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AMANDA KERNAHAN, individually : SUPREME COURT OF NEW JERSEY
and on behalf of others : Docket No. 079680
similarly situated, :
: On Appeal From:
: Superior Court of New Jersey
Plaintiff/Respondent, : APPELLATE DIVISION
: Docket No.: A-1355-16
v. :
: Sat Below:
: Hon. William E. Nugent, J.A.D.
HOME WARRANTY ADMINISTRATOR OF : Hon. Heidi Willis Currier,
FLORIDA, INC., CHOICE HOME : J.A.D.
WARRANTY, JOHN DOE CORPORATION :
1-10, JOHN DOES 1-10, :
:
Defendants/Petitioner. :
:

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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TABLE OF CONTENTS

Table of Authorities ii

Preliminary Statement 1

Legal Argument 4

 I. NEW JERSEY LAW PARALLELS FEDERAL LAW IN
 ITS COMMITMENT TO BOTH FAVORING AND
 ENFORCING PRIVATE AGREEMENTS TO
 ARBITRATE CONTROVERSIES 6

 II. KINDRED NURSING BROKE NO NEW GROUND IN
 ITS APPLICATION OF THE FEDERAL
 ARBITRATION ACT; IN APPLYING LONG-
 STANDING CONTRACTUAL JURISPRUDENCE TO AN
 ARBITRATION CLAUSE, ATALESE REMAINS GOOD
 LAW 6

 III. NOT ALL AGREEMENTS TO ARBITRATE SHOULD BE
 UNENFORCEABLE; PUBLIC POLICY FAVORS
 CLEAR ARBITRATION AGREEMENTS 8

 IV. BECAUSE THE INTERACTION OF NEW JERSEY LAW
 AND THE FEDERAL ARBITRATION ACT REMAIN
 UNCHANGED AFTER KINDRED NURSING, THE ONLY
 QUESTION BEFORE THE COURT IS WHETHER THE
 APPELLATE DIVISION IN KERNAHAN COMPORTED
 WITH ATALESE 10

Conclusion 13

Table of Authorities

Cases

<u>Atalese v. U.S. Legal Services Group, L.P.</u> , 219 <u>N.J.</u> 430 (2014), <u>cert. denied</u> , 135 <u>S. Ct.</u> 2804 (2015)	1,2,7,8,9,11,12
<u>AT&T Mobility LLC v. Concepcion</u> , 563 <u>U.S.</u> 333 (2011)	5,7
<u>DIRECTV, Inc. v. Imburgia</u> , 136 <u>S. Ct.</u> 463 (2015)	7
<u>Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A.</u> , 168 <u>N.J.</u> 124 (2001)	5
<u>Henningsen v. Bloomfield Motors</u> , 32 <u>N.J.</u> 358 (1960)	9
<u>Kernahan v. Home Warranty Administrator of Fl., Inc.</u> , A-1355-16T (App. Div. June 23, 2017)	10,12
<u>Kindred Nursing Center, L.P. v. Clark</u> , 581 <u>U.S.</u> ____, 137 <u>S. Ct.</u> 1421 (2017)	1,2,5,6,7,
<u>Knorr v. Smeal</u> , 178 <u>N.J.</u> 169 (2003)	12
<u>Marchak v. Claridge Commons, Inc.</u> , 134 <u>N.J.</u> 275 (1993)	9
<u>Missouri P. R. Co. v. Humes</u> , 115 <u>U.S.</u> 512 (1885)	4
<u>NAACP v. Foulke Mgt.</u> , 421 <u>N.J. Super.</u> 404 (App. Div. 2011)	11

Statutes, Rules & Regulations

<u>N.J. Const.</u> art. I, ¶ 9	4
<u>N.J. Const.</u> art. VI, § 1, ¶ 1	4
<u>N.J. Court Rules</u>	4

<u>N.J.S.A.</u> 2A:23B-1 to 32	4
<u>N.J.S.A.</u> 2A:23B-6a	5
<u>N.J.S.A.</u> 34:15-1 to 146	4
<u>N.J.S.A.</u> 52:14-1B-1 to 21	4
9 <u>U.S.C.A.</u> 2	5

PRELIMINARY STATEMENT

A contractual agreement to arbitrate, as is at issue in this matter, is granted favored status under both state and federal law. It cannot be burdened by any special requirements or heightened standards of review. It can, however, be subject to the same grounds for revocation as exist in contract law for any other contractual agreement. That is the principle applied by the New Jersey Supreme Court in Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014), cert denied, 135 S. Ct. 2804 (2015), and that remains unchanged today.

In deciding Kindred Nursing Center, L.P. v. Clark, 581 U.S. ___, 137 S. Ct. 1421 (2017), the U.S. Supreme Court did not break new ground or establish a new rule of law that the New Jersey courts must now apply in the analysis of a contractual arbitration requirement. The U.S. Supreme Court simply analyzed the Kentucky Supreme Court's clear statement rule, which seeks to safeguard a person's access to the courts, against the Federal Arbitration Act (FAA), which requires arbitration agreements to be placed on equal footing with all other contracts.

The U.S. Supreme Court concluded that the Kentucky rule is preempted by the FAA because it singles out arbitration agreements as a burden on an individual's access to the courts. However, that

determination has no bearing on the New Jersey Supreme Court's decision in Atalese. In invalidating an arbitration provision, the Court applied and re-affirmed New Jersey's long line of jurisprudence requiring any contractual waiver of any rights to be clear and unmistakable. Atalese, 219 N.J. at 443.

The Appellate Division's decision in this matter follows the established body of law, recognizing the importance of citizens' time-honored right of access to the courts, while still balancing those rights against the competing right to contract

This proper application of New Jersey jurisprudence should remain the law of the land, despite Defendants-Petitioner's request. Public policy favors clear arbitration agreements. However, if the current law of this state is rewritten, as urged by Defendant-Petitioners, consumers may be presented with confusing and difficult to understand arbitration provisions that fail to place the consumer on notice that he or she is waiving a constitutional or statutory right.

The NJSBA asserts that, if arbitration provisions are to be enforced, and the right to access our jury system is restricted, the parties must be made fully aware of the rights they are foregoing before the arbitration provision should be enforceable. Unlike Kentucky's clear statement rule at issue in Kindred Nursing,

this is the same standard that applies to any contractual waiver of rights under New Jersey law, and it should be applied here.

LEGAL ARGUMENT

I. NEW JERSEY LAW PARALLELS FEDERAL LAW IN ITS COMMITMENT TO BOTH FAVORING AND ENFORCING PRIVATE AGREEMENTS TO ARBITRATE CONTROVERSIES

The U.S. Supreme Court long ago declared “[i]t is the duty of every State to provide, in the administration of justice, for the redress of private wrongs...” Missouri P. R. Co. v. Humes, 115 U.S. 512, 521 (1885). New Jersey has embraced that principle by maintaining two principal fora - the public and the private.

The public is our system of trial and appellate courts which have earned public confidence by their democratic nature, particularly trial by jury, by their independence, transparency, commitment to reasoned dispositions, and the security afforded by the right of appeal. N.J. Const. art. I, ¶ 9 (trial by jury “inviolable”); art. VI, § 1, ¶ 1 (establishing the Supreme Court and Superior Court); N.J. Court Rules, passim. The state has also established a system of administrative courts which provide public tribunals to a wide range of claimants. See, e.g., N.J.S.A. 52:14-1B-1 to 21 (“Administrative Procedure Act”); N.J.S.A. 34:15-1 to 146 (“Workers Compensation Act”).

The second forum New Jersey has provided is that of consensual, private dispute resolution, via mediation and arbitration. Specifically, N.J.S.A. 2A:23B-1 to 32 (hereinafter,

"Arbitration Act"), grants favored status to arbitration and provides that "[a]n agreement...to submit to arbitration any... controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6a. Likewise, our courts recognize that the right of parties to an agreement to waive statutory remedies in favor of arbitration is a settled principle of law in this state. Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A., 168 N.J. 124, 131 (2001).

The principles of New Jersey's Arbitration Act parallel those of the FAA. Like the Arbitration Act, the FAA expressly provides that an arbitration contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. 2. Notably, the FAA limits state power regarding the formation, construction and enforcement of contracts in only one respect; state law must treat arbitration agreements on an "equal footing with other contracts". AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

True to this interpretation, the Court explained in its 8-1 opinion last year in Kindred Nursing Centers L.P. v. Clark, "[t]he Act thus preempts any state rule that discriminates on its face against arbitration or that covertly accomplishes the same

objective by disfavoring contracts that have the defining features of arbitration agreements.” Kindred Nursing, supra, 137 S. Ct. at 1423.

New Jersey contains no such discriminatory or disfavoring rule. It parallels federal law and looks favorably upon on arbitration agreements, and, consistent with federal law, holds them to the same requirements as any other contractual provision that results in a forfeiture of otherwise constitutionally or statutorily-provided rights.

II. KINDRED NURSING BROKE NO NEW GROUND IN ITS APPLICATION OF THE FEDERAL ARBITRATION ACT; IN APPLYING LONG-STANDING CONTRACTUAL JURISPRUDENCE TO AN ARBITRATION CLAUSE, ATALESE REMAINS GOOD LAW

In its decision in Kindred Nursing, supra, 581 U.S. ___, 137 S. Ct. 1421 the U.S. Supreme Court reversed and remanded a decision of the Kentucky Supreme Court that held invalid a consent to arbitrate, not because the contract was unclear, but because the plaintiffs’ general durable powers of attorney had not “expressly provided” the right to waive “adjudication by judge or jury”. The Court criticized the Kentucky Supreme Court’s “clear statement” rule because it was crafted for this specific situation, it placed a special burden on arbitration agreements and, in contradiction to the FAA, failed to “put arbitration agreements on

an equal plane with other contracts” Kindred Nursing, supra, 137 S. Ct. at 1426-27.

The Kindred Nursing decision was not new law. It simply followed in the track of other precedential decisions. See AT&T Mobility LLC v. Concepcion, supra, 563 U.S. 333; and DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015). The Supreme Court was very clear on this point by declaring, “[a]s we did just last Term, we once again “reach a conclusion that . . . falls well within the confines of (and goes no further than) present well-established law.” Kindred Nursing, supra, 137 S. Ct. at 1429 (quoting DIRECTV, supra, 136 S. Ct. at 471).

That conclusion has no effect on this Court’s prior decision in Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014), *cert denied*, 135 S. Ct. 2804 (2015), as Atalese did not place any novel burden on the election to arbitrate as was seen in Kindred Nursing. The Atalese Court properly weighed the public right to trial by jury against the private contractual right of parties to submit a dispute to arbitration. In doing so, the court appropriately looked to the long-standing principles of our contract law, specifically informed consent.

In holding that “[a]n agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principles of contract law[,]” Id. at 442 (quotations

omitted) (emphasis added), this Court affirmed that it was not running afoul of the FAA by creating new law specifically for arbitration agreements; it was merely applying traditional New Jersey contract law to the facts of the case before it.

The Court's ultimate holding further emphasizes that point by stating, "[t]he requirement that a contractual provision be sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right is not specific to arbitration provisions." Id. at 443 (emphasis added). This is because, "under New Jersey law, any contractual waiver-of-rights provision must reflect that the party has agreed clearly and unambiguously to its terms." Ibid.

Accordingly, because this Court applied the same analysis in deciding Atalese that would occur in any analysis of a contract involving the waiver of a constitutional or statutory right, the decision did not run afoul of the FAA or Kindred Nursing, and Atalese remains good law.

III. NOT ALL AGREEMENTS TO ARBITRATE SHOULD BE UNENFORCEABLE; PUBLIC POLICY FAVORS CLEAR ARBITRATION AGREEMENTS

The validity and enforceability of arbitration agreements has been embedded in New Jersey's jurisprudence for decades. Likewise, requiring that a provision in a contract of adhesion make it clear

to signators that they are waiving their right to access the court system has also been a part of that jurisprudence for decades. See Henningsen v. Bloomfield Motors, 32 N.J. 358 (1960) (invalidating an adhesion contract's disclaimer of a right of action arising from a product defect).

While it is true, "[a]n agreement to arbitrate should be read liberally in favor of arbitration," Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993), if an agreement to arbitrate "depriv[es] a citizen of access to the courts [it] should clearly state its purpose." Ibid. "The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Ibid.

This burden is not an onerous one, as "[o]ur courts have upheld arbitration clauses phrased in various ways when those clauses have explained that arbitration is a waiver of the right to bring suit in a judicial forum." Atalese, supra, 219 N.J. at 444.

The Atalese Court analyzed several cases where an arbitration provision was upheld by a reviewing court in New Jersey and recognized that "without difficulty and in different ways, the point can be made that by choosing arbitration one gives up the 'time-honored right to sue.'" Id. at 445 (quoting Marchak, supra, 134 N.J. 275.)

In short, Atalese encourages clear contracts, written in plain language, and a knowing decision-making process by all parties to a contract. It places no special burden on arbitration provisions and, in fact, cites favorably many instances where those provisions have been valid and enforceable. To revisit the gravamen of Atalese and materially change it, as petitioners request, would unfairly restrict access to the courts and upend New Jersey's well-established public policy requiring that arbitration provisions, like other provisions containing a waiver of rights, be clear and unmistakable.

IV. BECAUSE THE INTERACTION OF NEW JERSEY LAW AND THE FEDERAL ARBITRATION ACT REMAIN UNCHANGED AFTER KINDRED NURSING, THE ONLY QUESTION BEFORE THE COURT IS WHETHER THE APPELLATE DIVISION IN KERNAHAN COMPORTED WITH ATALESE

In deciding the case at issue, the Appellate Division properly refused to enforce a clause that is so confusing on its face that a reasonable consumer could not be expected to understand its import, all while placing no special burden on arbitration agreements. Kernahan v. Home Warranty Administrator of Fl., Inc., A-1355-16T (App. Div. June 23, 2017). It should be upheld because it adhered to New Jersey's statutory and common law requirement affirmed in Atalese that any waiver-of-rights provision be understandable to the ordinary consumer. Because reasonable minds

may differ about what the provisions of the Kernahan contract actually mean, the arbitration provision was properly deemed unenforceable.

This decision is further supported when the contract itself is analyzed. The arbitration clause is misleadingly found in a condensed block of illegible type. Enlarged into a readable font, it provides:

6. MEDIATION 2. Any and all disputes, claims and causes of action arising out of or connected with this Agreement (including but not limited to whether a particular dispute is arbitrable hereunder) shall be resolved exclusively by the American Arbitration Association in the state of New Jersey under its Commercial Mediation Rules. Controversies or claims shall be submitted to arbitration regardless of the theory under which they arise, including without limitation contract, tort, common law, statutory, or regulatory duties or liability.¹

The Appellate Division rightfully followed the straightforward approach outlined in Atalese in analyzing such clauses as this one. Citing NAACP v. Foulke Mgt., 421 N.J. Super. 404 (App. Div. 2011), a consumer class action seeking to bar enforcement of an arbitration clause in a contract for the purchase of an automobile, the Atalese Court explained that

[a]n agreement to arbitrate, like any other contract, 'must be the product of mutual assent, as determined under customary principles of contract law.' . . . Mutual assent requires that the parties

¹ See original contract clause at p.5, respondent Kernahan brief in opposition to petition for certification.

have an understanding of the terms to which they have agreed. 'An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights.' Knorr v. Smeal, 178 N.J. 169,177 (2003).

Atalese, supra, 219 N.J. at 442.

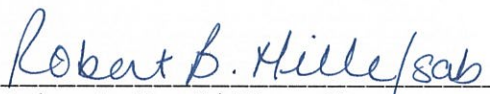
The court further explained that, "[b]y its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court....But an average member of the public may not know -- without some explanatory comment -- that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." Id. Therefore, an arbitration agreement must make clear to parties that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.

The Appellate Division correctly applied the Atalese analysis and rightly found inadequate the above clause because, inter alia, it did not "at least in some general and sufficiently broad way convey that parties are giving up their right to bring claims in court or in front of a jury". (Kernahan, supra, slip op. at 7). Accordingly, the Appellate Division decision should be affirmed.

CONCLUSION

In conclusion, the Kindred Nursing court broke no new ground. Atalese placed no special burden on arbitration provisions. Rather it expressed the longstanding, consistently-applied New Jersey principles of law and equity regarding the enforcement of agreements of all kinds. The Appellate Division reasonably applied those principles to the facts before it, and its decision should be affirmed.

Respectfully submitted,
New Jersey State Bar Association


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