

FILED IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

2014 APR 23 A 9 23

CHRISTINE PEARSON, as the
personal representative of the
Estate of Gary Banks, (deceased),

Plaintiff,

vs.

MANORCARE HEALTH SERVICES-
WILLOUGHBY, et al.,

Defendants.

CASE NO. 13CV001703

JUDGMENT ENTRY

The within cause came on for consideration this day, to wit: April 22, 2014, upon the following:

1. Defendants' Motion to Stay Proceedings Pending Arbitration, filed October 11, 2013;
2. Plaintiff's Brief in Opposition to Defendants' Motion to Stay Proceedings Pending Arbitration, filed February 20, 2014;
3. Defendants' Joint Reply in Support of their Motion to Stay Proceedings Pending Arbitration, filed March 12, 2014; and
4. Plaintiff's Sur-Reply Brief in Response to Defendants' Reply Brief in Support of Defendants' Motion to Stay Proceedings Pending Arbitration, filed March 19, 2014.

This action involves the Complaint of Plaintiff Christine Pearson, as the Personal Representative of the Estate of Gary Banks (deceased) ("Plaintiff") alleging wrongful death and survivorship claims against Defendants ManorCare Health Services-Willoughby, Manor Care, Inc., Manor Care of Willoughby, Manor Care of Willoughby, OH, LLC, HCR Manor Care Services, LLC, HCR ManorCare, Inc., HCR II Healthcare, LLC, HCR III Healthcare, LLC, HCR IV Healthcare, LLC, HCR ManorCare Heartland, LLC, HCR ManorCare Operations II, LLC, Healthcare Operations Holdings, Inc., Healthcare Operations Investments, Inc., Carlyle MC Partners, LP, MC Operations Investments, Inc., TC Group V, LP, Carlyle Partners V MC Holdings, LP; Carlyle Partners V MC, LP, HCP,

Inc., HCR Healthcare, LLC and Paul A. Ormond (collectively "Manor Care") and John Does 1-10. Manor Care has now moved this Court for an order staying this matter pending arbitration pursuant to R.C. 2711.02.

In its Motion to Stay, Manor Care asserts that this action must be stayed and Plaintiff's claims submitted to binding arbitration as the parties have executed a valid written arbitration agreement.

In her Brief in Opposition, Plaintiff argues that (1) the Admission Agreement, which includes the Arbitration Agreement, states that it terminates upon the decedent's discharge from Manor Care Health Services; (2) the Arbitration Agreement is not signed by Defendants, thus rendering it invalid under R.C. 2711.22(A); (3) an arbitration agreement is only valid and enforceable under R.C. 2711.24 if the person signing the agreement is able to effectively communicate in spoken and written English, and the Decedent Gary Banks ("the Decedent") could not effectively communicate in written English due to his intellectual disabilities; (4) the Arbitration Agreement did not state that the Decedent would receive care and treatment at Manor Care regardless of whether he signed the Arbitration Agreement, in violation of R.C. 2711.23(A); (5) the Arbitration Agreement does not state that the decision whether to sign is solely a matter for the resident's determination without any influence, as required by R.C. 2711.23(C); (6) the Arbitration Agreement was buried in the twenty-seven page Admission Agreement and was not a separate agreement, in violation of R.C. 2711.23(G); (7) wrongful death claims brought by next of kin are not subject to an arbitration agreement signed by a decedent; (8) Defendants admit in their Answer that there is no privity of contract between the parties; (9) Defendants have waived any right to arbitration by actively participating in this case; (10) the Arbitration Agreement is both procedurally and substantively unconscionable and is therefore unenforceable; and (12) the Arbitration Agreement violates the unanimous recommendations of the American Arbitration Association, the American Bar Association and the American Medical Association.

In its Reply Brief, Manor Care contends that: (1) arbitration agreements are favored under both Ohio and federal law; (2) the Arbitration Agreement did not terminate when Plaintiff's Decedent was admitted to the Cleveland Clinic, but instead, by its own terms,

remained in full force and effect notwithstanding the termination of the Admission Agreement; (3) there is privity of contract between Defendants and as such, Manor Care is entitled to enforce the Arbitration Agreement; (4) Manor Care's Answer does not constitute the active participation in a case necessary to waive a right to enforce arbitration; (5) the Arbitration Agreement is neither substantively nor procedurally unconscionable; and (6) all of Plaintiff's claims, including the claim for wrongful death, should be stayed pending arbitration of the survivorship claim.

In her Sur-Reply, Plaintiff reiterates and expands on the arguments raised in her Brief in Opposition.

Upon review, the Court finds Defendants' Motion to Stay Proceedings Pending Arbitration not well taken. The Court will address Plaintiff's unconscionability arguments first as they are dispositive of this Motion. Unconscionability involves the absence of meaningful choice on the part of one party in conjunction with contract terms which are unreasonably favorable to the other party. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408 (Citations omitted). "The party asserting unconscionability of a contract bears the burden of proving that the agreement is *both* procedurally and substantively unconscionable." (Emphasis added). *Id.*

"Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible." *Manley v. Personacare of Ohio*, 11th Dist. No. 2005-L-174, 2007-Ohio-343, citing *Small v. HCF of Perrysburg, Inc.*, 159 Ohio App. 3d 66, 2004-Ohio-5757, 823 N.E.2d 19.

In determining whether the Arbitration Agreement was procedurally unconscionable, the Court must examine the factors surrounding the bargaining power of the Decedent in comparison to the bargaining power of Manor Care. There are several factors that lean in favor of a finding of procedural unconscionability. First, the Arbitration Agreement was signed by the Decedent while being admitted to a nursing home. Further, the Decedent went directly from the hospital to the nursing home. The Decedent was a mentally retarded

man who could not read books, magazines, letters or documents on his own. He did not have any experience reviewing or negotiating contracts. He had no legal expertise, did not have an attorney present, and did not have any experience in litigation or arbitration.

While Defendants argue that the terms of the Arbitration Agreement were read to the Decedent and that the Decedent had the opportunity to ask questions or to alter the terms of the Arbitration Agreement, the Court finds that these factors are outweighed by the ones supporting a finding of procedural unconscionability. The circumstances surrounding Decedent's admission to Manor Care led to an absence of meaningful choice on the part of Decedent. As such, the Arbitration Agreement was procedurally unconscionable.

The Court now turns to Plaintiff's argument that the Arbitration Agreement was substantively unconscionable. In determining whether an agreement is substantively unconscionable, the Court must consider the terms of the agreement and decide whether they are commercially reasonable. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408. Plaintiff argues that the terms of the Arbitration Agreement were not commercially reasonable for several reasons. First, the Arbitration Agreement could only be rejected by sending notice by certified mail within thirty days of admission, which would have been next to impossible for the Decedent to accomplish. Further, Plaintiff asserts that there was no way to alter the Arbitration Agreement. Moreover, the Arbitration Agreement does not explain anything about the benefits of a jury trial or the rules that will apply to an arbitration.

Manor Care contends that the Arbitration Agreement was a separate document that specifically states in capital letters, bold-face type that **"THE PATIENT WILL RECEIVE SERVICES IN THIS CENTER WHETHER OR NOT THIS AGREEMENT IS SIGNED."** There is also a provision that the parties are waiving their right to a jury trial, and there is a thirty-day window within which to reject the Arbitration Agreement.

The Court finds that there are several factors that weigh against substantive unconscionability. Specifically, the Arbitration Agreement does state that the execution of the Arbitration Agreement is not a condition of admission, does notify the Decedent that he has the right to cancel the Arbitration Agreement within thirty days of signing it, and

does inform the Decedent that he was giving up his right to a jury trial.

However, these provision are outweighed by other factors supporting substantive unconscionability. The most important of these is that there is nothing in the record to demonstrate that the Decedent had the *capacity* to contract. At the time of Decedent's admission, Manor Care was aware of the Decedent's diagnosis of mental retardation and paranoid schizophrenia. In support of her opposition to Manor Care's Motion to Stay, Plaintiff submits her Affidavit, where she outlines the Decedent's abilities and limitations as follows: (1) the Decedent was in special education classes throughout the entirety of his education; (2) the Decedent was not able to read books, magazines, letter or documents on his own; (3) the Decedent was unable to discuss his medical conditions because he did not comprehend them; and (4) the Decedent would have signed anything he was asked to sign.

Manor Care does not provide any evidence specifically regarding the cognition of the Decedent at admission. Manor Care presents the deposition of Darlene Stincic, who helped with the Decedent's admission to Manor Care. In her deposition, Ms. Stincic outlines what she would *normally* do during the admissions process, but does not state anything specific to Decedent as she did not recall his particular admission. Manor Care also offers the deposition of Courtney Laurich, the nurse who performed a nursing assessment of the Decedent prior to his admission to Manor Care. Manor Care argues that the fact that the Decedent passed this assessment indicates the Decedent's coherence and ability to contract.

The Court is not swayed by the nursing assessment, however, as it merely shows that the Decedent was focused, coherent and conscious. It does not demonstrate any understanding on the part of the Decedent as to what he was signing. The lack of any evidence of capacity to contract is an extremely significant factor weighing in favor of substantive unconscionability. This matter is similar to *Wascovich v. Personacare*, 190 Ohio App.3d 619, 2010-Ohio-4563, 943 N.E.2d 1030, where the decedent had Alzheimer's Disease and the Eleventh District Court of Appeals found substantive unconscionability largely due to a lack of evidence as to the decedent's capacity to contract.

Moreover, the Court finds that no economy or efficiency is achieved by requiring this

case to be arbitrated. Wrongful death claims and survivor claims are treated separately, particularly in regard to arbitration. "As opposed to a survival claim, through which a decedent's estate may recover for the injuries suffered by the decedent before his death, a wrongful-death claim belongs to the decedent's beneficiaries." *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 136, 2007-Ohio-4787. "A decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims." *Peters*. Thus, the wrongful death claim would not be arbitrated and, as noted in the *Wascovich* case, no efficiency would be achieved as the parties would be forced to participate in two proceedings, instead of one. There would be an increase in costs and the potential for inconsistent decisions. The addition of this factor to the lack of any evidence of capacity to contract outweighs the factors weighing in favor of substantive unconscionability. Thus, the Court finds the Arbitration Agreement to be substantively unconscionable.

As Plaintiff has therefore demonstrated both procedural and substantive unconscionability, the Court finds that the Arbitration Agreement is unconscionable and shall not be enforced. The Court need not consider the remaining arguments raised by Plaintiff, and Manor Care's Motion to Stay Proceedings Pending Arbitration shall be denied.

WHEREFORE, it is the order of this Court that Defendants' Motion to Stay Proceedings Pending Arbitration is hereby denied.

IT IS SO ORDERED



JOSEPH GIBSON, JUDGE

JUDGE EUGENE A. LUCCI
LAKE COUNTY
COMMON PLEAS COURT

Copies to:

Blake A. Dickson, Esq.
Mark D. Tolles, II, Esq.
Jacqueline M. Mathews, Esq.
Thomas A. Prislipsky, Esq.
Danny M. Newman, Jr., Esq.

FINAL APPEALABLE ORDER
Clerk to serve pursuant
to Civ.R.58 (B)

**MAUREEN G. KELLY
CLERK OF COMMON PLEAS COURT
CLERK OF 11TH DISTRICT COURT OF APPEALS
25 N. PARK PLACE
PAINESVILLE, OHIO 44077**

CASE NO. 13CV001703

TO: BLAKE A. DICKSON/MARK D TOLLES II/JACQUELINE M MATHEWS
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**NOTICE OF FINAL APPEALABLE ORDER
CHRISTINE PEARSON REPRESENTATIVE OF vs . MANORCARE HEALTH SERVICES
WILLOUGHBY et al**

On April 23, 2014 a Judgment Entry or Order was signed by a Judge of the Court of Common Pleas and filed in the above captioned case.

This NOTICE is being sent by the Clerk of Courts in compliance with state statute.

NOTE: The Clerk of Courts cannot advise you of the amount of time for appeal nor interpret the intent of this Notice. For further information or clarification please contact your attorney.

**MAUREEN G. KELLY
LAKE COUNTY CLERK OF COURTS**