

14-0319

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Peggy Sue Davis, Individually and
on behalf of the Estate and Wrongful
Death Beneficiaries of Lillie Mae Gibson

[Handwritten Signature]
PLAINTIFF
KAWAHA COUNTY CLERK
2014 FEB 24 10 32 AM
TRIPOLI

vs.

CAUSE NO. 13-C-1279
Jury Demanded

AMFM, LLC; Commercial Holdings, Inc.
k/n/a Commercial Holdings, LLC;
Integrated Commercial Enterprises, Inc.,
Manzanita Holdings, LLC, Manzanita
Management, Inc., Lifetree, LLC, Wisteria, LLC,
Mercer Nursing & Rehabilitation Center, Inc. d/b/a
Mercer Nursing & Rehabilitation Center;
Matt Tucker; John Does 1 Through 10;
and Unidentified Entities 1 Through 10
(as to Mercer Nursing & Rehabilitation Center)

DEFENDANTS

**ORDER ON DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S
FIRST AMENDED COMPLAINT AND TO COMPEL ARBITRATION**

This cause came to be heard on January 8, 2014 on Defendants' Motion to Dismiss Plaintiff's Complaint and to Compel Arbitration, and after hearing argument by the Parties, having considered the pleadings, arguments of counsel, exhibits, applicable case law, and otherwise being fully advised in the premises, the Court hereby finds as follows:

Certified Question

Question: Are the Statutory Wrongful Death Beneficiaries bound by an arbitration agreement that was executed by the decedent or the decedent's legal representative?

Answer: No¹.

Findings of Facts

1. Lillie Mae Gibson was a resident of Mercer Nursing & Rehabilitation Center from

¹ The Court is instituting a 30 day stay of this matter and directing the parties to prepare a joint appendix of the record sufficient to permit review of the certified question.

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Per *[Signature]*

November 6, 2008 through July 13, 2011 and later passed on August 14, 2011.

2. Plaintiff alleges that due to the systemic and chronic failures at Mercer Nursing & Rehabilitation Center that Lillie Mae Gibson was the subject of neglect and abuse. Specifically, that she suffered the development of pressure sores over multiple areas of her body, went into acute renal failure due to severe dehydration, developed feces borne urinary tract infections, and became malnourished, all of which culminated in her demise. Defendants deny Plaintiff's allegations.
3. On November 10, 2008, Charles Gibson, Lillie Mae Gibson's son, completed admission paperwork pursuant to a durable power of attorney. This admission paperwork included an arbitration agreement which requires any claims between the parties to be resolved through binding arbitration and incorporates the National Arbitration Forum's (NAF) Code of Procedure. See exhibit "C" to Defendants' Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint and to Compel Arbitration.
4. The Plaintiff filed this matter on July 22, 2013 seeking both compensatory and punitive damages for various survival and wrongful death claims.
5. The Defendants served the instant motion on August 15, 2013 asserting that all claims set forth in Plaintiff's complaint are subject to the above-referenced arbitration agreement and, therefore, should be resolved through the arbitration process.

Conclusions of Law

6. While the issues appear to the Court to be fully briefed by the Parties in their respective briefs, the oral arguments focused on two (2) issues:
 - a. Whether the wrongful death beneficiaries could be compelled to

arbitrate their claims when they were not in any way part of the arbitration agreement signed by Lillie Mae Gibson's durable power of attorney.

b. Whether the availability of the NAF and its forum was an integral part of this agreement and that the lack thereof made the arbitration agreement unenforceable.

7. The Court will first address the issue of the Wrongful Death claims asserted by the Plaintiff.

8. It is clear that both survival claims and wrongful death claims must be brought by the Personal Representative of the Decedent. See W. Va. Code Ann § 55-7-6(a). However, the wrongful death cause of action is a statutory creation that did not exist at common law. See W. Va. Code Ann. §§ 55-7-5.

9. In *Trail v. Hawley*, 163 W.Va. 626, 259 S.E.2d 423 (W.Va. 1979), the West Virginia Supreme Court of Appeals held that when a wrongful death action is brought by the personal representative of a decedent's estate, such representative serves not as a representative of the deceased but as a trustee for the heirs who will receive any recovery. The Court has made it clear that "the personal representative is merely a nominal party, and any recovery passes directly to the beneficiaries designated in the wrongful death statute, and not to the decedent's estate. *Richardson v. Kennedy*, MD 197 W.Va. 326 (1996).²

² See also W. Va. Code Ann. § 55-7-6 which provides:

In every such action for wrongful death, the jury, or in a case tried without a jury, the court, may award such damages as to it may seem fair and just, and, may direct in what proportions the damages shall be distributed

10. Defendants assert that both *Trail* and *Richardson* only address issues as to the fiduciary capacity of the personal representative of the estate, and thus are not proper authority to render a decision that, in West Virginia, a wrongful death claim brought by a personal representative of the estate is not a derivative claim, but rather an independent action. Defendants cite to *Davis v. Foley*, 457 S.E.2d 532 (W.Va. 1995) in which the Supreme Court of Appeals stated:

The damages provided for in the wrongful death statute are not unlike the damages recoverable in a loss of consortium claim: both arise out of the death or injury of another person. As one court stated, in the wrongful death action “[t]he estate and the survivors suffered loss, not directly from the collision, but from the loss of the deceased who was killed in the accident. All their claims are derivative from the deceased as was the husband’s consortium claim[.]” *Jones v. Zagrodnik*, 600 So. 2d 1265, 1266 (Fla. Dist. Ct. App. 1992).

Id. at 536. Defendants argue that, while West Virginia’s Wrongful Death Act creates independent claims for survivors, these claims are nonetheless derivative because they are dependent upon a wrong committed on another person, and thus, the beneficiaries stand in the position of their decedent. The Court disagrees.

11. Therefore, it is clear that, as opposed to a survival claim through which a decedent’s estate may recover for the injuries suffered by the decedent before his death, a wrongful death claim belongs to the decedent’s beneficiaries. There is no scenario under our law upon which a wrongful death claim could ever belong to the decedent or his/her estate.

12. The Supreme Court has also said that “a court may not direct a nonsignatory to an

to the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death.

agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the nonsignatory exception to the rule requiring express assent to arbitration should be invoked."³

United Asphalt Suppliers, Inc. v. Sanders, 204 W.Va. 23 (1998); see also *Thomson-CSF, S.A., American Arbitration Association*, 64 F.3d 773 (2d Cir 1995).

13. Defendants argue that the United Asphalt case cited *supra* by Plaintiff related to parent and subsidiary corporations and not in situations such as that which arises in the nursing home arbitration/wrongful death setting.

14. Defendants assert that the following language in the arbitration agreement binds the wrongful death beneficiaries: "all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident." This Court disagrees. One cannot be bound to an arbitration agreement by mere reference in the agreement any more than any other type of contract.

15. Therefore, this Court finds that Lillian Mae Gibson⁴ did not have the authority to waive the constitutional right to a jury trial of her subsequent wrongful death beneficiaries and bind them to arbitration.

16. As to the availability of the NAF arbitration forum, the arbitration agreement at issue specifically reads that any claim "that arises out of or relates to the Resident Admission Agreement or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the

³ There have been no exceptions to the general rule presented to this Court.

⁴ Or her durable power of attorney.

Facility, in accordance with the Code of Procedure of the National Arbitration Forum ("NAF") which is hereby incorporated into this agreement, and not by a lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards."

17. It is not disputed between the parties that the NAF will no longer handle consumer cases. See Defendants' Reply at page 3.

18. Plaintiff asserts that the Code of Procedure requires that the parties utilize the NAF forum and its arbiters as well as its rules. Defendants assert that only the Code of Procedure of the NAF is to be used, not its arbitration service, and that the NAF was only an ancillary concern and not an integral part of the arbitration agreement.

19. The West Virginia Supreme Court addressed a related issue in *Credit Acceptance Corp v. Front*, 231 W.Va. 518 (2013). Syllabus point 3 of that case reads:

Where an arbitration agreement names a forum for arbitration that is unavailable or has failed for some reason, a court may appoint a substitute forum pursuant to section 5 of the Federal Arbitration Act, 9 U.S.C. § 5 (1947) (2006 ed.), only if the choice of forum is an ancillary logistical concern. Where the choice of forum is an integral part of the agreement to arbitrate, the failure of the chosen forum will render the arbitration agreement unenforceable.

20. After reviewing the Code of Procedure as provided and incorporated into the arbitration agreement at issue, the Court finds that the selection of the NAF was "an ancillary logistical concern" and not "an integral part of the agreement to arbitrate."

21. Therefore, the Court finds that the survival claims of Lillian Mae Gibson are hereby ordered to arbitration.

22. The Court notes that the objections and exceptions of any party aggrieved by this

Order are preserved.

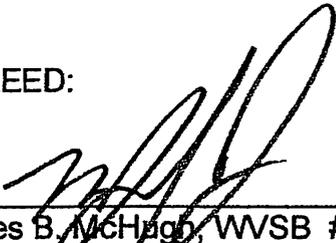
WHEREFORE, the Court GRANTS in part and DENIES in part the Defendants' Motion to Dismiss Plaintiff's First Amended Complaint and to Compel Arbitration as set out above.

SO ORDERED AND ADJUDGED this the 18 day of February, 2014.


The Honorable Louis Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID OFFICE
DATE OF _____
CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

AGREED:



James B. McHugh, WWSB # 10350
Michael J. Fuller, Jr., WWSB # 10150
McHugh Fuller Law Group
97 Elias Whiddon Road
Hattiesburg, MS 39402

Plaintiff

APPROVED BY:

 *with permission*

Mark Robinson, Esq.
Flaherty, Sensabaugh & Bonasso, PLLC
Post Office Box 3843
Charleston, WV 25338-3843

Defendants

2/20/14
Date: _____
Certified copies sent to:
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Cathy S. Gatson, Clerk

Dwayne Price
P. O. Box 905
Charleston, West Virginia 25323-0905
(304) 610-7253

I N V O I C E

SS# 459-90-5138
Invoice No. 14-010
Reporter: Dwayne Price
Paid: ^

DATE: January 31, 2014

PAID FEB 19 2014

TO: Flaherty, Sensabaugh & Bonasso, PLLC
200 Capitol Street
Charleston, WV 25301
Attn: Mark A. Robinson, Esq.

RE: Peggy Davis v. AMFM, LLC, et al.
Case No. 13-C-1279

TRANSCRIPT:

1/8/14 Motion to Dismiss and Compel Arbitration
Copy of transcript, 19 pp. \$19.00

TOTAL: \$19.00

Your prompt payment with the return of one
copy of this invoice is greatly appreciated.