
**IN THE
COURT OF APPEALS OF MARYLAND**

No. 110
2009 Term

CARMAN DICKERSON,
PERSONAL REPRESENTATIVE
OF THE ESTATE OF CARTER BRADLEY,
Appellant,

v.

RICARDO LONGORIA, *et al.*,
Appellees.

Appeal from the Circuit Court for Montgomery County
(The Honorable Ronald B. Rubin, Presiding)

**BRIEF OF *AMICI CURIAE* AARP, LEGAL AID BUREAU, INC., MARYLAND
DISABILITY LAW CENTER, NCCNHR – THE NATIONAL CONSUMER
VOICE FOR QUALITY LONG-TERM CARE AND VOICES FOR QUALITY OF
CARE IN SUPPORT OF APPELLANT**

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STATEMENTS OF INTEREST

Amici AARP, the Legal Aid Bureau, Inc., the Maryland Disability Law Center and NCCNHR: National Consumer Voice for Quality Long-Term Care (“*amici*”) are concerned about the rights of people in long-term care facilities. These organizations support laws and policies designed to protect the rights of health care consumers, including long-term care facility residents, and to preserve court access for those consumers to seek redress when their rights are violated.

AARP

AARP is a nonpartisan, nonprofit membership organization dedicated to representing the needs and interests of people age 50 and older. AARP’s nearly 40 million members include residents of nursing homes and other long-term care facilities, their spouses, and other relatives. More than 860,000 AARP members live in Maryland.

Legal Aid Bureau, Inc. (Maryland Legal Aid)

Maryland Legal Aid is a private, non-profit law firm that provides free legal services to low-income residents of Maryland. Each year, Maryland Legal Aid addresses the legal needs of tens of thousands low-income Marylanders, focusing on the most pressing and critical needs and the most isolated and vulnerable members of our population. Since 1992, Maryland Legal Aid has represented

hundreds of nursing home residents to ensure access to quality nursing home services, obtain benefits necessary to pay for care, and protect residents' rights.

Maryland Disability Law Center (MDLC)

MDLC is the federally funded, non-profit legal services organization officially designated by the Governor of the State of Maryland as the Protection and Advocacy System for people with disabilities within the State. MDLC's mission is to work with and for people with disabilities in defense of their legal and human rights. MDLC carries out its mission through public education, advocacy, and litigation. MDLC represents numerous individuals with developmental, physical, or psychiatric disabilities who reside in nursing facilities.

NCCNHR

NCCNHR: The National Consumer Voice for Quality Long-Term Care is a national organization of individuals and community groups that advocates for quality of care for people with long-term care needs, with a particular focus on ensuring adequate staffing and raising standards related to the provision of care. NCCNHR provides information and leadership on federal and state regulatory and legislative policy development and models and strategies to improve care and life for residents of long-term care facilities.

Voices for Quality of Care

Voices for Quality Care, Inc. (Voices) is a state-wide, all-volunteer, non-profit organization of people who need long-term care services, their friends and families, resident and family councils, advocates, and concerned citizens working together for quality long-term care in Maryland. Voices works with hundreds of nursing home residents and their friends and families each year on both individual and systemic advocacy issues. In cases such as that before the court, Voices speaks on behalf of all nursing home residents, their families and friends throughout Maryland and Washington, D.C.

SUMMARY OF ARGUMENT

Maryland law prohibits a nursing facility like Heritage Care from recognizing the authority of a health care agent if that agent (knowing or otherwise) exceeds her authority. Md. Code Ann. Health-Gen. § 19-344(b); C.O.M.A.R. 10.07.02.08-1. In this case, the trial court ignored Maryland's statutory and regulatory protections when it found that the Estate of Carter Bradley was bound by the arbitration provisions contained in the nursing home admission documents which Ms. Dickerson signed while acting as Mr. Bradley's agent. Order at 11. Even if Ms. Dickerson was appropriately acting as Mr. Bradley's health care agent, many state courts would find that she could not bind Mr. Bradley to a contract waiving his constitutional right to a jury trial without a clear statement

that Mr. Bradley intended to delegate to her the authority to bind him to obligations that were not required in order to secure medical treatment for him. The Maryland General Assembly enacted specific nursing home protections because it recognized that the nursing home admission process is so stressful and usually occurs in the midst of a medical crisis. When prospective long-term care facility residents and their families are presented with a nursing home admissions contract, it is unlikely that they would recognize that the contract contained provisions that have serious implications for their future legal rights. Under these circumstances, it is essential that nursing homes comply with all statutory and regulatory protections and that only a person who has express authority to agree to arbitration provisions be permitted to do so.

ARGUMENT

I. MR. BRADLEY DID NOT EXPRESSLY GIVE MS. DICKERSON AUTHORITY TO WAIVE CONSTITUTIONAL RIGHTS AND THUS SHE ACTED OUTSIDE HER AUTHORITY.

A. Maryland Law Prohibited Nursing Facility from Relying on Ms. Dickerson's Signature Without Verifying Her Authority At the Time She Signed the Admissions Agreement.

Maryland law provides for specific protections to ensure that a long term care resident like Carter Bradley will not have his rights compromised by someone who lacks legal authority to make decisions on his behalf. Indeed, Heritage Care was prohibited by Maryland law from permitting Ms. Dickerson to sign any

documents on behalf of Mr. Bradley without first verifying Ms. Dickerson's authority. Md. Code Ann. Health-Gen. § 19-344(b); *see also* C.O.M.A.R.

10.07.02.08-1. The Circuit Court erred when it failed to consider the alleged agency of Ms. Dickerson in light of this statute, which was enacted in acknowledgement of the susceptibility of nursing home residents during the admission process.

In enacting the Maryland Nursing Home Bill of Rights, the General Assembly recognized that because the nursing home admission process is so stressful, nursing homes are prohibited from soliciting the signatures of nonresidents unless the nursing home has documentation that the resident is incapacitated and cannot make their own decisions. Md. Code Ann. Health-Gen. § 19-343; *see also* C.O.M.A.R. 10.07.09.08. Moreover, the Maryland regulations governing the acts of agents and surrogates mandate that a nursing facility demand documentation or other appropriate verification of the authority of a representative. C.O.M.A.R. 10.07.02.08-1. Maryland law prohibits a nursing or other health facility from recognizing the authority of a representative if that representative (knowing or otherwise) exceeds her authority. *Id.* These statutes and regulations place the burden *on the nursing facility* of verifying that the person seeking to make decisions on behalf of a nursing home resident does in fact have that authority. *Id.*

Because of the significant rights at stake, arbitration provisions signed by an agent should not be found to be valid unless there is evidence that the principal being bound expressly authorized the agent to bind him. In this case, the trial court ignored the protections set out in the statute and regulations when it found that Mr. Bradley's Estate was bound by the arbitration provisions because Ms. Dickerson signed the documents at issue while acting as Mr. Bradley's agent. Order at 11. The court recognized that Ms. Dickerson was not legally authorized as Mr. Bradley's health care or general power of attorney to legally bind him. Order at 9. Nonetheless, the court concluded that Mr. Bradley acquiesced, presumably by failing to object, to Ms. Dickerson's acting on his behalf to sign him into the nursing home. The fact that Mr. Bradley, newly discharged from the hospital, did not object to Ms. Dickerson signing nursing home admission documents on his behalf did not absolve the nursing home of its obligation to ensure that Ms. Dickerson was in fact authorized to act on Mr. Bradley's behalf and to determine the scope of her authority. Specifically, even if Ms. Dickerson had authority to act as an "agent" for Mr. Bradley to complete the admission documents, the facility was still required under Maryland law to ascertain whether the scope of her authority was so expansive as to allow her to bind him to provisions which waived his constitutionally protected right to a jury trial.

B. Courts Refuse to Enforce Arbitration Provisions Agreed to by Health Care Agents Who Lack Express Authority to Bind Long-Term Care Facility Residents.

Courts throughout the country have concluded that mandatory arbitration clauses are so intrusive that the signatory must have express authority to make such a contract. The lower court in this case summarily concluded that the fact that Ms. Dickerson regularly made medical decisions on behalf of Mr. Bradley granted her agent-in-fact status. Order at 11. Assuming, for argument's sake, that Ms. Dickerson was Mr. Bradley's agent-in-fact, the court granted to Ms. Dickerson powers that extended far beyond what would flow to a mere agent-in-fact. Indeed, the court appears to have created a new status for Ms. Dickerson as "decision-maker without limits" for Mr. Bradley. Many state courts would find that Ms. Dickerson, as agent-in-fact, could not bind Mr. Bradley to a contract waiving his constitutional right to a jury trial without a clear statement that Mr. Bradley intended to delegate to her the authority to bind him to obligations that were not required in order to secure medical treatment for him. Notably, even if she had held a health care power of attorney or had been appointed guardian to make health care decisions, there would have been some limitations on the scope of Ms. Dickerson's authority. *See* Md. Code Ann. Est. & Trusts § 13-708(a)(1) (court may grant to a guardian of a person only those powers necessary to provide for the demonstrated need of the disabled person).

The Nebraska Supreme Court recently refused to enforce an arbitration clause on facts nearly identical to those here. *Koricic v. Beverly Enter. Nebraska, Inc.*, 773 N.W. 2d 145 (Neb. 2009). There, Frank Koricic signed the nursing home admissions contact on behalf of his mother, Manda Baker. The contract contained an arbitration clause that expressly stated it was not a condition of care in the facility. The court found that because Frank Koricic had acted as actual agent to make his mother's medical decisions for 10 years, and his mother authorized him to admit her to the nursing home, Frank Koricic had authority to sign the admission contact. *Id.* at 151. However, the court refused to enforce the arbitration clause finding that "his actual authority did not extend to signing the arbitration agreement that would waive Manda's right to access to the courts and to trial by jury." *Id.* The court also found that Frank Koricic did not have authority to agree to arbitration, concluding that although Manda Baker expected her son to sign the nursing home documents on her behalf and even ratified those documents, "nothing in the record suggests that a reasonable person should have expected an arbitration agreement to be included with the admissions documents for a nursing home." *Id.* at 152.

In *Beverly Enter., Inc. v. Stivers*, No. 2008-CA-000284, 2009 WL 723002 (Ky. Ct. App.), the Kentucky Court of Appeals found that the relative of the deceased nursing home resident had actual authority to sign the nursing home

admissions documents, but did not have authority to bind the deceased to the arbitration provisions. *Id.* at 2. The court relied upon the title of the arbitration document signed by the relative -- “Resident and Facility Arbitration Agreement (Not a Condition of Admission—Read Carefully)”-- and found that the arbitration document, unlike the medical forms signed by the relative, was not specifically related or necessary to the decedent’s admission into the nursing facility. *Id.* Therefore, the court found that the relative’s authority as an agent was not broad enough to bind her to the arbitration provisions that were not required for her nursing home admission.

As in the Kentucky case, the arbitration document that Ms. Dickerson signed specifically stated that “execution of this arbitration agreement is not a precondition to furnishing of services to the Resident of the facility.” E. 30. Even presuming that Mr. Bradley had delegated to Ms. Dickerson the actual authority to sign documents that were required for his nursing home admission, execution of those documents expressly did not require execution of the arbitration provisions. Therefore, Ms. Dickerson could not have been acting within scope of her authority when she signed the arbitration provisions and the nursing home was required by Maryland law to recognize this. C.O.M.A.R. 10.07.02.08-1.

Even when a written power of attorney exists, courts are careful to construe it narrowly when arbitration provisions are involved. The Georgia Court of

Appeals recently held that a daughter who was the duly appointed medical power of attorney could not bind her mother to an arbitration agreement contained in a nursing home admission contract. *Life Care Ctrs. of America v. Smith*, 681 S.E.2d 182, 185 (Ga. 2009). As in *Koricic*, the court found that “the agreement to arbitrate was optional and it [was] not contended in this case that in order for the [decedent] to be admitted to Life Care, Smith was required to sign the agreement to arbitrate.” *Id.* Even though Smith’s health care power of attorney was written very broadly, the Court found that the daughter’s authority was limited to making decisions “related to health care and not decisions related to the handling of potential contractual or negligence claims that might accrue.” *Id.* at 184.

II. THE EMOTIONAL CIRCUMSTANCES OF A NURSING HOME ADMISSION MUST BE CONSIDERED WHEN DETERMINING WHETHER THE RESIDENT AGREED TO ARBITRATION PROVISIONS KNOWINGLY AND VOLUNTARILY.

The circumstances that exist when admission to a long-term care facility become necessary make it difficult for residents and their family members to make informed decisions about all of the numerous provisions contained in an admissions contract. In the experience of *amici*, nursing home residents or their family sign the stack of documents placed in front of them, and only learn later, as Ms. Dickerson did, that the contract included provisions requiring the resident and his family to forego the use of the court system to resolve a wide range of future

disputes which, all too often, involve abuse, assault, malnutrition, neglect, and even death.¹ These arbitration agreements are having the effect desired by the nursing home industry, as recently highlighted in the Wall Street Journal:

Nursing-home patients and their families are increasingly giving up their right to sue over disputes about care, including those involving deaths, as the homes write binding arbitration into their standard contracts. The clause can have profound implications. Nursing homes' average costs to settle cases have begun dropping, according to an industry study, even as claims of poor treatment are on the rise.

Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits --- Big Payouts Fade As Arbitration Rises; Ms. Hight Falls Ill*, Wall St. J., Apr. 11, 2008, at A1.²

¹ Concerns about serious injuries and death that follow abuse and neglect in long term care facilities and the belief that facilities should not be able to avoid or unfairly limit liability for harm to vulnerable people entrusted to their care, led *amici* organizations AARP and NCCNHR to support “The Fairness in Nursing Home Arbitration Act of 2008,” S. 2838, H.R. 6126, which would render invalid and unenforceable any pre-dispute arbitration clause in a contract between a long-term care facility and a resident or his/her agent. *Fairness in Nursing Home Arbitration Act of 2008: Hearing on HR 6126 Before Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 2, 11 (2008).

² The article quotes former Sen. Mel Martinez, “[i]t is an unfair practice given the unequal bargaining position between someone desperate to find a place for their loved ones and a large corporate entity like a nursing home.” Moreover, the article notes that “[t]he biggest arbitration provider, the American Arbitration Association, frowns on agreements requiring arbitration in disputes over nursing-home care and generally refuses such cases. Some patients ‘really are not in an appropriate state of mind to evaluate an agreement like an arbitration clause,’ says

Decisions regarding admission into a nursing home or assisted living facility are “emotionally-charged, stress-laden event[s],” typically made in the midst of a crisis brought on by a precipitous deterioration in health, disability level, or the deterioration (or even death) of a spouse or other caregiver. *See, e.g., Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 101 (Ct. App. 1996) (*citing* Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 255, 258 (1990)); *see also* Maureen Armour, *A Nursing Home’s Good Faith Duty To Care: Redefining A Fragile Relationship Using the Law of Contract*, 39 St. Louis U. L.J. 217, 222 (1994) (“for many families and elders, long-term institutionalized care in a nursing facility is the only alternative available when personal care giving needs exceed a family’s ability to provide care.”); Marshall B. Kapp, *The “Voluntary” Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 New Eng. J. on Crim. & Civ. Confinement 1, 3 (1998) (explaining that an older person’s move to a nursing home often follows a period of acute hospitalization when she and/or her family cannot manage the home care demands).

The need to find a long-term care placement arises quickly and often is unplanned, leaving little time to investigate options or to wait for an opening at a

Eric Tuchmann, the association’s general counsel. A second group, the American Health Lawyers Ass’n, also avoids them.” Wall St. J., Apr. 11, 2008, at A1.

facility of one's choice.³ Denese Ashbaugh Vlosky, et al., "Say-so" As A Predictor of Nursing Home Readiness, 93 J. of Fam. & Consumer Scis. 59 (2001).

Time pressure significantly impairs the ability to seek and carefully consider alternatives, and the critical need for services almost always overshadows any other consideration.⁴ Consequently, both the resident and family members are unable to carefully examine the contract and contemplate the meaning and ramifications of its provisions, particularly those that have nothing to do with care and related services and costs.

People seeking admission to a long-term care facility are focusing on the quality and range of services available, and perhaps the costs, but are not thinking about possible future disputes. See, e.g., Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DePaul J. Health Care L. 263, 280 (2004) ("[a]dmitting a loved one to a nursing home is an

³ In the 1980s, the federal government changed the way hospitals are paid for their Medicare patients; since that change, hospital discharge planning occurs "quicker and sicker." Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. Mental Health & Aging 145, 148 (2000) [hereinafter *Navigating the Hazards*]. One danger is that the hospitalization itself debilitates patients and the assessment of the type of care and facility they need after discharge is made before they have fully recovered and are able to make informed decisions on these critical issues. *Id.* at 150-51.

⁴ Potential residents and their family members panic when they feel there is insufficient time to consider different facilities and they may choose a facility they would not have chosen if they had more time to weigh their options. *Navigating the Hazards*, *supra*, note 3, at 150.

overwhelming and stressful undertaking for families If families give any thought to the admissions agreement they are signing, they probably do not consider whether it contains a mandatory arbitration agreement”). When they are presented with admissions contracts, residents and family often do not know that an arbitration provision is buried in the multi-page document. In the rare instance in which prospective residents or their families are aware that the admissions contract contains an arbitration provision, they typically do not understand what it means and the many rights and protections they will lose in arbitration.

CONCLUSION

This case has far-reaching implications for people requiring admission to long-term care facilities and their families. A long-term care facility resident’s constitutionally protected rights to access the court and have a jury decide their claims cannot be waived by persons who do not have specific legal authority to make such a waiver. Maryland law sets out the obligations of a health care facility when it is providing treatment to someone who has an agent or surrogate decision-maker making health care decisions. Heritage Care failed to comply with those requirements. Therefore, for all the reasons described above, *Amici* respectfully urge the Court to reverse the trial court’s decision.

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