Court of Appeals Case No. 2005 - L - 174

IN THE COURT OF APPEALS OF OHIO
Eleventh Appellate Judicial District, Lake County

_____

CYNTHIA MANLEY, as the personal representative of
the Estate of PATRICIA MANLEY (deceased)
Plaintiff - Appellant
v.
PERSONACARE OF OHIO, INC., d.b.a.
LAKE MED NURSING AND REHABILITATION CENTER, et al.
Defendant-Appellee
On Appeal from the Lake County Court of Common Pleas
Case No. 05 CV 000876
BRIEF OF PLAINTIFF-APPELLANT CYNTHIA MANLEY
Plaintiff-Appellant respectfully requests that the within case be scheduled for oral argument.

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I. STATEMENT OF THE CASE.

A. The Procedural Posture.

Defendant Personacare of Ohio, Inc. d.b.a. Lakemed Nursing and Rehabilitation Center (hereafter referred to as Defendant "Personacare") filed a

Motion to Stay the underlying nursing home negligence case while it is referred to binding arbitration, and to forever deny Plaintiff Cynthia Manley her constitutionally protected right to a trial by jury. The Trial Court granted Defendant's Motion to Stay. Plaintiff-Appellant Cynthia Manley is asking this Honorable Court to overturn the Trial Court's granting of Defendant's Motion to Stay.

II. STATEMENT OF THE FACTS.

Plaintiff Cynthia Manley, as the personal representative of the Estate of Patricia Manley (deceased), initiated this nursing home negligence case against Lake Med Nursing and Rehab Center, alleging that Decedent Patricia Manley was a resident of Lake Med Nursing and Rehabilitation Center and that she suffered emotional and physical injuries as a result of the negligent acts and omissions of the employees of Lake Med Nursing and Rehab Center. In her complaint, Cynthia Manley also alleged that the negligence of the Defendant directly and proximately caused Patricia Manley's death. Plaintiff Cynthia Manley also alleged that decedent Patricia Manley fell several times, she was permitted to become very ill, and she was not treated properly, all of which led to her death.

As the Court can see from the Resident Admission Agreement and the Alternative Dispute Resolution Agreement, both of which were attached to Defendant Personacare's Reply Brief, on the day that she was admitted to the nursing home, April 15, 2004 (See Kathy Large's Affidavit Page 1) decedent Patricia Manley could barely sign her name to either agreement.

Further, Decedent Patricia Manley did not have a claim for injury when she signed the admission agreement and the Alternative Dispute Resolution Agreement. She signed these documents when she was admitted to the nursing home. At that time she had obviously not yet suffered any injury caused by Defendant's negligence.

Pursuant to the Exhibits to Ms. Large's Affidavit, on the date of her admission Patricia Manley was given 36 typewritten pages to read. According to Ms. Large, she was given the opportunity to read these pages but she was not required to. Further, Ms. Large does not testify that Patricia Manley did read any part of the agreement.

According to Patricia Manley's medical records, attached to Kathy Large's Affidavit at Exhibit A, at the time that she signed the Alternative Dispute Resolution Agreement, Patricia Manley was 66 years old. She had recently fallen and been injured and then hospitalized. She had a long history of kidney failure

and she had been on dialysis. A recent CT scan taken on March 1, 2004, showed cortical atrophy, as well as left parietal subdural hematoma. The CT scan also showed a remote parietal infarction. She had recently been assaulted. She needed help taking a shower. She had previously suffered a stroke. She had a history of multiple transient ischemic attacks and cerebral vascular accidents. Each time she suffers a transient ischemic attack she became confused and developed slurred speech. She also had confusion from time to time caused by her dialysis. She had a mild cognitive impairment. She suffered from adjustment disorder with depressed mood, chronic renal failure, small parietal subdural hematoma, history of cerebrovascular accident on the left parietal lobe, coronary artery disease, coronary artery bypass graft, peripheral vascular disease, left below the knee amputation, a history of multiple, transient ischemic attacks, a history of several cerebrovascular accidents and diabetes which required dialysis three times a week.

Patricia Manley, with all of the problems described above, was supposed to read 36 typewritten pages and make a decision about binding arbitration involving a potential cause of action that had not yet occurred.

III. ARGUMENT.

A. Standard of Review

Normally, the determination of whether a dispute is subject to a contractual arbitration clause rests within the sound discretion of the trial court. Small vs. HCF of Perrysburg, Inc., 159 Ohio App. 3d 66, 2004-Ohio-5757. However, the Fifth Appellate District Court of Appeals has observed that the issue of whether a contract is unconscionable is a question of law which requires a factual inquiry into the particular circumstances of the transaction. Bolton v. Crockett Homes, Inc., Stark App. No. 2004 CA 00051, 2004-Ohio-7318. In reaching this conclusion, the Fifth District Court of Appeals cited a case decided by the Ninth District Court of Appeals wherein the Court explained:

"Since the determination of whether a contract is unconscionable is a question of law for the court, a factual inquiry into the particular circumstances of the transaction in question is required. [Citations omitted.] Such a determination requires a case-by-case review of the facts and circumstances surrounding the agreement. [Citations omitted.] As this case involves only legal questions, we apply the de novo standard of review." Id. at ¶ 8, citing Eagle v. Fred Martin Motor Co., Summit App. No. 21522, 2044-Ohio-829.

Accordingly, Plaintiff-Appellant Cynthia Manley respectfully urges this Honorable Court to apply a de novo standard of review to this case.

B. Assignment of Error: The Trial Court erred when it granted Defendant Personacare of Ohio, Inc. d.b.a. Lake Med Nursing and Rehabilitation Center's Motion to Stay Proceedings Pursuant to O.R.C. §2711.02.

Defendant Personacare of Ohio d.b.a. Lake Med Nursing and Rehabilitation (hereafter referred to as Defendant "Personacare") moved the trial court to forever deny Cynthia Manley and the Estate of Patricia Manley their day in Court. Defendant Personacare asked the Trial Court to stay the within case, forever, and to force the litigants to arbitrate the case. The Trial Court granted Defendant Personacare's motion. This decision was in error and should be overturned.

It must be noted at the outset that the arbitration clause at issue in the within case was drafted by Defendant Personacare for the sole purpose of limiting its liability in cases involving claims of nursing home negligence. The arbitration clause at issue in the within case was drafted exclusively by Defendant Personacare and its attorneys for the sole purpose of preventing injured nursing home residents, and the families of deceased residents, from tying their cases to a jury. The sole purpose of the subject arbitration clause is to deprive nursing home residents and their families of their right to a trial by jury if the resident is injured or killed. Defendant Personacare can argue that Alternative Dispute Resolution was offered to Patricia Manley as if it were a service available to her at the nursing home like hair care or manicures. However, that is simply not the case.

Decedent Patricia Manley received no benefit whatsoever from the Alternative Dispute Resolution Agreement and she lost something extremely valuable. She lost her right to a trial by jury. After she was injured, after Patricia Manley was left unattended on the toilet and she fell and broke her leg and hit her head, after her leg was surgically repaired and after her brain surgery, then she and her lawyer could have agreed to mediation or arbitration. They may even have agreed to binding arbitration. But the time to discuss these options was after the claim arose, not the day she was admitted to the nursing home.

As noted by the Sixth District Court of Appeals in Small v. HCF of Perrysburg, 159 Ohio App. 3d 66 (2004), which is discussed at length below, arbitration clauses were first used in business contracts, between sophisticated business persons, as a means to save time and money should a dispute arise. These contracts have also been used between sophisticated parties who want future disputes kept confidential. However, in this case, Defendant Personacare, a sophisticated corporation, is attempting to impose this contract on an ordinary consumer, in a

negligence action. As the Sixth District Court of Appeals noted in the Small case, ". . . such cases are typically fact-driven and benefit from the discovery process afforded in a civil action. Further, negligence cases often hinge on the "reasonableness" of a particular action or inaction. Such a subjective analysis is often best left to a jury acting as the fact finder."

Defendant Personacare does not cite one single case where a Court has ever forced a Plaintiff, in a case involving allegations of nursing home negligence, to forego her constitutional right to a trial by jury, and instead to arbitrate her case. In Small v. HCF of Perrysburg, 159 Ohio App. 3d 66 (2004), the trial court ordered the plaintiffs in that case to submit their claims of nursing home negligence against the Defendant to arbitration, and stayed the case until the conclusion of the arbitration. The Plaintiffs appealed. On appeal, the Plaintiffs, now the Appellants, argued that "the clause was unconscionable because Mrs. Small, at the time she signed the document, was concerned about the immediate health of her husband and was in no position to review and fully appreciate the terms of the agreement." Small at 69. The Sixth District Court of Appeals still held the arbitration clause unconscionable.

In deciding this issue the Sixth District Court of Appeals held as follows (emphasis added):

As set forth above, R.C. 2711.01(A) provides that an arbitration clause may be unenforceable based on legal or equitable grounds. An arbitration clause may be legally unenforceable where the clause is not applicable to the matter at hand, or if the parties did not agree to the clause in question. Benson v. Spitzer Mgt., Inc., 8th Dist. No. 83558, 2004 Ohio 4751, P13, citing Ervin v. Am. Funding Corp. (1993), 89 Ohio App.3d 519, 625 N.E.2d 635. Further, an arbitration clause is unenforceable if it is found by a court to be unconscionable. Unconscionability refers to the absence of a meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to one party. Collins v. Click Camera & Video, Inc. (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294. Accordingly, unconscionability consists of two separate concepts: (1) substantive unconscionability, which refers to the commercial reasonableness of the contract terms themselves and (2) procedural unconscionability, which refers to the bargaining positions of the parties. Id. Collins defines and differentiates the concepts as follows:

Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability. However, courts examining whether a particular limitations clause is substantively

unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability. See Chanda, supra; Berjian, supra.

Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, e.g., 'age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.' Johnson v. Mobil Oil Corp. (E.D.Mich.1976), 415 F. Supp. 264, 268." Id.

In order to negate an arbitration clause, a party must establish a quantum of both substantive and procedural unconscionability. Id. In reviewing the arbitration clause at issue, we will individually discuss each prong.

Substantive Unconscionability

Appellants contend that the arbitration clause is substantively unconscionable because: (1) it gives The Manor the right to proceed in any forum its chooses for the resolution of fees disputes while limiting residents' claims to arbitration; (2) the arbitration clause, despite the language in the agreement, was a condition of admission; (3) the prevailing party is entitled to costs and reasonable attorney fees; (4) the issue of whether a resident's claim is subject to arbitration is improperly to be determined through the arbitration process; and (5) the clause requires that arbitration be conducted at the facility rather than a neutral setting. Appellee counters each assertion.

At the outset, we note that the arbitration clause does contain a sentence which provides that admission is not conditioned on agreement to the clause. However, the same clause states that any "controversy, dispute, disagreement or claim" of a resident "shall be settled exclusively by binding arbitration." Further, and most importantly, the bold print directly above the signature lines states that by signing the agreement the parties agree to arbitrate their disputes and that the parties agree to the terms of the agreement "in consideration of the facility's acceptance of and rendering services to the resident." The residents or their representatives are provided no means by which they may reject the arbitration clause. Accordingly, we believe that the resident or representative is, by signing the agreement that is required for admission, for all practical purposes being required to agree to the arbitration clause.

* * *

Procedural unconscionability

As stated above, procedural unconscionability involves an examination of the bargaining position of the parties. . . .

* * *

In finding that The Manor's arbitration clause is unconscionable, we must make a few observations. Though we firmly believe that this case

demonstrates both substantive and procedural unconscionability, there is a broader reason that arbitration clauses in these types of cases must be closely examined. Arbitration clauses were first used in business contracts, between sophisticated business persons, as a means to save time and money should a dispute arise. As evidenced by the plethora of recent cases involving the applicability of arbitration clauses, the clauses are now being used in transactions between large corporations and ordinary consumers, which is cause for concern. Particularly problematic in this case, however, is the fact that the clause at issue had potential application in a negligence action. Such cases are typically fact-driven and benefit from the discovery process afforded in a civil action. Further, negligence cases often hinge on the "reasonableness" of a particular action or inaction. Such a subjective analysis is often best left to a jury acting as the fact finder. These observations are not intended to prevent the application of arbitration clauses in tort cases, we merely state that these additional facts should be considered in determining the parties' intentions. Small at 71-73 (emphasis added).

The only other decided case that is known and/or that has been cited in the within case is the recently decided Fifth Appellate District Case of Idamay Fortune v. Castle Nursing Homes, Inc., Fifth Appellate District, Case No., 05 CA 1 (November 22, 2005). 1 In that case, the Fifth Appellate District Court agreed with the Trial Court in that case, and found the Arbitration clause at issue in the case to be substantively unconscionable. The Sixth Appellate District did not find that there was sufficient evidence to determine procedural unconscionability. However, in doing so, the Fifth Appellate District cited the Small case, stating,

‘Arbitration clauses were first used in business contracts, between sophisticated business persons, as a means to save time and money should a dispute arise. As evidenced by the plethora of recent cases involving the applicability of arbitration clauses, the clauses are now being used in transactions between large corporations and ordinary consumers, which is cause for concern. Particularly problematic in this case, however, is the fact that the clause at issue had potential application in a negligence action. Such cases are typically fact-driven and benefit from the discovery process afforded in a civil action. Further, negligence cases often hinge on the "reasonableness" of a particular action or inaction. Such a subjective analysis is often best left to a jury acting as the fact finder. These observations are not intended to prevent the application of arbitration clauses in tort cases, we merely state that these additional facts should be considered in determining the parties' intentions.’ Small at ¶ 29.

The Fifth Appellate District reversed the Trial Court’s decision and remanded the case for further proceedings because it did not find sufficient evidence of procedural unconscionability. However no case decided in Ohio has upheld a Motion to Stay, pending binding arbitration in a case like the one at bar.

Further, both the Sixth Appellate District Court in Small and the Fifth Appellate District Court in Fortune have expressed grave concerns about the application of a binding arbitration clause in a case like the one at bar.

Courts nationwide have held similar arbitration clauses unenforceable.

In Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) the Court stated that a one-sided arbitration agreement that takes away numerous substantive rights and remedies of employee under Title VII is so egregious as to constitute a complete default of employer's contractual obligation to draft arbitration rules in good faith.

In Broemmer v. Abortion Serv. of Phoenix, Ltd., 173 Ariz. 148, 840 P.2d 1013 (1992) the Court stated that an arbitration agreement was unenforceable because it required a patient to arbitrate a malpractice claim and to waive the right to a jury trial and was beyond the patient's reasonable expectations where the drafter inserted a potentially advantageous term requiring the arbitrator of malpractice claims to be a licensed medical doctor.

As stated by the Ohio Supreme Court in Branham v. Cigna Healthcare, 81 Ohio St. 3d 388, 390 692 N.E. 2d 137, 140 (1998), “While the law of this state favors arbitration, Council of Smaller Enterprises, infra, 80 Ohio St. 3d [661] at 666, 687 N.E.2d [1352] at 1356; Schaefer v. Allstate Ins. Co. (1992), 63 Ohio St. 3d 708, 711-712, 590 N.E.2d 1242, 1245, not every arbitration clause is enforceable. R.C. 2711.01(A); Schaefer, 63 Ohio St. 3d 708, 590 N.E.2d 1242.” (emphasis added).

The subject arbitration clause is unconscionable and against public policy. As Justice Cook stated in the Dissent in Williams v. Aetna Fin. Co., 83 Ohio St. 3d 464, 700 N.E.2d 859 (1998), though state and federal legislation favors enforcement of agreements to arbitrate, both O.R.C. §2711.01(A) and Section 2, Title 9, U.S. Code permit a court to invalidate an arbitration agreement on equitable or legal grounds that would cause any agreement to be revocable. One such ground is unconscionability.

'Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' Williams v. Walker Thomas Furniture Co. (C.A.D.C.1965), 121 U.S. App. D.C. 315, 350 F.2d 445,449."

Lake Ridge Academy v. Carney (1993), 66 Ohio St. 3d 376, 383, 613N.E.2d 183, 189. Accordingly, unconscionability has two prongs: a procedural prong, dealing with the parties' relation and the making of the contract, and a substantive prong, dealing with the terms of the contract itself. Both prongs must be met to invalidate an arbitration provision.

In explaining the analogies between this case and Patterson, the majority appears to stress the disparity of bargaining power between the parties and arbitration costs as reasons for nullifying the agreement to arbitrate as unconscionable. These factors, however, if by themselves deemed to render arbitration provisions of a contract unconscionable, could potentially invalidate a large percentage of arbitration agreements in consumer transactions.

The disparity of bargaining power between Williams and ITT would be one factor tending to prove that the contract was procedurally unconscionable. A finding of procedural unconscionability, or that the contract is one of adhesion, however, requires more. "Black's Law Dictionary (5 Ed.1979) 38, defines a contract of adhesion as a 'standardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. * * * ' " Sekeres v. Arbaugh (1987), 31 Ohio St. 3d 24, 31, 31 Ohio B. Rep. 75, 81, 508 N.E.2d 941, 946947 (H. Brown, J., dissenting), citing Wheeler v. St. Joseph Hosp. (1976), 63 Cal. App. 3d 345, 356, 133 Cal. Rper. 775, 783; Std. Oil Co. of California v. Perkins (C.A.9, 1965), 347 F.2d 379, 383. See, also, Nottingdale Homeowners' Assn., Inc. v. Darby (1987), 33 Ohio St. 3d 32, 37, 514 N.E.2d 702, 707, fn. 7.

1. Substantive Unconscionability.

Despite Personacare’s protestations to the contrary, it is clear that the Alternative Dispute Resolution Agreement was a condition of Admission. If it was not, why insist that Ms. Manley discuss it with the Admissions Director and sign the agreement as she was being admitted? Why not just leave the material for Ms. Manley and her family to read at their leisure and sign if they chose to at some later time? The implication is clear. The Admissions Director sat down with Ms. Manley, as she was being admitted, and presented her with the Alternative Dispute Resolution Agreement so that the inference was very clear that if Ms. Manley did not sign the agreement she would not be admitted. Further, the Director of Admissions imposed this agreement on Ms. Manley on the date of admission because she wanted to limit Personacare’s liability for negligence from the day Patricia Manley was admitted,

According to the agreement, the issue of whether a resident's claim is subject to arbitration is improperly to be determined through the arbitration

process.

There is no part of the agreement which would enable the resident to easily reject the agreement. The presumption is clearly that the resident sign the agreement and agree to binding arbitration.

Decedent Patricia Manley played no role in the formation of the subject contract. The admission agreement is a classic boilerplate, take it or leave it, contract of adhesion. Decedent Patricia Manley made no changes. She did not add any language to the agreement nor delete any paragraphs. Further, Defendant Personacare enlisted Kathy Large, the Director of Admissions and a licensed Social Worker to convince Patricia Manley to sign the agreement for the sole purpose of limiting Defendant Personacare's liability.

The subject agreement denies Decedent Patricia Manley her fundamental right to a trial by a jury of her peers, and, in its place, mandates binding arbitration. In exchange, Decedent Patricia Manley receives nothing. The agreement is substantively unconscionable.

2. Procedural Unconscionability.

As stated above, procedural unconscionability involves an examination of the bargaining position of the parties. The nursing home convinced Ms. Manley to give up her right to a trial by jury if they committed malpractice and the negligence of their employees caused her harm in exchange for nothing.

There was absolutely no reason for Patricia Manley to agree to Alternative Dispute Resolution Agreement at all, at any time, much less on the day she was admitted.

Further, at the time the agreement was signed Patricia Manley was an elderly woman with a myriad of health problems as articulated above, many of which affected her ability to think and reason. At the time she signed the agreement she was being admitted to a nursing home, a very depressing time for anyone. She had already been diagnosed with depression. She was facing the loss of her independence and the ultimate end of her life. She was at the absolute most vulnerable time in her life. Personacare, conversely, was a sophisticated corporation with numerous sophisticated people in its employment which was seeking to limit its potential liability. Patricia Manley was seeking the health care that she needed to stay alive. Personacare was engaged in a business transaction for profit.

Both prongs are met in this case. The subject arbitration clause should be invalidated by this Honorable Court.

3. There was no consideration for the agreement.

Further, no consideration is present for the arbitration agreement. Black letter law provides that an enforceable contract requires consideration and that a contract without consideration is unenforceable. Further, a promise to do something that the law already requires, does not furnish consideration. International Shoe Company v. Carmichael, 114 So.2d 436 (Fla. 1st DCA 1959).

Thus, because the nursing home is already obligated, under Federal and State law, to provide quality care, it fails to provide any consideration for the arbitration agreement. Patricia Manley received nothing in exchange for giving up her very valuable right to a trial by jury.

4. The AMA, the ABA and the AAA discourage these types of contracts.

In the Fall of 1997, the American Arbitration Association, the American Bar Association and the American Medical Association, the leading associations involved in alternative dispute resolution, law, and medicine collaborated to form a Commission on Health Care Dispute Resolution (the Commission). The Commission's goal was to issue, by the Summer of 1998, a Final Report on the appropriate use of alternative dispute resolution (ADR) in resolving disputes in the private managed health care environment. Their Final Report discusses the activities of the Commission from its formation in September 1997 through the date of its report, and sets forth its unanimous recommendations.

The Commission issued its Final Report on July 27, 1998. 2 That report concluded on page 15, in Principle 3 of a section entitled, “C. A Due Process Protocol for Resolution of Health Care Disputes.” that; “The agreement to use ADR should be knowing and voluntary. Consent to use an ADR process should not be a requirement for receiving emergency care or treatment. In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.” (Emphasis added.)

The arbitration agreement at issue in the within case clearly violates the guidelines set forth above. The agreement was signed when Patricia Manley was first admitted to the subject nursing home, on April 15, 2004. The dispute did not arise until some time later.

5. Federal Law prohibits the formation of the subject agreement.

The subject arbitration agreement is also in violation of Federal Law. Defendant Personacare is not permitted to require additional consideration from a resident in exchange for admission to their nursing home, pursuant to 42 U.S.C. § 1396r(c)(5)(A)(iii), which provides that;

In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required

to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility.

42 C.F.R. § 483.12(d)(3).

Both the Medicare and Medicaid programs mandate that participating facilities must accept program payments as “full payment.” 42 U.S.C. § 1395r(c)(5)(A)(iii).

Because Decedent Patricia Manley already had the right to a jury trial, prior to signing the admission agreement, requiring her to sign an agreement giving up that right, is prohibited additional consideration.

In a January 2003 memorandum, the Centers for Medicare & Medicaid Services (CMS) addressed the agency’s position on binding arbitration. CMS states "Under both programs, however, there may be consequences for the facility where facilities attempt to enforce these agreements in a way that violates Federal requirements." CMS offered guidance to State Survey Agency Directors -- that if a facility either retaliates against or discharges a resident due to the resident’s failure to agree to or comply with a binding arbitration clause, then the state and region may start an enforcement action against the facility.

IV. CONCLUSION.

Accordingly, Plaintiff-Appellant Cynthia Manley respectfully requests that this Honorable Court overrule the decision of the Trial Court granting Defendant’s Motion to Stay, and Remand this case back to the Trial Court to proceed. Respectfully submitted,

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I hereby certify that a copy of the foregoing, Plaintiff Cynthia Manley’s Appellate Brief, was sent by ordinary U.S. mail this 6th day of January, 2006, to the following:

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