

STATE OF MICHIGAN
COURT OF APPEALS

HAROLD KLEISS, JR., Personal Representative of
the Estate of HAROLD KLEISS, SR.,

UNPUBLISHED
February 14, 1997

Plaintiff-Appellant,

v

No. 185872
Wayne Circuit Court
LC No. 93-327901-NH

BOTSFORD GENERAL HOSPITAL,
G. SWIACKI, D.O., ROBERT SCHIRMER, D.O.,
and GARDEN CITY OSTEOPATHIC,

Defendants-Appellees.

Before: Reilly, P.J., and Sawyer and W.E. Collette,* JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition in favor of defendants on plaintiff's medical malpractice claim. We affirm.

Plaintiff's decedent was admitted to Botsford General Hospital through the emergency room. At that time, he signed arbitration agreements. He executed a second arbitration agreement when he was admitted to a hospital floor. He thereafter died while still hospitalized.

Plaintiff instituted the instant malpractice action against Botsford, the treating physicians, and Garden City Osteopathic Hospital. Garden City had apparently treated plaintiff's decedent earlier in the month before his admission to Botsford. Defendants moved for summary disposition on the basis that plaintiff's claims were subject to arbitration under the agreements signed by the decedent. Specifically with respect to Garden City, it claimed that it had been invited into arbitration by Botsford pursuant to MCL 600.5046(4); MSA 27A.5046(4). The trial court agreed and granted summary disposition.

On appeal, plaintiff argues that MCL 600.5046(4); MSA 27A.5046(4) is unconstitutional because it deprives plaintiff of his constitutional right to jury trial.¹ We disagree.

* Circuit judge, sitting on the Court of Appeals by assignment.

The essence of plaintiff's argument is that his right to a jury trial was never specifically waived with respect to Garden City. However, the right of parties to invite in to the arbitration proceeding other parties to the litigation was specifically provided for in the above statute. Had plaintiff or his decedent been unable to avoid arbitration, perhaps it could be said that the right to jury trial was infringed. However, there was no obligation to sign the arbitration agreement in the first place, MCL 600.5042(2); MSA 27A.5042(2), and plaintiff and his decedent also had the right to revoke the agreement within sixty days, MCL 600.5042(3); MSA 27A.5042(3). See also MCL 600.5042(4); MSA 27A.5042(4).²

In short, the statute put plaintiff and his decedent on notice that persons not a party to the arbitration agreement could be brought into the arbitration. Furthermore, the signing of the arbitration agreement was voluntary. Accordingly, plaintiff's right to a jury trial with respect to Garden City was voluntarily waived by the signing of the arbitration agreement and the failure to thereafter revoke it.

Next, plaintiff argues that this case is no longer subject to arbitration because of the repeal of the Malpractice Arbitration Act, MCL 600.5040 *et seq.*; MSA 27A.5040 *et seq.* Attorney General Kelley, in 1995 OAG 6866, opined that, under the repeal provisions of 1993 PA 78, malpractice claims are not subject to arbitration after October 1, 1995:

The Legislature did not enact any statutory provisions authorizing the continued arbitration of medical malpractice cases under Chapter 30A of the Insurance Code of 1956 after October 1, 1995.

It is my opinion, therefore, in answer to your third question, that the Legislature did not intend to provide for the arbitration of medical malpractice cases under Chapter 30A of the Insurance Code of 1956 after October 1, 1995. [1995 OAG 6866, p 5.]

However, this issue was not addressed in the trial court, the grant of summary disposition having been made before the Attorney General's opinion and before the apparent end of arbitration on October 1, 1995. Because this issue was not addressed in the trial court and was only raised in this Court by way of a supplemental brief, we decline to address the issue on appeal. However, our decision is without prejudice to plaintiff's filing a motion for reconsideration in the trial court on the grant of summary disposition. Such motion shall be limited to the issue raised in the Attorney General's opinion and must be filed, if at all, within twenty-one days of the return of the record to the trial court pursuant to MCR 7.210(I).

Affirmed. Defendants may tax costs.

/s/ Maureen Pulte Reilly
/s/ David H. Sawyer
/s/ William E. Collette

¹ This statute was repealed by 1993 PA 78, effective October 1, 1993. However, by the terms of the repealing statute, the prior statute applies to the case at bar because the cause of action arose before the effective date of 1993 PA 78.

² These statutory provisions were also repealed by 1993 PA 78.