FILED
2018 NOV 16 AM 11:01
MAUREEN G. KELLY
LAKE CO. CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

JENNIFER DONALDSON, REPRESENTATIVE OF ESTATE OF HOWARD DONALDSON	)	**CASE NO. 17CV001448**
Plaintiff(s)	)	**JUDGE EUGENE A. LUCCI**
vs.	)	
KINDRED TRANSITIONAL CARE & REHAB LAKEMED, et al.	)	**AMENDED ORDER NUNC PRO TUNC DENYING MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION**
Defendant(s)	)	

The court's order filed on November 5, 2018 denying the defendants' motion to stay proceedings and compel arbitration is hereby amended nunc pro tunc, as follows (amended language in italics):

The court has considered Defendants Kindred Transitional Care and Rehabilitation-LakeMed, Kindred Healthcare, Inc., Kindred Healthcare Operating, Inc., and PersonaCare of Ohio, Inc.'s motion to stay proceedings and to enforce the alternative dispute resolution agreement on behalf of defendants, filed February 5, 2018, the plaintiff's brief in opposition to defendants' motion to stay proceedings and refer this case to binding arbitration, filed June 27, 2018, the defendants' reply in support, filed July 5, 2018, and the plaintiff's sur-reply brief, deemed filed on July 10, 2018.

The instant complaint was filed on September 6, 2018. It alleges that Howard Donaldson was a resident of Kindred Transitional Care & Rehab-LakeMed nursing home, located at 70 Normandy Drive, Painesville, Ohio. The facility was allegedly owned and/or operated by one or more of the other named defendants. The plaintiff states that while under the defendants' care, Donaldson was caused to suffer numerous injuries resulting in his death. The suit was brought to address both survival and wrongful death claims.

Shortly after Donaldson was admitted to the nursing home, he signed an "alternative dispute resolution agreement."[1] That agreement states, in essence, that in order to minimize legal costs, any and all claims arising out of Donaldson's stay at the facility shall be referred to mediation and/or arbitration rather than being heard in a court of law.

The issue presented is whether that alternative dispute resolution agreement is valid and enforceable. For the following reasons, the court finds that it is not.

There is a strong public policy in Ohio in favor of arbitration because it provides a relatively expeditious and economic means of resolving a dispute and unburdens crowded court dockets. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶15. R.C. 2711.01 provides that a written arbitration provision is "valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." One ground for revocation of an arbitration agreement is unconscionability. *Hayes,* ¶19.

The party claiming unconscionability must establish that the agreement is both procedurally and substantively unconscionable. *Id.,* ¶20.

Procedural unconscionability considers the parties' relative bargaining power. *Wascovich v. Personacare of Ohio, Inc.*, 190 Ohio App.3d 619, 2010-Ohio-4563, 943 N.E.2d 1030 (11th Dist.), ¶29. Courts look to factors such as the parties' ages, education, intelligence, business acumen, experience with similar transactions, who drafted the agreement, whether the terms were explained to the weaker party, and whether there were alternative sources of supply for the goods or services involved. *Id.* Accord *Hayes,* ¶23.

Substantive unconscionability looks to the terms of the agreement and whether they are commercially reasonable. *Hayes,* ¶33. "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 facts has developed for this category of unconscionability." *Fortune v. Castle Nursing Home*, 164 Ohio App.3d 689, 693, 2005-Ohio-6195, 843 N.E.2d 1216 (5th Dist.), ¶21. "Factors courts have considered in evaluating whether a contract is substantively unconscionable include the fairness of the terms, the charge for the service

---

[1] See defendants' motion to stay proceedings and to enforce the alternative dispute resolution agreement on behalf of defendants, filed February 5, 2018, Exhibit A.

rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Hayes,* ¶33.

Wascovich involved survival and wrongful death claims against a nursing home. The nursing home sought to enforce an arbitration agreement. However, because a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claims, only the survival claim could have been subject to the arbitration agreement. *Id.* at ¶5-6. The Eleventh District Court of Appeals held that

> [t]he main problem with affirming the substantive aspect of the agreement, however, is that under the facts of this case, the normal factors favoring arbitration do not apply. This is because there is no economy or efficiency achieved. In fact, the contrary is true, because a party may be forced to participate in two proceedings, instead of one. Rather than achieve cost savings, there would be a substantial increase in costs. The potential exists for an increase in the number of depositions and hearings, duplicate discovery, and expert testimony and expense in two forums. The addition of these factors outweighs the factors that weigh in favor of substantive conscionability. Most importantly, enforcement of the agreement in this case may result in inconsistent decisions on the issue of liability— something that should be avoided in every case.

Id. at ¶51-52.

Although there are some differences, in general the facts in the instant case are remarkably similar to those in *Wascovich.* As noted, Mr. Wascovich's estate asserted survival and wrongful death claims against a nursing home and an affiliated corporate entity.[2] Wascovich was a 72 year-old retired truck driver.[3] He had no experience in litigation, or in reviewing or negotiating contracts.[4] The facility's representative did not explain the consequences of signing the arbitration agreement, "since she, herself, did not

---

[2] In fact, Wascovich's estate sued the same nursing home and one of the same corporations as Donaldson's estate has in this case.

[3] *Wascovich,* ¶ 31, 34. Unlike Donaldson, Wascovich had been diagnosed with Alzheimer's disease. However, his actual level of cognitive impairment was unknown. Therefore, the court gave this factor only minimal weight. *Id.,* ¶ 38.

[4] *Id.,* ¶ 31, 33.

understand how the arbitration clause would affect Wascovich."[5] He was transferred directly from the hospital to the nursing home.[6] He did not have a friend, family member, or attorney present when he signed the agreement.[7] During discovery, the nursing home explained its normal admission procedures, but it could present no evidence showing that Wascovich both understood the arbitration agreement and was willing to sign it.[8]

Based on the above facts, the court concluded that "Wascovich's bargaining power was substantially outweighed by the bargaining power of [the nursing home]. Consequently, the arbitration agreement at issue was procedurally unconscionable."[9]

Here, Donaldson was 79 years old.[10] He had a college degree, but no experience dealing with contracts.[11] He did not know the difference between arbitration and litigation.[12] No one at the nursing home could have explained the differences to him, because the facility's representative did not understand them herself.[13] It is alleged that he was transferred from Lake West Hospital directly to the nursing home.[14] He did not have family, friends or an attorney present when he signed the agreement.[15] Finally, the nursing home presented no evidence showing that Donaldson understood the arbitration agreement and was willing to sign it, because the person who presented it to him had no personal recollection of their meeting.[16] As in *Wascovich,* she could only explain how an admission is normally processed.[17]

Based on these facts, the court finds that the arbitration agreement at issue here is procedurally unconscionable.

---

[5] *Id.*
[6] Id., ¶ 33. It is unclear from the decision how soon after his arrival Wascovich signed the arbitration agreement.
[7] *Id.,* ¶ 36, 37.
[8] *Id.,* ¶ 39.
[9] *Id.,* ¶ 42.
[10] Plaintiff's brief in opposition, p. 12.
[11] *Id.* See also, Affidavit of Jennifer Donaldson, attached to plaintiff's brief in opposition, Exhibit D.
[12] *Id.*
[13] See generally, Deposition of Kimberly R. Roberts, filed June 18, 2018. The number of instances where Ms. Roberts admitted her unfamiliarity with the differences between mediation and arbitration are too numerous to cite individually.
[14] Plaintiff's Brief in Opposition, p. 1-2. The court notes this assertion is unsupported by admissible evidence, but it does not believe the defendants contest it.
[15] Affidavit of Jennifer Donaldson. It appears that Donaldson signed the agreement two days after his arrival.
[16] Deposition of Kimberly R. Roberts, p. 16, 35, 42-45.
[17] *Id.,* p. 42-45.

As for substantive unconscionability, the *Wascovich* court found that there were some factors weighing against such a finding.[18] However, as noted above, it still found that Wascovich's arbitration agreement was substantively unconscionable, primarily because it did not provide an expeditious and economical means of resolving disputes and because it could lead to inconsistent decisions on the issue of liability.

All of the factors weighing against a finding of substantive unconscionability considered by the *Wascovich* court were included in Donaldson's arbitration agreement. For example, the agreement was optional and was a separate, stand-alone agreement.[19] It contained a section entitled "Understanding of the Resident" in boldface.[20] It included clauses relating to discovery.[21] Arbitration costs were reasonable and unlikely to deter Donaldson from bringing a claim against the defendant.[22] And it allowed for revocation within 30 days of signing.[23]

However, under the *Wascovich* ruling, this court must also consider whether the agreement will result in an expeditious, economical, and consistent result. For the same reasons cited by the *Wascovich* court, it finds that the agreement here may not. Instead, it may require the parties to engage in substantial discovery and expense to arbitrate the survival claim at issue here, and then incur additional time and costs in litigating the wrongful death claim, with potentially conflicting outcomes regarding liability. Therefore, it is substantively, as well as procedurally unconscionable, and cannot be enforced.

This court is aware that appellate courts in other districts have found that the same factors contained in Donaldson's arbitration agreement weigh against a finding of substantive unconscionability. The issue may be one that should be certified for conflict to the Ohio Supreme Court. But barring that, this court is bound by the Eleventh District Court's ruling in *Wascovich.*

---

[18] *Wascovich,* ¶ 44.
[19] *Id.,* ¶ 45. See also, defendants' motion to stay, Exhibit A, p. 1. The court notes that the plaintiff contests whether the agreement stood alone from the general admission materials presented to Donaldson, but for the purposes of this analysis (and to view the evidence most strongly in favor of the defendants), the court finds that it did.
[20] *Wascovich,* ¶ 46, 47. Defendants' motion to stay, Exhibit A, p. 3.
[21] *Wascovich,* ¶ 48. Defendants' motion to stay, Exhibit A, p. 2.
[22] *Wascovich,* ¶ 48. Defendants' motion to stay, Exhibit A., p. 2.
[23] *Wascovich,* ¶ 49. Defendants' motion to stay, Exhibit A, p. 2.

Wherefore, the court finds that the defendants' motion to stay proceedings and to enforce the alternative dispute resolution agreement is not well-taken and is hereby denied. *This entry creates a final order solely on the issue of staying the case pending arbitration. Knight v. Altercare Post-Acute Rehabilitation Center, Inc., 11th Dist. No. 2016-P-0045, 2017-Ohio-6946, ¶ 27. Therefore, in accordance with Civ.R. 54(B), the court finds that there is no just reason for delay.*

IT IS SO ORDERED.

EUGENE A. LUCCI, JUDGE

c: Blake A. Dickson, Esq., Attorney for Plaintiff
Paul W. Mccartney, Esq., Attorney for Defendants