

August 1, 2010

## **I. PROFESSIONAL LIABILITY – ARBITRATION AGREEMENTS**

### **Court Refuses to Hold that All Pre-Dispute Agreements to Submit Medical Malpractice Claims to Binding Arbitration Are Unenforceable.**

In *Moore v. Woman to Woman Obstetrics and Gynecology, L.L.C.*, --- A.2d ---, 2010 WL 3238968 (N.J. Super. A.D. August 18, 2010), plaintiffs Monica and Kevin Moore, parents of Koral Moore, who has Down Syndrome, filed a complaint alleging medical malpractice and seeking damages, including special damages for extraordinary medical expenses. Due to Monica's age, her pregnancy was considered high risk. Her doctor, defendant Lisa Vernon, M.D., practicing with defendant Woman to Woman Obstetrics & Gynecology, L.L.C., referred Monica to defendants Carlos Fernandez, M.D., and Premier Perinatal, L.L.C. (Premier).

Monica's first appointment with Dr. Fernandez at Premier was on June 13, 2008. She was to be given an ultrasound due to her high-risk pregnancy. The receptionist gave Monica a clipboard with forms she was to complete. Monica recalls a "medical questionnaire" and "forms concerning privacy and, finances or that sort of thing." No one brought her attention to the arbitration agreement. Although Monica does not recall seeing or signing the arbitration agreement, she acknowledges that it bears her signature and is dated June 13, 2008. Monica was not given a copy of the agreement after she signed it or when she left the office.

Plaintiffs filed this appeal from orders compelling arbitration of all claims against defendants Dr. Fernandez and Premier. Plaintiffs requested the court hold that all pre-dispute agreements to submit medical malpractice claims to binding arbitration are unenforceable. The court found that plaintiffs arguments for a general rule prohibiting pre-dispute arbitration agreements are questions of policy which the Legislature has resolved in the Arbitration Act (N.J.S.A. 2A:23B-1 to -32). The court noted that the Legislature's approval of arbitration agreements is broad and the Act clearly allows pre-dispute agreements to arbitrate. Moreover, the Act does not prohibit agreements to arbitrate based upon the nature of the disputed claim. As such, the court declined imposing an absolute bar to enforcement of agreements to arbitrate such claims. However, it did point out the fact that that the Legislature requires the court to evaluate, on a case-by-case basis, cases in which a purported agreement to arbitrate should not be enforced because there was no agreement to arbitrate or because there are grounds to revoke an agreement to arbitrate.

The court then considered plaintiffs' arguments that it was error to compel arbitration pursuant to the signed pre-dispute agreement. As noted, defendants did not dispute, that plaintiff did not receive a copy of the arbitration agreement. Plaintiff contended that the agreement was not sufficiently clear to permit a finding that she knowingly agreed to waive her rights of access to

the courts. The court held that “[u]nder the totality of the circumstances in this case, defendants were not entitled to summary judgment enforcing this agreement over plaintiffs’ claims that this contract of adhesion was procedurally and substantively unconscionable.”

### **The Federal Arbitration Act Preempts State Nursing Home Law Therefore Allowing Nursing Home Resident Contracts to Contain Arbitrate Clauses**

In *Estate of Ruzala v. Brookdale Living Communities, Inc.*, --- A.2d ---, 2010 WL 3118695 (N.J. Super. A.D., August 10, 2010), plaintiffs, Ida Azzaro and Marie Mizerak, each signed residency agreements with two New Jersey assisted living facilities operated by Alterra Healthcare Corporation (Alterra), which is owned by Brookdale Living Communities, Inc. (Brookdale), both out-of-state companies. Ms. Azzaro signed the agreement on behalf of her husband, Pasquale Azzaro; Mizerak signed for Anna Ruzala, for whom she had power of attorney. Each resident suffered significant injuries at their facility and later died as a result.

Plaintiffs brought suits sounding in negligence and wrongful death against Alterra, Brookdale, and other individuals associated with the ownership and operation of these facilities. Defendants moved to compel arbitration based on the arbitration and limitation of liability provisions in the contracts. The arbitration provisions required that all claims, except eviction proceedings, be resolved through binding arbitration.

The main issue to be decided was whether § 2 of the Federal Arbitration Act (FAA) which declares arbitration provisions in contracts “valid, irrevocable, and enforceable,” preempts the public policy of the State “Nursing Home Responsibilities and Rights of Residents” act (the Act), N.J.S.A. 30:13-8.1, which renders void and unenforceable “[a]ny provision or clause waiving or limiting the right to sue between a patient and a nursing home.”

The trial court initially denied defendants’ motion without prejudice and directed the parties to conduct limited discovery on the issue of the enforceability of the arbitration provisions. Defendants renewed their motions at the end of this limited discovery period. The court denied defendants’ motions finding three independent grounds for not enforcing the arbitration provisions: (1) the arbitration provisions were void as against public policy under N.J.S.A. 30:13-8.1; (2) the FAA is not applicable because the transactions between the parties did not involve interstate commerce; and (3) even if N.J.S.A. 30:13-8.1 is preempted by the FAA, the arbitration agreements are part of a consumer contract of adhesion and the particular limitations and prohibitions contained render the agreements unconscionable.

On appeal, the court reversed the court’s finding that the FAA is inapplicable to the arbitration agreements at issue. The court held that the FAA preempts the anti-arbitration provision in N.J.S.A. 30:13-8.1 finding that the economic activities performed by these nursing facilities in servicing the residency contracts involve interstate commerce. However, the court affirmed the trial court’s determination that some of the arbitration provisions in the residency agreements were unenforceable based on the doctrine of substantive unconscionability. The court found that the residency agreements were contracts of adhesion as they were presented on a “take-it-or-

leave-it” basis. However, the court found the limited record insufficient to demonstrate a level of procedural unconscionability that would invalidate the parties' arbitration agreement. Nonetheless, the court did determine that the discovery restrictions, limitations on compensation for non-economic damages, and the preclusion of punitive damages were substantively unconscionable. Therefore, the court held that while the contract to arbitrate disputes with the facility were enforceable, the provisions limiting discovery and damages were unconscionable.

## **II. EMPLOYMENT LAW**

### **A Successful Summary Judgment Motion Does Not Necessarily Lead to a Finding that the Claims Are Frivolous and Unreasonable for Purposes of Collecting Attorney’s Fees and Costs**

In *Green v. Port of Authority of New York and New Jersey*, 2010 WL 2989990 (D.N.J. July 26, 2010), defendant Port Authority of New York and New Jersey (“Port Authority”) filed a motion for attorney’s fees after it was granted summary judgment on all counts of a complaint filed by plaintiff Frank Green alleging violations of Title VII. The Port Authority sought attorney's fees and costs arguing that Green's Title VII claims were frivolous, unreasonable, and without foundation.

The court began its analysis by citing the U.S. Supreme Court case *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), which held that “a district court may in its discretion award attorney's fees to a prevailing defendant ... upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation.” The court noted that the Third Circuit in *E.E.O.C v. L.B. Foster Co.* 123 F.3d 746, 751 (3d Cir.1997) refined the Christiansburg standard, stating that when determining whether an award of counsel fees to a Title VII defendant is appropriate, “courts should consider several factors, including whether plaintiff established a prima facie case, whether defendant offered to settle, and whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits.” Additional factors a court must consider when evaluating whether a plaintiff's action was frivolous, unreasonable or without foundation are whether the question was one of first impression; whether the plaintiff risked a real threat of injury; and whether the trial court has made a finding that the suit was frivolous under the guidelines set forth in *Christiansburg. Barnes Found. v. Twp. of Lower Merion*, 242 F.3d 151, 158 (3d Cir.2001)

Port Authority argued that Green's claims were frivolous and unreasonable because he did not establish a prima facie case. Port Authority specifically pointed to the Court's summary judgment opinion stating that the evidence “simply [did] not approach actionable conduct on the part of [his supervisor] or others.” Port Authority claimed that any reasonable person viewing the facts of this case would have found the allegations to be frivolous, and therefore it maintained that it was unreasonable for Green to bring his claims. It further argued that Green's sexual harassment, hostile work environment, and retaliation claims satisfy each of the *Christiansburg* elements even though a finding of just one would be sufficient to award attorney's fees. Defendant also argued that it is irrelevant that Green did not act in bad faith, because in *Christiansburg* the U.S. Supreme Court concluded that the standard for determining whether to award attorney's fees to

a prevailing party is objective; and quoting the court's summary judgment opinion argued that here, "objectively, Green's supervisor's actions were not misconduct at all."

The court rejected these arguments noting that although it determined that the comments and actions of Green's supervisor were at most "intersexual flirting" and that courts require more severe or pervasive misconduct than this to sustain plaintiff's claims, this observation did not equate with a characterization of the claims as "entirely frivolous."

The Court similarly rejected Port Authority's argument that because this case was decided on summary judgment, the court must have found Green's claims to be frivolous and unreasonable. Defendants argue that by granting summary judgment this "Court recognized the inherent weakness of Plaintiff's case."

The court provided that the defendant failed to consider that "[t]here is a significant difference between making a weak argument with little chance of success ... and making a frivolous argument with no chance of success.... [I]t is only the latter that permits defendants to recover attorney's fees." Port Authority's position would subject every plaintiff who lost on summary judgment to a probable fee award against him or her, exactly the menace that legal authority and the statutory scheme provide against.

Port Authority's second argument was that Green's claims against the individual defendants were without foundation under Title VII noting that in granting summary judgment, this court recognized that individual employees may not be held liable under Title VII. Port Authority argued that Green and his lawyer should have been aware that they could not name individual defendants in the case and that Port Authority put Green on notice of this fact in a letter to the plaintiff's attorney. The court held that under an objective standard, this misstep by Green's attorney did not necessarily entitle Port Authority to attorney's fees, especially because the misstep only applied to one of Green's many claims. The court provided "[t]he consequence for counsel's mistake is that Port Authority prevailed on the point, not that Port Authority gets to inflict punishment."

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