
**IN THE
COURT OF APPEALS OF MARYLAND**

No. 110
2009 Term

**CARMAN DICKERSON,
PERSONAL REPRESENTATIVE OF
THE ESTATE OF CARTER BRADLEY**
Petitioner,

v.

RICARDO LONGORIA, et al.
Respondents.

Appeal from the Circuit Court for Montgomery County
(The Honorable Ronald B. Rubin, Presiding)

REPLY IN SUPPORT OF CERTIORARI

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May 27, 2009

REPLY IN SUPPORT OF CERTIORARI

This appeal squarely presents two important and recurring questions with wide-reaching implications for consumer and employment cases generally, and for nursing-home cases in particular. Contrary to Heritage Care’s assertions, our petition does not constitute a “public policy assault on arbitration agreements.” Heritage Ans. at 6. We are *not* arguing that arbitration agreements (in the nursing home context or in any other context) can never be enforced. Rather, we agree that arbitration agreements, like any other contracts, are enforceable *if* they are validly entered into and not unconscionable. This case concerns whether an arbitration agreement meets those two basic prerequisites to the enforceability of *any* contract, under circumstances that are likely to be confronted with increasing frequency by the Maryland courts.

As to the first question—whether, and to what extent, a nursing home resident is bound by an arbitration agreement signed by someone else absent a power of attorney—Heritage Care does not deny that the issue is a recurring one that has yet to be addressed by Maryland’s appellate courts. Heritage Care correctly recognizes that the circuit court below, like courts in many other jurisdictions, applied general common-law agency principles. What Heritage Care fails to mention, however, is that the circuit court reached a conclusion contrary to that of the vast majority of other courts. *See* Dickerson Pet. at 9–10. That conflict should be resolved by this Court.

Heritage Care also contends that the Maryland Health Care Decisions Act, MD. CODE ANN. HEALTH-GEN. § 5-601, *et seq.*, and Maryland Nursing Home Bill of Rights, MD. CODE ANN. HEALTH-GEN. § 19-344, are irrelevant to the question presented. But that argument simply states Heritage Care’s position on the merits. If anything, the disagreement between the parties on this point demonstrates why this Court should grant review. No Maryland appellate court has weighed in on the

interaction between Maryland’s statutes governing agency in the nursing-home and healthcare contexts and common-law agency principles. And Heritage Care’s assertion that the statutes are irrelevant to the agency question in the nursing-home context is contrary to the holdings of numerous other courts in states with indistinguishable statutes. *See* Dickerson Pet. at 7–10. Once again, the conflict among the courts weighs in favor of review.

As to the second question—whether an arbitration agreement is unconscionable if it gives one party the power to unilaterally select the arbitrator—Heritage Care does not deny that no Maryland appellate court has ever addressed that important issue. Nor does Heritage Care dispute the fact that every other court to have addressed that question in the consumer or employment context has reached a conclusion contrary to the circuit court below. *See* Dickerson Pet. at 10. Instead, Heritage Care says that Maryland law requires both procedural and substantive unconscionability to be unenforceable. But, as we explain in our reply brief filed in court below (at 11-12), this is a misreading of Maryland law.¹ And to the extent that Maryland law is unclear on this point, that is yet another reason for this Court to grant review.

Finally, Heritage Care presents a new argument: that any application of the Health Care Decisions Act and Nursing Home Bill of Rights is preempted by the Federal Arbitration Act, 9 U.S.C. § 2. But the Federal Arbitration Act, by its own terms, yields to generally applicable contract law, and because these Maryland statutes are generally applicable to any contract a healthcare agent or surrogate might enter into, they are not preempted by the Federal Arbitration Act.

¹Dickerson’s Reply Brief filed in the Court of Special Appeals is attached.

In summary, this case presents an excellent vehicle for this Court to address two important and recurring questions of first impression, both of which have broad implications for access to justice in Maryland.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 27, 2009
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing Reply in Support of Certiorari were served via first class mail postage prepaid, this 27th day of May, 2009, on each of the following:

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