OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

May 9, 2013

To:

Hon. John R. Storck
Circuit Court Judge
Justice Facility
210 West Center St.
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

Jacques G. Balette
Marks, Balette & Giessel PC
10000 Memorial Drive, Suite 760
Houston, TX 77024-3412

Matthew H. Boller
Boller & Vaughan, S.C.
605 W. Main St.
Madison, WI 53703-2633

Jeffrey A. Evans
von Briesen & Roper, S.C.
411 E. Wisconsin Avenue, Suite. 1000
Milwaukee, WI 53202

Henry P. Giessel
Marks, Balette & Giessel PC
10000 Memorial Drive, Suite 760
Houston, TX 77024-3412

Camille Godwin
Marks Balette & Giessel PC
10000 Memorial Drive, Suite 760
Houston, TX 77024-3412

Richard D. Humphrey
U. S. Attorney's Office
660 West Washington Avenue, Suite 303
Madison, WI 53703

Robert F. Johnson
von Briesen & Roper, S.C.
411 E. Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202

Jamie Stock-Retzloff
Dean Health Plan, Inc.
1277 Deming Way
Madison, WI 53717-1971

You are hereby notified that the Court has entered the following opinion and order:

2012AP1521 Christine Ready v. GGNSC Holdings, LLC (L.C. # 2010CV380)

Before Higginbotham, Sherman and Kloppenburg, JJ.

GGNSC Holdings, LLC, and others (collectively "GGNSC") appeal an order denying their motion to stay proceedings and compel arbitration.[1] GGNSC argues that the parties' Resident and Facility Arbitration Agreement mandating arbitration is enforceable. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. See WIS. STAT. RULE 809.21 (2011-12). We affirm.

The undisputed facts are as follows. Upon admittance to a nursing home facility owned and operated by GGNSC, Merlin Ziebell executed a Resident Admission Agreement and a Resident and Facility Arbitration Agreement. The GGNSC Agreement contains the following relevant provision:

> It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the 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 an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure ..., and not by a lawsuit or resort to court process. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

After Ziebell's death in August 2007, Christine Ready, Ziebell's daughter and the administrator of his estate, filed an action against the owners and operators of the nursing home. GGNSC moved to stay proceedings and compel arbitration pursuant to the GGNSC Agreement. The circuit court found that GGNSC waived its right to have the matter referred to arbitration.

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[1] This court granted leave to appeal the order on February 1, 2013. *See* WIS. STAT. § 809.50(3) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

GGNSC filed a notice of appeal and a petition for leave to appeal, because GGNSC was uncertain whether the order from which it appealed was final. We granted the petition without implying any opinion about the finality of the order and ordered supplemental briefing addressing the application of ***Riley v. Extendicare Health Facilities, Inc.***, 2013 WI App 9, 345 Wis. 2d 804, 826 N.W.2d 398, which this court decided on December 27, 2012, and ordered published on January 30, 2013.

GGNSC argues that this case is distinguishable from ***Riley*** because the GGNSC Agreement contains different language from that contained in the ***Riley*** Agreement.[2] We disagree. As we explain below, under the reasoning of ***Riley***, the GGNSC Agreement is unenforceable.

This case involves issues of contract interpretation and arbitrability, questions of law that we review de novo. ***Cirilli v. Country Ins. & Fin. Servs.***, 2009 WI App 167, ¶10, 322 Wis. 2d 238, 776 N.W.2d 272. In ***Riley***, this court reviewed a nursing home Alternative Dispute Resolution Agreement that included a non-exclusive arbitrator designation clause and a clause

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[2] The relevant language in the ***Riley*** Agreement was as follows:

> The National Arbitration Forum (NAF) shall serve as any arbitrator of any dispute. In the event that NAF is unable or unwilling to serve, the parties shall select an alternative neutral arbitration service within thirty (30) days after receipt of notice by NAF of such. Regardless of the entity chosen to be Administrator, unless the Parties mutually agree otherwise in writing, the Alternative Dispute Resolution process shall be conducted in accordance with the NAF Rules and Code of Procedure (hereinafter, collectively "NAF Rules of Procedure") then in effect. This process shall include but not be limited to the selection of the Arbitrator and location of the Arbitration as set out in the NAF Rules of Procedure.

Riley, 345 Wis. 2d 804, ¶4.

mandating use of the National Arbitration Forum Code of Procedure. ***Riley***, 345 Wis. 2d 804, ¶25. The court reasoned that the clauses demonstrated the parties' intent to arbitrate exclusively before NAF, and worked together to make the selection of NAF integral to the ***Riley*** Agreement. ***Id.*** The court concluded that the NAF selection was integral to the ***Riley*** Agreement, and that the Agreement was unenforceable in NAF's absence. ***Id.***, ¶¶44, 47.

Several key points supported the conclusion in ***Riley*** that NAF was integral to the ***Riley*** Agreement. ***Id.***, ¶¶36-47. First, the parties used mandatory language when designating the NAF Code of Procedure as the governing procedural rules. ***Id.***, ¶36. Second, the fee schedule imposed by the NAF Code resulted in substantial arbitrary fees that would not be based on actual costs of non-NAF arbitrators and administrators. ***Id.***, ¶38. Third, the multiple references to NAF in the NAF Code of Procedure and the "pervasive intertwining of the NAF Rules of Procedure with the dispute resolution process prescribed by the [***Riley***] Agreement," rendered the designation of NAF and the NAF Code integral to the agreement to arbitrate. ***Id.***, ¶¶39-40. Fourth, an alternate arbitrator could not be appointed because "even if the court were to appoint a substitute arbitrator, no applicable NAF rules exist for the substitute arbitrator to apply." ***Id.***, ¶41. Finally, the NAF term was not severable because it was integral to the agreement and removing such an integral term would "'run contrary to the clear intent of the parties as expressed by the plain language of the Agreement itself.'" ***Id.***, ¶46 (quoted source omitted).

GGNSC argues that we should rely not on the reasoning of ***Riley*** but on the reasoning in ***Meskill v. GGNSC Stillwater Greeley LLC***, 862 F. Supp. 2d 966 (D. Minn. 2012), which involved a dispute between a nursing home and a former patient concerning an arbitration provision identical to that in the GGNSC Agreement. 862 F. Supp. 2d at 969. The ***Meskill*** court concluded that the NAF Code contained "nothing therein so unique to suggest that, by selecting

that Code, the parties implicitly designated the NAF due to some particular expertise it held." ***Id.*** at 973.

GGNSC interprets the analysis in ***Riley*** to suggest that if an arbitration agreement is identical to the agreement in ***Meskill***, then the reasoning in ***Riley*** does not apply. GGNSC's interpretation is incorrect. This court disregarded ***Meskill***'s reasoning because the difference in the language of the ***Meskill*** agreement did not aid the analysis of the ***Riley*** Agreement. Although there may be factual similarities between the ***Meskill*** agreement and the GGNSC Agreement, the reasoning set out in ***Riley*** controls the analysis of the GGNSC Agreement.

Applying the reasoning in ***Riley*** to the GGNSC Agreement here establishes that the GGNSC Agreement is unenforceable. First, the GGNSC Agreement uses mandatory language, stating that any issue arising under the Resident Admission Agreement "shall be resolved exclusively by binding arbitration ... in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this agreement." In turn, Rule 1.A. of the NAF Code of Procedure includes additional mandatory language: "[t]his Code shall be deemed incorporated by reference in every Arbitration Agreement," and "[t]his Code shall be administered only by the National Arbitration Forum." The use of such mandatory language as "shall" and "exclusively" demonstrates the parties' intent to use the NAF Code of Procedure.

Second, the GGNSC Agreement, by requiring use of the NAF Code of Procedure, imposes a fee schedule that does not reflect the costs of non-NAF arbitration. As in ***Riley***, it would be unreasonable to impose the NAF fee schedule on the parties because the fees would not be based on the actual costs of the non-NAF arbitrators and administrators. Third, the required

resort to the NAF Code of Procedure would result in the NAF Code controlling the outcome of the dispute resolution.

The GGNSC Agreement contains the same material terms as did the agreement in ***Riley***, exclusively invoking NAF and its Code. Under ***Riley*** and as demonstrated above, the NAF Code of Procedure is an integral term of the GGNSC Agreement. Severing this term and appointing a substitute arbitrator would contradict the "'clear intent of the parties.'" ***Riley***, 345 Wis. 2d 804, ¶46 (quoting ***Stewart v. GGNSC-Canonsburg, L.P.***, 2010 PA Super 199, 9 A.3d 215, 221). Moreover, as noted in ***Riley***, NAF stopped accepting new consumer arbitrations in 2009 and "'there are simply no NAF rules currently in effect for such arbitrations.'" ***Riley***, 345 Wis. 2d 804, ¶41 (quoting ***Rivera v. American Gen. Fin Servs.***, 2011-NMSC-033, 259 P.3d 803). Accordingly, we conclude that the entire agreement is unenforceable.

IT IS ORDERED that the order be summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals