

Case No. 18-2459

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mark Posey,

Appellant,

v.

Northport Health Services of Arkansas, LLC, *et al.*,

Appellees.

On Appeal from the United States District Court
for the Western District of Arkansas
Case No. (2:17-cv-02128)

**BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION
IN SUPPORT OF APPELLANT URGING REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and 8TH CIR. R. 26.1A, amici curiae AARP and AARP Foundation submit the following corporate disclosure statement:

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

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**STATEMENT OF THE IDENTITIES
AND INTERESTS OF AMICI CURIAE¹**

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 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.*

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

Extendicare Health Facilities, Inc., 147 A.3d 490 (Penn. 2015); *Dickerson v. Longoria*, 995 A.2d 861 (Md. App. 2010).

SUMMARY OF THE ARGUMENT

The constitutional right to a jury trial is vital to nursing facility residents and cannot be waived by a person who lacks the legal authority to bind the resident to a contract. Therefore, contracts containing arbitration provisions, like the one here, are invalid when they are signed by a resident who lacks the mental capacity to enter a contract and a family member who lacks the legal authority to bind the resident. Any other outcome would put nursing facility residents at risk that any random person could waive their right to a trial simply because they assisted the resident during the facility admissions process, even if they have no relationship to the resident.

The right to a trial is particularly important to nursing facility residents because of the prevalence and severity of abuse and neglect in nursing facilities and regulatory agencies' inability to protect the residents from harm and even death. Nursing facility residents need the full range of mechanisms available to obtain redress from wrongdoers and deter future bad conduct, including presenting their legal claims at trial. This critical, fundamental right should not be ripped away by the signature of someone who lacks the legal authority to bind the resident.

ARGUMENT

I. ARBITRATION PROVISIONS SHOULD NOT BE ENFORCED AGAINST A NURSING FACILITY RESIDENT WHEN THE PEOPLE SIGNING THE AGREEMENT LACKED THE LEGAL AUTHORITY TO BIND THE RESIDENT TO A CONTRACT.

A basic premise of contract law is that contracts must be valid to be enforceable. *See Pine Hills Health & Rehab. LLC v. Talley*, 546 S.W.3d 492, 496-498 (Ark. Ct. App. 2018). Here, the lower court resuscitated arbitration provisions in a nursing facility admissions agreement by applying the third-party beneficiary doctrine to an invalid contract signed by a resident who lacked the mental capacity to enter into the contract and his son who lacked the legal authority to bind his father. *Northport Health Servs. of Ark., LLC v. Posey*, 2018 U.S. Dist. LEXIS 100588 (W.D. Ark. June 15, 2018).

Contrary to the lower court's decision, the third-party beneficiary doctrine cannot be used to correct fatal flaws in an invalid contract, especially when the doctrine does not apply.² Moreover, contracts with pre-dispute arbitration clauses, like the one here, are not valid when the people signing the contract cannot legally bind the resident. *See, e.g., Courtyard Gardens Health & Rehab., LLC v. Quarles*, 428 S.W.3d 437, 444 (Ark. Ct. App. 2013)(arbitration agreement invalid where adult son did not have authority to enter the agreement on his parent's behalf).

² Amici agree with Appellant's reasons for the inapplicability of the third-party beneficiary doctrine stated in his brief and do not repeat them here.

Requiring legal authority before binding a resident to arbitration is vital to protecting nursing facility residents' constitutional right to a trial. Without that requirement, an unauthorized person who is not legally designated to act for the resident or who is barely involved in the resident's life could waive the resident's fundamental rights.

Imagine the various people who may accompany a resident at admission to a nursing facility:

- the neighbor who volunteers to accompany their friend;
- the son who intended to be a point-of-contact for medical issues but never talked to their parent about any legal concerns;
- the daughter who lives closest to the nursing facility, but is not the power of attorney or legal guardian for her mother;
- the volunteer who spends time visiting members of her local community;
- the cousin with power of attorney whose scope of authority only extends to medical decisions; or
- the nephew who is the only person available when the resident is being admitted to a facility.

The practical reality is that any of these people would sign a facility admissions agreement for fear that the facility would not admit the person needing

care if they did not. *See* Ann E. Krasuski, *Comment, Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts With Residents*, 8 DePaul J. Health Care L. 263, 263-64 (2004). People deciding on admission into a long-term care facility do so 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. *Id.* It is during the emotionally charged admission process that nursing facility residents, their family, or other people assisting them sign the stack of documents the facility places in front of them. *Id.* People in these tumultuous circumstances are focused on the care and safety of the resident and what they can do to support them. They usually have never seen a nursing facility contract, let alone know that the contract may include arbitration provisions that waive the resident’s right to a trial.

So, without adhering to the requirement that only a legally authorized person can bind another to a contract, anyone accompanying a resident at admission could bind them to arbitration.

With this in mind, courts must carefully scrutinize pre-dispute arbitration clauses in nursing facility admissions contracts to determine whether they are valid and enforceable—in particular, when one person is purported to have bound another to arbitrate future disputes. *See Hickory Heights Health & Rehab, LLC v. Cook*, 2018 Ark. App. LEXIS 504, *7 (Ark. Ct. App. Sept. 11, 2018)(“In

Arkansas, the presumption is that the parties only contract for themselves, thus, a contract will not be construed as having been made for the benefit of a third party unless it clearly appears that such was the intention of the parties.”)

Arkansas courts do not presume a family member’s agency to act on behalf of the resident. *Courtyard Gardens Health & Rehab*, 428 S.W.3d at 442 (declining to find actual or statutory authority in adult child). To create agency under Arkansas contract law, the family member or other person assisting the resident must have actual or apparent authority to act on the resident’s behalf. *See Progressive Eldercare Servs. - Chicot v. Long*, 449 S.W.3d 324, 327 (Ark. Ct. App. 2014)(arbitration clause not enforceable where wife lacked authority to act as husband’s representative). Without this authority, the agreement is not valid. *See, e.g., Broadway Health & Rehab LLC v. Roberts*, 524 S.W.3d 407, 411 (Ark. Ct. App. 2017)(adult child lacked authority to bind mother absent power of attorney or some conduct by mother when she was competent that child was her agent).

Here, Mr. Posey’s son did not have apparent or actual authority to bind his father to the contract. Thus, the agreement is not valid and arbitration provisions are unenforceable. In the end, invalidating the agreement is the only just result that will protect the resident and his family from the illegal, involuntary, and unknowing waiver of his constitutional right.

II. THE RIGHT TO ACCESS THE COURTS 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.

The abuse and neglect of nursing facility residents is at epidemic levels. As a result, nursing facility residents and their families must have access to all avenues, including the courts, to obtain redress for harm and deter future bad conduct.

Nursing facility residents cannot rely on regulatory authorities alone because those authorities do not provide adequate protections.

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

Elder abuse and neglect are widespread in nursing facilities. In a nationally representative study, a staggering one in ten older people reported being abused or neglected in the previous year alone. Acierno, et al., *Prevalence and Correlates of Emotional, Physical, Sexual and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, Am. J. Pub. Health (Feb. 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2804623/> at 292-297.

Indeed, nursing facility residents are more vulnerable to abuse due to their isolation from social networks; their age; their congregate living setting; their dependence on others to perform activities of daily living such as eating, bathing, dressing, and toileting; and their cognitive impairments. 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>.

For example, in 2014, more than 1.4 million Americans lived in 15,634 nursing facilities certified to participate in the Medicaid and/or Medicare health insurance programs. CTRS. FOR MEDICARE AND MEDICAID SERVS., U.S. DEP'T OF HEALTH AND HUMAN SERVS., NURSING HOME DATA COMPENDIUM 2015 EDITION, 30, 181 (2015) [*"2015 Compendium"*], <https://goo.gl/6yx9tT>. These nursing facility residents shared at least one characteristic that put them at risk of abuse and neglect: 84.5% were 65 years or older, 69.3% had functional impairments in three or more activities of daily living, and 61.4% had moderate or severe cognitive impairments. *Id.* at 181, 190.

Empirical data also shows sobering evidence that nursing facility residents are frequent victims of abuse and neglect. For instance, in one study surveying 2000 nursing facility residents, 44% of the nursing facility residents interviewed said they had been abused, and 95% said they had been neglected or had witnessed the neglect of another resident. See Richard Weinmeyer, *Statutes to Combat Elder Abuse in Nursing Homes*, AMA J. of Ethics (2014), <https://journalofethics.ama-assn.org/article/statutes-combat-elder-abuse-nursing-homes/2014-05>.

National databases provide even more evidence of the significant levels of abuse. An estimated 7.7% of all complaints to the long-term care ombudsmen

about nursing facilities were complaints of abuse, gross neglect, or exploitation. *See* ADMIN. FOR COMMUNITY LIVING, AGING INTEGRATED DATABASE, NATIONAL OMBUDSMAN REPORTING SYSTEM (NORS) COMPLAINTS RESULTS, <https://agid.acl.gov/CustomTables/Default.aspx>. In 2014, state surveys (inspections mandated by federal regulations and used to determine whether facilities are complying with federal and state law) revealed that 10.6% of the facilities surveyed had been cited for causing actual harm to residents or putting them in immediate jeopardy, 3.2% for substandard care, and 4.3% for use of restraints. *2015 Compendium*, at 98, 128, 134.

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.

Nursing facility residents need access to courts because regulatory enforcement is not resulting in reform. Nursing facilities are purportedly regulated

on the state and federal level to ensure quality care. Nursing facilities that receive federal funding must comply with the 1987 Omnibus Budget Reconciliation Act and its implementing regulations, which set forth minimum standards of care for long-term care facilities. *See* 42 U.S.C. §§ 1395i-3, 1396r (2017); 42 C.F.R. §§ 483.1-75 (2017).

Despite the mandatory nature of these minimum standards of care, 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>.

Arkansas nursing facilities have also flouted regulatory minimum standards of care. In the past three inspection cycles, 227 Arkansas nursing facilities have been cited for 1,161 deficiencies, equaling almost \$3.99M dollars in penalties. ProPublica, *Nursing Home Inspect*, <https://projects.propublica.org/nursing-homes/state/AR> (last visited Sept. 24, 2018)(raw data *available at* <https://data.medicare.gov/data/nursing-home-compare>). Most of these deficiencies, 1,103, involved the potential for more than minimal harm to the residents. *Id.* Many of these deficiencies—74—were categorized in the higher-severity levels, those that cause actual harm to residents. *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, U.S. DEPT. OF HEALTH & HUMAN SERVICES, A-01-17-00504, EARLY ALERT: THE CENTERS FOR MEDICARE AND MEDICAID SERVICES HAS INADEQUATE PROCEDURES TO ENSURE INCIDENTS OF POTENTIAL ABUSE OR

NEGLECT AT SKILLED NURSING FACILITIES ARE IDENTIFIED AND REPORTED (Aug. 24, 2017).

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 sum, 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. An unauthorized person should not be able to forfeit the resident's constitutional right to a trial that the resident desperately needs to obtain redress for their injuries and deter future bad conduct.

CONCLUSION

A long-term care facility resident's right to have a jury decide their claims should not be waived by people who do not have legal authority to make such a waiver. For the reasons described above, Amici respectfully urge the Court to reverse the trial court's decision.

Dated: October 2, 2018

Respectfully submitted,

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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 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: October 2, 2018

/s/ Maame Gyamfi

Maame Gyamfi

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2018, I electronically filed a true and correct copy of the foregoing document with the Clerk of this Court using the appellate CM/ECF system, which in turn effectuates service by sending a notice of electronic filing to all counsel participating in this appeal who are registered CM/ECF users.

Dated: October 2, 2018

/s/ Maame Gyamfi

Maame Gyamfi

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