IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D20-3778
L.T. Case No.: 16-2018-CA-005242

DARCELL WICK, as Personal Representative of the Estate of GERALDINE HARRIS, deceased,

Appellant,

v.

ORANGE PARK MGT, LLC, d/b/a OAK VIEW REHABILITATION CENTER; KINGSLEY AVENUE MGT, LLC; WILLIAM STEWART SWAIN; LAVERNE PATRICK HERZOG; and JAMES DAVID PRATER,

Appellees.
_____/

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This non-final appeal challenges the trial court's determination that Appellees, Orange Park Mgt, LLC, d/b/a Oak View Rehabilitation Center, Kingsley Avenue Mgt, LLC; William Stewart Swain; Laverne Patrick Herzog; and James D. Prater (collectively "Oak View Defendants") are entitled to arbitrate the claims brought by Plaintiff, Darcell Wick, as Personal Representative of the Estate of Geraldine Harris (the "Estate"). As argued below, arbitration cannot be compelled because the Estate lacks the ability to pay for any arbitration fees or costs. As such, arbitration is prohibitively expensive and the trial court was precluded from enforcing the arbitration agreement as a matter of law. Instead, the trial court invalidated the defense of prohibitive expense and forced the Estate to either find some unknown attorney who will advance arbitration costs on its behalf or forego vindicating its statutory, remedial rights.

Factual Background and Procedural History

On April 1, 2011, Darcell Wick signed an admission agreement to Doctors Lake Healthcare on behalf of her mother, Geraldine Harris. (A226, 397-407.) Ms. Wick had a General Durable Power of Attorney

granting her the authority to sign documents on her mother's behalf. (A303, 408-10.) The Estate stipulated:

> Based on the contract produced by the defendants and their representation that Mrs. Geraldine Harris's admission agreement with Doctors Lake Healthcare was not superseded by any later resident agreement, plaintiffs stipulate that Orange Park Mgmt, LLC, the lincensee that operates the nursing home, is a party to the admission agreement by virtue of the assignability clause.

(A147-48.) The stipulation did not apply to any other of the Oak View Defendants, nor did those defendants make any arguments or introduce any evidence supporting why they should be allowed to enforce an arbitration agreement against the Estate. (A355.) In fact, the Oak View Defendants' only fact witness testified that none of the other defendants were parties to the agreement. (A232-33; *see also* A294.)

The admission agreement with Doctors Lake contained an "Optional Arbitration Clause." (A407.) The clause provides:

> Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway arising from or relating to this Agreement governing the Resident's stay a[t] the Facility, shall be resolved by binding arbitration. Such binding arbitration shall be governed by the provisions of the Florida Arbitration Code, F.S. 682.01 et seq. As appropriate and in the event that the Florida

> Arbitration Code is deemed not to apply, binding arbitration shall be governed by the Federal Arbitration Act. **OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only.**

(A407.) Ms. Wick did not mark through the clause with an "X." (*Id.*)

Ms. Harris resided at Oak View through December 24, 2016. (A12.) The facility became Oak View Health and Rehabilitation ("Oak View") in approximately 2014-15. (A14.) The Estate has alleged that throughout her stay at Oak View, Ms. Harris suffered numerous falls, resulting in severe injuries and her ultimate death. (A14-21.) The Estate brought claims against the Oak View Defendants sounding in negligence and a violation of Ms. Harris's resident rights under Florida Statute section 400.023. (A28-114.)

In response, all of the Oak View Defendants moved to stay and enforce the arbitration agreement. (A115-16.) The Estate filed affidavits from Ms. Wick and expert witness, Damian Mallard, as well as a memorandum explaining why arbitration should not be compelled. (A128-54.) In short, the Estate argued that arbitration would be prohibitively expensive. (*Id.*) The Oak View Defendants responded with two memoranda, both of which refused to

acknowledge that "prohibitive cost" is a stand-alone defense to arbitration. (A186-206.)

The Evidentiary Hearing

The trial court held an evidentiary hearing on Defendants' Motion to Stay and Enforce Arbitration Agreement on October 5, 2020. (A207-09.)

In opening statements, counsel for the Oak View Defendants argued first that the costs of arbitration are considered only in the context of unconscionability. (A216.) Counsel then argued that arbitration is only cost prohibitive in this case because of the fee agreement with the Estate's counsel. (A217.) As the Oak View Defendants saw it, the Estate was having to pay arbitration costs because of the fee agreement signed with counsel, not because of the admission agreement requiring arbitration. (*Id.*)

The Estate's counsel informed the trial court that the prohibitive cost defense is a stand-alone defense under Florida law and cited controlling case law. (A219.) The Estate then explained that regardless of which expert witness the trial court accepted, arbitration will cost thousands of dollars that neither the Estate nor the beneficiaries could afford. (A220.) Moreover, when Ms. Wick came

to her attorney's office, the arbitration agreement was prohibitively expensive. (*Id.*) "In other words, it was already dead. And Mr. Watrel's employment agreement simply didn't [revive] it, nor was he under any obligation to [revive] it." (*Id.*) If the Estate is forced to arbitrate, it argued, then it will lose statutory rights created by the Florida legislature because it cannot afford to pay for arbitration. (A221.)

Ms. Wick testified at the hearing that she is the personal representative of her mother's estate. (A286.) The Estate had no assets. (A287.) Ms. Wick has one sister, who lives off Social Security and is unable to pay for any arbitration fees or costs. (A286.) Ms. Wick also lacks the means to pay for any amount of arbitration fees or costs because she lives paycheck-to-paycheck. (A291.) Her only savings has been diminished to $4,300 because she had to draw from it to fix her air conditioner. (A289.) Ms. Wick testified that she could not afford to pursue this case if it is sent to arbitration. (A297.)

Ms. Wick also testified about her engagement of Steve Watrel as her trial counsel. (A291.) She first called Morgan & Morgan, but they would not discuss the case with her. (*Id.*) She then called Harrell & Harrell, and they also declined to take the case, but referred her to Steve Watrel as being the best attorney to contact. (*Id.*) It was only on

her third attempt to obtain counsel that she was able to hire Mr. Watrel. (A292-93.)

Ms. Wick signed an employment contract with Steve Watrel, P.A. on November 9, 2017. (A292.) Mr. Watrel fully explained to Ms. Wick that the firm did not advance any costs associated with arbitration and she would be responsible to pay those costs. (*Id.*) Similarly, when Ms. Wick signed the employment agreement with Coker Law after Steve Watrel, P.A. merged in January 2020, Ms. Wick also agreed that she would be personally responsible for any arbitration costs. (A292-93.) Both contracts exclude arbitration expenses from the costs that the firms would advance on behalf of the client. (A411, 414.)

Both parties offered expert testimony on the likely costs of arbitration. The Estate called Damian Mallard, Esquire, who has represented both plaintiffs and defendants, and been a member of the Florida Bar since 1991. (A311-13.) Mr. Mallard has been board certified in civil trial law since 2007. (A313.) About one-third of his practice is dedicated to nursing home litigation. (A314.) Mr. Mallard testified that he has handled between 50 and 100 cases in arbitration. (A319.) Similar to Mr. Watrel, Mr. Mallard's firm does not

advance the costs of arbitration on behalf of his clients. (A322.) In fact, the most experienced nursing home attorneys in the state have decided not to advance arbitration costs because the return on investment in arbitration is too low. (A322-23.)

Mr. Mallard then testified that he and the defense expert both agree on the costs to take a nursing home case through trial, which he outlined in paragraphs 5A through P in his amended affidavit. (A133-36, 270, 325.) The experts differed over arbitration costs. Mr. Mallard believed that an average arbitration cost would be $30,800 per side. (A331, 136-37.) The last arbitration Mr. Mallard participated in cost $60,000 ($30,000 per side) for a single arbitrator to conduct a three-and-a-half-day arbitration. (A341-42.) Because the arbitration agreement does not specify the number of arbitrators, the plaintiff has no guarantee that the defense would agree to using a single arbitrator. (A330.) He also believed that arbitrating this case properly would take three days. (A342.) Mr. Mallard testified that arbitration expenses are over and above those costs incurred in circuit court, which a plaintiff is guaranteed to recoup if they prevail. (A326-27.) In contrast, an arbitrator has the discretion to award

costs, but is not required to do so under the Florida Arbitration Code. (A333-34.)

Drilling down into specifics, Mr. Mallard testified that arbitration would require the client to advance at least $5,000 just to retain an arbitrator. (A327.) Arbitrators will then charge hourly for every discovery motion, motion in limine, reviewing pleadings, conducting the arbitration, and writing findings of fact and conclusions of law. (A327-31.) Mr. Mallard also emphasized that whether the trial court accepted his estimation of costs or the estimation of the defense expert, the Estate could not afford either amount. (A331.)

Mr. Mallard further testified that there are very few attorneys in the state who would accept a case like this one, particularly where the statute of limitations has run and the attorney would have to advance arbitration costs. (A334-35.) The defense expert had not identified any plaintiffs' lawyers who would be willing to accept this case and advance the costs of arbitration. (A269-70.) In fact, were the Estate to have to hire new counsel, it would owe costs advanced by Steve Watrel, P.A. and Coker Law, plus quantum meruit for their services to date. (A270.)

The defense relied on the testimony of Robin Khanal, Esquire.[1] (A243.) Mr. Khanal has been a member of the Florida Bar since 2002 and primarily represents nursing homes and assisted living facilities. (A243-44.) He has tried approximately 20 nursing home cases to verdict and arbitrated roughly 40 cases to final award. (A244.) He has served as an arbitrator a "hand full" of times. (*Id.*) He testified that he believes it is less expensive overall to arbitrate a case than to try a case in court. (A248-49.) He based his opinion on the fact that trials take longer to conduct than arbitrations. (A249.)

Mr. Khanal also testified that a court can cap the amount of fees charged by the arbitrators. (A251.) In contrast, Mr. Mallard testified that he has never had a case where the defense lawyer agreed to cap arbitration costs. (A340.) In his experience, nursing homes benefit by making it more expensive for plaintiffs to litigate. (A340-41.) Mr. Khanal then testified that if the case was arbitrated before a single arbitrator, costs could be capped at $5,000 for a two-day arbitration

[1] The Oak View Defendants also called Shelly Jones, who was the Admissions Coordinator at the time Ms. Wick signed the Admission Agreement. (A223, 225.) Because her testimony primarily went to the issue of unconscionability, which is not argued on appeal, it is mostly omitted from the statement of facts.

and $7,500 for three days. (A253.) Of course, if the parties selected three arbitrators, retainers would have to be paid to those attorneys as well. (A272-73.) He estimated that a two-day, three-panel arbitration would cost $10,000 per side. (A280.)

In addition to these capped amounts, Mr. Khanal also agreed that the neutral arbitrator would charge hourly for resolving discovery motions and he has never had a nursing home case in which no discovery motions were filed. (A273-74.) Similarly, every time the parties need a dispositive motion or motion in limine resolved, the arbitrator would charge for their time. (A275.) Arbitrators also charge for their time in reviewing the pleadings, conducting the arbitration, and preparing a written award. (A275-76.) These are not expenses incurred in court. (*Id.*) Arbitrators would also charge for travel, hotels, and meals if they are coming from out of town. (A276.) On cross-examination, Mr. Khanal admitted that he had previously testified during deposition that a three-person, three-day arbitration would cost $25,000. (*Id.*) That expense does not include the expense of paying the arbitrators to review motions or conduct hearings, nor do they include travel or hotel expenses. (A277, 283.)

In closing arguments, the Oak View Defendants admitted "that there is a line of cases originating out of *Green Tree* [*Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000)] that has created this potential new avenue to otherwise invalidate an arbitration agreement if the facts support it." (A346.) They argued, however, that no Florida court has accepted this argument at the appellate level. (*Id.*)

The Oak View Defendants also argued that public policy should not allow a plaintiff to invalidate an arbitration agreement through a fee agreement later executed with counsel. (A347.) They argued that siding with the Estate could lead to "a point where any arbitration agreement can be challenged by a plaintiff's lawyer if they have the right fee provision in their contract." (A352.) They also argued that Ms. Wick has some disposable income, and Mr. Khanal testified that arbitration would not be *that* expensive. (A347-48.)

In contrast, the Estate argued that the prohibitive cost defense is a separate stand-alone defense. (A355; *see also* A366-68.) Florida case law has recognized this separate defense, but plaintiffs previously did not have sufficient evidence to support that defense. (A355-56.) However, in this case, the Estate has established all of the proof required by the case law. (A356-57.) The Estate is the real party

in interest and it has no assets; it cannot afford to pay any money toward arbitration. (A360.) The amount that Ms. Wick can afford, as the personal representative, should not factor into the equation. (*Id.*) However, Ms. Wick testified that she and her husband live paycheck-to-paycheck. (A359.) There was no evidence that their home has any equity, nor any evidence that they could obtain a third mortgage on their property. (*Id.*)

As to the costs of arbitration, the very lowest figure the trial court heard was $5,000 for a single arbitrator to conduct a two-day hearing. (A360.) That amount does not include costs for discovery motions, dispositive motions, or motions in limine. (*Id.*) On the other side, the court heard testimony that a three-day, three-panel arbitration would cost $30,000. (A360-61.) Regardless of which numbers the court accepts, the result is the same because the Estate cannot afford to pay any amount. (A361.) If the Estate is required to pay the cost of arbitration, Ms. Wick will have to abandon the claims because she has no ability to pay those costs. (*Id.*)

The Estate further argued that its inability to pay has nothing to do with the fee agreement with Mr. Watrel, as evidenced by the fact that if Ms. Wick were proceeding *pro se*, the arbitration agreement

would be prohibitively expensive. (A358.) The fee agreement with counsel did not change the financial position of the Estate. (*Id.*, A362.) Had nursing homes desired to avoid a prohibitive expense defense, they could have undertaken to pay arbitration costs in the agreement rather than shift those costs to attorneys. (A358.) The nursing homes have been on notice since the Supreme Court's *Green Tree* decision in 2000 that prohibitive expense was a potential defense and the onus was on them to draft around it. (A358-59.) "The onus is not on anyone else to step in and pay these costs when a plaintiff cannot." (A359.)

As to the defense public policy argument, there is no public policy requiring third party attorneys to pay arbitration costs. (A368.) However, the Florida Legislature has created public policy by creating statutory resident's rights. (*Id.*) Public policy supports allowing people to vindicate their legislatively created statutory rights. (*Id.*) When an arbitration agreement takes away a person's ability to vindicate their rights due to prohibitive expense, the arbitration agreement cannot be enforced. (A368-69.)

The trial court asked both sides to prepare and submit proposed orders. (A370.)

The Trial Court's Order

The parties submitted proposed orders to the trial court. (A417-432.) Ultimately, the trial court adopted the majority of the language proposed by the Oak View Defendants. (A4-10, 425-32.)

In its order, the trial court rejected the Estate's prohibitive cost defense on various grounds. (A6.) First, the trial court accepted the Oak View Defendants' public policy argument that a party to an arbitration agreement should not be able to invalidate the agreement by virtue of a subsequently executed fee agreement with counsel. (*Id.*) The trial court feared that if it did not enforce the arbitration agreement here, it "would effectively grant any party, in any type of case in Florida, the ability to unilaterally rescind an otherwise enforceable arbitration agreement." (A7.)

Second, the trial court concluded that prohibitive cost is not a stand-alone defense in Florida, but merely a consideration on the question of substantive unconscionability. (*Id.*) The trial court found "that it has not been presented with binding caselaw to support a 'prohibitive cost' defense as to the enforcement of an arbitration agreement." (A8.)

Third, the trial court found that even were prohibitive cost a separate defense, the Estate had not met its evidentiary burden of proving arbitration would be prohibitively expensive. (A8.) The trial court found that the theory of prohibitive costs is speculative, and that plaintiffs' counsel do not typically require plaintiffs to pay arbitration costs. (*Id.*) The trial court also cited the line from the Coker Firm agreement stating: "No fees or costs owed if no recovery," even though the contract prominently states that the firm does not advance costs related to arbitration. (*Id.*; A414.) The trial court then found Mr. Khanal's testimony that arbitration would cost between $5,000 - $7,500 per side to be more persuasive. (A8-9.) Based on this evidence, the trial court found that the Estate failed to satisfy its burden of proving the arbitration agreement is unenforceable. (A9.)

The trial court's order makes no mention of why all of the Oak View Defendants, instead of just Orange Park Mgt, LLC, should be allowed to compel the Estate to arbitrate. (A4-9.) In its proposed order, the Estate cited case law and evidence refuting any suggestion that the other defendants could compel arbitration. (A419.)

SUMMARY OF ARGUMENT

The Oak View Defendants created an arbitration agreement that made no provision for the payment of arbitration fees and costs. Under the Florida Arbitration Code, the parties equally share the fees and costs, and the arbitrator *may* award those costs back to a prevailing party. Neither the Estate nor the personal representative has any ability to advance the arbitration fees and costs, regardless of the amount. Therefore, under well-established law from the Supreme Court of the United States, and as adopted by sister District Courts in Florida, arbitration is prohibitively expensive and cannot be compelled.

The trial court's order improperly finds that the Plaintiffs Bar has an obligation to advance arbitration costs on behalf of their indigent clients and revive an otherwise prohibitively expensive arbitration agreement. This is not the law. As the drafters of the arbitration agreement, the Oak View Defendants had the ability to draft a provision requiring them to pay for the arbitration if it was prohibitively expensive for their residents. They cannot sidestep the financial burden of funding arbitration, and instead foist it upon plaintiff's attorneys who do not agree to advance such costs. The Oak

View Defendants must live with the failings of their own agreement; the trial court cannot save the agreement by assuming someone else will pay arbitration costs when the client cannot.

As an additional reason to reverse the order, the Oak View Defendants failed to prove, or even argue any reason, why the arbitration agreement should apply to anyone other than Orange Park Mgt, LLC. By stipulation of the parties, none of the other defendants are party to the agreement. The trial court erred in enforcing the agreement to the benefit of those defendants.

ARGUMENT

Standard of Review. This Court reviews the trial court's factual findings to determine whether they are supported by competent substantial evidence. *Zephyr Haven Health & Rahab. Ctr., Inc. v. Hardin*, 122 So. 3d 916, 919 (Fla. 2d DCA 2013). It reviews the validity of the agreement and the application of the law to the facts de novo. *Id.*

I. The arbitration agreement is prohibitively expensive.

In 2000, the Supreme Court of the United States held that it is possible "that the existence of large arbitration costs could preclude a litigant … from effectively vindicating her federal statutory rights in

the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000). For a party to "invalidate an arbitration agreement on the ground that the arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. Since the *Green Tree* decision, Florida appellate courts have recognized the prohibitive expense defense. *See FI-Tampa, LLC v. Kelly-Hall*, 135 So. 3d 563, 567 (Fla. 2d DCA 2014); *FI-Evergreen Woods, LLC v. Estate of Vrastil*, 118 So. 3d 859, 864-65 (Fla. 5th DCA 2013); *Zephyr Haven*, 122 So. 3d at 921. The Estate has established every element necessary to meet the prohibitive cost defense and the trial court erred in finding otherwise. Indeed, if the facts of this case do not establish the prohibitive expense defense to arbitration, it is difficult to imagine any case that would be entitled to assert this United States Supreme Court-established defense.

A. Prohibitive cost is a separate defense from unconscionability.

The trial court erred in finding that the prohibitive cost defense is not separate from the question of substantive unconscionability. (A7-8.) In reaching this conclusion, the trial court relied on the Oak View Defendants' misreading of the case law. (A196-98; 204-05.)

Indeed, the trial court adopted the Oak View Defendants' explanation of the case law verbatim (A429-30 at ¶¶ 9-10), even though the Estate fully explained at the hearing and in its own proposed order why that explanation was erroneous (A219, 355-56; 420). Contrary to the trial court's order, the prohibitive cost defense is not simply an element of substantive unconscionability.

The Second District Court of Appeal has addressed this issue and clearly recognized the separate arbitration defense. In *FI-Tampa,* 135 So. 3d at 567, the Second District said:

> Although costs of arbitration may be a basis for determining that an agreement to arbitrate is substantively unconscionable, since *Green Tree* the issue of prohibitive costs of arbitration has developed into a separate defense to the enforcement of an arbitration agreement.

See also FI-Evergreen Woods, 118 So. 3d at 865 (accepting the Supreme Court's *Green Tree* defense, but finding the estate failed to present sufficient evidence that arbitration would be too burdensome).

To reach a contrary conclusion, the trial court cited a number of cases, none of which support the outcome. (A7-8.) Most noteworthy is the *Zephyr Haven* case. 122 So. 3d at 916. As argued by the Oak

View Defendants (A429), the trial court quoted the *Zephyr Haven* case as standing for the proposition that "[i]n the context of unconscionability, the issue of financial cost of arbitration is generally considered substantive, rather than procedural." *Id.* at 920. (A7.) The Estate agrees that when an unconscionability argument is raised, costs are relevant to the consideration of substantive unconscionability. However, as already explained, this is not the only basis on which arbitration costs can be relevant.

The *Zephyr Haven* court went on to discuss the separate *Green Tree* prohibitive cost defense at length and recognized it as a stand-alone defense. *Id.* at 921-23. Here, this is precisely the argument raised by the Estate. The Estate asked the trial court to apply the prohibitive expense defense (A148-54), which was binding on the trial court by virtue of the Supreme Court's decision in *Green Tree* and the decisions of other Florida appellate courts. *See Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) ("in the absence of interdistrict conflict, district court decisions bind all Florida trial courts."). In light of both the Supreme Court's decision in *Green Tree* and the numerous Florida cases expressly recognizing that prohibitive expense is a

separate defense to enforcing an arbitration agreement, the trial court erred as a matter of law in finding otherwise.

B. The Estate's fee agreement with counsel did not invalidate the arbitration agreement.

The trial court next erred in adopting the Oak View Defendants' argument that a plaintiff cannot use a subsequent fee agreement with counsel to avoid arbitration. (A6-7; 428-29.) The trial court reasoned – incorrectly: "in denying enforcement of the instant arbitration agreement based on Plaintiff's subsequent fee agreement with her counsel, the Court would effectively grant any party, in any type of case in Florida, the ability to unilaterally rescind an otherwise enforceable arbitration agreement." (A7.) The trial court also incorrectly believed that "it would be inconsistent with Florida's public policy of favoring arbitration to allow Ms. Wick's fee agreement with her counsel to invalidate the arbitration agreement signed approximately 5 years beforehand." (A6.)

Of course, the Estate's agreement with counsel did not invalidate an otherwise enforceable agreement. As between the Oak View Defendants and the Estate, the agreement was always going to be prohibitively expensive because the Estate had no assets (and the

beneficiaries have no ability to pay any amount toward arbitration). (A286-87, 291-, 297); *see also* Section I.C., *infra.* Thus, the arbitration agreement was unenforceable when Ms. Wick hired Estate counsel. Counsel simply elected not to revive the unenforceable agreement by advancing the costs of arbitration. (A220-21, 362.) Neither counsel in this case, nor any other member of the Plaintiff's Bar, is obligated to fund an arbitration agreement entered into long before they were hired.

If the Oak View Defendants wished to avoid a situation where arbitration costs could be prohibitively expensive, then they could have taken that into account when drafting the agreement. They could have offered to pay all arbitration costs, or even just pay them in the event a trial court would otherwise apply the prohibitive cost defense. Instead, the Oak View Defendants want to pay half the costs of arbitration and let the remaining half fall on the shoulders of plaintiff's lawyers, who were never part of the arbitration agreement. Neither public policy nor the law supports allowing plaintiffs to vindicate their statutory rights *only if* they can find an attorney who will pay arbitration costs on their behalf.

In fact, the Second District Court of Appeal held that a plaintiff could not assert the prohibitive cost defense unless she proved that her counsel was not advancing arbitration costs under a contingency fee contract. *See Zephyr Haven*, 122 So. 3d at 923. There, the plaintiff had objected to testifying about the fee agreement on the basis of attorney-client privilege. *Id.* The appellate court reasoned that even if "the fee agreement contains privileged material, that information could be redacted and the billing information could be produced to substantiate [plaintiff's] claim." *Id.* Here, the Estate did just that and the fee agreements were stipulated into evidence. (A298, 411-14.) This requirement to produce the relevant portions of the fee agreement with counsel would be superfluous if the very act of excluding arbitration costs from a fee agreement were improper.

Moreover, and contrary to the Oak View Defendants' argument, public policy favors the Estate. As the Supreme Court recognized in *Green Tree*, litigants must be allowed to vindicate their statutory rights. 531 U.S. at 92. The Estate is attempting to vindicate the rights of Ms. Harris under Florida Statute § 400.023, a remedial statue designed to protect the rights of nursing home residents. *See Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62-63 (Fla. 4th DCA 2003)

(recognizing the Nursing Home Resident's Rights Act as a remedial statute enacted to prevent elder abuse). It has long been the law in Florida that an arbitration agreement is unenforceable as against public policy if it does not allow a party to vindicate statutory rights. *Id.; see also Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 474 (Fla. 2011). Because the Estate cannot afford arbitration, requiring it to arbitrate the claims would preclude it from pursuing the Legislatively created statutory remedies available under Chapter 400. Stripping a party of its statutory remedial remedies is contrary to public policy.[2]

In short, under these facts, the arbitration agreement was unenforceable due to prohibitive costs *unless* counsel agreed to cover those expenses. Counsel simply accepted the Estate has he found it. It was not his fee agreement that made the arbitration provision unenforceable. The arbitration agreement was unenforceable because the Estate could not afford the arbitration costs. The trial court erred as a matter of law in concluding otherwise.

[2] *See also Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 604 (Wash. App. 2002) (policy favoring arbitration "is defeated when an arbitration agreement triggers costs effectively depriving a plaintiff of limited pecuniary means of a forum for vindicating claims.")

C. Arbitration is prohibitively expensive for the Estate.

The trial court's finding that "Plaintiff has not met its evidentiary burden of proving that the subject arbitration is prohibitively expensive for the Plaintiff" is not supported by competent, substantial evidence. (A8.) In looking at a plaintiff's evidentiary burden, the Supreme Court did not articulate how detailed a showing a party must make to prove the prohibitive cost defense. *See Green Tree*, 531 U.S. at 92. The Court merely stated that if "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* When deciding how detailed of showing is required, most courts, including those in Florida, have adopted a case-by-case analysis that focuses "'among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims."' *Zephyr Haven*, 122 So. 3d at 922 (quoting *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F3d 549 (4th Cir. 2001)).

The *Zephyr Haven* court noted that this approach has also been adopted by the Eleventh Circuit, such that a claimant must offer evidence of the amount of the arbitration fees he is likely to incur and his inability to pay those fees. *Id.* (citing *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1259-60 (11th Cir. 2003)). The Estate has satisfied all of these elements. Therefore, the trial court's finding that the Estate failed to satisfy its evidentiary burden is not supported by competent, substantial evidence.

1. *Claimant's ability to pay costs.*

The arbitration clause of the Admission Agreement calls for the contract to be governed by the Florida Arbitration Code, Florida Statute Chapter 682 (2011). (A407.) Experts for both sides agreed that under the Florida Arbitration Code in 2011, each party would pay at least $5,000 upfront. (A282, 327.) As explained in the fact section, the parties' experts sharply disagreed about the likely costs of arbitration. *See supra* at 7-10. The trial court accepted Mr. Khanal's testimony that arbitration would cost each side $5,000-$7,500. (A9.) Of course, as Mr. Khanal testified, this is a bottom figure that does not include the costs of hearing discovery, dispositive, or any other motions, among other expenses. (A273-76.)

He has never had any cases, whether in trial or arbitration, that did not have discovery disputes. (A273-74.) Therefore, the number recited in the order is an inaccurately low estimate based on Mr. Khanal's own testimony.

Nonetheless, even if the Estate would only have to pay $5,000 to $7,500 in arbitration costs, there was no evidence that the Estate could afford this amount. The Estate offered uncontradicted evidence that it has no assets. (A287.) Ms. Harris died with nothing more than the "clothes on her back." (*Id.*) This alone should end the inquiry of whether arbitration costs would be prohibitively expensive because the Estate is the party that would bear the costs of litigation, not the personal representative. *See Beseau v. Bhalani*, 904 So. 2d 641, 641-42 (Fla. 5th DCA 2005) ("under ordinary circumstances, the estate would bear sole responsibility for any attorney's fee or cost award arising from" a wrongful death action).

However, even were the Court to consider the assets of the survivors when determining whether arbitration would be prohibitively expensive – which it should not – the uncontradicted evidence established that neither survivor of Ms. Harris could afford to contribute any amount toward the costs of arbitration. Ms. Harris

had only two children: Ms. Wick and Dixie Moore. (A285.) Ms. Moore lives off of social security and has no assets. (A286.) While Ms. Wick is employed, she and her husband cannot afford to pay any amount toward arbitration. (A287, 291, 297.) Ms. Wick lives paycheck-to-paycheck and has no money for extraordinary costs. (A291.) For example, even her 401K account has been diminished to a mere $4,300 because she had to fix her air conditioner. (A289.) What is clear from this evidence is that neither the Estate nor the survivors can afford to come out-of-pocket for arbitration costs.

Despite these facts, the trial court appears to have found that the Estate's prohibitive cost theory was based on "mere speculation" for three reasons: (1) "it is well recognized that contingency fee agreements with plaintiffs' counsel will not typically require plaintiffs to pay for the costs of arbitration;" (2) the fee contract with Coker Law says "No fees or costs owed if no recovery;" and (3) the testimony of Mr. Khanal. (A8.) None of these grounds support the finding that the Estate's prohibitive cost defense is based on mere speculation.

First, as to whether other firms advance arbitration costs, the Estate submitted uncontradicted evidence that two advertising firms would not take the case. (A291.) The Estate then submitted

uncontradicted evidence that its counsel does not advance arbitration costs. (A292-93, 411-14.) Mr. Mallard also testified that his firm does not advance arbitration costs, and he has personal knowledge that several of the leading nursing home litigation plaintiff's firm also do not advance arbitration costs. (A138, 322-23.) He explained in detail why firms cannot justify advancing arbitration costs based on the low return on investment received in an arbitration proceeding. (A323.) In contrast, Mr. Khanal could only "assume" that most plaintiff's firms advance arbitration costs because he has "arbitrated close to 40 of these cases" and not heard this argument raised before. (A260.) He certainly has never worked for a plaintiff's firm and had no retainer agreements from other firms to support his belief. (A260, 270.) Therefore, the court's factual finding that most contingency fee contracts do not require plaintiffs to front arbitration costs is unsupported by competent, substantial evidence. *See Brinkley v. Brinkley*, 453 So. 2d 941, 943 (Fla. 4th DCA 1984) (quoting *Fla. Rate Conf. v. Fla. R. and Public Utilities Comm.*, 108 So. 2d 601, 607 (Fla. 1959)) ("Surmise, conjecture or speculation have been held not to be substantial evidence.").

Yet, even if contingency fee contracts "will not typically require plaintiffs to pay for the cost of arbitration," (A8), the uncontradicted facts show that the Estate's counsel has not agreed to advance those costs in this case (A411-14.). The Estate's case was turned down by two other firms. (A291.) Mr. Khanal did not attempt to locate any plaintiff's firm that would take her case and agree to advance arbitration costs. (A270.) Nor should the Estate be required to shop its case to the lowest bidder.

To say that the Estate can only pursue its claim *if* Ms. Wick can locate counsel who will advance additional costs created by an arbitration agreement is to deny her counsel of her choice. Much like a motion for disqualification, courts should view a defense position requiring the Estate to switch counsel with grave skepticism because "'the ability to deny one's opponent the services of capable counsel, is a potent weapon.'" *Manning v. Cooper*, 981 So. 2d 668, 670 (Fla. 4th DCA 2008) (quoting *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 224 (6th Cir. 1988)). Ms. Wick hired Mr. Watrel as counsel for the Estate after being told that he was the best attorney to handle the case. (A291.) The Estate should not have to hire a less-experience litigator because it lacks assets.

Second, while the contract with Coker Law does state that the client will not owes fees or costs unless there is a recovery (A412), it also provides in all caps, bold, and underlined: "**NOTE: COSTS DO NOT INCLUDE THE EXPENSES RELATED TO ARBITRATION OR ANY OTHER ALTERNATIVE DISPUTE RESILSUTUON PROCEEDING WHICH ARE THE SOLE RESPONSIBILITY OF THE CLIENT)**." (A414.) Ms. Wick testified that this was explained to her when she signed the employment agreement with Coker Law and that she understood the firm would not advance arbitration costs on behalf of the Estate. (A292-93.) Thus, while the Estate does not have to repay costs advanced by Coker Law unless there is a recovery, arbitration expenses are specifically excluded from the costs that the firm will advance.

Third, the trial court relied on testimony by Robin Khanal, Esq. (A8-9.) None of his testimony supports the trial court's factual finding that the Estate failed to prove its prohibitive cost defense. Again, the fact that a career-long *defense* lawyer has never seen a fee agreement where *plaintiff*'s counsel would not advance arbitration costs does not change the facts of this case. Mr. Khanal also opined that arbitration would cost $5,000 - $7,500 per side, before the

arbitrators charged any amount for hearing discovery or dispositive motions. (A252-53, 273-76.) While this is less than the amount testified to by the Estate's expert, it is still more than the Estate can afford to pay. The Estate has no assets. (A287.) The beneficiaries of the Estate cannot afford to advance any amount for arbitration costs. (A286, 291, 297.) The smallest amount opined by Mr. Khanal (before his admitted additional motion practice costs are added in) exceeds Ms. Wick's savings. (A289.)

Simply put, the Estate proved that it has no ability to pay the costs of arbitration. The trial court's factual finding that its claim was speculative is not supported by competent, substantial evidence.

2. *The expected cost differential between arbitration and litigation in court and the likelihood of incurring those costs.*

Both the Estate and the Oak View Defendants agreed on the approximate costs of trying the case in the trial court. (A133-36, 270, 325/). The Estate's expert testified that arbitration costs are *in addition to* litigation costs. (A327.) In short, all of the same discovery has to be conducted in a trial as in an arbitration, but the parties do not have to pay judges or juries for their time. (A276, 327, 329.) In contrast, Mr. Khanal offered his conclusory opinion that it is more

expensive to try a case than to arbitrate because a trial takes longer. (A8, 248.) Of course, defense counsel is being paid hourly, so trial would be more expensive for *defendants* on that basis. (A264.) However, the costs of trial will be borne by the Estate's counsel. (A411-14.) Thus, the only cost bearing on whether the Estate can afford arbitration is the cost of arbitration itself. While the cost of a trial to the Estate is nothing unless there is a recovery, the Estate will bear the full costs of arbitration. That cost differential is $5,000 at a minimum, before the first discovery motion is heard, and exceeds what the Estate can afford. Even Mr. Khanal testified that these costs would be paid as an advance to the arbitrator, meaning that they would be incurred as soon as the parties are ordered to mediation. (A282.)

Additionally, the fact that arbitrators *may* award a prevailing plaintiff the costs of arbitration also does not save the agreement from being prohibitively expensive. (A9); *see* § 682.11, Fla. Stat. (2011). Mr. Khanal could only say that costs "could" be a taxable cost. (A254.) Obviously, there is no guarantee that the Estate would ever recover arbitration costs. As Mr. Mallard explained, arbitrators often

decline to award costs as a way of "splitting the baby" because they have an interest in being rehired for future arbitrations. (A334.)

Legally, courts examining the prohibitive cost defense have also said that reimbursement of costs at the end will not save an arbitration agreement from being prohibitively expensive because a plaintiff has to be able to afford to vindicate her rights at the start of the proceeding. (A422); *see Philips v. Assoc. Home Equity Servs., Inc.*, 179 F.Supp. 2d 840, 846-47 (N.D. Ill. 2001). As the *Philips* court explained, the fact that an arbitrator may assess costs at the conclusion of the case "is nothing more than an argument that there exists *some possibility* that [plaintiff] ultimately may not have to bear a prohibitively expensive portion of the arbitration costs." *Id.* (emphasis original). A reimbursement at the end does not defeat a plaintiff's "evidence that she would have to expend thousands of dollars that she does not have in order to pursue her claim, with no solid way of getting the money back." *Id.* The same is true in this case, where there is no guarantee that the Estate could recover the arbitration costs it cannot afford to expend in the first instance.

In short, the Estate proved that it unquestionably would have to come out-of-pocket thousands of dollars as soon as the case is

sent to arbitration. The fact that arbitration costs could be returned at the end of arbitration does not help a party who is unable to pay those costs at the start.

3. *Whether the cost differential is so substantial to deter the bringing of claims.*

Finally, the Estate proved that the cost differential between trial and arbitration is so substantial as to deter bringing the claims. Ms. Wick testified that she will not be able to continue with the case if the Estate is forced to arbitrate. (A297) Neither the Estate nor she can afford it. (A287, 289, 291.) The trial court did not recite any fact even suggesting that the Estate or Ms. Wick has the financial wherewithal to afford arbitration, regardless of the cost. (A8-9.)

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For all of the foregoing reasons, the trial court's finding that "Plaintiff has failed to satisfy her burden of proving that [the] subject arbitration agreement is unenforceable," is unsupported by competent, substantial evidence. (A9.) The Estate proved every element required of it under the case law. The Oak View Defendants' expert offered testimony that did not change the unassailable facts

of this case: the Estate cannot afford arbitration (regardless of the amount) and its counsel did not agree to pay for arbitration costs.

If these facts are not sufficient to support a prohibitive cost defense to arbitration, then there should never be a case that qualifies. Yet the Supreme Court of the United States, which has repeatedly upheld the validity of arbitration agreements,[3] has said that there is a prohibitive cost defense. *Green Tree*, 531 U.S. at 522. And numerous courts across the country have recognized that plaintiffs who cannot afford arbitration cannot be compelled into an arbitral forum based on the *Green Tree* decision. *See e.g., Spinetti v. Service Corp. Intern.*, 240 F.Supp. 2d 350, 355 (W.D. Penn. 2001); *Philips,* 179 F.Supp. 2d at 846; *Ball v. SFX Broadcasting, Inc.*, 165 F.Supp. 2d 230, 240 (S.D.N.Y. 2001); *Mendez*, 45 P.3d at 464-65; *Thomas v. CM Sec., LLC*, Case No. CV095033527S, 2010 WL 3038503 at *11 (Conn. Super. July 7, 2010). Even Florida appellate courts have recognized the validity of this stand-alone defense, but there is not yet a reported decision where a plaintiff has presented sufficient facts to support the defense. *See* Section I.A., *supra*. This Court

[3] *See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989) (and cases cited therein).

should similarly find that the Estate's evidence is sufficient to support the prohibitive cost defense and that the trial court's findings to the contrary are unsupported by competent, substantial evidence.

II. The trial court erred in requiring the Estate to arbitrate with persons not party to the arbitration agreement.

The parties stipulated that Orange Park Mgt, LLC was a party to the Admission Agreement by virtue of the assignability clause in that document. (A147-48.) The stipulation did not apply to any other of the Oak View Defendants, nor did those defendants make any arguments or introduce any evidence supporting why they should be allowed to enforce an arbitration agreement against the Estate. (A355.) The trial court's order similarly never mentioned why the other named defendants (Kingsley Avenue Mgt, LLC, William Stewart Swain, Laverne Patrick Herzog, and James David Prater, collectively the "Other Defendants") were entitled to enforce an agreement to which they were not parties. (A4-8.) As argued by the Estate at the hearing and in its proposed order, the Other Defendants were not entitled to compel the Estate to arbitrate against them. (A354-55, 419).

The proponents of an arbitration agreement have the burden of establishing an enforceable written agreement to arbitrate. *Palm Garden of Healthcare Holdings, LLC v. Haydu*, 209 So. 3d 636, 638 (Fla. 5th DCA 2017). Here, the Other Defendants offered no evidence establishing that they were proper parties to the agreement. In fact, the defense witness Shelly Jones specifically testified that these Other Defendants were *not* parties to the agreement. (A232-33.) Having failed to offer any proof, or even advance any legal argument showing an entitlement to benefit from the arbitration provision, the trial court erred in requiring the Estate to arbitrate against the Other Defendants.

CONCLUSION

For the foregoing reasons, individually or cumulatively, this Court should reverse and remand, allowing the Estate's claims to proceed in the trial court.

Respectfully submitted,

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I certify that the foregoing brief is in Bookman Old Style 14-point font and complies with the word count requirements of Rule 9.045, Florida Rules of Appellate Procedure.

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