IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

No. 1857
September Term, 2008

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 FOR APPELLANT CARMAN DICKERSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF CARTER BRADLEY

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STATEMENT OF THE CASE

This is a medical malpractice action brought by the estate of a man who died from infected bedsores that spread and deteriorated while he was a resident at a nursing home. The nursing home filed a petition to compel arbitration, which the trial court granted. This appeal followed.

The Maryland Legislature has recognized that "the circumstances surrounding admission to a nursing home are highly stressful for applicant[]s and their families. Most people are not in a position to carefully read and negotiate a contract at this time." *Walton v. Mariner Health of Md., Inc.*, 391 Md. 643, 665, 894 A.2d 584, 597 (2006) (quoting Bill Summary, H.B. 683 at 2). Nevertheless, the court below enforced a standard-form nursing-home-admission arbitration agreement against the estate of a deceased resident who never even saw or signed the agreement, which required the parties to submit all claims to a single arbitrator unilaterally selected by the nursing home from a list created by the nursing home.

Both issues are questions of first impression in the Maryland appellate courts. The trial court's decision is incompatible with two Maryland statutes—the Nursing Home Bill of Rights and the Health Care Decisions Act—and runs contrary to the trend among courts to decline to enforce nursing-home-admissions arbitration agreements signed by family members who have not been appointed as agents by courts or written agreements, or under statutorily mandated procedures. The trial court's decision also conflicts with the overwhelming consensus among state and federal courts that arbitration agreements putting the drafting party in complete control of the arbitrator-selection process are unenforceable.

QUESTIONS PRESENTED

1. The resident never discussed, saw, signed, or otherwise agreed to be bound by the nursing home's arbitration agreement. Instead, the agreement was signed by his second cousin, who inaccurately held herself out as having the

resident's power of attorney. Did the cousin have actual or apparent authority to bind the resident to arbitration and thereby relinquish his right to trial by jury?

2. The arbitration agreement provides that the nursing home will unilaterally select the sole arbitrator from a list created by the nursing home. Is the nursing home's arbitration agreement so one-sided as to be unenforceable?

STATEMENT OF THE FACTS

This is a medical malpractice action brought by Carman Dickerson in her capacity as the personal representative of the Estate of Carter Bradley, who died from infected bedsores that spread and deteriorated while he was a resident at Heritage Care, Inc.'s St. Thomas More Nursing and Rehabilitation Center. (*See* E 256). When Bradley arrived at the nursing home, he had a single bedsore wound on his buttock. Just two and a half months later, the sore had deteriorated into a Stage IV sore—the most serious type, characterized by a large-scale loss of skin and damage to the underlying muscle and bone.[1] (E 183–84). The infection resulting from Bradley's sore led to blood poisoning, ultimately killing him despite eventual hospital treatment. (E 184, 245). Bradley's death resulted from Heritage Care's negligence in failing to provide treatment for Bradley's bedsores, to turn him at regular intervals, and to transfer him to a hospital in enough time to save his life. (E 184–86).

A. The Arbitration Agreement

Heritage Care filed a petition to force the estate to arbitrate its claims under a form arbitration agreement signed by Dickerson, Bradley's second cousin. Heritage Care's arbitration agreement provides that any disputes arising out of Bradley's stay at the nursing home must be submitted to mandatory arbitration

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[1] *See* Mayo Clinic, Bedsores, http://www.mayoclinic.com/health/bedsores/DS00570/DSECTION=symptoms (last visited Apr. 1, 2009).

and that

> The arbitrator will be selected by the Facility from a list of individuals who are certified in alternative dispute resolution or are retired judges who routinely offer their services as arbitrators.
>
> * * *
>
> It is further agreed that the arbitrator will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.
>
> * * *
>
> The parties understand and agree that by entering this Arbitration Agreement they are relinquishing and waiving their constitutional right to have any claim decided in a court of law before a judge and/or jury.
>
> The parties agree that except as may be required by law, neither party, nor the arbitrator, may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all parties.

(E 29–30). Heritage Care's agreement provides no other arbitration rules or procedures.

B. Bradley's Admission to the Nursing Home

At the time of his admission to the nursing home, Bradley suffered from forgetfulness, organic brain syndrome, schizophrenia, and immobility.[2] (E 167, 169). A Korean War Veteran, Bradley had been a patient at a Department of Veterans Affairs (VA) hospital before the VA transferred him to St. Thomas More for physical and occupational therapy. (E 79). When Bradley arrived, he was put on a gurney in the nursing home's hallway. No nursing-home admissions officer asked whether he would be willing or able to sign the admissions paperwork, or who should sign the papers on his behalf—even though Bradley was described in the nurse's admissions notes as

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[2]Organic brain syndrome is "any acute or chronic mental dysfunction (as delirium or senile dementia) resulting chiefly from physical changes in brain structure and characterized especially by impaired cognition." MERRIAM-WESTER'S MED. DICTIONARY (2002).

"alert and oriented." (E 64, 180). An admissions coordinator instead intercepted Dickerson, Bradley's second cousin and former caregiver, to ask her to sign the admissions paperwork. (E 81–82). This happened immediately upon Dickerson's arrival at the nursing home, before Dickerson even had a chance to greet Bradley.

Dickerson was responsible for endorsing and depositing Bradley's VA benefits checks per written authorization from the VA, but it is undisputed that Bradley had never executed a power of attorney, or any other advance directive, authorizing Dickerson to act on his behalf. Bradley had not been deemed incapacitated by a physician or a court, and Dickerson had not been appointed his guardian.[3] (*See* E 91–92, 124–25). Dickerson, however, represented to the admissions coordinator that she held Bradley's power of attorney, and the admissions coordinator accepted Dickerson's assertions despite Dickerson's failure to produce any written authorization to act on Bradley's behalf. (E 108–09). Dickerson signed the large stack of admissions papers, including the agreement to arbitrate, as Bradley's purported representative.

After she completed the paperwork, Dickerson returned to the hallway where Bradley was still lying on a gurney, moaning and groaning. (E 82). Dickerson did not discuss the admissions process with Bradley, but instead unsuccessfully sought help from the nursing-home staff to ease her cousin's discomfort. (E 82–83). Bradley never saw the arbitration agreement and was unaware of its existence, and Heritage Care did not furnish Dickerson with a copy of the arbitration agreement until it was too late to rescind the agreement, and then, only at her request. (E 107, 123).

The stack of documents presented to Dickerson was approximately one inch thick, all of which she needed to sign before Bradley, who was lying in a hallway on a

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[3]The admissions agreement indicates that Carter Bradley had been certified in writing as incapacitated by a physician, but there is no supporting documentation, as required by the agreement itself, and no other evidence in the record supporting certification. (E 141).

gurney throughout this process, could be admitted to the nursing home. (E 99, 119). Among those documents were Heritage Care's arbitration agreement, an application for residency, a consent to treat, and a financial agreement—all of which were signed by Dickerson. (E 31, 140, 161, 162).

C. Regulatory Background: The Maryland Nursing Home Bill of Rights and the Maryland Health Care Decisions Act

Both the nursing-home-admissions process and the process by which a friend or family member can become a surrogate healthcare decisionmaker for an incapacitated patient are carefully regulated by the Maryland Nursing Home Bill of Rights and Maryland Health Care Decisions Act. In the Nursing Home Bill of Rights, the Legislature recognized that the nursing-home-admissions process can be stressful and thus prohibited nursing homes from soliciting the signatures of nonresidents unless the nursing home has documentation that the resident is incapable of making his or her own decisions per a court order or physician's certification. MD. CODE ANN. HEALTH-GEN. § 19-344(b). The Legislature has also regulated what the admissions agreements can and cannot say and limited the obligations and liability of any family members signing the agreements on residents' behalf, and the accompanying regulations envision the issuance of a model nursing home admissions agreement. *Id.* § 19-344; COMAR 10.07.09.06(B). Despite the prohibition in the statute and the lack of documentation of Bradley's incapacitation, Heritage Care's admissions coordinator solicited Dickerson's signature on Bradley's behalf. (E 60).

In the "Application for Residency," the admissions coordinator filled out Dickerson's name as the "Guarantor" in the "Financial Information" portion of the form and described Dickerson as holding a power of attorney on Bradley's behalf. (E 159). The form indicates that a copy of the power of attorney should be included, but, as noted, there was none to provide here. Dickerson is also listed as an "agent" on the

"Financial Agreement With St. Thomas More." (E 129).[4]

The Nursing Home Bill of Rights and the agreement provide that an "agent" "means a person who manages, uses, or controls the funds or assets that legally may be used to pay the applicant's or resident's share of costs or other charges for the facility's services." MD. CODE ANN. HEALTH-GEN. § 19-344(c)(1); (E 129). The statute discusses only financial rights and obligations of the "agent," *Id.* § 19-344(c), and "an agent's responsibility is limited to the administration and management of the resident's funds." *Walton*, 391 Md. at 667, 894 A.2d at 598. The financial agreement also defines the agent's rights and responsibilities in terms of finances and states that even if a family member is the resident's financial agent, the resident still has the right to make his or her own medical decisions. (E 135–36). Dickerson did not indicate in what capacity she signed the financial agreement, though the agreement asked the signatory to do so and provided a list of options. (E 140). In "Exhibit 1: Obligations of the Agent" to the financial agreement, Dickerson indicated she was signing the agreement not at the request of the resident but "[a]s a family member or other person with authority to manage, use, or control the Resident[']s income, funds, and/or assets" and "[a]s a financial Power of Attorney appointed by the Resident." (E 141–42). The agreement requires documentation of the authority, and it is undisputed that Dickerson provided no documentation. (E 142). Similarly, Dickerson signed the "Consent to Treat" form included in the stack of admissions documents, purportedly on Bradley's behalf, but she neither indicated the nature of her authority nor provided the nursing home with documentation of her authority—both of which were required

[4]Only the financial agreement indicates that it was approved by the Maryland Department of Health and Mental Hygiene. Heritage Care's arbitration agreement, application for residency, consent to treat, and other forms do not indicate such approval and do not mirror the Department's model nursing-home-admissions agreements. The model nursing-home agreements are available from the Maryland Department of Health and Mental Hygiene, Office of Health Care Quality.

by the form. (E 162).

The Maryland Health Care Decisions Act regulates who can make healthcare decisions on behalf of others. MD. CODE ANN. HEALTH-GEN. § 5-601–5-626. That Act defines "agents" as including only those appointed as agents by an advance directive, *id.* § 5-601(c), and, in the event that the patient has no advance directive, outlines a procedure by which a surrogate decisionmaker can be appointed, *id.* § 5-605–5-606. The patient must be certified in writing as being incapable of making informed medical decisions by two physicians, *id.* § 5-605(a)(2), -606(a)(1), and the surrogate, if not an immediate family member, must present an affidavit explaining his or her relationship with the patient, *id.* § 5-605(a)(3)(ii). Again, it is undisputed that Bradley executed no advance directive, and there is no documentation in the record that a physician certified Bradley as incapacitated or that Dickerson presented an affidavit explaining her fitness to be a surrogate decisionmaker. Nevertheless, in the context of these statutes, Heritage Care asked Dickerson to sign these admissions documents absent any documentation that Bradley authorized her to do so.

D. The Proceedings Below

Dickerson, as personal representative of Bradley's estate, brought a medical malpractice action against Heritage Care and Ricardo Longoria, who was Bradley's physician there. She first filed the estate's claim in the Maryland Health Care Alternative Dispute Resolution Office—as required by the Maryland Health Care Malpractice Claims Act, MD. CODE ANN. CTS. & JUD. PROC. §§ 3-2A-01–3-2A-10—and then filed suit in Prince George's County Circuit Court. (E 47). While Dickerson was pursuing the estate's claims, Heritage Care filed its petition to compel arbitration in Montgomery County Circuit Court.[5]

[5]Longoria intervened to join the petition. (E 4). The trial court denied the petition as to Longoria, and, in this Court, Longoria filed a cross-appeal, which he subsequently withdrew. (E 8).

In the Montgomery County court, Dickerson opposed the petition on the grounds that the arbitration agreement was not binding on Bradley or his estate because she did have the authority to act on Bradley's behalf and that the arbitrator-selection clause is unconscionably one-sided. Following a full-day trial, the court held that the Malpractice Claims Act does not preempt Heritage Care's arbitration agreement, as Dickerson had also argued below, that Bradley is bound by the agreement because Dickerson was acting as Bradley's actual agent, and that Heritage Care's arbitration agreement is not unconscionable. (E 18, 22, 25). Dickerson appeals only the latter two holdings.

As to the agency issue, the trial court held that Dickerson was Bradley's actual agent even though Bradley had executed no power of attorney on Dickerson's behalf. The court reasoned that Bradley "acquiesced to her decisions," because "Bradley, as the principal, exercised limited control, over his agent, Ms. Dickerson in that he expected her to act on his behalf," and because "Dickerson acted as Mr. Bradley's power of attorney." (E 20–22). As to the unconscionability issue, the trial court rejected the overwhelming consensus among state and federal courts that it is unconscionable for the party with stronger bargaining power to retain exclusive control over selection of the arbitrator. The trial court pointed to only two cases upholding one-sided selection mechanisms—both involving commercial ventures between sophisticated parties. (E 24, 25 n.4). The court did not cite any cases upholding a consumer, employment, or nursing-home arbitration agreement with a similarly one-sided selection mechanism.

SUMMARY OF THE ARGUMENT

Heritage Care's arbitration agreement cannot be enforced both because Dickerson lacked the authority to waive Bradley's constitutional right to a jury trial and because it is unconscionably one-sided. Dickerson, who signed the admissions documents but had not been appointed as a surrogate healthcare decisionmaker and

did not hold a power of attorney, did not have the authority to waive Bradley's constitutional right to a jury trial. The trial court held that Dickerson was Bradley's actual agent and therefore had the authority to waive Bradley's constitutional rights because Bradley did not object to Dickerson's having made some medical decisions for him in the past and because Dickerson was Bradley's fiduciary payee for his VA benefits, meaning that Dickerson endorsed and deposited Bradley's VA benefits checks. Under these facts, almost every jurisdiction that has considered whether a family member had the authority to waive a jury trial on behalf of a nursing home resident would find that there was no agency.

Dickerson is not Bradley's agent because the Maryland Legislature has outlined step-by-step procedures for the appointment of surrogate healthcare decisionmakers, and those procedures were not followed here. The Legislature has also limited the circumstances in which a nursing home can ask a family member to sign admissions documents on a resident's behalf, and those circumstances were not present here. And even when a family member may sign, the Legislature has limited that person's responsibilities to the management of the resident's finances. Thus, even if Dickerson could have signed the documents as Bradley's agent under the statute, her authority to do so was limited to managing Bradley's assets.

Finally, even if Dickerson had the authority to waive Bradley's legal rights to bring a claim in court, Heritage Care's agreement is unconscionable because it grants Heritage Care complete control over the pool of potential arbitrators and provides that Heritage Care will unilaterally select the sole arbitrator. This arrangement creates an inherently biased forum, and every court to consider similar arbitration clauses has found them to be unenforceable.

STANDARD OF REVIEW

Although agency is a determination of fact subject to a clearly erroneous standard of review, *Green v. H&R Block, Inc.*, 355 Md. 488, 504, 735 A.2d 1039, 1048

(1999), that standard "does not apply to a trial court's determinations of legal questions or conclusions of law based on findings of fact." *Ins. Co. of N. Am. v. Miller*, 362 Md. 361, 372, 765 A.2d 587, 593 (2001). Rather, where, as here, the order under review "involves an interpretation and application of Maryland statutory and case law, [an appellate court] must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review." *Walter v. Gunter*, 367 Md. 386, 392, 788 A.2d 609, 612 (2002); *Jackson v. 2109 Brandywine, LLC*, 180 Md. App. 535, 567, 952 A.2d 304, 323 (2008). A circuit court's decision as to whether a dispute is arbitrable is also subject to *de novo* review. *Walther v. Sovereign Bank*, 386 Md. 412, 422, 872 A.2d 735, 741 (2005).

ARGUMENT

I. BRADLEY'S ESTATE IS NOT BOUND BY THE AGREEMENT BECAUSE DICKERSON LACKED ACTUAL OR APPARENT AUTHORITY TO WAIVE BRADLEY'S RIGHT TO A JURY TRIAL.

Heritage Care argued below that Dickerson was Bradley's actual or apparent agent and therefore had the authority to waive his jury-trial rights. It based its apparent-authority argument on the fact that Dickerson had held herself out as holding Bradley's power of attorney to other healthcare providers in the past, which is irrelevant to the question whether Bradley indicated to Heritage Care that Dickerson was his agent. The trial court did not reach the apparent-authority issue and indicated during the trial that it did not believe there was apparent agency. (E 124). Instead, it concluded that because Bradley had not objected to Dickerson taking care of his healthcare needs, she had actual authority to waive Bradley's right to bring his claims in court.

Under Maryland's statutory schemes governing healthcare decisions and nursing home admissions, Dickerson was not Bradley's agent. The same is true under Maryland agency law, which is based on the Restatement (Second) of Agency. *See*

Green, 355 Md. at 503–04, 735 A.2d at 1047–48. For an agent to have actual authority to act on behalf of a principal, there must be (1) "manifestation by the principal that the agent shall act for him"; (2) "the agent's acceptance of the undertaking"; and (3) "the understanding of the parties that the *principal is to be in control* of the undertaking." RESTATEMENT (SECOND) OF AGENCY § 1 cmt. b (1958) (emphasis added). Apparent authority results from actions by the *principal* that indicate to a third party that the other person is his or her agent. *Id.* § 8 cmt. a; *see Chevron USA, Inc. v. Lesch*, 319 Md. 25, 34, 470 A.2d 840, 845 (1990). Under Maryland statute and common law, Dickerson was not Bradley's agent, and she therefore lacked either actual or apparent authority to waive Bradley's right to bring his claims in court.

A. There Is a Growing Consensus That, Absent a Written Directive, Nursing Home Arbitration Agreements Signed By Nonresidents Are Invalid.

As the use of binding mandatory arbitration clauses in nursing-home-admissions contracts increases, courts nationwide have had to decide whether such agreements, when signed by a family member, bind the resident and his or her estate. *See* Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits*, WALL ST. J., Apr. 11, 2008, at A1 (reporting that while arbitration agreements are on the rise and nursing homes' cost to settle cases is going down, abuse and neglect continue to increase). A family member can be authorized to exercise legal or healthcare rights on behalf of a relative when that relative has executed a power of attorney, whose provisions are usually triggered when the relative becomes incapacitated. "Powers of attorney, which create a principal-agent relationship, are written documents by which one party, a principal, appoints another as attorney-in-fact and confers upon the latter the authority to perform certain specified acts on behalf of the principal." *Figgins v. Cochrane*, 403 Md. 392, 415, 942 A.2d 736, 749–50 (2008).

Many legislatures, including Maryland's, have enacted procedures for

appointing someone to make decisions on behalf of an incapacitated resident when there is no power of attorney or other advance directive. Typically, these statutes require that the resident be certified, in writing, as "incapable of making an informed decision about treatment" by the attending physician. MD. CODE ANN. HEALTH-GEN. § 5-606(a)(1); *see also* FLA. STAT. § 765.204; MISS. CODE ANN. § 41-41-205(6); TENN. CODE ANN. § 68-11-1803(d). When a patient is incapacitated and there is no advance directive, these laws provide for the appointment of a surrogate decisionmaker (usually the person's next-of-kin) who has circumscribed power to make some healthcare decisions on the patient's behalf. MD. CODE ANN. HEALTH-GEN. § 5-605; *see also* FLA. STAT. § 765.201–.205; MISS. CODE ANN. § 41-41-211; TENN. CODE ANN. § 68-11-1806.

Courts have generally held that absent a written advance directive, properly applied statutory procedures for appointing a decisionmaker, or some other clear signal from the resident that the family member had the authority to act on his or her behalf, arbitration agreements signed by a family member are not binding on the resident. For example, the Mississippi Supreme Court has consistently declined to find nursing-home-arbitration agreements binding on residents or their estates absent a power of attorney or finding of incapacity per its healthcare-decisions statute. In *Compere's Nursing Home, Inc. v. Farish*, the court held that the resident's nephew lacked actual authority to bind the resident because the resident had never been found incapacitated under the statute and the nephew therefore could not have been a surrogate decisionmaker; nor did the nephew have apparent authority because the resident had never indicated to the nursing home that the nephew had the authority to act on her behalf. 982 So. 2d 382, 384 (Miss. 2008). Likewise, the daughter in *Mississippi Care Center of Greenville, LLC v. Hinyub* lacked authority to bind her father to an arbitration agreement because there was no record of an alleged written power of attorney, nor had the father been found incapacitated under the statute. 975

So. 2d 211, 217–18 (Miss. 2008). And, in *Grenada Living Center, LLC v. Coleman*, a sister lacked authority to enter into an agreement on behalf of her brother when she signed the arbitration agreement outside his presence, there was no indication from the brother that he authorized his sister as his agent, and he was not certified as incompetent under the statute. 961 So. 2d 33, 37–38 (Miss. 2007); *see also Forest Hill Nursing Ctr. v. McFarlan*, 995 So. 2d 775, 780–82 (Miss. Ct. App. 2008).

Other courts have taken the same approach, holding unenforceable arbitration agreements signed by family members lacking powers of attorney when the residents had neither been certified incompetent nor given the nursing home any indication that the signatories had the authority to act on the residents' behalf. For example, in refusing to enforce a nursing home arbitration agreement signed by the resident's husband, the court in *Warfield v. Summerville Senior Living, Inc.*, explained that "[t]he failure of a resident suffering from dementia to object to the living arrangements her husband made would hardly constitute evidence that she had authorized him to act as her agent in waiving her right to a jury trial." 69 Cal. Rptr. 3d 783, 787 (Cal. Ct. App. 2007). In other words, a resident's failure to oppose placement in a nursing home is insufficient to establish actual or apparent agency. *Ashburn Health Care Ctr., Inc. v. Poole*, 648 S.E.2d 430, 432–33 (Ga. Ct. App.), *cert. denied* (Ga. Sept. 10, 2007); *see also High v. Capital Senior Living Props. 2-Heatherwood, Inc.*, 594 F. Supp. 2d 789, 801 (E.D. Mich. 2008); *Thornton v. Allenbrooke Nursing & Rehab. Ctr., LLC*, 2008 WL 2687697, at *6–*8 (Tenn. Ct. App. July 3, 2008). And in contrast to the trial court's holding here, courts have held that there is no agency even if the signing family member was responsible for some of the resident's finances and had previously made healthcare decisions for the resident. *E.g.*, *Goliger v. AMS Props., Inc.*, 19 Cal. Rptr. 3d 819, 820 (Cal Ct. App. 2004); *Barbee v. Kindred Healthcare Operating, Inc.*, 2008 WL 4615858, at *7 (Tenn. Ct. App. Oct. 20, 2008); *Hearn v. Quince Nursing & Rehab. Ctr., LLC*, 2008 WL 4614265, *2–*3 (Tenn.

Ct. App. Oct. 16, 2008); *Mt. Holly Nursing Ctr. v. Crowdus*, 2008 WL 2852881, *4 (Ky. Ct. App. July 25, 2008); *Thornton*, 2008 WL 2687697, at *6–*8.

Courts have also declined to enforce arbitration agreements when family members held themselves out as agents of a resident absent an affirmative indication from the resident that the family member signing the agreement was authorized to do so. *Flores v. Evergreen at San Diego, LLC*, 55 Cal. Rptr. 3d 823, 827–28 (Cal. Ct. App. 2007); *Pagarigan v. Libby Care Ctr., Inc.*, 120 Cal. Rptr. 2d 892, 894–95 (Cal. Ct. App. 2002). These cases track traditional agency law, which requires some manifestation from the principal to establish agency: "A person cannot become the agent of another merely by representing herself as such." *Id.* at 894; *see also Waverly-Ark., Inc. v. Keener*, 2008 WL 316149, at *4 (Ark. Ct. App. Feb. 6, 2008); *Hendrix v. Life Care Ctrs. of Am., Inc.*, 2007 WL 4523876, at *7 (Tenn. Ct. App. Dec. 21, 2007); *Phillips v. Crofton Manor Inn*, 2003 WL 21101478, at *4 (Cal. Ct. App. June 13, 2003).

And some courts have held that even if a family member has valid authority to make medical decisions, that authority does not extend to entering into arbitration agreements. *See, e.g.*, *Hinyub*, 975 So. 2d at 218; *Flores*, 55 Cal. Rptr. 3d at 590; *Blankfield v. Richmond Health Care, Inc.*, 902 So. 2d 296, 300 (Fla. Ct. App. 2005); *Goliger*, 19 Cal. Rptr. 3d at 820–21 ("[T]he health care examples [the nursing home] cites do not equate with being an agent empowered to waive the constitutional right of a trial by jury. . . . [The nursing home's] argument does not, however, justify expanding [the daughter's] powers beyond what the evidence shows [the] mother permitted. The record shows [the] mother allowed [the daughter] to made medical decisions for her."); *Pagarigan*,120 Cal. Rptr. 2d at 895 ("Defendants do not explain how the next-of-kin's authority to make medical treatment decisions for the patient at the request of the treating physician translates into authority to sign an arbitration agreement on the patient's behalf at the request of the nursing home."). *But see Owens*

v. Nat'l Health Corp., 263 S.W.3d 876, 884 (Tenn. 2007).

B. The Maryland Health Care Decisions Act Specifies Procedures for Designating an Agent or Surrogate When a Patient Is Incapacitated, and Those Procedures Were Not Followed Here.

Even if Bradley arguably conferred common-law authority on Dickerson to make healthcare decisions on his behalf, and even if that authority included entering into arbitration agreements, because the carefully crafted procedures required by the Maryland Legislature for appointing an agent or surrogate decisionmaker in exactly this context were not followed, Dickerson could not have been Bradley's agent. By finding actual agency outside of the procedures required by the Legislature, the trial court's holding undermines the Legislature's policy decision to create a standardized step-by-step procedure for appointing agents and surrogate healthcare decisionmakers for patients unable to make their own decisions. *See Suter v. Stuckey*, 402 Md. 211, 232, 935 A.2d 731, 744 (2007) (explaining that "a statute which deals with an entire subject-matter is generally construed as abrogating the common law as to that subject").

The Legislature recognized that it was not uncommon for healthcare decisions to have to be made on behalf of incapacitated patients, but distinguished between "agents" appointed by advance directives such as powers of attorney, and "surrogates" who are appointed when no agent is available and are accorded more limited authority to act. MD. CODE ANN. HEALTH-GEN. §§ 5-601(c), -605(a),(d), -606(a), (b). An "agent" is "appointed by the declarant under an advance directive made in accordance with the provisions of this subtitle to make health care decisions for the declarant," *id.* § 5-601(c), and a "declarant" is a "competent individual who makes an advance directive," *id.* § 5-601(g). An "advance directive" is a "witnessed written document" or oral

statement made by the declarant, witnessed by the attending physician and another witness, documented in the medical record, and signed by those witnesses. *Id.* §§ 5-601(b), -602(d)(2). It is undisputed that Bradley has not executed an advance directive appointing Dickerson as his agent, and, therefore, Dickerson is not his agent within the meaning of the Maryland Health Care Decisions Act.

In the event that no agent is appointed, necessary healthcare decisions are to be made by a surrogate. *See id.* § 5-605. That surrogate may only make decisions on behalf of a patient when the person has been "certified to be incapable of making an informed decision." *Id.* § 5-605(a)(2). Certification requires that two physicians examine the patient and certify, within two hours of that assessment, that the patient is incapable of making an informed decision about medical treatment. *Id.* §§ 5-601(l)(1), 5-606(a)(1). Once there is a certification, family members may make medical decisions for an incapacitated patient, but when the proposed surrogate decisionmaker is not the patient's court-appointed guardian, adult child, or parent, that person must present an affidavit to the attending physician explaining the nature of his or her relationship with the patient. *Id.* § 5-605(a)(3). The physician must then include that affidavit in the patient's medical file. *Id.* § 5-605(a)(4). Because the patients do not choose the surrogates, the Legislature grants decision-making surrogates less power than agents; for example, surrogates generally may not authorize psychiatric treatment or the withholding or withdrawal of life-sustaining procedures. *Id.* §§ 5-605(d)(2), -606(b).

Under the statute, Dickerson was not Bradley's surrogate decisionmaker. There is no certification in the record, and Dickerson never received any documentation from Bradley's doctors that he was incapable of making his own decisions. (E 110). Because Dickerson was Bradley's second cousin, to be appointed a surrogate decisionmaker she would also have had to present the physician with an affidavit explaining her role in Bradley's life, and there is no evidence in the record that she did so. *See* MD. CODE ANN. HEALTH-GEN. § 5-605(a)(4). On the nursing-home-admissions documents,

someone circled a statement on the form indicating that Bradley's physician had certified in writing that Bradley was incapable of understanding his rights and responsibilities, but there is no documentation in the record to support that proposition, and the admissions form itself requires documents verifying the certification. (E 141). The trial judge stated that he believed there was no evidence in the record supporting the conclusion that Bradley had been deemed incapacitated by a qualified medical professional. (E124–28).

In sum, Dickerson has not satisfied the statutory requirements for appointment as an agent or surrogate decsionmaker and, therefore, had no authority to make any healthcare decisions on Bradley's behalf—much less the decision to submit his claims to binding arbitration. *See Farish*, 982 So. 2d at 384; *Hinyub*, 975 So. 2d at 217–18. The trial court's finding of agency should be reversed on that ground alone.

C. Dickerson Lacked Actual Authority to Waive Bradley's Right to a Jury Trial.

Under the weight of authority, the trial court's decision that Dickerson had actual authority to make all legal decisions on Bradley's behalf, including waiving Bradley's right to bring his claims into court, was wrong. It is undisputed that Bradley had executed no general or healthcare power of attorney during his lifetime and that Dickerson had written authorization only to act as Bradley's fiduciary payee for his VA benefits, meaning that Dickerson only had authority to receive and endorse Bradley's VA benefit checks and was obligated to deposit them on Bradley's behalf. (E 16). *See* MD. CODE ANN., EST. & TRUSTS §§ 15-201–15-211 (Maryland Uniform Fiduciaries Act). The trial court reasoned that because Dickerson was Bradley's fiduciary payee for his VA benefits, had in the past admitted Bradley into other healthcare facilities (none of whose admissions documents included an arbitration clause), and had signed documents allowing for blood transfusions and vaccinations, and because Bradley had acquiesced to those actions, they had an ongoing agent-principal relationship as to all

possible matters, including the waiver of Bradley's legal rights. (E 16).

Heritage Care has the burden of proving that an agency relationship existed between Bradley and Dickerson. *Green*, 355 Md. at 504, 735 A.2d at 1048. Under Maryland law, "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall have control, and consent by the other so to act." *Id.* at 503, 735 A.2d at 1047 (quoting RESTATEMENT (SECOND) OF AGENCY § 1 (1958)). Although agency may be inferred, "[t]he creation of an agency relationship ultimately turns on the parties' intentions as manifested by their agreements or actions." *Id.*, 735 A.2d at 1047–48. When there is no express grant of authority to the agent to act for the principal, Maryland courts consider three factors in evaluating whether an actual agency relationship exists: (1) "the principal's right of control over the agent"; (2) "the agent's duty to act primarily for the benefit of the principal"; and (3) "the agent's power to alter the legal relations of the principal." *Id.* at 505–06, 735 A.2d at 1049. Under these factors, there is no agency relationship here beyond Dickerson's role as Bradley's fiduciary payee for his VA benefits.

One of the essential elements of agency, and the first factor to be considered as to actual agency, is control of the principal over the agent, *Shear v. Motel Mgmt. Corp. of Am.*, 61 Md. App. 670, 687–88, 487 A. 2d 1240, 1248–49 (1985), and Bradley asserted no control over Dickerson. As the trial court noted, "the principal's control over the result or ultimate objective is essential," and Bradley did not exercise any ascertainable control over Dickerson. (E 21). And although the trial court held that there was sufficient control to establish agency, it cited nothing in the record to justify that conclusion.

The trial court also stated that "Ms. Dickerson acted as Mr. Bradley's power of attorney. . . . Ms. Dickerson held the power to alter Mr. Bradley's legal relations and did so repeatedly by signing binding legal documents on his behalf." (E 22). But under Maryland law, one cannot acquire the authority of a power of attorney—the power to

alter another's legal relations by signing binding legal documents on his or behalf—merely by acting as if one has that authority. Rather, "[p]owers of attorney, which create a principal-agent relationship, are *written documents* by which one party, a principal, appoints another as attorney-in-fact and confers upon the latter authority to perform specified acts on behalf of the principal." *Figgins*, 403 Md. at 415, 942 A.2d at 749–50 (emphasis added). Thus, a power of attorney, is, by definition, a *written* instrument, and it is undisputed that Bradley executed no power of attorney.

Because the grant of a power of attorney is a momentous delegation of legal rights, it is "well-settled" in Maryland "that powers of attorney 'are strictly construed as a general rule and [are] held to grant only those powers which are clearly delineated[.]'" *King v. Bankerd*, 303 Md. 98, 105, 492 A.2d 608, 611 (1985) (quoting *Posner v. Bayless*, 59 Md. 56 (1882)) (alterations in original). Powers of attorney are "very carefully drafted and scrutinized," and "courts give the terms used a technical rather than a popular meaning" and "discount or disregard . . . all-embracing expressions found in powers of attorney." *Id.* at 106, 492 A.2d at 612. Under Maryland law, powers of attorney are construed extremely narrowly; they confer only the smallest scope of power necessary for the execution of the agent's duties. *Id.* at 108, 492 A.2d at 613. Dickerson had only limited authority, under a written instrument, to endorse and deposit Bradley's VA benefit checks and that authority must be construed narrowly. *See id.* at 112, 492 A.2d at 614 (holding that a power of attorney authorizing an agent to convey, grant, bargain, or sell property did not authorize the agent to gift the property). Thus, authority to waive Bradley's legal rights cannot be inferred from her authorization to deposit his VA benefits checks.

And in the admissions documents themselves, Dickerson indicated only that she was acting as Bradley's agent or power of attorney in the portions explicitly referencing her control over Bradley's income. For example, Dickerson signed the "Financial Agreement With St. Thomas More" on Bradley's behalf, and the agreement

explained that, "This contract is between Heritage Care, Inc. . . . and Carman Dickerson . . . because you have access to (use, management, or control of) the income, funds and/or assets of Carter Bradley." (E 129). At the end of that same form, Dickerson indicated that she was signing it "As a family member or other person with the authority to manage, use or control the Resident[']s income funds and/or assets" and "As a financial Power of Attorney." (E 142).

The Nursing Home Bill of Rights anticipates that nursing homes will try to bind family members to agreements and expressly prohibits nursing homes from soliciting signatures from nonresidents absent written documentation, from a court or physician, that the resident is incapacitated. MD. CODE ANN. HEALTH-GEN. § 19-344(b). When nonresidents do sign admissions documents as "agents," the statute limits the liability and responsibility of those agents to managing the financial affairs of the resident. *Id.* § 19-344(c). In language incorporated by Heritage Care's Financial Agreement, the Nursing Home Bill of Rights defines "agent" as "a person who manages, uses, or controls the funds or assets that legally may be used to pay the applicant's or resident's share of costs or other charges for the facility's services." *Id.* § 19-344(c)(1). Thus, the Legislature has determined that, in the context of nursing-home agreements, agency is limited to control of the resident's finances. The Court of Appeals has held that this statute means that when a family member signs a financial agreement on behalf of a nursing home resident, that "agent's responsibility is limited to the administration and management of the resident's funds." *Walton*, 391 Md. at 667, 894 A.2d at 598. In short, the Legislature has carefully circumscribed the authority of financial agents in precisely this context and that authority does not extend to waiver of residents' constitutional rights, or even to healthcare decisions. (E 135). Therefore, even if Dickerson appropriately signed the admissions documents as Bradley's financial agent, that agency was limited, by statute, to authority over the funds being used to pay for Bradley's care.

By inferring that Dickerson holds power to act on Bradley's behalf in all legal matters, not just financial ones—power equivalent to the broadest possible power of attorney—just because Dickerson held herself out as Bradley's attorney-in-fact and Bradley failed to object, the trial court's holding undermines the Legislature's careful limits on the ability of a person to act as the attorney-in-fact for another. *See Hendrix*, 2007 WL 4523876, at *7 ("Nursing Home is not entitled, as it suggested at oral argument, to simply 'rely upon someone who comes in and says, "I'm the POA. I have the authority . . . Let me sign the documents."'").

D. Dickerson Lacked Apparent Authority to Waive Bradley's Right to a Jury Trial.

The trial court's memorandum did not reach the issue of whether, if Dickerson was not Bradley's actual agent, Dickerson had apparent authority to waive Bradley's right to a jury trial. Heritage Care, however, argued below that Dickerson was Bradley's apparent agent in the eyes of the nursing home because Dickerson had held herself out as Bradley's attorney-in-fact. But "[u]nder the equitable doctrine of apparent authority, a principal will be bound by the acts of a person purporting to act for him when 'the words or conduct of the *principal* cause the third party to believe that the principal consents to or has authorized the conduct of the agent.'" *Jackson*, 180 Md. App. at 566, 952 A.2d at 322 (quoting *Johns Hopkins Univ. v. Ritter*, 114 Md. App. 77, 96, 689 A.2d 91, 100 (1996)) (emphasis added); *see Chevron*, 319 Md. at 34, 470 A.2d at 845. This description of apparent agency—rooted in the purported *principal's* conduct toward the third party, not the purported *agent's* conduct—is mirrored by Restatement: "Apparent authority results from a manifestation by a person that another is his agent, the manifestation being made to a third person and not, as when authority is created, to the agent." RESTATEMENT (SECOND) OF AGENCY § 8 cmt. a (1958).

Thus, to establish apparent authority, Heritage Care must show that *Bradley's*

conduct led Heritage Care to reasonably believe that Dickerson was Bradley's agent. There is no support in the record for that conclusion. *See Chevron*, 319 Md. at 34, 470 A.2d at 845. The nursing-home-admissions coordinator testified that she did not speak with Bradley until days *after* the admissions process was complete. (E 58, 60, 64). The admissions coordinator instead gleaned Dickerson's name from the VA records and went straight to her without consulting Bradley at all. (E 60). And, because Bradley was placed on a gurney in the hallway on his arrival and left there throughout the admissions process, his conduct could not have given rise to Heritage Care's reasonable belief that Dickerson was his agent. (E 81–82). Because of the complete lack of evidence that Bradley gave Heritage Care any indication of any kind, the trial court opined during trial that there was no apparent agency here. (E 124).

Heritage Care nevertheless relies on the representations that Dickerson (the purported agent) made to the nursing home and to prior medical facilities. Dickerson's actions and representations, however, are irrelevant to the legal question of apparent authority because, as explained above, the relevant inquiry concerns the *principal's* manifestations to the third party. Thus, courts have rejected claims that a family member has apparent authority to bind a resident to a nursing-home arbitration agreement absent some indication from the purported principal—the resident—that the family member was acting as an agent. *E.g.*, *Farish*, 982 So. 2d at 384–85. For example, in *McFarlan*, the Mississippi Court of Appeals rejected the argument, indistinguishable from Heritage Care's argument below, that because the family member who signed the agreement held herself out as the resident's agent, there was apparent authority. *See* 995 So. 2d at 781–82 ("There is no proof of any action taken by [the resident], as principal, to show that an agency relationship existed when [her granddaughter] signed the agreement. Therefore, no evidence of apparent authority is shown here because the acts or conduct indicating the authority of the agent must be made by the principal."). And in *Warfield*, the court specifically held that the

resident's failure to object to her husband's holding himself out as her agent was insufficient to establish apparent agency. 69 Cal. Rptr. 3d at 448. In short, courts agree that "a person cannot become the agent of another person merely by representing (himself or) herself as such." *Phillips*, 2008 WL 21101478, at *4.[6]

We are aware of only two courts that have relied on apparent agency as a basis for upholding a nursing-home arbitration agreement, but those cases are inapplicable to the facts at hand and, in any event, cannot be reconciled with the Maryland Nursing Home Bill of Rights, the Maryland Healthcare Decisions Act, or common-law agency principals recognized by Maryland courts. As such, they should rejected. First, *Broughsville v. OHECC, LLC* upheld an arbitration agreement signed by the resident's daughter when the competent resident was, unlike Bradley, present and aware at the signing of the arbitration agreement, and her daughter signed the agreements only because the mother was physically unable to do so. 2005 WL 3483777 (Ohio Ct. App. Dec. 21, 2005). Second, *Carraway v. Beverly Enterprises Alabama, Inc.*, relying on grounds even further afield from traditional agency principles, found apparent authority not on the actions of the purported principal at the time of the signing of the agreement, but on the resident's executing a power of attorney *after* her admission to the nursing home. 978 So. 2d 27 (Ala. 2007); *see also Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004) (holding daughter's signature as "guardian/sponsor" bound resident without discussing agency at all). *But see Noland Health Servs., Inc. v. Wright*, 971 So. 2d 681, 687 (Ala. 2007) (explaining that, in *Owens*, "there was no issue regarding the authority of either signatory/personal representative to execute the agreement on behalf of his or her admittee" and

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[6] *Accord Poole*, 648 S.E.2d at 432–33; *Flores*, 55 Cal. Rptr 3d at 828; *Crowdus*, 2008 WL 2852881, at *2–*5; *Thornton*, 2008 WL 2687697, at *5–*8; *Hendrix*, 2008 WL 4523876, at *5.

declining to uphold nursing-home-arbitration agreement). Although these cases found apparent agency, they depart from settled principals of agency law recognized by the Maryland courts and did not consider any healthcare-decisions statutes. Accordingly, they are entitled to no weight in this case.

II. HERITAGE CARE'S ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE IT IS IMPERMISSIBLY ONE-SIDED.

A. An Arbitration Agreement That Gives One Party Complete Control Over Arbitrator Selection Is Fundamentally Unfair and One-Sided and Is Therefore Unenforceable.

1. The agreement here is so one-sided as to be unconscionable under Maryland law.

Heritage Care's arbitration agreement provides that Heritage Care will unilaterally select the sole arbitrator from a list created by Heritage Care. The arbitrator-selection clause is unreasonably favorable to the nursing home because the nursing home is in complete control of choosing the adjudicator of the dispute, thereby subjecting the resident to a procedure that "inherently lacks neutrality," *McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 (6th Cir. 2004), and deprives the resident of "equitable dispute resolution," *Ditto v. RE/MAX Preferred Props., Inc.*, 861 P.2d 1000, 1004 (Okla. Ct. App. 1993). Thus, even if the arbitration agreement is binding on Bradley and his estate, because of this provision, it is unconscionably one-sided and therefore unenforceable.

The Maryland Court of Appeals has recognized that an arbitration agreement may be so one-sided and unfair as to render it unconscionable and unenforceable. *Green*, 355 Md. at 425–27, 735 A.2d at 743–44. In doing so, the court has described unconscionable contracts as those in which the terms "are unreasonably favorable to the more powerful party" when those "unreasonably and unexpectedly harsh terms having nothing to do with price or other central aspects of the transaction." *Id.* at 426, 735 A.2d at 744 (quoting 8 Richard A. Lord, *Williston on Contracts* § 18:10 (4th ed.

1998)). Here, it is undisputed that the terms of the arbitration agreement were not actually negotiated by the parties, nor was the method by which an arbitrator was to be chosen a "central aspect" of the contract—whose fundamental purpose, after all, was to provide for Bradley's care in the nursing home. Requiring a party to arbitrate in such a non-neutral forum is also contrary to the spirit of arbitration as envisioned by the Maryland rules. *See* Md. Rule 17-102(b) (defining arbitration as a process in which the parties appear before "impartial arbitrators").

Review and invalidation of arbitration agreements for unconscionability is consistent with the Maryland Uniform Arbitration Act (MUAA) and the Federal Arbitration Act (FAA). Because the MUAA mirrors the FAA, Maryland courts rely on decisions interpreting the FAA in analyzing cases involving arbitration. *Walther*, 386 Md. at 423–24, 872 A.2d at 742. Although the FAA evinces a policy in favor of enforcing arbitration agreements, "generally applicable contract defenses such as fraud, duress or unconscionability may be applied to invalidate arbitration agreements without contravening [the FAA]." *Doctors' Assocs, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see* 9 U.S.C. § 2; MD. CODE ANN. CTS. & JUD. PROC. § 3-206(a).

The question here—whether an arbitration agreement that places complete control over the arbitrator-selection process in the hands of the drafting party is unconscionably one-sided—is an issue of first impression in the Maryland courts, but the Court of Appeals has declined to enforce other one-sided arbitration clauses. In *Cheek v. United Healthcare of the Mid-Atlantic, Inc.*, the court refused to enforce an arbitration agreement between an employer and an employee in which the employer could revoke or change the terms of the arbitration agreement at any time. 378 Md. 139, 835 A.2d 656 (2003). *Cheek* reasoned that because one party could unilaterally revoke or alter the terms, the agreement was illusory for lack of consideration. *Id.*, 378 Md. at 149–50, 154, 835 A.2d at 662–63, 665 (relying on *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000)). Although we do not contend that the

arbitration agreement here is illusory, *Cheek* highlights the one-sidedness of permitting the drafting party to have unilateral control over key aspects of the arbitration. Because the arbitrator would be selected exclusively by the nursing home and have exclusive control over the procedures of the arbitral forum, as in *Cheek*, the nursing home is effectively in control of all the rules and the format of the arbitral forum, which are not specified in the agreement. Because Maryland law recognizes that an arbitration agreement may be so one-sided as to be unconscionable or illusory and because this arbitration agreement places unilateral control over the arbitrator—and by extension the arbitral forum—in the hands of the nursing home, it is unenforceable under Maryland law.

2. Every court to consider this question in the consumer or employment context has concluded that such an agreement is unenforceable.

The United States Supreme Court has held that an arbitral forum in which the more powerful party has unilateral control over the selection of the arbitrator, even when the pool of potential arbitrators is neutral, lacks the minimum necessary impartiality to effectively vindicate constitutional rights. *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 308 (1986). The Court held that the labor arbitration at issue would be permissible, but only "so long as the arbitrator's selection did not represent the Union's unrestricted choice." *Id.* at 308 n.21 (emphasis added); *see Tierney v. City of Toledo*, 824 F.2d 1497, 1507 (6th Cir. 1987) (following *Chicago Teachers Union*, 475 U.S. at 308 n.21). In *Chicago Teachers Union*, as here, the challenge was to the selection *process*, not to the bias of a particular arbitrator, and the Court held that the *process* of selection was one-sided without regard to whether a particular arbitrator was biased. 475 U.S. at 308. And there, at least the pool from which the arbitrator was selected was a neutral group of state agency-approved arbitrators, *id.* at 296, whereas here, Heritage Care also has unilateral control over the

pool of potential arbitrators who need only be "certified" in alternative dispute resolution—a term that is defined in neither the contract nor state law.[7]

Similarly, every federal appeals court to consider an arbitral mechanism in which one party has sole control over the selection or pool of arbitrators has held that such control "renders the arbitral forum so fundamentally unfair as to prevent [parties] from effectively vindicating [their] statutory rights." *McMullen*, 355 F.3d at 490, 494. In *McMullen*, the employer had unilateral control in creating a pool of potential arbitrators, each of whom had to be an attorney, unaffiliated with the company, recognized as a neutral and experienced labor-and-employment arbitrator, and listed on the national rosters of arbitration organizations. *Id.* at 488. Despite these supposed indicia of independence, the Sixth Circuit held that the employer's unilateral control of the pool of arbitrators "inherently lack[ed] neutrality" and could not be enforced. *Id.* at 494. *McMullen* noted that "fair and impartial 'arbitration rules . . . provide protections against biased panels.'" *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991)).

Similarly, in *Hooters of America, Inc. v. Phillips*, the Fourth Circuit refused to enforce a one-sided arbitration agreement between an employee and an employer. 173 F.3d 933 (4th Cir. 1999). Hooters's procedures "provide[d] a mechanism for selecting

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[7]Various entities offer "certification" through online alternative-dispute-resolution courses. To be certified, an individual typically need only complete about forty hours of online training, and, in some cases, need not have a *high school* diploma, much less a college or law school degree. *E.g.* Arizona Department of Education, Arizona HEAT, 5187 - Alternative Dispute Resolution Online Certification Course, http://www.ade.az.gov/arizonaHEAT/Courses/Program_Information.asp?County=&city=&category=&ID=5187&returnP=1&Ptype= (last visited Mar. 5, 2009) (offering a seven-week online course for $600 with no prerequisites and not requiring a high school diploma); The Center for Legal Studies, Alternative Dispute Resolution Certificate Course, http://www.legalstudies.com/courses/alternativedispute.html (last visited Mar. 5, 2009) (offering a 42-hour online course for $500-$600 and requiring only a high school degree).

a panel of three arbitrators that [was] crafted to ensure a biased decisionmaker": Just as in this case, Hooters maintained the list of potential arbitrators. *Id.* at 938–39. The Hooters selection method was actually less one-sided than that outlined in Heritage Care's agreement because Hooters and the employee each selected an arbitrator from the pool and those two arbitrators selected the third, whereas here, Heritage Care both maintains the list and selects the sole arbitrator from it.[8] *Id.* Although the Hooters procedures were egregious for a number of other reasons, including lopsided filing requirements and Hooters's ability to alter the agreement at any time, the court stressed that the most important factor was Hooters's unilateral control over the arbitration panel. *Id.* at 940; *see also Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 302–03 (4th Cir. 2002) (relying on *Hooters* in declining to enforce an agreement under which the arbitrator would be chosen via alternate strike from a list of arbitrators created by the employer).

State appellate courts have also uniformly held that one-sided arbitrator-selection clauses in consumer and employment contracts are unconscionable. In *Vincent v. Schneider*, for example, the Missouri Supreme Court held unconscionable an arbitration clause in a contract between a homeowner and homebuilder under which the president of the local homebuilders association selected the arbitrator. 194 S.W.3d 853, 859 (Mo. 2006). The Missouri court explained that this procedure was unacceptable because "[i]t require[d] that an individual in a position of bias be the sole selector of an arbitrator, who must be unbiased." *Id.* The West Virginia Supreme Court of Appeals likewise has described processes in which one party designates the decisionmaker as "an impermissible structural unfairness," whether in the context of

[8]Although one of the experts quoted in the Fourth Circuit's opinion stated that "[i]t would be hard to imagine a more unfair method of selecting a panel of arbitrators" than that used by Hooters, it would seem that Heritage Care has achieved just that. *Hooters*, 173 F.3d at 939.

a judicial or arbitral forum, and has held that such processes are never enforceable. *Dunlap v. Berger*, 567 S.E.2d 265, 280 n.12 (W. Va. 2002); *Toppings v. Meritech Mortgage Servs., Inc.*, 569 S.E.2d 149, 149 (W. Va. 2002) (per curiam).

Likewise, the Supreme Court of California held that, in a music-promotion contract, an arbitration clause under which a member of the union of one of the parties would serve as the arbitrator was unconscionable and unenforceable, because it failed to meet the "minimum levels of integrity" required in binding alternative dispute resolution fora. *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 177 (Cal. 1981). Although the arbitration agreement here provides only that one party selects the arbitrator, not that the arbitrator be closely associated with one of the parties, nothing in Heritage Care's agreement prevents Heritage Care from selecting one of its own managers or a member of an industry group. *See Hooters*, 173 F.3d at 939 ("Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision maker would be a surprising result."). Finally, in *Ditto*, the Oklahoma Court of Appeals held unenforceable a RE/MAX employment contract in which RE/MAX managers selected RE/MAX sales agents to serve on the arbitration panel, explaining that "an arbitration clause [that] would exclude one of the parties from any voice in the selection of arbitrators cannot be enforced. Such a clause conflicts with our fundamental notions of fairness, and tends to defeat arbitration's ostensible goals of expeditious and equitable dispute resolution." 861 P.2d at 1004.

Faced with this overwhelming authority, the trial court was able to cite only two cases for the proposition that the unilateral control of one party over the arbitrator-

selection process does not render an arbitration agreement unenforceable. (E 25 n.4). Both are inapposite because they involved commercial agreements between sophisticated parties, a fact that was integral to their reasoning. First, in *Westinghouse Electric Corp. v. New York City Transit Authority*, the New York Court of Appeals upheld an arbitration clause that provided that the arbitrator would be the superintendent of the transit authority. 623 N.E.2d 531, 532 (N.Y. 1993). In reaching that conclusion, the court stressed that the agreement was a multimillion-dollar arm's-length commercial transaction between two sophisticated parties, a large corporation and a government agency:

> Westinghouse chose, with its business eyes open, to accept the terms, specifications and risks of the bid contract, including the ADR clause. . . . Without doubt, Westinghouse understood the implications of the ADR clause prior to undertaking its business and legal risks under the whole of the multimillion dollar agreement. . . . The bedrock of the doctrine of unconscionability is the prevention of oppression and unfair surprise and not of disturbance of the allocation of risk. Thus, where as here, the parties are dealing at arm's length with relative equality of bargaining power, they ought to be left to themselves.

Id. at 534–35 (citations and quotations omitted). Because *Westinghouse* was squarely rooted in the commercial nature of the contract and the equal bargaining power of the parties, it is inapplicable where, as here, a form arbitration agreement is foisted on a consumer in the course of a nursing-home admission—a situation that, as Maryland's Court of Appeals and Legislature have recognized, provides individuals little opportunity to carefully read and negotiate. *Walton*, 391 Md. at 665, 894 A.2d at 597.

Second, in *Hottle v. BDO Seidman, LLP*, the court, applying New York law and relying heavily on *Westinghouse*, upheld an arbitration provision in an accounting-firm partnership agreement that stipulated the arbitration panel would consist of five of the firm's partners. 846 A.2d 862, 865 (Conn. 2004). As in *Westinghouse*, the contract in *Hottle* was between financially sophisticated parties, and it thus is materially different

from Heritage Care's consumer form contract.[9] In sum, no published decision has upheld a consumer contract in which one party has unilateral control over the pool of possible arbitrators or selection of the arbitrator.

3. Because the arbitrator controls every aspect of the arbitration, neutral arbitrator-selection procedures are critical to ensure a neutral arbitral forum.

A neutral method for selecting an impartial arbitrator is important not only because the arbitrator makes the final decision, but also because where, as here, the arbitration agreement does not specify the arbitration rules, the arbitrator chooses the rules and, if the parties cannot agree, the location of the hearing. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-213(a)(1). Here, Heritage Care's arbitration agreement could have specified that a nationally recognized set of neutral procedural rules would govern the arbitration, but it is instead silent, leaving such decisions to an arbitrator hand-selected by one of the parties.

For example, the arbitrator could impose unconscionably restrictive discovery rules, severely curtailing the parties' ability to take depositions. *E.g.*, *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 387 (6th Cir. 2005) (parties limited to one deposition of right); *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 545 (E.D. Pa. 2006) (nursing-home resident only permitted to depose the nursing home's experts—the resident could not depose any other witnesses or nursing home employees). Or, the arbitrator could impose an unconscionable "loser pays" or fee-

[9]In our view, *Hottle* is incorrect, as courts in other states analyzing the same contract under New York law have concluded. *BDO Seidman v. Miller*, 949 S.W.2d 858 (Tex. Ct. App. 1997); *Buhrer v. BDO Seidman, LLP*, 16 Mass. L. Rptr. 551 (Mass. Super. Ct. 2003). And a treatise on consumer arbitration agreements has described *Hottle* as at the "outer limit of what a court may tolerate with respect to incentives for arbitral bias," even in cases between sophisticated parties in commercial ventures. CONSUMER ARBITRATION AGREEMENTS 5TH ED., NAT'L CONSUMER LAW CTR. 154 (2007).

splitting scheme, making it effectively impossible for ordinary consumers, such as Bradley, to arbitrate. *E.g.*, *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269 (3d Cir. 2004) ("loser pays" provision unconscionable); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212 (3d Cir. 2003) (fee-splitting provision unenforceable); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (en banc) (same); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.2d 766, 768 (Idaho 2003) ("loser pays" provision unconscionable); *Sosa v. Paulos*, 924 P.2d 357, 362 (Utah 1996) (same).

The agreement also provides that if the parties cannot agree on a location, the arbitrator will select one. When the arbitrator is not impartially selected, the arbitrator has an incentive to choose a location that is convenient to one party but effectively inaccessible to the other, which would itself be unconscionable. *See, e.g.*, *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1292 (9th Cir. 2006) (en banc); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 940 (9th Cir. 2001); *Bragg v. Linden Research*, 487 F. Supp. 2d 593, 610 (E.D. Pa. 2007); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002); *Hagehorn v. Veritas Softare Corp.*, 250 F. Supp. 2d 857, 862 (S.D. Ohio 2002); *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003).

The *Hooters* and Ryan's Family Steak Houses cases highlight the one-sided rules that can result from permitting a unilaterally selected arbitrator or a party to select the rules, rather than designating those rules in the agreement itself. In *Hooters*, the rules were promulgated by Hooters, were not part of the agreement itself, and could be unilaterally changed by Hooters without notice to the employee. *Hooters*, 173 F.3d at 936, 939. The result was rules that, to be charitable, favored Hooters. Not only did Hooters have unilateral control over the pool of arbitrators, but the rules also imposed onerous notice and filing requirements on the employee, but not on Hooters; permitted Hooters, but not the employee, to expand the scope of the

arbitration once it had commenced; permitted Hooters, but not the employee, to move for summary judgment; permitted Hooters, but not the employee, to record the proceedings; and permitted Hooters, but not the employee, to challenge the arbitral award under a preponderance-of-the-evidence standard. *Id.* at 938–39. Nothing in Heritage Care's arbitration agreement would prevent the arbitrator from imposing one-sided rules like these. And while, unlike in *Hooters*, Heritage Care itself would not be promulgating the forum's rules, the rules would be designed by Heritage Care's hand-picked arbitrator.

The arbitration system in the Ryan's Family Steak Houses cases was even more analogous to this one: Ryan's contracted with a single firm, Employment Dispute Services, Inc. (EDSI), to arbitrate all of its employment disputes. *Floss*, 211 F.3d at 309–10. EDSI had complete control over the rules and procedures and could modify them at any time without the employee's consent. *Id.* at 310. Besides EDSI's maintenance of the list of potential arbitrators, *Walker*, 400 F.3d at 376, its procedures required the employee to split the potentially prohibitive cost of arbitration with the employer, *Floss*, 211 F.3d at 314, and limited each party to one deposition, *Walker*, 400 F.3d at 387. Again, nothing in Heritage Care's agreement would preclude its selected arbitrator from creating and applying equally one-sided rules.

B. Heritage Care's Arbitration Agreement Also Bars Non-Compensatory Damages and Demands Secrecy.

Heritage Care's arbitration agreement also prohibits the arbitrator from awarding punitive and other non-compensatory damages and requires that the very existence of the arbitration be kept secret. Though not directly at issue in this appeal, courts around the country have held that it is unconscionable, in the consumer context, to include a waiver of remedies authorized by common law or statute. *E.g.*, *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178–79 (9th Cir. 2003); *Morrison*, 317 F.3d at 670–74; *In re Poly-Am.*,

L.P., 263 S.W.3d 337, 352 (Tex. 2008); *Vicksburg Partners, LP v. Stephens*, 911 So. 2d 507, 523–24 (Miss. 2005) (nursing-home-admissions agreement); *Dunlap*, 567 S.E.2d at 280; *Cavalier Mfg. v. Jackson*, 823 So. 2d 1237, 1248 (Ala. 2001); *Alterra Heathcare Corp. v. Linton*, 953 So. 2d 574, 578 (Fla. Ct. App. 2007) (nursing-home-admissions agreement). The waiver of non-compensatory punitive damages is unconscionable in form consumer contracts because "*every . . . customer* is deprived of their right to invoke and employ an important remedy provided by law to punish and deter illegal, willful, and grossly negligent misconduct—and [the defendant] would be categorically shielded from any liability for such sanctions, regardless of [the defendant's] level of wrongdoing." *Dunlap*, 567 S.E.2d at 278 (emphasis in original). In other words, by including a waiver of punitive damages in all its form consumer contracts, a business can circumvent substantive law intended to deter egregious conduct. *See Poly-America*, 262 S.W.3d at 352.

Heritage Care's arbitration agreement also contains an extremely broad secrecy clause. Such clauses have been deemed unconscionable in form consumer and employment arbitration agreements because they provide the repeat player with access to precedent, which the repeat player (here, Heritage Care) can use to inform its actions, without doing the same for the individual consumer. *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007); *Ting v. AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003) (citing *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1476 (D.C. Cir. 1997)); *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 765 (Wash. 2004); *Sprague v. Household Int'l*, 473 F. Supp. 2d 966, 974 (W.D. Mo.); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1181–82 (Ohio Ct. App. 2004).

In sum, although only the arbitrator-selection clause is directly at issue in this case, Heritage Care's arbitration agreement is riddled with potentially unconscionable clauses and should be held unenforceable in its entirety. *See Davis*, 485 F.3d at 1084

(declining to sever arbitration clauses when unconscionability "permeated" the arbitration agreement); *Ingle*, 328 F.3d at 1180 (declining to sever an agreement's numerous unconscionable provisions because they displayed an "insidious pattern" of unconscionability); *Toppings*, 569 S.E.2d at 149; *Dunlap*, 567 S.E.2d at 284. Even with only an unconscionable arbitrator-selection clause, however, the agreement is still unenforceable in its entirety. *Murray*, 289 F.3d at 306.

CONCLUSION

Because Heritage Care's arbitration agreement is unenforceable, the trial court's decision should be reversed, and Heritage Care's petition for an order to arbitrate should be dismissed.

Respectfully submitted,

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Dated: April 6, 2009
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PERTINENT STATUTES

MARYLAND NURSING HOME BILL OF RIGHTS

MD. CODE ANN. HEALTH-GEN. § 19-344.
Procedures for compliance.

(b) *Application or contract for admission.*

(1) A facility may not require or solicit, as a condition of admission into the facility, the signature of another person, other than the applicant, on the application or contract for admission to the facility, unless:

(i) The applicant is adjudicated disabled under Title 13, Subtitle 7 of the Estates and Trusts Article; or

(ii) 1. The applicant's physician determines that the applicant is incapable of understanding or exercising the applicant's rights and responsibilities; and

2. The applicant's physician records, in the applicant's facility record, the specific reasons for the determination.

(2) If, in addition to the signature of an applicant, a facility requires the signature of another person on the application or contract for admission to the facility in accordance with the provisions of paragraph (1) of this subsection, the facility shall provide a written statement to be included in the document of the rights, duties, and liabilities of the signer of the document.

(3) (i) A facility may request an applicant for whom a second signature cannot be required or solicited under paragraph (1) of this subsection to execute valid durable powers of attorney designating an attorney in fact to make financial, medical, funeral, and burial decisions in the event of the applicant's disability.

(ii) A facility may not require the execution of a durable power of attorney as a condition or requirement of admission to the facility.

(c) *Duties and Rights of Applicant's Agent.*

(1) In this subsection "agent" means a person who manages, uses, or controls the funds or assets that legally may be used to pay the

applicant's or resident's share of costs or other charges for the facility's services.

(2) Except as provided by the Department, a facility may not charge an applicant or resident who is a medical assistance beneficiary, or the applicant's or resident's agent, any amount in addition to the amounts determined by the medical assistance program for services that are covered by medical assistance.

(3) Unless otherwise agreed, the financial obligation of the applicant's or resident's agent is limited to the amount of the applicant's or resident's funds that are considered available to the agent by the medical assistance program.

(4) (i) A facility may require an applicant, a resident, or the agent of an applicant or resident to agree to distribute any funds, including income or assets of the applicant or resident, which the medical assistance program has determined to be available to pay for the cost of the applicant's or resident's care, to the facility, promptly when due, for the cost of the applicant's or resident's care.

(ii) For the purpose of this section, funds of the applicant or resident include funds of the applicant or resident that are under the use, ownership, management, or control of the agent.

(iii) A resident or agent of the resident who has not paid a current obligation for the resident's care may apply to the medical assistance program for a determination of the funds available to pay for the cost of the resident's care.

(iv) A resident or agent of the resident who has not paid a current obligation for the resident's care may apply to the medical assistance program for a determination of the funds available to pay for the cost of the resident's care.

(v) If a resident or agent of a resident who has not paid a current obligation for the resident's care fails to request a determination under subparagraph (iii) of this paragraph, the facility may, without requesting the appointment of a guardian, petition the appropriate circuit court for an order directing the resident or agent of the resident to request the determination with due diligence.

(vi) If a resident or agent of the resident fails to pay for the cost of the resident's care from funds that the medical assistance program has

determined to be available to pay for that care, the facility may, without requesting the appointment of a guardian, petition the appropriate circuit court for an order directing the resident or agent of the resident to pay the facility from the funds determined by the medical assistance program to be available.

(5) (i) An applicant, a resident, or the agent of an applicant or resident shall seek, on behalf of the applicant or resident, all assistance from the medical assistance program which may be available to the applicant or resident.

(ii) The facility shall cooperate with and assist the agent in seeking assistance from the medical assistance program on behalf of the applicant or resident.

(iii) If a resident or the agent of a resident fails to seek assistance from the medical assistance program or to cooperate fully in the eligibility determination process, a facility providing care to the resident may, without requesting the appointment of a guardian, petition the appropriate circuit court for an order requiring the resident or agent of the resident to seek assistance from the medical assistance program or to cooperate in the eligibility determination process with due diligence.

(6) (i) Any agent who willfully or with gross negligence violates the requirements of paragraph (4) of this subsection regarding the distribution of the applicant's or resident's funds is subject to a civil penalty not less than the amount of funds subject to the violation.

(ii) Any agent who willfully or with gross negligence violates the requirements of paragraph (5) of this subsection regarding an application for medical assistance by or on behalf of an applicant or resident is subject to a civil penalty not exceeding $10,000.

(iii) The Attorney General is responsible for the enforcement and prosecution of violations of the provisions of paragraphs (4) and (5) of this subsection.

(7) Nothing in this subsection may be construed to prohibit any person from knowingly and voluntarily agreeing to guarantee payment for the cost of an applicant's care.

MARYLAND HEALTH CARE DECISIONS ACT

MD. CODE ANN. HEALTH-GEN. § 5-601.
Definitions.

(b) "Advance directive" means:

(1) A witnessed written or electronic document, voluntarily executed by the declarant in accordance with the requirements of this subtitle; or
(2) A witnessed oral statement, made by the declarant in accordance with the provisions of this subtitle.

(c) "Agent" means an adult appointed by the declarant under an advance directive made in accordance with the provisions of this subtitle to make health care decisions for the declarant.

MD. CODE ANN. HEALTH-GEN. § 5-605.
Surrogate decision making.

(a) *Surrogate authorization.*

* * *

(2) The following individuals or groups, in the specified order of priority, may make decisions about health care for a person who has been certified to be incapable of making an informed decision and who has not appointed a health care agent in accordance with this subtitle or whose health care agent is unavailable. Individuals in a particular class may be consulted to make a decision only if all individuals in the next higher class are unavailable:

(i) A guardian for the patient, if one has been appointed;
(ii) The patient's spouse or domestic partner;
(iii) An adult child of the patient;
(iv) A parent of the patient;
(v) An adult brother or sister of the patient; or
(vi) A friend or other relative of the patient who meets the requirements of paragraph (3) of this subsection.

(3) A friend or other relative may make decisions about health care for a

patient under paragraph (2) of this subsection if the person:

(i) Is a competent individual; and

(ii) Presents an affidavit to the attending physician stating:

1. That the person is a relative or close friend of the patient; and

2. Specific facts and circumstances demonstrating that the person has maintained regular contact with the patient sufficient to be familiar with the patient's activities, health, and personal beliefs.

(4) The attending physician shall include the affidavit presented under paragraph (3) of this subsection in the patient's medical record.

* * *

(d) *Exclusions.* A surrogate may not authorize.

(1) Sterilization; or

(2) Treatment for a mental disorder.

MD. CODE ANN. HEALTH-GEN. § 5-606.
Certifications by physicians.

(a) *Certification of incapacity.*

(1) Prior to providing, withholding, or withdrawing treatment for which authorization has been obtained or will be sought under this subtitle, the attending physician and a second physician, one of whom shall have examined the patient within 2 hours before making the certification, shall certify in writing that the patient is incapable of making an informed decision regarding the treatment. The certification shall be based on a personal examination of the patient.

(2) If a patient is unconscious, or unable to communicate by any means, the certification of a second physician is not required under paragraph (1) of this subsection.

(3) When authorization is sought for treatment of a mental illness, the second physician may not be otherwise currently involved in the treatment of the person assessed.

(4) The cost of an assessment to certify incapacity under this subsection shall be considered for all purposes a cost of the patient's treatment.

(b) *Certification of condition.* A health care provider may not withhold or withdraw life-sustaining procedures on the basis of an advance directive where no agent has been appointed or on the basis of the authorization of a surrogate, unless:

(1) The patient's attending physician and a second physician have certified that the patient is in a terminal condition or has an end-stage condition; or

(2) Two physicians, one of whom is a neurologist, neurosurgeon, or other physician who has special expertise in the evaluation of cognitive functioning, certify that the patient is in a persistent vegetative state.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing Brief of Appellant were served via first class mail postage prepaid, this 6th day of April, 2009, on each of the following:

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