

IN THE SUPREME COURT OF OHIO

Stephen Musser, as the Personal	)	CASE NO. 08-0784
Representative of the Estate of	)	
Florence Hayes (deceased),	)	
	)	On Appeal from the Eighth Appellate
Appellant,	)	District Court of Appeals
	)	
vs.	)	
	)	Court of Appeals
The Oakridge Home, et al.,	)	Case No. CA 07 89400
	)	
Appellees.	)	

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**APPELLANT STEPHEN MUSSER'S  
MEMORANDUM IN OPPOSITION TO JURISDICTION**

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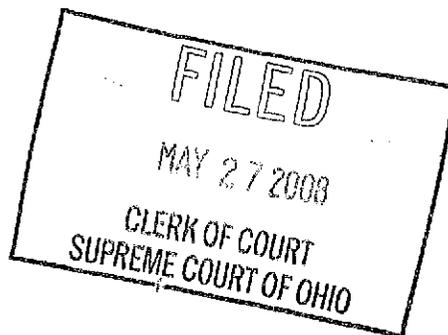
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ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.

Proposition of Law No. 1. Appellant argues that the law presumes that persons over the age of majority are competent to enter contractual agreements. Appellant also argues that 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. .... Page 11

Proposition of Law No. 2. Appellant argues that parties to an arbitration agreement can agree to forego the right to a jury trial, the right to recover punitive damages, and the right to recover attorney fees. Appellant argues further that the inclusion of such terms is no basis for a finding of substantive unconscionability in an arbitration agreement ..... Page 12

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APPENDIX

Idamay Fortune v. Sunset View Castle Nursing Homes, Inc., Case No. 04-CV-080. A copy of the Journal Entry from that case is attached hereto and identified as Exhibit "A"

**I. STATEMENT OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.**

Appellant argues that this appeal addresses an appellate court's ruling that threatens the validity of all arbitration agreements between nursing homes and the home residents. This is inaccurate. The Eighth Appellate District Court of Appeals decision in this case does not make any new law. The Eighth Appellate District Court of Appeals simply applied a well established body of law to the specific facts of this case.

Appellant also argues that Ohio law favors arbitration agreements. This is not entirely accurate. Ohio law favors some arbitration agreements. In Small v. HCF of Perrysburg, 159 Ohio App. 3d 66 (2004), the trial court ordered the plaintiffs in that case to submit their claims of nursing home negligence against the Defendant to arbitration, and stayed the case until the conclusion of the arbitration. The Plaintiffs appealed. On appeal, the Plaintiffs, now the Appellants, argued that "the clause was unconscionable because Mrs. Small, at the time she signed the document, was concerned about the immediate health of her husband and was in no position to review and fully appreciate the terms of the agreement." Small at 69. The Sixth District Court of Appeals held the arbitration clause unconscionable. In deciding this issue the Sixth District Court of Appeals held as follows (emphasis added):

As set forth above, R.C. 2711.01(A) provides that an arbitration clause may be unenforceable based on legal or equitable grounds. An arbitration clause may be legally unenforceable where the clause is not applicable to the matter at hand, or if the parties did not agree to the clause in question. Benson v. Spitzer Mgt., Inc., 8th Dist. No. 83558, 2004 Ohio 4751, P13, citing Ervin v. Am. Funding Corp. (1993), 89 Ohio App.3d 519, 625 N.E.2d 635. Further, 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. Collins v. Click Camera & Video, Inc. (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294. Accordingly,

unconscionability consists of two separate concepts: (1) substantive unconscionability, which refers to the commercial reasonableness of the contract terms themselves and (2) procedural unconscionability, which refers to the bargaining positions of the parties. *Id.* Collins defines and differentiates the concepts 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. See *Chanda, supra*; *Berjian, supra*.

“Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, e.g., 'age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.' *Johnson v. Mobil Oil Corp.* (E.D.Mich.1976), 415 F. Supp. 264, 268." *Id.*

In order to negate an arbitration clause, a party must establish a quantum of both substantive and procedural unconscionability. *Id.* In reviewing the arbitration clause at issue, we will individually discuss each prong.

#### "Substantive Unconscionability

Appellants contend that the arbitration clause is substantively unconscionable because: (1) it gives The Manor the right to proceed in any forum its chooses for the resolution of fees disputes while limiting residents' claims to arbitration; (2) the arbitration clause, despite the language in the agreement, was a condition of admission; (3) the prevailing party is entitled to costs and reasonable attorney fees; (4) the issue of whether a resident's claim is subject to arbitration is improperly to be determined through the arbitration process; and (5) the clause requires that arbitration be conducted at the facility rather than a neutral setting. Appellee counters each assertion.

At the outset, we note that the arbitration clause does contain a sentence which provides that admission is not conditioned on agreement to the clause. However, the same clause states that any "controversy, dispute, disagreement or

claim" of a resident "shall be settled exclusively by binding arbitration." Further, and most importantly, the bold print directly above the signature lines states that by signing the agreement the parties agree to arbitrate their disputes and that the parties agree to the terms of the agreement "in consideration of the facility's acceptance of and rendering services to the resident." The residents or their representatives are provided no means by which they may reject the arbitration clause. Accordingly, we believe that the resident or representative is, by signing the agreement that is required for admission, for all practical purposes being required to agree to the arbitration clause.

On review of the arbitration clause and the arguments of the parties, we find troubling the fact that the prevailing party is entitled to attorney fees. Typically, attorney fees are not awarded to the prevailing party in a civil action unless ordered by the court (such as following a finding of frivolous conduct.) Though the prevailing party may be the resident or representative, individuals may be discouraged from pursuing claims because, in addition to paying their attorney and, pursuant to the arbitration clause, the costs of the arbitration, they may be saddled with the facility's costs and attorney fees. Such a burden is undoubtedly unconscionable.

#### "Procedural unconscionability

As stated above, procedural unconscionability involves an examination of the bargaining position of the parties. In her affidavit, Mrs. Small stated that when she arrived at The Manor she was concerned about her husband's health because he appeared to be unconscious. Shortly after his arrival she was informed that Mr. Small was going to be transported by ambulance to the hospital. Mrs. Small was then approached by an employee of The Manor and asked to sign the Admission Agreement. The agreement was not explained to her and Mrs. Small stated that she signed the agreement "while under considerable stress \* \* \*." Mrs. Small stated that the entire process, from their arrival at The Manor until the ambulance left, took approximately 30 minutes.

After careful review of the particular facts of this case, we find procedural unconscionability. When Mrs. Small signed the agreement she was under a great amount of stress. The agreement was not explained to her; she did not have an attorney present. Mrs. Small did not have any particularized legal expertise and was 69 years old on the date the agreement was signed.

In finding that The Manor's arbitration clause is unconscionable, we must make a few observations. **Though we firmly believe that this case demonstrates both substantive and procedural unconscionability, there is a broader reason that arbitration clauses in these types of cases must be closely examined. Arbitration clauses were first used in business contracts, between sophisticated**

**business persons, as a means to save time and money should a dispute arise. As evidenced by the plethora of recent cases involving the applicability of arbitration clauses, the clauses are now being used in transactions between large corporations and ordinary consumers, which is cause for concern. Particularly problematic in this case, however, is the fact that the clause at issue had potential application in a negligence action. Such cases are typically fact-driven and benefit from the discovery process afforded in a civil action. Further, negligence cases often hinge on the "reasonableness" of a particular action or inaction. Such a subjective analysis is often best left to a jury acting as the fact finder. These observations are not intended to prevent the application of arbitration clauses in tort cases, we merely state that these additional facts should be considered in determining the parties' intentions.**

Based on the foregoing, we find that appellants' first assignment of error is well taken. Due to our disposition of appellants' first assignment of error, we find that appellants' second assignment of error is moot.

On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Wood County Court of Common Pleas is reversed. The case is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, costs of this proceeding are assessed to appellee.

Small at 71-73 (emphasis added).

Therefore, while there are cases that hold that arbitration is favored in some scenarios, particularly between corporations or between sophisticated business persons, there is no case, ever decided in Ohio, that holds that Ohio law favors arbitration agreements between nursing home residents and nursing homes. There is also no case which holds that the law in Ohio favors the enforcement of arbitration agreements buried in nursing home admission agreements. In fact, arbitration agreements that apply to nursing home residents and malpractice claims against nursing homes, which agreements have been entered into before the claim arose, are disfavored by a number of courts and a number of organizations in Ohio.

In the Fall of 1997, the American Arbitration Association, the American Bar Association and the American Medical Association, the leading associations involved in alternative dispute

resolution, law, and medicine, collaborated to form a Commission on Health Care Dispute Resolution (the Commission). The Commission's goal was to issue, by the Summer of 1998, a Final Report on the appropriate use of alternative dispute resolution (ADR) in resolving disputes in the private managed health care environment. Their Final Report discusses the activities of the Commission from its formation in September 1997 through the date of its report, and sets forth its unanimous recommendations.

The Commission issued its Final Report on July 27, 1998.<sup>1</sup> That report concluded on page 15, in Principle 3 of a section entitled, "C. A Due Process Protocol for Resolution of Health Care Disputes." that; **"The agreement to use ADR should be knowing and voluntary. Consent to use an ADR process should not be a requirement for receiving emergency care or treatment. In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises."** (Emphasis added.) The arbitration clause in this case was entered into before Ms. Hayes had a claim.

Further, a bill was introduced this past Thursday afternoon, May 22, 2008, in the U.S. House under which Nursing home operators would be unable to subject residents and prospective residents to binding arbitration clauses. A companion bill was introduced in the Senate in April of this year. The AARP, the Alzheimer's Association and the National Senior Citizen's Law Center are among the groups who have come out in support of "The Fairness in Nursing Home Arbitration Act of

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<sup>1</sup> Pages 15, 16 and 17 of the Final Report, which pages contain all the provisions quoted in this Brief, were attached to Plaintiff's Brief in Opposition to Defendant's Motion to Stay, and were identified as Plaintiff's Exhibit "E", which brief was filed with the Trial Court and is part of the record in this case. The entire 46 page report is available at the web site for the American Arbitration Association at the following address: <http://www.adr.org/sp.asp?id=28633>

2008."

As Appellant concedes on page 1 of its Memorandum, "this Court has held that [arbitration agreements] 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, . . ." Therefore, according to Appellant's own argument on page 1 of its memorandum, this Court has already ruled on this issue, it has ruled that arbitration agreements can be set aside as unconscionable if they are found to be both procedurally and substantively unconscionable. The Eighth Appellate District Court of Appeals found the arbitration agreement in this case procedurally and substantively unconscionable. Therefore, the Eighth Appellate District Court of Appeals applied the law, as set forth by this Court, to the facts of this case. There is no reason for this appeal.

Appellant claims that the appellate court held that the agreement was procedurally unconscionable because Florence Hayes was 94 years old, because the nursing home prepared the agreement and because the agreement was one of several forms present to Florence Hayes when she applied for admission to the nursing home. This is an incomplete and therefore inaccurate summary of the decision of the Eighth Appellate District Court of Appeals in this case. The Eighth Appellate District Court of Appeals held in this case that, "A review of the facts in this case shows that the arbitration agreement was clearly subsequently 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 forego her substantive legal rights when she agrees to arbitration. *Morrison v. Circuit City Stores* (C.A. 6, 2003), 317 F.3d 646, 670." The arbitration agreement in this case was substantively unconscionable because the terms were not fair to Ms. Hayes. The arbitration

agreement was substantively unconscionable because its terms took away Florence Hayes' rights to attorney's fees, punitive damages and a jury trial. The Court went on to say in its decision on page 5, "Under Ohio statute and case law, Ms. Hayes may recover punitive damages and attorney's fees. The arbitration agreement attempts to require her to forego 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."

The Court went on to say:

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.

The Court also found that there was no meeting of the minds and that Ms. Hayes gave up her right to a trial and received nothing in return. The Court held on page 6 of its opinion, "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."

Appellant argues on page 1 of its Memorandum that, "The sense of the appellate court's decision on procedural unconscionability is that contracts with the aged should be per se invalid, independent of any direct evidence on competence (appellee presented no evidence of incompetence here)." The subject arbitration agreement was not ruled unenforceable because Florence Hayes was incompetent. The subject arbitration agreement was ruled unenforceable for the numerous reasons

stated above. Ms. Hayes' age was just one factor. Her age is relevant. Florence Hayes was a 94 year old woman being admitted to a nursing home and the nursing home was run by a corporation with a team of lawyers. These facts are all relevant. These are factors that the Court of Appeals properly considered in accordance with a number of cases which are directly on point.

Further, Ms. Hayes' age was not the most important factor - although it was a relevant factor. The fact that she was being admitted to a nursing home was also very relevant. As was discussed during oral argument, nursing home residents are a protected class in Ohio. Ohio Revised Code §3721.13 sets forth the rights of Nursing Home residents, including; the right to a safe and clean living environment, the right to be free from physical, verbal, mental, and emotional abuse and to be treated at all times with courtesy, respect, and full recognition of dignity and individuality, the right to adequate and appropriate medical treatment and nursing care and to other ancillary services that comprise necessary and appropriate care consistent with the program for which the resident contracted, the right to have all reasonable requests and inquiries responded to promptly, the right to have clothes and bed sheets changed as the need arises, to ensure the resident's comfort or sanitation, etc. The law in Ohio provides a bill of rights for nursing home residents. The State of Ohio has identified nursing home residents as being particularly vulnerable and needing additional protection. Likewise, nursing home residents should be protected from unconscionable agreements that were never explained to them, that they likely did not even know they had agreed to.

Appellant's call the Eighth Appellate District Court of Appeals' decision in this case "radical". There is nothing radical about it. Numerous Courts in Ohio and throughout the country have made identical decisions as cited in Plaintiff's briefs in this case.

Appellant argues on page 2 of its Memorandum that, "The reasons that underlie Ohio's

favorable consideration of arbitration agreements apply equally in the context of nursing home disputes.” This is untrue. As stated above, arbitration may be appropriate between sophisticated business people and/or corporations. However, Courts throughout Ohio have been troubled by the notion of imposing these agreements on vulnerable nursing home residents, especially when they receive nothing in return, the terms were never explained to them, they had no experience with contracts and the agreements were presented at the time of admission, making it seem as if the arbitration agreement was a requirement of admission.

The Holmes County Court of Common Pleas recently denied a Motion to Stay in Idamay Fortune v. Sunset View Castle Nursing Homes, Inc., Case No. 04-CV-080. A copy of the Journal Entry from that case is attached hereto and identified as Exhibit “A”. In the Fortune case the Court considered an arbitration clause in a Nursing Home Negligence case in light of O.R.C. §2711.01. In the Journal Entry where the Court denied Defendant’s Motion to Stay, the Fortune Court held as follows (emphasis added);

While arbitration clauses were first used in business contracts between sophisticated business persons, as a means of saving resources should a dispute arise, there is much cause for concern when a nursing home patient agrees to waive her right to trial by jury and agrees to pay the nursing home’s attorney’s fees for the resolution of any dispute, including a negligence action as contained therein.

There is adequate law in this area. The law is fair and is being applied properly in many cases in numerous counties. There is no need for the Ohio Supreme Court to take jurisdiction of this appeal.

## **II. PROCEDURAL HISTORY.**

In the within case Plaintiff Florence Hayes sued Defendant The Oakridge Home (hereafter referred to as Defendant “Oakridge”), a nursing home where she was a resident, alleging that The

Oakridge Home provided Florence Hayes substandard care and as a result she suffered injury. While she was a resident of The Oakridge Home, Florence Hayes fell, and broke her hip. Her hip had to be surgically repaired.

Defendant Oakridge filed a Motion to Stay, asking the Trial Court to permanently stay the within case, and to refer the case to binding arbitration, and to forever deny Plaintiff Florence Hayes her constitutionally protected right to a trial by jury.

Defendant's Motion to Stay should have been denied by the trial court. The subject arbitration clause should not be enforced because it is procedurally and substantively unconscionable. Further, the contract is unenforceable as there was no meeting of the minds and no consideration. Finally, the subject arbitration clause violates Federal Law.

The Trial Court granted The Oakridge Home's Motion to Stay.

Plaintiff appealed. The Eighth Appellate District Court of Appeals overturned the Trial Court's decision and remanded the case for further proceedings.

### **III. STATEMENT OF THE FACTS.**

After 94 year old Florence Hayes fell and suffered injury she had to be admitted to a nursing home. Upon arriving at the Oakridge nursing home, a trying and emotional time for anyone, she was confronted by a representative of Defendant Oakridge who wanted her to sign a "Voluntary Agreement to Resolve Future Malpractice Claims by Binding Arbitration". On the day she was being admitted to the nursing home, she was asked to waive her right to a jury trial, if she was the victim of malpractice in the future. If Agreements like the one at issue in this case are enforced, Nursing Homes will be insulated from the consequences of their negligence. Florence Hayes is entitled to hold the Defendant in this case accountable for its actions in a court of law in front of a

jury. That right should not be stripped away from her.

No claim had arisen on the date that Florence Hayes was admitted to the nursing home. However, the nursing home, a sophisticated corporation, wanted to make sure that Florence Hayes, an elderly, 94 year old woman, could not sue the nursing home if its employees committed malpractice and injured Florence Hayes in the future. Rather than working on educating its employees and training them to reduce injuries suffered in the nursing home, Defendant The Oakridge Home has been working with its lawyers to draft agreements for elderly residents to sign in the lobby when they arrive at the nursing home, which agreements take away from the elderly residents their right to a trial by jury if they are the victim of medical malpractice in the future.

#### **IV. PROPOSITION OF LAW NO. 1.**

Appellant argues that the law presumes that persons over the age of majority are competent to enter contractual agreements. Appellant also argues that 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.

Appellant the Oakridge Home argues that age and business experience are not justifications for finding procedural unconscionability. Appellant is wrong. These are two factors that are to be considered when determining procedural unconscionability. The Eighth Appellate District Court of appeals held that age and experience are appropriate factors to consider in its decision in this case. In Small v. HCF of Perrysburg, 159 Ohio App. 3d 66 (2004), the Sixth District Court of Appeals held that age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations

in the printed terms were possible and whether there were alternative sources of supply for the goods in question, were all factors to be considered when determining procedural unconscionability. The Eighth Appellate District Court of Appeals considered all of these factors, as stated above, in finding procedural unconscionability in this case.

Appellant continually argues that Florence Hayes was competent. The Eighth District Court of Appeals did not find the arbitration agreement unconscionable because Florence Hayes was incompetent. Appellant's argument is misplaced. Appellant does like the decision of the Eighth Appellate District Court of Appeals. That is not a basis for this Honorable Court to take jurisdiction in this case.

Further, Appellant argues that a voluntary meeting of the minds was "possible". That may be true. However, the Eighth Appellate District Court of Appeals found that there was no meeting of the minds in this case. A meeting of the minds may have been possible but it did not take place. Therefore, the contract is unenforceable.

## **V. PROPOSITION OF LAW NO. 2.**

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

As stated above, the Eighth Appellate District Court of Appeals clearly laid out its reasons for finding that the subject agreement was substantively unconscionable. The Eighth Appellate District Court of Appeals held in this case that, "A review of the facts in this case shows that the arbitration agreement was clearly subsequently 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 forego her substantive legal rights when she agrees to arbitration. *Morrison v. Circuit City Stores* (C.A. 6, 2003), 317 F.3d 646, 670." The arbitration agreement in this case was substantively unconscionable because the terms were not fair to Ms. Hayes. The arbitration agreement was substantively unconscionable because its terms took away Florence Hayes' rights to attorney's fees, punitive damages and a jury trial. The Court went on to say in its decision on page 5, "Under Ohio statute and case law, Ms. Hayes may recover punitive damages and attorney's fees. The arbitration agreement attempts to require her to forego 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."

The Court of Appeals also found that there was no meeting of the minds and no consideration. Perhaps the most important finding by the Eighth Appellate District Court of Appeals is that Florence Hayes received nothing in exchange for giving up her right to a jury trial. If the arbitration agreement were to be enforced in this case, Florence Hayes would have no ability to conduct discovery, no subpoena power, no right to propound written discovery requests, no ability to seek the trial court's intervention when the nursing home refused to comply with Plaintiff's discovery requests, and no right to a trial by jury.

The right to vote and the right to a trial by jury are perhaps the most important two rights enjoyed by the citizens of this country. Neither right should be taken away in exchange for nothing. The Eighth District Court of Appeals found that Florence Hayes received nothing in exchange for the many rights she gave up. No contract is enforceable without consideration. There was no consideration in this case. There was no meeting of the minds in this case.

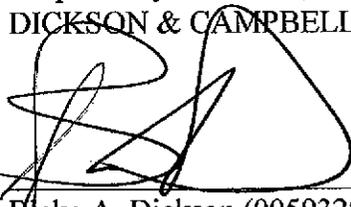
There is no reason for the Ohio Supreme Court to accept jurisdiction of this appeal.

#### IV. CONCLUSION.

For the reasons discussed above, Appellee respectfully requests that this Honorable Court not accept jurisdiction in this case. The Eighth District Court of Appeals properly applied the law to the facts of this case and made a proper decision. There were numerous reasons to find the arbitration agreement in this case unenforceable.

Respectfully submitted,  
DICKSON & CAMPBELL, L.L.C.

By: \_\_\_\_\_

  
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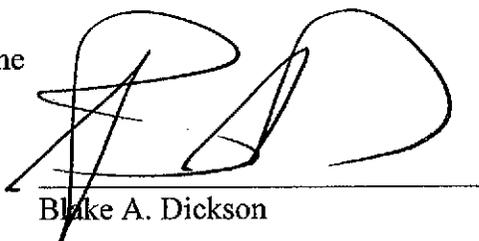
## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Appellant's Memorandum in Opposition to Jurisdiction, was sent by ordinary U.S. Mail **this 27<sup>th</sup> day of May, 2008**, to the following:

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By:



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FILED

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IN THE COURT OF COMMON PLEAS  
HOLMES COUNTY, OHIO

CLERK  
COMMON PLEAS COURT  
HOLMES COUNTY, OHIO

Ida May Fortune,  
Plaintiff,

v.

Sunset View Castle Nursing Homes, Inc.,  
et. al.,  
Defendants.

CASE NO. 04-CV-080

JOURNAL AND DOCKET ENTRY

Journalized: Journal 177, Page(s) 421-422

Before the Court for decision is defendant's motion of October 1, 2004 to stay proceedings pending arbitration.

At issue is the enforceability of the binding arbitration proceedings of the admission agreement between the plaintiff and defendant nursing home.

Defendant argues that the mandatory binding arbitration portions of the admission agreement are enforceable pursuant to R.C. 2711.02.

However, plaintiff argues that a very similar contract was ruled to be unconscionable by the Sixth District Court of Appeals in *Small v. HCF of Perrysburg, Inc.* (10/29/2004, Wood County, Sixth Appellate District Case No. WD-04-036, unreported).

After a thorough review of the admission agreement herein<sup>1</sup> and the decision of the Sixth District mentioned above, the Court finds for the reasons mentioned in the appellate decision that defendant's arbitration clause is unconscionable. The Court finds that the arbitration clauses herein are both substantive and procedurally unconscionable. Such arbitration clauses are subject to close examination. While arbitration clauses were first used in business contracts between sophisticated businesspersons, as a means of saving resources should a dispute arise, there is much cause for concern when a nursing home patient agrees to waive her right to trial by jury and

<sup>1</sup> Which was attached to defendant's motion to stay proceedings as Exhibit A.



agrees to pay the nursing home's attorney's fees for the resolution of any dispute, including a negligence action as contained herein.

Based on the foregoing and specifically relying upon the decision of the Sixth District Court of Appeals, this Court finds that defendant's motion to stay is not well-taken.

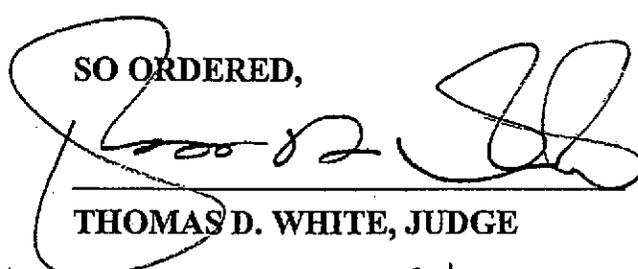
WHEREFORE, it is hereby Ordered, Adjudged and Decreed, that defendant's motion to stay proceedings is considered and denied.

It is further Ordered that there is no just cause for delay.

It is further Ordered that this case shall come on for case management conference 60 days out.

SO ORDERED,

Dated: December 3, 2004

  
THOMAS D. WHITE, JUDGE

cc: All counsel

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