

No. 08-0784

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT,
CASE NO. CA 07 89400

STEPHEN MUSSER, as the personal representative of the
Estate of FLORENCE HAYES, deceased

Appellee,

v.

THE OAKRIDGE HOME

Appellant

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT, THE OAKRIDGE HOME**

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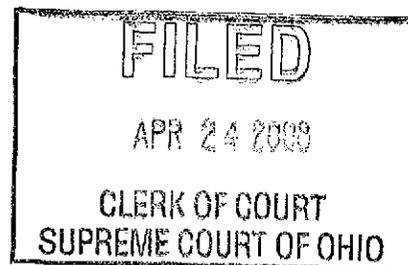


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STATEMENT OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This appeal addresses an appellate court's ruling that threatens the validity of all arbitration agreements between nursing homes and the home residents. Because Ohio law favors arbitration agreements, this Court has held that they can be set aside as unconscionable only if they are both procedurally and substantively unconscionable. The Eighth Appellate District, in a split decision, found that the arbitration agreement here was procedurally and substantively unconscionable, and did so on the basis of conditions that could apply broadly to almost any such agreements between a nursing home and its residents.

The appellate court held that the agreement was procedurally unconscionable because one of the parties—the resident—was 94 years old; because the nursing home prepared the agreement; and because the agreement was one of several forms presented to the resident when she applied for admission.

The court held that the agreement was substantively unconscionable because the terms were “not fair” to the resident, since the agreement (in the opinion of two judges) “requires Ms. Hayes to give up her legal rights to a jury, punitive damages, and attorney’s fees....”

The sense of the appellate court's decision on procedural unconscionability is that the contracts with the aged should be per se invalid, independent of any direct evidence on competence (appellee presented **no** evidence of incompetence here). As to substantive unconscionability, the court's ruling denies the right of any parties to agree by contract to waive the right to jury trial (a waiver implied in any arbitration agreement), punitive damages, and attorney fees and, instead, agree to arbitration. The radical principle announced in the decision is worded broadly and is not confined to nursing home agreements.

The case is important. Appellee's counsel urged the court to hold as a matter of law that predispute arbitration agreements between nursing homes and home residents should be held void as a matter of public policy. The decision below is a significant step in leading Ohio courts into that deep water. As explained in this brief, it is a step other states have decided, wisely, not to take.

The reasons that underlie Ohio's favorable consideration of arbitration agreements apply equally in the context of nursing home disputes. An important consideration is the savings arbitration provides in resolving disputes: it drives down health care costs, a key concern for the aging population. Ohio's public policy interests favor arbitration agreements in nursing homes.

In summary, the issue here warrants the Court's review.

STATEMENT OF THE CASE AND FACTS

I. *PROCEDURAL HISTORY*

Appellee filed this action in the Cuyahoga County Court of Common Pleas on June 21, 2006, alleging that Florence Hayes was a resident at appellant's facility, The Oakridge Home, when she fell and broke her hip on June 21, 2005.

Florence Hayes had signed an agreement to arbitrate future medical malpractice claims when she was admitted to the facility, and Oakridge moved the court to stay proceedings pending arbitration. The court granted the motion on January 9, 2007, and appellee appealed.

In a split decision issued on February 28, 2008, the Eighth Appellate District reversed, finding the arbitration agreement unenforceable on grounds of unconscionability. The appellate court journalized that judgment on March 10, 2008.

Oakridge timely moved the court under App. R. 25 and Article IV, Section 3(B)(4) of the Ohio Constitution to certify a conflict with the decision in *Manley v. Personacare of Ohio*, 11th Dist. No. 2005-L-174, 2007-Ohio-343. The court denied that motion on April 9, 2008.

Oakridge filed its notice of appeal to this Court on April 24, 2008, upon which the matter is now before this Court.

II. *FACTUAL BACKGROUND*

A. *The Arbitration Agreement*

Florence Hayes entered Oakridge in May of 2005, about a month before the incident. On the day of her admission, she signed an agreement to arbitrate future malpractice claims by arbitration. The two-page document explained that "execution of this Arbitration Agreement is voluntary and is not a precondition to receiving medical treatment at or admission to the

Facility.” It explained that if she signed the agreement, Hayes would “give up [her] constitutional right to a jury or court trial....”

The agreement also explained the benefits of arbitration “in the efficient resolution of conflicts,” and that it constituted an agreement to arbitrate “all medical malpractice disputes...arising out of or in any way related or connected to the Resident’s stay and care provided at the Facility.”

It also described the procedure for arbitration, explaining that any arbitration would be conducted before three arbitrators, with each party choosing one arbitrator and the two who were thereby selected choosing the third. It explained that arbitration would be conducted under the rules of procedure governing the American Arbitration Association, and that each party would bear their own attorney fees and costs.

The agreement concluded with an acknowledgement section, stating it “cannot be submitted to the Resident for approval when the Resident’s condition prevents the Resident from making a rational decision whether or not to agree.” It said, further, that Oakridge “must ensure that the Resident was able to communicate effectively in spoken or written English....” And it noted that the Resident “understands that he/she has the right to consult with an attorney of his/her choice, prior to signing this Arbitration Agreement.”

The agreement gave the Resident an opportunity to rescind “by giving written notice to the Facility within 60 days of Resident’s discharge from the facility.” It said that “If not rescinded within 60 days of Resident’s discharge from the Facility, this Arbitration Agreement shall remain in effect for all claims arising out of the Resident’s stay at the Facility.” The document explains that the Resident could cancel the agreement “merely by writing ‘cancelled’ on the face of one of his/her copies of the Arbitration Agreement, signing his/her name under

such word, and mailing by certified copy, return receipt requested, such copy to the Facility within such 60 day period.”

The agreement concluded with four lines of text in bold type, **all capital letters**, informing the resident “that by signing this arbitration agreement each has waived his/her right to a trial, before a judge or jury....”

Florence Hayes signed the agreement on May 31, 2005.

B. *Florence Hayes’ Admission to The Oakridge Home*

The circumstances of Hayes’ admission to the facility are not part of the record. In her briefs to the trial court and appellate court, Hayes argued that the arbitration agreement was unenforceable because it is procedurally and substantively unconscionable. She did not cite to any evidence in the record that bears on either point. Hayes wrote in her brief that the agreement was “thrust upon her in the lobby” on a “take it or leave it basis” while she was “presumably in a wheel chair or on a gurney” and “in dire need of care,” but she presented no evidence to support that account. She wrote in her appellate brief that “no one told Florence Hayes that she could cross out any part of the agreement that she did not like,” and that “no one from the Oakridge Home explained the terms of the agreement to Florence Hayes,” and “no one spoke to Florence Hayes about arbitration, or jury trials, or malpractice,” but that, too, is supposition. Again, none of that background was presented to the court. Hayes presented nothing to the court concerning her cognitive ability, her medical condition, her educational background, or her employment history.

C. *The Injury to Florence Hayes*

Hayes’ complaint alleges that “on or about June 21, 2005, Plaintiff Florence Hayes was caused to fall as the direct and proximate result of the negligence and/or recklessness of an

employee and/or agent of Defendant The Oakridge Home....” and that as a consequence of her injury she sustained medical and hospital bills.

The only evidence presented to the court concerning the incident is in the affidavit of merit of Irwin H. Mandel, M.D. that Hayes filed. Dr. Mandel stated in his affidavit that Florence Hayes presented to the Fairview Hospital Emergency Department on June 21, 2005 after “she apparently fell from a wheelchair” at Oakridge Home.

Dr. Mandel stated in his affidavit that he treated Hayes for her injury, and that Hayes underwent surgery on her hip. He incorporated in the affidavit his report of July 12, 2006, which explained that after the surgery, Hayes underwent an “acute stay in the hospital setting for medical management and early rehabilitation,” and that she was then transferred “to an extended care facility for assistance as well as functional rehabilitation and strengthening.” The evidence before the court showed that Hayes never returned to Oakridge after leaving the facility on June 21, 2005.

On July 9, 2007, appellee filed a suggestion of death, and a motion to substitute parties on September 12, 2007, stating that Florence Hayes had died on February 9, 2007. The court granted the motion on September 20, 2007, naming as plaintiff Stephen Musser, personal representative of the Estate of Florence Hayes.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

- I. **The law presumes that persons over the age of majority are competent to enter contractual agreements. An arbitration agreement between a nursing home and a home resident cannot be set aside as procedurally unconscionable based only on the age of the resident where there is no evidence that the resident lacked capacity to understand the agreement or that a voluntary meeting of the minds was not possible.**

Under R.C. 2711.01(A), an arbitration agreement can be set aside based on legal or equitable grounds. Unconscionability is one basis for setting aside such agreements, i.e., where there is “an absence of meaningful choice on the part of one of the parties to a contract, combined with terms that are unreasonably favorable to one party. *Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757. A party challenging an arbitration agreement as unenforceable on grounds of unconscionability must prove that the agreement is both procedurally unconscionable and substantively unconscionable. *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826.

An agreement is procedurally unconscionable where no voluntary meeting of the minds was possible, based upon the relative bargaining position of the contracting parties. *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ohio App.3d 27, 2004-Ohio-5953, ¶13. As this Court held in *Williams v. Aetna Fin. Co.* 83 Ohio St.3d 464, 473 1998-Ohio-294, an arbitration agreement is unconscionable where there is “considerable doubt that any true agreement ever existed to submit disputes to arbitration.”

The appellate court below found that the agreement here was procedurally unconscionable because “Ms. Hayes was a 94-year-old woman with no business or contract experience.” Even if the court was right that Ms. Hayes was inexperienced in business and

contracting (and this was supposition since there was no evidence about her background), neither point—her age or her inexperience—would be a basis for finding procedural unconscionability.

The law presumes that persons over the age of majority are competent to enter contracts. *Buzzard v. Pub. Emp. Retirement Sys. of Ohio* (2000), 139 Ohio App.3d 632, 637. Absent some evidence of mental debility, Ms. Hayes is presumed to have been competent to enter and understand the agreement. Her signature on the agreement was steady and appeared at the correct place on the page. There was no evidence that Ms. Hayes was unable to read and understand the document.

Her business experience, likewise, was not a basis to set aside the agreement. Even if appellee had presented evidence about the education and background of Ms. Hayes, that would not be a basis to set aside the agreement. In *Hurst v. Enterprise Title Agency, Inc.* 157 Ohio App.3d 133, 142, the court rejected the reasoning offered the appellate court in this case that a contract may be set aside based on the lack of business experience of a party to the contract, saying “...we do not hold that a clause in a real estate contract is procedurally unconscionable merely because one of the parties is a high school graduate who is purchasing his or her first home. To do so would render any contract clause that is disadvantageous to an otherwise competent first-time home buyer from having any force.”

The decision below conflicts with that of other Ohio appellate courts which have held that a party must establish procedural unconscionability with some evidence of the circumstances underlying the contract. Thus, in *Fortune v. Castle Nursing Homes*, Fifth App., 164 Ohio App.3d 689, 2005-Ohio-6194, the court held that plaintiff failed to show procedural unconscionability of a nursing home arbitration agreement, stating:

Counsel for appellee presented no evidence concerning the bargaining position of appellee at the time she executed the admission agreement. Without such evidence, we cannot make a finding of procedural unconscionability.

Fortune v. Castle Nursing, 2005 Ohio-6195, at ¶36.

Likewise, in *Manley v. Personacare*, 11th Dist. No. 2005-L-174, 2007-Ohio-343, the plaintiff challenged a nursing home arbitration agreement on grounds of unconscionability, and supported the claim of procedural unconscionability with evidence of the resident's cognitive impairment. The court found the plaintiff's evidence sufficient to show procedural unconscionability, noting that the record contained evidence of "numerous medical ailments" that "could cause her confusion."

The decision below threatens the principle Ohio courts have followed in evaluating challenges to arbitration agreements on grounds of unconscionability. By identifying the age of the resident as a basis for setting aside such agreements, the appellate court effectively accepted the argument by appellee that arbitration agreements between nursing homes and residents should be per se invalid—whether or not the resident is competent to understand the terms of the agreement.

The Massachusetts Supreme Court recently considered and rejected such a proposal. In *Miller v. Cotter*, 448 Mass. 671, 2007 WL 925792, the court concluded there was nothing improper about the use of arbitration agreements in nursing homes, and cited Supreme Court decisions from other states that had upheld the use of arbitration agreements by nursing homes. See *Briarcliff Nursing Home v. Turcotte* (Ala. 2004), 894 So.2d 661; *Vicksburg Partners, L.P. v. Stephens* (Miss. 2005), 911 So.2d 507. The Massachusetts court wrote:

As we do here, these courts found nothing in the circumstances of an ordinary admission to a nursing home that would suggest unfairness or oppression necessary to support a claim of procedural unconscionability. Nor did they find the terms of the arbitration agreements at issue, binding as they were on both parties, to favor one party over another in such a way as to suggest substantive unconscionability.

* * *

Miller also suggests, apart from the facts of any given case, that the context of nursing home admissions is inherently unfair to patients because of the pressures created by the patient's (often acute) need for nursing care, and invites us to adopt a per se rule that predispute arbitration agreements in the nursing home context should be void as a matter of public policy. We decline to adopt such a rule because this type of agreement does not meet the requirements for the public policy exception to the enforcement of contracts.

The decision below moves Ohio outside the mainstream view on this issue and adopts a radical position that would effectively negate nursing home arbitration agreements as invalid per se. The court should accept jurisdiction and check this attempt to steer Ohio law into an area that other states have avoided.

Proposition of Law No. 2:

II. Parties to an arbitration agreement can agree to forego the right to a jury trial, the right to punitive damages, and the right to recover attorney fees. The inclusion of such terms is no basis for a finding of substantive unconscionability in an arbitration agreement.

As noted earlier, a party seeking to set aside an arbitration agreement on grounds of unconscionability must prove both procedural and substantive unconscionability. One court described the test for substantive unconscionability as follows:

Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability. However, courts examining whether a particular limitations clause is substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability.

Collins v. Click Camera & Video, Inc. (1993), 86 Ohio App.3d 826, 834.

The court below concluded that the arbitration agreement in this case was substantively unconscionable because it deprived her of her right to a jury trial and to pursue punitive damages and attorney fees. The court cited no authority for such a finding, apart from the decision of the Sixth Circuit Court of Appeals noting that a party who agrees to arbitration does not forego her

substantive legal rights. *Morrison v. Circuit City Stores* (C.A. 6, 2003), 317 F.3d 646, 670. It then noted that the right to a jury trial and the right to pursue punitive damages and attorney fees are substantive legal rights and it concluded that the arbitration agreement could not properly “require Ms. Hayes to give up” those rights. (Opinion, p.5.)

This Court has held that “waiver of one’s jury trial rights is a necessary consequence of agreeing to have an arbitrator decide a dispute.” *Taylor Building Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, at ¶58. Ohio courts have, likewise, upheld arbitration agreements that barred recovery of punitive damages and, consequently, any attendant right to attorney fees. See, e.g., *Cronin v. Fitness*, Franklin App. No. 04AP-1129, 2005-Ohio-3273.

Despite rulings from this Court and other appellate courts holding such arbitration provisions valid, the decision below holds them substantively unconscionable per se. The holding is contrary to the Ohio law policy favoring arbitration agreements that this Court has recognized. The Court should accept jurisdiction.

CONCLUSION

As this Court has recognized, Ohio’s public policy encourages arbitration as a method of settling disputes. *Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708, 711-712. The decision below effectively renders all such agreements between nursing homes and their residents to be procedurally unconscionable per se, based only on the age of the contracting resident.

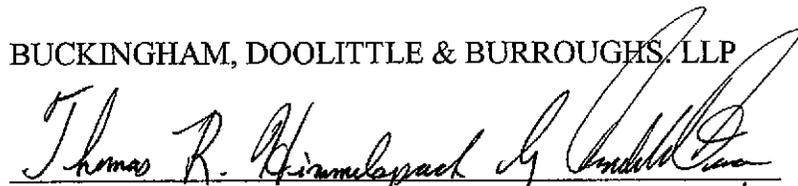
Ohio's public policy encourages arbitration as a method to settle disputes. *Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708, 711-712, 590 N.E.2d 1242. While appellee argued to the appellate court that arbitration agreements should be unlawful in nursing homes, they are, in fact, a benefit. Arbitration drives down health care costs. It allows parties to select expert

decision makers who are familiar with applicable laws, standards, and practices, which increases outcome predictability and which, in turn, can increase the probability of settlement.

In short, arbitration is not the evil that appellee has claimed. This Court should protect the availability of arbitration agreements as a way of resolving disputes in nursing homes. It should accept jurisdiction

Respectfully submitted,

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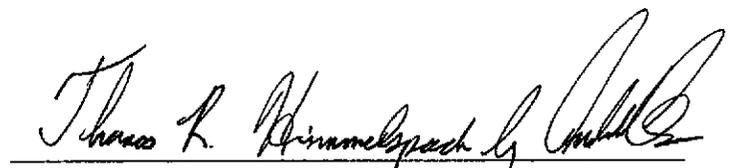
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PROOF OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction of Appellant, The Oakridge Home* was served by regular U.S. mail this 24th day of April, 2008, upon the following:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89400

FLORENCE HAYES

PLAINTIFF-APPELLANT

vs.

THE OAKRIDGE HOME; ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-594529

BEFORE: Celebrezze, J., Calabrese, P.J., and Boyle, J.

RELEASED: February 28, 2008

JOURNALIZED:

MAR 10 2008

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ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

FEB 28 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

FILED AND JOURNALIZED
PER APP. R. 22(E)

MAR 10 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

FRANK D. CELEBREZZE, JR., J.:

Appellant, Florence Hayes, appeals the trial court's granting of the motion to stay pending binding arbitration, which was filed by appellee, The Oakridge Home ("the nursing home"). After a thorough review of the record, and for the reasons set forth below, we reverse and remand.

The facts that lead to this appeal began on May 31, 2005, when Ms. Hayes was admitted to the nursing home. On that date, Ms. Hayes signed two arbitration agreements.

On June 21, 2006, Ms. Hayes filed a complaint alleging that the nursing home was negligent or reckless. In her complaint, she alleged that she fell from her wheelchair and broke her hip on June 21, 2005. On August 23, 2006, the trial court granted the motion to stay filed by the nursing home, which asked the trial court to permanently stay the case and refer the case to binding arbitration, pursuant to the arbitration agreement that Ms. Hayes had signed.

Ms. Hayes brings this appeal asserting one assignment of error for our review.

Unconscionability of Arbitration Clause

"I. The trial court erred by granting defendant's motion to stay, pending binding arbitration, because the arbitration clause at issue is procedurally and substantively unconscionable. Therefore, the arbitration cause is unenforceable."

Ms. Hayes argues that the trial court erred when it granted the nursing home's motion to stay pending arbitration. More specifically, she argues that the arbitration clause is procedurally and substantively unconscionable; therefore, it is unenforceable. We find merit in this argument. A review of the arbitration clause shows that it is unenforceable because it is substantively and procedurally unconscionable.

Ordinarily, we review a trial court's granting of a motion to stay pending arbitration under an abuse of discretion standard. *Simon v. Commonwealth Land Title Ins. Co.*, Cuyahoga App. No. 84553, 2005-Ohio-1007. However, the question of whether a contract is unconscionable involves only legal issues and is a question of law. *Fortune v. Castle Nursing Homes, Inc.*, Holmes App. No. 07 CA 001, 2007-Ohio-6447.

"An arbitration clause is unenforceable if it is found by a court to be unconscionable. Unconscionability refers to the absence of a meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to one party." *Small v. HCF of Perrysburg*, Wood App. No. WD-04-036, 2004-Ohio-5757, at ¶ 12, citing *Collins v. Click Camera & Video, Inc.* (Mar. 24, 1993), Montgomery App. No. 13571.

Unconscionability is comprised of two separate concepts: (1) substantive unconscionability, which encompasses the commercial reasonableness of the

terms of the contract, and (2) procedural unconscionability, which includes the bargaining position of the parties. Id. at ¶20.

Substantive unconscionability involves factors including fairness of terms, charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability. Id. at ¶21. Procedural unconscionability involves factors such as age, intelligence, education, business experience, bargaining power, who drafted the document, whether the terms were explained to the weaker party, whether alterations were possible, and whether there were alternative sources of supply. Id. at ¶22.

“In order to negate an arbitration clause, a party must establish a quantum of both substantive and procedural unconscionability.” Id. at ¶23. Here, the “agreement” section of the arbitration agreement signed by Ms. Hayes provided that “the parties agree that they shall submit to binding arbitration all medical malpractice disputes against each other ***. *** An arbitration hearing arising under this Arbitration Agreement shall be held in the county where the Facility is located before a board of three arbitrators selected from the American Arbitration Association.”

The “agreement” section also included language that “each party may be represented by counsel in connection with all arbitration proceedings and each

party agrees to bear their own attorney fees and costs. *** [T]he award in arbitration shall not include any amount for exemplary or punitive damages.”

Finally, in the “acknowledgments” section, the arbitration agreement stated that “each party agrees to waive the right to a trial, before a judge or jury, for all disputes, including those at law or in equity, subject to binding arbitration under this Arbitration Agreement.”

The nursing home argues that the trial court properly granted its motion to stay pending arbitration pursuant to the arbitration agreement; however, Ms. Hayes argues that the arbitration agreement is both substantively and procedurally unconscionable and is, therefore, unenforceable.

Substantive Unconscionability

A review of the facts in this case shows that the arbitration agreement was clearly substantively unconscionable. The terms were not fair to Ms. Hayes because they took away her rights to attorney's fees, punitive damages, and a jury trial. A party does not forgo her substantive legal rights when she agrees to arbitration. *Morrison v. Circuit City Stores* (C.A. 6, 2003), 317 F.3d 646, 670.

Under the agreement, the parties agreed to waive their rights to a jury trial and to submit “all disputes against each other” to binding arbitration. Further, they agreed to bear their own attorney's fees and that an award could not include punitive damages.

"In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages." R.C. 2315.21(D)(1). "Punitive damages are awarded to punish the guilty party and deter tortious conduct by others." *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, 660, 590 N.E.2d 737. "If punitive damages are proper, the aggrieved party may also recover reasonable attorney fees." *Locafrance U.S. Corp. v. Interstate Distribution Services, Inc.* (1983), 6 Ohio St.3d 198, 202-203, 451 N.E.2d 1222. "Attorney fees can be a significant portion of a plaintiff's award." *Id.*; *Post v. Procare Automotive Serv. Solutions*, Cuyahoga App. No. 87646, 2007-Ohio-2106.

Under Ohio statute and case law, Ms. Hayes may recover punitive damages and attorney's fees. The arbitration agreement attempts to require her to forgo those legal rights. Because the arbitration agreement requires Ms. Hayes to give up her legal rights to a jury, punitive damages, and attorney's fees, it is substantively unconscionable.

Procedural Unconscionability

In addition to being substantively unconscionable, the agreement is also procedurally unconscionable. Ms. Hayes was a 94-year-old woman with no business or contract experience. The nursing home, as a corporation whose lawyers drafted the agreement, had all of the bargaining power. No one

explained the terms to Ms. Hayes, including the fact that she could alter the agreement. Although the agreement indicated that she could cancel, that information was listed among a myriad of terms, and there were numerous forms for her to fill out. Also, there were not alternative sources of supply for Ms. Hayes -- finding a quality nursing home is difficult.

Consideration

Even if the agreement was not unconscionable, "courts may not force parties to arbitrate disputes if the parties have not entered into a valid agreement to do so." *Maestle v. Best Buy, Inc.*, Cuyahoga App. No. 79827, 2005-Ohio-4120. "In order to have a valid contract, there must be a 'meeting of the minds' ***, which [includes] an offer, acceptance, and consideration." *Reedy v. The Cincinnati Bengals, Inc.* (Feb. 9, 2001), Hamilton App. Nos. C000804, C000805. Here, Ms. Hayes has given up her right to a trial and has received nothing in return.

Ms. Hayes signed documents she felt she had to sign in order to be admitted to the nursing home, including an arbitration agreement that we find to be substantively and procedurally unconscionable. Accordingly, we sustain this assignment of error.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellees costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, J., CONCURS;
ANTHONY O. CALABRESE, JR., P.J., DISSENTS (WITH SEPARATE
OPINION)

ANTHONY O. CALABRESE, JR., P.J., DISSENTING:

I respectfully dissent from my learned colleagues in the majority. I believe that there is significant evidence to demonstrate a meeting of the minds between the nursing home and appellant. Moreover, there is nothing in the record indicating that the terms were unconscionable.

In the case at bar, appellant signed two arbitration agreements on May 31, 2005. The arbitration agreement concerning "future malpractice claims" is a two-page document with three sections: (I) an "Explanation," (II) the

"Agreement," and (III) the "Acknowledgments." It is written in plain language with a minimum of legal terms.

The "Explanation" section explains that the arbitration agreement is optional, a point also noted in the "Acknowledgments" section. An "Agreement" section also provides that any arbitration is to be conducted before three arbitrators, with each party choosing one arbitrator, and the two who are thereby selected choosing the third. The agreement says the arbitration is conducted under the rules of procedure governing the American Arbitration Association, and addresses the apportionment of costs: "Each party may be represented by counsel in connection with all arbitration proceedings and each party agrees to bear their own attorney fees and costs."

In the final section, the agreement states that the resident "understands that he/she has the right to consult with an attorney of his/her choice, prior to signing this arbitration agreement." The document also allows the resident an opportunity to rescind the agreement "by giving written notice to the facility within 60 days of the resident's discharge from the facility." It states that "if not rescinded within 60 days of resident's discharge from the facility, this arbitration agreement shall remain in effect for all claims arising out of the resident's stay at the facility." The agreement concludes with four lines of text in bold type and

in all capital letters, informing the resident "that by signing this arbitration agreement each has waived his/her right to a trial, before a judge or jury ***."

Appellant Hayes was not forced to sign the contract, and there was nothing to prevent her from changing or modifying the terms. In fact, appellant could have avoided signing the arbitration clause altogether and still have been admitted to the nursing home. Appellant's counsel argues that appellant was very old at the time she was asked to sign the forms, and the forms were complicated and confusing. However, appellant's advanced age does not preclude her from signing or comprehending an arbitration clause. An individual is assumed to be competent to sign a contract at the age of majority, unless proven otherwise. Appellant did not proffer any evidence demonstrating that she did not have the legal capacity to sign the arbitration clause. There is no evidence in the record concerning the education, employment history, cognitive abilities, or medical condition of appellant at the time she signed the agreement.

The arbitration agreement in the case at bar was voluntary, was not a condition to admission to the facility, gave appellant an opportunity to rescind the agreement, and warned her that by signing the agreement she was waiving her right to trial. The parties to an agreement should be able to rely on the fact that affixing a signature which acknowledges one has read, understood, and

agreed to be bound by the terms of an agreement means what it purports to mean. The parties to a contract must be able to rely on the statements enclosed in the documents asserting the other party understood the terms and conditions of the agreement. *Butcher v. Bally Total Fitness Corp.*, Cuyahoga App. No. 81593, 2003-Ohio-1734.

The contract terms were clear, and there is nothing in the contract that would rise to the level of unconscionability. The evidence demonstrates that appellant had the mental capacity to understand the terms of the contract and the contract provisions were fair and reasonable. Accordingly, I would affirm the lower court.