

IN THE SUPREME COURT OF MISSOURI

No. 89291

**DALE LAWRENCE, individually and
As the personal representative of the estate of DOROTHY LAWRENCE
Plaintiff/Respondent,**

vs.

**BEVERLY MANOR, a Missouri Corporation,
Defendant/Appellant**

**On Appeal from the Circuit Court of Jackson County, Missouri
Division 18 Honorable Jon R. Gray
District Court Case Number: 04CV237251**

**After Opinion by the Missouri Court of Appeals
Western District Case No. WD67920**

**BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL
ATTORNEYS IN SUPPORT OF RESPONDENT**

LELAND F. DEMPSEY MO #30756
ASHLEY L. BAIRD MO #59068
DEMPSEY & KINGSLAND, P.C.
1100 Main Street, Suite 1860
Kansas City, Missouri 64105
Telephone (816) 421-6868
Fax (816) 421-2610

Attorney for *Amicus Curiae* Missouri Association of Trial Attorneys

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I. TABLE OF AUTHORITIES

Cases:

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II. INTEREST OF THE AMICUS CURIAE

The issues presented by this case are of vital importance and interest to others besides the immediate parties, including the Missouri Association of Trial Attorneys ("MATA"). MATA is a non-profit, professional organization consisting of approximately 1,400 trial attorneys in Missouri, most of whom represent citizens of the state of Missouri. For over fifty years, MATA lawyers have vigilantly worked to protect their clients and Missouri citizens from injustice. In doing so, MATA strives to promote the administration of justice, to preserve the adversary system, and to apply its knowledge and experience in the field of law to advance the interests and protect the rights of individuals. MATA's members will be directly affected by the Court's decision in this case.

As a result of its substantial collective experience litigating cases against large corporate defendants, MATA supports plaintiff/respondent Dale Lawrence's position that he should not be compelled to arbitration for his claims involving the wrongful death of his mother. Allowing the enforcement of an arbitration clause for the wrongful death of Dorothy Lawrence would strip the Missouri Citizens, including Respondent Dale Lawrence, of their rights to a trial by jury. Pursuant to Missouri law and public policy, Missouri wrongful death class members have a separate cause of action and should not be

bound to arbitration clauses which are entered into on behalf of the decedent. In addition, many Missouri citizens do not understand these arbitration clauses that are often signed, as in the case at bar, upon filling out the paperwork when admitted to a nursing home. On behalf of the citizens of the State of Missouri, MATA urges this court to affirm the Court of Appeal's decision—that is to not compel arbitration of the agreement.

This brief *amicus curiae* is submitted in support of the Respondent and addresses the issues presented for review in a broader and different perspective than the perspective presented in the parties' briefs. In particular MATA wishes to supplement Respondent's arguments by emphasizing and underscoring the significant policy reasons why the appellate court's decision is correct. For these reasons, MATA and its members have a strong interest in explaining why this Court should uphold the decision below.

III. CONSENT OF THE PARTIES

MATA has received verbal consent from counsel for Respondent, Dale Lawrence, to file this brief. MATA sent a request for consent for the filing of this brief to the Appellant on August 1, 2008; however counselor for the Appellant Jeffrey Dunn verbally reported on August 1, 2008 that the Appellant will not consent to the filing of this brief. Therefore, MATA is seeking an order from this Court pursuant to Rule 84.05(f)(3) granting leave to file this *Amicus Curiae* brief. (The letter sent to the parties requesting consent to file this brief is attached hereto as Exhibit "A").

IV. STATEMENT OF FACTS

MATA adopts and incorporates Respondent's Statement of Facts.

V. ARGUMENT AND AUTHORITY

A. **The Alternative Dispute Resolution provision between decedent Dorothy Lawrence, and defendant Beverly Manor is not binding on the wrongful death claimants.**

A court may stay litigation only if it determines that the parties agreed to arbitrate. Fru-Con Constr. Co. v. Southwestern Redevelopment Corp. II, 908 S.W.2d 741, 744 (Mo.Ct. App. 1995). Arbitration is strictly a matter of contract. **A party can be compelled to arbitration only when it has agreed to do so.** Greenwood v. Sherfield, 895 S.W.2d 169, 173 (Mo. Ct. App. 1995)(citing AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648, 655 (1986)). Logically, since only the parties to a contract are bound by the terms of the agreement to arbitrate, a non-party to a contract cannot enforce the contractual terms upon one of the parties to the contract. Prickett v. Lucy Lee Hospital, Inc., 986 S.W.2d 947, 948 (Mo.Ct. App. 1999)(citing Wallace, Saunders, Austin, Brown v. Rahm, 963 S.W.2d 419, 422 (Mo. Ct. App.1998) and Kahn v. Prahl, 414 S.W.2d 269, 277-78 (Mo.1967)).

The Arbitration Agreement relied upon by Defendant was executed solely on behalf of decedent Dorothy Lawrence. Respondent, Dale Lawrence, as the wrongful death class member, is not bound by the Alternative Dispute Resolution. A wrongful death claim does not belong to the deceased. Campbell v. Callow, 876 S.W.2d 25 (Mo. App. 1994). A wrongful death right of action is neither a transmitted right nor a survival right, but is created and vested in the survivors at the moment of death. *Id.* Any wrongful

death settlement or recovery by this suit shall be for the use and benefit of all individuals included in the wrongful death class. The wrongful death class members, which include Dale Lawrence, did not contract with Defendants in his individual capacity nor was he privy to the Arbitration Agreement. The Arbitration Agreement was executed solely on behalf of his deceased mother.

Defendant suggests the wrongful death class stands in the shoes of the decedent regarding the damages they can recover. Defendant erroneously argues the Respondent is only entitled to recover those damages that decedent could have if death did not ensue. Rather, § 537.090 R.S.Mo., Missouri's Wrongful Death Statute, specifies;

“In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, **and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training and support of which those on whose behalf suit may be brought have been deprived by reason of such death...**”(emphasis added).

MO. REV. STAT. § 537.090 (2007)

Clearly, the Respondent is entitled to recover damages that decedent, Dorothy Lawrence, would not have been owed had she survived, those being the loss of her services, consortium, companionship, comfort, instruction, guidance, counsel and training.

Missouri's wrongful death statute grants ownership of a wrongful death claim to the wrongful death class. This is an important distinction Defendant overlooks in Missouri's Wrongful Death Statute as compared to those of other states. In this case, Dorothy Lawrence's surviving son owns the claim and has asserted the same in the Third Amended Petition. The law is clear that a wrongful death claim does not belong to the deceased, or the estate, and the wrongful death action is neither a transmitted right nor a survival right, but is created and vested in the survivors at the moment of death. Campbell, 876 S.W.2d at 25. Therefore, the cases cited by Defendants are distinguishable and are not persuasive.

It is undisputed that the wrongful death class member Dale Lawrence did not enter into an agreement to mediate or arbitrate any claim. A contract or agreement between these parties does not exist. Defendants' Motion to Compel Arbitration should be overruled as to the wrongful death cause of action held by the surviving son of Dorothy Lawrence.

B. Dale Lawrence Did Not Waive His Constitutional and Statutory Rights.

Respondent Dale Lawrence could not have waived his constitutional rights to due process, jury trial and access to the courts, and his statutory rights under R.S.Mo. § 198.093, R.S.Mo. § 537.020 and R.S.Mo. § 537.021 unless the waiver was voluntarily, knowingly and intelligently given. See, e.g., Miranda v. Arizona, 384 U.S. 436, 444 (1966) (waiver of constitutional right must be "voluntarily, knowingly, and intelligently" given).

Phyllis Skoglund did not voluntarily, knowingly, and intelligently intend to waive any of her mother's constitutional and statutory rights. Furthermore, by its wording it is impossible to discern that, by signing the Arbitration Agreement, Ms. Skoglund was waiving her mother's constitutional and statutory rights. The rights protected by the Constitution and the Missouri Omnibus Nursing Home Act, including the right to trial, are the same rights which Defendant now claims were waived.

The purpose of Missouri's arbitration law is to afford parties the chance to reach a final result to their differences in a quicker and cheaper manner than afforded by court litigation. State ex rel. Telecom Management Inc., v. O'Malley, 965 S.W.2d 215, 218 (Mo.App.W.D.1998)(citing Prima Paint Corp. v. Flood and Conklin Mfg. Co., 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967)).

More than a century ago, the Supreme Court observed:

[T]he right to sue and defend in the courts, is the alternative of force.
In an organized society it is the right conservative of all other rights,
and lies at the foundation of orderly government. It is one of the
highest and most essential privileges of citizenship.

Chambers v. Baltimore & Ohio R.R.U., 207 U.S. 142, 148 (1907).

“The right to petition extends to all departments of the Government, ‘and... ‘the right of access to the courts is... but one aspect of the right ‘to petition’” See also BE & K Construction Co. v. NLRB, U.S., 122 S.Ct. 2390, 2395-96 (2002)(quoting California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972)).

“The right of access to the courts is an aspect of the First Amendment right to

petition the Government for redress of grievances.” Bill Johnson’s Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 741 (1983). “[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.” United Transportation Union v. Michigan Bar, 401 U.S. 576 (1971).

The Defendant’s arbitration clause infringes upon the Respondent’s constitutional and statutory right to a trial by jury. To start, Respondent incurs substantial expense to prepare a case and submit it for mediation and arbitration. Respondent would not incur these same substantial costs if allowed to proceed directly to jury trial. More significantly, Respondent’s case suffers the delay of time. Evidence in the form of witnesses’ recollection fades over time and the case is negatively impacted.

Prior to the Defendants requiring Dorothy Lawrence or her representative to execute the Arbitration Agreement, the American Arbitration Association and two other prestigious professional groups published joint findings stating that “*the Commission’s unanimous view is that in disputes involving patients and/or plan subscribers, **binding arbitration should be used only where the parties agree to same after a dispute arises.***”

(American Arbitration Association, American Bar Association, American Medical Association, Commission on Health Care Dispute Resolution, Final Report, 1998 p10, (emphasis added)). The Commission also found that “[t]he agreement to use ADR should be knowing and voluntary.” (See *Id.*, p.15). The Commission’s findings support the position that **pre-dispute arbitration provisions** do not adequately protect the patients, and do not ensure a level playing field for the resolution of health care disputes.

Because Dorothy Lawrence or her representative and the wrongful death class members did not voluntarily, knowingly and intelligently waive her constitutional and statutory rights, enforcement of the Arbitration Agreement would be unjust. Defendants' Motion should be overruled on this basis.

C. The Alternative Dispute Resolution provision is unenforceable since it substantially infringes upon the statutory rights created by the Missouri Omnibus Nursing Home Act.

Defendant's Arbitration Agreement defeats the remedial purpose of the Missouri Omnibus Nursing Home Act. The Act is a comprehensive regulation of the nursing homes in Missouri. It sets forth the rights of nursing home patients and fashions a remedy when those rights are violated. The Act allows the Attorney General to file a claim on behalf of the State to enforce patients' rights to be free of abuse and neglect and to extract damages, while allowing for a private right of action absent the State filing a claim under the Act. § 198.093 R.S.Mo.

In Stiffelman v. Abrams, 655 S.W.2d 522 (1983) the Supreme Court considered the private right of action under Section 198.093 R.S.Mo. and the decision was one of great importance in the context of the Missouri Omnibus Nursing Home Act. The court in Stiffelman wrote:

The provision authorizing an action for damages for breach of the rights of nursing home residents to be free from mental or physical abuse is one reasonably directed toward bringing about compliance with the provisions of the Act. The private remedy for violations of the rights of residents

secured by Sec. 198.088 and 198.090, as the remedy is authorized by Sec. 198.093, looks to private parties for some degree of policing under the Act. It is a key feature of the Act, adopting the ‘private attorney general’ concept,The legislature well could have included it upon the rationale’ that government cannot do everything and that some requirements of the Act can best be enforced by those most directly involved. Id. at 530. Citing Vossmeyer & Felix, The Missouri Omnibus Nursing Home Act of 1979: A Legislature History, 24 St.L.U.L.J. 617.

The clear remedial purpose of the Missouri Omnibus Nursing Home Act and the intent of the Missouri legislature in passing the Act, are defeated by Defendant’s mandatory Arbitration Agreement. The provision prevents and/or discourages individuals from pursuing protection and enforcement of rights created under this Act. As a result, the Arbitration Agreement violates public policy and is, therefore, unenforceable. If the Defendant were allowed to circumvent liability for the abuse and neglect of nursing home residents, the Missouri Omnibus Nursing Home Act would have absolutely no deterrent effect on the conduct of the Defendant and would be for all practical purpose useless.

D. The Alternative Dispute Resolution provision is an unconscionable contract of adhesion.

Missouri courts have long recognized that “although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the

range of reasonable expectation.” Estrin Construction Company, Inc. v. Aetna Casualty and Surety Company, 612 S.W.2d 413, 423 (Mo. Ct. App. 1982). As discussed more fully below, the rules which defendants failed to include in their Arbitration Agreement far exceed the reasonable expectation of an average family attempting to place their loved one in a nursing home.

The Federal Arbitration Act, hereinafter FAA, upon which Missouri’s arbitration law is fashioned, provides in 9 U.S.C.A. § 2 that a contractual agreement to arbitrate is valid “save upon any grounds as exist at law or in equity for the revocation of any contract.” The purpose of the FAA is to “place arbitration agreements upon the same footing as other contracts.” Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed. 26 (1991). Therefore, Defendant’s Arbitration Agreement may be challenged and invalidated on any generally accepted contract principle without running afoul of the FAA. See Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687; 116 S.Ct. 1652, 1656 (1996) (stating generally applicable contract defenses such as fraud, duress or unconscionability can invalidate mediation and arbitration agreements without contravening the FAA).

The “[a]rbitrability of such claims rests on the assumption that the arbitration clause remits relief equivalent to court remedies.” Paladino v. Avnet Computer Tech., Inc., 134 F.3rd 1052, 1062 (11th Cir. 1998) (citing Gilmer, 500 U.S. at 28, 111 S. Ct. at 1653); See also Edwards v. Cigna Financial Advisors, Inc., 197 F.3rd 752, 763 (5th Cir. 1999) (stating Gilmer makes it clear that whether a claim can be subjected to mandatory arbitration depends upon whether the particular arbitral forum

provides an adequate substitute for a judicial forum in protecting the particular rights at issue). **When the Arbitration Clause denies a party the possibility of meaningful relief because the arbitrator cannot award damages the party would otherwise be entitled under the law the arbitration clause must be ruled unenforceable as unconscionable.** Coddington Enterprises Inc. v. Werries, 54 F.Supp.2d 935, 943 (W.D.Mo. 1999) transferred to In re Fleming Companies, Inc. Contract Litigation, 2000 U.S. Dist. Lexis 11649 (August 8, 2000) (holding unenforceable an arbitration clause which denied the plaintiff the possibility of meaningful relief that he would have been entitled to under the law, but for the arbitration agreement); Paladino v. Avnet Computer Techs., Inc., 134 F.3rd 1054, 1062 (11th Cir. 1998) (holding arbitration clause which insulated the defendant from equitable relief and Title VII damages denied the plaintiff meaningful relief that he would have had under the remedial provisions of a statute and therefore the arbitration clause was unenforceable); PowerTel v. Bexley, 743 So. 2d 570 (Fla. App. 1999), reh. denied, review denied, 763 So.2d 1044, 2000 Fla. Lexis 1005 (Fla. 2000) (holding an arbitration clause which forces the plaintiff to waive important statutory right such as injunctive relief, declaratory relief and his right to punitive damages renders the arbitration clause unenforceable); See also Seifert v. U.S. Home Corp., 750 So.2d 633 (Fla. 1999) (holding requiring plaintiffs to submit wrongful death claims to binding arbitration would deprive the plaintiffs of their constitutional rights, including the right to a jury trial, due process and access to the courts).

In addition, Section 435.350 of Missouri's Uniform Arbitration Act expressly denies the validity of arbitration provisions that are included in agreements of adhesion.

Missouri Courts have defined an adhesion contract as “a form contract submitted by one party and accepted by the other on the basis of this or nothing. Estrin Construction Company, Inc. v. Aetna Casualty and Surety Company, 613 S.W.2d 413, fn.3 (Mo. Ct. App. 1982). “It is a transaction not negotiated but to which one literally adheres from want of choice.” Id. Because of Dorothy Lawrence need for nursing care, the only way her daughter, Phyllis Skoglund, could obtain the care her mother desperately needed was to agree to the Arbitration Agreement offered by the defendant nursing home. She was simply given a form Agreement along with multiple other documents and was told to sign where appropriate. **There was no discussion that she was waiving her mother’s statutory and constitutional rights.** The nursing home representative did not point out or discuss the Arbitration provision with Dorothy Lawrence. The Arbitration Agreement relied upon by defendants meet the definition of a contract of adhesion and is unenforceable pursuant to Missouri’s Uniform Arbitration Act and Section 435.350 R.S.Mo.

VI. CONCLUSION

For the reasons stated above, the Court should affirm the opinion of the Court of Appeals not to compel arbitration of the agreement.

Respectfully submitted,

By: _____
Leland Dempsey MO #30756
Ashley L. Baird MO #59068
Dempsey & Kingsland, P.C.
1100 Main Street
City Center Sq. 1860
Kansas City, MO 64105-2112
Telephone: (816) 421-6868
Fax: (816) 421-2610
Attorney for *Amicus Curiae* Missouri
Association of Trial Attorneys

VII. CERTIFICATE OF COMPLIANCE

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of *Amicus Curiae* Missouri Association of Trial Attorneys In Support of Respondent is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 3,529 words, as calculated by the Microsoft Word software used to prepare this brief.

Leland F. Dempsey #30756

VIII. CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via Federal Express Mail, on this 1st day of August, 2008, to:

Phillip A. Burdick 46210
Burdick Law Offices, P.C.
511 Francis
St. Joseph, Missouri 64501
(816) 232-3883
(816) 232-3884 FAX

ATTORNEY FOR RESPONDENT/PLAINTIFF

Jon W. Jordan
Stephen M. Strum
Jeffrey L. Dunn
SANDGERG, PHOENIX & von GONTARD, P.C.
One City Centre, 15th Floor
St. Louis, Missouri 63101

ATTORNEY FOR APPELLANT/DEFENDANT

Leland Dempsey #30756