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Supreme Court  
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IN THE SUPREME COURT OF THE STATE OF HAWAII

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MICHAEL SIOPEs and LACEY SIOPEs,  
Petitioners/Plaintiffs-Appellants,

vs.

KAISER FOUNDATION HEALTH PLAN, INC.; HAWAII PERMANENTE  
MEDICAL GROUP, INC.; KAISER FOUNDATION HOSPITALS, INC.,  
Respondents/Defendants-Appellees.

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SCAP-12-0000361

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-12-0000361; CIV. NO. 11-1-2732-11)

September 26, 2013

CONCURRING OPINION BY ACOBA, J.

I concur in the conclusion of the majority that  
Petitioners/Plaintiffs-Appellants Michael Siopes (Michael) and  
Lacey Siopes (Lacey) (collectively Siopeses) were not bound to  
arbitrate because no binding arbitration agreement existed among  
the Siopeses and Respondents/Defendants-Appellees Kaiser  
Foundation Health Plan, Inc., Hawaii Permanent Medical Group,

Inc., and Kaiser Foundation Hospitals, Inc. (collectively, Kaiser). However, I would hold also that the Siopeses cannot be required to arbitrate because they were guaranteed the right to a jury trial under Article I, Section 13 of the Hawai'i Constitution,<sup>1</sup> and the Siopeses did not voluntarily, knowingly, and intelligently waive that right.

I.

A.

To recount briefly, Michael enrolled in a Kaiser health insurance plan (Kaiser plan) through the Hawai'i Employer-Union Health Benefits Trust Fund (EUTF). To subscribe to the Kaiser plan, Michael signed a one-page enrollment form entitled "EUTF Enrollment/Change Form for Active Employees" (Enrollment Form), which Michael signed on May 26, 2003. Michael, who is currently married to Lacey, indicated that he was "Single" on the Enrollment Form. On the Enrollment Form, Michael signed a provision indicating that he agreed to "abide by the terms and conditions of the benefit plans [he] selected." The Enrollment

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<sup>1</sup> Article I, Section 13 of the Hawai'i Constitution provides as follows:

In suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

(Emphasis added.)

Form neither defined the "terms and conditions" of the Kaiser plan nor explained where those terms were located.

Kaiser asserts that at the time Michael signed the EUTF, the Kaiser plan was governed by the 2003 Group Medical and Hospital Service Agreement (Group Agreement). Included in the Group Agreement is a section governing arbitration (Section 8 or arbitration clause). Under Section 8, "[a]ny claim arising from an alleged violation of a legal duty incident to this Service Agreement" brought by a "Member"<sup>2</sup> against a Kaiser entity is subject to "binding arbitration."<sup>3</sup> Section 8 further provides

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<sup>2</sup> The Group Agreement defines a "Member" as "Any Subscriber or Family Dependent."

<sup>3</sup> Section 8 provides in relevant part as follows:

B. Binding Arbitration. Any claim arising from an alleged violation of a legal duty incident to this Service Agreement shall be submitted by the Member to binding arbitration if the claim is asserted:

- (1) By a Member or the personal representative of the Member's estate, or by any other person entitled to bring an action for damages for harm to the Member as permitted by Hawaii state law existing at the time the claim is filed ("Claimant");
- (2) On account of death, bodily injury, physical ailment, mental disturbance, or economic loss arising out of the rendering or failure to render services or the provision or failure to provide benefits under this Service Agreement, or arising out of any other claim, irrespective of the legal theory upon which the claim is asserted;
- (3) For monetary damages exceeding the jurisdictional limit of the Small Claims Division of the District Court of the State of Hawaii for claims (other than counterclaims); and
- (4) Against one or more of the following entities or their employees, officers or directors ("Respondent"):
  - (i) Kaiser Foundation Health Plan, Inc.,
  - (ii) Kaiser Foundation Hospitals,
  - (iii) Hawai'i Permanente Medical Group, Inc.,
  - (iv) The Permanente Federation, LLC,
  - (v) The Permanente Company, LLC,
  - (vi) Any individual or organization that contracts with an organization named in (i), (ii), (iii), (iv) or (v) above to

that Members "waive their rights to jury or court trial." Nothing in the record indicates that Michael was aware of the Group Agreement or its arbitration provisions, either before or after he signed the EUTF. To the contrary, Michael stated in a declaration that "[p]rior to signing the Enrollment Form, [he did] not recall being provided a copy of the Group Service Agreement or any other documentation."

B.

In their Complaint, the Siopeses alleged that on February 16, 2010, it was determined that an ulcerated cancer tumor was located at the junction of Michael's esophagus and stomach. Kaiser physicians admitted that they did not have expertise with this type of cancer, and initially misdiagnosed Michael's condition as requiring an invasive surgery that would have left Michael "severely disfigured and disabled for the rest of his life."

The Siopeses sought a second opinion from Duke University Medical Center ("Duke"). Specialists at Duke

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provide services to Health Plan Members, when such contract includes a provision requiring arbitration of a claim of a Health Plan Member.

. . .

The arbitration award shall be final and binding. The Respondents and Members waive their rights to jury or court trial. With respect to any matter not expressly provided for herein, the arbitration shall be governed by Hawaii's Revised Statutes Chapter 658.

(Emphases added.)

correctly diagnosed Michael's cancer and recommended a course of treatment that was eventually successful. Two Kaiser physicians provided a referral for Michael's treatment at Duke, and Michael's personal physician requested that Michael's treatment be covered by the Kaiser plan. Nevertheless, Kaiser declined to cover the expense of Michael's treatment at Duke.

Based on the foregoing, the Siopeses filed suit against Kaiser on November 9, 2011. On the same day, the Siopeses filed a Demand For Jury Trial. On January 12, 2012, Kaiser filed a Motion to Compel Arbitration. The Siopeses filed an opposition memorandum, asserting, inter alia, that the Siopeses had not "waived [their] Constitutional right to a jury trial." Kaiser filed a reply but did not respond to the Siopeses' jury trial assertion. On March 5, 2012, the court issued an Order Granting the Defendant's Motion to Compel Arbitration, apparently reasoning that the Siopeses were bound by the arbitration clause of the Group Agreement under Leong v. Kaiser Foundation Hospital, 71 Hawai'i 240, 788 P.2d 164 (1990).<sup>4</sup> The court's order did not respond to the Siopeses' claim that they were denied their right to a jury trial.

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<sup>4</sup> In Leong, this court held that plaintiffs were bound to arbitrate under the terms and conditions of a Kaiser health insurance plan even though the terms and conditions did not contain an arbitration provision at the time they enrolled in the plan, and the plaintiffs arguably did not receive a copy of the changed terms and conditions of the plan. 71 Haw. at 245-46, 788 P.2d at 168. However, in Leong the plaintiffs did not assert that they were denied their right to a jury trial under the Hawai'i Constitution, and therefore that issue was not before this court.

II.

The right to a jury trial in civil cases is guaranteed by Article I, Section 13 of the Hawai'i Constitution, which mandates that "[i]n suits at common law where the value in controversy shall exceed five thousand dollars,<sup>5</sup> the right of trial by jury shall be preserved[.]" (Emphasis added.) The right to a jury trial is further protected by HRS § 635-13, which states that "[w]hen the right of trial by jury is given by the Constitution . . . and the right has not been waived, the case shall be tried with a jury[.]" (Emphasis added.) Hawai'i Rules of Civil Procedure (HRCP) Rule 38, provides that "[t]he right of trial by jury as given by the Constitution . . . shall be preserved to the parties inviolate." (Emphasis added.) It has been explained that "given [its] recognition by two branches of the Hawai'i state government, as well as both the Hawai'i and United States Constitutions, the right to a jury trial in civil cases is clearly among the most sacred, fundamental rights enjoyed by our citizens." Pancakes of Hawai'i, Inc. v. Pomare Properties Corp., 85 Hawai'i 300, 944 P.2d 97 (App. 1997).

"The constitutional right to a jury trial in civil cases . . . is capable of being waived.'" Lii v. Sida of

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<sup>5</sup> The Siopeses estimate that they "incurred over \$250,000 in medical expenses at Duke."

Hawai'i, Inc., 53 Haw. 353, 355, 493 P.2d 1032, 1033 (1972) (quoting Seong v. Trans-Pacific Airlines, Ltd., 41 Haw. 231, 240 (1955)). Such a waiver may occur when contracting parties waive the right to a jury trial. See Joy A. McElroy, M.D., Inc. v. Maryl Group, Inc., 107 Hawai'i 423, 430-31, 114 P.3d 929, 936-37 (App. 2005) (holding that the plaintiff waived his right to a jury trial by signing a contract with an unambiguous waiver); see also K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d 752, 755 (6th Cir. 1985) ("It is clear that the parties to a contract may by prior written agreement waive the right to jury trial.").<sup>6</sup> Nevertheless, "[t]he right to a jury trial is inviolate in the absence of an unequivocal and clear showing of a waiver[.]'" Mehau v. Reed, 76 Hawai'i 101, 110, 869 P.2d 1320, 1329 (1994) (quoting Lii, 53 Haw. at 355, 493 P.2d at 1034).

Moreover, any contractual waiver of the right to a jury trial must be voluntary, knowing, and intelligent.<sup>7</sup> See K.M.C.

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<sup>6</sup> This court has said that "[b]ecause article I, section 13 was patterned after the seventh amendment to the United States Constitution, we have deemed the interpretation of [the seventh amendment] by the federal courts highly persuasive in construing the right to a civil jury trial in Hawai'i." Hous. Fin. & Dev. Corp. v. Ferguson, 91 Haw. 81, 87, 979 P.2d 1107, 1113 (1999) (internal punctuation and quotation marks omitted).

<sup>7</sup> HRCF Rule 38 provides that a party may waive his or her right to a jury trial in a civil case by failing to make a timely demand, i.e. by "mere inadvertence." K.M.C. Co., 757 F.2d at 756 n.4. However, this does not preclude the application of the voluntary, knowing, and intelligent standard to a contractual waiver of the right to a jury trial. As explained by the Sixth Circuit with regard to the analogous Federal Rules of Civil Procedure Rule 38, "there is a sound rationale underlying the application of different standards in the two instances." Id. "[T]he rule respecting timely demand for trial by jury is a reasonable requirement calculated to insure the orderly presentation of the business of the court." Id. Such concerns are not

Co., 757 F.2d at 756 ("Those cases in which the validity of a contractual waiver of jury trial has been in issue have overwhelmingly applied the knowing and voluntary standard."); Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) ("It is elementary that the Seventh Amendment right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally."). This standard is consistent with the general rule that "[c]onstitutional rights may ordinarily be waived by clear and convincing evidence that the waiver is voluntary, knowing, and intelligent." Brown v. Thompson, 91 Hawai'i 1, 10 n.9, 979 P.2d 586, 595 n.9 (1999). Inasmuch as the right of a civil jury trial is embedded in the Hawai'i Constitution, that right may only be contractually waived if done so voluntarily, knowingly, and intentionally.<sup>8</sup>

Finally, the right to a trial by jury is a personal constitutional right. See Pancakes Hawai'i, 85 Hawai'i at 305, 944 P.2d at 102 (describing the right to a jury trial in civil cases as a "fundamental right enjoyed by our citizens") (emphasis

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present in the context of the contractual waiver of the right. See id.

<sup>8</sup> Regarding the right to a jury in criminal cases, this court has held that "[t]he right to trial by jury may be effectively waived only when the accused has acted voluntarily and knowingly." See, e.g., State v. Olivera, 53 Haw. 551, 553, 497 P.2d 1360, 1361 (1972) overruled on other grounds by State v. Young, 73 Haw. 217, 830 P.2d 512 (1992).



added); see also HRCP Rule 38 (mandating that the right to trial by jury "shall be preserved to the parties") (emphasis added); cf. Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 848-49 (1986) (listing the right to trial by jury in civil cases as a "personal constitutional right"); Barzellon v. Presley, 125 P.3d 588, 601 (Okla. 2005) ("The constitutional right to a jury trial [in civil cases] is a personal right[.]"). Hence, it can be waived only by the individual holding the right. See Scott v. Neely, 140 U.S. 106, 109-10 (1891) (stating that the right to trial by jury in a civil case "cannot be dispensed with, except by the assent of the parties entitled to it") (emphasis added); cf. Domingo v. State, 76 Hawai'i 237, 241, 873 P.2d 775, 780 (1994) (emphasis added) ("[T]he right to a trial by jury is a personal right that cannot be waived by anyone other than the defendant[.]"); State v. Young, 73 Haw. 217, 221, 830 P.2d 512, 515 (1992) ("[W]aiver of a fundamental right such as the right to jury trial must be through the personal action of the beneficiary of that right.") (emphasis added); Palmer v. Valdez, 560 F.3d 965, 969 (9th Cir. 2009) (noting that "[a]n individual may waive his or her right to a civil jury trial") (emphasis added).

### III.

The Siopeses indicated their intent to avail themselves of the right to a jury trial by filing a demand for

jury trial along with the complaint. However, the court denied the Siopeses this right by concluding that they were bound by the terms of the arbitration clause in the group agreement.<sup>9</sup> Under the arbitration clause, the Siopeses are required to submit to "final and binding arbitration." Under the court's ruling, the Siopeses could not later present their case to a jury. Instead, their case would be decided by "a panel of three arbitrators." Cf. Badie v. Bank of America, 67 Cal. App. 4th 779, 804 (1998) (noting that enforcing an arbitration agreement against the plaintiffs would "amount to waiver of their constitutionally based right to a jury trial").

It is evident that neither Michael nor Lacey voluntarily, knowingly, and intelligently waived their right to a jury trial. The Enrollment Form signed by Michael stated only that he agreed to the "terms and conditions" of the Kaiser plan. Nothing in the Enrollment Form referred to either the Group Agreement or the arbitration clause. Michael was not informed that the "terms and conditions" of the Kaiser plan were contained

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<sup>9</sup> The Siopeses raised the argument that they did not waive their right to a jury trial both before the court and on appeal. Before the court, the Siopeses pointed out that the clause in the Enrollment Form signed by Michael was "devoid of any language suggesting that he had agreed to binding arbitration or waived his Constitutional right to a jury trial[.]" In their Opening Brief before this court, the Siopeses further stated that "[t]he [court] determined that Michael Siopes had waived his right to a jury trial . . . based upon an arbitration provision that [he] had never seen or otherwise assented to." The Siopeses further argued that the court erroneously bound Lacey to the same provision.

in the Group Agreement, nor was he provided with a copy of the Group Agreement before he signed the Enrollment Form. Nothing indicated to Michael that by enrolling in the Kaiser plan he was agreeing to waive his right to a jury trial. In other words, Michael could not have expressly relinquished his jury right under the Hawai'i Constitution in the absence of evidence that he had voluntarily, knowingly, and intelligently given up that right.<sup>10</sup>

Kaiser does not contend that Michael personally waived his right to a jury trial.<sup>11</sup> At oral argument, however, Kaiser relied on Madden v. Kaiser Foundation Hospitals, 552 P.2d 1178 (Cal. 1976) for the proposition that the EUTF "could, as an agent for its employee beneficiaries, waive the right to a jury trial." Oral Argument at 46:50, Siopes v. Kaiser Found. Health Plan, Inc., No. SCAP-12-0000361, available at [http://state.hi.us/jud/oa/13/SCOA\\_051613\\_12361.mp3](http://state.hi.us/jud/oa/13/SCOA_051613_12361.mp3).

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<sup>10</sup> In the context of contracts that do not contain an agreement to arbitrate, federal courts have rejected provisions waiving the right to a jury trial on similar grounds. See, e.g., Hendrix, 565 F.2d at 258 (finding that a contractual waiver of the right to a jury trial was not knowing and voluntary because, inter alia, "[t]he waiver clause was set deeply and inconspicuously in the contract"); Drelling v. Peugeot Motors of America, Inc., 539 F. Supp. 402, 403 (D. Colo. 1982) (holding that waiver was not voluntary, knowing, or intelligent because, inter alia, there was no evidence that the provision was "even brought to the plaintiff's attention"); cf. K.M.C. Co., 757 F.2d at 757 (holding that a contractual waiver of the right to a jury trial was not knowing and voluntary because the party signing the contract was told "that the jury waiver provision would not be enforced").

<sup>11</sup> Kaiser did not discuss the Siopeses' right to a jury trial either before the court or in its briefs on appeal.

However, first, Madden did not expressly conclude that an agent could waive the right to a jury trial on behalf of its employee beneficiaries. Instead, the California Supreme Court only discussed the constitutional right to a jury trial in the context of its holding that "arbitration provisions without express mention of any right to jury trial" may be upheld. Madden, 552 P.2d at 1187. Indeed, the California Supreme Court's reasoning appeared to assume that the parties themselves would sign the arbitration provision. See id. ("When parties agree to submit their disputes to arbitration they select a forum . . . in which, as they well know, disputes are not resolved by juries.") (emphasis added).<sup>12</sup>

In any event, as explained supra, the right to a jury trial is a personal constitutional right that "cannot be dispensed with, except by the assent of the parties entitled to

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<sup>12</sup> Moreover, California law now requires that "[a]ny health care service plan that includes terms that require binding arbitration . . . and that restrict, or provide for a waiver of, the right to a jury trial" must include a disclosure "prominently displayed on the enrollment form" that "clearly state[s] whether the . . . enrollee is waiving his or her right to a jury trial." Cal. Health & Safety Code § 1363.1 (West 2013). The purpose of this provision "is to protect health care consumers from the consequences of unknowingly waiving their right to a jury trial." Rodriguez v. Blue Cross of California, 162 Cal. App. 4th 330, 332 (2008) (internal quotation marks omitted). Any arbitration agreement is unenforceable if the corresponding enrollment form does not comply with these statutory provisions. Zembsch v. Superior Court, 146 Cal. App. 4th 153, 168 (2006). Hence, California now effectively requires enrollees to personally waive their right to a jury trial.

it." Scott, 140 U.S. at 109-10 (emphasis added). To the extent that Madden conflicts with this basic rule inherent in all fundamental rights, cf. Young, 73 Haw. at 221, 830 P.2d at 515, it does not represent persuasive authority. Hence, irrespective of Madden, it is well established that the right to trial by jury can be waived only by the party entitled to it. Here, nothing in the record indicates that Michael personally waived this right. Thus, under the circumstances, Michael did not voluntarily, knowingly, or intelligently waive his right to a jury trial by signing the arbitration agreement.

Additionally, nothing in the record indicates that Lacey waived her right to a jury trial. Lacey did not sign any form indicating that she was subject to the conditions of the Kaiser plan, nor did she indicate her assent to the Group Agreement in any way. Thus, there is no basis in the record for concluding that Lacey voluntarily, knowingly, or intelligently waived her right to a jury trial.

In sum, in requiring the Siopeses to submit to arbitration, the court erroneously denied them the right to a jury trial granted by Article I, Section 13 of the Hawai'i Constitution, and thereby extinguished that right. However, because the Siopeses have not waived that right, the court's order must be vacated and the case remanded for a trial by

jury.<sup>13</sup> Mehau, 76 Hawai'i at 110, 869 P.2d at 1329 (holding that the right to a jury trial is "inviolable" absent waiver).

/s/ Simeon R. Acoba, Jr.



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<sup>13</sup> Section 2 of the Federal Arbitration Act (FAA) provides that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Section 2 "permits agreements to arbitrate to be invalidated by generally applicable contract defenses," but "not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (internal quotation marks removed). In other words, a court may not "rely on the uniqueness of an agreement to arbitrate" to invalidate an arbitration agreement. Id. at 1747. Further, a generally applicable rule is preempted if it "interferes with the fundamental attributes of arbitration." Id. at 1748.

In Concepcion, the Supreme Court voided a California rule invalidating, as unconscionable, contracts prohibiting class actions. Id. at 1750. The Court reasoned that the California rule "interferes with arbitration" because class arbitration is "slower, more costly, and more likely to generate procedural morass," "requires procedural formality," and "greatly increases risks to defendants." Id. at 1751. Therefore, the California rule was preempted by the FAA. Id. at 1753. However, the Court noted that "States remain free to take steps addressing the concerns that attend contracts of adhesion" by, for example, "requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted." Id. at 1750 n.6 (emphasis added).

The requirement that a party voluntarily, knowingly, and intentionally waive the right to a jury trial applies equally to every contractual waiver of that right, and does not "rely on the uniqueness of an agreement to arbitrate." Indeed, the same requirement has been applied by the federal courts to contracts that do not contain an arbitration provision on numerous occasions. See supra note 10. Further, this requirement does not interfere with "the fundamental attributes of an agreement to arbitrate." Unlike the rule at issue in Concepcion, the requirement that parties to a contract voluntarily, knowingly, or intelligently waive their right to a jury trial does not interfere with the procedural aspects of arbitration. Instead, the requirement that parties who waive their right to a jury trial do so voluntarily, knowingly, and intentionally is similar to the requirement that certain provisions of an arbitration agreement be highlighted, which Concepcion expressly approved.