

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

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

Defendants/Appellants,

v.

CASE NO.: 2D08-2679

L.T. NO.: 07-8766-CI-13

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

Plaintiff/Appellee.

APPELLANTS' REPLY BRIEF

MCCUMBER, DANIELS, BUNTZ,
HARTIG & PUIG, P.A.
Attorneys for Appellants
4830 West Kennedy Blvd., Suite 300
Tampa, Florida 33609
Telephone: (813) 287-2822
Facsimile: (813) 287-2833
MARA B. LEVY
Fla. Bar. No. 344280
MARK B. HARTIG
Fla. Bar No.: 0114529

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.....iii

ARGUMENT.....1

 THE TRIAL COURT ERRED IN DENYING DEFENDANTS’
 MOTION TO COMPEL ARBITRATION.....1

 I. AN ATTORNEY-IN-FACT WHO HAS BROAD POWER
 TO EXERCISE ANY RIGHT, RELATING TO ANY MATTER,
 AND FULL POWER AND AUTHORITY TO DO EVERYTHING
 NECESSARY IN EXERCISING THIS POWER HAS THE
 AUTHORITY TO AGREE TO ARBITRATION OF CLAIMS
 ARISING OUT OF THE PRINCIPAL’S ADMISSION
 TO A NURSING HOME.....1

 II. MS. MILO WAS BOUND BY THE OPTIONAL
 ARBITRATION AGREEMENT IN THIS CASE BECAUSE
 SHE WAS, AT A MINIMUM, AN INTENDED THIRD-
 PARTY BENEFICIARY OF THE CONTRACT 5
 THAT CONTAINED THE AGREEMENT

CONCLUSION 13

CERTIFICATE OF SERVICE..... 14

CERTIFICATE OF COMPLIANCE 14

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Alterra Healthcare Corp. v. Bryant</i> , 937 So. 2d 263 (Fla. 4th DCA 2006).....	4, 5
<i>Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham</i> , 953 So. 2d 574 (Fla. 1st DCA 2007).....	5, 7, 11, 12-13
<i>Baycare Health Systems, Inc. v. Agency for Health Care Admin.</i> , 940 So. 2d 563 (Fla. 2d DCA 2006).....	11-12
<i>Benton v. Vanderbilt University</i> , 137 S.W.2d 614 (Tenn. 2004).....	10-11
<i>Blankfeld v. Richmond Health Care, Inc.</i> , 902 So. 2d 296 (Fla. 4th DCA 2005).....	5-6, 7
<i>Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus</i> , 853 So. 2d 500 (Fla. 4th DCA 2003).....	8, 9, 10
<i>Cook's Pest Control, Inc. v. Boykin</i> , 807 So. 2d 524 (Ala. 2001).....	10
<i>Davis v. Prudential Securities, Inc.</i> , 59 F.3d 1186 (11th Cir. 1995).....	12
<i>Germann v. Age Institute of Florida, Inc.</i> , 912 So. 2d 590 (Fla. 2d DCA 2005).....	5, 6, 11
<i>Golden Gateway Ctr. v. Golden Gateway Tenants Assn.</i> , 29 P.3d 797 (Cal. 2001).....	12
<i>In re Estate of McKibbin v. Alterra Health Care Corp.</i> , 977 So. 2d 612 (Fla. 2d DCA 2008).....	5
<i>Martha A. Gottfried, Inc. v. Paulette Koch Real Estate</i> , 778 So. 2d 1089 (Fla. 4th DCA 2001).....	5, 6

MedValUSA Health Programs, Inc. v Memberworks, Inc.,
872 A.2d 423 (Conn. 2005).....12

Sears Authorized Termite & Pest Control, Inc. v. Sullivan,
816 So. 2d 603 (Fla. 2002).....8, 9

Seifert v. U.S. Home Corp.,
750 So. 2d 633 (Fla.1999).....9

Shelley v. Kraemer,
334 U.S. 1(1948).....12

Terminix Intern. Co., LP v. Ponzio,
693 So. 2d 104 (Fla. 5th DCA 1997).....6, 8-9

Zac Smith & Co., Inc. v. Moonspinner Condo. Ass'n,
472 So. 2d 1324 (Fla. 1st DCA 1985).....6

OTHER AUTHORITIES

Section 709.08(7)(b), Florida Statutes.....3-4

Section 765.401, Florida Statutes.....7

ARGUMENT

THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION TO COMPEL ARBITRAION

I. AN ATTORNEY-IN-FACT WHO HAS BROAD POWER TO EXERCISE ANY RIGHT RELATING TO ANY MATTER AND FULL POWER AND AUTHORITY TO DO EVERYTHING NECESSARY IN EXERCISING THIS POWER HAS THE AUTHORITY TO AGREE TO ARBITRATION OF CLAIMS ARISING OUT OF THE PRINCIPAL'S ADMISSION TO A NURSING HOME

The Estate asserts that Defendants' omission of language from the POA in the Initial Brief is "intentionally misleading." Answer Brief at 7. Defendants had no intention of misleading the Court. The clause cited in the Initial Brief was taken from the first sentence of the General Grant of Power. This sentence provides in full:

I hereby grant my Agent full power and authority to exercise or perform any act, power, duty, right or obligation whatsoever that I now have or may hereafter acquire, relating to any person, matter, transaction, or any interest in property owned by me, including, without limitation, my interest in all real property, including homestead real property; all personal property, tangible or intangible; all property held in any type of joint tenancy, including tenancy in common, joint tenancy with right of survivorship, or a tenancy by the entirety; all property over which I hold a general, limited, or special power of appointment, chooses in action; and, all other contractual or statutory rights or elections, including, but not limited to, any rights or elections in any probate or similar proceeding to which I am or may become entitled; all as to such property now owned or hereafter acquired by me.

(App. 1 at 1) The second sentence of this General Grant of Power goes on to provide: "I grant to my Agent full power and authority to do everything necessary in exercising any of the powers herein granted as fully as I might or could do if personally present, with full power of substitution or revocation." (*Id.*)

In the Initial Brief, Defendants quoted only the first clause of the first sentence that is emphasized above because it is Defendants' position that the grammatical structure of this General Grant of Power is such that this first clause is distinct and can therefore be read apart from the remainder of the provision.

Defendants suggest that this sentence should be parsed as follows:

I hereby grant my Agent full power and authority to exercise or perform any act, power, duty, right or obligation whatsoever that I now have or may hereafter acquire, relating to any

person,

[or]

matter,

[or]

transaction,

or any interest in property owned by me, including, without limitation, my interest in all real property, including homestead real property; all personal property, tangible or intangible; all property held in any type of joint tenancy, including tenancy in common, joint tenancy with right of survivorship, or a tenancy by the entirety; all property over which I hold a general, limited, or special power of appointment, chooses in action; and, all other contractual or statutory

rights or elections, including, but not limited to, any rights or elections in any probate or similar proceeding to which I am or may become entitled; all as to such property now owned or hereafter acquired by me.

This interpretation is supported by the fact that the phrase “any interest in property owned by me” is followed by “including” and then a list of property interests.

Further, although the enumerated list following this General Grant of Power includes specific grants of power related to property and finances, paragraph 5 of the POA expressly provides that “[t]he enumeration of specific powers herein is not intended to, nor does it, limit or restrict the general powers herein granted to my agent.” (App. 1 at 4). Accordingly, the General Grant of Power authorizing Ms. Brito to exercise any right relating to any matter should not be narrowly construed simply because the enumerated powers do not refer to arbitration or litigation.

Contrary to the Estate’s assertion, the limitations set forth in paragraph 2 of the POA do not indicate an intent to remove the exercise of Ms. Milo’s personal rights from broad General Grant of Power conferred to Ms. Brito. Each of the limitations referred to in paragraph 2 is imposed by section 709.08(7)(b), Florida Statutes.¹ There is no similar statutory bar on conferring the authority to agree to

1. This provision provides in full:

(b) Notwithstanding the provisions of this section, an attorney

arbitration of claims arising out of chapter 400. *See Alterra Healthcare v. Bryant*, 937 So. 2d 263, 269 (Fla. 4th DCA 2006). As the Fourth District has recognized, section 709.08 “does not prohibit the attorney in fact from consenting to arbitrate claims on behalf of the principle, *absent a provision in the document to the contrary.*” 937 So. 2d at 269 (emphasis supplied).

The POA also provides that it is “exercisable from the date of execution.” (App. A at 1). Thus, the Estate’s references to Ms. Milo’s mental capacity are irrelevant to the issue of Ms. Brito’s authority to agree to arbitration on Ms. Milo’s behalf.

Because the POA gave Ms. Brito a broad grant of authority to act on Ms. Milo’s behalf and exercise all of Ms. Milo’s legal rights, relating to any matter, the trial court erred in finding that the POA did not grant Ms. Brito the power to bind

in fact may not:

1. Perform duties under a contract that requires the exercise of personal services of the principal;
2. Make any affidavit as to the personal knowledge of the principal;
3. Vote in any public election on behalf of the principal;
4. Execute or revoke any will or codicil for the principal;
5. Create, amend, modify, or revoke any document or other disposition effective at the principal's death or transfer assets to an existing trust created by the principal unless expressly authorized by the power of attorney; or
6. Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.

Ms. Milo to the optional arbitration agreement included in the admission contract. Although this Court concluded that the power of attorney at issue in *In re Estate of McKibbin v. Alterra Health Care Corp.*, 977 So. 2d 612 (Fla. 2d DCA 2008), failed to confer the authority to bind the principal to arbitration, Defendants ask this Court to reject the Estate's argument that that *McKibbin* is controlling in a case such as this, where the POA evidences an intent to give the attorney-in-fact "broad authority to effectuate [the principal's] legal rights." *Bryant*, 937 So. 2d at 269.

II. MS. MILO WAS BOUND BY THE OPTIONAL ARBITRATION AGREEMENT IN THIS CASE BECAUSE SHE WAS, AT A MINIMUM, AN INTENDED THIRD-PARTY BENEFICIARY OF THE CONTRACT THAT CONTAINED THE AGREEMENT

When a contract contains a valid and enforceable arbitration agreement, a nonsignatory third-party beneficiary of the contract is bound to the agreement to the same extent that the promisee is bound. *See Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 579 (Fla. 1st DCA 2007); *Germann v. Age Institute of Florida, Inc.*, 912 So. 2d 590, 592 (Fla. 2d DCA 2005); *Martha A. Gottfried, Inc. v. Paulette Koch Real Estate*, 778 So. 2d 1089, 1090 (Fla. 4th DCA 2001). This is no different in the context of long term care than it is in any other setting. *Linton*, 953 So. 2d at 579; *see also Germann*, 912 So. 2d 591-92.

The Estate attempts to minimize the First District's decision in *Linton* by arguing that it is factual distinguishable, it is in conflict with the Fourth District's

decision in *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. 4th DCA 2005), it misapplied the law, and it is a “state action” that infringes on fundamental constitutional rights without being narrowly tailored to serve a compelling government interest. Each of these arguments is unpersuasive.

Initially, the Estate’s focus on *Linton* ignores the other Florida decisions that have held that third-party beneficiaries of a contract can be compelled to arbitrate. *Germann*, 912 So. 2d at 592; *Martha A. Gottfried*, 778 So. 2d at 1090; *Terminix Intern. Co., LP v. Ponzio*, 693 So. 2d 104, 108 (Fla. 5th DCA 1997) *Zac Smith & Co., Inc. v. Moonspinner Condo. Ass’n*, 472 So. 2d 1324 (Fla. 1st DCA 1985). As explained below, neither this case nor *Linton* involved tort claims unrelated to the admission contract.

The factual distinction between *Linton* and this case that the Estate asserts is dispositive had no bearing on the First District’s ruling and is irrelevant to the issue of third-party beneficiary status. Although *Linton* involved an elderly woman who suffered from advanced Alzheimer disease, the First District decision does not state that Ms. Linton was “incapable of being the contracting party.” Answer Brief at 14. Nor is the First District’s conclusion that Ms. Linton was a third-party beneficiary to the admission contract based on the fact that Ms. Linton suffered from Alzheimer. *Linton*, 953 So. 2d at 579. In fact, the First District’s only

reference to Ms. Linton's medical condition is in the opening paragraph of its decision. *Id.* at 576.²

The First District's decision in *Linton* is not in conflict with *Blankfeld*. In *Blankfeld*, the Fourth District did not consider whether the resident was a third-party beneficiary of the admission contract. Rather, the court held that a health care proxy under section 765.401, Florida Statutes, did not have the authority to waive the resident's right to sue for damages in court for violations of chapter 400 or the common law. 902 So. 2d at 300. The district court examined the statutory scheme and concluded that it provides for a proxy as "a last and limited resort" for the purpose of consenting "to health care services that the patient herself would likely choose if able to do so." *Id.* This limited statutory authority did not authorize the proxy to bind the resident to arbitration. *Id.* Because *Blankfeld* did not conduct a third-party beneficiary analysis, the First and Fourth Districts have not "reached disparate conclusions on the same issue of law." Answer Brief at 15.

The Estate also argues that *Linton* misapplied the law because like this case, none of the claims asserted in *Linton* were for breach of contract or based on third-

4. The Estate implies that Carrington Place chose to have Ms. Brito sign the admission contract without determining whether Ms. Milo was incapable of doing so herself. Answer Brief at 15. There is no evidence in the record that it was Carrington Place, rather than Ms. Milo, who chose to have her daughter sign the admission contract.

party beneficiary theory of recovery. This argument overlooks the fact that all of the Estate's claims in this case and the all of the claims in *Linton* arose out of the decedents' status as residents of the facilities and, thus, the admission contracts. See *Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus*, 853 So. 2d 500, 505-06 (Fla. 4th DCA 2003) (concluding that the nursing home resident's tort claims had a significant relationship to the admission contract and were therefore subject to arbitration).

In *Sears Authorized Termite & Pest Control, Inc. v. Sullivan*, 816 So. 2d 603, 605-06 (Fla. 2002), the Florida Supreme Court recognized that tort claims that are directly related to a contract for services are subject to arbitration. The Supreme Court approved of the Fifth District Court of Appeal's decision in *Terminix Intern. Co., LP v. Ponzio*, 693 So. 2d 104 (Fla. 5th DCA 1997), which held that an action for personal injuries that arose out of the defendant's contractual undertaking was subject to the arbitration clause contained in the contract. *Sullivan*, 816 So. 2d at 606 The *Ponzio* court explained:

The allegations of the complaint assert that Terminix had a duty, deriving from its contractual agreement, to eradicate certain pests and that it failed to do so resulting in bodily injury, etc. to the plaintiffs. There is no strict liability assertion nor is there any assertion of a failure to warn. The controversy or claims here clearly arise out of or derive from Terminix's contractual undertaking. *It is the nature of the injury and damages which differs from the typical breach of contract action but the arbitration language is not limited to merely breach of contract actions.*

693 So. 2d at 108 (emphasis supplied). The Fifth District further held that the nonsignatory plaintiffs were third-party beneficiaries of the contract bound by the arbitration agreement. *Id.*

The *Sullivan* court also distinguished *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999), which involved the inherently dangerous design of an air conditioning system that caused carbon monoxide gas from a vehicle in the garage to be circulated through the house, killing Mr. Seifert. *See Sullivan*, 816 so. 2d at 606. In *Seifert*, the Supreme Court concluded that the plaintiff could not be compelled to arbitrate a tort claim that did not relate to the agreement by the builder to construct the house. 750 So. 2d at 624. As the *Sullivan* court reiterated: “The tort claim filed in [*Seifert*] neither relies on the agreement nor refers to any provision within the agreement. Rather, the petitioner’s tort claim relates to duties wholly independent from the agreement.” 816 So. 2d at 606 (quoting *Seifert*, 750 So.2d at 642).

The Fourth District distinguished *Seifert* in *Fenelus*, which involved tort claims brought by the Estate of a nursing home resident. *See* 853 So. 2d 505-06. The district court concluded that the tort claims were subject to arbitration because they were significantly related to the admission contract. The district court explained why *Seifert* was not controlling:

We find the instant case clearly distinguishable. Here, the agreement containing the arbitration clause obligated appellant to provide appropriate care to the decedent, and the dispute alleges that appellant failed to provide appropriate care. It certainly appears to us that there is a strong nexus between the dispute giving rise to the lawsuit and the contract containing the arbitration clause. *That the claim sounds in negligence (failure to exercise reasonable care) rather than breach of contract (failure to fulfill a contractual obligation) does not ipso facto sever an otherwise significant relationship between the contractual obligation and the matter in dispute.*

Id. (emphasis supplied).

For the reasons expressed in *Fenelus* and *Ponzio*, the Alabama Supreme Court's decision in *Cook's Pest Control, Inc. v. Boykin*, 807 So. 2d 524 (Ala. 2001), is distinguishable because it involved claims that were truly independent from the contract that included the arbitration agreements. In *Cook's Pest Control*, the patient sued the pest control company that had a contract with the hospital when she was bitten by fire ants. The Court held that because the plaintiff disavowed any benefit of the contract between the hospital and pest control company by dismissing her breach of contract claim she could not be burdened by the contract's arbitration provision. *Id.* at 527. The Alabama Supreme Court's decision correctly determined that absent the breach of contract claim, the patient was merely an incidental beneficiary of a contract for services between two corporate entities. *Compare Benton v. Vanderbilt University*, 137 S.W.3d 614 (Tenn. 2004) (a third-party beneficiary who files a cause of action seeking to

enforce the contract between two corporate entities is bound by the arbitration agreement in that contract). This is similar to *Germann*, in which this Court concluded that the nonsignatory long-term care resident was nothing more than an incidental beneficiary of the contracts between two corporate entities for consulting and financial processing service, and thus, was not bound by those entities' agreements to arbitrate. *See* 912 So. 2d at 592.

In contrast, Ms. Milo was more than an incidental beneficiary of the admission agreement. Indeed, Ms. Milo's residency at Carrington Place was dependent on the admission contract. The claims now advanced by the Estate are all based on Ms. Milo's status as a resident and are claims to enforce Ms. Milo's rights under the admission contract. The Estate does not allege any claims against Carrington Place that are independent from Ms. Milo's residency and thus, independent from the admission contract. Because the admission contract "clearly expressed an intent to primarily or directly benefit her," *Germann*, 912 So. 2d 952, Ms. Milo was a third-party beneficiary of the contract, bound by the valid arbitration provision therein. *See Linton*, 953 So. 2d at 579.

Lastly, as this Court has recognized, a court decision enforcing a voluntary arbitration agreement is not "state action" that is subject to strict scrutiny review. *See Baycare Health Systems, Inc. v. Agency for Health Care Admin.*, 940 So. 2d 563, 569 (Fla. 2d DCA 2006) ("Numerous courts have held that the 'state action'

element of a due process claim is absent in cases involving voluntary private arbitration.”); *see also Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (“[W]e agree with the numerous courts that have held that the state action element of a due process claim is absent in private arbitration cases.”). In *Davis*, the Eleventh Circuit Court of Appeals explained that the *Shelley v. Kraemer*, 334 U.S. 1(1948), “theory that a court’s enforcement of a private contract constitutes state action” does not apply in the context of arbitration: “The holding of *Shelley*, however, has not been extended beyond the context of race discrimination. Instead, the concept of state action has since been narrowed by the Supreme Court.” 59 F.3d at 1191.³

In *Linton*, the First District ruled that an arbitration clause contained in an assisted living facility’s residency agreement was binding on resident’s estate, despite the fact that the agreement was not signed by resident but, rather, by her son. *Linton*, 953 So. 2d at 579. The court concluded that the trial court correctly

3. Other Courts have also recognized the limited precedential value of the *Shelley* decision outside the context of racially restrictive covenants. *See e.g., Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 29 P.3d 797, 811 (Cal. 2001) (“Although the United States Supreme Court has held that judicial effectuation of a racially restrictive covenant constitutes state action (*see Shelley v. Kraemer* (1948) 334 U.S. 1, 20), it has largely limited this holding to the facts of those cases.”); *MedValUSA Health Programs, Inc. v Memberworks, Inc.*, 872 A.2d 423, 430-36 (Conn. 2005) (performing an extensive analysis of the *Shelley* decision and noting that there is much support for the conclusion that “*Shelley* has been effectively confined to its facts”).

found that the resident was an intended third-party beneficiary of the agreement. *Id.* This Court should similarly conclude that Ms. Milo was a third-party beneficiary of the admission contract signed by Ms. Brito and that her Estate is now bound by the valid arbitration agreement contained therein.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court reverse the trial court's order denying Defendants' motion to compel arbitration.

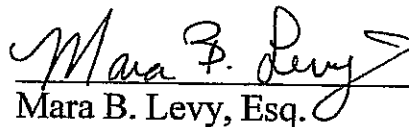
CERTIFICATE OF SERVICE

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 22nd day of August, 2008.

CERIFICATE OF COMPLIANCE

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

*McCumber, Daniels, Buntz
Hartig & Puig, P.A.*



Mara B. Levy, Esq.
Florida Bar No. 344280
Mark B. Hartig, Esq.
Florida Bar No. 0114529
One Urban Centre
4830 West Kennedy Blvd., Suite 300
Tampa, Florida 33609
813-287-2822
813-287-2833 fax