IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

ROY J. BURKETT, JR., Administrator of the Estate of NANNIE BURKETT, Deceased and In His Own Right,	:	OCTOBER TERM 2012
Appellee	:	No. 02585
v.	:	
ST. FRANCIS COUNTRY HOUSE, CATHOLIC HEALTH CARE SERVICES, and ARCHDIOCESE OF PHILADELPHIA,	:	2102 EDA 2018
Appellants	:	

RAU, J.

OPINION

I. Introduction

On June 14, 2010, Appellee's decedent, Ms. Nannie Burkett, arrived via ambulance at Appellant St. Francis Country House ("St. Francis"). Ms. Burkett, who was a Medicare recipient, was admitted to St. Francis as a last resort for Ms. Burkett's son, Appellee Roy Burkett, Jr., who tried to care for his mother himself after moving her into his home. Ms. Burkett's health issues mounted and she was in and out of hospitals and other nursing care facilities as she battled dementia, high blood pressure, high cholesterol, and Type II Diabetes. Upon discharge from her penultimate hospitalization in May 2010, Ms. Burkett was transferred to a long-term nursing care facility because the hospital told Mr. Burkett that his mother could no longer be cared for at home. However, any stability this provided was short-lived. Soon after her admission, Mr. Burkett was informed that Ms. Burkett's Medicare insurance was not sufficient for her to remain beyond 30 days and she would have to be transferred elsewhere. Limited in

options by facilities that accepted Medicare and had available beds, Mr. Burkett's only choice was St. Francis.

On June 14, 2010, Ms. Burkett was transferred to St. Francis in an ambulance. Mr. Burkett rushed there to meet her. Mr. Burkett received no advance notice. Mr. Burkett arrived shortly after his mother and briefly checked on her before meeting with St. Francis's Admissions Director, Emily Siolek. Mr. Burkett, as his mother's designated "Responsible Person," was given many documents to review and sign associated with Ms. Burkett's admission to St. Francis. The meeting lasted approximately 35 minutes. Ms. Siolek briefly explained some of the provisions included in the Nursing Facility Admissions Agreement for St. Francis Country House ("Admissions Agreement") but did not go over the mandatory binding arbitration clause before "rushing" him to sign everything. See Attachment A, Admissions Agreement, Evidentiary Hr'g. Tr. Ex. P-1.

Five months later, after several more visits to the hospital, Ms. Burkett passed away under hospice care in November 2010. Mr. Burkett, as his mother's executor and in his own right, brought a lawsuit against Appellants St. Francis Country House, Catholic Health Care Services, and the Archdiocese of Philadelphia alleging that medical negligence injured his mother while she was a patient at St. Francis and that negligence caused her death.

Appellants filed a Motion to Compel Arbitration of Mr. Burkett's survival and wrongful death claims pursuant to the mandatory binding arbitration clause in the Admissions Agreement. The Superior Court ruled that Mr. Burkett's wrongful death claims were not subject to mandatory binding arbitration because Mr. Burkett had not signed the Admissions Agreement in his own right. Mr. Burkett was a "non-intended third party, in his capacity as administrator of the Estate and in his own right" and was

therefore not a party to the mandatory binding arbitration clause nor bound by it. Burkett v. St. Francis Country House (Burkett II), 2017 WL 2954662 at *2, *5 (Pa. Super. filed July 11, 2017) (unpublished memorandum). The Superior Court ruled that Mr. Burkett "is entitled to a trial on the wrongful death cause of action." Id. at *5. Since Mr. Burkett signed the Admissions Agreement as the Responsible Person for his mother, the Superior Court remanded the survival act claims Mr. Burkett brought on his mother's behalf back to this Court[1] to hear evidence and argument on the contract-based defenses to the mandatory arbitration clause related to the survival action. The Superior Court explained the trial court's task on remand:

> "…[Mr.] Burkett argued he was not bound by the arbitration agreement based on allegations of unconscionability and lack of consideration. The trial court did not address these issues due to its finding that the claims fell outside of the agreement. Furthermore, there was no evidence presented by the parties with respect to these claims. Therefore, in accordance with Taylor II, we remand for the parties and the court to address these contract-based defense claims related to the survival action."

Id. at *5 (citation omitted).

After an evidentiary hearing, this Court finds that the mandatory binding arbitration clause within the Admissions Agreement is unenforceable under the law because the credible evidence showed that it was unconscionable in the circumstances of this case.[2] This Court further finds that since Appellants Catholic Health Care Services and the Archdiocese of Philadelphia did not sign the Admissions Agreement,

[1] The original trial judge in this matter was the Honorable Jacqueline Allen. Due to her duties related to being the Administrative Judge of the Trial Division, Judge Allen reassigned the matter to this judge after the Superior Court's remand "to address [Plaintiff's] contract-based defense claims related to the survival action." Burkett v. St. Francis Country House (Burkett II), 2017 WL 2954662, at *3 (Pa. Super. July 11, 2017) (unpublished memorandum).

[2] Given this Court's finding that the mandatory binding arbitration clause of the Admissions Agreement was unconscionable, the defense that there was no consideration given to be bound by arbitration is not addressed.

they were not parties to the mandatory binding arbitration clause, and cannot require Mr. Burkett's survival claims against them to be arbitrated rather than litigated in court.

II. Procedural History

Appellee Roy Burkett, Jr. filed his Complaint against Appellants St. Francis Country House, Catholic Health Care Services, and the Archdiocese of Philadelphia on October 18, 2012 containing survival claims on behalf of Appellee's decedent, Ms. Nannie Burkett, and wrongful death claims on his own behalf as his mother's sole beneficiary. Appellee alleges that the Appellants were negligent in caring for Ms. Burkett while she was a resident of St. Francis, leading to injuries that ultimately resulted in her death. Appellants filed an Answer to the Complaint and New Matter on February 8, 2013. On February 15, 2013, Appellants filed a Motion to Compel Arbitration based on the Admissions Agreement signed by Appellee Mr. Burkett, as Responsible Person for his mother, which contained a mandatory binding arbitration clause. Oral argument on the Motion to Compel Arbitration was held on June 6, 2013. On August 13, 2013, Judge Jacqueline Allen denied the Motion to Compel Arbitration for both the survival act and wrongful death claims. Appellants appealed Judge Allen's Order on September 13, 2013.

The Superior Court affirmed Judge Allen's denial of the Motion to Compel Arbitration on January 25, 2016. Burkett v. St. Francis Country House (Burkett I), 133 A.3d 22 (Pa. Super. 2016). The Superior Court held that because Mr. Burkett did not sign the Admissions Agreement in his own right, but did so standing in the shoes of his mother as her Responsible Person, he was not party to the Admissions Agreement nor the mandatory binding arbitration clause, and therefore could not be compelled to arbitrate his wrongful death claims. Id. at 30-31. The Superior Court further held that it

was obligated, based on the law at that time, to keep the survival act and wrongful death claims consolidated in one action and thus also affirmed that the survival act claims could not be compelled to arbitration. Id. at 34.

Appellants filed a petition for allowance of appeal with the Pennsylvania Supreme Court on April 20, 2016 and asked the Court to hold its decision until disposition of the then-pending Taylor II case. The Supreme Court agreed and after Taylor II[3] was decided, granted Appellants' petition for allowance of appeal, vacated the Superior Court's Order in Burkett I, and remanded for further proceedings.

Upon remand, the Superior Court "affirmed in part, reversed in part, and remanded [to the trial court] for further proceedings." Burkett II, 2017 WL 2954662 at *1. The Superior Court re-affirmed that "the trial court did not abuse its discretion in failing to compel arbitration of Burkett's wrongful death claims" because Mr. Burkett was not a party to the Admissions Agreement and could not be bound by the mandatory binding arbitration clause. Id. at *3. However, the Superior Court determined that under Taylor II, Ms. Burkett's survival claims could be severed from the wrongful death cause of action and sent to arbitration if the mandatory binding arbitration clause of the Admissions Agreement is valid and enforceable. Id. at *2. Because Mr. Burkett's contract-based defenses to the arbitration clause were never addressed by any court, and no evidence was ever presented on this issue, the Superior Court remanded the

[3] In Taylor II, the Supreme Court held that:

> "The only exception to a state's obligation to enforce an arbitration agreement is provided by the savings clause, which permits the application of generally applicable state contract law defenses such as fraud, duress, or unconscionability, to determine whether a valid contract exists. Pursuant to the savings clause, the compulsory joinder mandate of Rule 213(e) could bar the trial court from bifurcating the Taylors' arbitrable survival action from its pending litigation in state court only if it qualifies as a generally applicable contract defense." Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490, 509 (Pa. 2016).

case back to the trial court to hear evidence on Mr. Burkett's contract-based defenses to the mandatory binding arbitration clause of the Admissions Agreement.

This Court ordered briefing by the parties and held an evidentiary hearing on March 28, 2018. On June 19, 2018, this Court found that the credible evidence showed that the mandatory binding arbitration clause within the Admissions Agreement is unenforceable under the law because it is unconscionable. This Court further found that since Appellants Catholic Health Care Services and the Archdiocese of Philadelphia were not parties to the Admissions Agreement executed by Appellee Roy Burkett, Jr. and Appellant St. Francis Country House, they were not encompassed within the mandatory binding arbitration clause and may neither benefit from nor be bound by it. Thus, based on these valid contract-based defenses, Appellee's survival act claims can proceed in court rather than through mandatory arbitration. Appellants appealed this Court's Order on July 3, 2018.

III. Factual Findings

A. Mr. Burkett's lack of meaningful choice in nursing facilities and Ms. Burkett's arrival at St. Francis Country House

At the evidentiary hearing on March 28, 2018, Mr. Burkett testified credibly about the circumstances that led to his mother's admission to St. Francis in June 2010. Mr. Burkett, a former U.S. Army infantryman and current firefighter and paramedic with the City of Philadelphia, testified that prior to her admission to St. Francis, his mother, Nannie Burkett, lived independently until she was about 89-years old when she fell ill and moved in with Mr. Burkett and his wife. Evidentiary Hr'g Tr. 22:22 - 25:22, Mar. 28, 2018. Ms. Burkett's condition worsened and by April 2010, a Durable Power of Attorney was executed with Mr. Burkett named as his mother's Agent. Id. at 40:16-19; see also, Attachment A, Admissions Agreement; Evidentiary Hr'g. Tr. Ex. P-1. In April 2010, Ms.

Burkett, who suffered from dementia (and potentially Alzheimer's), high blood pressure, high cholesterol, and Type II Diabetes, was admitted to Delaware County Memorial Hospital. Ms. Burkett was briefly sent to two different nursing homes, in between further admissions to Delaware County Memorial Hospital, until she was finally transferred to Harlee Manor Rehabilitation Center. Evidentiary Hr'g Tr. 26:40-41, Mar. 28, 2018. Mr. Burkett testified that his mother left one of the nursing care facilities, HCR Manor Care Wallingford, "because she fell and . . . she wasn't getting the proper healthcare." Id. at 42:20-24. Due to the serious and ongoing nature of her health issues, Delaware County Memorial Hospital would not allow Ms. Burkett to be discharged home, and required that she be transferred to a skilled nursing care facility. Id. at 27:5-14. In May 2010, Ms. Burkett was transferred to Harlee Manor Rehabilitation Center, which "was supposed to be" for her long-term care. Id. at 43:16-25. However, approximately one month after her admission, Ms. Burkett's Medicare insurance "ran out for Harlee Manor" and stopped covering certain treatments she required. Id. at 41:2 - 42:6.

Mr. Burkett testified that he had very few options of skilled nursing care facilities where Harlee Manor could transfer his mother because of the limitations associated with Ms. Burkett's Medicare insurance coverage and the lack of availability at facilities that did accept Medicare. Id. at 44:13 - 46:14. Mr. Burkett went to Cathedral Village to try to set up a meeting, but "the health insurance that [his mother] had, it wasn't good enough. It wasn't enough." Id. at 45:3-6. Mr. Burkett testified that he did not want to send his mother back to HCR Manor Care Wallingford because he was unhappy with the treatment she received there, and she had previously fallen while under their care. Id. at 45:22 - 46:3, 42:20-24. Mr. Burkett also testified that he looked into Manor Care in Yeadon and Simpson House, but neither facility had an available bed. Id. at 46:4-14.

Even after Ms. Burkett was admitted to St. Francis, Mr. Burkett continued to look for other options but was unable to find another nursing care facility that would accept his mother's Medicare insurance and had an open bed. Id. at 25:11-16.

On June 14, 2010, Ms. Burkett was transferred from Harlee Manor Rehabilitation Center to St. Francis. Mr. Burkett testified that he was not present when the decision to transfer his mother was made, and only became aware that she was being moved when he received a phone call from Harlee Manor informing him that she was already on her way to St. Francis in an ambulance. Id. at 51:1 - 52:20. Mr. Burkett testified that he immediately drove to St. Francis "to make sure that everything was done." Id. at 26:20 - 27:4. When Mr. Burkett arrived, his mother was already in a room in the dementia ward being treated by nurses. Id. at 27:25 - 28:11. Mr. Burkett recalled that he checked in on his mother and spoke to one of the charging nurses, who explained "what they do and how they take care of patients up there." Id. at 28:2-8. Mr. Burkett then went down to the office on the first floor to complete paperwork. Id. at 52:21-24.

B. Mr. Burkett's meeting with the Admissions Director of St. Francis Country House and signing of the Admissions Agreement

When Mr. Burkett arrived at the front office, he met with Emily Siolek, St. Francis Country House's Admissions Director. Id. at 28:16-23, 72:7-13. This Court finds that Mr. Burkett credibly testified about the meeting with Ms. Siolek and what transpired. He testified that the meeting lasted about 35 minutes, Ms. Siolek handed him a stack of papers, and informed him that he had to sign admission papers in order for his mother to be admitted, including the Admissions Agreement and the Responsible Person Agreement. Id. at 37:15-16; 53:21-25; 62:25 - 63:18. Mr. Burkett testified that he brought a Power of Attorney giving him authority to sign on his mother's behalf. Mr. Burkett stated that Ms. Siolek did not have all the documents he signed when the

meeting started and she left the office several times and returned with additional papers. Id. at 30:10-18.

Mr. Burkett recalled that while Ms. Siolek briefly discussed some of the provisions contained in the Admissions Agreement generally, she did not go over each page or clause individually. Id. at 34:12-15. For example, Mr. Burkett described that Ms. Siolek explained the "Voluntary Mediation" clause and he understood it to mean that "if we had any problems, to discuss it with her, to give them a call and they will set up a meeting on my mom's healthcare." Id. at 34:23-25. The mandatory binding arbitration provision, along with the voluntary mediation section, falls under the "Facility Grievance Procedure" section of the Admissions Agreement, located on pages 17-21 of the 27-page Admissions Agreement. See Attachment A, Admissions Agreement; Evidentiary Hr'g. Tr. Ex. P-1. This Court finds that Mr. Burkett credibly testified that Ms. Siolek did not explain the mandatory binding arbitration clause or what arbitration was. See Evidentiary Hr'g Tr. 35:1-9, Mar. 28, 2018 ("Q: Did she explain to you what an arbitration was? A: No. Q: Did you know what an arbitration was? A: No, I did not. Q: Did anybody explain to you, within a 30-day process after you signed these papers, what an arbitration was? A: No."). This Court also finds that Mr. Burkett did not understand that signing the Admissions Agreement with the mandatory binding arbitration clause meant that he would be giving up his mother's right to a jury trial for any claims she may have against St. Francis. See id. at 66:10-13 ("Q (by the Court): Were you ever told that you were giving up rights with respect to the arbitration provision? A: No, Your Honor.").

Further, this Court finds that Mr. Burkett credibly testified that Ms. Siolek did not explain that he had the option to cross out or strike out portions of the Admissions

Agreement with which he disagreed and that he did not opt out of the mandatory binding arbitration clause because he was not aware that this was a possibility. See id. at 37:5-10, 64:18 - 65:14. Mr. Burkett also testified credibly that Ms. Siolek did not explain the 30-day opt out provision. Id. at 64:14-17. Further, there was a clause in the Admissions Agreement stating that "Resident may not modify this Agreement except by a writing signed by the Facility." Attachment A, Admissions Agreement; Evidentiary Hr'g. Tr. Ex. P-1 at 22. This Court finds that Mr. Burkett was unaware, and Ms. Siolek did not explain to him, that he could consult with a lawyer before he signed any of the paperwork. See Evidentiary Hr'g Tr. 37:11-14, Mar. 28, 2018 ("Q: Did she suggest to you or tell you you had a right to have an attorney go over the papers before you signed them? A: No.").

According to Mr. Burkett's testimony, Ms. Siolek asked for personal and financial information about Ms. Burkett and anyone that would be taking care of her finances while she was in St. Francis before she "explained certain patient care." Id. at 30:8; 28:24 - 29:4. Ms. Siolek left the room a "[c]ouple times" and would come back with more papers. Id. at 30:10-18. This Court finds credible Mr. Burkett's testimony that he was not finished reading the first papers Ms. Siolek gave him when she came in with more, and that Mr. Burkett felt "rushed to sign [them]." Id. at 30:19-23. In addition to signing the Admissions Agreement, Mr. Burkett was also asked in this 35-minute meeting to sign "triplicate of paperwork . . . for [his mother's] personal information, bank accounts, and everything." Id. at 36:16-21.

This Court finds that Mr. Burkett credibly testified that he believed he had to sign all the admissions documents during his meeting with Ms. Siolek in order for his mother to remain at St. Francis and receive necessary medical care. Id. at 62:10-17; see also,

id. at 62:25 - 63:18 (describing when he initially arrived at St. Francis and his mother had arrived by ambulance and was being treated by a nurse, that Ms. Siolek explained that "I [had] to sign the papers if I wanted to get her admitted"). This Court finds credible Mr. Burkett's testimony that he signed the admissions paperwork in the middle of the 35 minute meeting. Id. at 37:15-20.

After the meeting, Mr. Burkett recalled that Ms. Siolek gave him a folder with information on St. Francis' offerings, as well as blank copies of some of the documents he signed, including the Admissions Agreement and the Responsible Person Agreement. Id. at 53:16-25. He read through "almost" all the documents "the next day." Mr. Burkett called Ms. Siolek, who returned his call "later on" and answered his questions. Id. at 54:1-20. This Court also finds credible Mr. Burkett's testimony that his questions for Ms. Siolek were not about the Admissions Agreement or other paperwork but instead about getting his mother's medical equipment, such as a wheelchair and an air mattress, transferred to St. Francis from Harlee Manor. Id. at 66:18 - 67:4.

Mr. Burkett's credible testimony of this meeting was unrebutted by any contrary testimony. Ms. Siolek testified that she had no specific recollection of meeting with Mr. Burkett when his mother was admitted to St. Francis in June 2010. Id. at 87:9-12. Ms. Siolek's testimony was almost exclusively related to actions she said she generally took when meeting with new patients. See id. at 78:25 - 80:15, 82:21 - 83:7, 85:23 - 86:21, 87:21 - 88:10, 89:23 - 90:4, 103:7-10, 106:11-20. Ms. Siolek testified that she usually would "invite them into [her] office and try to make them comfortable [] and present them with two packets, quote unquote, of paperwork . . . [a]nd then just proceed by having them sign the admissions paperwork." Id. at 79:5-12. Ms. Siolek described the "admission packet" as "a pretty daunting document." Id. at 79:22-23. Ms. Siolek

testified that her approach was to explain the "many clauses in th[e] contract" and that she would "go over the main clauses that were pretty obvious." Id. at 79:24 - 80:2. These clauses included the consent to care clause, which Ms. Siolek testified she "always thought was the most important clause," financial clauses, a mandatory arbitration clause, and "consents for immunization, laundry, [and] things like that." Id. at 80:2-9. Ms. Siolek testified that when she discussed the mandatory arbitration clause with new residents or their family, she "didn't tell them what its purpose was. [She] just said that it was a clause in the contract whereby they agree to mandatory arbitration in the face of a legal issue." Id. at 101:8-11. Ms. Siolek described that while she understood "as an individual" that anyone who signed the Admissions Agreement with the mandatory binding arbitration clause was signing away their right to a jury trial, she did not generally explain that to people during the admissions process. Id. at 102:4-19. Ms. Siolek explained that the signer received a folder containing a blank copy of the Admissions Agreement for them to "peruse [] at their leisure" and that they had 30 days "to contest anything that they saw in the agreement." Id. at 80:10-15. Ms. Siolek testified that if residents or their family had questions about the Admissions Agreement or any specific provision, including if anyone wanted to cross any out or opt out of the mandatory arbitration clause, she would attempt to answer their questions to the best of her ability during the 20 to 45 minute meetings, but that she generally did not handle those issues and directed them to St. Francis's administrator. Id. at 83:3-7, 85:23 - 86:21, 104:4 - 105:6, 107:25 - 108:2. Again, since Ms. Siolek had no specific recollection of meeting with Mr. Burkett, his credible testimony of their meeting remains uncontested, including that Ms. Siolek never explained the mandatory arbitration clause or its consequences to him. Id. at 87:9-12.

This Court finds that Ms. Siolek's testimony on when a patient's admission was complete was contradictory. Compare id. at 77:25 - 78:4 ("Q: When would the actual admission be complete? A: The admission was completed when the resident arrived at the facility and the appropriate admissions paperwork was signed. That was a complete admission."), with id. at 84:2-6 ("Q: And was it a condition of the admission of the resident that the family member sign the paperwork absolutely before they could be deemed to be admitted? A: No.").

Ms. Siolek testified that the mandatory binding arbitration clause was incorporated into the existing Admissions Agreement at some point after she became Admissions Director of St. Francis in 1997. Id. at 72:12-13, 94:4-9. Ms. Siolek credibly testified that she did not recall any other changes that were made to the Admissions Agreement when the mandatory binding arbitration provision was inserted. Id. at 107:11-19, 109:15-20. Ms. Siolek did not receive any training on arbitration agreements or the specific mandatory binding arbitration clause added to the St. Francis Admissions Agreement. Ms. Siolek testified that she received "inservice" training at St. Francis on the Admissions Agreement as a whole, but "not necessarily any specific aspect of it," conducted by the legal team that drafted the document. Id. at 94:10 - 95:1. Ms. Siolek testified that the inservice training may have been two sessions of "perhaps" two to three hours each, but she did not specifically recall. Id. at 95:8 - 96:2. This Court finds that besides these two inservice training sessions on the Admissions Agreement as a whole, Ms. Siolek did not receive any other training or education on mandatory arbitration agreements.

This Court finds that Mr. Burkett credibly testified that he felt rushed and pressured during a 35-minute meeting to sign admissions paperwork and that he did not

understand the mandatory arbitration clause that was located within the longer Admissions Agreement. This Court further finds it credible that Mr. Burkett did not understand that he had signed documents that bound him to mandatory arbitration, that he had sacrificed his mother's right to litigate claims in court, and that he should have had an attorney at the time that could have explained that to him. Id. at 54:21 - 55:7. This Court finds it credible that Mr. Burkett felt that he had to sign the documents in order for his mother to remain and receive necessary medical care at St. Francis and that because she only had Medicare coverage he did not have alternative options of skilled nursing homes that took Medicare and had an available bed.

After five months as a patient and resident of St. Francis, punctuated by several trips to the hospital and one hospice facility, Ms. Burkett was taken to Delaware County Memorial Hospital for treatment at Mr. Burkett's request on November 14, 2010. On November 20, 2010, Ms. Burkett was discharged to home hospice care, where she passed away on November 24, 2010.

C. The Admissions Agreement Grievance Procedure and the mandatory binding arbitration clause

The St. Francis Admissions Agreement is a 27 page document containing 23 numbered sections. See Attachment A, Admissions Agreement; Evidentiary Hr'g. Tr. Ex. P-1. Section 19, the "Facility's Grievance Procedure" includes 4 subsections titled "Reporting Complaints," "Facility's Obligations," "Voluntary Mediation," and "Mandatory, Binding Arbitration." Relevant portions of the "Facility's Grievance Procedure" section is included below and can be found on pages 17 through 21 of the Admissions Agreement. See Attachment A, Admissions Agreement; Evidentiary Hr'g. Tr. Ex. P-1.

19. FACILITY'S GRIEVANCE PROCEDURE.

19.1 Reporting Complaints. If Resident, Responsible Person, or Resident's Attorney-in-Fact believe(s) that Resident is being mistreated in any way or Resident's rights have been or are being violated by staff or another resident, Resident or Responsible Person shall make his/her complaint known to Facility's Director of Nursing or Administrator. Resident, Responsible Person, or Residents Attorney-in-Fact must first notify the Facility of any such complaints, and provide the Facility with sixty (60) days to resolve the complaint satisfactorily to Resident before the Resident may pursue mediation and/or arbitration. This notice is not intended to preclude Resident, Responsible Person, or Resident's Attorney-in-Fact from filing a complaint with any appropriate governmental regulatory agency at any time.

19.2 Facility's Obligations. The Facility will review and investigate the complaint and provide a response to Resident/Resident's Attorney-in-Fact or Responsible Person.

19.3 Voluntary Mediation. Mediation is a form of alternative dispute resolution whereby an impartial person facilitates communication between the parties. The goal of mediation is to resolve the dispute promptly, amicably, and without incurring significant time and expense. Mediations are non-binding in nature. This Agreement provides for voluntary mediation whereby the parties may, upon mutual agreement, engage in mediation before resorting to arbitration. If the parties mutually agree to mediate any dispute that may arise between them then the mediation will be conducted at a site selected by Facility, which shall be at Facility or at a site within a reasonable distance of Facility. The costs of the mediation shall be borne equally by each party, and each party shall be responsible for their own legal fees. If the parties are unable to resolve their dispute through mediation, then the dispute may only be resolved by arbitration as provided in this Agreement. If the parties do not mutually agree to mediate any dispute that may arise between them, then they may proceed to arbitration.

19.4 Mandatory, Binding Arbitration. Arbitration is a specific process of dispute resolution utilized instead of the traditional state or federal court system. Instead of a judge and/or jury determining the outcome of a dispute, a neutral third party ("Arbitrator(s)") chosen by the parties to this Agreement renders the decision, which is binding on both parties. Generally an Arbitrator's decision is final and not open to appeal. The Arbitrator will hear both sides of the story and render a decision based on fairness, law, common sense and the rules established by the Arbitration Association selected by the parties. When Arbitration is mandatory, it is the only legal process available to the parties. Mandatory Arbitration has been selected with the goal of reducing the time, formalities and cost of utilizing the court system.

(a) Contractual and/or Property Damage Disputes. Unless resolved or settled by mediation, any controversy, dispute, disagreement or claim of any

kind or nature, arising from, or relating to this Agreement, or concerning any rights arising from or relating to an alleged breach of this Agreement, with the exception of (1) guardianship proceedings resulting from the alleged incapacity of the Resident; and (2) disputes involving amounts in controversy of less than Eight Thousand Dollars ($8,000), shall be settled exclusively by arbitration. This means that the Resident will not be able to file a lawsuit in any court to resolve any disputes or claims that the Resident may have against the Facility. It also means that the Resident is relinquishing or giving up all rights that the Resident may have to a jury trial to resolve any disputes or claims against the Facility. It also means that the Facility is giving up any rights it may have to a jury trial or to being claims in a court against the Resident. Subject to Section 19.4(f), the Arbitration shall be administered by ADR Options, Inc., in accordance with the ADR Options Rules of Procedure, and judgment on any award rendered by the arbitrator(s) may be entered in any court having appropriate jurisdiction. Resident and/or Responsible Person acknowledge(s) and understand(s) that there will be no jury trial on any claim or dispute submitted to arbitration, and Resident and/or Responsible Person relinquish and give up their rights to a jury trial on any matter submitted to arbitration under this Agreement.

(b) Personal Injury or Medical Malpractice. Unless resolved or settled by mediation, any claim that the Resident may have against the Facility for any personal injuries sustained by the Resident arising from or relating to any alleged medical malpractice, inadequate care, or any other cause or reason while residing in the Facility, shall be settled exclusively by arbitration. This means that the Resident will not be able to file a lawsuit in any court to bring any claims that the Resident may have against the Facility for personal injuries incurred while residing in the Facility. It also means that the Resident is relinquishing or giving up all rights that the Resident may have to a jury trial to litigate any claims for damages or losses allegedly incurred as a result of personal injuries sustained while residing in the Facility. Subject to Section 19.4(f), the Arbitration shall be administered by ADR Options, Inc., in accordance with the ADR Options Rules of Procedure, and judgment on any award rendered by the arbitrator(s) may be entered in any court having appropriate jurisdiction. Resident and/or Responsible Person acknowledge(s) and understand(s) that there will be no jury trial on any claim or dispute submitted to arbitration, and Resident and/or Responsible Person relinquish and give up the Resident's right to a jury trial on any claims for damages arising from personal injuries to the Resident which are submitted to arbitration under this Agreement.

. . .

(d) Right to Legal Counsel. Resident has the right to be represented by legal counsel in any proceedings initiated under this arbitration provision. Because this arbitration provision addresses important legal rights, the Facility encourages and recommends that Resident obtain the advice and assistance of

legal counsel to review the legal significance of this mandatory arbitration provision prior to signing this Agreement.

(e) Location of Arbitration. The Arbitration will be conducted at a site selected by the Facility, which shall be at the Facility or at a site within a reasonable distance of the Facility.

(f) Time Limitation for Arbitration. Any request for arbitration of a dispute must be requested and submitted to ADR Options, Inc., prior to the lapse of two (2) years from the date on which the event giving rise to the dispute occurred. In the event ADR Options, Inc., is unable or unwilling to serve, then the request for Arbitration must be submitted to Facility within (30) days of receipt of notice of ADR Options, Inc.'s, unwillingness or inability to serve as a neutral arbitrator. Facility shall select an alternative neutral arbitration service within (30) days thereafter and the selected Arbitration Agency's procedural rules shall apply to the arbitration proceeding. The failure to submit a request for Arbitration to ADR Options, Inc., or an alternate neutral arbitration service selected by Facility, within the designated time (i.e., two (2) years) shall operate as a bar to any subsequent request for Arbitration, or for any claim for relief or a remedy, or to any action or legal proceeding of any kind or nature, and the parties will be forever barred from arbitrating or litigating a resolution to any such dispute. Contact information for ADR Options, Inc., is as follows:

Two Commerce Square, Suite 1100
2001 Market Street
Philadelphia, PA 19103-7044
Phone: (215) 564-1775 / (800) 364-6098
Fax: (215) 564-1822
Website: www.adroptions.com

(g) Limitation on Damages and Allocation of Costs for Arbitration. The costs of the arbitration shall be borne equally by each party, and each party shall be responsible for their own legal fees. If Resident is or becomes eligible for Medicaid, then Facility shall pay the costs of the arbitration, but Resident shall remain responsible to pay any legal fees incurred by the Resident.

(h) Limited Resident Right to Rescind this Mandatory Arbitration Clause (Sections 19.4(a – i) of this Agreement. Resident or, in the event of Resident's incapacity, Resident's authorized representative have the right to rescind this arbitration clause by notifying the Facility in writing within thirty (30) days of the admission date. Such notice must be sent via certified mail to the attention of the Administrator of the Facility, and the notice must be post-marked within thirty (30) days of the admission date. The notice may also be hand-delivered to the Administrator within the same thirty (30) day period. The filing of a claim in a court of law within the thirty (30) days provided for above will automatically rescind the arbitration clause without any further action by Resident or Resident's authorized representative. . . .

This Court finds that the credible testimony and evidence demonstrated that the substantive provisions, procedure, and format of the mandatory binding arbitration clause that was tucked into the middle of the longer Admissions Agreement and the circumstances under which Mr. Burkett had to sign the Admissions Agreement in order to keep his mother in one of the few available facilities that accepted Medicare patients were unconscionable.

IV. Legal Analysis

Under the Federal Arbitration Act (FAA), arbitration agreements are just as "valid, irrevocable, and enforceable" as any other contract. 9 U.S.C. § 2. Courts may invalidate arbitration clauses based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)). In Pennsylvania, there is "a well-established public policy that favors arbitration, and this policy aligns with the federal approach expressed in the [FAA]. The fundamental purpose of the [FAA] is to relieve the parties from the expensive litigation and to help ease the current congestion of court calendars. Its passage was a congressional declaration of a liberal federal policy favoring arbitration agreements." MacPherson v. Magee Mem. Hosp. for Convalescence, 128 A.2d 1209, 1219 (Pa. Super. 2015) (en banc) (citations, quotation marks, and footnote omitted). Courts generally apply standard state law principles governing contracts when addressing the issue of whether there is a valid arbitration agreement, while still giving due regard to the federal policy favoring arbitration. Gaffer Ins. Co., Ltd. v. Discover Reinsurance Co., 936 A.2d 1109, 1114 (Pa. Super. 2007).

In this case, Appellee asserts that the Admissions Agreement's mandatory binding arbitration clause that he signed on his mother's behalf is unenforceable because it is unconscionable and there was no consideration. Unconscionability is a generally accepted defense to contract formation. This Court finds that the credible evidence presented showed that the procedural form and presentation of the St. Francis Admissions Agreement's mandatory binding arbitration clause, the circumstances surrounding how and when Mr. Burkett and St. Francis entered into the Agreement, and the substantive terms of the arbitration clause itself unreasonably favor St. Francis, making the mandatory arbitration clause both procedurally and substantively unconscionable and, therefore, unenforceable. Given this finding, this Court did not reach Appellee's claim of lack of consideration. Appellee also asserts that Appellants Catholic Health Care Services and the Archdiocese of Philadelphia were not parties to the Admissions Agreement and therefore may not benefit from its mandatory arbitration clause. It is a basic tenant of contract law that a person or entity not party to a contract cannot be held to its terms, absent specific and limited circumstantial exceptions. No such exceptions were credibly presented here. Accordingly, Appellee's survival act claims against Appellants Catholic Health Care Services and the Archdiocese of Philadelphia may proceed in court rather than by mandatory binding arbitration.

A. Unconscionability

The Supreme Court of Pennsylvania has maintained a consistent general formulation of the doctrine of unconscionability, based on statute and the Second Restatement of Contracts, for nearly 40 years. See Salley v. Option One Mortg. Corp., 925 A.2d 115, 119 (Pa. 2007). In Pennsylvania, "a contract or term is unconscionable, and therefore avoidable, where there was a lack of meaningful choice in the acceptance

of the challenged provision and the provision unreasonably favors the party asserting it." Id. (citing Denlinger, Inc. v. Dendler, 608 A.2d 1061, 1067-68 (Pa. Super. 1992) and Witmer v. Exxon Corp., 434 A.2d 1222, 1228 (Pa. Super. 1981)). Thus, for a court to determine that a contract is unconscionable, it must find both: "(1) that the contractual terms are unreasonably favorable to the drafter ('substantive unconscionability'), and (2) that there is no meaningful choice on the part of the other party regarding the acceptance of the provisions ('procedural unconscionability')." Cardinal v. Kindred Healthcare, Inc., 155 A.3d 46, 53 (Pa. Super. 2017) (citation omitted). The burden of proof with regard to procedural and substantive unconscionability lies with the party challenging the agreement. Unconscionability, while often fact sensitive, is ultimately a question of law for the court to decide. Salley, 925 A.2d at 120, 124.

The parties and the circumstances under which the contract was signed provide crucial context in analyzing whether or not a contract is unconscionable. While this Court heard testimony from Mr. Burkett regarding the circumstances surrounding his signing of the Admissions Agreement in his meeting with Ms. Siolek, it is important that Mr. Burkett did so only as Responsible Person for his mother. Thus, while Mr. Burkett's signature is found at the end of the Admissions Agreement, it is Ms. Burkett who is the party that was actually in contract with St. Francis, and it is the arbitrability of the survival claim belonging to Ms. Burkett that is at issue before this Court. Ms. Burkett was never consulted, nor took any part in the decisions surrounding her arrival and admission to St. Francis, because she suffered from dementia and was taken directly to the dementia unit upon her arrival. Ms. Burkett never signed the documents that took away her right to litigate claims in court and required her, or her survivors on her behalf, to share in the costs of mandatory arbitration.

1. Procedural Unconscionability

The procedural unconscionability of a contract, or clause, concerns the process by which the parties entered the contract. Often found in adhesion contracts, or those of a "take-it-or-leave-it" nature, procedural unconscionability has been distilled to involve the absence of meaningful choice in accepting the agreement on the part of one of the parties. Salley, 925 A.2d at 119. Determining procedural unconscionability requires courts to look at several factors, such as the parties' relative bargaining power, age, education, intelligence, business savvy and experience, who drafted the agreement, and whether the terms of the contract were explained to the weaker party. High v. Senior Living Props. 2 – Heatherwood, Inc., 594 F. Supp. 2d 789, 799 (E.D. Mich. 2008). The process by which parties enter into a contract can also involve an examination of the standardized form of the contract and the construction of the writing in how it is presented to the reader. See Salley, 925 A.2d at 125; Cardinal, 155 A.3d at 53; MacPherson, 128 A.3d at 221; see also, High v. Senior Living, 594 F. Supp. 2d at 799 ("[P]rocedural unconscionability of a contract is present where the challenged provision is buried in the text of a document, appears in small font, or is not otherwise conspicuous."). Here, given the evidence and testimony presented at the evidentiary hearing and this Court's findings of fact based thereon, the Admissions Agreement is procedurally unconscionable because Appellee Mr. Burkett lacked a meaningful choice, not only in the determination of what nursing care facility his mother could be admitted to, but also in his acceptance of the Admissions Agreement with the mandatory binding arbitration clause inconspicuously tucked into the middle of the 27-page document.

In the seminal case on the factors of unconscionability, the Pennsylvania Supreme Court adopted four criteria for making a determination on unconscionability:

". . . [1] the subject matter of the contract, [2] the parties' relative bargaining positions, [3] the degree of economic compulsion motivating the "adhering" party, and [4] the public interests affected by the contract." Salley, 925 A.2d at 125 (citing Delta Funding Corp. v. Harris, 912 A.2d 104, 111 (N.J. 2006)). Regarding the first factor, the subject matter of the contract is a mandatory binding arbitration clause that is included within a lengthy Admissions Agreement that had to be signed by Mr. Burkett in order for his mother to be admitted to a skilled nursing care facility due to her ailing health. Mr. Burkett attempted to care for his mother himself, but her health deteriorated to the point where professional assistance was necessary. Further, Ms. Burkett was in such poor health that she was in and out of the hospital and other rehabilitation and nursing care facilities before St. Francis was even on Mr. Burkett's radar. The hospital refused to release her to anything other than a skilled nursing home facility. Mr. Burkett worried about his mother receiving good health care but faced limited options because only a few facilities were available that accepted Medicare. This worry was evident in Mr. Burkett's testimony and underpins the sensitive nature of the context of Ms. Burkett's arrival at St. Francis, one common to the circumstances surrounding a loved one's admission to a nursing home. Thus, the subject matter of the contract at issue is not simply one of cut and dry contract terms or arbitration clauses, but involves emotional and mental vulnerability that only one side (Mr. Burkett) experienced.

The second factor laid out in Salley is the relative bargaining positions of the parties. Salley, 925 A.2d at 125. Here, it is clear that both Mr. Burkett and his mother, Ms. Burkett, who was the party actually being bound to St. Francis through the Admissions Agreement contract, were no match for the sophisticated health care institution of St. Francis Country House. The admissions paperwork presented to Ms.

Burkett through Mr. Burkett was drafted by company lawyers. The mandatory binding arbitration clause was part of St. Francis' extensive and "daunting" admissions paperwork in the longer Admissions Agreement that Mr. Burkett had to sign. It was in the nineteenth section of the 27-page Admissions Agreement. His mother was already at the facility and being treated. Mr. Burkett had no other alternatives and was in a situation where his mother's health and welfare rested on his shoulders. Mr. Burkett was never told nor did he have any understanding that his mother could still be treated and reside at St. Francis if he did not sign the documents or if he deleted sections within the lengthy agreement. Mr. Burkett was presented with documents that allowed his mother to access care she desperately needed, but unbeknownst to him, simultaneously took away her rights to litigate legal claims in court and created an obligation to share the costs of a mandatory arbitration procedure.

With the knowledge, business and legal savvy, education, and training disparities present between St. Francis and Mr. Burkett, let alone Ms. Burkett, St. Francis had the upper hand in its dealings with the Burkett family. The bargaining positions of the parties were exceptionally imbalanced in approaching the complex admissions paperwork. While this type of disparity in the relative bargaining power of the parties does not render the contract *per se* procedurally unconscionable, it is one factor this Court must consider, and one deeply intertwined with the idea of meaningful choice.

The third Salley factor requires an examination of the degree of economic compulsion the weaker party, or the "adhering" party in adhesion contracts, is placed under at the time of signing the agreement. Salley, 925 A.2d at 120. Similar to the way the relative bargaining power of the parties recalls the idea of meaningful choice, the degree to which a party may be economically constrained to enter a contract is

unequivocally linked to the amount of choice that party may or may not have in entering that particular contract. Here, Mr. Burkett was juggling not only all of the aspects that come with caring for an aging and ailing loved one, but doing so within the limitations imposed by his mother's Medicare health insurance. Mr. Burkett credibly testified that of the numerous nursing care facilities he researched, only a few would accept Medicare. That limited number was then further narrowed to facilities that had an open bed. Mr. Burkett had to research all of this quickly because his mother's insurance coverage was running out for Harlee Manor, which initially was intended to be a long term facility for her.

In our society, a person's access to services in nearly every industry is dependent upon their financial status. Those with means have multiple options and can afford to pay for the best. Access and choice is automatically limited for those without means, including those on Medicare. If a person cannot afford to deviate from their insurance carrier's coverage options, that lack of choice is necessarily resultant from the "economic compulsion motivating [them]" when it comes time to choose among those limited options. Id. at 125.

Here, Mr. Burkett had to act on behalf of his mother who suffered from dementia and could not make her own decisions. Because of Ms. Burkett's Medicare coverage, Mr. Burkett's options in available nursing home care were already limited. But in addition, Mr. Burkett also faced a lack of available beds at facilities that did accept Medicare. Ultimately, it came down to one facility, St. Francis Country House. Mr. Burkett was constrained, economically and otherwise, to contract with St. Francis to ensure his mother received necessary care.

The last factor under Salley, the public interests affected by the contract, can be seen as an amalgamation of various considerations, including those discussed above. Id. Protecting those who cannot afford choice based on their financial circumstances, who are often society's most vulnerable, such as the elderly, disabled, and children, is unquestionably an essential public interest that should be maintained. When people with limited financial ability are put into an even more vulnerable position by having to square off with a sophisticated business entity, backed by expertise, that controls the contracting process, an already dominant position is bolstered. Allowing that disparity to continue betrays the public interest.

Mr. Burkett and his mother were no match for St. Francis. When an entity can influence the nursing home intake process to ensure that consumers—and some of society's most vulnerable consumers at that—relinquish rights they may not fully understand, by hiding mandatory and binding arbitration provisions within other types of contracts, they are preventing patients and their families from understanding the purpose and meaning of the agreements, and thereby guaranteeing themselves an advantage in any future conflict. This creates a situation ripe with procedural unconscionability. Public policy interests demand that it be rectified.

These public policy concerns are also amplified because mandatory arbitration provisions in Medicare facility agreements essentially set up a two-tiered system of health care and legal rights based on a person's financial status. Ms. Burkett's inability to afford the full range of health care facilities meant that she would not have the right to litigate claims of inadequate care because she likely did not have the means to pay for arbitration. Our courts are free and open, even for those without financial means, and provide more expansive legal protections than arbitration systems provide. There is a

strong public interest against allowing mandatory arbitration agreements to be imposed on Medicare patients that strip them of their right to the public court system and force them to pay for challenges to their medical care in an arbitration forum when patients with greater financial means can choose among multiple health care facilities and do not need to sacrifice their legal rights in order to get that care. Allowing facilities to impose these mandatory arbitration agreements that require patients to pay for legal challenges could actually result in facilities providing substandard care to those with lesser financial means because these patients would not have the financial ability to challenge their care in the way that wealthier patients could.

When analyzing procedural unconscionability, courts also take into consideration the form of the contract itself, including how evident important provisions or limitations are presented to the signer, particularly in the nursing home arbitration context. In Cardinal, the Superior Court found that an arbitration agreement was not unconscionable for several reasons, including those directly related to the form and presentation of certain provisions of the agreement. First, the arbitration agreement was an individual document requiring a signature, and was not simply a clause within a larger contract. See Cardinal, 155 A.3d at 53. Second, the very top of the agreement contained a capitalized, bold-faced notice stating: "**THIS AGREEMENT IS NOT A CONDITION OF ADMISSION TO OR CONTINUED RESIDENCE IN THE FACILITY**." Id. Further, the first page of the agreement contained a bold-faced, underlined, and capitalized statement that: "**THE PARTIES UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY ENTERING INTO THIS AGREEMENT THEY ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR DISPUTES DECIDED BY A COURT OF LAW OR TO APPEAL ANY DECISION OR AWARD OF DAMAGES**

RESULTING FROM THE ADR PROCESS EXCEPT AS PROVIDED HEREIN." Id. at 53-54. Lastly, the agreement also contained language stating that the resident "understands that he or she has the right to seek advice of legal counsel and to consult with a Facility representative concerning this Agreement; [and] that his or her signing . . . is not a condition of admission to or continued residence in the Facility." Id. at 54.

Similarly, in MacPherson, the Superior Court upheld the enforceability of an arbitration agreement, which was a stand-alone 4 page document, based on several factors. First, the agreement contained the following notice at the very top of the page, even before the title of the document: "**VOLUNTARY AGREEMENT: If you do not accept this Agreement, the Patient will still be allowed to live in, and receive services in, this Center.**" MacPherson, 128 A.2d at 1214. Second, there was an additional conspicuous, large, bold-faced notification that by signing, the parties waive their right to a trial before a judge or jury: "**BY ACCEPTING THIS AGREEMENT, THE PARTIES ARE WAIVING THEIR RIGHT TO A TRIAL BEFORE A JUDGE AND/OR A JURY OF ANY DISPUTE BETWEEN THEM. PLEASE READ THIS AGREEMENT CAREFULLY AND IN ITS ENTIRETY BEFORE ACCEPTING ITS TERMS.**" Id. at 1214-15. This notice was repeated, again capitalized and bold-faced, at the end of the 4 pages of the agreement, and directly preceding the signature lines. Id. at 1218.

The mandatory arbitration clause at issue here is distinguishable from those in Cardinal and MacPherson in several important respects. First, the mandatory binding arbitration clause Mr. Burkett "signed" was not a separate document, but was part of a standardized Admissions Agreement contract and began on page 18 of the 27-page Admissions Agreement. In fact, not only was the mandatory binding arbitration clause included within the longer Admissions Agreement, it did not even warrant its own

section, and was instead the fourth of four subsections located under the "Facility's Grievance Procedure" section. See Attachment A, Admissions Agreement; Evidentiary Hr'g. Tr. Ex. P-1 at 18. Further, the title of the mandatory binding arbitration clause subsection was enumerated in the same bold-faced, underlined fashion as all the other subsection headings in the rest of the Admissions Agreement, with no typeface emphasizing the existence or importance of such a provision. Unlike in both Cardinal and MacPherson, there was no language at all, let alone in bold-faced, underlined, or capitalized typeface, highlighting that the document Mr. Burkett signed contained any provision foreclosing his mother's right to a jury trial on any and all claims she may have against St. Francis.

Additionally, in contrast to the arbitration agreements in Cardinal and MacPherson, there was no language, conspicuous or otherwise, within either the Admissions Agreement as a whole or the mandatory binding arbitration clause notifying Mr. Burkett that exercising the ability to rescind the provision would not impact Ms. Burkett's ability to remain a resident of St. Francis. As his testimony showed, Mr. Burkett was under the impression, based on his conversation with Ms. Siolek, that if he did not sign the Admissions Agreement his mother would not be admitted. See Evidentiary Hr'g Tr. 63:6-11, Mar. 28, 2018 ("[Ms. Siolek] explained that . . . I [had] to sign the papers if I wanted to get her admitted."). Given that Mr. Burkett had no other Medicare nursing home options, this Court finds it credible that Mr. Burkett felt he had no choice but to sign the Admissions Agreement to ensure that his mother could stay at St. Francis. Ms. Siolek had no specific memory of her discussion with Mr. Burkett and thus his credible testimony on what occurred was unrebutted. Her testimony that a resident would not be expelled from St. Francis if they did not want to agree to the

mandatory arbitration clause is meaningless if the Admissions Agreement implied otherwise and Mr. Burkett was never informed of this. There was no credible testimony that Mr. Burkett understood, or was even informed, that he could reject the arbitration clause or that he knew he was giving up some of his mother's significant legal rights by signing the mandatory binding arbitration clause.

Appellee Roy Burkett was a concerned son who sought professional medical care for his mother whose medical condition worsened beyond what he and his wife could manage in their home. He remained involved in her treatment and worried for her health. Because of the limitations of Ms. Burkett's Medicare insurance, Mr. Burkett was given little, if any, choice in the matter of transferring his mother to St. Francis, and was informed of the transfer only after his mother was already on her way to the facility. He hurried to St. Francis to be by his mother's side, to ensure she was comfortable and receiving treatment, and then to attend a meeting necessary to have her fully admitted. In a meeting that only lasted 35 minutes, Mr. Burkett was expected to (1) provide a mass of information, financial and personal, about his mother and himself; (2) review the batch of "daunting" documents presented to him, including one very long document, which covered a wide range of topics and contained the mandatory binding arbitration clause, tucked in as Section 19.4; (3) listen to Ms. Siolek's explanations of the procedure for admitting a new patient, the type and scope of treatment available to patients, the financial obligations of patients and their families, and the contents of the documents presented to him; (4) ask Ms. Siolek any questions he had about St. Francis, their procedures, and the admissions paperwork he was given minutes before; and (5) sign away his mother's constitutional right to litigate any and all claims she could ever have against St. Francis and agree to pay for any challenges in an arbitration

forum that provided fewer protections, where that signing occurred only halfway through the 35 minutes.

This Court finds that the credible evidence demonstrated that the circumstances surrounding the process in which Mr. Burkett and St. Francis entered the Admissions Agreement contract, which contained the mandatory binding arbitration clause, combined with the procedural aspects of the form and presentation of the clause itself, make the signing of the Admissions Agreement and therefore the mandatory binding arbitration clause procedurally unconscionable.

2. Substantive Unconscionability

Substantive unconscionability is concerned not with the process of the parties' formation of the contract, but with the substance of the contract itself and whether it unreasonably favors the drafting party. Salley, 925 A.2d at 119. The substantive unconscionability of an agreement or clause can only be determined after an examination of the material terms and provisions of the particular contract at issue and whether they are unreasonably one-sided in their partiality. In analyzing the specific terms of arbitration agreements challenged for substantive unconscionability, the Third Circuit has held that all provisions of an arbitration clause should be examined comprehensively to determine if the clause, as a whole, "is afflicted by fundamental and pervasive unfairness." Hall v. Treasure Bay Virgin Islands Co., 371 Fed. Appx. 311, 314 (3rd Cir. 2010). Thus, "a series of unconscionable provisions in an arbitration agreement will preclude severance and enforcement . . . if they evidence a deliberate attempt [] to impose an arbitration scheme that is designed to discourage [] arbitration or to produce results biased in the [drafter's] favor." Id.

Here, while some of the Admissions Agreement's individual terms may not appear unconscionable at first glance, when read as a whole, the terms (1) mandating cost-sharing of arbitration fees upon Ms. Burkett, a Medicare recipient, (2) allowing St. Francis to unilaterally decide the location of arbitration, and (3) giving St. Francis nearly sole authority to choose the "neutral" arbitrators creates "an arbitration scheme that is designed [] to produce results biased in [St. Francis'] favor" and is therefore substantively unconscionable. Id.

Here, the arbitration clause dictates that the costs of any arbitration are to be "borne equally by each party" unless "Resident is or becomes eligible for Medicaid, then [St. Francis] shall pay the costs of the arbitration." Attachment A, Admissions Agreement; Evidentiary Hr'g. Tr. Ex. P-1 at 20. Under this provision, Ms. Burkett would be required to pay half the arbitrators' costs in addition to her own legal fees, because she was insured under Medicare rather than Medicaid. Further, the location of any arbitration of claims occurs "at a site selected by the Facility, which shall be at the Facility or at a site within a reasonable distance of the Facility." Id. at 20. The choice in arbitrator is also unilaterally decided by St. Francis. See id. Even when the selected arbitration company is unavailable or unwilling to serve, St. Francis "shall select an alternative neutral arbitration service." Id. These provisions make it clear that the arbitration scheme is designed to weigh heavily in St. Francis's favor.

Appellants argue that "numerous decisions by the Superior Court have held that similar, but more stringent, nursing home admission agreements, some of which may even be characterized as adhesion contracts, are neither procedurally nor substantively unconscionable," and cite Cardinal and MacPherson. Dft.'s Br. 12 (emphasis omitted). However, these cases are distinguishable not just with respect to their lack of

procedural unconscionability, as discussed previously, but specific terms of the Cardinal and MacPherson arbitration agreements differentiate these cases from the Admissions Agreement at issue here. The contract in Cardinal, in addition to containing the bold-faced and conspicuous notices outlined above, stated that the facility would pay the fees and costs of the arbitrator while the parties would pay their own legal fees and cost. Cardinal, 155 A.3d at 54. The arbitration agreement in MacPherson similarly included the provision that the facility pay the arbitrators' fees and costs. MacPherson, 128 A.3d at 1221-22.

In this case, Appellant St. Francis' requirement that the patient must split the cost of the arbitrator makes the mandatory arbitration clause substantively unconscionable. This is a major distinction from the Cardinal and MacPherson arbitration agreements where the facility covered the cost of the arbitrator. For a person on Medicare, who is unable to pay for high end health care out of pocket, to be required to relinquish their right to a public, free court system and instead pay half the cost of an arbitrator selected by the facility—whose care the patient is challenging—dramatically reduces that person's legal rights. For most Medicare patients, this requirement effectively means that they sacrifice their ability to challenge any legal wrongdoing because they will not have the financial resources to pay the cost of an arbitrator. By contrast, the court system is open to all litigants, even those without resources. Thus, not only does mandatory arbitration necessitate that the Medicare recipient give up their constitutional right to a jury trial, but it may foreclose their ability to challenge any legal violations based on the cost requirement, one that does not exist in our public court system.

When analyzed as a whole, the Superior Court found that the Cardinal and MacPherson provisions, where the facility paid the entire cost of arbitration, in

conjunction with the prominent notices set off from the remainder of the arbitration language, made the agreements neither procedurally nor substantively unconscionable. In contrast here, there was nothing prominent in the Admissions Agreement that warned the signer about the mandatory arbitration clause or any of its specific and significant terms that eliminated the patient's rights. This procedural unconscionability was also coupled with several individual provisions of the mandatory binding arbitration clause biased towards St. Francis, including those that imposed location and time limitations, gave St. Francis complete control over choosing the "neutral" arbitrators, and particularly that which required the parties to split the arbitrators' costs, despite Ms. Burkett's Medicare recipient status. These provisions pointedly benefitted St. Francis to the extent that the process and the Admissions Agreement itself were designed to unreasonably favor St. Francis, and render the mandatory binding arbitration clause substantively unconscionable.

B. Other Contract Defenses

Appellee Mr. Burkett argues that Appellants Catholic Health Care Services and the Archdiocese of Philadelphia are not entitled to benefit from the mandatory binding arbitration clause because did not sign the Admissions Agreement. Pl.'s Closing Br. Evidentiary Hr'g 6. Catholic Health Care Services and the Archdiocese of Philadelphia were not even mentioned in the Admissions Agreement. The Admissions Agreement states in no uncertain terms that it is "by and between St. Francis Country House, a Pennsylvania non-profit corporation . . . and Resident." Attachment A, Admissions Agreement; Evidentiary Hr'g. Tr. Ex. P-1 at 1. Mr. Burkett contends that "arbitration agreements are to be strictly construed and . . . should not be extended by implication," and as a result, that "'parties to a contract cannot be compelled to arbitrate a given

issue absent an agreement between them to arbitrate that issue.'" Pl.'s Closing Br. Evidentiary Hr'g 6 (citing Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 661 (Pa. Super. 2013)). Non-signatories are not parties to a written contract. This Court concludes that, because Catholic Health Care Services and the Archdiocese of Philadelphia did not sign nor were mentioned directly or indirectly in the Admissions Agreement, the law requires that the survival act claims against these Appellants proceed to trial.

This argument was first raised forcefully by Mr. Burkett's counsel at the March 28, 2018 evidentiary hearing:

> "[T]here was no arbitration agreement with Catholic Healthcare Services. There was no arbitration agreement with the Archdiocese. The language of the contract speaks only to Mr. Burkett. This agreement is made by and between St. Francis Country House, a Pennsylvania nonprofit corporation, and the resident. It makes no reference to the other two defendants."

Evidentiary Hr'g Tr. 7:11-22, Mar. 28, 2018. Once it was raised, this Court informed the parties that this contract defense was an issue ripe for resolution and, as such, that they should enter evidence with regard to it at the evidentiary hearing. See id. at 14:5-7, 18-19, 22-24 ("[J]ust assume [the issue] is something that we have to address here today. . . . [T]hat is a discussion item today. . . . Don't assume that it's not an issue today. It's been raised as an issue, so I will have to address it as an issue.").

The finding that the Admissions Agreement only applies to and binds those who signed it is not new to this case. In Burkett I, the Superior Court held that because Mr. Burkett did not sign the Admissions Agreement in his own right, he was not bound by the mandatory arbitration clause and could pursue his wrongful death claims in court. Burkett I, 133 A.3d at 30. This situation is analogous. Catholic Health Care Services and the Archdiocese of Philadelphia did not sign the Admissions Agreement, are not

mentioned in it, and there is no provision stating that all agents or assigns may benefit from its terms.

Appellants Catholic Health Care Services and the Archdiocese of Philadelphia counter primarily on procedural grounds, rather than on the merits, that even though they did not sign the contract they should still benefit from the terms St. Francis secured for itself. Specifically, they argue that the survival claims against them should proceed in arbitration for three reasons: (1) whether they were parties to the Admissions Agreement is outside the scope the Superior Court's remand; (2) these contract defenses were waived; and (3) even though they did not sign the Admissions Agreement they should benefit from its terms because there is an "obvious and close nexus between the non-signatories and . . . the contracting party." Def.'s Post-Hr'g Br. 2-5. These responses were also argued at the evidentiary hearing. See Evidentiary Hr'g Tr. 12:2-15, Mar. 28, 2018 ("And if you look at the earlier progeny of the Burkett briefs and the decisions coming down from the Superior Court . . . [they] define St. Francis as including St. Francis Country House, the Archdiocese of Philadelphia, as well as Catholic Health Care Services."); id. at 12:18 - 13:8 ("[T]hat decision has already been decided and/or waived by the plaintiff. . . . It was never brought up by the plaintiff in either her response to the motion to compel arbitration, in any of the briefings, any of the oral argument before Judge Allen, in any of the Superior Court briefings on that issue.").

Appellants argue that the Superior Court remanded the case to address only the contract-based defenses of unconscionability and lack of consideration and that Appellee's other contract defense that Appellants Catholic Health Care Services and the Archdiocese of Philadelphia are not parties to the contract cannot be considered. Def.'s

Post-Hr'g Br. 3. This reading of the Superior Court's remand is unduly narrow. In Burkett II, the Superior Court reiterated that "the trial court did not abuse its discretion in failing to compel arbitration of Burkett's wrongful death claims" due to Mr. Burkett not signing the Admissions Agreement in his own right but only in his mother's stead. Burkett II, 2017 WL 2954662, at *3. With respect to Mr. Burkett's survival act claims on Ms. Burkett's behalf, the Superior Court charged this Court as follows:

> "However, like the claimants in Taylor II, Burkett argued he was not bound by the arbitration agreement based on allegations of unconscionability and lack of consideration. The trial court did not address these issues due to its finding that the claims fell outside of the agreement. Furthermore, there was no evidence presented by the parties with respect to these claims. Therefore, in accordance with Taylor II, we remand for the parties and the court to address these contract-based defense claims related to the survival action."

Id. (citation omitted). Therefore, the Superior Court's remand for an evidentiary hearing to address "these contract-based defenses" should cover any contract-based defenses that have not been covered, including whether a party was even a signatory to the contract. Notwithstanding the five years of litigation over how the arbitration clause will impact the parties' rights, the case has progressed little in terms of presenting any evidence on the merits of any claims. To date, there has been no evidence presented on *any* contract-based defenses.

This case is akin to Taylor II, where the Superior Court remanded the case to the trial court so "the parties will have the opportunity to litigate whether there [was] a valid and enforceable arbitration contract in accord with *generally applicable contract defenses and the FAA's savings clause.*" Taylor II, 147 A.3d at 513 (emphasis added). This Court interprets the phrase "these contract-based defenses" to encompass "the application of generally applicable state contract law defenses such as fraud, duress, or unconscionability, to determine whether a valid contract exists." Burkett II, 2017 WL

2954662, at *2 (citing Taylor II, 147 A.3d at 509). Consequently, Appellee Mr. Burkett should be able to raise the generally applicable state contract law defense of non-existence of mutual assent. To do otherwise would preclude Mr. Burkett's valid defense that two of the Appellants were not even parties to the contract from which they seek to benefit.

Appellants also argue that the Superior Court meant to preclude review of the specific contract defense that Appellants Catholic Health Care Services and the Archdiocese of Philadelphia are not parties to the contract because the Superior Court has referred to all three Appellants collectively as contract-parties in each of its opinions. Evidentiary Hr'g Tr. 12:2-15, Mar. 28, 2018. However, the Superior Court consistently refers to St. Francis Country House, Catholic Health Care Services, and the Archdiocese of Philadelphia collectively as "St. Francis" for ease of reference to the parties as collective Appellants. See Burkett I, 133 A.3d at 24 ("St. Francis Country House, Catholic Health Care Services and Archdiocese of Philadelphia (collectively, "St. Francis") appeal from the order of the Philadelphia Court of Common Pleas . . ."); Burkett II, 2017 WL 2954662, at *1 (referring to the denial of the motion to compel "brought by St. Francis Country House, Catholic Health Care Services, and the Archdiocese of Philadelphia (collectively, 'St. Francis'))." Appellants conclude that when the Superior Court makes such statements as "Burkett executed a Nursing Facility Admissions Agreement provided by St. Francis on behalf of Defendant," the reference to St. Francis is meant to capture all three parties, St. Francis Country House, Catholic Health Care Services, and the Archdiocese of Philadelphia. See Burkett I, 133 A.3d at 22, 25. This is disingenuous. The actual language of the contract governs who are parties to it. Appellants are distorting the Superior Court's collective reference to all

three Appellants in a completely different context to mean that it has ruled on this specific issue.

The Superior Court has not yet addressed whether there is even a valid contract between Appellee Mr. Burkett and Appellants Catholic Health Care Services and the Archdiocese of Philadelphia because they did not sign nor were they referenced as parties to it anywhere in the contract's language. This is a contract-based defense that should be resolved in the first instance by the trial court. Whether one is a party to a contract is an essential element in establishing the existence and validity of a contract. Because this issue was not addressed previously, like unconscionability, this Court considered it here.

Appellants raise an alternative procedural theory that the non-signatory Appellants should benefit from the mandatory binding arbitration clause in the Admissions Agreement even if they were not parties because "[p]laintiff long ago waived the argument." Def.'s Post-Hr'g Br. 3. In essence, Appellants argue that Appellee had only one opportunity to raise generally applicable contract defenses: in his initial answer to the Motion to Compel Arbitration on March 11, 2013 and he should be foreclosed from raising additional contract defenses. Id.

The Pennsylvania Rules of Civil Procedure explain that:

> "A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply, except a defense which is not required to be pleaded under Rule 1030(b), the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the objection of failure to state a legal defense to a claim, the defenses of failure to exercise or exhaust a statutory remedy and an adequate remedy at law and any other nonwaivable defense or objection."

Pa. R.C.P. No. 1032(a). The force of Rule 1032(a) is tempered by Rule 126, which states that:

> "The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

Pa. R.C.P. No. 126. This rule functions "to grant the trial court latitude to overlook any *procedural* defect that does not prejudice the rights of a party." Rubenstein v. SEPTA, 668 A.2d 283, 286 (Pa. Cmwlth. Ct. 1995) (citing Slaughter v. Allied Heating, 636 A.2d 1121 (Pa. Super. 1993)) (emphasis in original). In determining whether to disregard any error or defect of procedure, the trial court broad discretion.

It is true that Appellee committed a procedural error by not including in his response to the Motion to Compel Arbitration the contract defense that Appellants Catholic Health Care Services and the Archdiocese of Philadelphia did not sign nor were encompassed within the Admissions Agreement. However, Mr. Burkett's error here is akin to the error Appellants made at an earlier stage of this case. Specifically, Appellants failed to plead their defense—that Mr. Burkett's claims must be arbitrated—as a new matter. The Superior Court held that permitting a seven days belated and procedurally inaccurate Motion to Compel Arbitration to proceed did not affect the substantial rights of the parties. Burkett I, 133 A.3d at 26. As a result, the Superior Court, citing Rule 126, forgave Appellants that error and allowed them to continue litigating their Motion to Compel Arbitration:

> "We find that although Burkett is accurate in stating that, generally, a defense of arbitration should be pled as new matter, 'our Rules of Civil Procedure must be liberally construed so that actions are resolved in a just, speedy and inexpensive manner consistent with Rule 126' and as a result, the facility did not waive its right to compel arbitration."

Id.

In raising his defense that Catholic Health Care Services and the Archdiocese of Philadelphia were non-signatories to the Admissions Agreement, Appellee Mr. Burkett is five years late. Appellants, however, point to no development or occurrence in the litigation in the time since Appellee responded to the Motion to Compel Arbitration that would prejudice their ability to defend against additional contract defenses. Nor could they. The Superior Court's first opinion in this matter was limited to the issues of whether Ms. Burkett's family members were required to arbitrate the wrongful death claim even though they did not sign the Admissions Agreement that contained the mandatory binding arbitration clause. See Burkett I, 133 A.3d at 24. The Superior Court's second decision was limited to the issue of bifurcation 8of the wrongful death and survival claims in light of the Pennsylvania Supreme Court's decision in Taylor II. Burkett II, 2017 WL 2954662, at *2. Neither of these decisions touched upon the ability of Appellee to bring and Appellants to respond to additional contract defenses. In short, nothing has transpired over the course of litigation that affects the "substantial rights of the parties."

Like the Superior Court, this Court concludes that Rule 126 and principles of equity require this Court to forgive Mr. Burkett's procedural error in failing to assert the contract defense that Catholic Health Care Services and the Archdiocese of Philadelphia were not signatories to the contract in his response to the Motion to Compel Arbitration. If Appellee's defense is meritorious, he should not be bound by the mandatory arbitration clause as to non-signatory Appellants. The same principles of fairness that allowed Appellants' earlier procedural error to be remedied should operate

here to allow Appellee to assert a valid legal defense to the contract, especially since other contract defenses were similarly addressed for the first time in this remand.

Although Catholic Health Care Services and the Archdiocese of Philadelphia are non-signatories, Appellants argue that the mandatory arbitration clause should nevertheless be enforced because there is an "obvious and close nexus between the non-signatories and . . . the contracting party." Def.'s Post-Hr'g Br. 2-5. The Superior Court has held that generally, "only parties to an arbitration agreement are subject to arbitration." Elwyn v. DeLuca, 48 A.3d 457, 461 (Pa. Super. 2012). This is because "arbitration is a matter of contract, and parties to a contract cannot be compelled to arbitrate a given issue absent an agreement between them to arbitrate that issue." Id.; see also, Schoelhammer's Hatboro Manor, Inc. v. Local Joint Exec. Bd. of Phila., 231 A.2d 160, 164 (Pa. 1967) (declining to compel non-signatory of agreement to submit to arbitration because "arbitration, a matter of contract, should not be compelled of a party unless such party, by contract, has agreed to such arbitration"). Indeed, "the existence of an arbitration provision and a liberal policy favoring arbitration does not require the rubber stamping of all disputes as subject to arbitration." McNulty v. H & R Block, Inc., 843 A.2d 1267, 1271 (Pa. Super. 2004).

One exception to the general principle that non-signatories not be bound by a written contract comes from contract law: third-party beneficiaries may fall within the scope of an arbitration agreement if that is the parties' intent. Elwyn, 48 A.3d at 461. No credible evidence was presented that either Catholic Health Care Services or the Archdiocese of Philadelphia are third-party beneficiaries or, even if they were, that the parties intended the agreement to reach them.

Another exception to the principle that non-signatories are not bound by a written contract is that non-signatories "can enforce the [arbitration] agreement when there is an 'obvious and close nexus' between the non-signatories and the contract or the contracting parties." Provenzano v. Ohio Valley Gen. Hosp., 121 A.3d 1085, 1097 (Pa. Super. 2015) (citing Dodds v. Pulte Home Corp., 909 A.2d 348 (Pa. Super. 2006) (holding plaintiffs' joinder of defendant parent corporation, who was non-signatory to contract, and assertion of claims for fraud and unfair trade practices against non-signatory, did not defeat arbitration agreement)). One paradigmatic "obvious and close nexus" arises between "a signatory principal and a non-signatory agent; if the principal is bound by the arbitration agreement, its agents, employees, and representatives are generally likewise bound and can enforce the arbitration agreement." Provenzano, 121 A.3d at 1097. Like the third-party beneficiary exception, no credible evidence was presented that a principal-agent relationship existed between any of the three Appellants.

In short, St. Francis and Ms. Burkett, through Mr. Burkett standing in her shoes, entered into a written contract. A written contract may only be enforced against signatories. Just as Mr. Burkett was not bound by the mandatory binding arbitration clause for his wrongful death claims because he did not sign the agreement, Appellants Catholic Health Care Services and the Archdiocese of Philadelphia did not sign the agreement and do not get to benefit from its mandatory arbitration clause for the survival act claims against them. The Nursing Facility Admission Agreement for St. Francis Country House unambiguously seeks to bind St. Francis Country House and Nannie Burkett and no other parties. Because Catholic Health Care Services and the

Archdiocese of Philadelphia did not sign the Admissions Agreement, the survival claims against them should be asserted in the public courts and not be forced into arbitration.

V. Conclusion

Ms. Nannie Burkett had dementia and other medical issues that required skilled nursing care but was limited in her options for nursing home care because of the small number of nursing homes that accepted Medicare and had beds available. On June 14, 2010, her son Appellee Roy Burkett, Jr. rushed to meet his mother who had been transported by ambulance to Appellant St. Francis Country House, a nursing home with a vacancy. When Mr. Burkett arrived at St. Francis, his mother was already being treated in the dementia ward and he immediately was asked to review and sign, as the Responsible Person on his mother's behalf, a "daunting" admissions package that included the 27 page Admissions Agreement as well as other documents. The Admissions Agreement included a mandatory binding arbitration clause starting on page 18. The mandatory binding arbitration clause was not explained to Mr. Burkett nor was he advised that in signing the overall Admissions Agreement, he was relinquishing all his mother's legal rights to a trial in court for any claims of negligence stemming from the care she received while a patient at St. Francis. The mandatory binding arbitration clause also requires that patients pay half of the cost of arbitration whereas the public court system is free and open to all, regardless of financial situation. Mr. Burkett felt pressured to sign the documents quickly so that his mother could continue to receive necessary medical care. Mr. Burkett felt he had no choice but to sign the lengthy Admissions Agreement regardless of its provisions because as a Medicare recipient, his mother had no real options for alternative skilled nursing care.

This Court finds based on the credible evidence that the mandatory arbitration clause within the Admissions Agreement that Mr. Burkett had to sign on his mother's behalf is procedurally and substantively unconscionable and thus it is not enforceable for his mother's survival act claims. This Court also finds that Mr. Burkett can assert his mother's survival act claims against Catholic Health Care Services and the Archdiocese of Philadelphia in court rather through mandatory arbitration because they were not parties to the Admissions Agreement and do not get the benefit of the mandatory binding arbitration clause. This finding is similar to and consistent with the Superior Court's earlier holding in Burkett I that since Mr. Burkett was not a signatory to the Admissions Agreement in his own right, he was not bound by the mandatory arbitration clause in asserting his wrongful death claims. Accordingly, Ms. Burkett's survival act claims can proceed in court alongside Mr. Burkett's wrongful death act claims rather than being compelled to arbitration.

BY THE COURT:

_____
Lisa M. Rau, J.

DATE: August 1, 2018