

File name Hayes v. Oakridge 2009-Ohio-2054

Legally Speaking

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Judicial Empathy

There has been much chatter in the news lately about empathy in judicial decision making. To me, a recent decision from the Ohio Supreme Court in a nursing home context provides a good example of both empathy and the lack of it.

Resolving disputes through the procedure known as arbitration has become increasingly popular in recent years. Arbitration clauses are inserted into different types of agreements such as agreements between stock brokers and investors. Such agreements are particularly common in commercial settings. Usually one side drafts the agreement, and the other signs the pre-prepared document. What folks signing such agreements are giving up is the right to a jury trial in court, and all that means. Some benefits to arbitration are that it is quicker, cheaper, and decided by people with expertise in that particular field.

While courts generally favor arbitration, such agreements can be challenged in court as being fundamentally unfair to one of the parties. The Ohio Supreme Court just upheld an arbitration agreement between a nursing home resident and the Home.

Here's what happened.

The day 95 year old Florence Hayes was brought by ambulance from the hospital to be admitted to the Oakridge nursing home, she was asked to review and sign over 29 pages of documents, mostly related to her care plan. Among those documents were two

preprinted forms in which she agreed to arbitrate any claims against Oakridge. Hayes and a representative of Oakridge signed the documents on the day of her admission. In signing these agreements, Hayes gave up her right to any kind of trial, and her right to receive punitive damages (if warranted) and attorney fees.

About three weeks after she was admitted, Hayes fell out of her wheelchair at the home and fractured her hip, which resulted in a long stay in the hospital and an extended care facility. Hayes filed suit in Common Pleas Court in Cleveland against Oakridge for negligence and/or recklessness in caring for her. The trial court agreed with the nursing home that the proceedings could not be brought in court because of the arbitration agreement. Hayes appealed this decision, on the grounds that the agreement was unconscionable, meaning so fundamentally unfair that it should not be enforced. She died while the appeal was pending, and her executor was substituted as plaintiff in her stead. A divided court of appeals agreed with Hayes, but ultimately the Ohio Supreme Court did not.

There are two aspects to unconscionability-procedural and substantive. To prove that an arbitration agreement is so unfair that it should not be legally enforced, the person challenging the agreement must prove both.

Procedural unconscionability deals with the relative bargaining positions of the parties, and deals with such factors as age, intelligence, education, business experience, bargaining power, who drafted the document, whether the terms were explained to the weaker party, whether changes could be negotiated, and the availability of alternatives, in this case, for nursing care.

Substantive unconscionability involves consideration of the terms of the agreement and whether they are commercially reasonable, and involves factors including fairness, the standard in the industry, and the ability to accurately predict the extent of future liability.

A 6-1 Ohio Supreme Court, in an opinion written by Justice Maureen O'Connor, found that the arbitration agreement was neither procedurally nor substantively unconscionable and would be enforced.

In looking at unconscionability, not all factors are involved in all cases. The majority found the only two factors relevant to procedural unconscionability in this case were age and the terms of the agreement. The key finding on this point was that the agreement was not procedurally unconscionable solely because of Hayes' age when she signed it. That is certainly fair. But the Court was otherwise influenced—far less persuasively, in my mind-- by the fact that the agreement was voluntary, and by its terms clearly was not required as a condition of admission to Oakridge. The Court never addresses what real life option Hayes had if she didn't sign it.

Turning next to substantive unconscionability, the court focused on the clauses waiving the right to trial and the right to seek punitive damages and attorney fees. The Court found all these terms commercially reasonable, and neither one-sided nor oppressive.

“The critical factor herein is that Hayes voluntarily agreed to those terms and was not forced to agree. She had the opportunity to reject a waiver of punitive damages or any of the other terms,” wrote O'Connor.

Justice Judith Lanzinger, joined by Justice Evelyn Stratton, went along with the majority reluctantly, only because she didn't think Haynes had proven the procedural unconscionability part of her claim. (remember, both must be proven to set aside the agreement).

But Lanzinger did find the agreement substantively unconscionable, conflicting with the clear intent of the General Assembly to provide special protection for nursing home residents, evidenced by the passage of the Nursing Home Patients Bill of Rights. She urged the General Assembly to ban arbitration agreements in this context, as it has done in child custody disputes.

In an eloquent dissent, Justice Paul Pfeifer urged the Court to find any nursing home pre-admission agreement void as a matter of public policy (which the court has the power to do, but the majority did not address at all) and/or to hold this one both procedurally and substantively unconscionable.

“Does the majority really believe that Florence Hayes knowingly and voluntarily gave up her statutory rights through a negotiation process?” wrote Pfeifer.

Pfeifer believes that proving substantive unconscionability is unduly burdensome in the nursing home context, citing both the physical and mental state of entering residents.

He also does not believe the majority adequately addressed procedural unconscionability, underscoring the age, debilitation, and frame of mind of a newly entering resident, the burdensomeness of all admissions documents, and the complete inequality of bargaining power between the parties.

To me, that's empathy in judicial decision making.