

## **Summary of SC89291, Dale Lawrence v. Beverly Manor**

Appeal from the Jackson County circuit court, Judge Jon R. Gray.

**Attorneys:** The nursing home was represented by Jon W. Jordan, Stephen M. Strum and Thais Ann Folta of Sandberg, Phoenix & von Gontard of St. Louis; and Lawrence was represented by Tim E. Dollar of Dollar Burns & Becker LC in Kansas City and Phillip A. Burdick of the Burdick Law Offices PC in St. Joseph. Missouri Association of Trial Attorneys, which filed a brief as a friend of the Court, was represented by Leland F. Dempsey and Ashley L. Baird of Dempsey & Kingsland PC in Kansas City. Missouri Chamber of Commerce & Industry, which also filed a brief as a friend of the Court, was represented by David L. Schenberg and Mark G. Arnold of Husch Blackwell Sanders LLP in St. Louis as well as Harvey M. Tettlebaum of Husch Blackwell Sanders LLP in Jefferson City.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A nursing home appeals the circuit court's decision overruling its motion to compel a man to arbitration in a wrongful death suit he filed after his mother died as a result of injuries she sustained in the nursing home. In a decision written by Judge Michael A. Wolff, the Supreme Court of Missouri affirms the trial court's decision, holding the man is not bound by the arbitration agreement. Judge Wolff writes an opinion for himself and five other judges holding that the wrongful death claim is a new cause of action and not one that derived from a suit the decedent could have brought, which would have been covered by the arbitration agreement. In addition, the sister signed the agreement not in her individual capacity or on behalf of a potential class of wrongful death plaintiffs but only through her mother's power of attorney. Judge Glenn Norton – a judge of the Missouri Court of Appeals, Eastern District, who was sitting by special designation – wrote a concurring opinion in which he was joined by Judge Richard B. Teitelman. He notes the circuit court's judgment should be affirmed but believes the provisions of the arbitration agreement requiring the decedent or her family to arbitrate their claims, rather than having them decided in a court of law, are unconscionable and, therefore, are unenforceable.

**Facts:** At the time Dorothy Lawrence moved into the Beverly Manor nursing home in March 2003, her daughter, Phyllis Skoglund, signed an agreement requiring arbitration for any claims the mother may have against the nursing home and any claim "derived through" her claims. Skoglund signed the arbitration agreement on her mother's behalf, acting under the power of attorney her mother granted her in 1992. Shortly after being admitted to the nursing home, the mother died. Her son, Dale Lawrence, sued Beverly Manor for his mother's wrongful death, alleging she died as a result of injuries she

sustained when Beverly Manor employees dropped her. Beverly Manor filed a motion to compel arbitration, which the trial court overruled. Beverly Manor appeals.

## **AFFIRMED.**

**Court en banc holds:** (1) Dale Lawrence, as the plaintiff in the wrongful death suit, is not bound by the arbitration agreement his sister signed on their mother's behalf. Under both section 537.080, RSMo 2000, and the precedent cases, a wrongful death action is a new cause of action that does not revive a cause of action that belonged to the deceased, making it separate and distinct from any underlying tort claims the deceased might have pursued. The parties who may bring wrongful death suits are distinct from those who may bring a suit for an underlying tort, and the measure of damages in the two types of suits is different. Although the language of *State ex rel. Burns v. Whittington*, 219 S.W.3d 224 (Mo. banc 2007), may seem to create ambiguity as to whether wrongful death should be considered a derivative cause of action, the *Burns* holding is limited to the issue of venue, providing that, for purposes of venue, wrongful death actions are treated as derivative of the underlying tortious acts that caused the fatal injury. There is nothing in the venue statute that purports to amend the wrongful death statute or to overturn this Court's precedents construing the wrongful death statute. Similarly, *Burns* does not overturn this Court's precedent holding that, substantively, wrongful death is a cause of action separate from underlying torts. Here, the arbitration agreement applies only to persons "whose claim is derived through or on behalf of" Dorothy Lawrence. Dorothy Lawrence, however, could not be a party to the wrongful death suit resulting from her death, a claim for wrongful death does not derive from any claims she might have had, and the damages are not awarded to the wrongful death plaintiffs on her behalf.

(2) Neither Phyllis Skoglund nor the class of wrongful death plaintiffs is bound by the arbitration agreement because Skoglund signed the agreement only through her mother's power of attorney. She did not sign in her individual capacity or as a representative of the class of potential wrongful death beneficiaries, even assuming she could have done so.

**Concurring opinion by Special Judge Norton:** The author agrees with the result reached by the Court. He would hold, however, the provisions requiring the resident to arbitrate any personal injury claims against the nursing home and requiring the resident and nursing home to waive their right to have such claims decided in a court of law are procedurally and substantively unconscionable and, therefore, are unenforceable. Generally applicable state law contract defenses – such as fraud, duress and unconscionability – may be used to invalidate arbitration agreements without violating the federal arbitration act. This protects consumers against unfair pressure to agree to unwanted arbitration. Procedural and substantive unconscionability both may be found in an adhesion contract, which is a form contract created and imposed by a stronger party on a weaker party on a "take it or leave it" basis, the terms of which unexpectedly or unconscionably limit the obligations of the drafting party. Moreover, an agreement

requiring arbitration is unconscionable when an average reasonable person would not reasonably expect, in light of the totality of the circumstances surrounding the transaction, that a dispute might have to be resolved through arbitration rather than litigation. Here, the arbitration agreement is a contract of adhesion in which the individual resident and the nursing home have unequal bargaining power. During the admission process and beyond, the reasonable expectation is that the nursing home will provide adequate care for the resident. As a result, a person in the process of being admitted to a nursing home is not in a position to be thinking about whether, by signing a form in conjunction with an admission agreement, the resident and the resident's successors and assigns are waiving their right to have any personal injury claim decided in a court of law.