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

PETITIONER'S REPLY BRIEF ON THE MERITS

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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. #].

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

REPLY ARGUMENT

We reminded the Court that § 400.151 is found in Chapter 400, that part of the Florida Statutes regulating nursing homes such as Hampton Court. We also remind the Court that the district court found § 400.151's requirement that every nursing home contract be ". . . executed by . . . the resident or his or her designee or legal representative . . .", irrelevant to its decision because it believed that the case was controlled by common law, third-party beneficiary rules. *Mendez v. Hampton Court*, 140 So. 3d 671, 675-676 (Fla. 3d DCA 2014).

A. Chapter 400's Paramount Concern is the Protection of Nursing Home Residents.

Florida's nursing home regulations were "enacted largely to remedy the circumstances discovered and publicized by two 1979 Dade County grand jury reports which graphically described horrendous conditions in certain residential facilities." *Knowles v. Beverly Enterprises*, 898 So. 2d 1, 14 (Fla. 2005). Those

dreadful conditions existed for years. *See Committee on Health and Rehabilitative Servs., Nursing Homes: Senate Staff Analysis and Economic Impact Statement*, Bill No. 80-1218 (Fla. June 10, 1980). To combat the health hazards and deficiencies identified in the Grand Jury's Report, Florida's Legislature enacted the laws now found in Chapter 400 of the Florida Statutes. In doing so, our legislature acted to protect some of Florida's most vulnerable residents - - nursing home residents. *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 63 (Fla. 4th DCA 2003); *Mang v. Country Comfort Inn, Inc.*, 559 So. 2d 672, 673 (Fla. 3d DCA 1990).

With this in mind, we address Hampton Court's belief that the nursing home operators are best equipped to determine the person most suited to execute a nursing home contract.

B. Chapter 400 of the Florida Statutes is Remedial.

Chapter 400 of the Florida Statutes is remedial:

> The purpose of this part is to provide for the development, establishment, and enforcement of basic standards for:
>
> (1) The health, care, and treatment of persons in nursing homes and related health care facilities; and
>
> (2) The maintenance and operation of such institutions that will ensure safe, adequate, and appropriate care, treatment, and health of persons in such facilities.

§ 400.011, Fla. Stat.

C. § 400.151, of the Florida Statutes is Remedial.

"A remedial statute is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." *Lacey v. Healthcare and Retirement Corp.*, 918 So. 2d 333, 334 (Fla. 4th DCA 2006). While a statute need not possess all of these attributes to be remedial in nature, each of these virtues is present in this case:

- Section 400.151, Fla. Stat., specifies the terms and conditions that must be included in every nursing home contract and requires that ". . . each resident in a facility shall be covered by a contract, executed by . . . the resident or his or her designee or legal representative at the time of admission . . .". section 400.151 introduces regulations that are conducive to the public good by assuring that every nursing home contract is executed by someone with the legal right or authority to do so, and by assuring that both the nursing home and the resident are bound by the terms of the contract.
- Section 400.151, Fla. Stat., corrects / modifies existing law. The statute replaces the fuzzy, anyone-can-sign-and-bind-anyone-else, third-party beneficiary rule with a clear, concise requirement that every nursing home contract contain specific terms and be ". . . executed by the . . . the resident or his or her designee or legal representative at the time of admission . . .".
- Finally, § 400.151, Fla. Stat., redresses an existing grievance. If Hampton

Court is to be believed, there is much debate over who may sign-and-bind a nursing home resident to a nursing home contract. Section § 400.151, Fla. Stat. neatly and conclusively resolves these disputes by requiring that every nursing home contract be ". . . executed by . . . the resident or his or her designee or legal representative . . .".

Contrary to Hampton Court's argument, § 400.151(1), Fla. Stat., is remedial in nature. It corrects existing law, redresses an existing grievance and establishes regulations that are conducive to the public good.

D. A Statute That is Repugnant to the Common Law Changes the Common Law by Implication.

Citing *Thronber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990) and other authorities, Hampton Court argues that in order for a statute to change the common law, the statute must contain clear and unequivocal language stating that it is meant to change the common law. *Answer* at 24. Then, focusing on the language, rather than its effect, Hampton Court argues that § 400.151, Fla. Stat., does not specifically state that it is meant to change the common law, so it cannot be interpreted as doing so.

With all due respect to Hampton Court, that's not what *Thornber* says, nor is it how the law works. What *Thronber* says is this:

> Unless a statute unequivocally states that it changes the common law, **or is so repugnant to the common law**

> **that the two cannot coexist**, the statute will not be held to have changed the common law.

Id., at 918 (emphasis added).

And, as this Court has held for more than 100 years, 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).

Section 400.151's requirement that every nursing home contract be ". . . executed by . . . the resident or his or her designee or legal representative . . .", is repugnant to the fuzzy, anyone-can-sign-and-bind-anyone-else, third-party beneficiary rule. The two rules simply cannot coexist, they are mutually exclusive, either anyone-can-sign-and-bind-anyone-else to a nursing home contract **or** every nursing home contract must be ". . . executed by . . . the resident or his or her designee or legal representative . . .". Since § 400.151 of the Florida Statutes is repugnant to the third-party beneficiary rule, the statute must be deemed to have changed the common law by implication.

E. The Fact that No One Has Made the Argument Before Doesn't Mean that the Argument is Wrong.

Without really saying so, Hampton Court implies that our argument must be wrong because nobody has made it before. Then, citing *Integrated Health Services of Green Briar v. Lopez-Silvero*, 827 So. 2d 338 (Fla. 3d DCA 2002), Hampton

Court implies that despite the opportunity to do so, the Florida's courts have not applied § 400.151, Fla. Stat. in similar cases.

We begin by pointing out that an argument is not wrong merely because no one has argued it before - - there's a first time for everything.

We next point out that in *Lopez-Silvero* a nursing home ratified a contract it had previously failed to execute and then sought to enforce it, and its arbitration clause, against a resident. The resident, who had executed the contract, resisted, arguing that the contract was unexecuted and, thus, unenforceable. The *Lopez-Silvero* Court was not asked to address, and it does not even mention § 400.151, Fla. Stat. Instead, applying common law principals, the court found the contract enforceable against the resident.[1]

Lopez-Silvero is distinguishable from the instant case in one very important regard - - the party seeking to enforce the contract had the power to cure the defect by simply executing it. That's not the case here. Here, the party seeking to enforce the contract wants it enforced notwithstanding the fact that the contract does not name the party it is to be enforced against and in spite of the fact that the party it is to be enforced against did not execute it.

[1]The result in *Lopez-Silvero* result would be no different under § 400.151, Fla. Stat. The nursing home, a statutorily required signatory, could have simply cured the execution defect and demand performance.

F. Requiring Every Nursing Home Contract to Comply With § 400.151(1), Fla. Stat., Will Not Make it Impossible to Admit Frail, Elderly or Incapacitated Residents.

Employing what can only be called a win-at-any-cost scare tactic, Hampton Court states that requiring compliance with § 400.151, Fla. Stat., will deprive Florida's frail and elderly access to skilled nursing care by making it impossible for nursing homes to enter into valid contracts with incapacitated persons. *Answer* at 27-28. As we will show, this argument is just plain wrong.

Hampton Court's own contract provides the appropriate mechanism for admitting an incapacitated person seeking residency. Hampton Court's contract specifically states that "A resident is not deemed admitted until such time as all agreements required by law have been appropriately executed", and that "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." [A. 25, ¶ 1].

Contrary to Hampton Court's argument, it may conditionally admit an incapacitated person where it is confident that "appropriate arrangements have been made to comply with applicable law", *i.e.* arraignments have been made to have someone with the authority to do so execute the contract as required by § 400.151, Fla. Stat. At this point one might ask: If the resident's incapacitated, how

does this happen? The answer is found in Chapter 744 of the Florida Statutes, Florida's Guardianship Law.

Florida's Guardianship Law allows any interested person to seek appointment of a guardian for an incapacitated person on an expedited basis. *See* §§ 744.3031, 744.309, 744.312, 744.3125, 744.3201, Fla. Stat. Upon appointment of a guardian, an incapacitated person seeking residency will have a legal representative charged with looking out for her or his best interests, and empowered with the legal authority to sign-and-bind the resident to the nursing home contract. *Blankenship v. Richmond Health Care*, 902 So. 2d 296, 301(Fla. 4th DCA 2005) ("If a nursing home wants to deal with someone competent to make such decisions [sign a nursing home contract containing an arbitration clause], it has the right to seek the appointment of a guardian.") ((Farmer, CJ, concurring).

Contrary to Hampton Court's argument, it is possible for Florida's nursing homes to comply with § 400.151, Fla. Stat. when admitting frail, elderly and incapacitated persons. All they have to do is follow the law put in place to deal with just that situation - - Florida's Guardianship Law and § 400,151, Fla. Stat.

G. Hampton Court's Third-Party Beneficiary Cases Do Not Support its Argument.

Citing cases applying third-party beneficiary rules to pest control contracts, construction contracts, real estate brokerage contracts and PIP policies, Hampton

Court argues that the same rules should apply to nursing home contracts too. As we will explain, Hampton Court's cases do not support its argument.

In *Martha A. Gottfried, Inc. v. Paulette Koch Real Estate*, 778 So. 2d 1089 (Fla. 4th DCA 2001) members of the local Board of Realtors were contractually obligated to arbitrate commission disputes with other brokers. The authority of the broker to agree to the arbitration clause was not in dispute. Plaintiff (while it is not clear, from the facts it appears that the plaintiff was the broker's sales agent) sued another broker to recover a sales commission. The issue before the court was whether the broker's agent, who had not signed the Board of Realtor's contract, could be compelled to arbitrate. The court found the agent to be the third-party beneficiary of her broker's membership on the Board of Realtors because she had availed herself of the professional and economic benefits of her broker's membership.

In *Terminex v. Ponzio*, 693 So. 2d 104 (Fla. 5th DCA 1997) the issue before the court was whether a pest control contract containing an arbitration clause and signed by a husband/father was enforceable against his wife and children. The authority of the father to execute the contract was not disputed. The court enforced the contract against the wife and children because their claims were based on their third-party beneficiary status under the contract.

In *Zac Smith & Co. v. Moonspinner Condominium*, 472 So. 2d 1324 (Fla. 1st DCA 185), the issue before the court was whether a condominium association, claiming damages as the third-party beneficiary of a construction contract between the developer and its contractor, was bound to the arbitration clause found in the contract between the developer and its contractor. The authority of the developer to enter into the contract was undisputed. Since the condominium was seeking to recover as a third-party beneficiary of the contract, the court found that it was bound by the contract's arbitration clause.

Finally, in *Orion Insurance v. Magnetic Imaging Systems*, 696 So. 2d 475 (Fla. 3d DCA 1997), the issue before the court was whether an assignee of healthcare benefits under a PIP policy was bound by the policy's arbitration clause. The authority of the insured to enter into the contract was undisputed. The assignee wanted to enforce the contract and collect the PIP benefits, but it did not want the arbitration clause enforced against it. The court, in enforcing the arbitration clause, found that the assignee could not have its cake and eat it to.

In each of these cases,

- The contract was executed by someone with the authority to do so;
- The claims were based on plaintiffs' third-party beneficiary status under the contract; and
- Plaintiff did not want to be bound by the contract's arbitration clause

despite the fact that she or he was suing as a beneficiary of the contract.

Each of the above cases is distinguishable from the instant action in two very important ways. Here:

- The contract was not executed by someone with the authority to do so; and
- Mr. Mendez is not suing as a third-party beneficiary of the contract, he's suing Hampton Court for its negligence in allowing his left eye to become so infected that it had to be removed. [A. 1-11]. *See* § 400.023, Fla. Stat.

Contrary to Hampton Court's argument, its pest control, construction, real estate brokerage and PIP cases do not supply the controlling rule in this case.

H. We Are Not So Sure that Florida's Policy Favoring Arbitration is as "Strong" as Hampton Court Believes it is.

We are not so sure that Florida's policy favoring arbitration is as "strong" as Hampton Court believes it is. When one looks at the cases discussing the affect to be given arbitration statutes it becomes clear that arbitration clauses are not superior to, or favored over, other contractual terms. It is also clear that arbitration clauses "should be placed on the same footing" as any other lawful contract term. *Blankenship v. Richmond Health Care*, 902 So. 2d 296 (Fla. 4th DCA 2005).

> The purpose of [arbitration] statutes is now generally understood to mean that arbitration is 'favored' only in

> the sense that arbitration agreements should be placed on the same footing as any lawful contract. *See Doctor's Assoc. Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) ("Courts may not ... invalidate arbitration agreements under state laws applicable only to arbitration provisions."); *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 510–11, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) (USAA places arbitration on "same footing as other contracts").

Id., at 306, fn 15. (Farmer, CJ, concurring).

And when one views an arbitration clause as an "equal" contractual term, and not a "superior" one, Hampton Court's, and for that matter the *Mendez* Court's public policy rationale evaporates.

I. The Fox Should Not Be Put in Charge of the Chicken Coop.

Hampton Court argues that the nursing home industry is in the best position to determine the appropriate person to execute a nursing home contract. We believe that this is akin to putting the fox in charge of the chicken coop.

In *Blankenship v. Richmond Health Care*, 902 So. 2d 296 (Fla. 4th DCA 2005), a nursing home made the same basic argument Hampton Court makes here.[2] Judge Farmer questioned the correctness of that position:

> One may rightly ask, under what theory . . . someone handpicked by a [nursing home] provider [could] waive

[2] The nursing home argued that under § 765.401, Fla. Stat., Florida's Healthcare Proxy Statute, it was entitled to have anyone identified in the statute sign-and-bind the resident to a contract containing an arbitration clause.

> the right to a jury or to substitute a private set of rules to decide a statutory claim for damages?

Id., at 302.

As Judge Farmer explained, basic fairness dictates that the nursing home not be allowed to chose the person to execute the residency contract because the

> health care provider has different interests, which might even become antagonistic to the patient. [and] It would be unprecedented to allow someone who may have adversarial interests dealing at arms length to make such personal decisions for someone.

Id.

We agree with Judge Farmer, and believe that the following scenarios show why his concerns are well founded:

- An unscrupulous nursing home operator could instruct its staff to not asking potential residents, that appear hostile to arbitration, to execute the admission contract. Instead, they should seek out someone more amenable to arbitration - such as an accompanying friend or family member - and ask that person to execute the nursing home contract "for the benefit of the resident."
- An unscrupulous nursing home could direct its staff that they should, while admitting an incompetent resident, seek out a third-party they know will accept an arbitration agreement, and have that person execute the nursing home contract "for the benefit of the resident."

The temptations associated with Hampton Court's proposed anyone-can-sign-and-bind-anyone-else so long as they do so for the benefit of the resident rule are simply too great. The best, and easiest way to avoid mischief in the admission process is to require every nursing home contract to be ". . . executed by . . . the resident or his or her designee or legal representative . . .". § 400.151, Fla. Stat.

J. An Evidentiary Hearing Was Not Held, The Trial Court Did Not Take Evidence and There Is No Evidence Showing that Mr. Mendez Was the Intended Beneficiary of the Contract Or that He Knowingly Accepted the Benefits of the Contract.

Subscribing to the "if you say it long enough and loud enough it will become true" theory of argument, Hampton Court, with absolutely no record citation whatsoever, repeatedly states that Mr. Mendez was the intended beneficiary of the contract and that he knowingly accepted its benefits. This argument ignores the fact that the trial court, despite being asked to, [A. 63, lines 5-6, 12-13; 39, ¶ 8], did not hold an evidentiary hearing, [A. 63, lines 4-5; 34-35] did not take evidence, [A. 50-71], and made no findings regarding Mr. Mendez' admission to Hampton Court or his knowing acceptance of the benefits of the contract. [A. 72-74].

1. We Don't Know Why Mr. Mendez Was Admitted to Hampton Court.

As we explained to both the district court and this Court - - the truth is we don't know why Mr. Mendez was admitted to Hampton Court. What we do know

is this: Families reluctantly place parents and loved ones in nursing homes for a number of very good reasons. For instance, the family may be physically unable to provide the level of care or attention needed by the loved one. Also, the family may be unable to emotionally handle with the distress occasioned 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. For all we know, that is the case here.

2. There is Nothing Showing that Mr. Mendez Knowingly Accepted the Benefits of the Contract.

For years Hampton Court insisted that Mr. Mendez was incapacitated at the time of admission. [A. 62, lines 13-25; Supp. App.; *Answer Brief* in the District Court at 31-32]. Realizing that Mr. Mendez could not have knowingly accepted the benefits of the contract if he was incapacitated, and that the district court's estoppel holding is wrong, Hampton Court now says that whether Mr. Mendez was incapacitated is irrelevant to this Court's decision.[3] *Answer* at 30.

Without belaboring the point, we again point out that the trial court, despite being asked to do so, did not hold an evidentiary hearing. Since it didn't, there is

[3] If Mr. Mendez was incapacitated, estoppel would not be proper because Mr. Mendez was incapable of knowingly accepting the benefits of the contract.

no evidence supporting the district court's finding that Mr. Mendez is estopped from repudiating the contract because he knowingly accepted its benefits.

K. While the Legal Reasoning Used in the Third-Party Beneficiary / Nursing Home Cases is Unsatisfying, the Result Reached in *McKibbin*, *Lepisto*, *Perry* and *Fletcher* Need Not Be Rejected.

While the legal reasoning used in the cases dealing with third-party beneficiary's of nursing homes contacts is unsatisfying, the results reached in *McKibbin v. Alterra Health Care,* 977 So. 2d 612 (Fla. 2d DCA 2008), *Lepisto v. Senior Lifestyle,* 78 So. 3d 89 (Fla. 4th DCA 2012), *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) need not be rejected.

In *Mendez* and, to a lesser extent *Alterra Healthcare v. Estate of Linton ex rel Graham,* 953 So. 2d 574 (Fla. 1st DCA 2007), the court determined that anyone can sign-and-bind a resident to a nursing home contract containing an arbitration clause so long as the resident is the intended beneficiary of the contract.

In *McKibbin*, *Lepisto*, *Perry* and *Fletcher* the courts, after engaging in various legal gymnastics, ultimately decided that an arbitration clause in a nursing home contract is unenforceable where the contract was not executed by the resident or a person with the legal right or authority to do so.

Mendez and *Linton* must be rejected because Florida's courts are charged with protecting nursing home residents rights, and neither of these cases do so - - they advance the interests of the nursing home operator.

The same is not true of *McKibbin*, *Lepisto*, *Perry* and *Fletcher*. Each of these cases protect the rights of nursing home residents by requiring nursing home contracts to be executed by the resident or someone with the legal right or authority to do so. Moreover, while the legal reasoning employed in *McKibbin*, *Lepisto*, *Perry* and *Fletcher* may be unsatisfying, the holdings need not be disturbed because each of these cases reached the right result, *al beit* for the wrong reason, and as we all know, right for the wrong reason is still right. *Carraway v. Armour & Co.*, 156 So. 2d 494, 497 (Fla. 1963) ("The pupil of impulse, it forc'd him along, His conduct still right, with his argument wrong; Still aiming at honour, yet fearing to roam, The coachman was tipsy, the chariot drove home; ***").

L. We End Where We Began.

Florida's nursing home laws were enacted in response to abuses by the nursing home industry. Their paramount purpose is to protect some of Florida's most vulnerable residents - - nursing home residents. Requiring every nursing home contract to comply with § 400.151(1), Fla. Stat. advances this policy by:

- Guaranteeing that every person seeking admission to a nursing home has real input into the admission process by ensuring that decisions are made

by the resident or someone with the legal right or authority to make decisions on the resident's behalf;

- Assuring that the rights guaranteed incapacitated persons by Florida's Guardianship Law are protected by ensuring that the resident's legal guardian is the one making decisions for the resident during the admissions process;
- Places the burden of assuring that the admission contract is properly executed on the party with the most knowledge of the rules and regulations governing nursing homes - - the nursing home; and
- Places the onus of guaranteeing that there is an enforceable contract squarely on the party seeking to enforce the arbitration clause - - the nursing home.

While Hampton Court may disagree - - requiring every nursing home contract to comply with § 400.151(1), Fla. Stat. is not just good policy, its good law.

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 and trial on the merits.

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 **April 28, 2015**.

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CERTIFICATE OF COMPLIANCE

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

By:_____
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