

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2040

September Term, 2007

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LOCHEARN NURSING HOME, LLC  
d/b/a FUTURE CARE - LOCHEARN,  
INC.

VS.

BEULAH ADDISON

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Hollander,  
Zarnoch,  
Thieme, Raymond G., Jr.,  
(Retired, Specially Assigned),

JJ.

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Opinion by Zarnoch, J.

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Filed: September 19, 2008

On November 16, 2006, appellant Lochearn Nursing Home, LLC, d/b/a Future Care-Lochearn ("Future Care") filed a breach of contract action against appellee Beulah Addison to recover unpaid charges for nursing home services Future Care provided to Addison. On March 16, 2007, Addison filed a counterclaim against the nursing home, alleging breach of fiduciary duty, negligent hiring and supervision, negligent misrepresentation, fraud, tortious breach of contract and slander of title. Future Care answered the counterclaim and asserted that these issues were required to be submitted to arbitration. On July 18, 2007, Future Care filed a Motion to Compel Arbitration of Counterclaim and a Motion to Stay the proceedings, which were opposed by Addison. After a hearing, the circuit court denied the motions.

Future Care presents the following questions for appeal:

1. Does this Court have the authority to exercise jurisdiction over this appeal?
2. Did the Circuit Court for Baltimore City err as a matter of law in refusing to compel Ms. Addison to arbitrate her counterclaim as required by Section 3-207 of the Courts and Judicial Proceedings Article?
3. Did the Circuit Court for Baltimore City err as a matter of law by refusing to stay the remaining litigation as required by Section 3-209 of the Courts and Judicial Proceedings Article?

We hold that this Court has jurisdiction. In addition, because the circuit court erred in refusing to compel the arbitration of the counterclaim and in declining to stay the remaining litigation, we reverse the judgment of the Circuit Court for Baltimore City and remand for the entry of appropriate orders compelling arbitration and staying the legal action.

## FACTS AND LEGAL PROCEEDINGS

Beulah Addison suffered a stroke in September 2005 and, as a result, was admitted to and became a resident of Future Care Nursing Home. Approximately 14 days after admission, she signed a fourteen-page Resident Admission Contract and a separate five-page Resident and Facility Arbitration Agreement, which provided in relevant part:

**[A]ny legal disputes, controversies, demands or claims** (hereinafter collectively referred to as “claim or claims”) **that arise out of, or relate to any safety issues, professional service or health care provided by the Facility, its agents, servants, and or employees to the Resident, or provided by any management company associated with the Facility,** shall be resolved exclusively by binding arbitration...

This agreement to arbitrate includes, **but is not limited to**, any claims for medical, nursing, or other health care malpractice rendered to the Resident by the Facility or any of its agents, servants and/or employees, including, **but not limited to** claims for fraud, misrepresentation, negligence, gross negligence, malpractice or any other claim based on any departure from accepted standards of medical or health care or safety standards, whether sounding in tort, contract, or otherwise. This agreement shall also **not** apply to any claim by the Facility against the Resident for nonpayment of any charge for nursing home or related services, and such action may be brought in any court of competent jurisdiction.

(Emphasis added)(“not” bold in original)

The first step toward the invocation of these arbitration provisions occurred when Future Care filed suit against Addison and her Attorney-in-Fact, Alice Robinson, in the Circuit Court for Baltimore City. The nursing home alleged that Addison owed Future Care money for nursing home services and breached a contract to pay. Because Addison did not receive medical assistance benefits, which would have covered the full cost of services at Future Care, Future Care billed Addison at the private party rate, which was

the basis for the amount claimed. Future Care also requested a Writ of Attachment to prevent Addison from selling her property to Robinson. After Robinson withdrew her offer to buy Addison's property, a motion to dismiss the complaint against Robinson was granted.

Addison counterclaimed against Future Care, alleging that Future Care initiated a "foreclosure rescue scam" to deprive her of the equity in her home. Specifically, she asserted that Future Care social worker, Deborah Fernandez, after learning from Addison that the resident faced foreclosure of her house, set up a meeting with certain individuals who claimed they could arrange a way to "save" her property. Addison was purportedly promised that she would receive \$25,000 from the sale of her house, but, in fact, under the alleged scheme "would get nothing at all." In addition, the counterclaim asserted that Future Care promised Addison it would file a Medicaid application, but then let the application lapse in order to charge her higher nursing home service rates. Addison claimed these acts amounted to breach of fiduciary duty, negligent hiring and supervision, negligent misrepresentation, fraud, tortious breach of contract, and slander of title.<sup>1</sup> Future Care filed an Answer to Addison's counterclaim, asserting that Addison was bound by the arbitration agreement to submit these claims to arbitration. Future Care

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<sup>1</sup>Addison also alleged that when she and her attorney-in-fact attempted to have Addison moved from Future Care to another nursing facility, Future Care was misinforming facilities about Addison's Medicaid status. Future Care eventually evicted Addison, and she was transferred to an assisted living facility.

later moved to compel arbitration of Addison's counterclaim and stay the proceedings, which the circuit court denied in a written order.

On October 29, 2007, Future Care appealed.<sup>2</sup> A flurry of motions and responses followed raising appealability and stay issues. As a result, in a March 3, 2008 Order, Chief Judge Peter B. Krauser, on behalf of this Court, declined to dismiss the appeal and stayed further proceedings in the circuit court pending the conclusion of this appeal or further order of the Court of Appeals.<sup>3</sup> Addison then filed a Petition for Certiorari, asking the Court of Appeals to review this case in advance of argument and decision in this Court. The petition was denied. *Addison v. Lochearn*, 405 Md. 62 (2008).

## DISCUSSION

### 1. Appealability

Addison still presses her argument that the circuit court's order denying the motion to compel arbitration is not appealable. At the same time, Future Care asks us to certify this order as final in accordance with Maryland Rule 8-602(e)(1). Our cases support Future Care and make Addison's position untenable.

In *Essex Corporation v. Susan Katherine Tate Burrowbridge, LLC*, 178 Md. App.

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<sup>2</sup> Future Care also filed in the circuit court a Motion for Certification of the Court's Order as a Final Judgment and Motion to Stay. The motions were denied December 7, 2007.

<sup>3</sup>The March 3, 2008 Order denied the motion to dismiss without prejudice to Addison's right to raise the issue in her brief and argument. This Court made a similar disposition with respect to a motion filed by Future Care to certify the circuit court's order as a final judgment.

17, 29 (2008), this Court held that a denial of a petition to compel arbitration was appealable. Specifically; we said that whether the petition to compel arbitration “was brought separately or was raised as a motion in the pending contract action, it concerns only the proper forum in which to resolve the parties’ disputes, and its denial is a proper subject of appeal at this juncture.” *Id.* at 30. We reached a similar conclusion in *NRT Mid-Atl. Inc. v. Innovative Prop., Inc.*, 144 Md. App. 263 (2002). In both cases, this Court exercised its authority under Maryland Rule 8-602(e)(1) to enter a final judgment on its own initiative with respect to the circuit court’s arbitration ruling. We shall do so here.<sup>4</sup>

## 2. Motion to Compel Arbitration

The role of a court in deciding a motion to compel arbitration is limited to one question: “[I]s there an agreement to arbitrate the subject matter of a particular dispute?” *Gold Coast Mall, Inc. v. Larmer Corp.*, 298 Md. 96, 104 (1983).<sup>5</sup> Whether there is an agreement to arbitrate the parties’ dispute is a question of contract interpretation. *NRT Mid Atlantic, supra*, 144 Md. App. at 279.

When parties have agreed to arbitrate, but the scope of the arbitration clause is

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<sup>4</sup>Future Care also argues that the circuit court’s decision on arbitration is appealable as a collateral order. In light of our action under Maryland Rule 8-602(e)(1), we need not reach this issue.

<sup>5</sup>A court has the authority under Md. Code (1973, 2006 Repl. Vol.) §3-207 of the Courts & Judicial Proceedings (C&JP) Article to enforce an arbitration agreement and order parties to arbitrate their dispute.

unclear, the dispute over whether or not to arbitrate must be decided by the arbitrator. *Essex Corp., supra*, 178 Md. App. at 33. Only when the subject of the dispute is unequivocally outside the scope of the arbitration clause may a motion to compel arbitration be denied. *Id.*

In determining the scope of an arbitration provision, a court must consider two competing aims. Reflecting the strong public policy in favor of arbitration, a court must resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *The Redemptorists v. Coulthard Services, Inc.*, 145 Md. App. 116, 150 (2002). In doing so, however, the contract nature of arbitration must be respected, so as not to require a party to submit a dispute to arbitration that it has not agreed to arbitrate. *Id.* at 150-51. “In short, as with any other contract, the parties’ intentions control, but those intentions are generously construed as to issues of arbitrability.” *Id.* at 151.

Maryland courts have drawn a distinction between “broad” arbitration clauses and “narrow” ones.

When an agreement to arbitrate is broadly drafted, arbitration should be granted “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” **However, when presented with a narrowly drawn commercial arbitration clause, the court should consider whether the conduct in issue is on its face within the scope of that clause. “Hence, if the arbitration agreement cannot reasonably be construed to cover [a particular] dispute..., arbitration need not be compelled.”**

(Emphasis in original and citation omitted).

*Redemptorists, supra*, 145 Md. App. at 146.

Turning to the Arbitration Agreement in this case, we note the circuit court judge's reasons for his decision not to compel arbitration:

I think the best interpretation of the phrase 'professional services' is conditioned by the surrounding words and relates to - - and I don't want to make a circular definition of the term - - but I guess, relates to nursing care services, dietary services, nutritional services, things that a nursing home supplies to the occupants.

Now I understand the argument that's made that professional services could cover social work services. And that gets a little closer, I think, but nonetheless, I don't think it gets close enough to cover what we're really talking about, is application for Medicaid and maybe looked at one way, one could call that a service that a nursing home renders to its residents. But, of course, the reason that nursing homes apply for Medicaid is because it defrays the costs of care and most residents of nursing homes are not in a position to indefinitely pay for their care without that assistance.

To the extent that there's a lack of clarity in the phrase, I think that it has to be construed against the drafter . . .

The circuit court also noted:

The second paragraph of the agreement says, 'the agreement to arbitrate includes, but is not limited to', et cetera, et cetera, but that has to be read in light of the first paragraph of the agreement. In other words, you can't just - - if you just had the second paragraph, while you might say it includes every claim in the world, but that would be reading it without the contextual meaning that is supplied by the first paragraph. And to me, the first paragraph is really the one that defines the scope of what the parties are required to arbitrate. ...

[R]ead in its context, this agreement to arbitrate does not

cover these claims. And for those reasons, because I believe that the . . . the contract, interpreted in what I view to be its most likely meaning, does not require arbitration of these claims, I don't think there is a basis to compel arbitration in this case.<sup>6</sup>

In addition, Addison argues that the arbitration agreement is "unusually narrow" and is a contract of adhesion and, thus, should be narrowly construed, and that her counterclaims are so unrelated to services provided by a nursing home that no reasonable person would expect them to be covered by the arbitration language.<sup>7</sup>

In our view, the language of the arbitration agreement is neither as narrow nor as unequivocally exclusive as Addison contends. The initial clause of the agreement requires arbitration not only of claims "that arise out" of the enumerated issues or services, but also of those that "relate to" those subjects. *See Ingersoll-Rand v. McClendon*, 498 U.S. 133, 138 (1990)(noting that the language "relate to" in ERISA is "broad" and intended to be "expansively applied"). The same paragraph indicates that not only the actions of the facility, its agents and employees are covered, but also those of "any management company," thus, suggesting that disputes over some management actions are subject to arbitration requirements. The next clause ("Application of

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<sup>6</sup> The court rejected Addison's contention that the agreement was invalid as unconscionable. Specifically, the circuit judge said that "in my opinion, there has been no evidence produced to demonstrate unconscionability, whether procedural or substantive."

<sup>7</sup> Appellee's brief argues that "it is only natural that residents such as Ms. Addison would have a reasonable expectation that if they were sued for money, they could countersue for purely economic claims (as opposed to claims for medical malpractice, violation of medical professional standards or risks to their physical safety)."

Agreement”) states that it “includes, but is not limited to” the enumerated claims. These are not words of limitation. *Cf.* Md. Code (1957, 2005 Repl. Vol.), Art. 1, §30. In addition, the laundry list of torts includes even fraud and misrepresentation.

The key term, “professional service,” is also susceptible of a broad interpretation. For example, in *Utica Mutual v. Miller*, 130 Md. App. 373 (2000), this Court interpreted an insurance policy that required the insurer to defend for errors and admissions in rendering or failing to render “professional services.” We concluded that this term applied to an insurance agent’s acts of monitoring his business operation, maintaining records and accounting for premiums. *Id.* at 390. In so doing, we relied on a Pennsylvania case defining such services “as any acts necessary or incidental to conduct of [the insured’s] insurance business, including, *inter alia*, administration in connection therewith....” *Biborosch v. Transamerica Ins. Co.*, 412 Pa. Super. 505, 603 A. 2d 1050, 1053, *appeal denied*, 532 Pa. 653, 615 A. 2d 1310 (1992).

Also instructive is the decision of the Supreme Court of New Hampshire in *Weeks v. St. Paul Fire & Marine Ins. Co.*, 140 N.H. 641, 673 A. 2d 772 (1996). At issue was whether an insurance policy covering the failure to provide “professional services” applied to the acts of nursing home trustees in allegedly breaching a fiduciary duty to properly manage and invest the home’s assets and to supervise their management and investment. Rejecting the contention that the policy applied only to health care malpractice, the court held that “professional services” included the mismanagement of the home’s assets. 140 N.H. at 644;

673 A. 2d at 774. The insurer argued that a professional function meant “making health care decisions” as opposed to the “administrative” function of “overseeing financial matters.” 140 N.H. at 645; 673 A. 2d at 774. However, the court said that “this distinction is not persuasive.” *Id.* In addition, the court characterized the language of the policy as ambiguous, noting that “[a]t the very least, a reasonable disagreement exists as to the meaning of the term ‘professional’.” 140 N.H. at 645; 673 A. 2d at 775.

Addison’s position is not advanced by her assertion that “extraordinary predatory real estate schemes” are not within the scope of the arbitration agreement. This misframes the inquiry. The question is whether Future Care’s social worker engaged in “extraordinary predatory real estate schemes” *or*, in accordance with the duty of a social worker to “enhance social functioning” of an individual, Md. Code (1981, 2005 Repl. Vol.), Health Occupations Art. §19-101(m)(1), responded to a resident’s request for assistance with respect to a financial problem.<sup>8</sup> Resolution of this inquiry would still appear to be related to a professional service provided by Future Care.

The alleged failure to file a Medicaid application (“Medicaid sabotage”) also seems to relate to what nursing home officials and employees are authorized, required and expected to do with respect to their residents. *See* Md. Code (1982, 2005 Repl. Vol.), Health-General Art., §19-344 (c)(5)(ii) (“The facility shall cooperate with and assist the

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<sup>8</sup> According to an affidavit filed by Addison in connection with the breach of contract action, she approached Fernandez and said that she was afraid she was going to lose her house and that “[t]he social worker said she had someone who might be able to help.”

agent in seeking assistance for the medicaid assistance program on behalf of the applicant or resident.”).

Without deciding ultimate questions regarding its interpretation, we nevertheless believe that there is sufficient ambiguity in the broad language of the agreement that Maryland courts are obliged to defer to the arbitrator’s construction of its scope.

Addison also contends that the arbitration agreement is a contract of adhesion that should be strictly construed against Future Care to exclude the counterclaim.<sup>9</sup> The circuit court, in rejecting the “unconscionability” claim, concluded that the fact that Future Care drafted the agreement was not conclusive on the point. The same is true when adhesion is the inquiry. The arbitration agreement was embodied in a separate document, bearing the caveat “Read Carefully.” The agreement was not presented to her until two weeks after her admission. The sparse record below indicated that it was explained to her. And there was no evidence whether Addison would have suffered any adverse consequences had she not signed the agreement. For these reasons, we do not find the arbitration agreement to be a contract of adhesion.

In concluding that the ambiguity of key terms of the agreement require us to defer their interpretation to an arbitrator, we are not unmindful of the fact that the use of arbitration provisions in nursing home contracts is a matter of public concern. *See* 154

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<sup>9</sup> Although the circuit court concluded that the arbitration agreement was not unconscionable, it did not *expressly* rule on whether or not the agreement was a contract of adhesion.

Cong. Rec. E1079 (May 22, 2008)(Exten. of Remarks of Hon. Linda T. Sanchez). In addition, two bills (S2838 and HR 6126) are moving through Congress to make unenforceable all pre-dispute, mandatory binding arbitration clauses in contracts between long-term care facilities and their residents. Nevertheless, the present state of Maryland law on arbitration leaves us no other course.

### 3. Motion to Stay Litigation

It necessarily follows from our decision that an arbitrator, not a court, must determine whether Addison's counterclaims are subject to arbitration that the circuit court erred in not staying the proceedings below.

Section 3-209 of the C&JP Art. states:

- (a) A court *shall* stay any action or proceeding involving an issue subject to arbitration if:
  - (1) A petition for order to arbitrate has been filed; or
  - (2) An order for arbitration has been made.
- (b) If the issue subject to arbitration is severable, the court may order the stay with respect to this issue only.
- (c) If a petition to stay has been filed with a court where any action or proceeding concerning arbitration is pending, the court's order to arbitrate shall include the stay.

(Emphasis added).

Even when arbitrable issues are intertwined with non-arbitrable ones, litigation should be stayed pending the outcome of the arbitration. *Redemptorists, supra*, 145 Md. App. at 151. The decision whether to stay proceedings is especially important, since "one who litigates an issue that otherwise would be subject to arbitration waives his right

subsequently to arbitrate that issue.” *Id.* at 137.

Thus, all proceedings between the parties in the circuit court should continue to be stayed.

JUDGMENT OF THE CIRCUIT  
COURT FOR BALTIMORE CITY  
REVERSED. CASE REMANDED TO  
THE CIRCUIT COURT FOR  
BALTIMORE CITY WITH  
INSTRUCTIONS TO ENTER ORDER  
COMPELLING ARBITRATION AND  
STAYING LITIGATION IN  
ACCORDANCE WITH THIS  
OPINION. COSTS TO BE PAID BY  
APPELLEE.