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IN THE SUPREME COURT OF FLORIDA
Fl. S. Ct. Case No. SC14-1349
DCA Case No. 3D13-1855

The Estate of JUAN MENDEZ, SR., by and through JUAN MENDEZ, JR.,

Petitioner,

v.

HAMPTON COURT NURSING CENTER, LLC,

Respondent.

_____/

RESPONDENT'S AMENDED ANSWER BRIEF (JURISDICTION)

(*Amended to Correct Certificate of Service*)

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STATEMENT OF THE CASE AND FACTS

The relevant facts are set forth in the Third District's opinion in this case. Accordingly, Respondent hereby adopts and incorporates the same by reference as if they were set forth fully herein.

SUMMARY OF THE ARGUMENT

The Third District's decision properly applies and is absolutely consistent with the overwhelming weight of Florida authority that has consistently held that a third party beneficiary to a contract can be compelled to arbitrate pursuant to the terms of an arbitration provision or agreement that is part of that contract; and the principle that an individual that receives and accepts the benefits of a contract cannot subsequently avoid an arbitration provision in that same contract.

The Third District's decision is consistent with the cases that have recognized the principle that an intended-third party beneficiary of a contract is bound by the terms of that Contract including any valid Arbitration Provision contained therein; and virtually all of the cases cited by Petitioner. However, its decision does conflict in part with the decision in *Perry ex rel. Perry v. Sovereign Healthcare of Metro West, LLC.* Specifically, this case conflicts with the (legally baseless and unsupported) alternative holding in *Perry*, in which that court acknowledged the validity of this well established principle but declined to apply it to bind the plaintiff in that case to the arbitration agreement contained in the

contract because there was no evidence the intended third party beneficiary was mentally incapable of executing the agreement on her own behalf.

Based on this conflict, it is technically within this Court's discretion to review or decline to review this case via the exercise of the limited discretionary conflict jurisdiction. However, Respondent respectfully suggests the Court should **decline** to review the decision here for reasons explained in detail herein. *In the alternative*, if the Court decides to exercise jurisdiction in this case, it should do so solely for the purpose reaffirming the principle of the third party law at issue and rejecting the legally baseless alternative holding in *Perry*.

ARGUMENT

I. THE THIRD DISTRICT'S DECISION IS ABSOLUTELY PROPER AND CONSISTENT WITH THE OVERWHELMING AUTHORITY HOLDING THAT A THIRD PARTY BENEFICIARY TO A CONTRACT CAN BE COMPELLED TO ARBITRATE PURSUANT TO THE TERMS OF AN ARBITRATION PROVISION OR AGREEMENT THAT IS PART OF THAT CONTRACT

The Third District's decision in the case at bar properly applied and is absolutely consistent with the numerous Florida cases that have consistently held that a non-signatory, intended third-party beneficiary of a contract can be compelled to arbitrate pursuant to the terms of an arbitration provision or agreement that is part of that contract. *See e.g. Alterra Healthcare, Inc. v. Linton*, 953 So. 2d 574, 579 (Fla. 1st DCA 2007); *see also Terminix Int'l Co. LP v. Ponzio*, 693 So.2d 104 (Fla. 5th DCA 1997); *Raffa Assocs., Inc. v. Boca Raton Resort &*

Club, 616 So.2d 1096 (Fla. 4th DCA 1993); *Zac Smith & Co., Inc. v. Moonspinner Condo. Ass'n,* 472 So.2d 1324 (Fla. 1st DCA 1985); *Martha A. Gottfried, Inc. v. Paulette Koch Real Estate*, 778 So.2d 1089 (Fla. 4th DCA 2001): and *Thomson-CSF, S.A. v. American Arbitration Ass'n,* 64 F.3d 773, 776 (2d Cir.1995).

Applying those principles to the facts of this case, the Third District properly held Juan Mendez, Sr., who was indisputably sole third party beneficiary of the admission contract at issue was bound by the terms of that contract, including the terms of the arbitration provision contained therein. *Id.* This is particularly true where Mendez Sr. received the benefits of that contract over a five year period before Petitioner's attempt to deny that status in an effort to avoid the Arbitration Clause contained in that Contract. *See Consolidated Resources Healthcare Fund I, Ltd., v. Fenelus*, 853 So.2d 500 (Fla. 4th DCA 2003). Thus, the Third District's decision does not run afoul of the principle of third party beneficiary law recognized in all of those cases.

A. THE DISTRICT COURT DECISIONS CITED BY PETITIONER IN ITS JURISDICTIONAL BRIEF ARE LARGELY INAPPLICABLE TO AND NOT IN CONFLICT WITH THE DECISION IN THIS CASE

The Third District's decision is absolutely consistent with the most factually similar (nearly identical) case of *Alterra v. Linton, supra.* The Third District's decision is also consistent with two similar cases that recognized the validity of the third party beneficiary principle at the heart of the *Linton* decision but

distinguished their cases from *Linton* based on unique facts that differentiated those cases from *Linton.*

In re Estate of McKibbin v. Alterra Health Care Corp

The Second District's decision in *Estate of McKibbin v. Alterra Health Care Corp.*, 977 So.2d 612 (Fla. 2d DCA 2008) does not conflict with the decision in this case in any way. The *McKibbin* case involved the question of whether a Durable Power of Attorney ("DPOA") established expressly or by necessary implication that it was the intent of the principal who created the DPOA to grant her attorney-in-fact the legal authority to enter into an arbitration agreement on her behalf. The decision in that case, which involved principles of agency law and legal authority within the context of the construction of a DPOA, has nothing to do with the issues in this case. This case does not involve the construction of a DPOA or the assessment of claims of legal authority based on principles of agency law. Rather, it involves the application of **principles of third party beneficiary law.** In other words, it involves the application of legal principles that are completely separate and distinct from (and are not impacted by) principles of agency law. Therefore, there is no conflict between the decision in this case and the decision in *McKibbin.*

Fletcher v. Huntington Place Limited Partnership

The Fifth District's decision in *Fletcher v. Huntington Place Limited Partnership*, 952 So.2d 1225 (Fla. 5th DCA 2007) also does **not** conflict with the decision in this case in any way. The *Fletcher* case addressed the question whether a resident's daughter signed the Admissions Agreement that contained the arbitration agreement in that case not in her capacity as her mother's representative but solely as a person who "control[led] funds or assets that can be used to pay [her mother's] charges and wants to receive financial notices" had the legal authority to contract and thereby agree to arbitration on her mother's behalf. In that case, the Court, with little analysis, determined she did not have such authority. The *Fletcher* decision does not mention, analyze, or address the third party beneficiary concept at issue in this case in any way. Thus, the decision in *Fletcher*, which did not address the application of principles of third party beneficiary law, the principles at the heart of the decision in this case. Therefore, there is no express or direct conflict between the decision in this case and the decision in *Fletcher*.

Lepisto v. Senior Lifestyle Newport Ltd. Partnership

In *Lepisto v. Senior Lifestyle Newport Ltd. Partnership*, 78 So.3d 89 (Fla. 4th DCA 2012) the Court addressed the question of whether a "Financially Responsible Party" had the **legal authority** to enter an admission contract and agree to arbitration on behalf of a nursing home resident. The *Lepisto* decision

does not mention, analyze or address the third party beneficiary concept at issue in this case in any way. The main argument in *Lepisto* was based on the equitable principle that a party who makes use of a contract as long as it works to his or her advantage is estopped from subsequently arguing that he or she is not bound by an arbitration provision in that contract. The *Lepisto* Court recognized the validity of this principle but distinguished the case before it from the precedent on that issue based on the fact that the admission agreement and arbitration agreement in *Lepisto* were two completely **separate** contracts; and that, as such, while the Facility in that case could establish the resident received the benefits of the Admission Contract, it could not establish that the resident should be bound to the **separate** Arbitration Agreement (under the principle of estoppel). Thus, *Lepisto* does not expressly and directly conflict with the decision in this case.

Perry ex rel. Perry v. Sovereign Healthcare of Metro West, LLC

The Third District's decision does conflict, *in part*, with the Fifth District's decision in *Perry ex rel. Perry v. Sovereign Healthcare of Metro West, LLC*, 100 So.3d 146 (5th DCA 2012). In *Perry*, the Fifth District reversed an order compelling arbitration for two main reasons. First, it rejected the argument that Perry's daughter had the authority to sign the Admission Agreement on Perry's behalf because it found no indication Perry's daughter had such authority (*an argument based on principles of Agency law which, as explained previously, are*

not at issue here). Second, the *Perry* Court recognized the validity of the legal principle upon which the *Linton* decision was based *but* proceeded to state in its *alternative holding* that *Linton* was distinguishable from *Perry* based on the fact that, in *Linton* there was evidence that the resident was mentally incapable of signing the admission agreement on her own behalf while, in *Perry*, there was no such evidence.

There is no legal authority in Florida to support the proposition that an individual must be found to be incapacitated before she or he can be bound to the terms of a contract as a third party beneficiary. Thus, there is no legal authority to support the *Perry* Court's effort to distinguish that case from *Linton*. While the *Linton* Court mentioned in its recitation of the facts that the resident in that case was mentally incapacitated and therefore incapable of signing the admission agreement on her own behalf, it did not base its analysis or conclusion on that fact. Therefore, the *Perry* Court's attempt to support its *alternative holding* by "distinguishing" *Perry* from *Linton* in this manner is legally baseless.

Thus, while Petitioner attempts to characterize the Third District's decision in this case as an anomaly, the only true anomaly in the Florida case law addressing the principles at issue here is the alternative holding in *Perry*. Any confusion created by that alternative holding can be clarified by this Court via the denial of Petitioner's request for review; an act which, by its nature, would provide

guidance to the District Courts of Appeal regarding the Court's view of this limited conflict.

II. *THE DECISION IN THIS CASE DOES NOT CONFLICT WITH THE DECISIONAL AUTHORITY THAT REQUIRES "STRICT CONSTRUCTION" OF STATUTES IN DEROGATION OF COMMON LAW*

The Statute cited by Petitioner (Section 400.151, Florida Statutes) states a mere procedural/administrative requirement; and **does not** expressly or by implication evidence an intent to change the common law with regard to contract law in Nursing Homes cases. A statute designed to change common law must state that intent in clear and unequivocal terms the intent to change the common law because the presumption is that no change in common law is intended unless the statute is explicit in that regard. *See Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914 (Fla. 1990); *Florida Dept. of Health and Rehabilitative Services v. S.A.P*, 835 So. 2d 1091 (Fla. 2002); *see also* 3 Sutherland, *Statutory Construction* § 61:1, *Strict construction of statutes in derogation of common law* (7th ed.). **The cited Statute does no such thing.**

Petitioner's claim on this point runs contrary to and is based on a clear misunderstanding of the statute and the principle of strict construction. First, the fact is that, absent a clear statement by the Legislature expressing its intent to change the common law of contracts (*which does not exist in this case*), the presumption is that it did not intend to change the common law. Second, even if

there were doubt about the Legislature's intent in enacting the statute, the statute would be given the effect which makes the least, rather than the most, change in the common law. *See Florida Power & Light Co. v. Russell Engineering, Inc.*, 96 So. 3d 1016 (Fla. 4th DCA 2012); *Rudolph v. Unger*, 417 So. 2d 1095 (Fla. 3d DCA 1982); *Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001).

CONCLUSION

Based on the foregoing, Respondent respectfully suggests the Court should **decline** to review the decision in this case because (unlike the alternative holding in *Perry* decision – the only portion of Florida law that conflicts with the decision in this case) this case properly applies Florida law to the relevant facts of the this case; and because the act of declining to exercise conflict jurisdiction will provide the District Court's with sufficient guidance on this issue by demonstrating approval of the decision in this case and disapproval of the alternative holding in *Perry*. *In the alternative*, if the Court decides to exercise jurisdiction in this case, it should do so solely for the purpose reaffirming the principle of the third party law at issue and disapproving of and rejecting the legally baseless alternative holding in *Perry*.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic mail to Charles M-P George, e-service@cmpg-law.com, cgeorge@cmpg-law.com, 1172 South Dixie Highway, #508, Coral Gables, Florida 33146; Christopher Wadsworth, cw@wadsworth-law.com and Raymond Dieppa, rrd@wadsworth-law.com, Wadsworth Huott, LLP, 14 NE 1st Avenue, Miami, Florida 33132, *Attorneys for Petitioner*, on this 10th day of September, 2014.

CERTIFICATE OF COMPLIANCE

WE HEREBY FURTHER CERTIFY that the foregoing complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure and is in the required font of Times New Roman 14.

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

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