

IN THE SUPREME COURT OF OHIO

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

Appellee,

vs.

THE OAKRIDGE HOME

Appellant.

Case No. 2008-0784

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District

MERIT BRIEF OF APPELLANT, THE OAKRIDGE HOME

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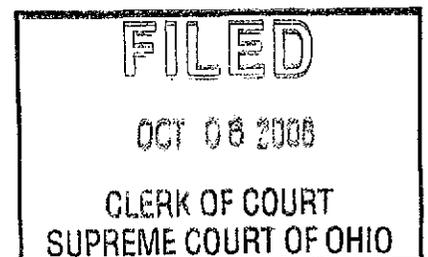


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STATEMENT OF FACTS

I. *CASE SUMMARY*

This case involves a personal injury claim brought by a nursing home resident against the facility. The case was filed originally in the name of the resident, Florence Hayes, who died on February 9, 2007. Plaintiff/appellee moved to substitute the personal representative of the estate on September 12, 2007, and the trial court granted that motion on September 20, 2007.

The nursing home, Oakridge, moved the trial court to stay proceedings pending arbitration, under an agreement signed by Florence Hayes at admission. The court granted the motion, and Hayes appealed. The appellate court reversed, holding that the agreement was procedurally and substantively unconscionable. Oakridge filed a motion to certify jurisdiction and the Court granted the motion.

II. *FLORENCE HAYES' ADMISSION TO THE OAKRIDGE HOME*

Florence Hayes alleged that she fell and broke her hip on June 21, 2005 while a resident at the Oakridge Home, the long-term care facility operated by appellant. (Supp. 1.) Hayes alleged that the injury happened because Oakridge was negligent and reckless.

Florence Hayes signed two arbitration agreements on May 31, 2005, one pertaining to disputes involving malpractice claims and one pertaining to disputes not involving malpractice claims. Oakridge attached the one pertaining to malpractice claims to its motion to stay proceedings pending arbitration (Supp. 16, 17.), and Hayes attached the other to her response brief. The agreement that Oakridge attached is captioned:

VOLUNTARY AGREEMENT TO RESOLVE FUTURE MALPRACTICE CLAIMS
BY BINDING ARBITRATION.

The circumstances of Hayes' admission to Oakridge are not part of the record. There is, for example, no evidence concerning the manner in which the agreement was presented to her,

i.e., whether it was explained; whether there was any discussion about the agreement; or whether Hayes was accompanied by a family member when she signed the agreement. The agreement itself, however, explicitly provides that “[t]he Resident and/or Legal Representative understands, agrees to...and acknowledges that the terms have been explained to him/her or his/her designee, by an agent of the Facility, and that he/she has had an opportunity to ask questions about this Arbitration Agreement.” (Supp. 17.) There is no evidence in the record about Florence Hayes’ cognitive abilities, about her education, or employment history. The only evidence is that she signed all the documents at the right places with a steady and legible signature. Florence Hayes was 94 when she was admitted.

III. *THE ARBITRATION AGREEMENT*

The arbitration agreement concerning “future malpractice claims” is a two-page document with three sections: (1) an “Explanation,” (2) the “Agreement,” and (3) the “Acknowledgments.” (Supp. 16, 17.) It is written in plain language with a minimum of legal terms.

A. *The Explanation Section*

The first section explains that arbitration “is a method of resolving disputes without the substantial time and expense of using the judicial system,” and that resolution through arbitration “will almost always resolve a dispute sooner and at less cost than a trial.” (Supp. 16.) It advises of limited appeal rights following an arbitration award, and explains that absent fraud on the part of the arbitrators or a serious procedural defect, the arbitration award will be final.

The “Explanation” section also explains that the arbitration agreement is optional, a point noted also in the “Acknowledgements” section where the document says:

The execution of this Arbitration Agreement is voluntary and is not a precondition to receiving medical treatment at or admission to the Facility. (Supp. 17.)

Finally, the “Explanation” section alerts the resident that by signing the arbitration agreement, the resident “will give up [her] constitutional right to a jury or court trial....” (Supp. 16.)

B. *The Agreement Section*

Under section II, the agreement notes that the consideration supporting the arbitration provision includes “the benefits of the use of arbitration in the efficient resolution of conflicts....” (Supp. 16.) It states that the parties agree to “submit to binding arbitration all medical malpractice disputes against each other and their agents... arising out of or in any way related or connected to the Resident’s stay and care provided at the Facility.” (Supp. 16.)

The 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. (Supp.16.) It 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. (Supp.16.)

C. *The Acknowledgment Section*

In light of the aged population of nursing home residents, the arbitration agreement says it applies only to residents capable of understanding the terms set out. In the final section, the agreement notes that 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.” (Supp. 17.) It says, further, that Oakridge “must ensure that the Resident was able to communicate effectively in spoken or written English....” (Supp.17.) It 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.” (Supp. 17.)

The agreement also allows a period during which the resident may rescind “by giving written notice to the Facility within 60 days of Resident’s discharge from the facility.” (Supp. 17.) 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.” (Supp. 17.) 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.” (Supp. 17.)

The agreement concludes 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....” (Supp. 17.)

The copy shows a signature of Florence Hayes, dated May 31, 2005.

IV. *THE INJURY TO FLORENCE HAYES*

The evidence before the trial court when it addressed the motion to stay proceedings pending arbitration is that Florence Hayes was at Oakridge for less than a month when she suffered an injury. The 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. (Supp. 3.)

The only evidence that was presented to the court concerning the incident is in the Civ. R. 10(D) affidavit of merit of Dr. Irwin Mandel that Hayes filed. (Supp.18, 19.) In the affidavit, Dr. Mandel stated that Florence Hayes presented to the Fairview Hospital Emergency Department on June 21, 2005 after “she apparently fell from a wheelchair” at her nursing facility, Oakridge Home. (Supp. 18.) (He did not offer an opinion that the fall was a result of substandard care by Oakridge staff. Oakridge’s motion to strike the affidavit was denied as moot, in light of the ruling staying proceedings pending arbitration. Appx. 16, Tab 3.)

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.” (Supp. 17.) The evidence before the court showed, therefore, that Hayes never returned to Oakridge after leaving the facility on June 21, 2005.

V. *THE PROCEDURAL HISTORY*

Hayes filed her complaint on June 21, 2006 (Supp. 1.), within one year of the alleged injury. Oakridge moved to stay proceedings pending arbitration on August 23, 2006, and Hayes’ obtained two extensions of time to respond to the motion (R. 19, Sept. 5, 2006; R. 26, Nov. 3, 2006), ultimately filing her response brief on November 17, 2006 (R. 30.). The response brief included no affidavit or testimonial evidence concerning the circumstances of Hayes’s admission and her signing of the agreement.

On January 9, 2007, the court granted Oakridge’s motion to stay proceedings. (Appx. 16, Tab 3.) Hayes appealed the judgment to the Eighth Appellate District (R. 18, Feb. 7, 2007),

arguing that the arbitration agreement was unenforceable on grounds of procedural and substantive unconscionability.

The appellate court reversed the judgment, finding the arbitration agreement unenforceable. *Hayes v. Oakridge Home*, 175 Ohio App.3d 334, 2008-Ohio-787, 806 N.E.2d 928 (Appx. 4-15, Tab 2.). It found the agreement procedurally unconscionable, reasoning that Hayes was “a 94 year old woman with no business or contract experience,” and that “no one explained the terms” of the arbitration agreement to her. *Hayes*, 2008-Ohio-787, at ¶19 (Appx. 10, 11, Tab 2.). The dissenting judge, Anthony Calabrese, Jr., noted that the court’s findings of inexperience was supposition: “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.” 2008-Ohio-787, at ¶27 (Appx.14, Tab 2.)

Without citing any supporting evidence, the appellate court concluded that “there were not alternative sources of supply for Hayes – finding a quality nursing home is difficult.” 2008-Ohio-787, at ¶10(Appx. 11, Tab 2.) The court found the agreement was substantively unconscionable because the agreement “took away [Hayes’s] rights to attorney fees, punitive damages, and a jury trial.” *Hayes*, 2008-Ohio-787 at ¶15 (Appx. 9, Tab 2.)

Oakridge moved under App. R. 25 to certify a conflict with the decision in *Manley v. Personacare of Ohio*, 11th Dist. No. 2005-L-174, 2007-Ohio-343 (March 18, 2008). The court denied that motion. (April 9, 2008.)

Oakridge filed its discretionary appeal on April 24, 2008 (Appx. 1, Tab 1), and the Court granted jurisdiction on August 6, 2008.

ARGUMENT

Proposition of Law No. 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.

A. *Ohio law favors arbitration.*

This Court has encouraged the use of arbitration as a method of resolving disputes. See, e.g., *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 1998-Ohio-612, 692 N.E.2d 574; *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 1998-Ohio-172, 687 N.E.2d 1352. The Supreme Court of the United States has, likewise, acknowledged the policy favoring enforcement of arbitration clauses. See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270; *Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995), 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753.

Accordingly, when the subject of a dispute falls within the scope of an arbitration provision, courts apply a presumption favoring arbitration. *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18. The reason for the presumption is that courts consider arbitration agreements as an expression of the parties' agreement to arbitrate disputes and, therefore, uphold the provisions as any other contract term.

Ohio statutory law reflects that reasoning. Under R.C. 2711.01(A), arbitration agreements are "valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." As the Court held in *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 1998-Ohio-294, 700 N.E.2d 859. a contract may be revoked on grounds of unconscionability.

B. *A court may revoke a contract on grounds of unconscionability.*

This Court recently addressed the circumstances under which an arbitration clause may be set aside on grounds of unconscionability. In *Taylor Building Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, the Court held that unconscionability includes both “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” 2008-Ohio-938, at ¶34. A party seeking to set aside an arbitration clause on grounds of unconscionability has the burden of proving that the provision is both procedurally and substantively unconscionable. See *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006-Ohio-4464, 861 N.E.2d 553.

Procedural unconscionability concerns the “formation of the agreement and occurs when no voluntary meeting of the minds is possible.” *Porpora v. Gatliff Bldg. Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, 828 N.E.2d 1081, at ¶7. Procedural unconscionability “considers the circumstances surrounding the contracting parties’ bargaining, such as the parties’ “...age, education, intelligence, business acumen and experience, ...who drafted the contract,...whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question.” *Collins v. Click Camera & Video* (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294, 1299. The principle is stated in the Restatement of the Law 2d, Contracts (1981), Section 208, Comment *d*, as follows:

Factors which may contribute to a finding of unconscionability in the bargaining process include the following:...knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

C. *The age of a nursing home resident is an insufficient basis, standing alone, from which to find procedural unconscionability.*

The appellate court concluded that the arbitration agreement was procedurally unconscionable because Florence Hayes was 94 years old when she signed it. Although the court wrote that Hayes had had “no business or contract experience” (2008-Ohio-787, at ¶19, Appx. 10.), the dissent observed that there was support in the record for that conclusion. (Appx. 14.) Accordingly, the appellate court’s judgment finds procedural unconscionability based only the age of the nursing home resident.

While the age of a party to an arbitration agreement may be a factor in evaluating a claim of procedural unconscionability, that factor, standing alone, cannot serve as the basis to disqualify a nursing home arbitration agreement. Such a conclusion would deny the constitutional right to contract. Section 10, Article I, United States Constitution (“No state shall...pass any...law impairing the obligation of contracts.”); Section 28, Article II, Ohio Constitution (“The General Assembly shall have no power to pass...laws impairing the obligation of contracts.”)

As the Court held in *Farmers Nat’l. Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309, 329-30, 94 N.E. 834, “The right of private contract is a constitutional right that it is the duty of the court to guard zealously. The terms and conditions are written into a contract for the purpose of being observed by the parties thereto. Courts must not make contracts for parties nor exercise a guardianship over contracting parties.” See, also, *Nottingdale Homeowners Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 36, 514 N.E.2d 702 (“...[P]ersons have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced. This freedom ‘is as fundamental to our society as the right to write and to speak without restraint.’” Quoting *Blount v. Smith* (1967), 12 Ohio St.2d 41, 47, 231 N.E.2d 301, 305.) The Court, in *Nottingdale*, held that

“[g]overnment interference with this right must therefore be restricted to those exceptional cases where intrusion is absolutely necessary, such as contracts promoting illegal acts.”

The circumstances here do not warrant the sweeping measure taken by the appellate court, negating arbitration agreements based solely on the age of the resident signatory. Lack of capacity is a defense to contract liability. Oakridge has already set out the common law principles on revoking unconscionable contracts. The Federal Arbitration Act, likewise, allows a party to challenge the validity of an arbitration provision based on state-law contract defenses. 9 U.S.C. §2; See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (“Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening §2.”) There are, therefore, already available protections under the law for those persons lacking capacity to understand the terms of the contract.

The Oakridge contract, in fact, stated that 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.” Under the terms of the Oakridge agreement, a resident who signed the agreement without the requisite mental capacity is not bound by it, whether or not the agreement was substantively and procedurally unconscionable.

In *Plageman v. Stroppel* (1904), 16 Ohio Dec. 190, reversed on other grounds, 16 Ohio Dec. 273, the court stated that “[e]quity looks only to the competency of the undertaking, and neither age, sickness, extreme distress, nor debility of body, will affect the capacity to make a contract or conveyance if sufficient intelligence remain to understand the transaction.” Thus, in *Olney v. Schurr* (Ohio App. 2 Dist. 1936), 21 Ohio Law Abs. 630, the court upheld the right of a testator to determine the disposition of his property, rejecting the argument that the disposition

be set aside for undue influence based on his advanced age. The court wrote that “advanced age, forgetfulness, growing infirmity of mind and opportunity to exercise undue influence, either singly or collectively, standing alone, are not sufficient to sustain a claim of undue influence.” Courts in other jurisdictions follow this rule. See, e.g., *Olsen v. Hawkins* (Idaho 1965), 408 P.2d 462, 466 (“Proofs of old age...standing alone do not constitute proof of incompetency.”); *Boerma v. Johnson* (Mich. 1959), 98 N.W.2d 596, 598 (“Proofs of old age and alcoholic addiction, standing alone, do not constitute proof of incompetence. The evidence must show that at the time in question the person’s reason was overthrown.”)

D. *There is no indication that Ohio courts have found difficulty in applying the common law tests for unconscionability in nursing home arbitration agreements.*

The ruling of the appellate court below effectively assures a finding of procedural unconscionability in every case involving a nursing home arbitration agreement by finding that the age of the resident signatory, standing alone, was sufficient to make that showing. There is no evidence, however, that such a sweeping change is needed for Ohio courts to decide such claims of unconscionability.

Several Ohio appellate courts have recently addressed claims of procedural unconscionability in nursing home arbitration cases, and their analyses on this issue has been consistent in evaluating the evidence offered on the point. In *Manley v. Personacare*, 11th Dist. No. 2005-L-174, 2007-Ohio-343, for example, the plaintiff brought a medical negligence claim against a nursing home, alleging that her decedent, Patricia Manley, received substandard care and sustained injuries. The nursing home moved to stay proceedings and to have the matter referred to arbitration under an agreement the parties had signed.

The plaintiff, in *Manley*, argued that the arbitration agreement was unconscionable, and offered evidence of the decedent’s “mild cognitive impairment,” and that she “had two different

medical conditions, either of which could cause her confusion.” The court noted that there was documented evidence in the record of “numerous medical ailments of Patricia Manley.” The trial court found that the plaintiff had established procedural unconscionability, and the appellate court affirmed that finding, noting evidence from the agreement itself that Manley was not competent: “None of the signatures are entirely on the designated line. Her signature on the arbitration agreement is entirely below the designated line....The fact that Patricia Manley had extreme difficulty signing her name on the day in question suggests that she did not have the ability to meticulously read the provisions of the contracts presented to her.” 2007-Ohio-343, at ¶26.

Unlike Hayes, the plaintiff, in *Manley*, used her opportunity to present relevant evidence bearing on the issue of procedural unconscionability. The court had no difficulty evaluating that evidence and deciding the issue.

Likewise, in *Rinderle v. Whispering Pines Health Care Center*, 12th Dist. No. CA2007-12-041, 2008-Ohio-4168, the plaintiff was a nursing home resident who sued the home for negligence. Whispering Pines moved to stay proceedings pending arbitration under R.C. 2711.02(B), and Rinderle appealed. The court affirmed the judgment, finding the agreement was neither procedurally unconscionable nor substantively unconscionable. It noted that Rinderle had presented no evidence of cognitive impairment, no evidence that the admission was an emergency or was rushed, no evidence that Whispering Pines discouraged questions about the arbitration agreement or that it was unintelligible.

In *Broughsville v. OHECC, LLC*, 9th Dist. No. 05CA008672, 2005-Ohio-6733, a respite care resident with mild dementia sued a nursing home alleging negligence. The trial court granted the defendant’s motion to stay proceedings pending arbitration, and Broughsville

appealed. The court affirmed the judgment, noting that although the plaintiff was 85 years old, “the record does not indicate that she was suffering from dementia or confusion at the time and nowhere has Appellant averred that she was incompetent.” 2005-Ohio-6733, at ¶21.

In *Hanson v. Valley View Nursing & Rehabilitation Center*, 9th Dist. No. 23001, 2006-Ohio-3815, plaintiff’s decedent was a resident at a nursing home, and plaintiff sued alleging medical negligence. The court granted defendant’s motion to stay proceedings pending arbitration, and plaintiff appealed, arguing that the agreement was unconscionable. The appellate court noted its responsibility in deciding whether the agreement was procedurally unconscionable to evaluate “factors bearing directly relating to the relative bargaining position of the parties....” 2006-Ohio-3815, at ¶9. The court concluded that the plaintiff had not established such unconscionability, noting “[n]o evidence was presented showing that Appellant was unable to read a two page arbitration agreement, or that he was unable to understand the terms of the agreement.” 2006-Ohio-3816, at ¶18.

Ohio courts have consistently applied the pertinent factors in determining whether a nursing home agreement is procedurally unconscionable, and have not identified any difficulty in doing so. There is, therefore, no reason to supplant that established test with the broad standard adopted by the court below, i.e., that evidence of the resident’s age, standing alone, is sufficient to establish procedural unconscionability.

This Court should reverse the decision below and clarify that the tests followed throughout Ohio on this issue remain valid and in effect. The age of a nursing home resident, standing alone, does not establish procedural unconscionability.

Proposition of Law No. 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.

In order to set aside the arbitration agreement on grounds of unconscionability, Florence Hayes' had the burden of proving the agreement was both procedurally unconscionable and substantively unconscionable. Substantive unconscionability goes to the terms of the contract themselves. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 809 N.E.2d 1161, 2004-Ohio-829, at 31. Contract terms are substantively unconscionable if they are unfair and commercially unreasonable. *Dorsey v. Contemporary Obstetrics & Gynecology, Inc.* (1996), 113 Ohio App.3d 75, 80, 680 N.E.2d 240. As one court has noted, “[b]ecause 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.” *Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294.

The court below found that the terms of the arbitration agreement were substantively unconscionable because they “took away [Florence Hayes’s] rights to attorney fees, punitive damages, and a jury trial.” *Hayes v. Oakridge Home*, 2008-Ohio-787, at ¶15 (Appx. 9). The court reasoned that “[a] party does not forgo her substantive legal rights when she agrees to arbitration.” 2008-Ohio-787, citing *Morrison v. Circuit City Stores* (C.A. 6, 2003), 317 F.3d 646, 670. Accordingly, the court below identified three rights that, in its view, must be preserved in any arbitration agreement. The right to a jury trial, of course, cannot be preserved in an arbitration agreement. This Court acknowledged the point in the *Taylor Building* case, stating

that a waiver of one's jury trial rights "is a necessary consequence of agreeing to have an arbitrator decide a dispute." *Taylor Building Corp.*, 2008-Ohio-930, at ¶54.

The court held that parties to an arbitration agreement cannot give up the right to attorney fees and punitive damages in an arbitration agreement. Actually, only a single consideration is involved here, since the court explained that the right to attorney fees arises only where the plaintiff establishes the defendant's liability for punitive damages. 2008-Ohio-787, at ¶17, quoting *Locafrance U.S. Corp. v. Interstate Distrib. Servs., Inc.* (1983), 6 Ohio St.3d 198, 202-03, 451 N.E.2d 1222.

In *State Farm Mut. Ins. Co. v. Blevins*, 49 Ohio St.3d 165, 167, 551 N.E.2d 955, the Court noted that the authority of arbitrators is defined by the scope of the agreement, stating:

The arbitrator has no authority to decide issues which, under their agreement, the parties did not submit to review. Our task is to determine whether the insurance policy, which is the contract between the parties, grants the power to award punitive damages.

One court recently followed the reasoning in *Blevins* in deciding whether an arbitrator could award punitive damages. In *George Ford Constr., Inc. v. Hissong*, 9th Dist. No. 22756, 2006-Ohio-919, a homeowner sued a contractor for damages under the Consumer Sales Practices Act. The contractor moved to stay proceedings pending arbitration, and the trial court agreed. The homeowner appealed, arguing that the Better Business Bureau arbitration rules prohibited arbitrators from awarding punitive damages.

The appellate court affirmed, holding that the arbitrators could award punitive damages, but not under the reasoning used by the court below in this case. The court, in *Hissong*, noted the rule that the scope of the arbitrator's authority was defined by the terms of the agreement, and that the BBB rules authorized the arbitrators to award any damages allowed by statute. Since the

homeowner had alleged a claim under the CSPA which allows the recovery of punitive damages, the court held that the arbitrators had authority to make a punitive damage award.

In *Mastrobuono v. Shearson Lehman Hutton* (1995), 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76, the court upheld the right of arbitrators to award punitive damages only upon a finding that the award was authorized by the agreement. The plaintiff, in *Mastrobuono*, recovered compensatory and punitive damages on a claim against a securities brokerage firm, claiming that the defendant had mismanaged his account. The defendant moved to vacate the punitive damage award, arguing that the contract stated New York law would govern the dispute, and that under decisional law of New York, punitive damage awards may be made only by courts and not arbitrators. The district court agreed and vacated the award, and the Seventh Circuit affirmed.

The Supreme Court reversed, however. The court began its analysis by noting that the central purpose of the Federal Arbitration Act, 9 U.S.C. §§ 3,4 is to ensure “that private agreements to arbitrate are enforced according to their terms.” *Mastrobuono*, 514 U.S. 54. It concluded, therefore, that the dispositive point “comes down to what the contract has to say about the arbitrability of petitioners’ claim for punitive damages.” The court held that the choice-of-law provision applied only to the substantive law of New York, and not to the state’s allocation of power between alternative tribunals. Since the agreement incorporates the NASD arbitration rules, which do not limit the arbitrators’ discretion to award punitive damages, the court held that the punitive damage award was within the scope of the agreement.

In this case, the agreement expressly excludes awards of punitive damages, stating (“...the award in arbitration shall not include any amount for exemplary or punitive damages.” §

2, paragraph . Under the above decisional law, the contract is controlling and must be given effect.

Moreover, the conclusion by the court below that arbitration agreements cannot infringe on the “substantive rights” of litigants is baseless. The substantive right of a litigant includes the right to contract and, as discussed in the decisions above, litigants can define by agreement the terms under which they will resolve disputes. The court’s use of the term “substantive rights” in the opinion below suggests a meaning near or equivalent to a fundamental right. Black’s Law Dictionary (5 Ed. 1979) 1281, defines a “substantive right” as “[a] right to the equal enjoyment of fundamental rights, privileges and immunities.”

The assertion in the decision below that litigants have a fundamental right to recover punitive damages is unfounded. Punitive damages are intended to promote a societal objective of punishing and deterring malicious conduct, rather than to compensate the complaining party. The Supreme Court has defined a fundamental right as “those fundamental liberties that are implicit in the concepts of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.” *Palko v. Connecticut* (1937), 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed.2d 288. Citing that definition, one Ohio appellate court has concluded “...the award of punitive damages does not involve a fundamental right.” *Blancett v. Nationwide Care, Inc.* (Dec. 16, 1998), 5th Dist. No. 98 CA 4, 1999 WL 3958, at *6.

Other jurisdictions have held likewise. A Mississippi court recently addressed this point, stating:

The recovery of punitive damages is not a fundamental right belonging to a plaintiff in civil litigation. Rather, it is a means by which the public interest is served by sanctioning a party for particularly offensive conduct both as punishment to the offending party and as an object lesson to others to avoid similar conduct in the future. *Brown v. North Jackson Nissan, Inc.* (Miss. App. 2003), 856 So.2d 692.

See also, *Rhyne v. K-Mart Corp.* (N.C. App. 2002), 562 S.E.2d 82 (“...punitive damages do not constitute property belonging to an individual. Thus, there can be no taking of property by placing a cap on punitive damages and no infringement of the right to enjoy the fruits of one’s labor.”); *Wertz v. Chapman Twp.* (Pa. 1999), 741 A.2d 1272, 1280 (“There exists no fundamental right to recover punitive damages....”); *Romero v. J. & J. Tire* (Mont. 1989), 777 P.2d 292, 295 (“Romero argues there is a fundamental right to claim punitive damages. He cites no authority, and his proposition is not supported by this Court’s previous opinions.”).

The court below found that an arbitration agreement is substantively unconscionable if it precludes the award of punitive damages which, in its view, violated the resident’s fundamental right. That ruling infringes on the rights of parties to define by agreement the scope of arbitration. It also premised on a mistaken view of the law concerning the fundamental rights of litigants. The Court should adopt the proposition of law set forth herein.

CONCLUSION

The decision below effectively renders most nursing home arbitration agreements procedurally unconscionable because the resident signatories are typically aged. The ruling also makes the agreements substantively unconscionable if the parties agree to forego trial or if the agreements preclude the recovery of punitive damages. It is a sweeping ruling, and one responsive to the argument by Hayes’ counsel that the court ignore the lack of any evidence surrounding the circumstances of the resident’s admission and simply close the door on the use of arbitration agreements in nursing homes.

That is a dangerous approach, contrary to the freedom of contract, and one resting on a claimed need for protection on an area already covered effectively by existing law. As shown by

the many decisions applying the tests of unconscionability, Ohio courts have defined workable and recognized standards to assure the proper use of arbitration in nursing home disputes.

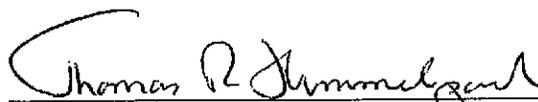
To the extent that Hayes' counsel argues for the wholesale prohibition on nursing home arbitration agreements, the Court should understand that the many policy considerations implicit in such a decision are already being reviewed in Congress. A bill is now pending that would preclude pre-dispute arbitration agreements in nursing homes—the “Fairness in Nursing Arbitration Act,” S. 2838 (Appx. 32-36, Tab 10.). Congress is receiving testimony and documentary evidence bearing on the issue, including evidence on the comparative procedural costs between arbitration and litigation and the probable effect of the proposed law in barring residents with claims that fall below the threshold severity level that attorneys consider in deciding whether to take a case.

The record in this appeal will not give the Court the information necessary to undertake the decision now facing Congress. The Court should review the propositions of law and issue its decision based on the relevant arguments. The case allows the Court an opportunity to maintain existing Ohio law against the threat of erosion from the ill-considered decision below.

Oakridge respectfully asks the Court to reverse the judgment of the appellate court and reinstate the trial court's ruling staying the case pending arbitration.

Respectfully submitted,

BUCKINGHAM, DOOLITTLE & BURROUGHS. LLP



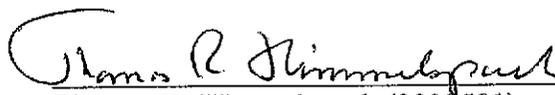
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PROOF OF SERVICE

A copy of the foregoing *Merit Brief of Appellant, The Oakridge Home* was served by regular U.S. mail this 3rd day of October, 2008, upon the following:

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Attorney for Appellant



Thomas R. Himmelspach (0038581)
Attorney for Appellant, The Oakridge Home

No. 08-0784

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT,
CASE NO. 2007 CA 089400

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

Appellee,

v.

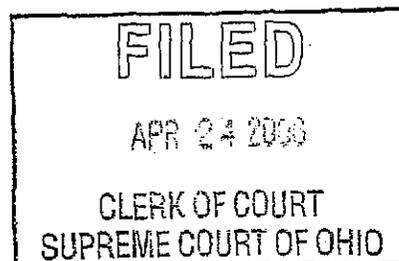
THE OAKRIDGE HOME,

Appellant.

**NOTICE OF APPEAL OF APPELLANT,
THE OAKRIDGE HOME**

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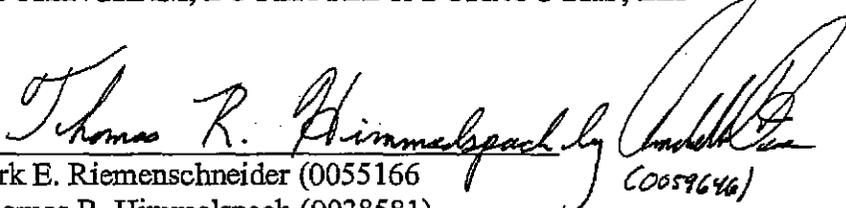
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NOTICE OF APPEAL OF APPELLANT,
THE OAKRIDGE HOME

Now comes appellant, The Oakridge Home, and gives notice of its appeal to the Supreme Court of Ohio from the opinion and judgment entry of the Cuyahoga County Court of Appeals, Eighth Appellate District in Case No. 2007 CA 089400, which was released on February 28, 2008 and journalized on March 10, 2008. Appellant submits that the case is one of public or great general interest.

Respectfully submitted,

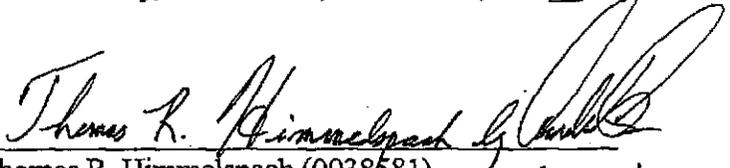
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CERTIFICATE OF SERVICE

A copy of the foregoing *Notice of Appeal* was sent by regular U.S. mail to Blake A. Dickson, counsel for Appellee at 3401 Enterprise Parkway, Beachwood, OH 44122, this 21st day of April, 2008.


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Counsel for Appellant

«CT2:594663_v1»

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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 1 0 2008

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VOL 0653 P00264

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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

CA07089400

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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

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VOL 9653 P0265

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. Procure 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.



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FLORENCE HAYES
Plaintiff

LIFE CARE CENTERS OF AMERICA
Defendant

Case No: CV-06-595245

Judge: JOSEPH D RUSSO



JOURNAL ENTRY

96 DISP. OTHER - FINAL

OAKRIDGE HOME'S MOTION TO STAY PROCEEDINGS PENDING ARBITRATION, FILED 8/23/06, IS GRANTED. ALL CLAIMS ARE TO BE RESOLVED PURSUANT TO THE PARTIES' VOLUNTARY ARBITRATION AGREEMENT. BOTH CASES REMOVED FROM THIS COURT'S ACTIVE DOCKET.

OAKRIDGE HOME'S MOTION FOR LEAVE TO FILE REPLY INSTANTER TO PLAINTIFF'S MOTION TO STRIKE MOTION TO COMPEL, FILED 12/05/2006, IS MOOT. PLAINTIFF'S MOTION TO STRIKE WAS DENIED ON 12/11/06. OAKRIDGE HOME'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MOTION TO STRIKE AFFIDAVIT OF IRWIN H. MANDEL, M.D, FILED 12/13/2006, IS MOOT. CASE IS STAYED PENDING ARBITRATION AS OF THIS DATE. COURT COST ASSESSED AS EACH THEIR OWN.

Judge Signature

01/09/2007

THE STATE OF OHIO Cuyahoga County	} SS	I. GERALD E FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL		
Vol. 3765 pg 907		1-9-07
NOW ON FILE IN MY OFFICE.		
WITNESS MY HAND AND SEAL OF SAID COURT THIS		
DAY OF January		A. D. 2007
GERALD E. FUERST, Clerk		
By		Deputy

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01/05/2007

VOL 3765 PG 0907

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Page 1

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Blancett v. Nationwide Care, Inc.
 Ohio App. 5 Dist., 1998.
 Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Guernsey
 County.

Albert D. BLANCETT, Executor of the Estate of
 Mary V. Blancett, Plaintiff-Appellee/Cross-Appellant,

v.

NATIONWIDE CARE, INC. dba Cambridge
 Health Care Center, Defendant-Appellant/Cross-Appellee.
 No. 98 CA 4.

Dec. 16, 1998.

Civil Appeal from the Court of Common Pleas,
 Case No. 96 CV 260.

D. Andrew List, Dale K. Perdue, Clark, Perdue,
 Roberts & Scott, Columbus, Ohio, for Plaintiff-Appellee/Cross-Appellant.

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 Ohio, for Defendant-Appellant/Cross-Appellee.

Judges FARMER, P.J., HOFFMAN and WISE, JJ.

OPINION

WISE.

*1 Appellant Nationwide Care, Inc. d.b.a. Cambridge Health Care Center, Inc. ("Cambridge") is appealing the verdict rendered in the Guernsey County Court of Common Pleas. The following facts give rise to this appeal.

Appellee Albert Blancett commenced this action on June 26, 1996, following the death of his eighty-two year old wife, Mary Blancett. On October 30, 1995, Mrs. Blancett fell, at Cambridge nursing home. On November 6, 1995, Mrs. Blancett suffered a second fall, striking her head and suffering a subdural hematoma. As a result of the falls, Mrs. Blancett died on November 22, 1995. Appellee's complaint alleges the following causes of action: common law nursing home negligence, nursing home negligence pursuant to R.C. 3721.13 and R.C. 3721.17, and wrongful death of Mary Blancett.

Appellant subsequently filed a partial motion for summary judgment on July 18, 1997. The trial court denied appellant's motion on August 20, 1997. The trial of this matter commenced on November 18, 1997. On November 21, 1997, following jury deliberations, the jury returned a verdict, in the amount of \$168,298.35, in favor of appellee and against appellant on appellee's negligence claim and against appellee on appellee's wrongful death claim. Following the jury's award of compensatory damages, the trial court commenced a second phase of the trial to address punitive damages. The jury returned a verdict for punitive damages, against appellant, in the amount of \$850,000.

On December 8, 1997, appellant filed a motion for judgment notwithstanding the verdict, new trial, or alternatively, for remittitur. Appellee filed a motion for attorney's fees on December 4, 1997. The trial court issued a judgment entry on February 4, 1998. The trial court granted attorney's fees, ordered a remittitur of punitive damages, if accepted by appellee, or otherwise a new trial on punitive damages, and entered final judgment. Appellant timely filed a notice of appeal and appellee filed a cross-appeal. The parties set forth the following assignments of error for our consideration:

I. HOUSE BILL 357 MANDATES § 2315.21 OF THE OHIO REVISED CODE APPLIES TO ANY

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AWARD OF PUNITIVE OR EXEMPLARY DAMAGES UNDER § 3721.17(I). AS THE JURY IN THIS CASE HAS CONCLUDED THAT THE REQUIREMENTS OF § 2315.21 HAVE NOT BEEN MET, CAMBRIDGE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE PUNITIVE DAMAGE CLAIM.

II. EVEN ASSUMING THE LEGISLATURE HAD NOT CHANGED THE LAW WHICH APPLIES TO THIS PENDING CASE, THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND/OR MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE ISSUE OF PUNITIVE DAMAGES, AS OHIO LAW REQUIRES PROOF THAT A DEFENDANT ACTED WITH ACTUAL MALICE BEFORE THE IMPOSITION OF PUNITIVE DAMAGES, OTHERWISE THE ORIGINAL § 3721.17(I) IS IN VIOLATION OF OHIO LAW AND THE OHIO AND FEDERAL CONSTITUTIONS.

III. PLAINTIFF'S ATTORNEY FEES AWARD SHOULD BE REVERSED, AND PLAINTIFF SHOULD ONLY RECEIVE ATTORNEY'S FEES, NOT FIGURED ON A CONTINGENCY FEE BASIS, BUT, RATHER, CALCULATED BY THE NUMBER OF HOURS REASONABLY EXPENDED IN THE CASE TIMES A REASONABLE HOURLY FEE REGARDING ONLY THE SUCCESSFUL CLAIMS.

Cross-Appeal

*2 I. THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THAT THE JURY'S AWARD OF PUNITIVE DAMAGES WAS EXCESSIVE AND IN ORDERING REMITTITUR. THUS, THIS COURT SHOULD REINSTATE THE JURY VERDICT FOR PUNITIVE DAMAGES AND, PURSUANT TO CIVIL RULE 60(B), MAKE A CLERICAL CORRECTION TO REFLECT AN AWARD OF ATTORNEY FEES EQUALING ONE-THIRD OF THE TOTAL REINSTATED JURY VERDICT.

I

Appellant maintains, in its first assignment of error, that H.B. 357 mandates that R.C. 2315.21 apply to any award of punitive damages under R.C. 3721.17(I). We disagree.

In support of this argument, appellant cites the language contained in R.C. 3721.17(I), which provides:

(I)(1) Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation. The action may be commenced by the resident or by the resident's sponsor on behalf of the resident.

(2)(a) If compensatory damages are awarded for a violation of the resident's rights, section 2315.21 of the Revised Code, except divisions (E)(1) and (2) of that section, shall apply to an award of punitive or exemplary damages for the violation.

Appellant further maintains R.C. 3721.17(I)(2)(a) is applicable pursuant to R.C. 3721.17(I)(3), which states:

(3) Division (I)(2)(a) of this section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action in which this section is relevant, whether the action is pending in court or commenced on or after the effective date of this amendment.

The revised version of R.C. 3721.17 became effective on July 9, 1998. Appellant claims that pursuant to R.C. 3721.17(I)(3), appellee had to establish he was entitled to punitive damages under the standard contained in R.C. 2315.21. This statute requires a plaintiff to establish, by clear and convincing evidence, actual malice, before punitive damages are recoverable. The jury, in the case *sub judice*, found in interrogatory number one that appellant's actions were not committed with actual malice toward appellee's decedent. Therefore, appellant claims absent a finding of actual malice, as required by R.C.

2315.21, appellee was not entitled to an award of punitive damages.

In determining whether, R.C. 3721.17, as amended on July 9, 1998, is applicable to this case, we refer to the case of *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489. Under *Van Fossen*, we must first determine whether the statute in question is applicable if all other constitutional criteria are met. Section (D)(3) of the statute clearly provides that the operation of the statute applies to any civil action which is pending in a court or commenced on or after the effective date of the amendment.

As in the matter currently before the Court, in *Van Fossen*, the trial court entered final judgment prior to the effective date of the statute in question. However, the Supreme Court of Ohio found the phrase "pending in any court" to also include a case pending in the court of appeals until the rendering of final judgment. The Court based its conclusion on the fact that a case remains "pending" until final judgment is entered. The Court concluded that since Section 3(B)(3), Article IV of the Ohio Constitution vests, in the courts of appeals, the authority to render a final judgment, a case remains "pending" even after a trial court enters final judgment, provided a timely notice of appeal is filed. The Court explained:

*3 It has long been established that an appeal is merely a proceeding in the original cause which 'has the effect of continuing the cause and suspending or vacating the decree of the inferior tribunal until the cause is heard in the appellate court.' *Van Fossen* at 103-104, 522 N.E.2d 489, citing *Heirs of Ludlow v. Kidd's Executors* (1828), 3 Ohio 541, 547-548; *Charles v. Fawley* (1904), 71 Ohio St. 50, 53-54, 72 N.E. 294.

Appellee filed its notice of appeal on February 26, 1998. The new statute became effective on July 9, 1998, prior to the rendering of our decision in this matter. Therefore, the revised version of R.C. 3721.17 is applicable if all other constitutional cri-

teria are met.

Under *Van Fossen*, since we found appellee's claim to be a "pending action", we must next address whether R.C. 3721.17 may be applied to causes of action which accrued prior to its effective date. Prior to addressing the issue of whether a statute may be constitutionally applied retroactively, we must first determine, under R.C. 1.48, whether there is a clear indication of retroactive application. R.C. 1.48 provides that: "A statute is presumed to be prospective in its operation unless expressly made retrospective." A review of R.C. 3721.17(D)(3) clearly indicates the General Assembly's intent that this statute be applied retroactively.

Since R.C. 3721.17 meets the threshold requirement of R.C. 1.48, we must next determine whether the statute violates the ban of retroactive legislation as prohibited by Section 28, Article II of the Ohio Constitution. This section of the Ohio Constitution provides:

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Under this constitutional analysis, we must determine whether the statute is "substantive" or "remedial". The Court, in *Van Fossen*, defined the terms "substantive" and "remedial" as follows:

[A] statute is substantive when it does any of the following: impairs or takes away vested rights, * * *, affects an accrued substantive right, * * *, imposes new or additional burdens, duties, obligations or liabilities as to a past transaction, * * *, creates a new right out of an act which gave no right and imposed no obligation when it occurred, * * *, creates a new right, * * *, gives rise to or takes away the

right to sue or defend actions at law, * * *. On the other hand, remedial laws are those affecting only the remedy provided. These include laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right. [Footnote omitted.] * * * [L]aws which relate to procedures are ordinarily remedial in nature [Citations omitted.] * * * including rules of practice, courses of procedure and methods of review [Citations omitted.] * * *. *Van Fossen* at 107-108, 522 N.E.2d 489.

*4 A statute that is purely remedial does not violate Section 28, Article II of the Ohio Constitution. We find R.C. 3721.17 to be substantive because R.C. 3721.17(I)(3) imposes a new, more difficult burden of proof upon a plaintiff attempting to recover punitive damages under R.C. 3721.17(I)(2)(a). Since this statute limits a substantive right, it is a retroactive law prohibited by Section 28, Article II of the Ohio Constitution. Therefore, R.C. 3721.17(I) cannot be retroactively applied to appellee's cause of action and the jury did not have to find appellant acted with actual malice before awarding punitive damages to appellee.

Appellant's first assignment of error is overruled.

II

In its second assignment of error, appellant contends that even if R.C. 3721.17(I) does not apply to this case, Ohio law still requires proof of actual malice before the imposition of punitive damages otherwise, there exists a violation of Ohio law and the Ohio and Federal Constitutions. We disagree.

The trial court denied appellant's argument that a plaintiff must establish actual malice, by clear and convincing evidence, even under the former version of R.C. 3721.17, on the basis of this Court's decision in *Slagle v. Parkview Manor, Inc.* (Oct. 7, 1983), Stark App. Nos. 6155, 6159, unreported. In *Slagle*, this Court held:

In our view, the statute would have been pointless

and unnecessary to enact if it merely restated the common law. We find R.C. 3721.17(I) clearly and simply gives 'any residents whose rights * * * are violated * * * ' a cause of action for which the court award actual and punitive damages for violation of the rights. The statute says so in those simple words and we think that is what the legislation was intended to accomplish. In short, we think the right to punitive damages flows directly and simply from the failure to furnish 'adequate and appropriate care' and we do hold. We hold this to be true even where it be assumed arguendo that the evidence did not justify a finding of malice or an award of punitive damages under a common law theory. We add, incidentally, that the procedural posture of this appeal does not require us to decide whether the evidence in this case shows malice or supports punitive damages under a common law theory. *Id.* at 4.

This Court's decision, in *Slagle*, is based upon the prior version of R.C. 3721.17(I). This version of the statute provided, in pertinent part:

(I) Any resident whose rights under section 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation. The action may be commenced by the resident or by his sponsor on his behalf. *The court may award actual and punitive damages for violation of the rights.* The court may award to the prevailing party reasonable attorney's fees limited to the work reasonably performed. (Emphasis added.)

*5 Under the plain language of the statute, punitive damages may be awarded to a nursing home resident upon a showing that the resident received inappropriate or inadequate medical treatment or nursing care. Appellee contends, and we agree, under R.C. 2315.21, the punitive damages statute, the General Assembly recognized an exception to the actual malice requirement. Section (D) of this statute provides:

(D) This section does not apply * * * to the extent

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that another section of the Revised Code expressly provides any of the following:

(1) Punitive or exemplary damages are recoverable from a defendant in question in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, * * *.

We affirm our previous decision in *Slagle*, pursuant to R.C. 2315.21(D), as former R.C. 3721.17(I) clearly permits an award of punitive damages merely for the violation of a nursing home resident's rights. Therefore, R.C. 2315.21 has no application in this case.

In support of this assignment of error, appellant also sets forth two constitutional arguments. First, appellant contends the award of punitive damages, under R.C. 3721.17(I), without the requirements and parameters of R.C. 2315.21, violates the due process and equal protection provisions of the Ohio and United States Constitutions. We will first address appellant's equal protection argument. We begin by noting that legislative enactments enjoy a presumption of constitutionality. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus. We " * * * must, to the extent reasonably possible, construe a statute so as to uphold a challenged statute if at all possible." *Van Der Veer v. Ohio Dept. of Transp.* (1996), 113 Ohio App.3d 60, 64, 680 N.E.2d 230.

The analysis for due process and equal protection are almost identical except that legislation reviewed under equal protection involves a classification. *Id.* "A statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clauses of the Ohio and United States Constitutions if it bears a rational relationship to a legitimate governmental interest." *Id.*, citing *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181. Appellant does not argue a suspect class is involved.

We also find the award of punitive damages does not involve a fundamental right. In *State v. Benson* (1992), 81 Ohio App.3d 697, 701, 612 N.E.2d 337, the court addressed the definition of "fundamental rights". "Fundamental rights have been defined by the United States Supreme Court as 'those fundamental liberties that are implicit in the concepts of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.'" [Citations omitted.] A fundamental right also exists in 'those liberties that are deeply rooted in this Nation's history and tradition.' [Citations omitted.] In *Shamblin's Ready Mix, Inc. v. Eaton Corp.* (C.A.A., 1989), 873 F.2d 736, 742, the court explained that the amount of exemplary damages is not a fundamental element of the trial. It is a remedy in the nature of a penalty designed to punish and deter reprehensible conduct. Therefore, a plaintiff has no "right" to punitive damages.

*6 Since neither a suspect class nor a fundamental right is involved, we must analyze appellant's claim under a rational basis test. *Van Der Veer* at 65, 680 N.E.2d 230, citing *State ex rel. Abde v. Police & Firemen's Disability & Pension Fund* (June 25, 1996), Franklin App. No. 96APD02-126, unreported. "Under a rational basis analysis, a statutory classification does not violate equal protection if it bears a rational relationship to a legitimate governmental interest." *Van Der Veer* at 65, 680 N.E.2d 230, citing *Roseman v. Firemen & Policemen's Death Benefit Fund* (1993), 66 Ohio St.3d 443, 613 N.E.2d 574. The rational basis test involves a two-step analysis. We must first identify a valid state interest. Second, we must determine whether the method or means by which the state has chosen to advance that interest is rational. *Van Der Veer* at 65, 680 N.E.2d 230, citing *Buchman v. Wayne Trace Local School Dist. Bd. Of Edn.* (1995), 73 Ohio St.3d 260, 267, 652 N.E.2d 952.

Clearly, the state has a valid interest in permitting the award of punitive damages solely for the violation of a nursing home resident's rights. By permitting the award of punitive damages, without requir-

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ing a plaintiff to establish actual malice, the state promotes a legitimate interest in protecting elderly citizens in nursing homes.

We also find the means by which the state chose to advance that interest is rational. "The policy for awarding punitive damages in Ohio ' * * * has been recognized * * * as that of punishing the offending party and setting him up as an example to others that they might be deterred from similar conduct.'" *Preston v. Murty* (1987), 32 Ohio St.3d 334, 335, 512 N.E.2d 1174. Although the General Assembly enacted the Ohio Nursing Home Residents' Bill of Rights, to protect the rights of nursing home residents, the General Assembly recognized that as a business, nursing homes would respond to the deterrent effect of punitive damages by making those nursing homes that violate a resident's rights an example to others in the business. We find the award of punitive damages under R.C. 3721.17(I), without the requirements and parameters of R.C. 2315.21, is rationally related to a legitimate governmental interest. Therefore, appellant's equal protection argument must fail.

We will now address appellant's due process argument. Since neither a suspect class nor a fundamental right is involved, we must apply a rational basis test. "A rational basis analysis provides that when a statute is challenged on due process grounds, it will be deemed valid if it (1) bears a real and substantial relation to the public health, safety, morals or general welfare of the public and (2) if it is not unreasonable or arbitrary. *Van Der Veer* at 67, 680 N.E.2d 230, citing *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 274, 503 N.E.2d 717. Obviously, the protection of nursing home residents is a consideration that bears a real and substantial relation to the general welfare of the public. Therefore, the challenged statute is not unreasonable or arbitrary. As such, appellant's due process argument must also fail.

*7 Appellant's second assignment of error is overruled.

III

In its final assignment of error, appellant maintains the award of attorneys' fees should be reversed and appellee should only receive attorneys' fees based upon the number of hours expended in the case times a reasonable hourly rate rather than on a contingency fee basis. We agree.

Former R.C. 3721.17(I) permits the award of reasonable attorney's fees, to the prevailing party, limited to the work reasonably performed. The award of attorney's fees is discretionary with the trial court. Therefore, we will not reverse the award of attorneys' fees, in this matter, unless we find the trial court abused its discretion. An abuse of discretion connotes more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

In analyzing this assignment of error, we rely upon the case of *Landis v. Grange Mutual Insurance Co.* (Feb. 21, 1997), Erie App. No. E-96-034, unreported. In *Landis*, the Sixth District Court of Appeals stated:

In a contingency fee agreement, the parties are the attorney and his client. As long as there is no overreaching in the negotiations, such contracts are seldom disturbed. An adversary, however, is not involved in these negotiations and is not a party to the contract. Consequently, it is fundamentally unfair to hold an adversary to someone else's bargain. *Id.* at 5.

The court explained that a contingency fee arrangement may be a reasonable and proper measure for attorney's fees. However, before a trial court adopts a private contingency fee agreement, as the basis of an award of attorney's fees, the trial court must consider the factors contained in DR2-106 (1) time and labor, novelty of issues raised, and necessary skill to pursue the course of action; (2) customary fees in the locality for similar legal services; (3) result ob-

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tained; and (4) experience, reputation and ability of counsel. *Id.* at 4, citing *Yarber v. Cooper* (1988), 61 Ohio App.3d 609, 615, 573 N.E.2d 713 quoting *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 35, 463 N.E.2d 98. In addition to these four factors, we find the trial court should also consider the other four factors contained in DR2-106.

In the case *sub judice*, there is no indication the trial court considered the factors contained in DR2-106 when it awarded attorneys' fees based upon the contingency fee agreement entered into between appellee and his attorneys. We therefore affirm appellant's third assignment of error and remand this issue to the trial court for the court to make findings of fact consistent with DR2-106.

Appellant also argues that appellee's counsel should not receive attorneys' fees for time spent on unsuccessful claims. In support of this argument, appellant cites to the case of *Fenton v. Query* (1992), 78 Ohio App.3d 731, 605 N.E.2d 1303. The *Fenton* case addresses the award of attorney's fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, Section 1988, Title 42 and applies federal case law. We find *Fenton* inapplicable to the case *sub judice*. The trial court should proceed, in determining attorneys' fees, based upon the analysis contained in *Landis*.

*8 Appellant's third assignment of error is sustained.

Cross-Appeal

In his sole assignment of error, under his cross-appeal, appellee maintains the trial court abused its discretion when it ordered the remittitur of the jury's award of punitive damages. We disagree, but find it necessary to remand the issue of remittitur to the trial court for further consideration.

Prior to addressing the trial court's grant of remittitur, we must address the language contained in the trial court's judgment entry granting remittitur. The trial court stated:

In accord with Ohio Law, this Court modifies the Jury's verdict as to punitive damages on the condition that the Plaintiff accept the remittitur of this Court in modifying the punitive damage award. The remittitur must be accepted by the Plaintiffs within thirty days of the date of this Entry or a new jury trial should be conducted only on the issue of punitive damages. Judgment Entry, Feb. 4, 1998, at 4-5.

Although appellant filed its notice of appeal prior to the expiration of this thirty-day period provided for in the trial court's judgment entry, we find appellee could still have accepted the remittitur had he desired to do so. During the pendency of an appeal, the trial court continues to have jurisdiction over the action, so long as the exercise of that jurisdiction does not interfere with the power of the appellate court to review the judgment under appeal and affirm, modify or reverse that judgment. *Buckles v. Buckles* (1988), 46 Ohio App.3d 118, 120, 546 N.E.2d 965. Appellee did not accept the remittitur, within the time period allotted by the trial court, and we will therefore address this issue on appeal.

This Court thoroughly addressed the concept of remittitur in the case of *Betz v. Timken Mercy Medical Center* (1994), 96 Ohio App.3d 211, 644 N.E.2d 1058, discretionary appeal disallowed, 71 Ohio St.3d 1436, 643 N.E.2d 142, motion for reconsideration denied, 71 Ohio St.3d 1467, 644 N.E.2d 1389. In *Betz*, we explained:

Fundamental to our justice system is the right to a jury of our peers. It is in their collective wisdom that the parties place their trust. We must be 'guided by a presumption that the findings of the trier-of-fact were indeed correct.' *Seasons Coal*, 10 Ohio St.3d at 80, 10 OBR at 410, 461 N.E.2d at 1276. Also, 'It is the function of the jury to assess the damages, and generally, it is not for a trial court or appellant (sic) court to substitute its judgment for that of the trier-of-fact.' *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 40, 543 N.E.2d 464, 469.

Though the trial court is prohibited from substit-

ing its own judgment as to damages for that of the jury, the jury's decision is not inviolate. The legal concept of remittitur was developed to provide the trial court with the procedural mechanism by which it could adjust or correct an unjust award. However, prior to doing so, the damages awarded by the jury must be 'so manifestly against the weight of the evidence to show a misconception by the jury of its duties.' *Howard v. City Loan & Savings* (Mar. 27, 1989), Greene App. No. 88-CA-39, unreported, at 6-7, 1989 WL 33137. 'Remittitur is only proper where a court can affirmatively find that the jury's verdict is manifestly excessive.' *Uebelacker v. Cincom Systems, Inc.* (1992), 80 Ohio App.3d 97, 103, 608 N.E.2d 858, 862. See, also, *Scott v. Hall* (Sept. 9, 1988), Montgomery App. No. 10921, unreported, at 5, 1988 WL93668.

*9 While recognizing the above presumption in favor of sustaining the jury's verdict, we must also be cognizant of our standard of review in this case. At issue is whether, given the deference the trial court was required to give to the jury's verdict, the trial court abused its discretion in granting the remittitur. To demonstrate an abuse of discretion, it must be shown that the trial court's decision was unreasonable, arbitrary or unconscionable. *In re Adoption of Ridenour* (1991), 61 Ohio St.3d 319, 320, 574 N.E.2d 1055, 1057.

It is under this analysis we review the trial court's decision to grant remittitur in this case. The trial court awarded compensatory damages, to appellee, in the amount of \$168,298.35 and punitive damages in the amount of \$850,000. The trial court remitted the award of punitive damages to \$504,000 on what it found to be the disparate relationship between the award of compensatory damages and punitive damages. The trial court noted that the award of punitive damages was more than five times the award of compensatory damages. Judgment Entry, Feb. 4, 1998, at 3. The trial court also commented on the fact that the jury did not find appellant acted with actual malice and concluded that in comparing the culpability of appellant's conduct, the desirability of

discouraging continuation of similar conduct, the impact on the parties and appellee's net earnings in 1993 and 1994, the proper ratio of punitive damages to compensatory damages should be three to one. *Id.* at 4.

In *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 543 N.E.2d 464, the Ohio Supreme Court held, "A jury verdict as to punitive damages which is not the result of (1) passion and prejudice or (2) prejudicial error will not be reduced on appeal." *Id.* at syllabus. A large disparity between compensatory damages and punitive damages, standing alone, is insufficient to justify a trial court's interference with the province of the jury. *Id.* at 40, 543 N.E.2d 464. While there is no rigid mathematical standard to determine proportionality, awards of punitive damages must not be so disproportionate to the actual damages as to indicate they are the result of passion and prejudice rather than reason on the part of the jury. *Gray v. Allison Div., Gen. Motors Corp.* (1977), 52 Ohio App.2d 348, 358-359, 370 N.E.2d 747. The amount of punitive damages award should be neither more nor less than is sufficient to achieve the goals of deterrence and punishment. *Villella* at 50, 543 N.E.2d 464.

In remitting damages in the case *sub judice*, the trial court never found that the award of punitive damages was the result of passion and prejudice or prejudicial error. Instead, the trial court focused almost exclusively on the disparity between compensatory and punitive damages which we find is not a proper basis for remitting punitive damages. The trial court also reviewed the appellant's conduct and stated that the evidence established appellant did not have a fall prevention policy; appellant did not have a policy to insure the nurse's aides received information about a resident's condition; and appellant did not have a policy that allowed nurses' aides to look at the patient's records that would alert them to particular needs, including the need to prevent falls. Judgment Entry, Feb. 4, 1998, at 2. The trial court concluded this conduct, by appellant, did not support the amount of punitive damages awar-

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ded by the jury.

*10 In *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, 189 N.E. 851, paragraph three of the syllabus, the Ohio Supreme Court explained:

In order to determine whether excessive damages were so influenced [by passion or prejudice], a reviewing court should consider, not only the amount of damages returned and the disparity between the verdict and remittitur where one had been entered, but it becomes the duty of such court to ascertain whether the record discloses that the excessive damages were induced by * * * misconduct on the part of the court or counsel, or * * * by any other action occurring during the course of the trial which can reasonably be said to have swayed the jury in their determination of the amount of [punitive] damages that should be awarded.

The trial court did not address the factors of passion and prejudice or prejudicial error as required by the Ohio Supreme Court in *Villella*. We therefore remand this matter to the trial court for the court to consider whether the award of punitive damages was the result of passion and prejudice or prejudicial error in addition to the other factors contained in *Villella*.

Cross-appellant's assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas, Guernsey County, Ohio, is hereby affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

FARMER, P.J., and HOFFMAN, J., concurs in part and dissents in part. HOFFMAN.

I fully concur in the well written and well reasoned majority opinion as to its analysis and disposition of appellant's first and second assignments of error.

I respectfully dissent from the majority's decision to sustain appellant's third assignment of error.

The majority concludes the trial court based its

award of attorney fees upon the one-third contingency fee agreement between appellant and his attorneys. In support of its conclusion, the majority states, "... there is no indication the trial court considered the factors contained in DR2-106 when it awarded attorney fees based upon the contingency fee agreement ..." (Majority Opinion at 14). I find the record is inapposite.

Following the submission of briefs and evidence FN1, the trial court stated in its February 4, 1998 Entry:

FN1. In addition to providing the trial court with evidence as to the actual time spent on the case, appellee submitted affidavits from three experienced trial lawyers as to the reasonable value of the services provided and the reasonableness of the one-third contingent fee.

The Court approves the written one-third contingency fee agreement entered into by the plaintiffs and their attorneys (as approved by the Probate Court) in this matter. The Court further finds, when applying the standards of D.R. 2.106 of the Code of Professional Responsibility, in this case, and based upon the actual time spent by the Plaintiffs' attorneys and the results obtained, and the fee customarily charged in Guernsey County, Ohio for similar legal services, the one-third contingency fee is both reasonable and necessary.

While to award attorney fees based solely upon a contingency agreement constitutes an abuse of discretion, the *Landis* case cited in the majority opinion recognizes a contingency fee agreement may be the proper measure for attorney fees, provided the trial court considers the factors contained in DR2-106. The record demonstrates the trial court did so in the case *sub judice*. I find the trial court did not abuse its discretion in determining the amount of attorney fees awarded to appellee. Accordingly, I would overrule appellant's third assignment of error.

*11 Finally, I respectfully dissent from the major-

Not Reported in N.E.2d
 Not Reported in N.E.2d, 1999 WL 3958 (Ohio App. 5 Dist.)

ity's decision to overrule cross-appellant's assignment of error.

Because the propriety of the jury's award of punitive damages is an issue directly raised by appellant on appeal, any further action by the trial court (new trial) on this issue would interfere with our appellate review of it. As such, I find appellant's filing of a timely notice of appeal tolled the time period within which cross-appellant had to accept or reject the remittitur.

The majority correctly notes the trial court's reliance upon the disparate relationship between the award of compensatory damages and punitive damages is improper under *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 40, 543 N.E.2d 464. Furthermore, the trial court's comment the jury did not find cross-appellee acted with actual malice is immaterial given our discussion of appellant's first and second assignments of error, *supra*. If anything, such finding mitigates against an inference the jury's award was the result of passion or prejudice.FN2

FN2. The trial court also commented upon the culpability of appellant's conduct, the award's impact on the cross-appellee's net earnings and its thoughts as to the proper ratio of punitive damages to compensatory damages (3 to 1). None of these factors directly address the issue of whether the jury's award was the result of passion or prejudice.

Pursuant to this Court's decision in *Betz v. Timken Mercy Medical Center* (1994), 96 Ohio App.3d 211, 644 N.E.2d 1058, I do not find the damages awarded by the jury so manifestly against the weight of the evidence as to show a misconception by the jury of its duties. *Howard v. City Loan and Savings* (March 27, 1989), Green App. No. 88-CA-39, unreported, at 6-7. Indeed, we must be "guided by a presumption that the findings of the trier-of-fact were indeed correct." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461

N.E.2d 1273.

Given the deference the trial court is required to give to a jury's verdict and the improper emphasis the trial court placed upon the disparity between the compensatory and punitive damages, I believe the trial court abused its discretion in ordering a remittitur. Accordingly, I would sustain cross-appellant's sole assignment of error and reinstate the jury's punitive damage award.

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Guernsey County, Ohio, is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

Ohio App. 5 Dist., 1998.
 Blancett v. Nationwide Care, Inc.
 Not Reported in N.E.2d, 1999 WL 3958 (Ohio App. 5 Dist.)

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U.S.C.A. Const. Art. I § 10, cl. 1

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CUnited States Code Annotated Currentness
Constitution of the United States

☐ Annotated

☐ Article I. The Congress (Refs & Annos)

→ **Section 10, Clause 1. Treaties, Letters of Marque and Reprisal; Coinage of Money; Bills of Credit; Gold and Silver as Legal Tender; Bills of Attainder; Ex Post Facto Laws; Impairment of Contracts; Title of Nobility**

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility

<This clause is displayed in six separate documents according to subject matter.>

<see USCA Const Art. I § 10, cl. 1-Treaties, Etc.>

<see USCA Const Art. I § 10, cl. 1-Coinage of Money>

<see USCA Const Art. I § 10, cl. 1-Bills of Credit>

<see USCA Const Art. I § 10, cl. 1-Legal Tender>

<see USCA Const Art. I § 10, cl. 1-Bills of Attainder, Etc.>

<see USCA Const Art. I § 10, cl. 1-Impairment of Contracts>

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OH Const. Art. II, § 28

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C

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs & Annos)

▣ Article II. Legislative (Refs & Annos)

→ O Const II Sec. 28 Retroactive laws; laws impairing obligation of contracts

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

Current through 2008 File 129 of the 127th GA (2007-2008), apv. by 9/24/08, and filed with the Secretary of State by 9/24/08.

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Baldwin's Ohio Revised Code Annotated Currentness
 Title XXVII. Courts--General Provisions--Special Remedies
 Chapter 2711. Arbitration (Refs & Annos)
 General Provisions

→ 2711.01 Provision in contract for arbitration of controversies valid; exceptions

(A) A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

(B)(1) Sections 2711.01 to 2711.16 of the Revised Code do not apply to controversies involving the title to or the possession of real estate, with the following exceptions:

- (a) Controversies involving the amount of increased or decreased valuation of the property at the termination of certain periods, as provided in a lease;
- (b) Controversies involving the amount of rentals due under any lease;
- (c) Controversies involving the determination of the value of improvements at the termination of any lease;
- (d) Controversies involving the appraisal of property values in connection with making or renewing any lease;
- (e) Controversies involving the boundaries of real estate.

(2) Sections 2711.01 to 2711.16 of the Revised Code do not apply to controversies involving international commercial arbitration or conciliation that are subject to Chapter 2712. of the Revised Code.

CREDIT(S)

(1991 H 221, eff. 10-23-91; 1975 H 682; 126 v 304; 1953 H 1; GC 12148-1)

Current through 2008 File 129 of the 127th GA (2007-2008), apv. by 9/24/08, and filed with the Secretary of State by 9/24/08.

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R.C. § 2711.02

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Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

Chapter 2711. Arbitration (Refs & Annos)

General Provisions

→ 2711.02 Court may stay trial; appeal

(A) As used in this section and section 2711.03 of the Revised Code, "commercial construction contract" means any written contract or agreement for the construction of any improvement to real property, other than an improvement that is used or intended to be used as a single-family, two-family, or three-family detached dwelling house and accessory structures incidental to that use.

(B) If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

(C) Except as provided in division (D) of this section, an order under division (B) of this section that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

(D) If an action is brought under division (B) of this section upon any issue referable to arbitration under an agreement in writing for arbitration that is included in a commercial construction contract, an order under that division that denies a stay of a trial of the action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

CREDIT(S)

(2000 H 401, eff. 3-15-01; 1990 S 177, eff. 5-31-90; 1953 H 1; GC 12148-2)

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9 U.S.C.A. § 2

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Effective:[See Text Amendments]

United States Code Annotated Currentness

Title 9. Arbitration (Refs & Annos)

▣ Chapter 1. General Provisions (Refs & Annos)

→ § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

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9 U.S.C.A. § 3

Page 1

C**Effective:[See Text Amendments]**

United States Code Annotated Currentness
Title 9. Arbitration (Refs & Annos)
 ▣ Chapter 1. General Provisions (Refs & Annos)

→ **§ 3. Stay of proceedings where issue therein referable to arbitration**

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

Current through P.L. 110-334 (excluding 110-315, 110-324 to 330) approved 10-1-08

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9 U.S.C.A. § 4

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Effective:[See Text Amendments]

United States Code Annotated Currentness

Title 9. Arbitration (Refs & Annos)

Chapter 1. General Provisions (Refs & Annos)

→ § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

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110TH CONGRESS
2D SESSION

S. 2838

To amend chapter 1 of title 9 of United States Code with respect to arbitration.

IN THE SENATE OF THE UNITED STATES

APRIL 9, 2008

Mr. MARTINEZ (for himself and Mr. KOHL) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend chapter 1 of title 9 of United States Code with respect to arbitration.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Fairness in Nursing
5 Home Arbitration Act".

6 **SEC. 2. DEFINITIONS.**

7 Section 1 of title 9, United States Code, is amend-
8 ed—

9 (1) by striking the section heading and insert-
10 ing the following:

1 **"§ 1. Definitions";**

2 (2) by inserting before the first beginning
3 quotation mark, the following: "(a) As used in this
4 chapter, the term (1)";

5 (3) by striking "Maritime" and inserting "mari-
6 time";

7 (4) by striking "jurisdiction;" and inserting
8 "jurisdiction; (2)"; and

9 (5) by striking the period and inserting the fol-
10 lowing: "; (3) 'long-term care facility' means—

11 "(A) any skilled nursing facility, as defined in
12 1819(a) of the Social Security Act;

13 "(B) any nursing facility as defined in 1919(a)
14 of the Social Security Act; or

15 "(C) a public facility, proprietary facility, or fa-
16 cility of a private nonprofit corporation that—

17 "(i) makes available to adult residents sup-
18 portive services to assist the residents in car-
19 rying out activities such as bathing, dressing,
20 eating, getting in and out of bed or chairs,
21 walking, going outdoors, using the toilet, ob-
22 taining or taking medication, and which may
23 make available to residents home health care
24 services, such as nursing and therapy; and

25 "(ii) provides a dwelling place for residents
26 in order to deliver such supportive services re-

1 ferred to in clause (i), each of which may con-
2 tain a full kitchen and bathroom, and which in-
3 cludes common rooms and other facilities ap-
4 propriate for the provision of supportive serv-
5 ices to the residents of the facility; and

6 “(4) ‘pre-dispute arbitration agreement’ means any
7 agreement to arbitrate disputes that had not yet arisen
8 at the time of the making of the agreement.

9 “(b) The definition of ‘long-term care facility’ in sub-
10 section (a)(3) shall not apply to any facility or portion of
11 facility that—

12 “(1) does not provide the services described in
13 subsection (a)(3)(C)(i); or

14 “(2) has as its primary purpose, to educate or
15 to treat substance abuse problems.”.

16 **SEC. 3. VALIDITY AND ENFORCEMENT.**

17 Section 2 of title 9, United States Code, is amend-
18 ed—

19 (1) by striking the section heading and insert-
20 ing the following:

21 **“§ 2. Validity and enforceability”;**

22 (2) by striking “A written” and inserting “(a)
23 A Written”;

24 (3) by striking “, save” and all that follows
25 through “contract”, and inserting “to the same ex-

1 tent as contracts generally, except as otherwise pro-
2 vided in this title"; and

3 (4) by adding at the end the following:

4 "(b) A pre-dispute arbitration agreement between a
5 long-term care facility and a resident of a long-term care
6 facility (or anyone acting on behalf of such a resident, in-
7 cluding a person with financial responsibility for that resi-
8 dent) shall not be valid or specifically enforceable.

9 "(c) This section shall apply to any pre-dispute arbi-
10 tration agreement between a long-term care facility and
11 a resident (or anyone acting on behalf of such a resident),
12 and shall apply to a pre-dispute arbitration agreement en-
13 tered into either at any time during the admission process
14 or at any time thereafter.

15 "(d) A determination as to whether this chapter ap-
16 plies to an arbitration agreement described in subsection
17 (b) shall be determined by Federal law. Except as other-
18 wise provided in this chapter, the validity or enforceability
19 of such an agreement to arbitrate shall be determined by
20 the court, rather than the arbitrator, irrespective of
21 whether the party resisting the arbitration challenges the
22 arbitration agreement specifically or in conjunction with
23 other terms of the contract containing such agreement."

1 **SEC. 4. EFFECTIVE DATE.**

2 This Act, and the amendments made by this Act,
3 shall take effect on the date of the enactment of this Act
4 and shall apply with respect to any dispute or claim that
5 arises on or after such date.

○