Supreme Court of Florida

No. SC09-768

ANGELA I. GESSA, etc.,
Petitioner,

vs.

MANOR CARE OF FLORIDA, INC., et al.,
Respondents.

[November 23, 2011]

PERRY, J.

Angela I. Gessa seeks review of the decision of the Second District Court of Appeal in Gessa v. Manor Care of Florida, Inc., 4 So. 3d 679 (Fla. 2d DCA 2009), on the ground that it expressly and directly conflicts with a decision of another Florida district court of appeal on a question of law.[1] We have jurisdiction. See art. V, § 3(b)(3), Fla. Const.

I. BACKGROUND

Angela Gessa was admitted as a resident to Manor Care of Florida, Inc., a nursing home. Upon admission, her daughter, acting as her attorney-in-fact, signed

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1. See infra notes 5-8.

admissions documents that included an arbitration agreement. During her stay, Gessa filed suit against Manor Care, alleging negligence, violation of resident's rights, and breach of fiduciary duty. Manor Care moved to compel arbitration. At the hearing on the motion, Gessa argued that the arbitration agreement was unconscionable and contrary to public policy due to the limitation of liability provisions in the agreement that capped noneconomic damages at $250,000 and waived punitive damages. The trial court, however, granted the motion to compel, ruling that, because any offensive clauses can be severed, the agreement was not unconscionable. The court declined to rule on the public policy issue, leaving it for the arbitrator. Gessa appealed, arguing that the limitation of liability provisions violated public policy and were not severable. The district court affirmed, agreeing with the trial court that the provisions were severable. Also, the district court did not rule on the public policy issue, leaving it for the arbitrator. Gessa sought discretionary review, which we granted.

Gessa raises several issues, including the following: (i) whether the limitation of liability provisions are severable, (ii) whether the court or the arbitrator must decide whether the arbitration agreement violates public policy, and (iii) whether the limitation of liability provisions violate public policy. Manor Care, in counterpoint, contends that the United States Supreme Court's recent

decision in Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010), is applicable here and entitles Manor Care to relief on its motion to compel.

As explained more fully below, our decision in this case is controlled in part by our recent decision in Shotts v. OP Winter Haven, Inc., No. SC08-1774 (Fla. Nov. 23, 2011), another nursing home arbitration case. Pursuant to our reasoning in that case, we hold that the district court below erred in the following respects: (i) in ruling that the limitation of liability provisions in this case, which place a $250,000 cap on noneconomic damages and waive punitive damages, are severable; (ii) in failing to rule that the court, not the arbitrator, must decide whether the arbitration agreement violates public policy; and (iii) in failing to rule that the above limitation of liability provisions violate public policy. As in Shotts, we also conclude that the United States Supreme Court's decision in Jackson is inapplicable here.

A. Facts and Procedural History

The relevant facts of this case are set forth in the district court decision under review:

> Angela I. Gessa, by and through Miriam G. Falatek, her attorney-in-fact, challenges the trial court's order granting Manor Care of Florida, Inc.'s motion to compel arbitration in Gessa's action against Manor Care for negligence, violation of resident's rights, and breach of fiduciary duty. . . .
>
> Gessa was admitted as a resident of Manor Care of Carrollwood on two occasions. Upon each admission, she or Falatek signed admissions documents that included an arbitration agreement. One

document, entitled "Admission Agreement," was a nine-page document to which Attachments A through I were appended. In addition, a form entitled "Attestation of Admission Agreement and Attachment" was executed. However, the crux of this appeal centers on the form that bears no specific title but is captioned with the following warning: "THIS AGREEMENT CONTAINS A WAIVER OF STATUTORY RIGHTS. PLEASE READ CAREFULLY." This document was not designated as an attachment to the Admissions Agreement, nor does the attestation form include any reference to it.

The document is composed of two sections: A. Arbitration Provisions and B. Limitation of Liability Provision[s]. The last paragraph of section A reads: "The Limitation of Liability Provision[s] below [are] incorporated by reference into this Arbitration Agreement." At the time of Gessa's first admission, this document was signed by a representative of Manor Care and by Gessa. Falatek and a Manor Care representative signed it upon Gessa's return to the facility.

During her second stay, Gessa filed suit against Manor Care under chapter 400, Florida Statutes (2004), the Nursing Home Residents Act (the Act). In her complaint, Gessa sought damages for the improper treatment she received at the facility. In response to the complaint, Manor Care moved to compel arbitration pursuant to the parties' arbitration agreement. Gessa filed her memorandum in opposition to the motion, arguing that the arbitration agreement was both substantively and procedurally unconscionable. Additionally, Gessa argued that the arbitration agreement was unenforceable because it was contrary to public policy. These arguments were premised on the terms of the limitation of liability provision[s] contained in section B of the document that the parties signed during the admissions process. [These provisions] prohibited the award of punitive damages and capped any award of noneconomic damages at $250,000. Gessa argued that these limitations were contrary to the rights specifically granted by the Act, and that they invalidated the entire agreement to arbitrate. Gessa repeated these arguments at the hearing held on the motion to compel arbitration.

Gessa, 4 So. 3d at 680 (citation omitted).

The trial court, in its written order, granted the motion to compel, concluding that the agreement was severable and was not unconscionable:

> This cause came before the Court on March 1, 2007, concerning the Defendant's Motion to Stay Proceedings and to Compel Arbitration. The Court, having reviewed the memoranda, considered the arguments presented, and being otherwise fully advised, grants the Defendant's Motion to Stay Proceedings and Compel Arbitration. The Court finds no procedural unconscionability, as there was a three day right of rescission contained in the arbitration agreement. Further, the agreement was not substantively unconscionable because offensive clauses can be severed, as they are not integral to the contract and are separate from the arbitration provision.

(Emphasis added.) The court declined to rule on the public policy issue, leaving it for the arbitrator.

Gessa appealed, arguing that the limitation of liability provisions violated public policy and were not severable. The district court affirmed, agreeing with the trial court that the provisions were severable. Also, the district court declined to rule on the public policy issue, leaving it for the arbitrator:

> Here, the trial court reviewed the document that contained the arbitration agreement and limitation provision[s] and determined that the limitation [provisions were] not an integral part of the parties' agreement to settle claims by arbitration. This factual finding is supported by competent evidence. Based on the test defined in Local No. 234 [v. Henley & Beckwith, Inc., 66 So. 2d 818, 821-22 (Fla. 1953)], we agree with the trial court that the limitation provision[s] [are] severable, even though the contract lacks a specific severability clause. Although the inclusion of such . . . provision[s] would expressly demonstrate the intent of the parties, pursuant to Local No. 234, the trial court is not bound by the inclusion or omission of such a clause when determining the issue of severability. Accordingly, the

> trial court, having found the limitations provision[s] here to be severable, properly directed that the case proceed to arbitration.

Gessa, 4 So. 3d at 682. Gessa sought discretionary review, which we granted. Gessa raises several claims,[2] and we address three of them.[3]

B. Arbitration Agreement

The arbitration agreement that Gessa's daughter signed when Gessa was admitted to Manor Care bore no title. Instead, the document bore the following heading: "THIS AGREEMENT CONTAINS A WAIVER OF STATUTORY RIGHTS. PLEASE READ CAREFULLY." The document was divided into four parts: A, B, C and D. Part A was titled "ARBITRATION PROVISIONS" and was approximately three and one-half pages long. The following provisions were included at various points in Part A:

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2. Gessa raises the following claims: (a) the public policy issue is a gateway issue, and it must be addressed by the court, not the arbitrator; (b) the present district court decision conflicts with decisions from the other district courts, which have uniformly refused to enforce limitations of remedies provisions in nursing home and assisted living facility arbitration agreements because they defeat the remedial purposes of chapter 400, Florida Statutes; (c) the present district court decision conflicts with decisions of this Court and other district courts on the issue of whether the offending limitations provisions are severable; and (d) the present district court decision conflicts with decisions of this Court and other district courts on the issue of whether an arbitration agreement that contains unenforceable terms that violate public policy renders the entire agreement void.

3. We address, in the following order, claims (c), (a), and (b). We decline to address the other claim raised by Gessa.

—Except as expressly set forth herein, the provisions of the Florida Arbitration Code, Florida Statutes §§ 682.01, et. seq., shall govern the arbitration.

—Discovery in the arbitration proceeding shall be governed by the Florida Rules of Civil Procedure [except as otherwise provided herein].

—[T]he only depositions allowed shall be of experts and any treating physicians. No other individuals may be deposed.

—The arbitrator shall apply the Florida Rules of Evidence and Florida Rules of Civil Procedure in the arbitration proceeding except where otherwise stated in this Agreement. Also, the arbitrator shall apply, and the arbitration award shall be consistent with, Florida law except as otherwise stated in this Agreement.

—The arbitrator's fees and costs associated with the arbitration shall be paid by the Facility . . . .

—The parties shall bear their own attorney's fees and costs and hereby expressly waive any statutory right to recover attorney fees or costs . . . .

—The parties agree to maintain the confidentiality of the arbitration proceeding in all respects . . . .

Significantly, at the conclusion of Part A, just before the beginning of Part B, the document provided:

—The Limitation of Liability Provision[s] below [are] incorporated by reference into this Arbitration Agreement.

(Emphasis added.)

Part B of the document, which was approximately one-half page in length, was titled "LIMITATION OF LIABILITY PROVISION[S]: Read Carefully Before Signing," and it contained four provisions, one of which placed a $250,000 cap on noneconomic damages, and another of which called for a waiver of punitive damages. Part B provided as follows in full:

> 1.1 The parties to this Agreement understand that the purpose of [these] "Limitation of Liability Provision[s]" is to limit, in advance, each party's liability in relation to this Agreement.
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> 1.2 Liability for any claim brought by a party to this Agreement against the other party, including but not limited to a claim by the Facility for unpaid nursing home charges, or a claim by a Resident, arising out of the care or treatment received by the Resident at the Facility, including, without limitation, claims for medical negligence or violation(s) of Florida Statutes §§ 400.022, et seq., arising from simple or gross negligence, shall be limited as follows:
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> 1. Net economic damages shall be awardable, including, but not limited to, past and future medical expenses, off-set by any collateral source payments; any outstanding liens shall be satisfied from the damages awarded.
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> 2. Non-economic damages shall be limited to a maximum of $250,000.
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> 3. Interest on unpaid nursing home charges shall not be awarded.
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> 4. Punitive damages shall not be awarded.
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> The parties hereto each acknowledge that these limitations of liability are fair and reasonable under the circumstances.

(Emphasis added.) Part C of the document, which was a brief paragraph, was titled "WITHDRAWAL PERIOD," and it provided that each party shall have three business days in which to cancel the agreement. And Part D, which was also a brief paragraph, was titled "FULL AGREEMENT," and it stated that the agreement constitutes the entire agreement between the parties.

II. ANALYSIS

As noted above, this case is controlled in part by our decision in Shotts v. OP Winter Haven, Inc., No. SC08-1774 (Fla. Nov. 23, 2011), and although the two

cases are similar, they differ in several respects. First, whereas the limitation of liability provisions in the present case include a $250,000 cap on noneconomic damages and a waiver of punitive damages, the limitations of remedies provisions in Shotts included the imposition of the AHLA rules[4] and a waiver of punitive damages. And second, whereas the present arbitration agreement contains no severability clause, the agreement in Shotts contained such a clause.

A. Severability

In this claim, Gessa contends that the district court erred in ruling that the limitation of liability provisions in the present case are severable. To the extent this claim is based on written materials before this Court, the issue is a pure question of law, subject to de novo review. See Aills v. Boemi, 29 So. 3d 1105, 1108 (Fla. 2010) ("Because this is a question of law . . . the standard of review is de novo."). In its opinion, the district court below indicated that it agreed with the trial court's ruling that "offensive clauses can be severed." Gessa contends, however, that the district court erred in this respect—she contends that the limitation of liability provisions violate public policy and are not severable. We agree.

4. American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration.

This Court addressed a similar scenario in Shotts, where we held that one of the limitations of remedies provisions in that case—the provision called for the imposition of the AHLA rules—was not severable. Because it was unnecessary to do so, we did not address whether the second provision in that case—a waiver of punitive damages—was severable. There, we noted that we had established a general standard for determining whether a contractual provision is severable from the whole, and that standard provides in part: "[A] bilateral contract is severable where the illegal portion of the contract does not go to its essence, and where, with the illegal portion eliminated, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other." Local No. 234 v. Henley & Beckwith, Inc., 66 So. 2d 818, 821-22 (Fla. 1953) quoted in Shotts, No. SC08-1774, slip op. at 33.

In Shotts, we then reviewed the decisional law in this area and applied the above standard from Local No. 234 to the limitations of remedies provision in Shotts. We ruled as follows:

> Based on the foregoing, we conclude that the limitations of remedies provision in the present case that calls for the imposition of the AHLA rules is not severable from the remainder of the agreement. Although the arbitration agreement in this case contains a severability clause, the AHLA provision goes to the very essence of the agreement. If the provision were to be severed, the trial court would be forced to rewrite the agreement and to add an entirely new set of procedural rules and burdens and standards, a job that the trial court is not tasked to do. See Local No. 234, 66 So. 2d at 821-22.

> Further, if the AHLA provision were severed, the trial court would be hard pressed to conclude with reasonable certainty that, with the illegal provision gone, "there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other" id.—particularly, when those legal promises are viewed through the eyes of the contracting parties. See generally id. at 822. . . . We note that the trial court below ruled that the limitations of remedies provisions in the present case are not severable—and we agree with that assessment. Under the above standard of review, we hold that the district court below erred in ruling that the AHLA provision in this case is severable.

Shotts, No. SC08-1774, slip op. at 38-39.

As in Shotts, we conclude that the limitation of liability provisions in the present case, which place a $250,000 cap on noneconomic damages and waive punitive damages, are not severable from the remainder of the agreement. As noted above, the limitation of liability provisions are contained in Part B of the arbitration agreement, which is titled "LIMITATION OF LIABILITY PROVISION[S]," and the first section in part B provides as follows: "The parties to this Agreement understand that the purpose of [these] 'Limitation of Liability Provision[s]' is to limit, in advance, each party's liability in relation to this Agreement." When viewed jointly, the above two provisions place a clear upper limit on noneconomic damages and foreclose the prospect of punitive damages altogether. The extent of liability under the agreement is thus, within bounds, reasonably foreseeable. Without these provisions, on the other hand, the extent of

liability would be open-ended. In this respect, the two provisions constitute the financial heart of the agreement.

As in Shotts, we conclude that if the present provisions were to be severed, "the trial court would be hard pressed to conclude with reasonable certainty that, with the illegal provision[s] gone, 'there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other' id.—particularly, when those legal promises are viewed through the eyes of the contracting parties." Shotts, No. SC09-1774, slip op. at 38 (quoting Local No. 234, 66 So. 2d at 821-22). Thus, contrary to the ruling below, these limitation of liability provisions, which place a $250,000 cap on noneconomic damages and waive punitive damages, are not severable from the arbitration agreement. This conclusion is consistent with the weight of authority in Florida.[5]

5. For instance, the First District Court of Appeal has held that a limitations of remedies provision is severable but only where the agreement itself contained a severability clause. See Alterra Healthcare Corp. v. Estate of Linton, 953 So. 2d 574 (Fla. 1st DCA 2007) (finding severability where agreement had a severability clause, capped noneconomic damages at $250,000, and precluded punitive damages). The Fourth District Court of Appeal has held that a limitations of remedies provision is not severable, regardless of whether the agreement did or did not contain a severability clause. See Place at Vero Beach, Inc. v. Hanson, 953 So. 2d 773 (Fla. 4th DCA 2007) (rejecting severability where agreement had a severability clause and a provision adopting AHLA rules); Lacey v. Healthcare & Retirement Corp. of Am., 918 So. 2d 333 (Fla. 4th DCA 2005) (rejecting severability where agreement capped noneconomic damages at $250,000, precluded punitive damages, and had no severability clause). And the Fifth District Court of Appeal has held that such a provision is not severable, regardless of whether the agreement contained a severability clause or not. See Fletcher v.

Under the above standard of review, we hold that the district court below erred in ruling that the limitation of liability provisions in this case are severable.

B. Court or Arbitrator

In this claim, Gessa contends that the district court erred in affirming the trial court's order which, in effect, allowed the arbitrator, not the court, to decide whether the arbitration agreement violates public policy. This issue is a pure question of law, subject to de novo review. See Aills v. Boemi, 29 So. 3d 1105, 1108 (Fla. 2010). We agree with Gessa.

This issue has already been decided in Gessa's favor in Shotts. There, we held that the court, not the arbitrator, must decide whether an arbitration agreement violates public policy:

> [T]his Court in Seifert [v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999),] held that it was for the court, not the arbitrator, to determine "whether a valid written agreement to arbitrate exists," Seifert, 750 So. 2d at 636 (emphasis added), and we later explained the meaning of the term "valid" in this context, with respect to arbitration and public policy: "No valid agreement exists if the arbitration clause is unenforceable on public policy grounds." Global Travel [Marketing, Inc. v. Shea, 908 So. 2d 392, 398 (Fla. 2005)]. Thus, under Siefert and Global Travel, it is incumbent on the court, not the arbitrator, to determine whether an arbitration agreement violates public policy.

Huntington Place Ltd. P'ship, 952 So. 2d 1225 (Fla. 5th DCA 2007) (rejecting severability where contract capped noneconomic damages at $250,000, precluded punitive damages, and had a severability clause); SA-PG-Ocala, LLC v. Stokes, 935 So. 2d 1242 (Fla. 5th DCA 2006) (rejecting severability where agreement contained provisions that capped noneconomic damages at $250,000 and precluded punitive damages, and had no severability clause).

Shotts, No. SC08-1774, slip op. at 24. Again, this conclusion is consistent with the weight of authority in Florida,[6] and even the district court below—the Second District Court of Appeal—now concedes this.[7]

Under the above standard of review, we hold that the district court below erred in failing to rule that the court, not the arbitrator, must decide whether the arbitration agreement violates public policy.

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6. See, e.g., Hanson, 953 So. 2d 773 (affirming the trial court's ruling that the arbitration agreement conflicted with the Florida Nursing Home Residents Act and was unenforceable); Fletcher, 952 So. 2d 1225 (reversing the trial court's ruling compelling arbitration and instead holding that a limitations of remedies provision in a nursing home contract violates public policy and is void); Linton, 953 So. 2d at 578 ("The issue of whether the provision violated public policy goes to the first Seifert inquiry: whether there was a valid agreement to arbitrate. This is a question for the trial court."); Alterra Healthcare Corp. v. Bryant, 937 So. 2d 263, 267 (Fla. 4th DCA 2006) ("[T]he trial court properly considered whether the arbitration and limitation of liability provisions were valid."); Stokes, 935 So. 2d at 1243 ("It is the court's obligation, in deciding a motion to compel arbitration, to determine whether a valid written agreement to arbitrate exists."); Lacey, 918 So. 2d 333 (reversing the trial court's ruling compelling arbitration and instead holding that a limitations of remedies provision in a nursing home contract violates public policy and is void); Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296 (Fla. 4th DCA 2005) (same).

7. See Jaylene, Inc. v. Steuer, 22 So. 3d 711, 713 (Fla. 2d DCA 2009) ("We note that we are in conflict with decisions by the First, Fourth, and Fifth Districts holding that the trial court initially must determine whether an arbitration agreement's limitation on statutory remedies renders the agreement unenforceable on public policy grounds.").

C. Limitation of Liability Provisions

In this claim, Gessa contends that the district court erred in failing to rule that the limitation of liability provisions in the present case violate public policy. This issue is a pure question of law, subject to de novo review. See Aills v. Boemi, 29 So. 3d 1105, 1108 (Fla. 2010). As noted above, the limitation of liability provisions in this case call for a $250,000 cap on noneconomic damages and a waiver of punitive damages. The district court below did not decide whether these provisions violate public policy, but rather left the matter to the arbitrator. Gessa contends that the district court erred in this respect—she contends that the provisions violate public policy, and that the district court should have so ruled. We agree.

As noted above, this Court addressed a similar scenario in Shotts, where the limitations of remedies provisions included the imposition of the AHLA rules and a waiver of punitive damages. There, we ruled as follows:

> Based on the foregoing, we conclude that the limitations of remedies provisions in the present case violate public policy, for they directly undermine specific statutory remedies created by the Legislature. See §§ 400.022, 400.023, Fla. Stat. (2003). This conclusion comports with the vast weight of authority in Florida, as discussed above. The Fourth District Court of Appeal in Romano v. Manor Care, Inc., 861 So. 2d 59 (Fla. 4th DCA 2003), explained succinctly:
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> > Sections 400.022 and 400.023 are remedial statutes, designed to protect nursing home residents. The Nursing Home Resident's Rights Act, section 400.022,

> was originally enacted after a Dade County Grand Jury investigation of nursing homes revealed substantial elder abuse occurring in many nursing homes without any remedial action being taken. The law set up rights of residents, including the right to appropriate medical care, and requires nursing homes to make public statements of the rights and responsibilities of the residents. To enforce these rights, the legislature provided each resident with a cause of action for their violation. . . . The legislature also provided for the award of punitive damages for gross or flagrant conduct or conscious indifference to the rights of the resident. Moreover, there was no cap on pain and suffering damages in the statute.
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> Romano, 861 So. 2d at 63 (emphasis added) (citations omitted).
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> In light of the recognized need for these remedies and the salutary purpose they serve, we conclude that any arbitration agreement that substantially diminishes or circumvents these remedies stands in violation of the public policy of the State of Florida and is unenforceable.

Shotts, No. SC08-1774, slip op. at 31 (first emphasis in original) (second emphasis added).

As in Shotts, we conclude that the limitation of liability provisions in the present case violate public policy. As noted above, the nursing home statute provides for the award of "punitive damages for gross or flagrant conduct or conscious indifference to the rights of the resident. Moreover, there was no cap on pain and suffering damages in the statute." In contrast, the limitation of liability provisions in the present case eliminate punitive damages altogether and severely restrict damages for pain and suffering. These provisions directly frustrate the remedies created by the statute. The provisions eviscerate the remedial purpose of

the statute, or, in the language of Shotts, they "substantially diminish[] or circumvent[] these remedies." Shotts, No. SC08-1774, slip op. at 31. Thus, these limitation of liability provisions, which place a $250,000 cap on noneconomic damages and waive punitive damages, violate the public policy of the State of Florida and are unenforceable. Again, this conclusion is consonant with the weight of authority in Florida.[8]

Under the above standard of review, we hold that the district court below erred in failing to rule that the limitation of liability provisions in the present case violate public policy.

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8. See, e.g., Linton, 953 So. 2d at 578 ("The arbitration agreement in the present case defeats the remedial purpose of the Act by eliminating punitive damages and capping noneconomic damages, so the trial court correctly ruled that it was void as against public policy."); Bryant, 937 So. 2d at 266 ("This court has held repeatedly that arbitration agreements eliminating punitive damages and capping non-economic damages defeat the remedial purpose of the NHRA and are, therefore, void as against public policy."); Stokes, 935 So. 2d at 1243 ("It would be against public policy to permit a nursing home to dismantle the protections afforded patients by the Legislature through the use of an arbitration agreement."); Lacey, 918 So. 2d at 334 ("To the extent that a contractual limitation defeats the purpose of a remedial statute, the limitation may be found void as a matter of law. . . . [The arbitration agreement here] eliminates punitive damages, which are expressly provided for in the Act. It also caps non-economic damages at $250,000, which would seem to substantially affect the compensatory damage remedy. These provisions are thus void under the public policy rationale utilized in this district."); Romano v. Manor Care, Inc., 861 So. 2d 59, 62 (Fla. 4th DCA 2003) ("Although parties may agree to arbitrate statutory claims, even ones involving important social policies, arbitration must provide the prospective litigant with an effective way to vindicate his or her statutory cause of action in the arbitral forum. When an arbitration agreement contains provisions which defeat the remedial provisions of the statute, the agreement is not enforceable.") (citations omitted)).

D. Rent-A-Center v. Jackson

Approximately two weeks after this Court heard oral argument in the present case, the United States Supreme Court issued its decision in Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010), in which that Court addressed the issue of whether the court or the arbitrator must determine whether an arbitration agreement is unconscionable (Jackson contended that the agreement was unconscionable under Nevada law because it required the splitting of arbitration fees) where the agreement contained a provision, known as a delegation provision, in which the parties specifically agreed to arbitrate the enforceability of the arbitration agreement. The United States Supreme Court held that, where there has been no specific challenge to the delegation provision, the arbitrator, not the court, must decide the issue.

After Jackson was decided, Manor Care filed in this Court a motion to submit supplemental briefing addressing whether Jackson is applicable to the present case. This Court granted the motion and ordered the parties to submit supplemental briefs on an expedited schedule. In its supplemental brief, Manor Care contends that under Jackson the present case must proceed to arbitration because Gessa did not challenge the agreement to arbitrate but rather challenged the limitation of liability provisions, which are separate from that agreement. We disagree.

In Jackson, after Antonio Jackson filed an employment discrimination claim against Rent-A-Center, West, Inc., which was his former employer, Rent-A-Center filed a motion to compel arbitration pursuant to the Mutual Agreement to Arbitrate Claims that Jackson had signed as a condition of his employment. The agreement contained a delegation provision in which the parties agreed to arbitrate the enforceability of the agreement. Jackson did not challenge the delegation provision specifically; rather, he opposed the motion on the ground that the entire arbitration agreement was unconscionable. The federal district court granted the motion, and the circuit court of appeals reversed. The United States Supreme Court granted certiorari and reversed, ruling that the delegation provision was controlling and should have been challenged.

In the present case, because the arbitration agreement contained no delegation provision, there was no such provision for Gessa to challenge. Instead, she challenged the arbitration agreement itself and this included the limitation of liabilities provisions, which had been incorporated by reference into the agreement. This was the proper course of action under section 2 of the Federal Arbitration Act, for unlike the situation in Jackson, the entire arbitration agreement in the present case operated as the "written provision . . . to settle by arbitration a controversy," under section 2. See 9 U.S.C. § 2 (2006). Specifically, because the agreement contained no delegation provision, Jackson is inapplicable here.

III. CONCLUSION

Based on the foregoing, we conclude that the district court in the present case erred in the following respects: (i) in ruling that the limitation of liability provisions, which place a $250,000 cap on noneconomic damages and waive punitive damages, are severable; (ii) in failing to rule that the court, not the arbitrator, must decide whether the arbitration agreement violates public policy; (iii) in failing to rule that the above limitation of liability provisions violate public policy. We also conclude that the United States Supreme Court's decision in Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010), is inapplicable here.

We quash the decision of the district court in Gessa v. Manor Care of Florida, Inc., 4 So. 3d 679 (Fla. 2d DCA 2009).

It is so ordered.

PARIENTE, LEWIS, QUINCE, and LABARGA, JJ., concur.
POLSTON, J., dissents with an opinion, in which CANADY, C.J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

POLSTON, J., dissenting.

The majority errs by holding that the arbitration agreement is not enforceable because challenged limitations of remedies within the agreement violate public policy. Contrary to the majority's ruling, the challenged limitations may be severed from the arbitration provisions so that the arbitration should go

forward as agreed by the parties. Moreover, the Florida Legislature, not this Court, should decide whether Florida's public policy has been violated. Because the Florida Legislature has addressed the enforceability of other limitations but not these, the Court should not void the contract. The Court should not be a policy maker.

Therefore, I respectfully dissent.

I. BACKGROUND

The arbitration agreement is a stand-alone agreement, separate from the admissions agreement signed by the parties. The arbitration agreement explicitly provides that the Florida Arbitration Code applies and that it pertains to "[a]ny and all claims or controversies . . . arising out of or in any way relating to the Resident's stay at the facility." It states:

> A. Arbitration Provisions
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> 1.1 Any and all claims or controversies between the Facility and the Resident arising out of or in any way relating to the Resident's stay at the Facility, including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, and whether based upon statutory duties, breach of contract, tort theories or other legal theories (including, without limitation, any claim based on Florida Statutes §§400.022, 400.023, 400.428, 400.429, or a claim for unpaid nursing home or related charges), shall be submitted to final and binding arbitration. Except as expressly set forth herein, the provisions of the Florida Arbitration Code, Florida Statutes §§682.01, et. seq., shall govern the arbitration. Each party hereby waives its right to file a court action for any matter covered by this Agreement.
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> . . . .

> 1.9 The arbitration award shall be made and delivered in accordance with Section 682.09 of the Florida Arbitration Code, and shall be delivered to the parties and their counsel no later than thirty (30) days following the conclusion of the arbitration. The award shall set forth in detail the arbitrator's findings of fact and conclusions of law.

The Petitioner challenged this arbitration agreement as unenforceable as contrary to public policy because it includes a limitation of damages otherwise available by Florida's statutes. Specifically, the Petitioner challenged the provisions that provide that (i) "[n]on-economic damages shall be limited to a maximum of $250,000," and (ii) "[p]unitive damages shall not be awarded."

The trial court ruled that these provisions may be severed from the agreement, even though there is no separate severability provision, and that the remaining provisions, including arbitration, are enforceable. See Gessa v. Manor Care of Fla., Inc., 4 So. 3d 679, 681 (Fla. 2d DCA 2009). The trial court did not determine whether the challenged provisions violate public policy, but it did rule that the arbitration agreement was neither procedurally nor substantively unconscionable. Id. The trial court granted Manor Care of Florida's motion to compel arbitration. Id. at 680.

On appeal, the Second District Court of Appeal affirmed the trial court's order compelling arbitration. Id. The Second District characterized the trial court's ruling regarding severability as a finding of fact and determined that there was competent substantial evidence to support it by reviewing the agreement. See

id. at 681. It held that "the trial court, having found the limitations provision here to be severable, properly directed that the case proceed to arbitration." Id. at 682.

Before this Court, the Petitioner argues that Second District erred in ruling that the arbitrator, not the court, should decide whether the arbitration agreement is enforceable because it includes limitations of remedies that violate public policy.

II. ANALYSIS

In Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University, 489 U.S. 468, 477 (1989), the United States Supreme Court ruled that parties to a contract may choose another state's arbitration law without preemption by the Federal Arbitration Act (FAA), except to the extent the state law undermines the goals and policies of the FAA. Accordingly, the parties' contract should be enforced according to the Florida Arbitration Code as expressly provided for, except to the extent it conflicts with the FAA.[9]

Generally, under Florida and federal arbitration law, if enforceability of the arbitration agreement, rather than the contract as a whole, is challenged, then the court rather than the arbitration panel will decide enforceability. See Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 2856 (2010); O'Keefe Architects, Inc. v. CED Constr. Partners, 944 So. 2d 181, 184-85 (Fla. 2006). However, the

9. The FAA applies because the transaction undeniably involves interstate commerce. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); 9 U.S.C. § 2 (2006).

arbitration agreement may delegate to the arbitration panel the power to decide the issue of enforceability of the arbitration agreement, which should be enforced. See Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772 (2010);[10] ATP Flight Sch., LLC v. Sax, 44 So. 3d 248, 252 (Fla. 4th DCA 2010). If there is no delegation to arbitration, but there are challenged provisions that may be severed from the arbitration provisions, then the matter should be decided by arbitration since the matter will be arbitrated in any event. See Musnick v. King Motor Co. of Ft. Lauderdale, 325 F.3d 1255, 1261 (11th Cir. 2003); ManorCare Health Servs. v. Stiehl, 22 So. 3d 96, 99-100 (Fla. 2d DCA 2009). If there is no delegation and no severance of challenged provisions, then the court should decide whether the arbitration agreement is enforceable. See Howsam v. Dean Witter Reynolds, 537 U.S. 79, 83 (2002); Anders v. Hometown Mortg. Servs., 346 F.3d 1024, 1031 (11th Cir. 2003).

Severability

Severability of the contract is a matter of state law, therefore is controlled by Florida law. See Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327,

10. I agree that, in this case, arbitration agreement language does not delegate the petitioner's challenge to the enforceability of the arbitration agreement to arbitration. Therefore, Jackson does not apply, even if, without deciding the issue, the FAA requires the Jackson analysis over any contrary state law.

1331 (11th Cir. 2005).[11] Severability has long been recognized in Florida's law of contracts and is determined by the intent of the parties. See Local 234 of United Ass'n of Journeymen & Apprentices v. Henley & Beckwith, Inc., 66 So. 2d 818, 822 (Fla. 1953) ("Whether a contract is entire or divisible depends upon the intention of the parties."); see also Frankenmuth Mut. Ins. Co. v. Escambia Cnty., 289 F.3d 723, 728 (11th Cir. 2002) (applying Florida law and explaining that "a bilateral contract is severable where the illegal portion of the contract does not go to its essence, and where, with the illegal portion eliminated, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other") (quoting 6 Samuel Williston, The Law of Contracts, § 1782 (rev. ed. 1938))).

Who decides whether severance is permissible in this contract—the court or arbitrator? As earlier stated, the enforceability of the arbitration agreement, not the whole admissions agreement, is challenged and there is no delegation clause for the matter to be decided by arbitration. Accordingly, the court, rather than the

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11. The severance of unenforceable provisions of a contract as a matter of state law is not to be confused with the severability doctrine decided under federal law that treats arbitration provisions of a contract separately from the contract as a whole for purposes of the "who decides" issue. See Jackson, 130 S. Ct. at 2778 ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.") (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006)); see also Buckeye, 546 U.S. at 447 ("[T]he rule of severability . . . ultimately arises out of § 2 . . . .").

arbitration panel, must decide severability here. See Howsam, 537 U.S. at 83. But, under both Florida and federal arbitration law, if the challenged provisions are severable, then the case should proceed to arbitration because the matter will be determined in arbitration. See Musnick, 325 F.3d at 1261; Stiehl, 22 So. 3d at 99-100; Bland ex rel. Coker v. Health Care & Ret. Corp. of Am., 927 So. 2d 252, 258 (Fla. 2d DCA 2006). With severance, there is no longer any dispute for the court to decide because arbitration will occur. See, e.g., Terminix, 432 F.3d at 1332 (describing Anders, 346 F.3d at 1031-32); Gessa, 4 So. 3d at 682; Rollins, Inc. v. Lighthouse Bay Holdings, Ltd., 898 So. 2d 86, 89 (Fla. 2d DCA 2005).

In this case, there is no severability clause explicitly recognizing the parties' intent to sever. The trial court did not conduct an evidentiary hearing; rather, it simply reviewed the terms of the contract to determine that the challenged provisions were severable. See Gessa, 4 So. 3d at 682. Although the Second District characterized this as finding of fact by the trial court, it is based on a construction of the agreement by the trial court, without any evidentiary hearing, to find the challenged terms severable. See id. The majority, while coming to the opposite conclusion that the challenged terms are not severable, also simply reviews the contract. Majority op. at 11-12.

Contrary to the majority's ruling, the issue of severability cannot be decided in Petitioner's favor. The majority mistakenly considers the $250,000 limitation

on noneconomic damages and the preclusion of punitive damages in the contract as "the financial heart of the agreement." Majority op. at 12. However, this ignores and mischaracterizes the economic reality of the transaction. The separate admissions agreement is the financial heart of the agreement between the parties, providing for the rights and responsibilities of the parties relating to the resident's stay at the nursing home, including the room and board rate, ancillary charges, and room and standard services by the facility. The separate arbitration agreement is a side agreement determining the specifics of arbitration, i.e., the scope, how and where the arbitration will be conducted, and the limitations of a potential arbitration award. The limitations also include provisions that both parties waive their rights to attorney's fees and costs under any statutory rights and proposals for settlement, that net economic damages will not be limited but offset by collateral source payments and liens satisfied from the damages awarded, and that interest on unpaid nursing home charges will not be awarded.

Contrary to the majority's ruling, the limitations of noneconomic damages and elimination of punitive damages are divisible and do not eliminate the essence of the agreement to arbitrate the parties' claims. See Stiehl, 22 So. 3d at 100 ("[W]e do not find that the remedial limitation is so interrelated and interdependent that it cannot be severed by the arbitrator if necessary . . . ."). The remainder of the agreement, describing what will be arbitrated, how the arbitration process will

occur, where the arbitration will occur, and the other limitations could remain intact without "rewriting the contract" as the majority asserts. See id. I agree with the trial court and the Second District that the contract unambiguously may be severed.[12] The majority errs by holding that the contract unambiguously prohibits severance of these challenged provisions.

Because of the severability of the challenged provisions, the matter should be arbitrated, and the arbitration panel should decide whether the challenged provisions may be enforced, if they ever arise. The speculative nature of these challenged limitations is an additional reason to enforce the arbitration provision. Petitioners may not be able to prove entitlement to noneconomic damages exceeding $250,000 or punitive damages so that the limitations would never be triggered. If that were the case, then the arbitration agreement, which otherwise should be enforced according to the facts of the case, would be improperly

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12. To any extent that this is not clear from the terms of the contract, the trial court should conduct an evidentiary hearing to determine the parties' intent. See, e.g., Gold, Vann & White, P.A. v. Friedenstab, 831 So. 2d 692, 695-97 (Fla. 4th DCA 2002) (ruling that issues relating to whether the employment contract's essential purpose would be nullified by severance must be determined by evidentiary hearing); Harrison v. Palm Harbor MRI, Inc., 703 So. 2d 1117, 1119 (Fla. 2d DCA 1997) (remanding to trial court for evidentiary hearing of severability of contract where there was no severance provision in the contract). In this case, if there were an ambiguity as to whether the parties intended to sever the challenged provisions, it would itself be a gateway question of arbitrability and is therefore appropriate for a court to answer in the first instance. See PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 407 n.2 (2003).

rendered unenforceable by the speculation that such limitations might be invoked. See PacifiCare, 538 U.S. at 407 (holding that courts should not speculate on how an arbitrator might rule "in a manner that casts [agreements'] enforceability into doubt," and in such cases the proper course is to compel arbitration); Kristian v. Comcast Corp., 446 F.3d 25, 40 (1st Cir. 2006) (interpreting PacifiCare to state that "[g]iven the presumption in favor of arbitration, a court should not foreclose the operation of that presumption by deciding that there is a question of arbitrability when there is the possibility that an arbitrator's decision in the first instance would obviate the need for judicial decision making"). This rationale is consistent with that used by the United States Supreme Court in Buckeye, 546 U.S. at 448-49, to address the "conundrum" that a contract ultimately found to be unenforceable could be used to arbitrate a dispute:

> It is true, as respondents assert, that the Prima Paint[13] rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. Prima Paint resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration provisions.

In this case, there is a similar conundrum. The limitation provisions of a contract might be invoked if Petitioner proves sufficient damages to exceed the cap and for punitive damages. But to decide at the outset that the agreement is

13. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

unenforceable because the limitations might be reached is to deny effect to an arbitration provision in a contract that the court may later find to be perfectly enforceable (because the limitations were not reached). As in Buckeye and Prima Paint, the speculative nature of the enforceability issue should be resolved in favor of the separate enforceability of arbitration provisions. See Buckeye, 546 U.S. at 448-49; Prima Paint, 388 U.S. at 403-04.

Public Policy—Enforceability

Because the arbitration panel should decide whether the challenged provisions may be enforced as a matter of Florida law, as described earlier, the majority erred by reaching the issue and then again by erroneously deciding the challenged limitation provisions are unenforceable as void against public policy. The Florida Legislature, not this Court, should decide Florida's public policy.

It is well-settled that contractual waivers are enforceable under Florida law for any type of rights. See Bellaire Secs. Corp. v. Brown, 168 So. 625, 639 (Fla. 1936) ("A party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution.").

For instance, one may waive constitutional rights. Article I, section 26 of the Florida Constitution, contained within the Declaration of Rights, provides:

> **Claimant's right to fair compensation.—**
>
> (a) Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a

> contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

The public policy of the State of Florida was expressed by the vote of the people of Florida by enacting this 2004 Florida constitutional amendment to provide rights relating to contingency attorney's fees. In spite of the remedial provisions in favor of claimants, this Court held that these Florida constitutional rights could be waived by contract and that attorneys could recover more than permitted by this amendment. See In re Amendment to the Rules Regulating the Fla. Bar—Rule 4-1.5(f)(4)(B) of the Rules of Prof'l Conduct, 939 So. 2d 1032 (Fla. 2006) (adopting an amendment to the Rules Regulating the Florida Bar to permit a contractual waiver of section 26, imposing a specified legal fee structure for contingency fees). It is difficult to understand how, as a matter of public policy, the expressly declared rights of this constitutional provision may be waived, but the damages provided by statute may not be limited by contract.

Unlike other statutory remedies, the Florida Legislature has not prohibited a waiver of the remedies provided in chapter 400, Florida Statutes (2004). The Florida Legislature has specifically prohibited waiver of rights under chapter 443,

Florida Statues (2004), Florida's unemployment compensation law, and voided any agreement that attempts to waive those rights:

> 443.041 Waiver of rights; fees; privileged communications.—
> (1) WAIVER OF RIGHTS VOID.— Any agreement by an individual to waive, release, or commute her or his rights to benefits or any other rights under this chapter is void. Any agreement by an individual in the employ of any person or concern to pay all or any portion of any employer's contributions . . . required under this chapter from the employer, is void. An employer may not directly or indirectly make or require or accept any deduction from wages to finance the employer's contributions . . . required from her or him, or require or accept any waiver of any right under this chapter by any individual in her or his employ. Any employer or officer or agent of an employer, who violates this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

§ 443.041(1), Fla. Stat. (2004).

Moreover, the Florida Legislature stated that any waiver of specified provisions of the Motor Vehicle Retail Sales Finance Act "shall be unenforceable and void." § 520.13, Fla. Stat. (2004). And, regarding liability of persons engaging in certain hazardous occupations, the Legislature has provided:

> 769.06 Contracts limiting liability invalid. —Any contract, contrivance or device whatever, having the effect to relieve or exempt the persons mentioned in s. 769.01 from the liability prescribed by this chapter shall be illegal and void.

§ 769.06, Fla. Stat. (2004). Florida's insurance law specifies that "[n]o contract shall contain any waiver of rights or benefits provided to or available to subscribers under the provisions of any law or rule applicable to health maintenance organizations." § 641.31(11), Fla. Stat. (2004). And chapter 713, Florida Statutes,

addressing construction liens, makes unwaivable the right to claim a lien before it matures. § 713.20(2), Fla. Stat. (2004) ("A right to claim a lien may not be waived in advance. . . . Any waiver of a right to claim a lien that is made in advance is unenforceable.").

Similarly, if waiver of the remedies of chapter 400 violates public policy, it should be the Florida Legislature's decision to specify that such waivers are prohibited and void, rather than the judiciary's. See art. II, § 3, Fla. Const. (recognizing separation of powers); Knowles v. Beverly Enters.-Fla., Inc., 898 So. 2d 1, 9 (Fla. 2004) (ruling that section 400.023 is a legislatively created cause of action to be brought by personal representatives only under certain circumstances and concluding that the Florida Legislature had the authority to determine the extent of the statutory right and to prescribe or limit the remedies available for a violation of the right). Had the legislature intended to void contractual provisions waiving remedies under chapter 400, it could have said so. See Tallahassee Mem'l Reg'l Med. Ctr. v. Kinsey, 655 So. 2d 1191, 1198 (Fla. 1st DCA 1995) ("Had the legislature intended that posting of a satisfactory 'bond or security' would relieve defendants of all further liability for future economic damages, it would have been an easy matter for it to have said so. In our opinion, the absence of any such language is strong evidence that the legislature did not intend the result urged by appellants. To presume such an intent in these circumstances would amount to the

most blatant form of judicial legislation. We decline appellants' invitation to don the legislative mantle."); see also Knowles, 898 So. 2d at 7 (noting that, although section 400.023(1) provides remedial remedies for nursing home residents, the Court is without power to add words to the statute); Fla. Wildlife Fed'n v. State Dep't of Envtl. Regulation, 390 So. 2d 64, 67 (Fla. 1980) ("If the legislature had meant for the special injury rule to be preserved in the area of environmental protection, it could easily have said so.").

Significantly, in Unicare Health Facilities, Inc. v. Mort, 553 So. 2d 159, 161 (Fla. 1989), this Court recognized that remedies provided in chapter 400 may be waived when it ruled that the attorney's fees provision of section 400.023 is "merely a statutory right to seek fees," and that "[c]learly, statutory rights can be waived." See also Bland, 927 So. 2d at 258 ("[A] compelling argument can be made that, absent a legislative restriction, the courts should honor a party's decision to contract away statutory protections."); § 400.151(2), Fla. Stat. (2004) (stating that nursing home contract shall include "any other matters which the parties deem appropriate"); cf. Am. Int'l Grp., Inc. v. Siemens Bldg. Techs., Inc., 881 So. 2d 7, 12 (Fla. 3d DCA 2004) ("It is well settled that the parties are free to 'contract out,' by an arbitration provision or otherwise, of any common law remedy which might otherwise be available. See 17 Am. Jur. 2d Contracts § 709 (2004).").

The Court has erred by invoking public policy to void this arbitration agreement.

III. CONCLUSION

Because the challenged provisions of the arbitration agreement may be severed, and the determination of whether the provisions violate public policy should be determined by the Florida Legislature rather than this Court, I would affirm the Second District's ruling in favor of arbitration. I respectfully dissent.

CANADY, C.J., concurs.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Second District - Case No. 2D07-1928

(Hillsborough County)

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