No. 22-cv-0894

In the

District of Columbia Court of Appeals

KAISERDILLON, PLLC

Appellee,

v.

CORBETT DALY AND TUNAY KURU, M.D.,

Appellants.

Appeals from the Superior Court of the District of Columbia, Civil Division No. 2021CA004343 *(Hon. Robert R. Rigsby, Judge)*

REPLY BRIEF FOR APPELLANTS

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AUGUST 1, 2023

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INTRODUCTION

In its brief opposing the appeal of Appellants, Corbett Daly and Tunay Kuru (hereinafter "the Dalys"), Appellee, KaiserDillon, PLLC (hereinafter "KaiserDillon"), expends the bulk of its efforts gratuitously attacking their former clients. Such *ad hominem* attacks upon the Dalys are as unprofessional as they are baseless and have no place in this case. Counsel for the Dalys will not dignify such vituperation, which peppers KaiserDillon's brief, by addressing each and every instance where KaiserDillon misstates or mischaracterizes the conduct and motivation of the Dalys, as such scurrilous attacks do not bear upon the important legal issues raised by the Dalys before this Court.

Those issues are twofold: first, what steps must a law firm take to fully apprise a potential client as to the scope and effect of arbitration and the important differences from court litigation before having the potential client sign an engagement agreement mandating arbitration of fee disputes; and, second, whether the Attorney Client Arbitration Board (hereinafter "ACAB") rules forbidding the transcription of hearings are procedurally deficient in that the rules unduly limit the statutory rights of a client to challenge an ACAB award under D.C. Code § 16-4423.[1]

[1] In the height of irony, Kaiser Dillon takes the legal position that the transcription of arbitration hearings runs counter to the attributes and goals of arbitration, yet its Brief at pages 9-11 and 15-20 is replete with what KaiserDillon claims to have

ARGUMENT

In response to the arguments of KaiserDillon pertaining to these legal issues, the Dalys state as follows:

First, the Dalys have not waived their position on appeal that KaiserDillon failed to fulfill its fiduciary obligations and sufficiently discuss and explain to the Dalys the advantages and disadvantages of arbitration, and as a consequence, the mandatory arbitration provision in KaiserDillon's Engagement Agreement is not enforceable.

In its brief, KaiserDillon baldly contends that the Dalys "have waived this argument by failing to actually make it in Superior Court." Brief of Appellee KaiserDillon, PLLC ("KD Brief") at 27. That is not correct. In their Answer to KaiserDillon's motion to confirm the ACAB award, the Dalys specifically "den[ied] that the so-called Engagement Agreement properly bound the Defendants to proceedings before the D.C. Attorney Client Arbitration Board." J.A. 46, ¶ 1. Additionally, in their Motion to Vacate the arbitration award, the

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been William Pittard's "extensive testimony" at the ACAB hearing, including his "repeated warnings (to the Dalys) about the wisdom of proceeding" with their legal case in Superior Court, "the reasonableness of KaiserDillon's fees," and "the work KaiserDillon had done for Defendants." Obviously, without the benefit of a transcript, the Dalys lack the ability to challenge KaiserDillon's self-serving recitation and set the record straight with record cites. This just confirms the importance of allowing a party to the ACAB proceedings to have the arbitration hearing transcribed.

Dalys asserted that the award should be vacated because, *inter alia,* "it is still the case that the client be advised of the arbitration process," and in the "circumstances here," the description of ACAB arbitration in KaiserDillon's Engagement Letter "is clearly not sufficient." J.A. 65.

Moreover, the Dalys pointed out there was no discussion at all with Ms. Kuru about the engagement and no discussion with Mr. Daly about arbitration. In the Dalys' Supplemental Submission to the court, Tunay Kuru submitted her affidavit stating that KaiserDillon "did not discuss the retainer agreement with me"; "did not mention ACAB to me"; "did not explain the implications of an arbitration agreement to me"; "did not explain to me that ACAB arbitration proceedings would not be officially recorded, nor officially transcribed"; and "did not explain to me that the lack of an official transcript would impair any rights to a meaningful appeal and due process." J.A. 130. Mr. Daly submitted an affidavit along similar lines that KaiserDillon failed to "explain all of the implications of an ACAB arbitration" and the lack of an official transcript on "a meaningful appeal and due process." J.A. 136.

KaiserDillon responded to the Dalys' argument in its Opposition to their Motion to Vacate by arguing that its Engagement Agreement did provide sufficient information for the Dalys to make an informed choice to agree to mandatory ACAB arbitration. J.A. 102.

Thus, the issue clearly was joined in the Superior Court proceedings, and KaiserDillon's present contention that the Dalys' argument was a "mere undeveloped afterthought below" is simply fashioned out of whole cloth.[2]

Second, even if, as KaiserDillon erroneously contends, the Dalys' argument was not sufficiently developed below, that does not end the matter. In *Biotechpharma, LLC v. Ludwig & Robinson, PLLC*, 98 A.3d 986, 993 (D.C. 2014), cited by KaiserDillon, this Court addressed whether ACAB Rule 8 and D.C. Bar Rule XIII give clients the power to require arbitration of fee disputes even though the issue had been raised for the first time on appeal because it was "a purely legal issue" and "'the interests of justice' are best served if we address it here." As in *Biotechpharma,* the Dalys have raised issues before this Court "of continuing importance" and "of great public interest" involving the circumstances in which a law firm may enforce an engagement agreement containing a mandatory arbitration provision. Further, as in *Biotechpharma,* it would serve no purpose to remand the matter to the Superior Court "for further factual development" since the issue is a purely legal one. 98 A.3d. at 994.

[2] It also should be noted that prior to the commencement of the arbitration proceedings, the Dalys challenged the enforceability of the arbitration provision. J.A. 325-41 (Under Seal), which was opposed by KaiserDillon. J.A. 102. That challenge was denied by the ACAB panel. J.A. 50.

Third, this Court should hold that the Dalys were not adequately informed as to the scope and effect of agreeing to mandatory arbitration because KaiserDillon never engaged in a discussion or dialog with the Dalys, explaining to them the critical differences between court litigation and arbitration.

In its Brief, KaiserDillon recognizes that under D.C. Bar Ethics Opinion 376, before agreeing to a mandatory arbitration provision in an engagement agreement, a client must have been "fully informed about the 'scope and effect' of a mandatory arbitration provision" and provided with "'adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.'" KaiserDillon Brief at 30-31, quoting Ethics Opinion 376. Kaiser Dillon then argues that the firm satisfied this requirement with respect to the Dalys because the Engagement Agreement that they signed contains language that is in accord with superseded D.C. Bar Ethics Opinion 218, which opines "that a fee agreement providing for mandatory arbitration of fee disputes before the ACAB is ethically permissible provided the agreement informs the client in writing that counseling and a copy of the ACAB's rules are available through the ACAB staff and further that the lawyer encourage the client to contact the ACAB for counseling and information prior to deciding whether to sign the agreement."

Although Opinion 376 superseded Opinion 218, KaiserDillon contends that Opinion 218's disclosure requirements actually have not been superseded because Opinion 376 "loosen[ed] the requirements set forth in Opinions 211 and 218." KaiserDillon Brief at 30, quoting Comment 13 to D.C. Rules of Professional Conduct. But, that loosening concerned the expansion of the disputes that may be arbitrated to include malpractice claims as well as fee disputes. Notably, Ethics Opinion 376 did not repeat or otherwise endorse the limited disclosure expressed in Opinion 218, upon which KaiserDillon hangs its hat.

As KaiserDillon points out in its Brief at page 31, the justification given by the D.C. Bar to "loosen" the scope of attorney-client arbitration in Opinion 376 was what the Bar termed "the evolution and proliferation of arbitration as an alternative dispute resolution method that has occurred since the issuance of Opinion 211," such that "clients are now likely to be able to understand the 'complex nature' of arbitration in a way they might not have been able to in the early nineties when arbitration was less common," quoting D.C. Bar Opinion 376, Comment 13.

Following the promulgation of Opinion 376 in 2019, however, the benefits and fairness of arbitration have been called into serious question, most notably by federal legislation introduced on April 27, 2023, as S. 1376 and entitled Forced Arbitration Injustice Repeal Act, available at https://www.congress.gov/bill/118th-

congress/senate-bill/1376/text. That proposed legislation, which has 38 co-sponsors in the Senate, would prohibit predispute arbitration agreements that require arbitration of future consumer disputes, as well as those involving employment, antitrust, and civil rights. A "consumer dispute" is defined as a dispute between one or more individuals who seek to acquire services for personal purposes and a provider of such services. S. 1376, Sec. 3. There is no exemption for the provision of legal services. Notably, a similar proposal (H.R. 2953) passed the House of Representatives during both the 116th and 117th Congress. The Dalys respectfully submit that this Court should take into account the serious questions that have been raised about the fairness of the arbitration process in considering the Dalys' appeal.

Accordingly, the issue remains for this Court to determine what steps a lawyer must take to satisfy its ethical obligation to "fully inform" a client about the "scope and effect" of arbitration so that the client is in a position to freely give his or her informed consent to mandatory arbitration. And, in that context, the New Jersey Supreme Court's decision in *Delaney* provides important guidance. As *Delaney* emphasizes, for there to be the requisite informed consent, the lawyer must enter into a dialogue with the client and have a full discussion of the nature of

arbitration and the advantages and disadvantage of arbitration as compared to court litigation. *Delaney v. Dickey*, 244 N.J. 466, 496, 242 A.3d 359 (N.J. 2020).[3]

Fourth, contrary to the impression KaiserDillon seeks to give, the Dalys' citation to *Delaney* is not merely for the proposition that the ACAB "no transcript" rule and its ramifications must have been "separately disclosed in a fee arbitration provision." KD Brief at 32. To be sure, one of the aspects of ACAB arbitration that warrants discussion with the client is the rule prohibiting transcription of ACAB hearings, which limits the statutory bases upon which an ACAB decision may be appealed to the Superior Court. And, providing a potential client with an engagement agreement that discloses the nature of ACAB arbitration and its pros and cons (including a rule prohibiting transcripts) is certainly necessary. But as *Delaney* makes clear, written disclosures, in and of themselves, are not sufficient to ensure that a potential client is fully informed.[4] To fulfill his or her fiduciary

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[3] As KaiserDillon notes, New Jersey's Advisory Committee on Professional Ethics has gone even further to recommend that mandatory arbitration provisions in engagement agreements be abolished altogether. KD Brief at 35. To hold that the mandatory arbitration provision in KaiserDillon's Engagement Agreement was not enforceable and, hence, the ACAB award must be vacated, this Court need not go so far as to abolish all mandatory arbitration provisions. Because, as discussed *supra*, KaiserDillon never discussed the impact of agreeing to mandatory arbitration, the agreement may be invalidated on that ground alone.

[4] KaiserDillon also argues that the Dalys should have known that without a transcript "it will be exceedingly difficult to challenge the result" because it is "just common sense," especially for "a sophisticated real estate broker and a medical doctor like Appellants." However, Mr. Delaney was a "sophisticated business

duties, the lawyer must undertake a full and complete, interactive discussion with the client to ensure that the client is fully aware and understands those rights the client is waiving by agreeing to mandatory arbitration.[5]

And, in this case, KaiserDillon does not question that it never engaged in such a discussion or dialogue with the Dalys. Indeed, as the Dalys' affidavits submitted in the Superior Court proceedings confirm, KaiserDillon did not even mention the paragraph in its Engagement Agreement providing for mandatory arbitration, nor otherwise discuss with the Dalys the ramifications of signing away their legal rights and protections inherent in the litigation (as opposed to the arbitration) process. J.A. 130, 136.

Fifth, KaiserDillon does not dispute that in *Zegeye v. Liss,* 70 A.3d 1208 (D.C. 2013), the plaintiff not only signed an engagement agreement that provided for mandatory arbitration before the ACAB, but moreover had been the party that instituted the arbitration proceedings and did not challenge the "no transcript rule" until she appealed an adverse decision by the arbitration panel. Given this scenario,

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man," 244 N.J. at 471, yet that did not give the law firm a pass on satisfying its ethical obligation to have a full discussion with him to ensure that he had been provided sufficient information to give his informed consent.

[5] *Delaney* noted that this interactive discussion need not take place orally, but could occur through an email exchange. 244 N.J. at 497. What is critical is that there be an actual dialogue between the lawyer and the client to ensure that the client appreciates the important rights foregone when agreeing to arbitrate disputes.

there could be no dispute that the plaintiff had "agreed to rules of the Arbitration Board" and should be bound by them. By contrast, the Dalys from the start challenged their being required to participate and defend themselves in the ACAB proceedings. J.A. 325-41 (Under Seal).

And, as explained in the Dalys' Opening Brief, in cases under the Federal Arbitration Act, where an employee has signed an arbitration agreement, the courts have scrutinized the provisions of the agreement and held that they were unenforceable as being both procedurally and substantively defective. Daly Br. at 29-30, citing *Cole v. Burns Int'l Sec. Servs.,* 105 F.3d 1465, 323 U.S. App. DC 133 (D.C. Cir. 1997); *Ingle v. Circuit City Stores, Inc.,* 328 F.3d 1165 (9th Cir. 2003). There is no reason that the rules of the ACAB should be exempted from the type of scrutiny the courts have given to arbitration procedures and rules in other contexts. In fact, given the fiduciary relationship between a law firm and a client, the opposite should be the case; the ACAB rules and procedures should be subject to heightened scrutiny to ensure they are fundamentally fair.

Sixth, while the right of appeal may not be essential to due process of law, this legal truism does not mean that where the law sets forth certain bases upon which an arbitration award may be vacated, an arbitration agreement may eliminate a party's right to invoke some of those bases, which, as this case demonstrates, is precisely what the "no transcript" rule does. Without a hearing

transcript, the Dalys were denied the right to challenge the ACAB award because the panel "refused to consider evidence material to the controversy" or "other reasonable ground" under D.C. Code § 16-4423(a)(3), (b). Whether termed a denial of due process or of a statutory right, the point is the same. The ACAB "no transcript" rule is fundamentally unfair and requires the arbitration award against the Dalys be vacated.

That there may be certain circumstances where a hearing transcript is not essential to challenge an arbitration award, as KaiserDillon argues on page 42 of its Brief, does not mean that the ACAB "no transcript rule" does not have an unduly limiting effect upon a party's right to challenge an award under the limited grounds set forth in the D.C. Code. In *Dolton v. Merrill Lynch,* 935 A.2d 295, 298-99 (D.C. 2007), cited by KaiserDillon, this Court recognized that the grounds for vacating arbitration awards under the D.C. Code are "substantially limited by statute" and that "a party's failure to provide a transcript of the arbitration hearing can be fatal to its challenge of the arbitration panel's award." In the Dalys' case, the sole reason for the Dalys' "failure" to provide a hearing transcript was due to the ACAB "no transcript" rule – nothing else.

The history of the proceedings behind the 2008 revisions to the D.C. Arbitration Act, discussed by KaiserDillon at 44-45 of its Brief, lends no support to its position. According to KaiserDillon, the drafters of the 2008 revisions

"consciously limited the scope of potential challenges to arbitral awards, in part, because broader challenges would require transcription of arbitration hearings." KD Brief at 44. But, the Dalys are not asking this Court to broaden the scope of potential challenges to arbitration awards, nor to require the transcription of arbitration hearings. The Dalys' point is that to give effect to what KaiserDillon agrees is the "limited scope of potential challenges to arbitral awards," the ACAB rules need to permit the transcription of the hearing.

KaiserDillon erroneously contends that ABA Model Rule 5 for Fee Arbitration, cited by the Dalys in their Opening Brief at 31, fails to support their position. According to KaiserDillon, the Model Rule allows for transcription of an arbitration hearing only in the discretion of the arbitration panel. KD Brief at 46. But, KaiserDillon fails to note that the Model Rule also provides for a party, at its own expense, to make arrangements to have the hearing transcribed. Neither the approval of the panel nor the opposing party is required, just adequate notice. This is precisely what the Dalys sought at the ACAB hearing, and what the panel denied: the opportunity to have the hearing transcribed at the Dalys' own expense.

Finally, and to be clear, the Dalys' position is simply that the ACAB "no transcript" rule unduly limited their right to challenge the ACAB award under the existing limited statutory grounds. They are not asking this Court to "require arbitrators to provide detailed rationales for their decisions" as KaiserDillon

contends, nor are they seeking to upend or overturn "the benefits of a streamlined resolution process." KD Brief at 47. Rather, the Dalys merely are contending that their extremely limited right to challenge an ACAB arbitration award under the D.C. Code requires that they should have had the option to arrange for a transcription of the arbitration hearing, just as ABA Model Rule 5 allows. The parade of horribles that KaiserDillon argues would flow from this Court's recognizing such a right is without any basis whatsoever.

CONCLUSION

Accordingly, for the reasons set forth above and those set forth in their opening brief, Corbett Daly and Tunay Kuru respectfully submit that this Court should reverse the Superior Court's confirmation of the ACAB arbitration award in favor of KaiserDillon, LLC and vacate the award.

DATED: August 1, 2023 Respectfully submitted,

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Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
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     (4) the year of the individual's birth;
     (5) the minor's initials; and
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2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Bernard J. DiMuro
Signature

22-cv-0894
Case Number(s)

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