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)

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

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May 21, 2009

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INTRODUCTION

We are not arguing that arbitration agreements can never be enforced in the nursing-home context. When a nursing-home arbitration agreement is validly entered into by a competent resident or his or her legally authorized agent—such as an individual holding the resident's valid power of attorney—and that agreement is not unconscionable, it is enforceable against the resident and the resident's estate.

The issue at the heart of this appeal is whether Carman Dickerson was Carter Bradley's actual agent and thereby had authority to enter into the nursing home's arbitration agreement on his behalf. Heritage Care's entire argument on that issue consists of two paragraphs on pages 8–10 of its brief. In essence, Heritage Care argues that because, in the past, Bradley did not object to Dickerson having made some arrangements for his healthcare, Dickerson was authorized to waive Bradley's right to a jury trial when Bradley was admitted to Heritage Care. Under settled principles of agency, such a broad grant of authority cannot arise from Bradley's inaction, and Heritage Care's agreement therefore cannot be enforced against Bradley's estate.

Heritage Care is correct that arbitration agreements are to be treated like any other contract. Heritage Br. at 8. And, as explained in our opening brief (at 25), like any other contract, it must have been validly entered into to be enforceable and must yield to generally applicable contract defenses such as unconscionability. Here, as to unconscionability, Heritage Care has not produced a single case in which a court upheld a consumer or employment agreement allowing one side to hand-pick the arbitrator. As the case law universally holds, even if Dickerson was Bradley's agent and had the authority to bind him to an arbitration agreement, Heritage Care's arbitration agreement cannot be enforced because it is unconscionably one-sided.

I. DICKERSON WAS NOT BRADLEY'S AGENT.

The Circuit Court held that Dickerson was Bradley's agent for all purposes. Even if the facts are viewed in the light most favorable to Heritage Care, however, the facts do not support a finding of actual agency. The parties agree that an agency determination is generally a finding of fact subject to the clearly erroneous standard of review. Dickerson Br. at 9–10; Heritage Br. at 6–7. The clearly erroneous standard, however, does not apply to *legal conclusions* based on those findings, *Ins. Co. of N. Am. v. Miller*, 362 Md. 361, 372, 765 A.2d 587, 593 (2001), and a circuit court's application of Maryland agency law to the relevant facts is reviewed *de novo*, *Jackson v. 2109 Brandywine, LLC*, 180 Md. App. 535, 567, 952 A.2d 304, 323 (2008). Thus, when the underlying facts are undisputed, Maryland appellate courts have not hesitated to overturn a circuit court's misapplication of agency law to those facts. *E.g.*, *Miller*, 362 Md. at 374, 765 A.2d at 594; *Jackson*, 180 Md. App. at 567–68, 952 A.2d at 323.

A. Dickerson Was Not Bradley's Agent Under Well-Established Maryland Agency Law.

We do not dispute the relevant facts. Rather, our point is that the facts here do not give rise to actual agency under traditional principles of agency articulated in the Restatement of Agency and followed by the Maryland courts. *See Green v. H&R Block, Inc.*, 355 Md. 488, 503–04, 735 A.2d 1039, 1047–48 (1999) (following RESTATEMENT (SECOND) OF AGENCY (1958)). "Agency is the fiduciary relation which results from the *manifestation of consent* by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.* at 503, 735 A.2d at 1047 (quoting RESTATEMENT (SECOND) OF AGENCY § 1 (1958)) (emphasis added).

Heritage Care points to no evidence that Bradley manifested his consent for Dickerson to waive his right to a jury trial on his behalf. Heritage Care states only

that Bradley "acquiesced" to and "assumed" Dickerson's management of his medical affairs. Heritage Br. at 9. Nor does Heritage Care explain how Bradley exercised any control over Dickerson's actions. Rather, Heritage Care merely speculates that Bradley "exercised sufficient control" over Dickerson because he "could have" acted differently. *Id.* Bradley expressly authorized Dickerson to endorse and deposit his veterans' benefits checks, but Heritage Care does not explain why that very limited grant of authority authorized Dickerson to waive all of Bradley's legal rights. Instead, Heritage Care relies (at 9) on the fact that Dickerson represented to Heritage Care and other facilities that she held Bradley's power of attorney or was his legal guardian. How Dickerson portrayed herself, however, is irrelevant to the question of whether *Bradley consented* to such representations. It is undisputed that no court had appointed Dickerson as Bradley's legal guardian, and it is undisputed that Bradley executed no power of attorney (which must be in writing). Dickerson Br. at 18–19. Heritage Care's final argument (at 10) that "by signing [Heritage Care's] contracts on his behalf . . . clearly Appellant had the power to alter the legal relations of the principal" is circular. Furthermore, it ignores the fundamental characteristic of agency, which depends on manifestation of consent *by the principal.* As this Court has held, the conduct of a purported *agent*—even one who might reasonably be assumed to have the authority to act on the principal's behalf—does not support a finding of actual agency. *Jackson*, 180 Md. App. at 567–68, 952 A.2d at 323.

In *Jackson*, the decedent's girlfriend told the decedent's friend that she was the executor and legal representative of the estate and that the friend could pay her the mortgage payments that he owed the decedent. *Id.* at 547, 952 A.2d at 311. The friend knew that the decedent and his girlfriend had lived together and shared a bank account and did not ask the girlfriend for any documentation supporting her

assertions. *Id.* Because there was no evidence that either the decedent or the estate had authorized the girlfriend to act as an agent in receiving the mortgage payments—the girlfriend had not been appointed as executor or personal representative of the estate—this Court held that there was no agency. *Id.* at 567–68, 952 A.2d at 323.

As in *Jackson*, the alleged agent here, Dickerson, had a close personal relationship with the alleged principal and represented to a third party that she had the legal authority to act on the alleged principal's behalf. And without checking other documentation, the third party, Heritage Care, believed the alleged agent. In rejecting the argument that the girlfriend in *Jackson* was the estate's actual or apparent agent, this Court explained, "[r]ecognizing that neither [the decedent] nor the Estate expressly delegated authority to [the girlfriend], the [circuit] court inferred such a relationship solely from the actions of [the girlfriend]. The law is clear, however, that a principal-agent relationship must arise from the conduct of the principal, not the agent." *Id.* at 568, 952 A.2d at 323. Thus, Dickerson's representations about her authority to act on Bradley's behalf are irrelevant.

B. The Vast Majority of Other Jurisdictions to Have Considered Similar Factual Scenarios Would Find No Agency Here.

There are no Maryland appellate decisions examining the existence of principal-agent relationships in the nursing-home context. Because there are no Maryland decisions precisely on point, it is unremarkable—not "political" as Heritage Care contends (at 11)—that we have asked this Court to examine what other courts have concluded after applying basic agency principles to similar facts.

Nothing in Heritage Care's brief undermines Dickerson's characterization of the existing authority set out at pages 11–14 of our opening brief. For example, Heritage Care cites *In re Ledet*, but there, the court held that the son had authority to enter into arbitration and other admissions agreements on behalf of his parent

because the son was a surrogate healthcare decisionmaker under Texas's healthcare decisions statute. 2004 WL 2945699, at *4 (Tex. Ct. App. Dec. 22, 2004). Heritage Care insists (at 15), however, that an agreement to arbitrate in the nursing-home context is *not* a healthcare decision and that Maryland's equivalent healthcare decisions statute cannot confer the authority to enter into an arbitration agreement on behalf of another. Heritage Care cannot both rely on cases where authority was conferred by a healthcare decisions statute and argue that Maryland's Health Care Decisions Act should not apply here.[1]

C. Dickerson Was Not Bradley's Agent, Whether or Not An Agreement to Arbitrate Nursing-Home-Related Disputes Is a Healthcare Decision.

An agreement to arbitrate nursing-home-related disputes is either a healthcare decision or it is not. If such an agreement is a healthcare decision, then the Maryland Health Care Decisions Act, MD. CODE ANN. HEALTH-GEN. § 5-601 *et seq.*, applies and Dickerson could not have been Bradley's agent or surrogate healthcare decisionmaker with the authority to make decisions on Bradley's behalf. *See* Dickerson Br. at 15–17. Heritage Care does not contest that Dickerson did not

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[1]Furthermore, in all but one of the cases cited by Heritage Care on page 14 of its brief, agency was not even a contested issue. *See Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 285 (M.D.N.C. 2005) (hospital patient signed agreement); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 510 (Miss. 2005) (resident signed agreement); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 663 (Ala. 2004) (agency uncontested); *MN MedInvest, L.P. v. Estate of Nichols*, 908 So. 2d 1179, 1179 (Fla. Ct. App. 2005) (mother signed agreement on behalf of minor child); *Estate of Etting v. Regents Park at Aventura, Inc.*, 891 So. 2d 558, 558 (Fla. Ct. App. 2004) (resident signed agreement). The only case in which agency was actually contested is an outlier. *Carraway v. Beverly Enterprises Alabama, Inc.*, 978 So. 2d 27 (Ala. 2007), bucks the growing consensus that traditional agency principles cannot support a relative's authority to waive a resident's right to a jury trial absent a power of attorney or similar express authorization. *See* Dickerson Br. at 23.

fulfill the requirements to be a healthcare agent or surrogate decsionmaker under the statute. But if the agreement to arbitrate is *not* a healthcare decision, then Bradley could not have been bound by the arbitration agreement because there was no basis for a finding that any actual agency Dickerson may have had extended to non-healthcare decisions (such as a waiver of a right of access to the courts). Either way, Dickerson did not have the authority to enter into the arbitration agreement on Bradley's behalf.

Heritage Care's argument for actual authority is premised on Bradley's acquiescence in Dickerson's making past healthcare decisions on his behalf; neither the circuit court nor Heritage Care identify any action by Dickerson that was not a healthcare decision or expressly authorized by Bradley (*i.e.*, Dickerson's limited authority to endorse and deposit Bradley's veterans' benefits checks). None of the prior admission agreements Dickerson signed—which Heritage Care heavily relies on—contained an arbitration agreement. Heritage Care argues (at 15) that the agreement to arbitrate was not a healthcare decision and was separate from the healthcare decision to admit Bradley to the nursing home. Yet Heritage Care relies exclusively on Bradley's failure to object to Dickerson making *healthcare* decisions on his behalf. There is no evidence that Bradley also would have acquiesced in Dickerson's waiving his jury trial rights and sending his claims to arbitration. And it is undisputed that Bradley did not see or know about the Heritage Care arbitration agreement.

As one court held, "the 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." *Goliger v. AMS Props., Inc.*, 19 Cal. Rptr. 3d 819, 820–21 (Cal. Ct. App. 2004). In holding that a daughter's acting on behalf of her mother in healthcare matters did not authorize the daughter to enter into an arbitration agreement on her mother's behalf, that court explained, "[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 make medical decisions for her." *Id.* In other words, if agreeing to arbitrate nursing-home claims is not a healthcare decision, past healthcare decisionmaking cannot support an authorization to enter into an arbitration agreement. Dickerson Br. at 13–14 (citing cases).

II. HERITAGE CARE'S ALTERNATIVE ARGUMENTS ALSO FAIL TO ESTABLISH THAT HERITAGE CARE'S ARBITRATION AGREEMENT BINDS BRADLEY AND HIS ESTATE.

Heritage Care raises a grab-bag of alternative arguments. None supports a finding that Bradley is bound by Heritage Care's arbitration agreement.

First, although a genuine third-party beneficiary may be bound by an arbitration agreement, Bradley is not a third-party beneficiary because there was no valid underlying arbitration agreement. *Ricketts v. Christian Care Ctr. of Cheatham County, Inc.*, 2008 WL 3833660, at *4 (Tenn. Ct. App. Aug. 15, 2008) ("Third party beneficiary concepts should not be used to circumvent the threshold requirement that there be a valid arbitration agreement."). Dickerson signed Heritage Care's agreement only as Bradley's purported representative. Because Dickerson did not have the authority to enter into the arbitration agreement as Bradley's representative, that means there is no valid contract, not that there is an arbitration agreement between Dickerson and Heritage Care under which Bradley could be a third-party beneficiary. *See Grenada Living Ctr., LLC v. Coleman*, 961 So. 2d 33, 38 (Miss. 2007) (rejecting third-party beneficiary argument in the nursing-home context); *Ricketts*, 2008 WL 3833660, at *4 ("Without a valid contract, there can be no third party beneficiary."). Indeed, if Heritage Care's argument were correct, then any dispute about whether a purported agent had the authority to bind a purported principal to a contract would result in the principal

being bound as a third-party beneficiary, in effect negating the need for an agency relationship.

Second, Heritage Care contends that Bradley's estate is estopped from resisting enforcement of the arbitration agreement because Dickerson happens to have signed the agreement, be the personal representative of the estate, and be an heir.[2] Heritage Care, however, cites no authority for circumventing the distinction between an individual acting in her personal capacity and in her capacity as the representative of an estate, a distinction that is more than formalistic. As the personal representative of the estate, Dickerson has a fiduciary duty to act in the best interest of the estate—a duty that may not square with her personal interests as an heir. *See* MD. CODE ANN. EST. & TRUSTS § 7-101(a).

As Heritage Care points out (at 19), equitable estoppel requires that the party seeking to assert a right have voluntarily surrendered it. But here, *Bradley's estate* is challenging the arbitration agreement and *neither Bradley nor his estate* entered into the agreement. Thus, Heritage Care's equitable-estoppel argument presupposes that Dickerson had the authority to enter into the contract on Bradley's behalf, which, if true, precludes the need to reach Heritage Care's equitable estoppel theory. Furthermore, no court faced with a challenge to an arbitration agreement by an estate whose personal representative also signed the arbitration agreement has held that the estate is thereby estopped from challenging the validity of the agreement. *See, e.g.*, *Mississippi Care Ctr. of Greenville v. Hinyub*, 975 So. 2d 211 (Miss. 2008) (individual, who later acted as the

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[2]Oddly, Heritage Care laments that "there is virtually no distinction between the Estate and the Appellant." Heritage Br. at 19. But the appellant *is* the estate. Moreover, Heritage Care misstates the record when it says that Dickerson is Bradley's sole heir: Dickerson's brother, Lloyd Dickerson, is also Bradley's heir. Heritage App. at 130, 210; App. 2–3.

personal representative, lacked authority to enter into the arbitration agreement on the resident's behalf and therefore arbitration could not be compelled); *Blankfield v. Richmond Health Care, Inc.*, 902 So. 2d 296, 301 (Fla. Ct. App. 2005) (same); *Barbee v. Kindred Healthcare Operating, Inc.*, 2008 WL 4615858, at *1, *12 (Tenn. Ct. App. Oct. 10, 2008) (same).

In *Case Handyman & Remodeling Services, LLC v. Schuele*, this Court held that equitable estoppel precluded a signatory to an arbitration agreement from avoiding arbitration when the signatory sought to enforce the contract's substantive terms against a non-signatory. 183 Md. App. 44, 57, 959 A.2d 833, 841 (2008). That traditional application of equitable estoppel comports with the doctrine's rationale: that "it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage." *Id.* at 58, 959 A.2d at 841 (quoting *Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006)). It is logical that a party seeking to enforce a contract should not be permitted to claim that it is not bound by that contract's agreement to arbitrate. But here, Bradley's estate is not seeking to enforce any aspect of the agreement. Rather, the estate contends that it is not bound by the agreement at all. *See InterGen N.V. v. Grina*, 344 F.3d 134, 143, 145 (1st Cir. 2003) (holding that a non-signatory was not equitably estopped from resisting arbitration when the non-signatory was not seeking to enforce the contract; noting that "courts should be extremely cautious about forcing arbitration in situations in which the identity of the parties who have agreed to arbitrate is unclear" (internal quotations omitted)).[3]

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[3]Heritage Care also appears to argue (at 20) that the estate is precluded from challenging the enforceability of the arbitration agreement because at no time *prior to litigation* did the estate challenge the agreement. Because Bradley did not know about the arbitration agreement, he could not have challenged it. In any event, Heritage Care cites no precedent for the novel theory that a party waives its right to

Finally, Heritage Care contends that Bradley's estate is precluded from asserting that it is not bound by Heritage Care's arbitration agreement under the unclean-hands doctrine because Dickerson both signed the agreement purportedly on Bradley's behalf and is now the personal representative of Bradley's estate. Like Heritage Care's estoppel argument, this argument would require this Court to ignore the distinction between Dickerson's individual capacity and her capacity as representative of Bradley's estate. Furthermore, the equitable doctrine of unclean hands may only be applied to preclude the "unclean" party from receiving *equitable* relief. *See Mfrs. Fin. Co. v. McKey*, 294 U.S. 442, 449 (1935); *Wells Fargo Home Mortgage, Inc. v. Neal*, 398 Md. 705, 729–30, 922 A.2d 538, 552 (2007); *see also Adams v. Manown*, 328 Md. 463, 487–89, 615 A.2d 611, 623–24 (1992) (Chasanow, J., concurring and dissenting) (Maryland law views unclean hands as an equitable defense to an equitable claim and cannot apply to preclude a claim at law). Here, however, Bradley's estate has not sought any agency-related equitable remedy, and, therefore, the unclean hands doctrine is inapplicable.

III. HERITAGE CARE'S ARBITRATION AGREEMENT IS UNCONSCIONABLY ONE-SIDED.

Even if Bradley's estate were bound by Heritage Care's arbitration agreement, the agreement would not be enforceable because it is unconscionably one-sided. Heritage Care's agreement provides that "[t]he 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." (E 29). Our opening brief explains (at 26–31) that every court to have considered the question of whether an arbitrator-selection clause giving one party unilateral control over the selection of the arbitrator or the pool of potential

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maintain contract defenses by not raising them before litigation.

arbitrators in the consumer or employment context has held that such clauses are unenforceable. This is true whether or not the arbitrator-selection clause is the only unconscionable clause in the arbitration agreement. *See, e.g.*, *McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 (6th Cir. 2004) (employment arbitration agreement unenforceable solely because of one-sided arbitrator-selection clause). In response, Heritage Care cites no cases in which a one-sided arbitrator-selection clause was upheld in a consumer or employment contract.

A. Maryland Law Does Not Require That a Contract Be Both Procedurally and Substantively Unconscionable to Be Unenforceable.

Heritage Care contends (at 24–26) that even when an arbitration agreement is substantively unconscionable, it is not unenforceable unless it is also procedurally unconscionable. Heritage Care relies on dictum in *Doyle v. Finance America, LLC* suggesting that, in Maryland, arbitration agreements must be both procedurally and substantively unconscionable to be unenforceable. 173 Md. App. 370, 383, 918 A.2d 1266, 1274 (2007). That dictum, however, is unsupported—and undercut—by Court of Appeals precedent, as well as by *Doyle* itself.

First, *Walther v. Sovereign Bank*, the Court of Appeals' seminal case on unconscionable arbitration agreements, is premised on the proposition that an arbitration agreement may be rendered unenforceable by either procedural *or* substantive unconscionability, and the agreement in *Walther* was examined for both. 386 Md. 415, 872 A.2d 735 (2005). Indeed, after finding the arbitration agreement not procedurally unconscionable, *Walther* went on to consider substantive unconscionability in great depth, *id.* at 430–31, 449, 872 A.2d at 746–47, 757, which would have been surplusage had the finding on procedural unconscionability been dispositive. To be sure, *Walther* states that a contract of adhesion is not automatically unenforceable, but it would be a misreading to say

that *Walther* required both procedural and substantive unconscionability. *Id.* at 430–31, 872 A.2d at 746–47. Similarly, in *Cheek v. United Healthcare of the Mid-Atlantic, Inc.*, the Court of Appeals held an employment arbitration agreement unenforceable based only on substantive unconscionability. 378 Md. 139, 144, 835 A.2d 656, 659 (2003); *Walther*, 386 Md. at 432, 872 A.2d at 747 (describing the lack of consideration in *Cheek* as substantive unconscionability). Indeed, in *Doyle* itself, the court noted that the arbitration agreement "approache[d] procedural unconscionability," but never held that it was procedurally unconscionable, then went on to address the parties' substantive unconscionability argument, ultimately holding that the agreement was neither procedurally nor substantively unconscionable. 173 Md. App. at 386, 918 A.2d at 1275. Again, such an analysis would have been unnecessary had a finding of both procedural and substantive unconscionability been required.[4]

B. The Requirements of Maryland Rule 17-105 Do Not Apply to Heritage Care's Arbitrator-Selection Clause.

Next, Heritage Care attempts to exempt its arbitrator-selection clause from the consensus rule that such agreements are unconscionable by contending that its arbitrator would be subject to the requirements for court-appointed arbitrators outlined in Maryland Rule 17-105, which mandates that court-appointed arbitrators be experienced Maryland lawyers, undergo a training course, and be monitored by the appointing court. Heritage Br. at 26–27. But Heritage Care's selected arbitrator would not be subject to these requirements because the rule only applies

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[4]In stating that Maryland law requires both procedural and substantive unconscionability, *Doyle* relies on *Holloman v. Circuit City Stores, Inc.*, but cites only to the dissenting opinion, which, in turn, merely quotes what a court in another jurisdiction has stated without imputing that law to Maryland. *Doyle*, 173 Md. App. at 383, 918 A.2d at 1274 (quoting *Holloman v. Circuit City Stores, Inc.*, 391 Md. 580, 603, 894 A.2d 547, 560 (2006) (Bell, C.J., dissenting)).

to arbitrators "designated by the Court," Md. Rule 17-105(a)(1), and the clause Heritage Care is seeking to defend provides that *Heritage Care* designates the arbitrator.

Even if Rule 17-105 applied, however, that would not make Heritage Care's arbitrator-selection clause enforceable because it is the fact that Heritage Care selects the arbitrator—not that an arbitrator selected under that clause may be unqualified—that renders the agreement unconscionable. Indeed, the Supreme Court has refused to enforce an agreement in which one party unilaterally selected the arbitrator from a pool of neutral state-approved arbitrators. *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 296, 308 (1986); *see McMullen*, 355 F.3d at 488 (where the arbitrator had to be an attorney, unaffiliated with the employer, and recognized as a neutral labor-and-employment arbitrator, the arbitration agreement was nevertheless unenforceable because the employer unilaterally selected the pool of potential arbitrators). Heritage Care further contends (at 27) that the unconscionability argument is moot because it has, since the circuit court's decision, selected a retired Maryland judge as the arbitrator. But the letter Heritage Care cites was drafted after the circuit court's order, was never filed in the court below, and is not a part of the record in this case. In any event, who Heritage Care selected has no bearing on the question here: whether an agreement providing for unilateral selection of the arbitrator is unconscionable. *See Chi. Teachers Union*, 475 U.S. at 308 (agreement providing for unilateral arbitrator-selection was unenforceable because the *process of selection* was one-sided, not because the arbitrator was biased or unqualified); *McMullen*, 355 F.3d at 494 (same); *Dunlap v. Berger*, 567 S.E.2d 265, 280 n.12 (W.Va. 2002) (unilateral arbitrator-selection is "an impermissible structural unfairness").

C. The Possibility of Limited Judicial Review Does Not Save Heritage Care's One-Sided Arbitration Agreement.

Heritage Care also argues that a one-sided arbitrator-selection clause is not unconscionable because a decision by a biased arbitrator may be vacated by judicial review. Heritage Br. at 27. But the unconscionability of a one-sided selection clause rests in the selection process's "inherent[] lack[] [of] neutrality," *McMullen*, 355 F.3d at 494, and "structural unfairness," not just in the substance of the arbitrator's bias, *Dunlap*, 567 S.E.2d at 280 n.12. In other words, it remains unfair to permit one party to unilaterally control the selection process even if the selected arbitrator is not biased, just as it is, for example, unacceptable for one party to select the judge that oversees a trial even if the judge is not outwardly partial. Moreover, although Maryland courts may overturn an arbitration award for "evident partiality," a party faces a high bar in proving that an arbitrator is partial. MD. CODE ANN. CTS. & JUS. PROC. § 3-224(b)(2). For example, in *Wyndham v. Haines*, the Maryland Court of Appeals upheld an arbitration award where the arbitrator in a medical-malpractice action was also serving as plaintiffs' counsel in two other suits against doctors represented by defense counsel in the arbitration. 305 Md. 269, 278–79, 503 A.2d 719, 724 (1986). Although limited judicial review of an arbitration award is always available, no court has considered such review sufficient to outweigh the fundamental one-sidedness of permitting one party to unilaterally control the arbitrator-selection process. *See* Dickerson Br. at 26–31.

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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APPENDIX

STATEMENT REGARDING APPENDIX

Heritage Care claimed for the first time in its appellate brief that Carman Dickerson is Carter Bradley's sole heir. Heritage Care, however, misstates the record: Lloyd Dickerson, Carman's brother, is also Carter Bradley's heir. Lloyd Dickerson's status as an heir is reflected by probate materials included in the record as Petitioner's Trial Exhibit 5, two pages of which are excerpted here. *See* Md. Rule 8-501(f).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing Reply Brief of Appellant were served via first class mail postage prepaid, this 21st day of May, 2009, on each of the following:

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