2012 WL 12092414 (Pa.Com.Pl.) (Trial Motion, Memorandum and Affidavit)
Court of Common Pleas of Pennsylvania.
Philadelphia County

Patrick J. MACPHERSON, Executor of the Estate of Richard Macpherson, Deceased, Plaintiff,

v.

THE MAGEE MEMORIAL HOSPITAL FOR CONVALESCENCE d/b/a MAGEE REHABILITATION HOSPITAL,

and

JEFFERSON HEALTH SYSTEM, INC.,

and

TJUH SYSTEM,

and

MANOR CARE OF YEADON PA, LLC, d/b/a, Manorcare Health Services-Yeadon,

and

HCR MANORCARE, INC.,

and

MANORCARE, INC.,

and

HCR II HEALTHCARE, LLC,

and

HCR III HEALTHCARE, LLC, Defendant.

No. 111000191.
April 20, 2012.

October Term, 2011

Plaintiff's Memorandum of Law in Opposition to Defendants', Manor Care of Yeadon PA, LLC, d/b/a Manorcare Health Services - Yeadon, HCR Manorcare, Inc., Manor Care, Inc., HCR II Healthcare, LLC, HCR III Healthcare, LLC, and HCR Healthcare, LLC, Preliminary Objections to Plaintiff's Amended Complaint

Wilkes & McHugh, P.A., Ruben J. Krisztal, Esquire, Attorney Identification No. 202716, 1601 Cherry Street, Suite 1300, Philadelphia, PA 19102, Tel No. (215)972-0811, Email: rkrisztal@wilkesmchugh.com, for plaintiff, Patrick J. Macpherson, Executor of the Estate of Richard Macpherson, Deceased.

Plaintiff, Patrick J. MacPherson, Executor of the Estate of Richard MacPherson, deceased, through his counsel, Wilkes & McHugh, P.A., files this Memorandum of Law in Opposition to Defendants', Manor Care of Yeadon PA, LLC, d/b/a ManorCare Health Services - Yeadon, HCR ManorCare, Inc., Manor Care, Inc., HCR II Healthcare, LLC, HCR II Healthcare, LLC, and HCR Healthcare, LLC (collectively "ManorCare Defendants"), Preliminary Objections to Plaintiffs Amended Complaint, as follows.

I. MATTER BEFORE THE COURT

ManorCare Defendants' Preliminary Objections to Plaintiff's Amended Complaint. Plaintiff requests the Court overrule the Preliminary Objections and order ManorCare Defendants to file an Answer to Plaintiff's Amended Complaint.

II. STATEMENT OF QUESTIONS PRESENTED

1. Is this matter subject to a valid arbitration agreement?

Suggested Answer: No.

2. Is venue proper in Philadelphia County?

Suggested Answer: Yes.

3. Does Plaintiffs Amended Complaint properly plead a claim for Punitive Damages?

Suggested Answer: Yes.

4. Does Plaintiffs Amended Complaint properly plead a claim under 18 Pa.C.S.A. §2713?

Suggested Answer: Yes.

5. Does Plaintiffs Amended Complaint contain scandalous and impertinent matter?

Suggested Answer: No.

III. FACTS

This is a nursing home **abuse** and neglect case which includes a hospital Defendant. It arises from severe injuries, which Richard MacPherson suffered while residing under the Defendants care at Magee Rehabilitation Hospital, a hospital, from August 20, 2009, through September 15, 2009, and ManorCare Health Services -Yeadon, a nursing home facility, from September 15, 2009, through February 1, 2010. Mr. MacPherson died on February 1, 2010. Plaintiff, Patrick J. MacPherson, Executor of the Estate of Richard MacPherson, deceased, filed an Amended Complaint in Civil Action on March 19, 2012, alleging that Defendants **abused** and neglected Mr. MacPherson at their respective facilities. [1] On March 30, 2012, ManorCare Defendants filed Preliminary Objections seeking to enforce an alleged arbitration agreement, transfer venue to Delaware County, strike Plaintiff's claims for punitive damages and negligence per se, and strike alleged scandalous and impertinent averments from Plaintiffs Complaint.

IV. ARUGMENT

Preliminary Objections

1. Standard

Under Pennsylvania law, a court should sustain Preliminary Objections only in cases that are free and clear of doubt. Bower v. Bower, 531 Pa. 54, 57, 611 A.2d 181, 182 (1992). If the complaint pleads facts that, if believed, would entitle the plaintiff to the relief sought, then a court must overrule the objections. Wilkinsburg Police Officers Ass'n v. Commonwealth, 535 Pa. 425, 431, 636 A.2d 134, 137 (1993). As shown below, all of Defendants' Preliminary Objections should be overruled, as this Court has previously found in similar matters.

Plaintiff submits that ManorCare Defendants' Preliminary Objection seeking to Compel Arbitration cannot be decided at this time, as the record is insufficient to permit this Honorable Court to make an informed ruling on the matter. Thus, pursuant to

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Pennsylvania Rule of Civil Procedure 1028(c)(2), Plaintiff requests a scheduling order from this Court to conduct discovery so as to create a record for the determination of this issue. Assuming that arbitration is not compelled, Plaintiffs submit this Memorandum of Law in Opposition to ManorCare Defendants' Preliminary Objections seeking to dismiss Plaintiff's claims as listed.

2. Arbitration Agreement

In terms of the enforceability of contractual agreements to arbitrate, under Pennsylvania law, generally applicable contract defenses, such as fraud, duress, unconscionability, impracticability of performance, frustration of purpose, etc., may be applied to invalidate arbitration agreements and provisions. Contrary to ManorCare Defendants' contentions, Pennsylvania case law neither favors nor disfavors the enforcement of arbitration agreements. Arbitration agreements are contracts "as enforceable as other contracts, but not more so." As our Supreme Court recently noted, Congress' purpose in enacting the Federal Arbitration Act ("FAA") was to establish "a substantive rule of federal law placing [arbitration] agreements upon the same footing as other contracts." Salley v. Option One Mortgage Corp., 592 Pa. 323, 330, 925 A.2d 115, 118-19 (2007) (emphasis added).

ManorCare Defendants misrepresent the Pennsylvania Supreme Court's decision in Com., Office of Administration v. Com., Pennsylvania Labor Relations Board, 598 A.2d 1274 (Pa. 1991). ManorCare Defendants allege that this case supports that our Supreme Court favors dispute resolution in this Commonwealth. See Deft's Memorandum of Law, pp. 3-5. The ManorCare Defendants then go on to quote the Court's preference for arbitration. What the ManorCare Defendants leave out, however, is that Com. Office of Administration, involved a public employer - public employee labor dispute -- a factual setting (and public policy considerations) completely distinguishable from, and not present in, the case at hand. In fact, the Court specifically stated, "It is in the best interest of the health and safety of citizens of the Commonwealth that necessary and essential public employees have their labor disputes with the public employer resolved promptly." 598 A.2d at 1278 (emphasis added). Therefore, this case cannot stand for the broad proposition that ManorCare Defendants allege.

For the reasons given below, this Court should overrule all of ManorCare Defendants' preliminary objections and order them to file an Answer to Plaintiffs Amended Complaint.

A.1 THIS MATTER IS NOT SUBJECT TO A VALID ARBITRATION AGREEMENT.

ManorCare Defendants' purported Arbitration Agreement is invalid on numerous grounds. Prior to developing the legal arguments in opposition to ManorCare Defendants' attempt to compel arbitration, Plaintiff will highlight the grossly one-sided and misleading nature of the Arbitration Agreement.

The arbitration provision embedded in the lengthy admission agreement is riddled with unconscionable clauses, including the following:
D. DISCOVERY: Discovery shall be governed by NAF's Code of Procedure. However, discovery shall be limited as follows:... (2) A party may serve a maximum of 30 written questions (interrogatories), 30 requests to produce documents and 30 requests for admissions; inclusive of subparts.... (4) Each Party may have up to three (3) experts and no more than ten (10) lay witnesses for its witness list, as well as for Hearing. Depositions of witnesses shall be limited to the Parties' witness lists or in the Parties' Rule 26 disclosures or discovery responses but under no circumstances will a Party be allowed to take more than 13 depositions...

F. OTHER PROVISIONS:... 10. No Jury Trial: If this Agreement is found to be unenforceable and arbitration is not compelled, then as a default, the parties agree that the disputes shall be resolved solely by a judge via a bench trial. Under no circumstances will a jury decide any dispute.

Additionally, the agreement falsely states, in two separate places in the agreement, the "benefits" to arbitration: that "Arbitration is supported by the potential cost-effectiveness and time-savings... potentially to a Patient's advantage." [2]

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With this background, Plaintiff submits the following arguments of law as to why ManorCare Defendants' objection attempting to compel arbitration must be overruled.

i. The Arbitration Agreement must be struck down based upon the Doctrine of Frustration of Contractual Purpose, otherwise known as Impracticability of Performance

Pennsylvania law recognizes the doctrine of frustration of contractual purpose, otherwise known as impracticability of performance, as a defense to a party's performance of a contractual duty. Our Superior Court recently struck down a similar arbitration agreement in Stewart v. GGNSC-Canonsburg, L.P, 9 A.3d 215 (Pa. Super. 2010), reh'g denied (Jan. 13, 2011). In Stewart, a nursing home **abuse** and neglect case, the Court held that an arbitration agreement that requires the proceedings to be governed by the NAF Code of Procedure ("NAF Code") -- which mandates that the arbitrators be members of NAF, "who are the only people authorized to administrator and apply the NAF Code" -- is an integral provision that cannot be performed as NAF no longer hears such disputes. Id. at 220-22 (original emphasis; bolding added). The Court held that since the arbitral forum selection clause in agreement entered into between nursing home and resident that required the parties to arbitrate any disputes before NAF, and NAF had stopped hearing such disputes, the agreement was unenforceable. Id. At 220-22.

In Stewart, Pennsylvania also adopted the Restatement (Second) of Contracts § 261 (1981), which provides:

> [A]fter a contract is made, a party's performance is made impracticable without his fault by occurrence of an event, a non-occurrence of which was a basic assumption on which the contract was made, a duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Id.; see also Hart v. Arnold, 884 A.2d 316 (Pa. Super. 2005); Stewart v. GGNSC-Canonsburg, L.P., 9 A.3d 215, 2010 PA Super 199 (2010), reh'g denied (Jan. 13, 2011) Thus, when parties enter into an agreement that is dependent upon the existence of a specific entity or object, and when availability of the same comes to an end through no fault of the parties, the contract dissolves.

This is exactly the issue in the case at bar. The arbitration provision contained in Mr. MacPherson's admission agreement states in several provisions that NAF shall arbitrate any dispute under the Arbitration Agreement and that NAF's Code of Procedure shall apply: [3]

[B.] 1. Administrator: The arbitration shall be administered by National Arbitration Forum ("NAF"), 6465 Wayzata Blvd., Suite 500, Minneapolis, MN 55426; www.arbitration-forum.com (hereinafter "Administrator"). If the Parties mutually agree in writing not to select NAF or if the NAF is unwilling or unable to serve as the Administrator, the Parties shall agree upon another independent entity to serve as the Administrator, unless the Parties mutually agree to not have an Administrator.
[B.] 2. Demand for Arbitration shall be made in writing, sent to the other Party via certified mail, return receipt requested, and filed with NAF (unless NAF is mutually waived).

[B.] Arbitration Panel: The arbitration shall be conducted by three (3) Arbitrators (the "Panel"). Each party will select on Arbitrator. The two selected Arbitrators will select a third Arbitrator. Each Arbitrator must be a retired State or Federal Court Judge or a Member of the State Bar where the Center is located with at least 10 years of experience as an attorney. NAF approved Arbitrators do not have to be used. If one Party refuses to select its arbitrator within 30 days of a written request for same, then the Administrator shall select that Party's Arbitrator.

D. DISCOVERY: Discovery shall be governed by NAF's Code of Procedure. However, discovery shall be limited as follows....

[F.] 6. Fees and Costs: The Panels' fees and costs will be paid by the Center except in disputes over non-payment of Center charges wherein such fees and costs will be divided equally between the Parties. NAF's administrative fees shall be divided

equally among the Parties. To the extent permitted by law, any Party who unsuccessfully challenges the enforcement of this Agreement shall be required to pay the successful Parties' reasonable attorney fees and costs incurred to enforce such contract (i.e., Motion to Compel Arbitration). The Parties shall bear their own attorney fees and costs in relation to all preparation and attendance at the arbitration hearing, unless the Panel concludes that the law provides otherwise. Except as stated above the Parties waive any right to recover attorneys' fees and costs.

The entire Alternative Dispute Resolution Agreement is contingent upon the option to submit claims to the NAF and proceed in accordance with the NAF Mediation Rules and NAF Code of Procedure. Like in Stewart, since NAF no longer hears such disputes, the agreement is unenforceable.

Even if it is assumed, for the sake of argument, that the arbitration clause is part of a valid and binding agreement, the doctrine of frustrated performance effectively precludes Defendants from enforcing the agreement since it has become impracticable through no fault of Plaintiff. Defendants, however, seek to enforce the agreement despite realizing that NAF no longer accepts such cases. Yet, Defendants have failed to remove NAF as the default arbitrators of its agreements.

Further, "[t]he courts are not generally available to rewrite agreements or make up special provisions for parties who fail to anticipate foreseeable problems."[4] The Stewart Court also refused to rewrite the arbitration agreement "to replace an unenforceable provision that was integral to the agreement." Stewart, 9 A.3d at 221.[5] In declining to do so, the Court stated, "Sanctioning this type of action would run contrary to the clear intent of the parties as expressed by the plain language of the Agreement itself." Stewart, 9 A.3d at 221. Under limited circumstances, a court may sever a provision from a contract, but it is not at liberty to rewrite a contract to include terms that neither party envisioned at the outset.[6] All of these problems were avoidable with proper drafting. Accordingly, this Court should not redraft the agreement. Accordingly, this Court should not redraft this Agreement.

ii. ManorCare Defendants have failed to establish a knowing and voluntary waiver of the right to a jury trial and this agreement is against public policy

In the alternative, ManorCare Defendants have failed to establish a knowing and voluntary waiver of the right to a jury trial. Although the Seventh Amendment to the Constitution protects the right of trial by jury in civil actions,[7] that right may be waived as a part of an express agreement of the parties. Such a waiver, however, must be knowing and voluntary, according to First Union National Bank v. U.S., 164 F.Supp.2d at 663 (E.D. Pa. 2001). In First Union National Bank, the Court related that the test for contractual waiver of the Seventh Amendment right to a jury trial is knowing, voluntary and intelligent when facts show that (1) there was no gross disparity in bargaining power between parties; (2) parties are sophisticated business entities; (3) parties had opportunity to negotiate contract terms; and (4) waiver provision was conspicuous. Id. at 663.

The holding and test set forth therein have been upheld as recently as 2007.

Whether a waiver of a jury trial is knowing and voluntary involves a fact-specific inquiry. Indeed, the context in which a nursing home arbitration agreement is presented to a resident is critical to the determination of a bilateral knowing and voluntary waiver. At the time an admissions package containing numerous agreements for reimbursement and care is presented to a resident, the resident is assured that the facility will take good care of them as if they were family. At the same time, the facility will occasionally present the resident with what is described as a quick, private, inexpensive, alternative forum for the resolution of disputes, i.e. an arbitration agreement. Under the attendant circumstances, the resident cannot comprehend the magnitude or significance of the agreement that they are requested to sign. Indeed, the Plaintiff submits that there can be no knowing and voluntary waiver of the right to trial by jury under these circumstances because the horrific mistreatment and **abuse** that later occurs cannot be comprehended upon the admission of a resident to a long-term skilled nursing facility. Id.

It is questionable whether any policy favoring arbitration has the same force in cases such as this one as it does in the typical case involving an arbitration agreement. As this Court is well aware, the vast majority of cases dealing with arbitration agreements deal with those agreements that occur in commercial settings. Such agreements are borne out of negotiations between two sophisticated parties who are simply bargaining for the opportunity to resolve their disputes in a certain forum. In those instances, the parties are aware of the types of disputes that may arise, particularly since any dispute would be based on the contract that was negotiated between those parties. It is quite natural that courts and legislatures would recognize a "policy" favoring arbitration in these settings. Recognizing the unique vulnerability of nursing home patients, Pennsylvania courts have observed that "arbitration clauses in... [nursing home] cases must be closely examined." Robb v. Mountainview Specialty Care Center, Inc., 2007 Pa. Lexis 122 (C.P. Westmoreland Apr. 9, 2007) (quoting Small v. HCF of Perrysburg, 823 N.E.2d 19, 24 (Ct. Appeals Ohio 2004)) (emphasis added). The Robb court aptly noted that, given the time pressure and emotional stress involved with securing needed care, nursing home residents lack the ability to "shop" for a nursing home. Id. at *13. Thus, nursing home residents do not enjoy the same options available to sophisticated business persons or consumers generally.

Accordingly, the Robb court found that the arbitration agreement at issue in that case violated public policy because it "deprive[d] the resident of the benefit of remedial legislation enacted by Congress and [the Pennsylvania] General Assembly to protect nursing home patients." Id. at *13. Further, the court identified particular concerns with applying arbitration agreements to negligence actions, where the "reasonableness" of a defendant's action is "best left to a jury acting as a fact finder." Id. (quoting Small v. HCF of Perrysburg, 823 N.E.2d 19, 24 (Ct. Appeals Ohio 2004). Here, the ManorCare Arbitration Agreement bars any court action arising out of State or Federal law, including "breach of... provisions relating to the Resident's rights under Pennsylvania law." As such, the agreement violates public policy by both stripping Mr. MacPherson of the rights explicitly granted to him (and others in a similarly vulnerable position) by this State's legislature and failing to provide proper procedural safeguards.

Additionally, sensitive to public policy concerns with protecting nursing home patients, courts do not enforce these types of agreements unless they contain basic safeguards designed to prevent overreaching. For example, in Chighizola v. Beverly Enterprises Inc., 2006 WL 4069446 (Pa.Com.Pl.), the court upheld a nursing home arbitration agreement because the facility made clear, in no uncertain terms, that the agreement was not a precondition of admission: "At the top of the arbitration agreement, it clearly states in bold letters "RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION - READ CAREFULLY)." Id. at *423. Language of this clarity and boldness is not is contained in the Arbitration and Limitation of Liability Agreement that Richard MacPherson unwittingly signed. In the case at bar, the arbitration provision did not clearly indicate that agreeing to arbitration was not a precondition to admission. Thus, the Arbitration Agreement lacked even a basic safeguard to protect Richard MacPherson - a vulnerable nursing home resident.

A case involving personal injury, particularly in the medical care setting, is far different than those in commercial settings. First, there is no negotiation between the parties as to the terms of the agreement as required by First Union National Bank, supra. Second, there is clearly no reasonable expectation that an injury would occur. At the time of his admission to the Facility, Mr. MacPherson certainly did not have a reasonable expectation that he would suffer the injuries enumerated in the Amended Complaint. It was certainly not reasonable to expect that the ManorCare Defendants would fail to provide care to him such that he would suffer horrific and preventable injuries causing his death during his residency at Manor Care Health Services - Yeadon. Any policy favoring arbitration must rest against this backdrop.

Since the factors in First Union National Bank, supra, have not been met in this case, a finding that Richard MacPherson knowingly and voluntarily waived his Constitutional right to a jury trial cannot be justified. Additionally, public policy weighs heavily against enforcing this agreement. Lastly, the utter lack of procedural safeguards to protect a vulnerable portion of society weighs in favor of invalidating the agreement. For all the foregoing reasons, the ManorCare Defendants' Preliminary Objection attempting to compel arbitration should be overruled.

iii. The purported Arbitration Agreement is neither a part of, nor forms, a contract pursuant to Pennsylvania law, and is thus unenforceable

In the alternative, the purported Arbitration Agreement does not constitute a valid contract in the Commonwealth. For a valid, enforceable contract to exist under Pennsylvania law, the parties to the purported agreement must be shown to have reached a mutual understanding, exchanged consideration, and delineated the terms of their bargain with sufficient clarity. Consideration is typically defined as "a benefit to the promisor or a detriment to the promisee." Weavertown Transport Leasing, Inc. v. Moran, 834 A.2d 1169 (Pa. Super. 2003).

As noted by the court in Pennsy Supply, supra, "[i]t is not enough, however, that the promisee has suffered a legal detriment at the request of the promisor. The detriment incurred must be the 'quid pro quo', or the 'price' of the promise, and the inducement for which it was made." Whether or not a contract is supported by consideration, and thus valid, is a question of law for the court.

With respect to the instant Arbitration Agreement, a simple reading of the terms contained therein clearly indicates that there is no consideration that would allow it to be enforced by either party as a binding contract. ManorCare Defendants are similarly precluded from taking the position that the alleged agreement to arbitrate is merely a component of the admissions agreement for Mr. MacPherson to become a resident at the Facility. Since the purported arbitration agreement was outside of the admissions agreement, it did not become a component of it, and therefore Mr. MacPherson's Estate is not bound to arbitrate this case outside of this Honorable Court. As such, there was no detriment and/or benefit in exchange for a detriment as to either party, and thus the agreement lacks consideration in accordance with Pennsy Supply, supra.

Accordingly, the Arbitration Agreement proffered by ManorCare Defendants cannot be enforced as a matter of law under any theory of contract. Therefore, ManorCare Defendants preliminary objection attempting to compel arbitration should be overruled.

iv. The proffered arbitration agreement is void as a matter of state and federal law

The Facility, ManorCare Health Services - Yeadon, participates in the Federal Medicare Program, and thus falls within the requirements of Title XIX of the Social Security Act, 42 U.S.C. §1396, et. seq. 42 U.S.C. §1396(r)(c)(5) prohibits a nursing facility from requiring additional consideration above that provided by Medicare as a condition for resident's admission to a nursing facility. In addition, Pennsylvania regulations regarding skilled nursing facilities provide that "a facility may not obtain from or on behalf of residents a release from liabilities or duties imposed by law or this subpart except as part of formal settlement in litigation."

In this case, a provision requiring adherence to binding arbitration (presumably in accordance with the Arbitration Agreement) was embedded in the Facility's admissions contract. In a skilled nursing setting, such admissions contracts are prerequisites for admission into the facility. Thus, in order to receive the benefit of skilled nursing treatments and other services provided by the nursing home, the agreement was required to be signed. Clearly, the alleged agreement to arbitrate embedded in with the admissions contract with this case flies in the face of federal law, and is thus void as a matter of law, since it serves as additional consideration for admission to the facility. It is also void as a matter of state law, as it constitutes a release from liabilities and duties imposed by law for the Facility.

For all the foregoing reasons, ManorCare Defendants' preliminary objection attempting to compel arbitration should be overruled.

v. The Arbitration Agreement violates Pennsylvania Law By Creating a Perpetual Term

A contract that is not subject to any termination clause reflects a prohibition that extends into perpetuity. See e.g., Nova Chemicals, Inc. v. Sekisui Plastics Co., Ltd, 2008 WL 4170029, at *6, *7, *9 n.1 (W.D. Pa. Sept. 3, 2008) (holding that the clause at issue was not one in perpetuity because it defined the scope of the agreement and the duration, as it provided for two events that would terminate the agreement, nor did it contain a separate article providing for a perpetual term).

A contract that is perpetual, or "for-the-rest-of-your-life," is clearly unreasonable. In QVC, Inc. v. Tauman, 1998 WL 156982, at *6 (E.D. Pa. Apr. 3, 1998), the court found that where a covenant could be "construed to be indefinite in its term.... the Agreement could march into perpetuity, carrying with it the restrictive covenant. on its coattails for the rest of [one's] life." Id. (emphasis added). The court went on to find that "such a duration is clearly unreasonable." Id.; see also Trilog Assoc., Inc. v. Famularo, 455 Pa. 243, 256, 314 A.2d 287, 294 (1974) (rejecting a restrictive covenant with unlimited time because it is "so far-reaching, that it becomes ludicrous") (emphasis added). Consequently, contracts with an indefinite duration should be unenforceable.

Here, the Agreement at issue does not provide a termination provision. It does not provide for any termination date or events either. Instead, Defendants drafted a contract that not only endured for the rest of Mr. MacPherson's life, but also continues in perpetuity his after his death. The Agreement in fact states,

> ... this Agreement shall insure to the direct benefit of and bind... the Patient...his/her successors, spouses, children, next of kin, guardians, administrators, legal representatives, responsible parties, assigns, agents, attorneys, health care proxies, health care surrogate, third Party beneficiaries, insurers, heirs, trustees, survivors and representatives, including the personal representatives or executors of his/her estate, any person whose claim is derived through or on behalf of the Patient or relates in any way to the Patient's stay(s) at this Center, or any person who previously assumed responsibility for providing Patient with necessary services such as food, shelter, clothing, or medicine, and any person who executed this Agreement or the Admission Agreement. [8]

Thus, his Estate and his family are subject to the unconscionable terms of this unreasonable agreement. Under these circumstances, the Arbitration Agreement must be construed against ManorCare Defendants. Trilog Assoc., Inc., 455 Pa. at 256, 314 A.2d at 294.

vi. This Arbitration Agreement violates public policy because Pre-dispute arbitration agreements are not appropriate where multiple defendants are involved

Forcing a plaintiff into alternative dispute resolution where the plaintiff has sued multiple defendants under the same set of facts is void against public policy. Here, as this Court is well aware, there are other Defendants involved, the "Jefferson Defendants."

Recently, the Pennsylvania District Court rejected arbitration in a case where plaintiff had an agreement to arbitrate with only one defendant of the several that were sued under the same factual circumstance. Scott v. LTS Builders LLC, et al., 2011 WL 6294490 (M.D. Pa. 2011). The court reasoned that this "would not serve Pennsylvania's policy of using arbitration for the swift and orderly disposition of claims." Id. at *5. The court noted that other Pennsylvania courts have reached the same conclusion in similar circumstances, including: Utecht v. Fieldstone Partners L.P., 2010 WL 7057996 (C.P. Chester 2010) (petition by some defendants to compel arbitration against plaintiff home buyers based on arbitration clause in agreement of sale was denied as it would create two cases, one in court against certain defendants not subject to the arbitration clause and one in arbitration against the defendants seeking arbitration); Kiesel v. Lehigh Valley Eye Ctr. P.C., 79 Pa. D. & C.4th 432, 435 (C.P. Lehigh 2006) (arbitration clause in employment agreement would not be enforced against the ex-employee plaintiff as it would leave the individual defendant in court while the case against the corporate defendant went to arbitration); Lichtman v. Taufer, 2004 WL 1632574, at *3 (C.P. Phila. 2004); Stanley-Laman Group, LTD. v. Hyldahl, 2007 WL 5090632 (C.P. Chester 2007); 1930-34 Assocs., L.P. v. BVF Const. Co., Inc., 2006 WL 1462932, at *3 (C.P. Phila. 2006); and Univ. Mech. & Eng'g Contractors Inc.

v. Ins. Co. of N. Am., 2002 WL 31428913, at *5 (C.P. Phila 2002), aff'd, 839 A.2d 1172 (Pa. Super. 2003), appeal denied, 579 Pa. 692, 856 A.2d 834 (2004). Id. at *6.

Therefore, as this case involves multiple defendants, and the ManorCare Defendants are attempting to compel arbitration, this Agreement is void as against public policy.

vii. The Arbitration Agreement is unconscionable for several reasons

The determination of whether or not a contract is unconscionable is a question of law for the court. "A contract or a clause in a contract is to be considered unconscionable if there is an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other."

In Pennsylvania, and in many other states, unconscionability requires a showing that the contract was both procedurally and substantively unconscionable when made, although these elements need not be present to the same degree. Witmer v. Exxon Corp., 495 Pa. 540, 551, 434 A.2d 1222, 1228 (1981). "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." 15 WILLISTON ON CONTRACTS § 1763A, pp. 226-27 (3d ed. 1972). In other words, the greater the showing with respect to one of these two elements, the less showing is required with respect to the other in order to support a finding that a given term is unconscionable. See e.g., Salley, supra, 592 Pa. at 341 n.12, 925 A.2d at 125 n.12 (noting that procedural and substantive unconscionability are generally assessed according to a sliding-scale approach).

The elements of procedural and substantive unconscionability, when properly applied, meaningfully distinguish the range of ordinary and acceptable bargaining situations from those in which strong public policy favors contract avoidance. Salley, 592 Pa. at 331, 925 A.2d at 119. In this case, the Arbitration Agreement has all the markings of unconscionability, both procedural and substantive.

"Procedural unconscionability refers specifically to 'the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language.'" Zimmer v. CooperNeff Advisors, Inc., 523 F.3d 224, 228 (3d. Cir. 2008) (discussing unconscionability under Pennsylvania law) (citing Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999)); see also Germantown Mfg. Co. v. Rawlinson, 341 Pa. Super. 42, 491 A.2d 138, 145-46 (1985). "[P]rocedural unconscionability may be found where parties to a contract have unequal bargaining power." Capital Bonding v. Wilson, 2000 WL 1201885, at *2 (E.D. Pa. August 22, 2000) (citing Harris, 183 F.3d at 181); Moscatiello v. Pittsburgh Contractors Equip. Co., 407 Pa. Super. 363, 595 A.2d 1190, 1196-97 (1991), appeal denied, 529 Pa. 650, 602 A.2d 860 (1992).

An agreement is substantively unconscionable if it is "unreasonably favorable to the drafter." Huegel v. Mifflin Const. Co., 796 A.2d 350, 357 (Pa. Super. 2002). Substantive unconscionability can also be grounded on public policy concerns. Hall v. Arnica Mut. Ins. Co., 538 Pa. 337, 347-348, 648 A.2d 755 (1994).

The Agreement is procedurally unconscionable because it was presented to an individual who was clearly under the stress of moving into the facility, and, who felt he had no other choice in signing it. Moreover, there was a gross disparity in bargaining power between the two parties. It is also substantively unconscionable because it violates public policy grounds as detailed more fully below.

In summary, the Agreement is both procedurally and substantively unconscionable and thus, unenforceable. Salley, 592 Pa. at 331, 925 A.2d at 119. For these reasons, Defendants' Preliminary Objection should be overruled.

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viii. The limitation on discovery is substantively unconscionable

The alleged agreement to arbitrate in this matter also unfairly limits discovery in a manner that prejudices the Plaintiff. As previously noted, substantive unconscionability, as it pertains to arbitration, involves a process that favors one party over another. The admission contract and embedded Arbitration Agreement is substantively unconscionable because it favors the ManorCare Defendants over the Plaintiff. One of the most blatantly illegal, substantive aspects of the contract is the limitation on discovery:

> DISCOVERY: Discovery shall be governed by NAF's Code of Procedure. However, discovery shall be limited as follows:... (2) A party may serve a maximum of 30 written questions (interrogatories), 30 requests to produce documents and 30 requests for admissions; inclusive of subparts... (4) Each Party may have up to three (3) experts and no more than ten (10) lay witnesses for its witness list, as well as for Hearing. Depositions of witnesses shall be limited to the Parties' witness lists or in the Parties' Rule 26 disclosures or discovery responses but under no circumstances will a Party be allowed to take more than 13 depositions...

If the Court upheld the restrictions enumerated in the Arbitration Agreement, Plaintiffs ability to conduct meaningful discovery would be completely precluded. The ManorCare Defendants operate a nursing home, staffed by many nurses, nursing assistants, therapists, dieticians, and other personnel. Plaintiff would essentially be forced to guess which staff members of the facility may have rendered care to Mr. MacPherson during the residency, which staff members had control over the policies and procedures, and which employees might have knowledge of the staffing numbers and practices of the facility. This renders the arbitration agreement unconscionable.

The discovery limitations clearly give ManorCare Defendants an unfair advantage in this litigation. Further, the ManorCare Defendants' Arbitration Agreement is a de facto violation of the Carll v. Terminix, 793 A.2d 921, 926 (Pa. Super. 2002), by effectively limiting and/or eliminating a Plaintiff's cause of action by precluding meaningful discovery. The limit on discovery is clearly unconscionable and should render the entire agreement void.

ix. The offending clauses are not severable

The Arbitration Agreement contains a severability clause at the end of the document which indicates that "[i]n the event that any portion of the Arbitration Agreement is determined to be invalid or unenforceable, the remainder of this Arbitration Agreement will be deemed to continue to be binding upon the parties." Carll v. Terminex, supra, 793 A.2d at 926. Our Superior Court, however, has clearly indicated that clauses within an arbitration provision are not severable unless they are distinct and independent from the provisions' non-offensive language. See Carll v. Terminex, supra, 793 A.2d at 926. The court explained:

> Appellants also contend that the arbitration provision is severable from the limitation of damages provision and suggest that this court enforce the arbitration provision and allow the arbitrator to determine whether the limitation of damage language is against public policy. We cannot accept this argument because the arbitration provision is not independent of the limitation of damage provision. Contained under one heading of "Arbitration"... The limitation of liability language is not independent of the agreement to arbitrate. [Because] [t]hese provisions are not distinct... We find the entire arbitration clause, as a whole, must fail.

Id. (emphasis added).

The clauses at issue are found under a single heading: "Arbitration Agreement ("Agreement")." Further, the offensive language permeates all aspects of the arbitration provision, which explicitly incorporates limitations on liability. Thus, the agreement itself clearly establishes that the arbitration and limitation of liability provisions are intertwined and not independent of one another. This provision does not involve a single, discrete unenforceable provision, but many unlawful and/or questionable

terms. Accordingly, offensive language within this provision is not severable from the arbitration and limitation of liability provision as a whole.

Consistent with Pennsylvania law, the Third Circuit has explained the rationale for voiding entire arbitration provisions permeated by unconscionable language in Alexander v. Anthony International, 341 F.3d 256, 271 (3d Cir. 2003), by analogizing: "[b]ecause the sickness has infected the trunk, we must cut down the entire tree." In Alexander, the court noted that the plaintiff lacked real choice about whether to accept the agreement, was burdened with paying arbitration fees and costs if unsuccessful, had to comply with unreasonable time limitations, and was unfairly limited as to potential damages. In sum, the court found that the cumulative effect of such "draconian terms" precluded enforcement of the entire agreement. Applying these principles, the court struck down the arbitration agreement despite the existence of a non-severability clause. Clearly, the same outcome is warranted here. See also, Stewart, supra (holding that if a particular arbitrator is required under the arbitration clause, and that arbitrator no longer hears such cases, such a requirement is not an ancillary, logistical concern, but rather, is a primary purpose of the agreement itself, and thus, even though the agreement contained a severability clause, the clause was unenforceable).

Moreover, courts have refused to sever offensive language from arbitration agreements where "multiple defects... strongly suggest[] a deliberate decision to use [the drafter's] superior bargaining position to obtain an unfair advantage." Such arbitration provisions, like the one at issue in this case, cannot be enforced without effectively rewriting the agreement, which is beyond the proper role of a court. Accordingly, courts refuse to enforce arbitration provisions in their entirety where unconscionable language permeates. The case at bar does not involve just one discrete unenforceable provision, but many unlawful and/or questionable terms. The arbitration clause is permeated with these unconscionable terms, making severance inappropriate.

Finally, failure to void arbitration agreements riddled with unlawful provisions offers incentive to drafters to include such provisions. Enforcing such agreements essentially assures drafters that their arbitration agreement will be enforced, no matter how many oppressive terms they insert. As one commentator noted: "If drafters know that the worst courts will do to them is simply to give them the arbitration clause they should have written in the first place, there will be no down-side to overdrafting, but a likely up-side: Many adhering parties may fail to challenge the oppressive contract term." Thus, the only way to deter such conduct is to void the entire agreement. In summary, there are many reasons why severance is inappropriate here. Therefore, the entire arbitration clause should be invalidated.

x. In the alternative, this Court may sever the unconscionable provisions of the arbitration agreement

Assuming, arguendo, that this Honorable Court determines the Arbitration Agreement is enforceable and the terms complained of by Plaintiff are not integral, Pennsylvania law provides that if less than an entire disputed contract is invalid, and the invalid provision is not an essential part or the primary purpose of the agreement, then the remaining portions of the agreement are enforceable. Accordingly, this Court could choose to strike the unconscionable provisions of the arbitration agreement only.

The Honorable Judge Alan M. Black addressed a similar issue, with the same corporate defendants and the same arbitration agreement as in this case, in Mannion v. Manor Care Health Services, Inc. et. al., 2006 WL 6012873 (Pa. Comm. Pl., September 26, 2006). This case involved a daughter signinghis mother into a Manor Care facility and signing the same documents at issue in the matter sub judice. Judge Black found the arbitration agreement to be conscionable, but the same provisions at issue here to be unconscionable.

If this Honorable Court finds the arbitration agreement to be conscionable, which Plaintiff maintains it is not, Plaintiff requests this Honorable Court sever the provisions limiting discovery, since they are unconscionable, as a matter of law and compel arbitration absent those provisions.

Based upon the foregoing, ManorCare Defendants' preliminary objection attempting to compel arbitration should be overruled.

A.2. ALTERNATIVELY, A FACTUAL RECORD MUST BE CREATED SO THAT PLAINTIFF CAN DEVELOP FURTHER ARGUMENTS AGAINST THE VALIDITY OF THE AGREEMENT

If this Court decides not to dismiss ManorCare Defendants' Preliminary Objection outright, Plaintiff requests that this Court set a discovery schedule regarding the Agreement. ManorCare Defendants assert that this matter should be compelled to binding alternative dispute resolution in accordance with the terms of a purported Agreement proffered by them. Plaintiff denies that such a valid agreement exists and avers that this Honorable Court is the proper venue for this litigation. Obviously, there are disputed facts at issue which mandate discovery and briefing of the issue pursuant to Pennsylvania Rule of Civil Procedure 1028(c)(2).

Currently, there are insufficient facts of record for this Honorable Court to properly rule on several of Plaintiff's arguments against Kindred Defendants' Preliminary Objection to enforce the Alternative Dispute Resolution Agreement. A factual record must be developed so that Plaintiff can fully develop his arguments in opposition to Kindred Defendants' Preliminary Objection. These issues include but may not be limited to:

1. Whether there was a knowing and voluntary waiver of Plaintiffs and Mr. MacPherson's right to a jury trial;

2. Whether the purported Arbitration Agreement (a contract of adhesion) or any of the terms stated within the Agreement, are procedurally and substantivel unconscionable.

Discovery may reveal further issues regarding the validity of the purported Agreement, and Plaintiff hereby reserves the right to raise additional arguments should they arise and/or supplement the arguments already made herein. Therefore, in the event that ManorCare Defendants' Preliminary Objection is not dismissed outright, this Honorable Court should issue a Scheduling Order for discovery and briefing the issue. Plaintiff will submit an additional Memorandum of Law in Opposition to ManorCare Defendants' Preliminary Objection seeking to compel alternative dispute resolution in accordance with this Honorable Court's order.

B. VENUE IN PHILADELPHIA COUNTY IS PROPER

ManorCare Defendants aver that venue in Philadelphia County is improper because Plaintiffs professional liability claims arose exclusively in Delaware County, the location of the ManorCare Health Services - Yeadon Facility. Specifically, Mr. MacPherson arrived at the Jefferson Facility, Magee Rehabilitation Hospital, with several skin injuries and subsequently developed new pressure ulcers and the worsening of his existing wounds. [9] Upon his admission to ManorCare Defendants' facility, Mr. MacPherson still had several skin wounds, including his left heel blister, sacral/coccyx ulcer and right foot ulcer. [10] By September 19, his sacral ulcer had increased in size to 4.5x5.6cm. [11] By October 8, his sacral ulcer had increased to 10 x 5cm; several of his other wounds also worsened; and he developed new skin injuries to his spine. [12] By October 29, both his superior and inferior sacral wound developed tunneling and he had sepsis. [13] By November 2, his sacral ulcer now was exposing bone. [14] Pa.R.C.P. 1006(c)(2) provides that in an action to enforce joint or joint and several liability against two or more defendants including one or more medical professional liability claims, the action may be brought in any county in which venue may be laid against any one of the defendants. As venue is proper in Philadelphia County as to the Jefferson Defendants, venue is accordingly proper as to the ManorCare Defendants.

Objecting Defendants are incorrect in their assertion that venue is improper in Philadelphia County. The ManorCare Defendants, Jefferson Defendants are jointly and severally liable for the injuries of Mr. MacPherson. The Restatement (Second) of Torts, § 457 states, "[i]f the negligent actor is liable for another's injury, he is also liable for any additional bodily harm resulting from acts done by third persons in rendering aid which the other reasonably requires, irrespective of whether such acts are

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done in a proper or negligent manner." [15] In determining whether multiple defendants are separate or joint tortfeasors, courts in Pennsylvania consider several factors, including:

[T]he identity of a cause of action against each of two or more defendants; the existence of a common, or like duty; whether the same evidence will support an action against each; the single, indivisible nature of the injury to plaintiffs; the identity of the facts as to time, place or result; [and] whether the injury is direct or immediate, rather than consequential... [16] As outlined below, application of these factors and Pennsylvania law strongly supports a finding that the ManorCare Defendants and the Jefferson Defendants are jointly and severally liable for Mr. MacPherson's injuries.

The Pennsylvania Superior Court has held that multiple health care providers treating the same plaintiff for injuries are joint tortfeasors if their harms create a single, indivisible injury. [17] In Capone v. Donovan, the plaintiff alleged that he suffered a permanent loss of motion of the elbow as a result of mistreatment and misdiagnosis by multiple physicians for a broken arm. The court held that the harm allegedly suffered by plaintiff due to each physician's failure to properly treat the initial injury was incapable of division among the physicians on a logical, reasonable or practical basis, and supported a finding that each physician was jointly liable. [18]

Plaintiff alleges that the ManorCare Defendants and the Jefferson Defendants owed identical duties to Mr. MacPherson while he was under their care. In Essex v. Rayaski, [19] the U.S. District Court for the Eastern District of Pennsylvania found that two defendants who owed the plaintiff a duty to hire and train employees to maintain safety and order, and failed to do so, were joint tortfeasors. Plaintiff submits that a similar finding is warranted in the case sub judice, as his Amended Complaint alleges that the ManorCare Defendants and the Jefferson Defendants breached the duty to hire and train employees in such a way as to maintain the health and safety of Mr. MacPherson. [20] In addition, Plaintiff alleges that all sets of Defendants held themselves out as being able to provide skilled nursing care and assumed responsibility for the same, promising that they would adequately care for Mr. MacPherson's needs, [21] which produced an obligation to provide timely and appropriate care and to employ competent, qualified staff so as to ensure Mr. MacPherson received proper treatment. [22]

Moreover, Plaintiff alleges identical causes of actions against the Defendants for Mr. MacPherson's injuries. In his Amended Complaint, Plaintiff has alleged that the ManorCare Defendants and the Jefferson Defendants had a duty to provide Mr. Morrison with appropriate and competent healthcare, custodial care, protection and supervision. [23] Furthermore, the indivisible nature of Mr. MacPherson's infections, pressure sores, and malnutrition over a six month time period justify a finding that all sets of Defendants are responsible for these injuries. Again, Mr. MacPherson's residencies at the Defendants' facilities are nearly identical in time — as he was a resident at both facilities within six months -- and result, as breaches by the Defendants at all facilities resulted in needless pain and suffering to the Plaintiffs decedent.

In Jackson v. York Hanover Nursing Centers. [24] the Florida Court of Appeals found that a hospital and nursing home were joint tortfeasors because they acted in concert to cause the death of a woman to severe dehydration who was cared for negligently at both facilities. [25] The court noted that it was dealing with "a continuum of the same injury," as the deceased had suffered from dehydration while in the hospital, when she left the hospital, and while she was a resident at the nursing home. [26] The court held that even if the two seemingly independent tortuous acts do not coincide precisely with one another, the actors can be deemed joint tortfeasors if the sequence of their tortuous acts produces a single injury. [27] A similar outcome is warranted in the case sub judice. Plaintiff has alleged that as a direct and proximate result of the conduct of the ManorCare Defendants and the Jefferson Defendants, Mr. MacPherson suffered severe injuries. In fact, in a similar nursing home **abuse** and neglect case involving the ManorCare Defendants, involving this same firm for Defendants, Judge Sandra Mazer Moss overruled Defendants' Preliminary Objections as to venue. [28] Accordingly, venue is proper in Philadelphia County and Defendants' preliminary objection must be overruled.

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C. PLAINTIFF HAS SUFFICIENTLY PLED A CLAIM FOR PUNITIVGE DAMAGES

In their Preliminary Objections, Defendants argue that this Court should strike Plaintiff's claim for punitive damages because he fails to allege facts that suggest intentional, reckless, or malicious conduct on the part of the Defendants. Even a cursory review of the Complaint proves that Defendants' argument is without merit.

Punitive damages are awarded for outrageous conduct; that is, for acts done with "an evil motive or in reckless indifference to the rights of others." Scampone v. Grane Healthcare Co., 11 A.3d 967, 991 (Pa. Super. 2010), reh'g denied, --- A.3d --- (Sept. 24, 2010), appeal granted, -- A.3d (Mar. 08, 2011) (appeal granted on unrelated issue) (internal quotations omitted). For example, punitive damages are appropriate if the actor's conduct was wanton, willful, or exhibited a reckless indifference to the rights of others. Id. Wanton conduct, as distinguished from ordinary negligence, "is characterized by a realization on the part of the tortfeasor of the probability of injury to another, and a reckless disregard of the consequences." 1 P.L.E. Negligence § 48 (2005).

Discussing the concept of "reckless indifference," the Pennsylvania Supreme Court has held that punitive damages may be assessed where an actor knows, or has reason to know, of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act (or fails to act) in conscious disregard of, or indifference to, that risk. See SHV Coal, Inc. v. Continental Grain Co., 526 Pa. 489, 494-95, 587 A.2d 702, 704-05 (1991) (citations omitted). Actual knowledge or evil intent is not a requirement, only an appreciation by the actor that his conduct might substantially increase the risk of serious harm to another in a perceptible way. See Hall v. Jackson, 2001 Pa. Super. 334, 799 A.2d 390, 403 (2001).

Our Supreme Court has also established that punitive damages may be appropriate in negligent supervision cases based upon a theory of direct liability. See Hutchinson v. Luddy, 582 Pa. 114, 124-125, 870 A.2d 766, 772 (2005).[29] The court reasoned that neither law nor logic "prevent[s] the plaintiff in a case sounding in negligence from undertaking the additional burden of attempting to prove, as a matter of damages, that the defendant's conduct not only was negligent but that the conduct was also outrageous, and warrants a response in the form of punitive damages." Hutchinson, 582 Pa. at 124-125.[30]

In Scampone, the Pennsylvania Superior Court firmly established that understaffing allegations may serve as a basis for punitive damages in healthcare provider **abuse** and neglect cases, like this matter. The Scampone Court held that evidence of chronic understaffing at the defendant's nursing facility established that defendants acted with reckless disregard to the rights of the facility's residents, sufficient to submit the question of punitive damages to the jury. Scampone, 11 A.3d at 991. The court concluded that "[t]he evidence [of understaffing and insufficient care] in question related to all residents of [the nursing facility]; [the decedent] was clearly a resident of [the nursing facility] during the time covered by these witnesses. In addition, as analyzed above, the effects of understaffing was specifically connected to [the decedent's] care. Id.

Similarly, in Capriotti v. Beverly Enterprises Pennsylvania Inc., 72 Pa. D.& C.4 th 564 (C.P. Fayette 2004), the court considered allegations of corporate negligence, including claims "that the corporate defendants knowingly, and with reckless disregard for the health and well-being of the facility residents, grossly understaffed and under-funded the facility; failed to appropriately train the staff; and knowingly permitted Ms. Capriotti to be neglected." Id. at 572. The Capriotti court had no trouble finding that these allegations of corporate neglect, "if believed, would entitle the plaintiff to punitive damages." Id. at 576. The court also concluded that the same allegations, "if believed, would entitle the plaintiff to relief under the corporate negligence theory." Id. at 572. In addition, in McCain v. Beverly Health and Rehabilitation Services, Inc., 2002 U.S. Dist. LEXIS 12984 (E.D. Pa. 2002), the defendants' motion to dismiss punitive damages was denied. Id. In that case, the plaintiff alleged that the defendants knew of the decedent's "high risk" of developing pressure sores and failed to take preventive measures. See Id.

Further support for this proposition exists in Honorable Carmen D. Minora's recent opinion in South v. Osprey Ridge Healthcare Ctr., et al.[31] In South, Judge Minora overruled and dismissed the defendant's preliminary objections to strike plaintiffs claims for punitive damages. South, p. 11. Judge Minora held that the complaint pled sufficient facts to show that the defendants grossly and chronically understaffed and under-funded the facility in question and the defendants were aware of the condition. Despite

that knowledge, the defendants continued to create recklessly high nurse-to-resident ratios, to the point where the defendants knew or should have known that their actions would lead to severe injuries to residents at their facility. Id. For that reason, Judge Minora determined that the defendants' actions fell squarely within the contours Scampone and allowed the plaintiffs claims for punitive damages to proceed. Id.

In this case, Plaintiff's Amended Complaint similarly alleges that Defendants grossly and chronically understaffed the Facility, to the point that Defendants knew that the personnel on duty would not be able properly to attend to the medical needs of the Facility's residents, leading to the horrific pressure sores and other injuries that Mr. MacPherson suffered. [32] Moreover, the Amended Complaint alleges that the Defendants knew, or should have known, that their actions would lead to severe injuries like those suffered by Mr. MacPherson. [33]

Under the law cited herein, the Amended Complaint's allegations are sufficient to overrule Defendants' preliminary objection to strike Plaintiffs claims for punitive damages for lack of specificity. Similar conduct has warranted punitive damages throughout the Commonwealth of Pennsylvania. [34] Moreover, this Honorable Court has overruled preliminary objections on the issue of punitive damages in similar nursing home **abuse** and neglect cases. [35] Accordingly, this Court should overrule Defendants' preliminary objection.

D. PLAINTIFF HAS PLED SUFFICIENT FACTS TO JUSTIFY A CLAIM FOR NEGLIGENCE PER SE CLAIM FOR DEFENDANTS' VIOLATIONS OF 18 PA.C.S.A. §2713.

Defendants argue that Plaintiff cannot support a claim under 18 Pa. C.S. § 2713 (hereinafter "§ 2713") because it is a criminal statute. Defendants mischaracterize Plaintiff's claims in this matter, as Plaintiff is not attempting to bring a private cause of action under a criminal statute, but intends to use the statute as the standard of care for Plaintiff's negligence per se claim.

Under Pennsylvania law, Plaintiff is entitled to bring a negligence per se claim for violation of a criminal statute. A claim based upon negligence per se is not the same as a private cause of action. Contrary to Defendants' assertions, Plaintiff is not asserting a private statutory cause of action under § 2713. Rather, Plaintiff alleges that Defendants breached the standard of care as prescribed in § 2713, which conveys an actionable tort duty, and therefore, Defendants should be held liable for negligence per se. The doctrine of per se liability does not create an independent basis of tort liability, but rather establishes, by reference to a statutory scheme, the standard of care appropriate to the underlying tort. Cabiroy v. Scipione, 767 A.2d 1078, 1082 (Pa. Super. 2001). Here, § 2713 establishes the requisite standard of care for the treatment of care-dependent individuals.

The absence of a statutory right to a private cause of action does not preclude a claim of negligence per se for violation of the statute. In a similar nursing home **abuse** and neglect case, the Court held that a statute which does not provide a private right of action can still be utilized to establish negligence per se. McCain v. Beverly Health and Rehabilitation Services, 2002 WL 1565526 (E.D. Pa. 2002). Importantly, the Court noted that:

Courts in Pennsylvania have recognized that the "absence of a private cause of action in a statutory scheme is an indicator that the statute did not contemplate enforcement of an individual harm." However, it is just an indicator or a factor to consider and "does not necessarily preclude [the statute's] use as the basis of a claim of negligence per se." [36]

If a plaintiff can prove the defendant's negligence was the proximate cause of the injury in question, then the violation of the applicable statute is negligence per se and liability may be grounded on such negligence. Cabiroy, at 1079. A similar situation exists in the present matter. Although § 2713 does not provide a private cause of action, Defendants' conduct breached the standard of care required by the statute, which makes Defendants liable for negligence per se.

Pennsylvania courts have clearly established that a plaintiff asserting negligence per se properly relies upon a statute that lacks a private cause of action where: (1) the statute is designed to protect a particular class of individuals from the type of harm

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suffered by the plaintiff and (2) the claim will further the purpose of the statute. See Cabiroy v. Scipione, 767 A.2d 1078, 1081 (Pa. Super. 2001) (citing Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873, 875 (1965)); Frantz v. HCR Manor Care Inc., 64 Pa. D.&C.4th 457, 465 (C.P. Schuylkill 2003) (citing McCain v. Beverly Health and Rehabilitation Services, 2002 WL 1565526, at *1 (E.D. Pa. 2002).

Discussing statutes that do not provide for a private cause of action, courts have further clarified this concept as follows:

> The concept of negligence per se establishes both duty and required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm.... In analyzing a claim based on negligence per se, the purpose of the statute must be to protect the interest of a group of individuals, as opposed to the general public, and the statute must clearly apply to the conduct of the defendant.

Frantz, 64 Pa. D.&C.4th at 461-62 (quoting Braxton v. PennDOT, 160 Pa. Cmwlth. 32, 45, 634 A.2d 1150, 1157 (1993)). The Frantz court further held: "In analyzing a claim based on negligence per se, the purpose of the statute must be to protect the interest of a group of individuals, as opposed to the general public, and the statute must clearly apply to the conduct of the defendant." Id., at 462. Thus, negligence per se applies where an individual within the class contemplated by the statute suffers the type of harm that the statute seeks to prevent. Id. (citing Wagner v. Anzon Inc., 453 Pa. Super. 619, 627, 684 A.2d 570, 574 (1996)).

Under section 2713 of the Pennsylvania Crimes Code, a caretaker is guilty of neglect of a care-dependent person if he:

> (1) Intentionally, knowingly or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom he is responsible to provide care. 18 Pa.C.S.A. §2713(a)(1).

Further, the statute defines "caretaker" as "an owner, operator, manager or employee of a nursing home." 18 Pa.C.S.A. § 2713(f)(1). Thus, the statute's plain language clearly establishes that the statute's purpose is to prevent a public harm: **elder abuse** and neglect by owners and operators of nursing homes.

ManorCare Health Services - Yeadon is a nursing facility and therefore, falls within the definition of "caretaker." Defendants were clearly Mr. MacPherson's "caretakers" as defined by the statute.[37] Id. Plaintiffs averments, if proven, establish that Defendants reckless failure to provide basic care caused Mr. MacPherson avoidable injuries and suffering.[38] Id. Thus, Plaintiffs allegations clearly support a claim that Defendants' conduct falls within the type of harm that the statute seeks to prevent and furthers the statute's purpose. Id.

Since Plaintiff is not bringing a private cause of action under § 2713, it is inconsequential that the enforcement of the criminal aspect of this statute lies with either the District Attorney of the county or the Attorney General of this Commonwealth. Plaintiff does not seek to bring a criminal action against Defendants under this statute. Defendants' argument regarding the nature of the statute appears to be an attempt to mischaracterize Plaintiffs claims, and to confuse the Court as to the real issues in this case.

Again, in South, a similar nursing home **abuse** and neglect case, the Honorable Judge Carmen D. Minora held that "Plaintiff's allegations clearly support a claim that defendants' conduct falls with the type of harm that the statute seeks to prevent and furthers the statute's purpose." See South, supra, p. 7.[39] Just recently, the Honorable Edward E. Guido of the Cumberland County Court of Common Pleas found Judge Minora's reasoning in South persuasive and adopted it.[40] Thus, there is little doubt that Plaintiff's claim for negligence per se arising from ManorCare Defendants' OAPSA violations should proceed. Notably, this Court has similarly overruled preliminary objections to claims of negligence per se arising under § 2713 in similar nursing home

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abuse and neglect cases.[41] Additionally, other Courts of Common Pleas throughout Eastern Pennsylvania have overruled the same.[42] Accordingly, this Court should dismiss Defendants' preliminary objection.

E. PLAINTIFF'S AMENDED COMPLAINT DOES NOT CONTAIN SCANDALOUS AND IMPERTINENT MATTER

Finally, Defendants quibble that Plaintiffs Amended Complaint contains scandalous and impertinent matter in that paragraphs 31-34, and 37, contain references to other residents at the Facility. While accurately quoted, the references to other residents are not scandalous or impertinent, and should not be dismissed.

Paragraphs 31-34 aver that the Defendants intentional understaffing of the Facility caused the quality of care to suffer greatly for all residents, including Mr. MacPherson. Paragraph 37 alleges that Defendants financial motive was the backing for this understaffing, and all residents faced potential harm because of it. The mentions of residents other than Mr. MacPherson are relevant to Plaintiffs punitive damages claim, for the reasons set forth in Section B, supra. Specifically, the pertinent section of the MCARE Act provides that punitive damages are appropriate when a defendants' "reckless indifference to the rights of others...".[43]

Additionally, in Phillip Morris USA v. Williams, 127 S.Ct. 1061 (2007), the U.S. Supreme Court held that such evidence can be admitted in punitive damages cases so that the reprehensibility of the defendants' conduct can be determined: "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible..." Phillip Morris, 127 S.Ct. at 1064. The Supreme Court merely cautioned that the amount of punitive damages awarded should punish defendants for harm caused to the plaintiff, not harm caused to non-parties. Id.

By referencing other residents in these Paragraphs, Plaintiff is pleading that Defendants' acts show a "reckless indifference to the rights of others," for purposes of demonstrating their knowledge of the same and reprehensibility, thus making punitive damages appropriate.

Therefore, Defendants' preliminary objection should be overruled.

IV. CONCLUSION

Plaintiff, Patrick J. MacPherson, Executor of the Estate of Richard MacPherson, deceased, through his counsel, respectfully requests that this Court issue a scheduling order regarding discovery and submission of briefs on the arbitration issue within twenty (20) days of the date of the order. Plaintiff further requests that this Court OVERRULE ManorCare Defendants' Preliminary Objections and further order Defendants to file an Answer to Plaintiffs Amended Complaint within twenty (20) days of the date of the Order.

Dated: 4/20/2012

Respectfully submitted,

WILKES & McHUGH, P.A.

Ruben J. Krisztal, Esquire

Attorney for Plaintiff

Footnotes

1 See Amended Complaint attached as Exhibit "A."

2 See Arbitration Agreement (Exhibit "B"), Section A. and F.3. (emphasis added). Given the above provisions, this representation is clearly false.

3 See Arbitration Agreement, B.1-3., B.5, D, F.6, attached hereto as Exhibit "B." 7

4 In re Estate of Hall, 535 A.2d 47, 56 n.7 (Pa. 1987).

5 See also Glassmere Fuel Serv., Inc. v. Clear, 900 A.2d 398 (Pa. Super. 2006) (court should not rewrite the terms of a contract, nor give them meaning that conflicts with that of the language used); Solomon v. U.S. Healthcare Sys. of Penn., Inc., 797 A.2d 346 (Pa. Super. 2002) (when a term is missing from or is not specified in a contract, it is not up to the court to rewrite the agreement and supply the missing term).

6 See e.g., Glassmere Fuel Service, Inc. v. Clear, 900 A.2d 398 (Pa. Super. 2006) (court should not rewrite the terms of a contract, nor give them meaning that conflicts with that of the language used); Solomon v. U.S. Healthcare Systems of Penn. Inc., 797 A.2d 346 (Pa. Super. 2002) (when a term is missing from or is not specified in a contract, it is not up to the court to rewrite the agreement and supply the missing term).

7 See also Pa. Const. Art. 1 ¶6.

8 See Arbitration Agreement, F.5, attached hereto as Exhibit "B."

9 Amended Complaint, ¶¶67, 69, 80, 83, 85, 88.

10 Amended Complaint, 1136.

11 Amended Complaint, 1139.

12 Amended Complaint 1144.

13 Amended Complaint, 1152-53.

14 Amended Complaint, ¶154.

15 See Thompson v. Fox, 326 Pa. 209, 212 192 A.2d 107, 109 (1937) (adopting § 457 of the Restatement in Pennsylvania).

16 Voyles v. Corwin, 295 Pa.Super. 126, 130-31,441 A.2d 381, 383 (1982).

17 Capone v. Donovan, 332 Pa.Super 185, 188, 480 A.2d 1249, 1250 (1984). 26

18 Id. at 1251.

19 2007 WL 1965537 at *4 (E.D. Pa. 2007).

20 Amended Complaint ¶¶28 96.

21 Amended Complaint, ¶¶ 97-98.

22 Amended Complaint, ¶¶ 106-108.

23 Amended Complaint, ¶¶ 191-194, 197, 204,220-223, 225, 235.

24 876 So.2d 8, 13 (Fla. 5th Dist. Ct. App. 2004).

25 Id. at 9-10.

26 Id., 876 So.2d at 12.

27 Id. at 13

28 See Honorable Sandra Mazer Moss' May 24, 2011 Order in the case of Harold Williams v. Mercy Manor Partnership, et al., Overruling Defendants Preliminary Objections, and Defendants' Preliminary Objections, attached collectively hereto as Exhibit "C."

29 Under the doctrine of corporate negligence, "a corporation is held directly liable, as opposed to vicariously liable, for its own negligent acts." Welsh v. Bulger, 548 Pa. 504, 513, 698 A.2d 581, 585 (Pa. 1997) (emphasis added). The doctrine imposes a "non-delegable duty" on an institution to "uphold a proper standard of care for patients." Rauch v. Mike-Mayer, 783 A.2d 815, 826 (Pa. Super. 2001). In short, "[a] cause of action for corporate negligence arises from the policies, actions or inaction of the institution itself." Welsh, 698 A.2d at 585.

30 See, e.g., Ditzler v. Wesolowski, 2006 WL 2546857, at *2 (W.D. Pa. 2006). In rejecting defendants' conclusion that punitive damages are not recoverable for negligent conduct, the court relied upon the Supreme Court's decision in Hutchinson and stated that "negligent conduct may be so egregious that it may fairly be described as outrageous." Id.

31 A copy of Judge Minora's opinion is attached as Exhibit "D."

32 Amended Complaint, ¶¶28-187.

33 Amended Complaint, ¶¶ 113, 114, 120, 196, 200(f), 229(f),(g), & (cc), 234, 236, 253,

34 See Zaborowski v. Hospitality Care Center of Hermitage, Inc., 60 Pa. D & C. 4 th 474, 501-503 (Mercer County, 2002) (the nursing home resident's injuries were weight loss, dehydration, a Stage I pressure sore and death and the Court held that the allegations of improper hiring, training and supervising of employees to ensure that adequate care was delivered was sufficient to award punitive damages) Zassera v. Roche, 54 Pa. D. & C.4 th 225 Lackawanna 2001) (allowing punitive damages claim to proceed against physician who operated on right carotid artery when patient had been hospitalized for surgery to left); Medvecz v. Choi, 569 F.2d 1221 (3d Cir. 1987) (anesthesiologist abandoned patient in operating room to get lunch); and Hoffman v. Mem'l Osteopathic Hosp., 492 A.2d 1382 (Pa. Super. 1985) (defendant allowed patient with neurological paralysis to remain crying on floor of emergency room, repeatedly stepping over him for hours, telling him there was nothing wrong with him).

35 See e.g., Caraballo v. New Courtland, et al., 1/31/12 Order and Plaintiff's Statement of Questions Involved; McCoy v. GGNSC Holdings, LLC, et al., 11/3/11 Order and Plaintiff's Statement of Questions Involved; Mackey v. Thomas Jefferson University Hospitals, et al, 12/1/09 Order and Plaintiff's Statement of Questions Involved; Mackey v. Albert Einstein Medical Center, et al, 12/1/09 Order and Plaintiff's Statement of Questions Involved; Williams v. Mercy/Manor Partnership, et al., 5/24/11 Order and Plaintiffs Statement of Questions Involved; Williams v. Inglis House, et al., 5/24/11 Order and Plaintiff's Statement of Questions Involved; Williams v. Manor Care, Inc., et al., 5/24/11 Order and Plaintiff's Statement of Questions Involved; O'Leary v. Trinity Transition Assoc. L.P., d/b/a Angela Jane Pavilion, et al., 11/4/09 Order and Plaintiff's Statement of Questions Involved; O'Leary v. Northern Health Facilities, Inc., d/b/a Statesman Health and Rehabilitations Center, et al., 11/4/09 Order and Plaintiff's Statement of Questions Involved, attached collectively hereto as Exhibit "E."

36 McCain, at *1, citing Fallowfield Development Corp. v. Strunk, 1990 WL 52745, at *19 (E.D. Pa. 1990) (emphasis added). 34

37 Amended Complaint, at ¶¶ 239-246.

38 Amended Complaint, at ¶¶133, 134, 204, 212, 213, 235, 251, 252.

39 Attached hereto as Exhibit "D."

40 See The Honorable Judge Guido's 1/10/12 Order, attached hereto as Exhibit "F."

41 See e.g., Caraballo v. New Courtland, et al., 11/31/12 Order and Plaintiff's Statement of Questions Involved; McCoy v. GGNSC Holdings, LLC, et al., 11/3/11 Order and Plaintiff's Statement of Questions Involved; Mackey v. Thomas Jefferson University Hospitals, et al, 12/1/09 Order and Plaintiff's Statement of Questions Involved; Mackey v. Albert Einstein Medical Center, et al, 12/1/09 Order and Plaintiffs 36 Statement of Questions Involved; Williams v. Mercy/Manor Partnership, et al., 5/24/11 Order and Plaintiff's Statement of Questions Involved; Williams v. Inglis House, et al., 5/24/11 Order and Plaintiff's Statement of Questions Involved; Williams v. Manor Care, Inc., et al., 5/24/11 Order and Plaintiff's Statement of Questions Involved; O'Leary v. Trinity Transition Assoc. L.P., d/b/a Angela Jane Pavilion, et al. 11/4/09 Order and Plaintiff's Statement of Questions Involved; O'Leary v. Northern Health Facilities, Inc., d/b/a Statesman Health and Rehabilitations Center, et al., 11/4/09 Order and Plaintiff's Statement of Questions Involved, attached hereto collectively as Exhibit "E."

42 See e.g., the Honorable Edward Griffith's 6/1/09 Order (Chester County); the Honorable George A. Pagano's 6/1/09 Order (Delaware County), attached hereto collectively as Exhibit "G." See e.g., 7/12/11 Lederhandler Order (Montgomery County); Whitfield 12/1/09 Order and Plaintiffs Statement of the Questions Involved (Montgomery County); O'Leary 12/19/08 Order and Plaintiff's Statement of the Questions Involved (Montgomery County), attached hereto collectively as Exhibit "H."

43 See MCARE statute, supra (emphasis added).

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