

IN THE SUPREME COURT OF FLORIDA

CARRINGTON PLACE OF ST.
PETERSBURG, LLC, et al.,

Petitioners,

v.

Case No.: SC09-1152
2d DCA Case No.: 2D08-2679

THE ESTATE OF JENNIE MILO, by and
through ANNETTE BRITO A/K/A
ANTOINETTE MARY BRITO, Personal
Representative,

Respondent.

**ON PETITION FOR DISCRETIONARY REVIEW FROM
A DECISION OF THE SECOND DISTRICT COURT OF APPEAL**

AMENDED JURISDICTIONAL BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

In this Brief, Petitioners, Defendants below, will be referred to as “Carrington Place,” Respondent will be referred to as the “Estate,” the resident will be referred to as “Ms. Milo,” and Ms. Milo’s attorney-in-fact will be referred to as “Ms. Brito.”

STATEMENT OF THE CASE AND FACTS

The facts as set forth in the Second District Court of Appeal's decision in *Carrington Place of St. Pete, LLC v. Estate of Milo ex rel. Brito*, 34 Fla. L. Weekly D640, 2009 WL 763607 (Fla. 2d DCA 2009), are as follows. Jennie Milo was admitted to Carrington Place of St. Pete on June 3, 2006. *See slip op.* at 2. Upon Ms. Milo's admission to the facility, her daughter and attorney-in-fact, Annette Brito, executed the admission documents, including an arbitration agreement. At that time, Ms. Brito did not indicate a desire to exclude the arbitration provision from the admission agreement. *See id.*

After Ms. Milo's death, Ms. Brito, as the personal representative of Ms. Milo's estate, brought suit against Carrington Place for wrongful death, negligence, breach of fiduciary duty, and residents' rights violations. *See id.* Carrington Place filed a motion to dismiss or stay the proceedings in order to proceed to arbitration. The trial court denied the motion, finding that the durable power of attorney (POA) executed by Ms. Milo was insufficient to authorize Ms. Brito to waive Milo's right to a jury trial and agree to arbitration. *See id.* at 3.

The Second District affirmed the denial of the motion for compel arbitration. The district court concluded that "the language of the POA specifically refers to the rights, duties, and powers that Brito may exercise on behalf of Milo," but does not confer the authority to agree to arbitration because, "the language does not

‘unambiguously make[] a broad, general grant of authority’ to Brito.” *Id.* at 3-4 (citing *Jaylene, Inc. v. Moots*, 995 So. 2d 566, 568 (Fla. 2d DCA 2008)).

Carrington Place moved for rehearing and rehearing en banc, which the Second District denied. Carrington Place timely filed a notice to invoke this Court’s jurisdiction under Florida Rule of Appellate Procedure 9.120(b) and article V, section 3(b)(3) of the Florida Constitution.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal’s decision in this case expressly and directly conflicts with numerous decisions of the other district courts of appeal that enforce arbitration agreements under the generally applicable contract principle that a non-signatory to a contract is bound by its terms when assent to the contract is established through the parties’ mutual course conduct. *See, e.g., Comcast Spotlight, Inc. v. Eventys Marketing and Products, Inc.*, 984 So. 2d 631 (Fla. 3d DCA 2008); *BDO Seidman, LLP v. Bee*, 970 So. 2d 869 (Fla. 4th DCA 2007); *Alterra Healthcare Corp. v. Bryant*, 937 So. 2d 263 (Fla. 4th DCA 2006); *Consol. Res. Healthcare Fund I, Ltd. v. Fenelus*, 853 So. 2d 500 (Fla. 4th DCA 2003); *Integrated Health Services of Green Briar, Inc. v. Lopez-Silvero*, 827 So. 2d 338 (Fla. 3d DCA 2002). Several of these decisions have applied this principle specifically to enforce arbitration agreements in nursing home contracts. *See Bryant*, 937 So. 2d at 270-71; *Fenelus*, 853 So. 2d at 503-04; *Lopez-Silver*, 827 So.

2d at 338-39. A decision by this Court directing the lower courts to uphold all valid contract terms when both the resident and the facility assent to those terms through performance is necessary to promote uniformity on this issue throughout the state

ARGUMENT

I. THE SECOND DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS THAT ENFORCE ARBITRATION AGREEMENTS BASED ON THE GENERALLY APPLICABLE CONTRACT PRINCIPLE THAT A NON-SIGNATORY TO A CONTRACT IS BOUND BY ITS TERMS WHEN ASSENT TO THE CONTRACT IS ESTABLISHED THROUGH THE PARTIES' MUTUAL COURSE OF CONDUCT

In the decision below, the Second District affirmed the trial court's order denying Carrington Place's motion to compel arbitration based on its conclusion that the attorney-in-fact, who executed the admission contract, did not have the authority to agree to the arbitration on the resident's behalf. The Second District declined to enforce the valid and binding arbitration agreement despite the fact that Ms. Milo assented to the terms of the admission agreement, including the valid and binding arbitration clause, by virtue of her performance thereunder during her residency.

Carrington Place seeks review of the Second District's decision in Milo based on this decision's express and direct conflict with several decisions of the Third and Fourth Districts that recognize that under generally applicable contract

principles a non-signatory to a contract is bound by its terms, including an agreement to arbitrate, when assent to the contract is established through the parties' mutual course conduct. *See, e.g., Comcast Spotlight, Inc. v. Eventys Marketing and Products, Inc.*, 984 So. 2d 631 (Fla. 3d DCA 2008); *BDO Seidman, LLP v. Bee*, 970 So. 2d 869 (Fla. 4th DCA 2007); *Alterra Healthcare Corp. v. Bryant*, 937 So. 2d 263 (Fla. 4th DCA 2006); *Consol. Res. Healthcare Fund I, Ltd. v. Fenelus*, 853 So. 2d 500 (Fla. 4th DCA 2003); *Integrated Health Services of Green Briar, Inc. v. Lopez-Silvero*, 827 So. 2d 338 (Fla. 3d DCA 2002). In fact, several of these decisions have applied this principle to enforce arbitration agreements contained in nursing home admission contracts. *See Bryant*, 937 So. 2d at 270-71; *Fenelus*, 853 So. 2d at 503-04; *Lopez-Silver*, 827 So. 2d at 338-39

In *Lopez-Silvero*, the Third District reversed a trial court order denying the facility's motion to compel arbitration despite the fact that the nursing home did not sign the admission contract, which contained the arbitration clause. The Third District relied in the well-established contract principle that "[a] contract is binding, despite the fact that one party did not sign the contract, where both parties have performed under the contract." *Lopez-Silvero*, 827 So. 2d at 339.

The Fourth District followed *Lopez-Silvero* in *Fenelus*. In that case, the trial court denied the motion to compel arbitration because the nursing home's representative signed the admission contract in her capacity only as a witness, not

in her capacity as the representative of the facility. *Fenelus*, 853 So. 2d at 503. Giving deference to the trial court's factual finding that the representative signed the contract only as a witness, the Fourth District nonetheless reversed the trial court because both parties assented to the terms of the contract through performance. *Id.* at 503-04.

In *Bryant*, the Fourth District also concluded that an arbitration agreement was enforceable despite the fact that neither the resident nor her POA signed the admission contract. *See* 937 So. 2d at 270. Again, the Fourth District relied on the generally applicable contract principle that when both parties acted as if a valid contract exists through performance, they have assented to the contract's terms. *Id.*

The Third and Fourth District's have also applied this principle outside of the nursing home litigation context, ruling that the plaintiffs' were required to arbitrate claims that arose under a contract that included an arbitration clause despite the fact that the plaintiffs did not sign the contracts. *See Comcast Spotlight*, 984 So. 2d at 631; *BDO Seidman*, 970 So. 2d at 874-75. By failing to recognize that the arbitration agreement in this case is enforceable because Ms. Milo and Carrington Place performed under the contract, the Second District's decision is conflicts with those decisions that have enforced arbitration agreements against a non-signatory based on the parties' mutual course of conduct.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE SECOND DISTRICT'S DECISION BECAUSE THIS COURT'S PRECEDENT IS NEEDED TO RECONCILE AN ISSUE THAT IS THE SUBJECT OF FREQUENT LITIGATION THAT HAS PRODUCED DISPARATE RESULTS

The enforceability of arbitration agreements in nursing home contracts is the subject of frequent litigation in the lower courts. When an arbitration agreement is otherwise enforceable under state law, i.e., it is neither unconscionable nor against public policy, the trial courts nonetheless fail to enforce these agreements when the admission contracts are not signed by the resident but rather by the resident's power of attorney. The district courts then affirm or reverse these rulings based on their interpretation of the POA and whether it is sufficiently "broad" to grant the authority to agree to arbitration. *See Sovereign Healthcare of Tampa, LLC v. Estate of Huerta*, 2009 WL 1424011 (Fla. 2d DCA May 22, 2009) (POA was sufficiently broad to confer authority to agree to arbitration); *Estate of Milo*, 2009 WL 763607 at *1 (POA was not sufficiently broad to confer the authority to agree to arbitration); *Five Points Health Care, Ltd. v. Mallory*, 998 So. 2d 1180 (Fla. 1st DCA 2008) (POA was sufficiently broad to confer authority to agree to arbitration); *Family Extended Care of Winter Haven, Inc. v. Pion*, 995 So. 2d 518 (Fla. 2d DCA 2008) (PCA citation to *McKibbin*, indicating that POA was not sufficiently broad to confer the authority to agree to arbitration); *Jaylene, Inc. v. Moots*, 995 So. 2d 566, 570 (Fla. 2d DCA 2008) (POA was sufficiently broad to

confer authority to agree to arbitration); *Estate of McKibbin v. Alterra Health Care Corp.*, 977 So. 2d 612 (Fla. 2d DCA 2008) (POA did not confer authority to agree to arbitration).

Because there is no established framework for deciding whether a POA is sufficiently “broad” to confer the authority to agree at all of the valid and binding terms of a nursing home admission contract, nursing homes must resort to chance when allowing an attorney-in-fact to execute admission documents on behalf of a resident because any post-dispute determination continues to be left the ad hoc decision-making of each individual trial court. Continued litigation regarding the authority of the POA would be unnecessary, however, if the district courts would uniformly apply the above explained contract principle that precludes one party from disavowing the validity of all of the terms of a contract when both parties have assented to those terms by rendering performance. Indeed, the Federal Arbitration Act requires that Florida courts enforce arbitration agreements just as they would any other contract term. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (“What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”). Thus, a

decision by this Court directing the lower courts to uphold all valid contract terms when both the resident and the facility assent to those terms through performance is not only necessary to promote uniformity on this issue throughout the state but also to comply with the dictates of the Federal Arbitration Act.

CONCLUSION

For the reasons set forth above, Carrington Place respectfully requests that this Court exercise its discretionary jurisdiction to review the Second District's decision in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Isaac Ruiz-Carus**, Wilkes & McHugh, P.A., Tampa Commons, Suite 800, One N. Dale Mabry Highway, Tampa, Florida 33609, and **Susan B. Morrison, Esq.**, Law Offices of Susan B. Morrison, P.A., 1200 W. Platt St., Suite 100, Tampa, Florida 33606, on this ____ day of July, 2009.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief was typed in Times New Roman 14 point font.

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