mendez' charges. [A. 3]. The admission agreement contained an arbitration clause. [A. 2]. Mendez, Jr. had no legal right or authority to execute documents on behalf of his father. [A. 2].

While in Hampton's care, Mr. Mendez' left eye became so infected it had to be removed. [A. 3]. A lawsuit was brought, and Hampton asked the court to compel Mr. Mendez to arbitrate his claim. [A. 3.]. Since Mr. Mendez did not sign the arbitration agreement, he opposed arbitration. [A. 3]. The trial court found that Mr. Mendez was the third-party beneficiary of the arbitration agreement. [A. 3]. Mr. Mendez appealed. [A.]. The Third District affirmed. [A.].

The decision identifies four cases the panel believed to be indistinguishable from the instant action: *Perry v. Sovereign Healthcare of Metro West*, 100 So. 3d 146 (Fla. 5th DCA 2012) (*en banc*); *Lepisto v. Senior Lifestyle Newport Limited Partnership*, 78 So. 3d 89 (Fla. 4th DCA 2012); *Fletcher v. Huntington Place Ltd*, 952 So. 2d 1225 (Fla. 5th DCA 2007); and *Alterra Healthcare Corp. v. Estate of Linton*, 953 So. 2d 574 (Fla. 1st DCA 2007). [A. 6-7]. The panel agreed with the rule announced in *Linton*; holding "that the father is bound by the arbitration clause in the agreement." [A. 5]. The panel expressly disagreed with, and declined to follow the rules announced in *Lepisto, Fletcher & Perry*; finding "We cannot reconcile them [*Lepisto, Fletcher & Perry*] with the ordinary rules of law governing third-party beneficiaries and arbitration agreements . . .". [A. 6-7].

The panel also found § 400.151, Fla. Stat. "irrelevant" to its analysis and, despite the fact that his son was not qualified to execute the nursing home

admission agreement under § 400.151, Fla. Stat., that Mr. Mendez was bound by the arbitration agreement under common law third-party beneficiary rules [A. 8].

SUMMARY OF THE ARGUMENT

I. THE PANEL DECISION, AS WELL AS THE FIRST DISTRICT'S DECISION IN *LINTON*, DIRECTLY AND EXPRESSLY CONFLICT WITH THE SECOND DISTRICT'S DECISION IN *McKIBBIN*, THE FOURTH DISTRICT'S DECISION IN *LEPISTO*, AND THE FIFTH DISTRICT'S DECISIONS IN *PERRY* AND *FLETCHER*.

This case presents an issue of statewide concern impacting on the fundamental constitutional rights of a protected class of persons, namely elderly nursing home residents. The panel in this case, as well as the First District in *Linton*, determined that a nursing home resident's personal, constitutional rights of access to the courts and trial by a jury of one's peers can be waived by someone, anyone, notwithstanding their lack of legal right or authority to do so, who signs a nursing home admission agreement containing an arbitration clause where the resident benefits from the residency. This decision directly conflicts with the Second District's decision in *McKibbin*, the Fourth District's decision in *Lepisto* and the Fifth District's decisions in *Perry* and *Fletcher*, wherein it was held that an arbitration clause in a nursing home agreement that was not executed by the resident, or a party with the legal right or authority to execute it, is not enforceable

against the nonsignatory resident. In order to assure uniformity and certainty of the law on this issue, this Court should accept jurisdiction and resolve the conflict.

II. THE PANEL DECISION CONFLICTS WITH DECISIONAL LAW FROM THIS COURT HOLDING THAT WHERE A STATUTE IS SO REPUGNANT TO THE COMMON LAW THAT THE TWO CANNOT COEXIST, THE STATUTE WILL BE DEEMED TO HAVE CHANGED THE COMMON LAW.

Section 400.151, Fla. Stat., requires every nursing home contract to be executed by ". . . the resident or his or her designee or legal representative at the time of admission . . .". The common law is not so demanding - - it allows anyone, even a stranger, to make anyone else the third-party beneficiary of a contract by merely signing a contract intended to benefit that party. Obviously, these rules cannot co-exist - - one must yield to the other.

The Panel found § 400.151's execution requirements "irrelevant" and, in reaching its decision, applied common law third-party beneficiary rules. [A. 8]. The panel's decision conflicts with decisional law from this Court holding that where a statute is so repugnant to the common law that the two cannot coexist; the statute will be deemed to have changed the common law. *See e.g., Cullen v. Seaboard Air Line R. Co.*, 63 Fla. 122, 58 So. 182 (1912). In order to assure uniformity and certainty of the law throughout the State, the Court should accept jurisdiction and resolve the conflict.

ARGUMENT

I. THE PANEL DECISION, AS WELL AS THE FIRST DISTRICT'S DECISION IN *LINTON*, DIRECTLY AND EXPRESSLY CONFLICT WITH THE SECOND DISTRICT'S DECISION IN *McKIBBIN*, THE FOURTH DISTRICT'S DECISION IN *LEPISTO*, AND THE FIFTH DISTRICT'S DECISIONS IN *PERRY* AND *FLETCHER*.

Citing with approval the First District's holding in *Alterra Healthcare Corp. v. Estate of Linton*, 953 So. 2d 574 (Fla. 1st DCA 2007), the Third District panel held that a nonsignatory nursing home resident's personal, constitutional rights of access to the courts and trial by a jury of one's peers can be waived by someone, anyone, notwithstanding their lack of legal right or authority to do so, who signs a nursing home admission agreement containing an arbitration clause so long as the nonsignatory resident benefits from the residency. [A. 1-10]. In reaching this decision the panel expressly disagreed with, and declined to follow, the Fourth District's holding in *Lepisto v. Senior Lifestyle Newport Limited Partnership*, 78 So. 3d 89 (Fla. 4th DCA 2012) and the Fifth District's holdings in *Perry v. Sovereign Healthcare of Metro West*, 100 So. 3d 146 (Fla. 5th DCA 2012) (*en banc*) and *Fletcher v. Huntington Place Ltd*, 592 So. 2d 1225 (Fla. 5th DCA 2007) (and, for that matter, the Second District' holding in *McKibbin*[1]), wherein it was

[1] In *Estate of McKibbin*, 977 So. 2d 612 (Fla. 2d DCA 2008), a son signed a residency agreement, under a durable power of attorney, on behalf of his mother. *Id*., at 613. The agreement contained an arbitration clause. *Id*. After the son filed suit against the

expressly held that an arbitration agreement that is not executed by the resident, or a party with the legal right or authority to execute it, is not enforceable against the nonsignatory resident. [A. 5-7]. We agree with the panel that its decision is irreconcilable with the decisions in *Perry*, *Lepisto* and *Fletcher* (and *McKibbin*) and, try as we might, we cannot explain the conflict between the panel's decision and those cases any better than the panel did in its decision. [A. 5-7]

Each of Florida's five District Courts of Appeal has addressed the issue raised by this case: The Third District in this case, and the First District in *Linton*, hold that a nonsignatory, third-party beneficiary of a nursing home admission agreement is bound by an arbitration clause contained in that agreement. The Second District in *McKibbin*, the Fourth District in *Perry* and the Fifth District in *Lepisto* & *Fletcher*, hold that an arbitration agreement that is not executed by the resident, or a party with the legal right or authority to execute it, is not enforceable against the nonsignatory resident. There is clearly a split between the districts on this issue. Moreover, that split involves more than a denial of a mere legal right - - the rights affected are the fundamental, constitutional rights of access to the courts and trial by a jury of one's peers. The ability to enforce these fundamental, constitutional rights should not hinge on trivial factual distinctions that may or may

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nursing home, the facility moved to compel arbitration. *Id*. The trial court granted the motion. *Id*. On appeal, the Second District reversed, holding that the son lacked authority to enter into the arbitration agreement on the resident's behalf. *Id*.

not apply depending upon which appellate district the trial court may be sitting. The ability to enforce these fundamental, constitutional rights should be based on clearly established, statewide rules of law. Article V, §3(b)(3) of the Florida Constitution gives this Court the power to harmonize the law on this issue. In order to eliminate confusion and maintain uniformity of decision throughout the state, this Court should accept jurisdiction and create a controlling statewide rule.

II. THE PANEL DECISION CONFLICTS WITH DECISIONAL LAW FROM THIS COURT HOLDING THAT WHERE A STATUTE IS SO REPUGNANT TO THE COMMON LAW THAT THE TWO CANNOT COEXIST, THE STATUTE WILL BE DEEMED TO HAVE CHANGED THE COMMON LAW.

Section 400.151, Fla. Stat., requires every nursing home contract to be executed by ". . . the resident or his or her designee or legal representative at the time of admission . . .". The common law is not so demanding - - it allows anyone, even a stranger, to make anyone else the third-party beneficiary of a contract by merely signing a contract intended to benefit that party. Obviously, these rules cannot co-exist - - one must yield to the other.

Where a statute is so repugnant to the common law that the two cannot coexist; the statute will be deemed to have changed the common law. *See e.g., Cullen v. Seaboard Air Line R. Co.*, 63 Fla. 122, 58 So. 182 (1912). Where a statute addresses a specific subject, that statute controls over other laws addressing

the same subject on more general terms. *See McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994).

There are three different sets of laws at play in this case: Chapter 400, Florida's nursing home law; Chapter 682, Florida's Arbitration Code; and common law third-party beneficiary rules. None of these laws address the effect one has on the other and, since they don't, it was the panel's task to reconcile and harmonize the law in manner giving effect to each. *See Knowles v. Beverly Enters. Inc.*, 898 So. 2d 1 (Fla. 2004).

Chapter 400 does not prohibit arbitration agreements in nursing home contracts. *See Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456 (Fla. 2011). Chapter 682 Florida's Arbitration Act, does not require that an arbitration agreement be executed in any particular way. Finally, § 400.151 of the Florida Statutes requires that every nursing home contract be executed by ". . . the resident or his or her designee or legal representative at the time of admission . . .". Reading these rules together, it is clear that the common law's third party beneficiary rule, which does not require a contract be executed in any particular way, directly clashes with § 400.151, Fla. Stat.'s requirement that every nursing home contract be executed by ". . . the resident or his or her designee or legal representative at the time of admission . . .". Since it does, well-settled rules of statutory construction called for the panel to give effect to the specific rule over the general one, *McKendry, supra,*

and determine that the execution requirements contained in § 400.151, Fla. Stat., changed the common law by implication. *Cullen, supra.* The panel did not follow these rules - - instead, it found § 400.151, Fla. Stat.'s execution requirements "irrelevant", and enforced the common law.

The panel's decision directly and expressly conflicts with decisions of this Court holding that the specific controls over the general and where a statute is so repugnant to the common law that the two cannot coexist; the statute will be deemed to have changed the common law. In order to eliminate confusion and maintain uniformity of decision throughout the state, this Court should accept jurisdiction and resolve the conflict.

CONCLUSION

The Third District panel's decision, as well as the First District's holding in *Linton*, directly and expressly conflict with the Second District's decision in *McKibbin*, the Fourth District's decision in *Lepisto* and the Fifth District's decisions in both *Perry* and *Fletcher*. The panel decision also directly and expressly conflicts with decisions from this Court holding that where a statute is so repugnant to the common law that the two cannot coexist; the statute will be deemed to have changed the common law. In order to eliminate confusion and maintain uniformity of decision throughout the state, this Court should accept jurisdiction and resolve these conflicts.

CERTIFICATE OF SERVICE

WE CERTIFY that a true and correct copy of the foregoing was served by electronic service pursuant to Rule 2.516 of the Florida Rules of Civil Procedure to **Thomas Valdez, Esq.**, **Deborah L. Moskowitz, Esq.**, and **Samantha S. Johnson, Esq.**, of Quintairos, Prieto, Wood & Boyer, PA, *Attorneys for Hampton Court Nursing Center, LLC*, 255 South Orange Avenue, Suite 900, Orlando, Florida 32801, email tvaldez@qpwblaw.com, dmoskowitz@qpwblaw.com, sjohnson@qpwblaw.com, acruz@qpwblaw.com, tvaldez.pleadings@qpwblaw.com, on July 24, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the font utilized in this brief is New Times Roman and the size is 14 point.

By: _____
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