

**IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FL 32399-1925**

AG MANOR CARE, INC.;
MANOR CARE OF AMERICA,
INC.; MANORCARE HEALTH
SERVICES, INC.; NEW
MANORCARE HEALTH SERVICES,
INC.; MANORCARE HEALTH
SERVICES OF BOYNTON BEACH,
INC.; and MANOR CARE OF BOCA
RATON, INC. (as to MANORCARE
HEALTH SERVICES-BOCA RATON)

CASE NO.: SC04-203
L.T. Case No.: 4D02-3852

Defendants/Petitioners,

vs.

JOSEPHINE ROMANO, by and
through LAWRENCE ROMANO,
SR., Plenary Guardian.

Plaintiff/Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

Petitioners cannot properly invoke this Court's discretionary jurisdiction based upon Rule 9.030(a)(2)(A)(iv), in that the cases cited by Petitioners are not in express and direct conflict with decisions of this Court or another district on the same questions of law. The cases cited by Petitioners as in conflict with *Romano* are ones in which the courts considered *different evidentiary facts* of procedural unconscionability, *different arbitration agreements* and *different issues of substantive unconscionability*, and they involved the application of *different measures of a sliding scale balancing test* to weigh the showing of procedural and substantive unconscionability of each agreement. In the presence of so many variables, it cannot be said that the cases are in express and direct conflict, nor can there be any precedential value (other than to the litigants of each such case) of each court's findings on unconscionability.

Further, Petitioners' Jurisdictional Brief improperly contains 'facts' not contained in the Fourth District's *Romano* opinion, and rather than containing only a short and concise statement of the court's discretionary review jurisdiction, Petitioners' brief improperly argues the merits of the substantive issues of its Petition.

ARGUMENT

Rule 9.120(d) of the Florida Rules of Appellate Procedure requires Petitioner to file a brief on jurisdiction "limited solely to the issue of the supreme court's jurisdiction." The Committee Notes to this Rule make it clear that the jurisdictional brief should be short and concise, and that "[i]t is inappropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the jurisdictional issues."

Notwithstanding the clarity of this Rule, Petitioners have submitted a Jurisdictional Brief which ignores the Rule and goes well beyond an assertion that this Court's discretionary jurisdiction should be based upon an alleged interdistrict conflict. Their brief includes improper argument on the merits of Petitioners' claim that the Fourth District erred in holding that the arbitration agreement signed by Lawrence Romano purportedly on his wife, Josephine's behalf, was unenforceable.

Further, Petitioners' Jurisdictional Brief improperly cites 'facts' allegedly contained in the record below, which are not found within the Fourth District's *Romano* opinion. (Brief at p. 7). Such 'facts' cannot be considered by this Court in determining whether to exercise its discretionary jurisdiction, and such matters should be stricken from the Jurisdictional Brief or otherwise disregarded by this Court. *See Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986) (The only facts relevant to our decision to accept or reject such petitions are those facts contained within

the four corners of the decisions allegedly in conflict. . . .[W]e are not permitted to base our conflicts jurisdiction on a review of the record or on facts recited only in dissenting opinions.")

Petitioners do not set forth a clear and concise statement of the Court's discretionary jurisdiction based upon interdistrict conflict, but rather use their Jurisdictional Brief as an unauthorized motion for rehearing, where they continue to assert the merits of their substantive legal argument that "arbitration agreements are favored and should be enforced unless the agreement is both substantively and procedurally unconscionable." (Petitioners' Brief at p. 3).

I. ROMANO IS NOT IN CONFLICT WITH THIS COURT'S OPINION IN UNICARE HEALTH FACILITIES, INC. V. MORT.

Petitioners assert that *Romano* is in direct conflict with this Court's opinion in *Unicare Health Facilities, Inc. v. Mort*, 553 So.2d 159 (Fla. 1989). Although *Mort* did involve a nursing home resident's rights claim brought under chapter 400, the similarities of the two cases end there and the asserted 'conflict' is simply nonexistent. *Mort* did not involve consideration of an arbitration agreement or unconscionability defenses, and there is nothing in the opinion to suggest that the settlement agreement in *Mort* was entered into by a third party family member 'on behalf of' of the nursing home resident. *Mort* is not in conflict with *Romano* and is entirely inapposite to the instant case. In *Mort*, this Court held that where a party settled its claims pursuant to an offer of judgment, a contract was formed which

effectively terminated the litigation and foreclosed such party's right to seek statutory attorney's fees pursuant to section 400.023 in the absence of an express reservation of such claim. The *Mort* Court acknowledged that,

"[t]here is an 'organic right' of parties to contract a settlement, which by definition concludes all claims unless the contract of settlement specifies otherwise.' "

553 So.2d at 161, *quoting, Ahmed v. Lane-Pontiac-Buick, Inc.*, 527 So.2d 930, 931 (Fla. 5th DCA 1988).

Petitioners make no attempt to analogize *Mort* to *Romano*, except to incorrectly suggest that *Romano* "establishes the rule that it is substantively unconscionable for a contracting party to waive rights under Chapter 400." (Brief at p. 3). Yet, the *Romano* Panel made no such finding, but instead found that the arbitration agreement (which capped compensatory damages and did not authorize the arbitrator to award statutory attorney's fees or punitive damages) was unenforceable because it defeated the remedial purposes of the act and emasculated the statute by depriving the Romanos of an effective way to vindicate Mrs. Romano's nursing home resident's rights in an arbitral forum.

"This arbitration agreement would not vindicate the resident's statutory rights. Therefore, the agreement is unenforceable. *See Flyer Printing*, 805 So.2d at 831. **Because of the limitations contained in the arbitration agreement, it takes away any effective enforcement of the statutory rights of the resident.**" (*emphasis added*).

II. ROMANO IS NOT IN CONFLICT WITH EITHER GAINESVILLE HEALTH CARE CENTER, INC. v. WESTON OR BRASINGTON v. EMC CORPORATION .

Petitioners assert that *Romano* is in direct conflict with two decisions in which the First District found arbitration agreements enforceable and not procedurally unconscionable. (Brief at pp. 6, 8). Assuming *arguendo*, that these cases are in 'factual conflict' with *Romano*, these cases cannot be the basis of this Court's discretionary jurisdiction based on interdistrict conflict, because findings of procedural unconscionability are *case-fact specific* and provide *no precedential value* whatsoever, except to the litigants in each particular case.

In *Gainesville Health Care Center, Inc. v. Weston*, 857 So.2d 278 (Fla. 2003), the First District reversed the trial court's order denying the defendants' motion to compel arbitration, on the basis of insufficiency of the plaintiff's evidence to support its contract avoidance defense of procedural unconscionability.

The *Weston* Panel focused on evidentiary facts which were unique to the *Weston* litigants and which differed from the facts in evidence in *Romano*. By way of example, in *Weston*, there was no evidence that the plaintiff had no other meaningful choice in obtaining a satisfactory nursing home placement, whereas in *Romano*, there was evidence that the Romanos settled on Manor Care's nursing home for Mrs. Romano's rehabilitation only after determining that "their first choice was unavailable," and Mrs. Romano had been admitted and was in

residence at the home for some time before the arbitration agreement was presented to her husband for signing. Further, in *Weston*, there was evidence that "any haste associated with reviewing and signing the documents was self-imposed . . . [and] it appeared that Ms. West had had "ample opportunity" to read the documents before she executed them," and that had she wanted to, she would have been permitted to take the agreements to an attorney. *Id.* at p. 281. In *Romano*, on the other hand, the evidence showed that the administrator presented eight documents to Mr. Romano without explaining that Mrs. Romano would not be ousted from the nursing home if he failed to sign them, and that "the administrator simply told him **that he had to sign** the admission papers." (*emphasis added*).

Aside from the obvious differences in the evidence of procedural unconscionability, the *Weston* and *Romano* courts also considered the terms of the agreements themselves in the context of the parties' substantive unconscionability defenses. The *Romano* Court correctly acknowledged that procedural and substantive unconscionability *must both be present* to avoid enforcement of an otherwise enforceable arbitration contract, but noted that "they need not be present in the same degree." The court applied a 'sliding scale' approach, "which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." *Citing 15 Williston on Contracts* (3d ed. 1972). In *Romano*,

the arbitration agreement capped non-economic compensatory damages at \$250,000, waived statutory attorney's fees and punitive damages, precluded the taking of discovery depositions other than of experts, limited discovery, and provided that only former judges could serve as arbitrators. The *Romano* Court found that "[b]ecause the arbitration contract in this case is substantively unconscionable to a great degree, and we conclude that there is some irregularity in the contract formation amounting to procedural unconscionability of some degree, the contract is enforceable."

In contradistinction, in *Weston*, the arbitration agreement did not limit damages, and it allowed the arbitrator to award attorney's fees and punitive damages. Further, there was no evidence that "appellee would be subject to a different rule regarding the award of attorney's fees from that applicable in a court." *Id.* at p. 282.

Because *Romano* and *Weston* involved *different evidentiary facts* of procedural unconscionability, and *different substantive contract terms* establishing substantive unconscionability, and because the Fourth and the First Districts obviously assigned different weights to the evidence and to the contract terms in each court's attempt to apply the 'sliding scale' of indicia of unconscionability, it cannot be said that the cases are in direct conflict and the Petitioners' reliance upon *Weston* to invoke this Court's discretionary conflicts jurisdiction is misplaced. *See*

Florida Power & Light, Co. v. Bell, 113 So.2d 697 (Fla. 1959); *Neilsen v. Sarasota*, 117 So.2d 731 (Fla. 1960); *Seaboard Air Line Railroad Co. v. Branham*, 104 So.2d 356 (Fla. 1958).

Petitioners' assertion of conflict based upon *Brasington v. EMC Corporation*, 855 So.2d 1212 (Fla. 1st DCA 2003) is likewise misplaced. As with *Weston*, the evidence of procedural unconscionability was different in each case. In fact, the only factual similarities between *Romano* and *Brasington* were that in both cases, the terms of the arbitration clauses were not explained to the signatories. In *Brasington*, the signatory was a well-educated, management level employee who signed an employment agreement on her own behalf. Mr. Romano, on the other hand, was an elderly, retired gentleman with limited education, who signed a nursing home admission agreement on his wife's behalf. There was no 'take it or leave it' evidence in *Brasington*, whereas in *Romano*, there was evidence that Mrs. Romano, a poor surgical candidate, was being discharged from a hospital in need of physical therapy, and that the Romano's first choice of a rehabilitation facility was unavailable.

On the issue of substantive unconscionability, *Brasington* is actually consistent with *Romano*. Although the *Brasington* Court found the defendant's arbitration agreement to be enforceable, it did so under different facts of procedural unconscionability, and considered an arbitration agreement which had

significantly different terms than *Romano's*. The *Brasington* Court acknowledged well-settled law that "[a]n agreement to arbitrate statutory claims is enforceable if it provides an adequate mechanism for pursuing statutory rights and does not defeat the remedial purpose of the statute under which the claim is brought. . . .

The plaintiff should be able to obtain the same relief via arbitration as would be available in court. (emphasis added). *Id.* at p. 1215. The arbitration agreement in *Brasington* permitted the prevailing plaintiff to recover statutory fees and costs, and the defendant/employer's "arbitration policy states that the arbitrator may grant 'any remedy or relief that would otherwise be awarded under the law.' " The *Romano* agreement deprived the Romano's of the right to recover attorney's fees, punitive damages and pain and suffering damages in excess of \$250,000. These cases are simply not in conflict and cannot be the basis of an invocation of this Court's discretionary jurisdiction.

III. ROMANO DOES NOT CONFLICT WITH BRATTON, QUBTY OR SABIN.

Petitioners argue that *Romano* is in conflict with this Court's decision in *Allied Van Lines, Inc. v. Bratton*, 351 So.2d 344 (Fla. 1977), and with the Fifth District's opinions in *Qubty v. Nagda*, 817 So.2d 952 (Fla. 5th DCA 2002) , and *Sabin v. Lowe's, Inc.*, 404 So.2d 772 (Fla. 5th DCA 1981), that a party is bound by his contracts unless he can demonstrate that he was prevented from reading it or

induced to refrain from reading it, and that a party to a contract has a duty to learn and know the contents of the contracts which he signs.

Respondent takes no issue with the holdings of the foregoing cases, but is perplexed as to Petitioners' logic in asserting that *Romano* is in conflict with them. These cases merely reiterate the bedrock law of this state that an otherwise enforceable contract cannot be avoided unless the party seeking such avoidance provides competent admissible evidence of traditional contract avoidance defenses (such as lack of capacity, lack of consideration, duress, fraud in the inducement, or *unconscionability*). Ignoring for purposes of this brief on jurisdiction, that there is no reference whatever in the *Romano* opinion that Mr. Romano had actual or apparent authority to bind his wife to the arbitration agreement, the fact is that the Romanos did, in fact, raise and produce evidence of their contract avoidance defenses, and the Fourth District considered such evidence to be sufficient to avoid enforcement of the agreement. As *Romano* is entirely consistent with the aforementioned cases, and because these cases are inapposite to the issue which Petitioners seek to bring before this Court, Petitioners have failed to assert entitlement to this Court's discretionary review jurisdiction.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court decline to invoke its discretionary jurisdiction to review the *Romano* opinion.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the above has been sent by [] Hand Delivery [X] Overnight Mail [] U.S. Mail [] Facsimile to: **Christopher B. Hopkins, Esquire**, Cole, Scott & Kissane, P.A., Suite 280, Esperante Building, 222 Lakeview Avenue, West Palm Beach, Florida 33401, **Betsy E. Gallagher, Esquire**, Cole, Scott, & Kissane, P.A., Bridgeport Center, 5201 W. Kennedy Blvd., Suite 750, Tampa, Florida 33609, (Facsimile: 561-366-1150), on this _____ day of April, 2004.

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CERTIFICATE OF COMPLIANCE

I **HEREBY CERTIFY** that the foregoing complies with the Florida Rules of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

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