Supreme Court of Florida

CASE NO SC14-1349

JUAN MENDEZ, JR.,
as Personal Representative of
The Estate of Juan Mendez, Sr.,

Petitioner,

v.

HAMPTON COURT NURSING CENTER, LLC,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FLORIDA DISTRICT COURT OF APPEAL, THIRD DISTRICT

INITIAL BRIEF ON THE MERITS

CHARLES M-P GEORGE
LAW OFFICES OF CHARLES M-P GEORGE
1172 South Dixie Highway #508
Coral Gables, Florida 33146
Telephone: 305-661-7686
E-Service@cmpg-law.com

CHRISTOPHER W. WADSWORTH
RAYMOND R. DIEPPA
WADSWORTH HUOTT, LLP
200 SE First Street #1100
Miami, Florida 33131

TABLE OF CONTENT

TABLE OF CITATIONS

CASES **PAGE**

RULES

PRELIMINARY STATEMENT

Juan Mendez, Sr. will be referred to as Mr. Mendez or Father. Mr. Mendez' son, Juan Mendez, Jr. will be referred to as Son or Mendez, Jr. Hampton Court Nursing Center, LLC will be referred to as Hampton Court.

Citations to the Documents in the Appendix are designated [A. #].

The opinion on review is attached as an Appendix and its official Southern Report citation, *Mendez v. Hampton Court Nursing Center, LLC*, 140 So. 3d 671 (Fla. 3d DCA 2014), is used throughout this brief.

Except as noted, all **emphasis** is ours.

STATEMENT OF THE CASE AND FACTS

Statement of the Case.

Juan Mendez, Sr. was admitted to Hampton Court Nursing Center, LLC on March 13, 2009. [A. 47]. In July of 2011, while under the care of Hampton Court, Mr. Mendez's left eye became so infected that it had to be removed. [A. 3-4, 5, 6]. In August of 2011, Mr. Mendez gave his son, Juan Mendez, Jr., his power of attorney. [A. 10]. In December of 2012, Mendez, Jr. filed a lawsuit on behalf of his Father against Hampton Court. [A. 1-9].

Citing the arbitration clause in its agreement, Hampton Court asked the trial court to refer the matter to arbitration. [A. 12]. On June 13, 2013, the trial court

stayed the case and ordered the parties to arbitration. [A. 82-84]. From that order Mr. Mendez timely appealed. [A. 80-81].

On June 4, 2014, the Florida District Court of Appeal, Third District, affirmed the trial court's order. *Mendez v. Hampton Court Nursing Center, LLC*, 140 So. 3d 671 (Fla. 3d DCA 2014). Mr. Mendez timely sought review in this Court.

The Proceedings in the Trial Court.

On March 13, 2009 Juan Mendez, Sr. was admitted to Hampton Court. [A. 47]. [A. 41-47]. At that time, Mr. Mendez, Sr. had not been adjudicated incapacitated, [A.] a guardian had not been appointed for him, [A.], Mr. Mendez' son, Mendez, Jr., was not his Father's guardian, [A. 78], Mendez, Jr. did not hold his Father's power of attorney, [A. 78], Mr. Mendez had not authorized his Son to act as his representative, [A. 78], or execute Hampton Court's nursing home contract on his behalf. [A. 78].

At the time of his Father's admittance, Hampton Court had Mendez, Jr. execute an "Agreement For Care" as the "Resident's Representative". [A. 47; 62, lines 13-25]. Juan Mendez, Sr.'s name does not appear anywhere in the agreement, and Juan Mendez, Sr. did not sign it. [A. 41-48].

By its own terms, Mendez, Jr. is only bound to the "Agreement for Care" to the extent of the resident's assets. [A. 47].

> In the event that the resident has appointed a representative to control his/her assets, and even if such appointment has not been made through a legal document, the resident's representative shall be fully bound to the extent of those assets to the terms of this Agreement.

[A. 47].

The agreement contains an arbitration clause stating in pertinent part that " . . . Any controversy or claim arising out of or relating to the agreement, or the breach thereof, shall be settled by arbitration . . ." [A. 44, ¶ 12].

In July of 2011, almost two and one-half years after he became a resident at Hampton Court, Mr. Mendez' left eye became so infected that it had to be removed. [A. 3-4, 5, 6]. In August of 2011, a month after the removal of his left eye, Mr. Mendez gave his Son a power of attorney. [A. 10]. In December of 2012, Mendez, Jr., on behalf of his Father, sued Hampton Court. [A. 1-9]. The Complaint does not allege that Mr. Mendez was incapacitated at the time of his admittance to Hampton Court. [A. 1-9].

Hampton Court asked the trial court to compel arbitration, incorrectly arguing that "Mr. Mendez's Durable Power of Attorney, Juan Mendez, Jr." had signed an agreement containing a valid arbitration clause. [A. 16-17, § IV.A.]. At hearing, Hampton Court repeated this incorrect statement - - telling the court that Mr. Mendez' "legal representative, which is his son" had signed an agreement containing an arbitration clause. [A. 52, line 21]. Hampton Court also argued for

the first time that it believed Mr. Mendez was incapacitated at the time of his admission and proffered an unsworn, unauthenticated form stating that Mr. Martinez wasn't competent at the time of admission. [A. 62, lines 13-25, Supp. App.].

In opposition, Mr. Mendez' counsel explained that Mr. Mendez had not signed the agreement. [A. 56, line 1; 60, lines 8-10]. It was also explained that at the time his Son executed the agreement

- Mendez, Jr. was not his Father's legal guardian; [A. 59, lines 19-22; 61, lines 7-13; 78; 56, lines 6-8]
- There was no evidence that Mr. Mendez was legally incapacitated; [A. 59, lines 19-24; 64, lines 8-12]
- Mendez, Jr. did not hold Mr. Mendez' power of attorney or other written consent to act on his Father's behalf; [A. 58, lines 1; 61, lines 7-13; 78; 56, line 6] and
- Mendez, Jr. did not have his Father's permission to sign the agreement. [A. 60, lines 1-6; 61, line 9-10; 78]

Mr. Mendez further explained that he began residing at Hampton Court in March of 2009 and that he had not given Mendez, Jr. a power of attorney until almost two and one-half years later, in August of 2012. [A. 57, line 21-25; 56, line 12-14].

The August 12, 2011 power of attorney Mr. Mendez gave his Son was attached to his Complaint. [A. 10].

Mr. Mendez also provided the trial court with his Son's sworn affidavit stating that in March of 2009, when Mendez, Jr. signed the agreement with Hampton Court

- Mendez, Jr. did not have written authority or consent to act as his Father's agent;
- Mr. Mendez had not instructed or directed Mendez, Jr. to act for, or on his behalf in any matter; and
- Mr. Mendez had not authorized or instructed Mendez, Jr. to execute the Hampton Court agreement on his behalf.

[A. 78].

Finally, Mr. Mendez told the trial court that he wanted an evidentiary hearing, [A. 63, line 5-6; 39, ¶ 8], that Hampton Court had not set one, [A. 63, line 4-5], and if the court was going to decide the issue on the facts, an evidentiary hearing was necessary. [A. 63, line 12-13].

The trial court did not hold an evidentiary hearing. [A.]. No one presented evidence regarding the purpose or intent behind Mr. Mendez' admission to Hampton Court. [A.]. No one presented evidence regarding Mr. Mendez' capacity at the time of his admission. [A.].

The trial court took the matter under advisement, [A. 66], and two months later, issued its order finding that " . . . Juan Mendez, Sr., never executed the Agreement . . . ", [A. 83, ¶ 4], that Mendez, Jr. executed the agreement and was bound "to the extent of the resident's assets to the terms of the Agreement", [A. 83, ¶ 4], that " . . . Juan Mendez, Sr., lacked the capacity to consent to the Agreement at the time of its execution", [A. 83, ¶ 4], and, without really explaining why, staying the case and ordering the parties to arbitration. [A. 83].

The Proceedings in the Third District.

The district court found that Mr. Mendez was a resident of Hampton Court between 2009 and his death in 2013. *Mendez*, 140 So. 3d at 673. Two years into his residency, Mendez' eye became so infected that it had to be removed. *Id*. After the loss of his eye, Mr. Mendez gave his Son a power of attorney and his Son brought suit against Hampton Court. *Id.*

The court also found that Hampton Court's admission agreement contained an arbitration agreement, that Mr. Mendez did not execute the admission agreement and that his Son did so in a signature block identified as "residents representative". *Id.* Finally, the court found that at the time Mendez, Jr. executed the agreement with Hampton Court, he was not acting under a power of attorney. *Mendez*, 140 So. 3d at 673.

Citing case law from this Court, the court found that "arbitration is a favored means of dispute resolution." *Mendez*, 140 So. 3d at 673-674. Citing third-party beneficiary and acceptance of the benefit case law, the court also found that it did not matter who signed the agreement and that so long as the residency benefits the resident and the resident resided in the nursing home, the resident was bound by the agreement. *Mendez*, 140 So. 3d at 674-675. Finally, the court found it irrelevant that the person executing Hampton Court's nursing home agreement was not authorized to do so by § 400.151(1), Fl. Stat.[1] *Mendez*, 140 So. 3d at 675.

Applying this reasoning to the facts, the court held under common law contract and third-party beneficiary rules anyone could waive a nursing home resident's constitutional right to a jury trial by executing a nursing home agreement containing an arbitration clause where the residency benefits the resident and the resident accepted the benefit by residing in the nursing home. *Mendez*, 140 So. 3d at 674-675.

The Conflict Cases.

Citing *In Perry ex rel. Perry v. Sovereign Healthcare of Metro West, LLC*, 100 So. 3d 146, 148 (Fla. 5th DCA 2012), *review dismissed*, 134 So. 3d 450 (Fla. 2014); *Lepisto v. Senior Lifestyle Newport Limited Partnership*, 78 So. 3d 89 (Fla.

[1] § 400.151(1), 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 . . . ".

4th DCA 2012); and *Fletcher v. Huntington Place Ltd. P'ship*, 952 So. 2d 1225, 1227 (Fla. 5th DCA 2007), the *Mendez* Court recognized that "other district courts have held, for a variety of reasons, that nursing home residents who are nonsignatories to the care agreements under which they receive care at a facility are not bound by the arbitration clauses found in those care agreements." *Mendez*, 140 So. 3d at 675. The Third District declined to follow these cases because it could not "reconcile them either with the ordinary rules of law governing third-party beneficiaries and arbitration agreements or with Florida's avowed public policy to favor arbitrations." *Id*.

STANDARD OF REVIEW

Orders compelling arbitration are reviewed *de novo*. *Briceno v. Sprint Spectrum, L.P.*, 911 So. 2d 176, 179 (Fla. 3d DCA 2005).

ISSUE BEFORE THE COURT

I. DOES FLORIDA'S THIRD-PARTY BENEFICIARY LAW REQUIRE ENFORCEMENT OF AN ARBITRATION CLAUSE IN A NURSING HOME AGREEMENT WHERE THE AGREEMENT WAS NOT EXECUTED BY THE RESIDENT OR HIS OR HER DESIGNEE OR LEGAL REPRESENTATIVE AT THE TIME OF ADMISSION?

SUMMARY OF THE ARGUMENT.

I. FLORIDA'S THIRD-PARTY BENEFICIARY LAW DOES NOT REQUIRE ENFORCEMENT OF AN ARBITRATION CLAUSE IN A NURSING HOME AGREEMENT WHERE THE AGREEMENT WAS NOT EXECUTED BY THE RESIDENT OR HIS OR HER DESIGNEE OR LEGAL REPRESENTATIVE AT THE TIME OF ADMISSION.

The districts are split on the answer to this question - - for various reasons, the Second, Fourth and Fifth say no, and the First and Third say yes. In reaching their respective decisions, the First, Second, Fourth and Fifth Districts agree that the answer is dependent on the facts of each case, whereas the Third District has set up a bright-line rule stating that anyone can bind anyone else to a nursing home contract so long as the residency benefits the resident and so long as the resident has resided in the nursing home.

Mr. Mendez submits that there's a third approach, one that harmonizes Chapter 400, Florida's nursing home law, Chapter 682, Florida's Arbitration Code and common law contract and third-party beneficiary rules, while not impinging upon the right of the parties to a nursing home contract to agree to arbitration if they so desire. The cornerstone of this rule is § 400.151(1), Fla. Stat., the statute requiring every nursing home contract to be executed by " . . . the resident or his or her designee or legal representative at the time of admission . . . ".

This approach calls for the court to first determine whether the person executing the contract is one of those persons required to do so under § 400.151(1), Fla. Stat. If the answer to this question is no, there is no agreement and the arbitration clause can't be enforced against the resident. If the answer is yes, the court then must determine whether the language of arbitration clause is valid and, if so, it will be enforced against the resident.

This rule is simple, clear, easy to understand, apply and enforce. It provides an easy way to resolve pretty much any dispute arising out of or related to execution of a nursing home admission contract. It also furthers our legislature's announced public policy of requiring every nursing home contract to be executed by " . . . the resident or his or her designee or legal representative at the time of admission . . . ".

ARGUMENT

I. FLORIDA'S THIRD-PARTY BENEFICIARY LAW DOES NOT REQUIRE ENFORCEMENT OF AN ARBITRATION CLAUSE IN A NURSING HOME AGREEMENT WHERE THE AGREEMENT WAS NOT EXECUTED BY THE RESIDENT OR HIS OR HER DESIGNEE OR LEGAL REPRESENTATIVE AT THE TIME OF ADMISSION.

A. The Enforceability of A Nursing Home Contract Should Not Based on a Particular Court's View of the Facts or the District in Which the Case Was Filed.

Whether an arbitration clause in a nursing home admission contract is enforceable has been addressed by the First District in *Alterra Healthcare v. Estate of Linton ex rel Graham*, 953 So. 2d 574 (Fla. 1st DCA 2007), the Second District in *Sovereign Healthcare of Tampa, LLC v. Estate of Yarawsky*, 150 So. 2d 873 (Fla. 2d DCA 2014), *Stalley v. Transitional Hospitals Corp.*, 44 So. 3d 627 (Fla. 2d DCA 2010), *Carrington Place of St. Pete LLC v. Brito*, 19 So. 3d 340 (Fla. 2d DCA 2009) and *Germann v. Age Institute of Florida*, 912 So. 2d 590 (Fla. 2d DCA 2005), the Third District in *Mendez v. Hampton Court Nursing Center, LLC*, 140 So. 3d 671 (Fla. 3d DCA 2014), the Fourth District in *Lepisto v. Senior Lifestyle*, 78 So. 3d 89 (Fla. 4th DCA 2012) and the Fifth District in *Fi-Evergreen Woods, LLC v. Robinson*, 135 So. 3d 331 (Fla. 5th DCA 2013), *Perry v. Sovereign*

Healthcare of Metro West, 100 So. 3d 146 (Fla. 5th DCA 2012) and *Fletcher v. Huntington Place*, 952 So. 2d 1225 (Fla. 5th DCA 2007).

The Second, Fourth and Fifth Districts refuse to enforce arbitration clauses in nursing home contracts where the contract was not executed by the resident or his or her designee or legal representative at the time of admission. *Lepisto*, 78 So. 3d 89 (arbitration clause unenforceable where resident did not sign the agreement and where the person signing the agreement did so as the financially responsible party and not as the resident's agent or guardian); *Perry*, 100 So. 3d 146 (error to compel arbitration where the resident was not named in the agreement, had not signed it and where the person signing the agreement is not the resident's conservator, guardian, power of attorney or surrogate); *Fletcher*, 952 So. 2d 1225, 1227 (error to compel arbitration where the resident had not signed the agreement and where the party signing the agreement did so as the person controlling the resident's assets); *Germann*, 912 So. 2d 590 (error to compel arbitration where the resident did not sign the agreement).

On the other side of the coin, the First and Third Districts have applied common law contract and third-party beneficiary rules to enforce arbitration clauses in nursing home contracts where the contract was not executed by the resident or his or her designee or legal representative at the time of admission. *Linton*, 953 So. 2d 574 (arbitration clause enforceable where resident did not

execute agreement, person executing agreement did not have permission or legal authority to do so, where the resident is incapacitated, where resident's incapacity is apparent on the face of the complaint, where the resident's incapacity is undisputed and where the evidence presented at hearing clearly established that the resident is the third-party beneficiary of the agreement containing the arbitration clause); *Mendez*, 140 So. 3d 671 (arbitration clause in nursing home agreement enforceable where residency benefits resident and where resident accepts the benefit by residing in the nursing home).

Finally, despite the split in opinion, the First, Second, Fourth and Fifth Districts all agree that the answer is dependent on the facts of the given case, whereas the Third District has set up a bright-line rule, that applies in every single case, so long as: 1) the residency benefits the resident, and 2) the resident accepts the benefit by residing in the nursing home.

As we will explain below, the enforceability of a nursing home contract should not based on a particular court's view of the facts or, for that matter, the District in which the case was filed. The analysis must begin with a determination that the contract was, or was not, executed by a person with the authority to do so, and that decision is controlled by § 400.151(1), Fla. Stat., the statute requiring every nursing home contract to be executed by " . . . the resident or his or her designee or legal representative at the time of admission . . . ".

B. Chapter 400, Florida's Nursing Home Law, Requires Every Nursing Home Contract to be Executed by the Resident, the Resident's Designee or the Resident's Legal Representative.

Rule 59A-4.106 of the Florida Administrative Code requires nursing homes, such as Hampton Court, to provide every resident, at the time of admission, various documents detailing their rights. The Rule also requires every nursing home contract to comply with § 400.151(1), Fla. Stat.

Section 400.151(1) of the Florida Statutes states in pertinent part that: " . . . each resident in a facility shall be covered by a contract, executed by the licensee and the resident or his or her designee or legal representative at the time of admission . . . ". Chapter 400 of the Florida Statutes does not define "designee" or "legal representative". Since it doesn't, we must give those terms their plain and ordinary meaning and, in ascertaining the meaning, we may look to the dictionary for guidance. *See Nehme v. Smithkline Beecham Clinical Labs*, 863 So. 2d 201, 204-205 (Fla. 2003) (unless otherwise indicated, words used in statute should be given their plain and ordinary meanings and when necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary).

Merriam-Webster defines "designee" as:

> : a person who has been officially chosen to do or be something : a person who has been designated
>
> http://www.merriam-webster.com/dictionary/designee.

Merriam-Webster defines "legal representative" as:

> : a personal representative having legal status: a : one that represents another (as a deceased or incompetent person) : one that succeeds to the interest in property of a person living or corporate — compare administrator, assignee, curator, executor, guardian, heir, legatee, receiver, trustee in bankruptcy ; distribution b : an agent having legal status; esp: one acting under a power of attorney
>
> http://www.merriam-webster.com/dictionary/legal%20representative.

Inserting these definitions into § 400.151(1), it becomes clear that Florida law requires every nursing home contract to be executed by 1) the resident, 2) a person officially chosen by the resident to act on her or his behalf, or 3) a person given, by legal document or court appointment, the legal right to act for or on behalf of the resident. With this plain, common sense reading of the statute in mind, we address the interplay between § 400.151(1), Chapter 682, Florida's Arbitration Code and the common law of contracts.

C. The Specific Requirements of § 400.151(1) Control Over the General Requirements Found in Chapter 682, Florida's Arbitration Code and the Common Law of Contracts.

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 the common law of contracts. Each has, to one degree or another, an impact on the analysis and, consequently, each must be considered in reaching a decision in this

case. *See generally Knowles*, 898 So. 2d 1 (where the applicable statutes and common law do not specifically address the effect one has on the other, the court must reconcile and harmonize the competing rules and statutes in manner that gives effect to each).

We begin by reminding the court of the basic, governing rules: "When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute itself must be given its plain and obvious meaning." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1985). Unless otherwise indicated by a statute, the words used should be given their plain and ordinary meanings and when necessary, the plain and ordinary meaning of words may be ascertained by reference to a dictionary. *See Nehme*, 863 So. 2d at 204-205. A court should not construe a statute in a manner that leads to an absurd result. *See Weber v. Dobbins*, 616 So. 2d 956, 958 (Fla. 1993). Where there is a specific statute, focusing on a particular subject matter, that statute controls over another addressing the same subject in more general terms. *See McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994). Finally, 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 by implication. *Cullen v. Seaboard Air Line R. Co.*, 63 Fla. 122, 58 So. 182 (1912);

Peninsular Supply Co. v. C.B. Day Realty of Florida, Inc., 423 So. 2d 500 (Fla. 3d DCA 1982).

Chapter 400, Florida's nursing home law, does not prohibit arbitration agreements in nursing home contracts. *See Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456 (Fla. 2011). Since it doesn't, Hampton Court was free to ask Mr. Mendez to agree to the arbitration clause in its contract. *Id.*

Chapter 682, Florida's Arbitration Act, does not require an arbitration agreement to be executed in any particular manner. Since it doesn't, the manner in which Hampton Court's contract is executed is unimportant, so long as the agreement's execution comports with the common law of contract or, if there is one, an applicable statutory provision.

Under the common law of contract, third-party beneficiary rule a nonparty to a contract may be bound by a contract where the contract clearly demonstrates the express intention to primarily and directly benefit the nonparty. *Security Mutual v. Pacura*, 402 So. 2d 1266, 1267 (Fla. 3d DCA 1981). Given this, a nonsignatory, third-party beneficiary of a contract containing an arbitration clause is bound to that agreement so long as the arbitration clause is valid, *i.e.*, the executing party had the right/authority/power to assent to its terms and execute it. *Lepisto*, 78 So. 3d at 93; *Germann*, 912 So. 2d at 591-592.

Finally, § 400.151(1), Fla. Stat., which is found in Chapter 400, Nursing Homes and Related Health Care Facilities, requires every nursing home contract to be executed by " . . . the resident or his or her designee or legal representative at the time of admission . . . ".

> 400.151 Contracts. —
>
> (1) **The presence of each resident in a facility shall be covered by a contract, executed by** the licensee and **the resident or his or her designee or legal representative at the time of admission or prior thereto** and at the expiration of the term of a previous contract, and modified by the licensee and the resident or his or her designee or legal representative at the time the source of payment for the resident's care changes. Each party to the contract is entitled to a duplicate original thereof, printed in boldfaced type, and the licensee shall keep on file all contracts which it has with residents. The licensee may not destroy or otherwise dispose of any such contract until 5 years after its expiration or such longer period as may be provided in the rules of the agency. Microfilmed records or records reproduced by a similar process of duplication may be kept in lieu of the original records. (emphasis added)

The common law's contract / nonsignatory, third-party beneficiary rule directly clashes with § 400.151(1)'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 . . . ". Given this, this Court must decide whether the statute or the common law controls the manner in which a nursing home statute must be executed. *Knowles*, 898 So. 2d 1.

Mr. Mendez respectfully submits that the common law contract / nonsignatory, third-party beneficiary rule is so repugnant to § 400.151(1)'s execution requirements that the two cannot coexist. *Cullen*, 58 So. 182. Mr. Mendez also submits that § 400.151(1) must be deemed to have changed the common law contract / nonsignatory, third-party beneficiary rule by adding an exception stating that third-party beneficiary rules do not apply to nursing home contracts because every nursing home contract must be executed by " . . . the resident or his or her designee or legal representative at the time of admission . . . ".

Unfortunately, the district court found § 400.151(1) irrelevant. *Mendez*, 140 So. 3d at 675. By not making § 400.151(1), Fla. Stat. the cornerstone of its analysis the court not only failed to give the statute its required effect, it also missed an opportunity to announce a simple, workable and easy to apply rule that would eliminate just about every dispute arising out of or related to the execution of a nursing home contract.

Mr. Mendez respectfully submits that common law contract / nonsignatory third-party beneficiary rules cannot trump § 400.151(1)'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 . . . ". He also submits the cornerstone of every inquiry into the validity of a nursing home contract and, consequently, the

validity of an incorporated arbitration clause, should be a determination that nursing home contract was, or was not, executed by " . . . the resident or his or her designee or legal representative at the time of admission . . . ". That did not happen in this case. For this reason alone, the opinion on review should be reversed with directions that the case be remanded to the trial court for vacation of the order staying the case and compelling arbitration.

D. Requiring Every Nursing Home Contract to Comply With the Execution Requirements of § 400.151(1) is Good Law.

Florida's legislature has determined that nursing home contracts must be executed by 1) the resident, 2) a person officially chosen by the resident to act on her or his behalf, or 3) a person given, by legal document or court appointment, the legal right to act for or on behalf of the resident. Requiring every nursing home contract to comply with § 400.151(1) not only advances this policy - - it's good law. Doing so not only eliminate disputes over the right or authority of a person signing a nursing home contract to bind a nonsignatory resident, it also eliminates the need for the factually intensive analysis presently employed by creating an easy to understand and apply rule.

Moreover, requiring every nursing home contract to comply with § 400.151(1) will

- Assure that the resident has input into the decision making process

during admission by guaranteeing that every decision is made by the resident, his or her's official designee or someone with legal authority to make decisions on the resident's behalf;

- Assure that an incapacitated resident's rights under Chapter 744, Florida's Guardianship laws, are protected by guaranteeing that the resident's legally appointed guardian is the one making decisions for the resident;
- Places the burden of assuring that the contract is properly executed on the party with the least emotional involvement in the admittance, and greatest knowledge of the rules and regulations governing nursing homes - - the nursing home; and
- Places the onus of assuring that there is a valid contract squarely on the one demanding the arbitration agreement - - the nursing home.

E. While the Rule Announced in *Mendez* May Appear Reasonable on its Face, It's Not A Good Rule.

While the rule announced by the *Mendez* Court may appear reasonable on its face, it's not a good rule. Under the rule of *Mendez*, anyone can sign and bind anyone else to a nursing home contract's arbitration agreement so long as the residency benefits the resident and the resident resides in the nursing home.

Under this rule, a nursing home has no incentive to comply with § 400.151, Fla. Stat. In fact, the opposite is true - - this rule encourages nursing homes to seek out the person most likely to execute the contract, without regard for their right or authority to do so. Under this rule, the nursing home itself may execute the contract and later argue that the resident is the third-party beneficiary of the agreement. Moreover, under the rule announced in this case an incapacitated person looses all of the protections built into and guaranteed by Chapter 744, Florida's Guardianship laws. Finally, and while we do not suggest that it has happened here, the potential for fraud under this rule is rife. This is why we say that while the rule announced in this case may appear reasonable on its face, it's not a good rule.

F. If the Court Believes that § 400.151(1) is Irrelevant and that the Decision Should Be Factually Based, Enforcement of the Arbitration Clause is Wrong on the Facts of this Case.

If the Court believes that § 400.151, Fla. Stat. is irrelevant and that the decision should be factually based, enforcement of the arbitration clause is wrong on the facts of this case.

1. Mr. Mendez' Name Does not Appear Anywhere in the Contract and, at the Time of Mr. Mendez' Admission, His Son was not His Guardian, He Did Not Hold His Father's Power of Attorney, He Was Not His Father's Agent and He Did Not Have His Father's Permission to Do Anything.

Mr. Mendez' name does not appear anywhere in the agreement. [A. 25-33]. He did not sign the contract. [A. 31]. Further, at the time his Son signed the agreement

- Mendez, Jr. was not his Father's legal guardian; [A. 59, lines 19-22; 61, lines 7-13; 78; 56, lines 6-8]
- There was no evidence that Mr. Mendez was legally incapacitated; [A. 59, lines 19-24; 64, lines 8-12]
- Mendez, Jr. did not hold Mr. Mendez' power of attorney or other written consent to act on his Father's behalf; [A. 58, lines 1; 61, lines 7-13; 78; 56, line 6] and
- Mendez, Jr. did not have his Father's permission to sign the agreement. [A. 60, lines 1-6; 61, line 9-10; 78].

It is also undisputed that at the time Mendez, Jr. signed the agreement:

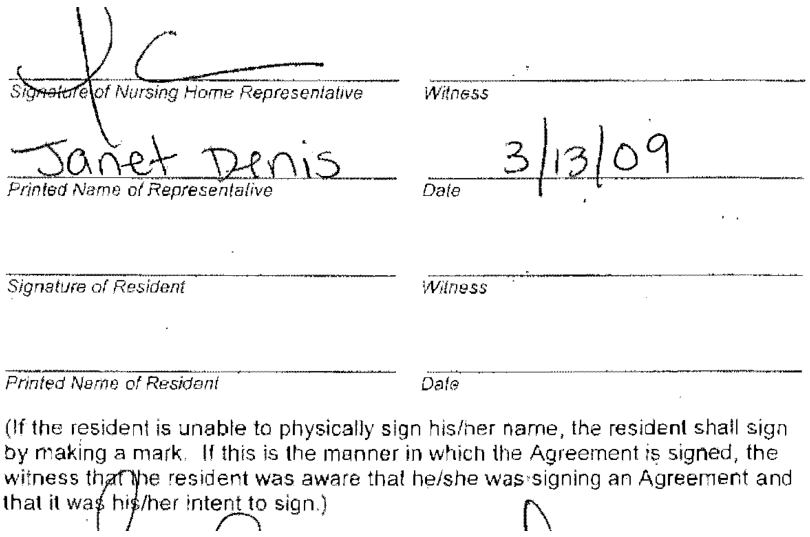
- Mendez, Jr. did not have written authority or consent to act as his Father's agent;
- Mr. Mendez had not instructed or directed Mendez, Jr. to act for, or on his behalf in any matter; and
- Mr. Mendez had not authorized or instructed Mendez, Jr. to execute the agreement on his behalf.

[A. 78].

On these facts, it simply cannot be said that Mr. Mendez agreed to be bound by Hampton Court's arbitration agreement.

2. If Hampton Court Really Wanted to Assure that it Had a Binding Contract, All Hampton Court Had To Do Was Follow Its Own Contract.

Hampton Court's agreement contains a signature block for use by the Nursing Home Representative and the Resident:



Signature of Nursing Home Representative — Witness

Janet Denis — 3/13/09

Printed Name of Representative — Date

Signature of Resident — Witness

Printed Name of Resident — Date

(If the resident is unable to physically sign his/her name, the resident shall sign by making a mark. If this is the manner in which the Agreement is signed, the witness that the resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.)

[A. 31].

There is also a signature block for use by the Resident's Legal Designee:

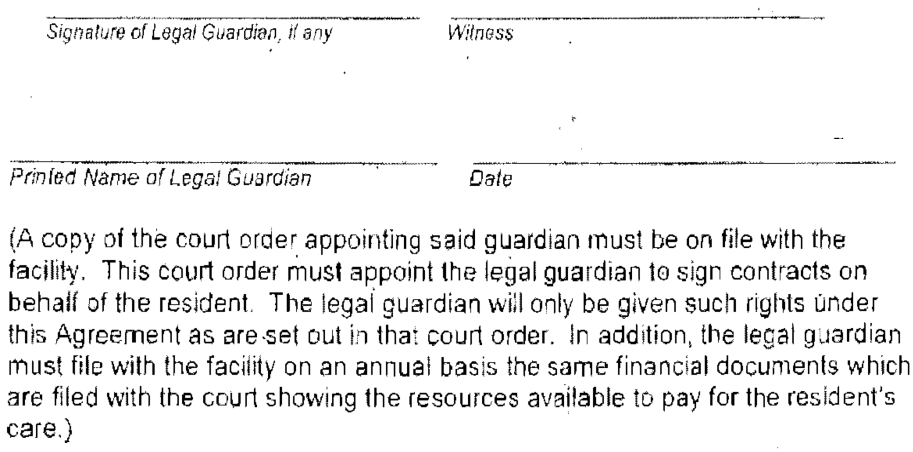
Signature of Legal Designee, if any — Witness

Printed Name of Legal Designee — Date

(The legal designee shall supply the facility with a copy of the power of attorney, durable power of attorney, or other legal document which permits him to act as the legal designee of the resident. It is understood that the legal designee shall pay for the care of the resident in accordance with this Agreement to the extent that he has access to the resident income or resources. The facility may require an accounting from time to time as to the nature and type of said resources; failure to supply such an accounting shall be a breach of this Agreement.)

[A. 32].

As well as one for use by the Resident's Legal Guardian:



Signature of Legal Guardian, if any Witness

Printed Name of Legal Guardian Date

(A copy of the court order appointing said guardian must be on file with the facility. This court order must appoint the legal guardian to sign contracts on behalf of the resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with the facility on an annual basis the same financial documents which are filed with the court showing the resources available to pay for the resident's care.)

[A. 31-32].

Further, Hampton Court's contract states that "A resident is not deemed admitted until such time as all agreements required by law have been appropriately executed", and "This provision may be waived in writing by the nursing home, at its sole discretion, if the resident is unable to sign and appropriate arrangements have been made to comply with applicable law." [2] [A. 25, ¶ 1].

If Hampton Court really wanted to assure that it had a binding contract, it should have had Mr. Mendez execute the contract, or have his official designee execute it, or have his legal representative, *i.e.*, his power of attorney, execute it or,

[2] Of course, drafting the agreement in this manner makes perfect sense because the law requires Hampton Court's contract to be " . . . executed by the licensee and the resident or his or her designee or legal representative at the time of admission . . . ". § 400.151, Fla. Stat.

if Mr. Mendez was incapacitated, conditionally admit him and petition, or have an interested person petition the court for appointment of a guardian.[3] *See* §§ 744.301, 744.309, 744.312, 744.3125, 744.3201, Fla. Stat.

This is not a "What else could we do?" case, and it's not a "We did the best we could in a horrible situation!" case - - there are laws in place for dealing with this exact situation. If Hampton Court really wanted to deal with someone competent to execute its contract, all it had to do was follow the law - - that's what it's own contract says it should do.

3. There is No Evidence Supporting a Finding that Mendez, Sr. was the Primary and Directly Intended Beneficiary of the Contract Between Mendez, Jr. and Hampton Court.

In support of it's holding, *Mendez* expressly finds that Mr. Mendez was the third-party beneficiary of the contract between his Son and Hampton Court: "The intent of the parties to the agreement was to arrange for the father's care at the facility." *Mendez,* 140 So. 3d at 674.

We are not so sure that Hampton Court's motives were so benevolent, and strongly suspect that Hampton Court's real intent in admitting Mr. Mendez was profit related. And, while we are equally unsure of Mendez, Jr.'s reasons or intent in admitting his Father, what we do know is this - - families reluctantly place loved

[3]This can be done in an expedited manner. *See* §744.301, Fla. Stat. ("A court, prior to appointment of a guardian but after a petition for determination of incapacity has been filed pursuant to this chapter, may appoint an emergency temporary guardian for the person or property, or both, of an alleged incapacitated person.").

ones in nursing homes for a number of reasons. For instance, the family may be unable to physically provide the level of attention needed by the loved one. Also, the family may be unable to emotionally cope with the anguish often caused by caring for a physically or mentally infirm parent or loved one. In these situations, the admittance, while certainly of benefit to the resident, is not primarily and directly intended to benefit the resident - - it's for the benefit of the over-stressed family. Whether that is the case here we do not know because the trial court did not hold an evidentiary hearing and, thus, no one knows why Mendez, Jr. admitted his Father to Hampton Court or what Hampton Court's motive was in accepting him. [4]

4. There is No Evidence Supporting a Finding that Mendez, Sr. Lacked Capacity to Give Informed Consent at the Time of the Admittance.

Without saying why it's important, the *Mendez* opinion states that Mr. Mendez lacked the capacity to give informed consent at the time of the admittance. *Mendez*, 140 So. 3d at 674. This finding is based Hampton Court's proffer of an unsworn, unauthenticated statement by its staff doctor. [A. 73; 83].

A proffer is not evidence; it's merely a representation by a party's lawyer. *Grim v. State*, 841 So. 2d 455, 462 (Fla. 2003) ("Proffered evidence is merely a

[4] We remind the Court that Mr. Mendez wanted an evidentiary hearing, [A. 63, line 5-6; 39, ¶ 8], and told the trial court that if it was going to decide the issue on the facts, an evidentiary hearing was necessary. [A. 63, line 12-13].

representation of what evidence the defendant proposes to present and is not actual evidence.). Argument of counsel is not evidence either, and it may not be treated as a substitute for evidence. *Lazcar Intern., Inc. v. Caraballo*, 957 So. 2d 1191, 192 (Fla. 3d DCA 2007) (unsworn argument of counsel is not evidence). Finally, the courts of this state may not rely upon a proffer in making evidentiary decisions or rulings. *Smith v. Smith*, 64 So. 3d 169, 171 (Fla. 4th DCA 2011).

Contrary to the findings of both the trial and appellate courts, there is no record evidence supporting the conclusion that Mr. Mendez lacked capacity to consent to the agreement and, more importantly, lack of capacity should not be a factor in the decision in this case.

5. If Mendez, Sr. Lacked Capacity to Give Informed Consent at the Time of the Admittance, It's Hard to Say that He Knowingly Accepted the Benefit of Contract.

Important to the *Mendez* decision is the court's belief that Mr. Mendez, by residing at Hampton Court, knowingly accepted the benefit of his Son's contract with Hampton Court. Assuming, which we don't, that Mr. Mendez was incompetent, it's hard to say that he knowingly accepted the benefit of the contract and, thus, he should be bound by the contract's terms.

6. An Evidentiary Hearing is Not Necessary.

We are aware of those decisions holding that where the facts regarding the enforceability of an agreement to arbitrate are in dispute the trial court "must

summarily hear and determine disputed issues regarding arbitration in an expedited evidentiary hearing", *Travelers Ins. Co. v. Irby Const. Co., Inc.*, 816 So. 2d 829, 830 (Fla. 3d DCA 2002), and write to point out that:

- Mr. Mendez asked for an evidentiary hearing and Hampton Court choose not to set one;
- Hampton Court had the opportunity to put on evidence supporting a finding that Mr. Mendez signed the agreement and that the arbitration clause should be enforced against him, it failed to do so and it should not be given a second bite at that apple.
- Hampton Court had the opportunity to put on evidence supporting a finding that Mendez, Jr. had the right, authority or permission to sign and bind his Father to the agreement's arbitration clause, it failed to do so and it should not be given a second bite at that apple.
- Hampton Court also had the opportunity to put on evidence supporting a finding that Mr. Mendez had been adjudicated incapacitated in March of 2009, it failed to do so and it should not be given a second bite at that apple.

Given the above, it is respectfully submitted that Hampton Court had its chance to present evidence supporting it's position, did not do so and, instead, chose to rely on its contract and argument of counsel. Based on the facts Hampton Court chose to rely on, it is clear that the arbitration clause cannot be enforced

against Mr. Mendez and, consequently, the opinion on review should be reversed with directions that the case be remanded to the trial court for vacation of the order staying the case and compelling arbitration.

CONCLUSION

Based on the foregoing, Mr. Mendez respectfully submits that the opinion on review should be reversed with directions that the case be remanded to the trial court for vacation of the order staying the case and compelling arbitration.

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.**, and **Deborah L. Moskowitz, 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, tvaldez.pleadings@qpwblaw.com, and acruz@qpwblaw.com, on **February 11, 2015**.

LAW OFFICES OF CHARLES M-P GEORGE
Attorneys for Juan Mendez, Jr.

By: */s/ Charles M-P George*
CHARLES M-P GEORGE
Florida Bar Number: 996718
1172 South Dixie Highway #508
Coral Gables, Florida 33146
Telephone: 305-661-7686
E-Service Email: e-service@cmpg-law.com
Secondary Email: cgeorge@cmpg-law.com

CERTIFICATE OF COMPLIANCE

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

By:_____
Charles M-P George