IN THE SUPREME COURT OF FLORIDA

ANGELA I. GESSA, by and through MIRIAM G. FALATEK, her Attorney-In-Fact,

Petitioner,

v.

MANOR CARE OF FLORIDA, INC., et al.

Respondent.
_____/

Case No.: SC09-768

L.T. Case No. 2D07-1928

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner Angela Gessa, by and through Miriam G. Falatek ("Gessa"), sued Manor Care of Florida, Inc. and the other respondents (collectively, "Manor Care") in connection with Gessa's admission to the Manor Care of Carrollwood nursing home. App. At 2. Gessa was admitted twice to the facility, and each time she or Falatek executed an "Arbitration Agreement" that required arbitration of all claims between Gessa and the facility. *Id.* at 2-3. The agreement limited the remedies available in arbitration by prohibiting punitive damages and capping noneconomic damages at $250,000. *Id.*

After Gessa filed suit, Manor Care moved to compel arbitration of her claims. Gessa opposed the motion, arguing that the Arbitration Agreement's remedial limitations rendered it void as a matter of public policy. *Id.* at 3. Gessa also challenged the agreement as unconscionable. *Id.*

The trial court held a hearing on the arbitration motion and granted it. The court found that no procedural unconscionability existed and, as to substantive unconscionability, that the provisions Gessa challenged were not integral to the parties' agreement and were severable. *Id.* The trial court did not rule on Gessa's public policy challenge to the agreement's remedial limitations. *Id.* at 3-4.

Gessa appealed the trial court's order to the Second District. Gessa abandoned her unconscionability argument on appeal and instead rested on her

public policy challenge. *Id.* at 3. She claimed that the trial court determined the challenged remedial limitations were void as a matter of public policy but erred in severing them because the Arbitration Agreement contains no severability clause. *Id.* at 3-5. Manor Care pointed out that, in fact, the trial court did not rule on whether the remedial limitations were void as a matter of public policy or sever them from the Arbitration Agreement; rather, the court simply, and properly, found them severable and ordered the case to proceed to arbitration. *Id.* at 4.

The Second District agreed with Manor Care. The court rejected Plaintiff's characterization of the trial court's order as declaring the remedial limitations to be void and severing them. *Id.* at 4-5. To the contrary, the court explained that the trial court never reached the validity of the remedial limitations and so did not sever them—the trial court determined only that those limitations were severable. *Id.* at 4-5. The court also rejected Plaintiff's argument that the trial court erred in finding the limitations severable in the absence of a severability provision. *Id.* at 5-6. The district court held that a provision authorizing severance is not required for a contract's provisions to be severable. *Id.*

Having affirmed the trial court's severability determination, the district court affirmed the order directing the parties to arbitrate. *Id.* at 6. The court expressly relied upon the Fourth District's decision in *Alterra Healthcare Corp. v. Bryant*, 937 So. 2d 263 (Fla. 4th DCA 2006), where the Fourth District held similar

remedial limitations to be void but then, after determining they were also severable, directed the parties to proceed to arbitration. App. at 6 (*citing Bryant*).

The court did not address the merits of Gessa's public policy challenge and so left that issue for the arbitrator. The court explained in a footnote that it was not reaching the "very complicated issue" of whether a trial court "should" determine the validity of a challenged provision and sever it before sending the case to arbitration or if the trial court should allow the arbitrator to determine the provision's enforceability if it becomes necessary. *Id.* at 6 n.1. The court then cited *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, 898 So. 2d 86 (Fla. 2d DCA 2005), where the Second District held the validity of remedial limitations was an issue for the arbitrator. The court also cited *Bryant*, where the Fourth District severed limitations it held invalid and compelled arbitration, and *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242 (Fla. 5th DCA 2006), where the Fifth District held such issues are for the court, did not sever, and refused to compel arbitration.

SUMMARY OF ARGUMENT

Gessa's brief on jurisdiction makes numerous claims of conflict based on the result below, which enforced arbitration, and the results in other cases, which rejected arbitration. No conflict exists regarding severability or the merits of her public policy challenge. Manor Care agrees, however, that the district courts are in conflict over the narrow but important issue of whether a public policy challenge to

an arbitration agreement's remedial limitations is to be decided by the court or the arbitrator. Manor Care agrees the Court should accept jurisdiction to resolve that important issue and approve the decision below, which left Gessa's public policy challenge to the arbitrator.

ARGUMENT

A. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM OTHER DISTRICTS ON WHETHER A PUBLIC POLICY CHALLENGE TO AN ARBITRATION AGREEMENT'S REMEDIAL LIMITATIONS IS AN ISSUE FOR THE COURT OR THE ARBITRATOR.

Gessa first argues that the decision below conflicts with *Alterra Healthcare Corp. v. Bryant*, 937 So. 2d 263 (Fla. 4th DCA 2006), and *Alterra Healthcare Corp. v. Estate of Linton*, 953 So. 2d 574 (Fla. 1st DCA 2007), on whether Gessa's public policy challenge to the Arbitration Agreement's remedial limitations is an issue for the court or the arbitrator. The Second District below stated that it was not resolving whether the court or the arbitrator should resolve such challenges. Manor Care acknowledges, however, that the result in *Gessa* conflicts with the results in these other decisions on whether such challenges can be resolved by courts or arbitrators. By leaving the issue to be addressed by the arbitrator, the decision below sided with the Second District's earlier decisions, which in turn followed a wide body of federal decisions holding a remedial limitations challenge

is for the arbitrator to resolve. The Court should accept jurisdiction to review this important conflict and approve the Second District's decision below.

Florida public policy, codified through the Florida Arbitration Code, "favors resolving disputes through arbitration when the parties have agreed to arbitrate." *Maguire v. King*, 917 So. 2d 263, 266 (Fla. 5th DCA 2005). Likewise, the Federal Arbitration Act reflects a strong national public policy that favors enforcing arbitration agreements. *Global Travel Marketing, Inc. v. Shea*, 908 So. 2d 392, 396 (Fla. 2005).

This Court has held that, in determining whether to compel arbitration pursuant to an agreement, a court should consider three elements, sometimes referred to as "gateway" issues: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration has been waived. *Id.* at 398; *see also Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999). The Fifth District in *SA-PG-Ocala*, the Fourth District in *Bryant*, and the First District in *Linton* all viewed the plaintiffs' public policy challenges to the remedial limitations at issue in those cases as coming within the first gateway issue: the existence of a valid agreement. In short, they concluded that a challenge to the enforceability of an agreement's provisions is a challenge to the agreement's validity.

That reasoning overlooks two important principles of contract and arbitration law, and this oversight helps demonstrate the significance of the conflict at issue here. First, as a matter of contract law, even agreements with unenforceable provisions are nonetheless valid agreements if the challenged portions can be severed. *See, e.g.*, *Local No. 234 v. Henley & Beckwith*, 66 So. 2d 818, 821-22 (Fla. 1953). Second, courts should have as little involvement as possible in cases where the parties have agreed to arbitrate, and so should resolve only issues necessary to determine whether arbitration is appropriate in the first place. *See, e.g.*, *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003).

Applying these two principles, there is no basis for a court to examine a remedial limitation's validity if the limitation can be severed. If the limitation is found invalid, it will simply be excised and not enforced, and the overall agreement's validity will not be affected. This situation occurred in *Bryant*, where the Fourth District engaged in a lengthy analysis to hold the challenged limitations in that case invalid but then found them severable and compelled arbitration. Because the limitations were severable, however, their validity was ***not*** a gateway issue and should not have been decided by the court. Arbitration should have simply been compelled—efficiently, inexpensively, and quickly, as arbitration is supposed to be.

Contrary to *Bryant*, *SA-PG-Ocala*, and *Linton*, the Second District has previously (and correctly) held that public policy challenges to remedial limitations are issues for the arbitrator, not the court. *Rollins*, 898 So. 2d at 89 (holding "the arbitrator should in the first instance decide the validity of the remedial restrictions" in an arbitration contract); *see also Bland v. Health Care & Retirement Corp.*, 927 So. 2d 252, 258 (Fla. 2d DCA 2006) (following *Rollins*; "[W]e see no reason why the arbitrator, in the first instance, cannot decide whether to enforce the remedial limitations.").

In so holding, the Second District aligned itself with numerous federal decisions holding challenges to remedial limitations—including challenges that waivers on punitive damages are invalid—are issues for the arbitrator, not the court. *E.g.*, *See, e.g., Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002); *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001); *Great Western Mtg. Corp. v. Peacock*, 110 F.3d 222, 230 (3d Cir. 1997); *MCI Telecomms. Corp. v. Matrix Communs. Corp.*, 135 F.3d 27, 33 n.12 (1st Cir. 1998); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002); *Faust v. Command Ctr., Inc.*, 484 F. Supp. 2d 953, 955 (S.D. Iowa 2007) ("[T]he particular issue of whether a waiver of punitive damages violates public policy is, at least in the first instance, a matter for the arbitrator to decide.").

Consistent with these federal decisions, the Second District refused to address Gessa's remedial limitations challenge and instead left the issue for the arbitrator. While the court did not explain why it was sending the case to arbitration without resolving Gessa's public policy challenge, and though the court stated in a footnote it was not deciding whether the arbitrator or court should address this issue in the first instance, the result left the public policy challenge for the arbitrator to resolve, contrary to *Bryant*, *SA-PG-Ocala*, and *Linton*.

Given the result below, the Second District's decision in *Gessa* conflicts with the decisions in *Bryant*, *SA-PG-Ocala*, and *Linton*. A trial court in the Second District sends a case to arbitration without addressing the enforceability of an agreement's remedial limitations, while trial courts in the First, Fourth, and Fifth District's resolve the enforceability issue themselves. Manor Care thus agrees the Court should accept jurisdiction to resolve the important issue of whether a public policy challenge to an arbitration agreement's remedial limitations is for the court or the arbitrator to decide.

B. NO CONFLICT EXISTS REGARDING SEVERABILITY.

Gessa's point "B" is unclear. The point contains only one sentence of substantive argument, stating that "The Panel's ruling" the arbitrator has authority to decide Gessa's remedial challenge conflicts with other decisions holding that issue to be a gateway one for the court. Pet. Br., at 7. That is the same argument

Gessa made in her first point. The heading of point "B," however, references a supposed conflict over severability. To the extent Gessa argues conflict involving who hears her public policy challenge, that issue is addressed above. To whatever extent Gessa argues conflict over whether remedial limitations are severable, the decision below made clear that such things turn on the evidence in the particular case, and she demonstrates no conflict in that ruling.

C. NO CONFLICT EXISTS REGARDING THE ENFORCEABILITY OF THE CHALLENGED REMEDIAL LIMITATIONS.

Gessa finally argues that conflict exists regarding whether the remedial limitations at issue are void as against public policy. Gessa admits, however, that the Second District "failed to opine on the public policy voidness issue, deferring resolution of the issue to the arbitrator . . . ." Pet. Br., at 3. Declining to address the public policy issue on its merits is not a decision that conflicts with how other district courts have resolved the issue. No conflict exists.

CONCLUSION

The Court should accept jurisdiction to resolve the important conflict over whether a challenge to an arbitration agreement's remedial limitations is for the court or the arbitrator. No other conflict exists.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Susan B. Morrison, LAW OFFICE OF SUSAN B. MORRISON, P.A., 1200 W. Platt Street, Suite 1000, Tampa, Florida 33606, Isaac R. Ruiz-Carus and Amy J. Quezon, WILKES & McHUGH, P.A., One North Dale Mabry Hwy., Suite 800, Tampa, Florida, 33609 Counsel for Petitioners, on this 8th day of June, 2009.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this

brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: _____
Matthew J. Conigliaro