Case No. 18-6059

United States Court Of Appeals
FOR THE SIXTH CIRCUIT

GGNSC LOUISVILLE HILLCREEK, LLC,
d/b/a GOLDEN LIVING CENTER - HILLCREEK;
GGNSC ADMINISTRATIVE SERVICES; and
GGNSC CLINICAL SERVICES,
Appellants,

v.

ESTATE OF ROBERT C. BRAMER, BY AND THROUGH
MARGARET A. BRAMER, AS ADMINISTRATRIX; and
MARGARET BRAMER, individually,
Appellees.

On Appeal from the United States District Court
for the Western District of Kentucky, Case No. (3:17-cv-439)

BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF APPELLEES URGING AFFIRMANCE

Maame Gyamfi*
Kelly Bagby
AARP Foundation
601 E Street, N.W.
Washington, DC 20049
(202) 434-6291
*Counsel of Record
Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit Case Number: 18-6059

Case Name: GGNSC Louisville Hillcreek, LLC, et al. v. Estate of Robert C. Bramer

Name of Counsel: Maame Gyamfi

Pursuant to 6th Cir. R. 26.1, AARP makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: *No.*

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: *No.*

CERTIFICATE OF SERVICE

I certify that on December 26, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ Maame Gyamfi
Maame Gyamfi

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s/ Maame Gyamfi
Maame Gyamfi

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STATEMENT OF THE IDENTITIES AND INTERESTS OF AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

Among other things, AARP and AARP Foundation (collectively, "Amici") fight to protect the rights of nursing facility residents to obtain judicial redress when they have been victims of neglect or abuse. Amici

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[1] Amici curiae certify that no party or party's counsel authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. Amici curiae also certify that no person, other than themselves, their respective members, and their undersigned counsel, contributed money intended to prepare or submit this brief.

Both Appellants and Appellees have consented to the filing of this brief. FED. R. APP. P. 29(a)(2).

have filed amicus briefs in many state and federal cases that challenged the enforceability of pre-dispute arbitration clauses in long-term care, consumer, and employment contracts. *See, e.g., Kindred Nursing Ctrs Ltd. P'ship v. Clark,* 137 S. Ct. 1421 (2017); *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490 (Penn. 2015); *Dickerson v. Longoria*, 995 A.2d 861 (Md. App. 2010).

SUMMARY OF THE ARGUMENT

When a nursing facility presents its residents with new admission and arbitration agreements at each new admission, the residents should not be bound by arbitration provisions from prior admissions because each subsequent admission is a separate legal relationship with its own specific set of agreements. Residents may have many reasons for refusing to waive their right to a trial for claims arising from their current admission even if they agreed to arbitrate claims arising from a prior admission. These reasons include changes in their medical condition, concerns about staffing and other issues at the facility, or because they have subsequently learned how arbitration provisions can impede them from enforcing their rights if the facility harms them.

The right to a have a jury decide a legal dispute at trial is essential to nursing facility residents and their families. Unfortunately, abuse and neglect in nursing facilities is very prevalent and regulatory agencies are unable to protect residents from harm and even death. Nursing facility residents need every avenue—but especially access to jury trials—to secure redress from wrongdoers, provide transparency as to care being provided at nursing facilities, and deter future bad conduct.

ARGUMENT

I. WHEN A NURSING FACILITY PRESENTS ITS RESIDENTS WITH NEW ADMISSION AND ARBITRATION AGREEMENTS AT THE START OF EACH NEW ADMISSION, THE RESIDENTS SHOULD NOT BE BOUND BY ARBIRATION PROVISIONS FROM PRIOR ADMISSIONS BECAUSE EACH ADMISSION IS A NEW LEGAL RELATIONSHIP BETWEEN THE FACILITY AND THE RESIDENT.

Under the Federal Arbitration Act (FAA), an arbitration agreement is enforceable unless it is invalid under state contract or equity law. 9 U.S.C. § 2. The FAA requires courts to place arbitration agreements on "equal footing with other contracts;" however, it preempts state laws that only apply to arbitration agreements. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. at 1424. Thus,

courts review the enforceability of nursing facility arbitration agreements through the applicable state contract law. *Id*.

The primary goal of the contract interpretation is "to effectuate the intentions of the parties." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. 2002). "Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible." *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986). When resolving ambiguity, courts may use extrinsic evidence concerning the parties' intentions as well as "the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties." *Cantrell*, 94 S.W.3d at 385.

When a nursing facility presents new admission and arbitration agreements for a resident to sign at each admission, despite the resident having been previously admitted to the facility and signing identical documents, it shows that the intention of the parties is for each admission to be directly linked and governed by the specific set of admission and arbitration agreements presented at that admission.

In fact, this interpretation comports with the experience of nursing facility residents. For residents, each nursing facility admission is a separate legal relationship brought on by a unique set of circumstances. As such, a resident who signed an arbitration agreement at one admission may refuse to sign an arbitration agreement at a subsequent admission because they are no longer comfortable entering into the agreement due to such reasons as a change in their medical condition or their past experience with the facility.

A brief glance at a resident's experience at a nursing facility shows how each experience is individualized and tailored to that specific admission and stay. For starters, a resident can enter a nursing facility after being discharged from a hospital, injured in their own home, or transferred from another skilled nursing facility. Each one of these starting points carries its own unique challenges. *See e.g.,* CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS, YOUR GUIDE TO CHOOSING A NURSING HOME OR OTHER LONG-TERM SERVICES & SUPPORTS 5, https://www.medicare.gov/Pubs/pdf/02174-Nursing-Home-Other-Long-Term-Services.pdf.

Then, once the resident is at the facility, the nursing facility must satisfy several federal and state requirements that emphasize meeting the resident's individualized needs. The Nursing Home Reform Act (NHRA) and its regulations require that nursing facilities conduct a comprehensive and accurate assessment of the resident's functional capacity as part of the current admission. *See* 42 U.S.C. §§ 1395i-3, 1396r (2017); 42 C.F.R. §§ 483.1-75 (2017); 42 C.F.R. § 483.20. A resident's functional capacity can change from one admission to the next and needs to be assessed each time. 42 C.F.R. § 483.20(b)(2).

The resident also gets an individualized plan of care based on their current condition. The regulations require nursing facilities to develop, maintain, and use a written plan of care which describes the medical, nursing, and psychosocial needs of the resident and how the facility will meet those needs. *See* 42 C.F.R. § 483.21. The nursing facilities then must provide "services and activities to attain or maintain the highest practicable physical, mental, and psychological well-being of each resident in accordance with [the] written plan of care." 42 U.S.C. § 1396r(b)(2). These activities and services include ensuring that residents receive care for their current challenges. They

can also include services such as ensuring adequate supervision and assistive devices to prevent accidents; preventing and treating pressure sores; providing respiratory care and pain management; and maintaining acceptable parameters of nutritional status, among other services. *See* 42 C.F.R. § 483.25.

Simply put, these requirements underscore that for residents, each admission is unique because of their changing circumstances and individualized needs. As such, nursing facility residents must be able to evaluate the new arbitration agreements in the context of their condition and state of mind at the time of the new admission. A resident or his family member who signed an arbitration agreement at one admission may refuse to sign an arbitration agreement at a subsequent admission because they are no longer comfortable entering into the agreement due to a change in their medical condition, their past experience with the facility, or because they have subsequently learned how arbitration provisions can impede them from enforcing their rights if the facility harms them.

Indeed, the conduct of the nursing facilities also supports this interpretation. When facilities present new admission and arbitration

agreements at each admission, they are communicating that each admission is a separate legal relationship. If they did not intend this, they would not present a new arbitration agreement at each admission, but instead would provide the resident with a copy of their previous arbitration agreement.

Accordingly, when a resident is presented new arbitration and admission agreements during a new admission despite having previously been admitted to the facility, the only reasonable expectation is that those agreements are a recognition of a new relationship by all parties. Thus, a resident's failure to sign an arbitration agreement at a new admission is a renunciation of the resident's willingness to arbitrate claims from that admission.

In sum, as the goal of contract interpretation is to effectuate the intention of the parties, the agreements in these circumstances should be linked only to the stay at which the nursing facility presented them.

II. THE RIGHT TO TRIAL IS CRITICAL TO NURSING FACILITY RESIDENTS BECAUSE OF THE HIGH INCIDENCE OF ABUSE AND NEGLECT IN NURSING FACILITIES AND THE FAILURE OF REGULATORY ENFORCEMENT TO PROTECT RESIDENTS.

Elder abuse and neglect remain pervasive in nursing facilities throughout the United States, including in Kentucky. Unfortunately, the federal and state enforcement scheme designed to penalize perpetrators and deter wrongful conduct has failed to effectively detect and remedy this problem. Maintaining the right of nursing facility residents to publicly litigate allegations of wrongful conduct is important to filling the void left by a lack of enforcement activity.

A. Nursing Facility Residents Are Frequent Victims of Abuse and Neglect.

Nursing home residents are highly vulnerable to abuse and neglect, both because they depend on others to perform activities of daily living, and because they are often isolated from their social networks. *See* Kjersti Lisbeth Braaten and Wenche Malmedal, *Preventing Physical Abuse of Nursing Home Residents- As Seen From the Nursing Staff's Perspective*, Nursing Open (2017), https://doi.org/10.1002/nop2.98. In 2014, 44% of nursing facility residents surveyed said that they had personally been abused, 95% said that they had been

neglected or had witnessed neglect of another resident. *See* Richard Weinmeyer, *Statutes to Combat Elder Abuse in Nursing Homes,* 16 AMA J. of Ethics 359, 360 (2014), https://journalofethics.ama-assn.org/article/statutes-combat-elder-abuse-nursing-homes/2014-05. Nursing facility staff corroborate the high levels of elder abuse, with over 50% admitting to subjecting older patients to physical violence, mental abuse, or neglect. *See* Merav Ben Natan & Ariela Lowenstein, *Study of Factors That Affect Abuse of Older People in Nursing Homes*, 17 J. Nursing Mgmt. 20, 22 (2010).

The complex challenge of collecting accurate data on the prevalence of abuse in nursing facilities means that these numbers, though unacceptably high, are a mere sampling of a largely under-detected and under-reported problem. *See* OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HEALTH AND HUMAN SERVS., A-01-17-00504, EARLY ALERT: THE CENTERS FOR MEDICARE & MEDICAID SERVICES HAS INADEQUATE PROCEDURES TO ENSURE THAT INCIDENTS OF POTENTIAL ABUSE OR NEGLECT AT SKILLED NURSING FACILITIES ARE IDENTIFIED AND REPORTED IN ACCORDANCE WITH APPLICABLE REQUIREMENTS 5-7 (2017).

B. Federal and State Enforcement Efforts Have Failed to Address Abuse and Neglect in Nursing Facilities Effectively.

Regulatory enforcement has not resulted in effectively addressing abuse and neglect in nursing facilities. Despite the mandatory nature of the NHRA minimum standards of care for long-term care facilities, many facilities fail to comply. In 2016, over one in five U.S. nursing facilities received a deficiency for causing actual harm or jeopardy to residents. *See* Charlene Harrington et al., *Kaiser Family Found., Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 Through 2016*, 4 (Apr. 3, 2018), https://www.kff.org/45f0273/.

Sadly, that picture was not much different from a decade before. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-794T, NURSING HOME REFORM: CONTINUED ATTENTION IS NEEDED TO IMPROVE QUALITY OF CARE IN SMALL BUT SIGNIFICANT SHARE OF HOMES 9 (May 2007), https://bit.ly/2moSvnQ (testimony before Congress that "[a] small but significant proportion of nursing homes nationwide continue to experience quality-of-care problems—as evidenced by the almost 1 in 5 nursing homes . . . cited for serious deficiencies in 2006"). Serious deficiencies "cause actual harm or place residents in immediate

jeopardy," *id.* at 3, and those found in facilities *cycling* in and out of compliance include inadequate treatment of pressure sores, medication errors, poor accident supervision, and resident abuse, *see* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-241, NURSING HOMES: EFFORTS TO STRENGTHEN FEDERAL ENFORCEMENT HAVE NOT DETERRED SOME HOMES FROM REPEATEDLY HARMING RESIDENTS 26, 68 (2007), https://bit.ly/2Ju67HF.

Kentucky nursing facilities have also been cited for failing to meet regulatory minimum standards of care. In the past three inspection cycles, Kentucky nursing facilities have been cited for 4,465 deficiencies, equaling almost $9.42M dollars in penalties. ProPublica, *Nursing Home Inspect*, https://projects.propublica.org/nursing-homes/state/KY (last visited Dec. 17, 2018) (raw data *available at* https://data.medicare.gov/data/nursing-home-compare). Sixty-one of 287 facilities were considered homes with serious deficiencies. *Id.*

These reports likely reveal only a fraction of care deficiencies because CMS has insufficient procedures to ensure incidences of neglect or abuse are reported. OFFICE OF INSPECTOR GENERAL, EARLY ALERT at 5-7. (OIG issued early alert after audit revealed that CMS has

inadequate procedures to ensure that incidents of potential abuse or neglect of Medicare beneficiaries residing in SNFs are identified and reported).

As these facts show, federal and state regulatory enforcement efforts are inadequate to remedy the abuse and neglect epidemic. Many nursing facilities, even after being cited by regulators, continue practices that harm residents. *See, e.g.*, CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., SPECIAL FOCUS FACILITIES (SFF) INITIATIVE 1, https://go.cms.gov/2LnXVu6.

In conclusion, the sheer prevalence and severity of abuse and neglect in nursing facilities and the historic and continued failure of state and federal governments to hold nursing facilities accountable create a continued need for nursing facility residents to use every tool of redress and deterrence available to them.

CONCLUSION

For the reasons described above, Amici respectfully urge the Court to affirm the trial court's decision.

Dated: December 26, 2018

Respectfully submitted,

/s/ Maame Gyamfi
Maame Gyamfi*
Kelly Bagby
AARP Foundation
601 E Street, N.W.
Washington, DC 20049
(202) 434-6291
*Counsel of Record

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) (as made applicable to amicus briefs by FED. R. APP. P. 29(a)(5)) because it contains 2,293 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared with Microsoft Word 2016, using a proportionally spaced, serif typeface (Century Schoolbook) in 14-point size, with boldface and italics reserved for emphasis (e.g., headings) or distinction (e.g., case names).

Dated: December 26, 2018

/s/ Maame Gyamfi
Maame Gyamfi
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2018, I filed the foregoing Brief of Amici Curiae AARP and AARP Foundation in Support of Appellees with the Clerk of the United States Court of Appeals for the Sixth Circuit via the CM/ECF system, which will send notice of such filings to all registered CM/ECF users.

Dated: December 26, 2018

/s/ Maame Gyamfi
Maame Gyamfi