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 ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Juan Mendez, Jr. will be referred to herein as "Petitioner," "Mendez, Jr.," or "Son." Juan Mendez, Sr. will be referred to as "Mendez Sr.," "Resident" or "Father." Respondent, Hampton Court Nursing Center, will be referred to herein as "Facility," "Respondent" or "Hampton Court."

STANDARD OF REVIEW

The questions presented in this case are all pure questions of law (e.g. the interpretation and application of principles of contract law and interpretation and the interpretation and application of state statutes). The standard of appellate review for pure questions of law presented to this Court is the *de novo* standard. *See Cromartie v. State*, 70 So. 3d 559 (Fla. 2011).

STATEMENT OF THE CASE AND FACTS

Respondent agrees with the statement of the case and facts as stated in the opinion of the Petitioner Court of Appeal (hereinafter "Third District") in this case. Therefore, Respondents incorporate that statement of the facts by reference as if the same were set forth fully herein.

SUMMARY OF THE ARGUMENT

The Third District's decision properly applies and is absolutely consistent with the Florida authority that has properly 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 that an one who receives and accepts the benefits of a contract cannot subsequently avoid arbitration pursuant to an arbitration provision contained in that same contract.

The Third District's decision is consistent with the numerous 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. Moreover, the cases that are cited as being in conflict with it are either distinguishable from the case or, in the alternative, were wrongly decided based on an failure to recognize or properly interpret and apply the longstanding third party beneficiary and estoppel principles on which the decision of the Third District is correctly premised.

Petitioner's entire argument to this Court is based on a complete misinterpretation and proposed misapplication of Section 400.151, Florida Statutes. Section 400.151 is a procedural statute meant to do no more than require that the presence of each resident in a nursing home be covered by a *written*

contract and that each such contract contain certain *mandatory* provisions (i.e. provisions setting forth the services and accommodations to be provided by the facility, the rates or charges, bed reservation, and refund policies). Petitioner's argument that this statute was somehow meant to change the longstanding body of substantive common law to abrogate the third party beneficiary rule; and, thereby, prevent any resident from receiving the benefits of or being bound to the terms of an admission contract under either theory, is meritless, misguided and wrong.

ARGUMENT

I. A NON-SIGNATORY TO A CONTRACT CAN AND IN CASES LIKE THIS ONE SHOULD BE COMPELLED TO ARBITRATE PURSUANT TO THE TERMS OF AN ARBITRATION PROVISION CONTAINED IN THAT CONTRACT BASED ON THE THIRD PARTY BENEFICIARY RULE AND RELATED ESTOPPEL PRINCIPLES

This Court should resolve the split in authority in the several District Courts of Appeal of this State by approving and affirming the Petitioner's decision in *Mendez v. Hampton Court Nursing Center, LLC*, 140 SO.3d 671 (Fla. 3d DCA 2014), the First District's decision in *Alterra Healthcare v. Estate of Linton ex rel Graham*, 953 So.2d 574 (Fla. 1st DCA 2007) ("*Linton*"), and the long established principles of contract law, specifically third party beneficiary and estoppel principles, on which they are based.

A. THE PETITIONER'S DECISION IN THIS CASE WAS THE PRODUCT OF A PROPER APPLICATION OF THE RELEVANT FACTS IN THIS CASE TO THE RELEVANT CONTROLLING PRINCIPLES OF STATE CONTRACT LAW (I.E. THIRD PARTY BENEFICIARY AND RELATED ESTOPPEL PRINCIPLES

The Petitioner's decision in this case was the product of a proper application of the relevant facts in this case to the relevant controlling principles of state contract law (i.e. third party beneficiary and estoppel principles). The Petitioner began its analysis by highlighting some important points regarding Florida's strong public policy in favor of arbitration. To wit, that this Supreme Court has held that 'arbitration is a favored means of dispute resolution; that, in Florida, arbitration provisions are generally favored by the courts; and that, where possible, courts should resolve all doubts in favor of arbitration rather than against it. *Mendez* at 673-674 (internal citations omitted).

These are important points that appear to be all too often forgotten or ignored by the lower courts of this State, including some District Courts of Appeal, who decide cases involving arbitration in a nursing home setting. It is true that these points do not come into play in the category of cases where the arbitration agreements at issue are clearly invalid. However, this case and others like it do not fall into that category. On the contrary, cases such as this one are exactly the types of cases which should be decided with Florida's strong public policy favoring

arbitration and the above stated points related to that policy in mind (i.e. should be decided in favor of arbitration).

There is much discussion in the cases Petitioner cites as being in conflict with the decision in this case about whether the individuals in those cases had the "authority" to enter admission contracts containing arbitration agreements or, in some cases, separate arbitration agreements. That discussion is relevant in cases where the individual who signed the contract containing the arbitration provision is alleged to have had the legal power to act as the resident's agent; and the Facility's argument is based on principles of *Agency Law*. However, it has no relevance in cases like this one where the individual who signed the contract containing the arbitration provision is alleged to have acted "for the benefit of the resident"; and where the Facility's argument is, as a result, based on principles of *Third Party Beneficiary Law* and related principles of estoppel.

Third Party Beneficiary law and related estoppel principles are legally separate from and are in no way dependent on Agency Law or an Agency Law analysis. This distinction between an argument based on Agency law and one based on Third Party Beneficiary Law (and related principles of estoppel) appears to be lost on Petitioner and even some Courts. However, that distinction was properly recognized and appropriately addressed by the Third District in this case.

The Third District correctly stated and explained the applicable law in its opinion in this case. It noted that it is well-established that arbitration clauses in contracts are binding on third party beneficiaries (see citations in opinion); and that this is true even if the third-party beneficiary did not sign the contract containing the arbitration agreement because "a nonsignatory to an arbitration agreement may be bound to arbitrate if the nonsignatory has received something more than an incidental or consequential benefit of the contract, or if the nonsignatory is specifically the intended third-party beneficiary of the contract." *See Mendez* at 674 (citing *Germann v. Age Inst. of Fla., Inc.*, 912 So.2d 590, 592 (Fla. 2d DCA 2005); *see also Orion Ins. Co. v. Magnetic Imaging Sys. I,* 696 So.2d 475, 478 (Fla. 3d DCA 1997); *Terminix Int'l Co., LP v. Ponzio*, 693 So.2d 104, 109 (Fla. 5th DCA 1997); *Martha A. Gottfried, Inc. v. Paulette Koch Real Estate*, 778 So.2d 1089, 1090 (Fla. 4th DCA 2001); *Zac Smith & Co., Inc. v. Moonspinner Condo. Ass'n, Inc.*, 472 So.2d 1324, 1325 (Fla. 1st DCA 1985).

Moreover, the Third District correctly applied that applicable law to the facts of this case. It noted that Mendez Sr. was the sole intended third-party beneficiary of the agreement (as opposed to a mere incidental beneficiary: that the intent of the parties to the agreement was to arrange for Mendez Sr.'s care at the facility, and that Mendez Sr. received the benefit of the parties' bargain under that agreement for the duration of his residency at the facility (for more than four years). Based on

these facts, the Third District properly concluded that as a third-party beneficiary to the agreement, Mendez Sr. was bound by the arbitration provision; and noted that the First District came to a similar conclusion in *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So.2d 574 (Fla. 1st DCA 2007)("Linton").

In *Linton*, a nursing home facility moved to compel arbitration in a suit brought on behalf of Mrs. Linton, its deceased former resident. *Linton* at 576. The plaintiff in that case argued that the resident was not bound by the arbitration clause contained in the residency agreement signed by her adult son because her son had no authority to sign the agreement on her behalf (an argument based on principles of agency law). *Id.* The First District rejected that argument, which was based on ignorance or willful disregard of third party beneficiary law, and held:

> "[W]e reject the plaintiff's argument that there was not a valid agreement to arbitrate that was binding on Mrs. Linton, because she did not sign the agreement. In general, arbitration provisions are personal covenants that bind only the parties thereto. But the trial court correctly concluded that Mrs. Linton was an intended third-party beneficiary of the agreement in the present case. A nonsignatory third-party beneficiary is bound by the terms of a contract containing an arbitration clause. *Id*. at 579.

The Third District applied similar reasoning to the analogous facts presented to it in this case and properly reached the conclusion that the father is bound by the arbitration clause in the agreement signed for his sole benefit by his son. The Court recognized that other district court had held, for a variety of reasons, that nursing home residents who were nonsignatories to the contracts under which they

received care at a facility were not bound by the arbitration clauses found in those care agreements.

The Third District noted that, in those cases, an adult family member had executed the contact to obtain care and residency for a sick or elderly parent or relative; **and, importantly, that those other decisions often omitted any discussion of the issue of whether the resident was a third-party beneficiary**. Further, it went on to distinguish several of those cases and express its disagreement with those and other cases insofar as they might be deemed to conflict with its decision in this case.

In the following paragraphs, Respondent will discuss those several decisions and will explain why the decisions are completely distinguishable from and **not** dispositive of the issue in this case; and why, as the Third District noted, those cases cannot be reconciled either with the ordinary rules of law governing third-party beneficiaries and arbitration agreements or with Florida's avowed public policy to favor arbitrations and should be corrected, clarified or abrogated insofar as they conflict with the Third District's decision in this case in the First District's decision in *Linton*.

Lepisto v. Senior Lifestyle Newport Limited Partnership

The resident in *Lepisto v. Senior Lifestyle Newport Ltd. Partnership,* 78 So.3d 89 (Fla. 4th DCA 2012) executed a durable power of attorney naming his

wife as his attorney-in-fact prior to his admission to the Facility. At the time of his admission, his wife presented the power of attorney to the Facility and executed admission contract and an addendum to that contract, a part of that contract, which provided for arbitration of disputes between the parties. Despite the fact it was undisputed that the wife had authority to sign the contract and the arbitration addendum on behalf of her husband as his attorney-in-fact, the Court held "there [was] no evidence that she [did so when she merely signed the [c]ontract and [a]ddendum in her individual capacity as the financially responsible party".

As a result of the Court's rejection of its agency law based argument, the Facility argued, 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; and cited to the case of *Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus*, 853 So.2d 500 (Fla. 4th DCA 2003). In *Fenelus* the Fourth District had previously recognized the principle that a contract is binding when both parties perform under it, even if only one party signs the contract, because a party's assent to a contract can be shown by its acts or conduct; and held that the nursing home had clearly

assented to the contract by performing the contract for more than three years and that the agreement was, therefore, valid[1].

The Forth District rejected this argument on the basis that *Fenelus* was distinguishable from *Lepisto.* In *Fenelus* there was evidence that the non-signing party that sought to enforce the terms of the contract (the nursing home) had assented to the contract by providing services to the client for **over three years**. The Lepisto Court held that, though there was evidence the resident received services from the nursing home (i.e. that he received the benefits under the contract), that evidence did not establish that the resident assented to the contract because there was no proof those services were paid for by the resident or his representative. Though the record showed the payments were made by the resident's wife who, though she was the resident's attorney-in-fact, signed the contract as the *Financially Responsible Party.*

A review and a comparison of the opinion in *Lepisto* to the opinion of the Third District in this case, makes it clear that *Lepisto* is completely factually distinguishable from and should have no (direct) impact on this case or any similar case. However, as the Third District correctly pointed out in its opinion in this case, the *Lepisto* decision cannot be reconciled the ordinary rules of law governing third-party beneficiaries and arbitration agreements or with Florida's avowed

[1] *Fenelus* is consistent with and provides further support for the Third District's decision in this case.

public policy to favor arbitrations. Therefore, that decision should be addressed by this Court.

The *Lepisto* decision recognizes the principle of estoppel that commonly arises in third party beneficiary cases (including this one) however completely misapplies that principle. The individual who was a party to the contract in *Lepisto* signed that contract for the obvious benefit of the resident in that case. However, the *Lepisto* case overlooked this key fact; and, instead, focused all of its attention on the fact the party signed the contract as a "financially responsible party"; a fact that is irrelevant in a third-party beneficiary analysis).

In short, the decision in *Lepisto* misapplies the law; mechanically places form over substance; and seems to go out of its way to avoid arbitration instead of resolving any doubts in favor of arbitration as public policy should dictate. For these reasons, *Lepisto* is a bad decision that sets a disturbing precedent and runs afoul of the applicable rules of law and public policy. Therefore, this Court should unequivocally reject the reasoning espoused in *Lepisto* and correct that reasoning via its opinion in this case.[2] Specifically, as the Third District noted in its opinion in this case, the principle that a third-party beneficiary is bound by an arbitration

[2] The *Lepisto* decision cited to the Fifth District's decision in *Fletcher v. Huntington Place Limited Partnership*, 952 So.2d 1225 (Fla. 5th DCA 2007) which involved an argument based on agency as opposed to third party beneficiary law. Therefore, *Lepisto's* reliance on that case to analyze a third party beneficiary argument was completely misplaced.

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

The Fifth District's decision in *Perry ex rel. Perry v. Sovereign Healthcare of Metro West, LLC*, 100 So.3d 146 (5th DCA 2012), conflicts with the decision of the Third District in this case and improperly avoids the decision in *Linton* based on the concoction of a "distinction" that has no legitimate legal basis and should have had no legal effect. In short, a review of the *Perry* case quickly reveals that the reasoning underlying the decision in that case is flawed and legally baseless; and that, the *Perry* case (rather than this one) is ill reasoned and created "bad law," which should be corrected by this Court.[3]

In *Perry*, the Fifth District reversed an order compelling arbitration and rejected a third party beneficiary argument like the one made in this case and *Linton* based on reasoning that is dubious at best. The *Perry* Court highlighted the following facts: (1) the Resident's daughter signed the admission contract on the Resident's behalf as the "responsible party" - the individual who undertakes the obligation of a guarantor for payment on behalf of the resident (*it is difficult to imagine how the Court could have concluded that this fact was anything other than evidence of action taken for the benefit of the resident*); (2) there was no evidence

[3] On a side note, the *Perry* case was before this Court for substantive consideration at one point. However, the eventual settlement of the underlying case and resulting dismissal of the appeal in that case, deprived the Court of the opportunity render an opinion regarding the *Perry* decision. This case, however, presents an opportunity for the Court to issue a correction of that decision which is long overdue.

the Resident's daughter has legal "authority" to sign the admission contract on the Resident's behalf (*this fact is completely irrelevant in a third party beneficiary analysis*); (3) the Resident's name did not appear anywhere on the contract (*this fact played no role in the Court's decision*); (4) there was no evidence the Resident was incapable of signing the admission contract that contained the arbitration agreement on her own behalf (*this fact is completely irrelevant in a third party beneficiary analysis*).

In reliance on some of these "facts" (but with no regard for others), the *Perry* Court rejected the Facility's third party beneficiary argument agreement by: 1) purporting to distinguish *Linton* from *Perry* on the grounds that, in *Perry*, there was no evidence the resident was incapable of signing the agreement on her own behalf; and (2) that even if the resident's daughter signed the agreement on the resident's behalf, there was no evidence the daughter had the "authority" to bind the resident to the agreement. The reasoning of the *Perry* Court is flawed and should be rejected by this Court for two reasons.

First, 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. Moreover, a survey of third party beneficiary case law unequivocally establishes that mental capacity or competence is irrelevant to the

question of whether an individual can be bound to the terms of a contract as a third party beneficiary. Thus, the *Perry* Court‘s claim its case could be distinguished from *Linton* based on the fact resident in its case did not lack the capacity to contract was had no legitimate legal baseless claim; and, in turn, that claim did not provide a legitimate legal basis for the *Perry* Court’s rejection of the Facility’s third party beneficiary argument. In fact, a proper analysis of the facts in *Perry* Should undeniably have results in the conclusion that the resident in that case was the third party beneficiary of the admission contract, had accepted the benefits of that contract, and was therefore bound by its terms including the arbitration provision included amongst those terms.

Second, the *Perry* Court’s holding that there was no evidence the daughter had the “authority” to bind the resident to the admission contract was not relevant to the analysis in that case (in which the Facility made no arguments based on agency law principles) and is not relevant to the analysis in this case (in which the Facility made no arguments based on agency law principles). As Respondent has stated repeatedly, principles of agency law and principles of third party beneficiary law and estoppel are completely separate and distinct. Therefore, the question whether a son who signs a contract for the benefit of his father had “authority” to sign that contract under agency principles is irrelevant to the question of whether

the father is bound to the terms of the contract (including any arbitration provision contained therein) as a third party beneficiary of that contract.

In short, there is express and direct conflict between the decision in this case and the decision in *Perry*. However, for the reasons explained herein, the *Perry* decision is based on a fallacy; a fallacy that should be addressed directly and corrected by this Court. More specifically, this Court should unequivocally reject and abrogate the *Perry* decision in its entirety; and affirm the Third District's well-reasoned and legally sound decision in this case as well as the First District's similarly well-reasoned and legally sound decision in *Linton*.

Sovereign Healthcare of Tampa, LLC v. Estate of Yarawsky

The case of *Sovereign Healthcare of Tampa, LLC v. Estate of Yarawsky*, 150 So.3d 873 (2d DCA 2014) ("*Yarawsky*") was decided after the Third District issued its opinion in this case. The *Yarawsky* decision appears to take everything wrong with the cases cited and discussed previously herein and to incorporate those things into a single decision, which should be unequivocally rejected by this Court. The *Yarawsky* Court specifically recognized the decision in this case (*Mendez*) and purported to distinguish its decision from *Mendez*. However, Respondent addresses the case here for the sake of being thorough and providing the Court with the most complete analysis possible.

The *Yarawsky* decision begins its analysis by citing to and relying to a

significant extent on the *Perry* decision. As a result, *Yarawsky* incorporates and, therefore, suffers from all of the same infirmities that *Perry* does. Those infirmities, all of which make *Perry* bad law, were previously discussed in detail herein; and need not be reiterated here except to point out that that *Yarawsky* decision's reliance on *Perry* is detrimental rather than helpful to the decision.

The *Yarawsky* Court does recognize that the concept of a third-party beneficiary applies when "the parties to the contract intended that a third person should be benefited thereby," 11 Fla. Jur.2d *Contracts* § 203 (2014), and there is no requirement that the third-party have knowledge of or accept the contract, *see Id.* at § 209. Moreover, it recognizes that Mrs. Yarawsky signed the admission contract for the purpose of obtaining skilled nursing care for her husband. However, it concerns itself more with the fact Ms. Yarawsky signed the contract in her individual capacity as "responsible party" and cites to *Lepisto* and *Fletcher* apparently in an effort to support the proposition that the label "responsible party" should control the outcome of the case.

Moreover, the *Yarawsky* decision confuses principles of agency law with principles of third party beneficiary law and estoppel and muddles the analysis of the third party beneficiary issue at issue in the case as a result. Specifically, the *Yarawsky* Court states that "because nobody signed the agreement on behalf of the resident or as the resident's legal representative, the resident is not a third-party

beneficiary of the agreement or the arbitration provisions within the contract" and purports to distinguish *Yarawsky* from *Linton* on that same basis. This analysis is glaringly wrong. While the question of whether anyone with legal **authority** signed the contract would be relevant to an analysis of an agency law argument, it has nothing to do with the analysis of an argument based on third party beneficiary law.

As stated previously, *Yarawsky* recognized that the concept of a third-party beneficiary applies when "the parties to the contract intended that a third person should be benefited thereby," 11 Fla. Jur.2d *Contracts* § 203 (2014). However, its analysis focused on whether anyone signed the contract "on behalf of the resident or as the resident's legal representative" ignores the truly relevant question "whether the parties to the contract intended that a third person should be benefited thereby."

Given the fact that Mrs. Yarawsky executed the admission contract for the purpose of obtaining skilled nursing care for her husband, it should have been crystal clear to the *Yarawsky* Court that the answer to this question was, yes. The contract at issue in that case was clearly entered by Mrs. Yarawsky and the Facility for the direct (sole) benefit of Mr. Yarawsky. These facts made *Yarawsky* a textbook third party beneficiary case. However, the *Yarawsky* Court, apparently focused on selected issues from certain cases (some of which have already been

addressed herein), and failed to recognize that fact.

The *Yarawsky* Court took note of the *Mendez* decision but stated "the facts in *Mendez* are different from the facts in this case and the facts in *Perry*." It explained that in *Mendez* on the day of admission, a doctor at the nursing home had "determined the [resident] lacked the capacity to give informed consent or make medical decisions" (a fact which is irrelevant in a third party beneficiary analysis). Further, it explained that "[m]ore important, the resident's son 'signed the agreement on a signature line indicating 'signature of resident's representative,'" who by the terms of the contract also happened to be the financially responsible party. *Id.* It went on to say that, in *Mendez* a promisee (the resident's son) bound the third-party beneficiary (the resident) by signing the contract as the resident's representative, not simply as the financially responsible party.

These facts are true and establish that Mendez Sr. was a third party beneficiary of the contract at issue in this case. However, the facts in *Yarawsky* are not different enough to justify the completely different result reached by the Court in that case. Therefore, based on a proper reading of the Third District's decision in this case and a proper application of those principles on which that decision is based (as opposed to the mechanical application of form over substance, the *Yarawsky* Court should, like the *Mendez* Court, have arrived at the conclusion that

resident in *Yarawsky* was the intended third party beneficiary of the contract in that case; and was bound to arbitrate as a result. Therefore, *Yarawsky* conflicts with *Mendez* in terms of its result in the manner in which it reached that result. A comparison of the reasoning stated in both cases makes it clear that *Mendez* is the more well-reasoned of the two cases; and should control over the muddled and ultimately improper and incorrect analysis in *Yarawsky*. Therefore, the Court should reject the reasoning and decision in *Yarawsky* and affirm the reasoning and decision of the Third District in this case.

Section Conclusion

Like the Third District, Respondents respectfully disagree with the decisions that conflict in whole or in part with the decision in this case. The principle that a third-party beneficiary is bound by an arbitration provision does not depend upon whether the party to the agreement signs only as the "financially responsible party" or some other designation. It turns on whether the party acted for the benefit of a third party and whether that third party should be bound to the terms of the contract as a third-party beneficiary.

Similarly, the principle that a third-party beneficiary is bound by an arbitration agreement does not depend upon whether the party who signed the agreement for care had actual or apparent authority to agree to arbitration: it turns only on whether the resident accepted the benefits of the contract and thereby was

a third-party beneficiary. *Martha A. Gottfried, Inc.*, 778 So.2d at 1090 (holding that nonsignatory to contract was "bound by her agreement to arbitrate, as having accepted the economic and professional benefits of [signatory's] membership with the board").

For the same reason, it is irrelevant to the third-party beneficiary analysis whether the son's signature as "Resident's Representative" on the agreement qualified as the signature of the father's "designee or legal representative" under section 400.151, Florida Statutes. Whether or not the son's signature so qualified, the father resided and received care at the facility for years pursuant to the agreement and was therefore a third-party beneficiary bound by the arbitration provision. *See Mendez* at 675-676 (citing *Integrated Health Servs. of Green Briar, Inc. v. Lopez–Silvero*, 827 So.2d 338, 339 (Fla. 3d DCA 2002) ("A contract is binding, despite the fact that one party did not sign the contract, where both parties have performed under the contract.").

In all of the cases that have been or will be discussed in conjunction with this appeal, the purpose of the agreement is to obtain residential and medical care for an elderly parent or relative. The elderly parent or relative was therefore a third-party beneficiary and, accordingly, bound by the arbitration provision. *Orion Ins. Co.*, 696 So.2d at 478; *Martha A. Gottfried, Inc.*, 778 So.2d at 1090; *Ponzio*, 693 So.2d at 109, *Zac Smith & Co., Inc.*, 472 So.2d at 1325. In deciding whether

to enforce arbitration clauses in cases like this one, the Court are bound by longstanding principles of contract and arbitration law. Any question of whether the policy concerns raised by the realities of how these arbitration provisions are entered warrants review and/or a substantial overhaul of the common law of contracts is within the purview of and should properly be left to the Legislature.

II. PETITIONER'S ATTACK ON THE DECISION OF THE THIRD DISTRICT IN THIS CASE IS BASED ALMOST EXCLUSIVELY ON A MISINTERPRETATION AND MISAPPLICATION OF SECTION 400.151, FLORIDA STATUTES, AND OTHER MISCONCEPTIONS

In section IA of his Initial Brief, Petitioner cites a number of cases that have dealt or purportedly dealt with third party beneficiary and/or estoppel issues in a nursing home context as support for the proposition that there is a split of authority between the District Courts of Appeal on these issues. However, Petitioner does not discuss those decisions in great detail. He merely states the holding in each of those cases and points out that the Courts in those cases applied the facts in those cases to the controlling law [as they saw it]. He then mischaracterizes the decision of the Third District in this case as an anomalous decision that eschewed the relevant facts and law in favor of the blind application a rigid "bright line" test; and asserts that a nursing home resident can only be bound to arbitrate pursuant to an arbitration clause in an admission contract under agency principles based on a complete misread of Section 400.151, Florida Statutes, which he views as superior to the state common law contract principles that have controlled the formation of

contracts in this state for more than a century. Petitioner's position could not be more wrong.

A. CHAPTER 400, FLORIDA STATUTES, DOES NOT TRUMP THE LONGSTANDING PRINCIPLES OF CONTRACT LAW THAT ARE AT ISSUE IN AND SHOULD CONTROL THE OUTCOME OF THIS CASE AND SIMILAR CASES

Chapter 400, Florida Statutes, which contains ten separate sections (numbered I – X) that deal with "nursing homes and related health care facilities." Chapter 400 includes remedial provisions such as those found in Section 400.022 and 400.023, Florida Statutes ***and*** purely procedural provisions such as Section 400.151. The Courts of this Stated have repeatedly considered challenges to the validity of arbitration agreements raised by current and former nursing home residents. However, none have found anything in any provision of Chapter 400 that would *per se* preclude the arbitration of disputes between nursing home residents (current or former) and nursing homes.

Moreover, none have found anything in any provision of Chapter 400 that would supplant the longstanding principles of contract law (including third party beneficiary and estoppel principles) that are at issue in this case. Therefore, notwithstanding Section 400.151 or any other provision in the current version of Chapter 400, Florida Statutes, the outcome of this case and similar cases should be controlled by those longstanding and still viable principles of contract law. Section

400.151, Florida Statutes is discussed in detail in the following section of this Brief. Therefore, it will not be discussed in further detail here.

B. SECTION 400.151, A SINGLE ADMINISTRATIVE PROVISION IN THE WHOLE OF CHAPTER 400, FLORIDA STATUTES, WAS MEANT TO REQUIRE THAT NURSING HOME CONTRACTS BE IN WRITING, NOT TO TRUMP THE FLORIDA ARBITRATION CODE, ALTER LONGSTANDING PRINCIPLES OF CONTRACT LAW, OR TO CREATE A BARIER TO ACCESS TO SKILLED NURSING CARE

Section 400.151, Florida Statutes, is a purely procedural statute, the clear purpose of which is to require that the presence of each resident in a nursing home be covered by a *written contract* that *must* contain certain provisions (i.e. provisions setting forth the services and accommodations to be provided by the facility, the rates or charges, bed reservation, and refund policies) and *may* include other provisions the parties deem appropriate (e.g. a valid arbitration provision). *See* Section 400.151(1) and (2), Florida Statutes.

Petitioner appears to assert that the purpose of Section 400.151 was to change the longstanding body of substantive common law with regard to contracts in Nursing Homes cases. More specifically, Petitioner appears to assert that the purpose of the statute is to change the common law to place limitations on who may execute a nursing home admission contract; and, thereby, prevent the formation of a nursing home admission contract by anyone

other than a Facility/Licensee *and* the resident, or his or her designee or legal representative.

This is assertion is inaccurate, unsupported unworkable for several reasons: (1) there is no clear, unequivocal language in the statute to support Petitioner's claim; (2) the terms Petitioner cites as support for his argument are broad, vague, and actually undercut Petitioner's argument; (3) the Courts of this State have not interpreted Section 400.151 the way Petitioner seek to have this Court interpret it.

First, a statute designed to change common law must state in clear and unequivocal terms the Legislature's 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. SAP*, 835 So.2d 1091 (Fla. 2002); *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). Section 400.151 does **not** contain any such statement (i.e. contains no clear statement by the Legislature expressing an intent to change the common law of contracts). The absence of any such statement speaks volumes about the

Legislature's intent and the fallacious nature of Petitioner's argument on this point.

Second, the meanings of the terms Petitioner relies on as purported support for its argument ("designee" and "legal representative") are, by Petitioner's own admission, not defined in Chapter 400. Given this fact, those terms do not provide even a hint of a legislative intent to drastically change the common law of contracts (as Petitioner claims); and cannot even arguably be said to come anywhere close to stating a legislative intent to change the common law in "clear and unequivocal" terms. In fact, one or both of those terms could reasonably be interpreted in Respondents' favor as opposed to Petitioner's.[4]

Third, the Courts of this State have interpreted Section 400.151 in a manner that supports Respondents understanding of the intent of that statute; and flies directly in the face of Petitioner's proposed interpretation. For

[4] Black's Law Dictionary refers the reader seeking a definition of the term "legal representative" to the term "representative" which it defines, first and foremost, as "Someone who stands for or acts on behalf of another"; and to the equivalent term "lawful representative" which it defines as "1. **A legal heir**. 2. An executor, administrator, or other legal representative." *See* Black's Law Dictionary (10th ed. 2014). These definitions are notable because they provide ordinary meanings for the term that could reasonably be interpreted to include *inter alia* a close relative (such as Juan Mendez Jr.) entering a legal contract for nursing home services for the benefit of a resident (such as Juan Mendez Sr.).

example, in *Integrated Health Services of Green Briar, Inc., v. Lopez-Silvero,* 827 So.2d 338 (Fla. 3d DCA 2002)(holding that though nursing home licensee did not sign the admission contract in that case, it did perform under the contract; and that, as a result, the contract and the arbitration agreement contained in it were valid).

Fourth, Section 400.151, Florida Statutes, does **not** trump the provisions of the Florida Arbitration Code or the common law of contracts. Petitioner's confusing discussion of principles of statutory construction does nothing to change that. Interestingly, Petitioner even recognizes and acknowledges the validity of the common law third party beneficiary rule that that a non-party to a contract may be bound by a contract where the contract clearly demonstrates the express intention to primarily and directly benefit the non-party; and that, given this fact, a non-signatory to a contract is bound to the agreement so long as the arbitration agreement is valid (I.B. at 17).

However, he then erroneously attempts to blur the lines between third party beneficiary law and agency law, which he fails to recognize as two completely different legal theories under which a "non-signatory" can be bound to an arbitration agreement. Further, he then returns to his argument that Section 400.151 should be deemed to have changed the common law. These arguments are completely without merit.

In conclusion, Section 400.151, Florida Statutes cannot reasonably be deemed to have changed the common law of this state with regard to the formation of contracts in general or the formation of contracts in cases involving third party beneficiary or estoppel principles. If the Legislature wanted to displace the entire body of common law regarding the formation of contracts it could do so. However, in order to accomplish such a drastic change in that law, it would have had to do much more than it did when it passed Section 400.151. That section is a procedural statute that was not meant to bring about a profound, substantive change in the law. Petitioner's argument to the contrary is, quite simply, wrong and should be rejected by this Court. This is particularly true where, as discussed in the following section, accepting Petitioner's argument would be exceedingly bad public policy.

C. REQUIRING EVERY NURSING HOME CONTRACT TO COMPLY WITH THE SO CALLED "EXECUTION REQUIREMENTS" OF SECTION 400.151 WOULD BE IMPRACTICAL AND CONTRARY TO PUBLIC POLICY

There is no way to definitively quantify the percentage of frail elderly or infirmed population in this State who require nursing care but are physically or mentally unable or unwilling to execute nursing home admission agreements and have not appointed an Attorney-in-Fact or other similar Agent. However, if the sheer number of "third party beneficiary and estoppel) cases currently

pending before this Court and other Courts of this State gives any indication, that percentage is substantial.

Under Petitioner's interpretation of the statute and case law, skilled nursing facility will be unable to enter a valid contract for the care of such a resident, even where that resident has a close relative (e.g. son. daughter, or spouse) who is willing to enter such a contract for the residents' benefit. The acceptance of such an interpretation of the statutory and/or case law by this Court would set a disturbing precedent and create a public policy nightmare by needlessly depriving the aforementioned segment of the frail elderly and infirmed population of access to required skilled nursing care.

None of the points Petitioner raises in his Initial Brief in an attempt to establish that compliance with his proposed approach would be good policy ring true. None of them changes the fact that Petitioner's proposed approach, which suggests a rigid application of Section 400.151 based on Petitioner's complete misinterpretation of that section, is wrongheaded and fatally flawed.

D. THE THIRD DISTRICT'S DECISION IN THIS CASE PROPERLY APPLIES LONGSTANDING PRINCIPLES OF STATE CONTRACT LAW, LOGICALLY ADDRESSES PRACTICAL CONSIDERATIONS THE PETITIONER EFFECTIVELY IGNORES, AND IS GOOD LAW

The Third District's decision in this case is based on sound legal precedent and addresses the issue presented in a practical, common sense manner. Petitioner's suggestion that "under the rule of *Mendez*, anyone can sign and bind

anyone else to a nursing home arbitration agreement …" is purposely exaggerated, inflammatory, inaccurate, and misleading rhetoric; and should be treated accordingly. (I.B. at 21). As the *Mendez* Court noted in its opinion in this case, all of the relevant cases on this issue involve a close relative acting for the benefit of a resident to assure that they obtain skilled nursing care.

E. THE THIRD DISTRICT'S DECISION IN THIS CASE IS BASED ON A LOGICAL AND ABSOLUTELY CORRECT APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

Respondent's position, that the third district's decision in this case ***is*** based on a logical and absolutely correct application of the law to the facts of this case, has been explained in great detail in the foregoing pages of this brief. That analysis is unchanged by any of the last few points Petitioner makes in an effort to support his position in this case. Each and every one of those points is completely without merit.

First, Petitioner's claim to the contrary notwithstanding, the fact that Juan Mendez, Jr., executed the Contract at issue here for the benefit of his Father has never been and cannot reasonably be disputed, therefore, the fact Mendez, Sr.'s name does not appear on the contract, like Petitioner's agency argument, is irrelevant. Second, Petitioner's claim to the contrary notwithstanding, there is no merit to Petitioner's argument that Hampton Court did not follow its own contract. Third, Petitioner's claim to the contrary notwithstanding, there can be

no dispute that Juan Mendez, Sr. was the sole intended beneficiary of the Contract between his son and Hampton Court.

Fourth, Petitioner's assertion that there is no evidence Juan Mendez, Sr., lacked the ability to give informed consent at the time of his admission to Hampton Court is contradicted by record evidence. That said, Mendez, Sr.'s mental status is irrelevant to a proper third party beneficiary analysis (as discussed previously herein).

Fifth, Petitioner has no legitimate basis for arguing that Mendez, Sr. did not accept the benefits of the admission contract where he resided and received care and services from the Facility for four years. Petitioner's attempt to imply the necessity of "knowing" acceptance is legally and factually baseless.

C**ONCLUSION**

Based on the foregoing, Respondent respectfully requests that this Court approve and affirm the District Court of Appeal decisions in *Mendez* and *Linton*; and reject and invalidate any decisions that conflict on whole or in part with that decision.

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 8th day of April, 2015.

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.

/s/ - Thomas A. Valdez

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