

IN THE SUPREME COURT OF OHIO

Stephen Musser, as the Personal)
Representative of the Estate of)
Florence Hayes (deceased),)
)
Appellee,)
)
On Appeal from the)
Cuyahoga County Court of Appeals)
Eighth Appellate District)
vs.)
)
The Oakridge Home, et al.,)
)
Appellants.)

MERIT BRIEF OF APPELLEE STEPHEN MUSSER

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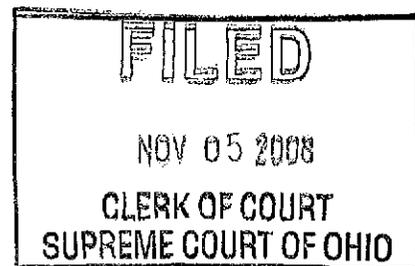


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I. STATEMENT OF FACTS.

After 94 year old Florence Hayes fell and suffered injury, she had to be admitted to a nursing home. Upon arriving at the Oakridge nursing home, a facility owned and operated by the Appellant, a trying and emotional time for anyone, she was confronted by a representative of Appellant The Oakridge Home who wanted her to sign a large quantity of documents, including a “Voluntary Agreement to Resolve Future Malpractice Claims by Binding Arbitration”. On the day she was being admitted to the nursing home, she was asked to waive her right to discovery and a jury trial and punitive damages and attorney fees if the employees of the nursing home committed malpractice in the future and injured her. No claim had arisen on the date that Florence Hayes was admitted to the nursing home. The nursing home, a sophisticated corporation, wanted to make sure that Florence Hayes, an elderly, 94 year old woman, could not sue the nursing home, if its employees committed malpractice and injured Florence Hayes in the future. Florence Hayes signed the agreement. Appellee maintains that the terms of the Arbitration Clause were never explained to Florence Hayes. No one talked with her about malpractice or her right to trial by jury or the fact that discovery cannot be effectively conducted once the case is stayed. Florence Hayes did not make any changes to the Arbitration Clause.

On June 21, 2005, Florence Hayes was allowed to fall out of her wheelchair at the Oakridge Home. As a result she suffered a right, intertrochanteric hip fracture which had to be surgically repaired with a hip screw and a side plate. (Appellant’s Supp. 18). Irwin H. Mandel, M.D. opined in his Affidavit of Merit which was filed in the Trial Court in this case that Ms. Hayes’ injury was the direct result of her fall. (Appellant’s Supp. 19) Dr. Mandel also opined that as a result of her injuries, Florence Hayes required surgery followed by an “acute stay in the hospital setting for

medical management and early rehabilitation. She then required transfer to an extended care facility for assistance as well as functional rehabilitation and strengthening.” (Appellant’s Supp. 19) Dr. Mandel goes on to opine that, “However, the natural history of a hip fracture in a 95 year old female could result in medical demise due to inability to function as well as loss of ambulatory skills.” (Appellant’s Supp. 19) Florence Hayes died on February 9, 2007.

Appellee Stephen Musser is pursuing Appellant for both survivorship claims and wrongful death claims.

II. ARGUMENT.

A. Standard of Review.

Normally, the determination of whether a dispute is subject to a contractual arbitration clause rests within the sound discretion of the trial court. *Small v. HCF of Perrysburg*, (2004) 159 Ohio App. 3d 66, 2004 Ohio 5757, 823 N.E. 2d 19. However, the Fifth Appellate District Court of Appeals has observed that the issue of whether a contract is unconscionable is a question of law which requires a factual inquiry into the particular circumstances of the transaction. *Bolton v. Crockett Homes, Inc.*, (Stark App. No. 2004, CA 00051), 2004-Ohio-7318, 2004 Ohio App. Lexis 6805. In reaching this conclusion, the Fifth District Court of Appeals cited a case decided by the Ninth District Court of Appeals wherein the Court explained:

“Since the determination of whether a contract is unconscionable is a question of law for the court, a factual inquiry into the particular circumstances of the transaction in question is required. [Citations omitted.] Such a determination requires a case-by-case review of the facts and circumstances surrounding the agreement. [Citations omitted.] As this case involves only legal questions, we apply the de novo standard of review.” *Id.* at ¶ 8, citing *Eagle v. Fred Martin Motor Co., Summit App. No. 21522, 2044-Ohio-829.*

The Eighth Appellate District Court of Appeals reviewed the Trial Court’s decision to stay

this case de novo and Reversed the Trial Court's decision to stay the case. Appellant urges a de novo review of that decision.

B. Not all Arbitration Agreements are favored.

Appellant argues that Ohio law favors arbitration agreements. This is not entirely accurate. Ohio law favors some arbitration agreements. As this Court held in *Peters v. Columbus Steel Castings Co.*, (2007) 115 Ohio St.3d 134, 2007-Ohio-4787 at ¶ 8 (emphasis added);

First, there is no dispute that “ ‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit, ’ ” [citing *Council of Smaller Ents v. Gates, McDonald & Co.* (1998), 80 Ohio St. 3d 661, 665, 687 N.E. 2d 1352, quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409.] **While arbitration is encouraged as a form of dispute resolution, the policy favoring arbitration does not trump the constitutional right to seek redress in court.** See *id.*; *ABM Farms Inc. v. Woods* (1998), 81 Ohio St.3d 498, 500, 692 N.E.2d 574; see, also, Section 16, Article I, Ohio Constitution. Therefore, unless the company proves that Peter's beneficiaries specifically agreed to arbitrate their wrongful-death claims, they should not be bound to do so.

This Court went on to say on *Peters*;

Although we have long favored arbitration and encourage it as a cost-effective proceeding that permits parties to achieve permanent resolution of their disputes in an expedient manner, it may not be imposed on the unwilling. Requiring *Peters*'s beneficiaries to arbitrate their wrongful-death claims without a signed arbitration agreement would be unconstitutional, inequitable, and in violation of nearly a century's worth of established precedent.

Peters at ¶ 19.

In *Small v. HCF of Perrysburg*, (2004) 159 Ohio App. 3d 66, 2004 Ohio 5757, 823 N.E. 2d 19, the trial court ordered the plaintiffs in that case to submit their claims of nursing home negligence against the Defendant to arbitration, and stayed the case until the conclusion of the arbitration. The Plaintiffs appealed. On appeal, the Plaintiffs, now the Appellants, argued that “the

clause was unconscionable because Mrs. *Small*, at the time she signed the document, was concerned about the immediate health of her husband and was in no position to review and fully appreciate the terms of the agreement.” *Small* at 69. The Sixth District Court of Appeals held the arbitration clause unconscionable. In deciding this issue the Sixth District Court of Appeals held as follows (emphasis added):

As set forth above, R.C. 2711.01(A) provides that an arbitration clause may be unenforceable based on legal or equitable grounds. An arbitration clause may be legally unenforceable where the clause is not applicable to the matter at hand, or if the parties did not agree to the clause in question. Benson v. Spitzer Mgt., Inc., 8th Dist. No. 83558, 2004 Ohio 4751, P13, citing Ervin v. Am. Funding Corp. (1993), 89 Ohio App.3d 519, 625 N.E.2d 635. Further, an arbitration clause is unenforceable if it is found by a court to be unconscionable. Unconscionability refers to the absence of a meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to one party. Collins v. Click Camera & Video, Inc. (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294. Accordingly, unconscionability consists of two separate concepts: (1) substantive unconscionability, which refers to the commercial reasonableness of the contract terms themselves and (2) procedural unconscionability, which refers to the bargaining positions of the parties. *Id.* Collins defines and differentiates the concepts as follows:

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

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

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

"Substantive Unconscionability

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

At the outset, we note that the arbitration clause does contain a sentence which provides that admission is not conditioned on agreement to the clause. However, the same clause states that any "controversy, dispute, disagreement or claim" of a resident "shall be settled exclusively by binding arbitration." Further, and most importantly, the bold print directly above the signature lines states that by signing the agreement the parties agree to arbitrate their disputes and that the parties agree to the terms of the agreement "in consideration of the facility's acceptance of and rendering services to the resident." The residents or their representatives are provided no means by which they may reject the arbitration clause. Accordingly, we believe that the resident or representative is, by signing the agreement that is required for admission, for all practical purposes being required to agree to the arbitration clause.

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

"Procedural unconscionability

As stated above, procedural unconscionability involves an examination of the bargaining position of the parties. In her affidavit, Mrs. Small stated that when she arrived at The Manor she was concerned about her husband's health because he

appeared to be unconscious. Shortly after his arrival she was informed that Mr. Small was going to be transported by ambulance to the hospital. Mrs. Small was then approached by an employee of The Manor and asked to sign the Admission Agreement. The agreement was not explained to her and Mrs. Small stated that she signed the agreement "while under considerable stress * * *." Mrs. Small stated that the entire process, from their arrival at The Manor until the ambulance left, took approximately 30 minutes.

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

In finding that The Manor's arbitration clause is unconscionable, we must make a few observations. **Though we firmly believe that this case demonstrates both substantive and procedural unconscionability, there is a broader reason that arbitration clauses in these types of cases must be closely examined. Arbitration clauses were first used in business contracts, between sophisticated business persons, as a means to save time and money should a dispute arise. As evidenced by the plethora of recent cases involving the applicability of arbitration clauses, the clauses are now being used in transactions between large corporations and ordinary consumers, which is cause for concern. Particularly problematic in this case, however, is the fact that the clause at issue had potential application in a negligence action. Such cases are typically fact-driven and benefit from the discovery process afforded in a civil action. Further, negligence cases often hinge on the "reasonableness" of a particular action or inaction. Such a subjective analysis is often best left to a jury acting as the fact finder. These observations are not intended to prevent the application of arbitration clauses in tort cases, we merely state that these additional facts should be considered in determining the parties' intentions.**

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

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

Small at 71-73 (emphasis added).

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

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

The Commission issued its Final Report on July 27, 1998.¹ That report concluded on page 15, in Principle 3 of a section entitled, "C. A Due Process Protocol for Resolution of Health Care

¹ Pages 15, 16 and 17 of the Final Report, which pages contain all the provisions quoted in this Brief, were attached to Plaintiff's Brief in Opposition to Defendant's Motion to Stay, and were identified as Plaintiff's Exhibit "E", which brief was filed with the Trial Court and is part of the record in this case. These pages are also attached to Appellee's Supplement as pages 2, 3 and 4. The entire 46 page report is available at the web site for the American Arbitration Association at the following address: <http://www.adr.org/sp.asp?id=28633>

Disputes.” that; **“The agreement to use ADR should be knowing and voluntary. Consent to use an ADR process should not be a requirement for receiving emergency care or treatment. In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.”** (Emphasis added.) It is not in dispute that the arbitration clause in this case was entered into before Ms. Hayes had a claim.

Further, a bill was introduced on May 22, 2008, in the U.S. House under which Nursing Home operators would be unable to subject residents and prospective residents to binding arbitration clauses. A companion bill was introduced in the Senate in April of this year. The AARP, the Alzheimer's Association and the National Senior Citizen's Law Center are among the groups who have come out in support of "The Fairness in Nursing Home Arbitration Act of 2008." The Senate Judiciary Committee passed the bill on Thursday, September 11, 2008. These binding Arbitration Clauses are of such concern that there is currently Federal Legislation making its way through the Federal Legislature which would make these clauses illegal nationwide. The very existence of this legislation certainly speaks to the unconscionable nature of these clauses.

C. The Wrongful Death Portion of this case is not Subject to the Arbitration Clause at Issue.

As this Court held in the Syllabus of *Peters v. Columbus Steel Castings Co.*, (2007) 115 Ohio St. 3d 134, 2007-Ohio-4787,

1. A survival action brought to recover for a decedent's own injuries before his or her death is independent from a wrongful-death action seeking damages for the injuries that the decedent's beneficiaries suffer as a result of the death, even though the same nominal party prosecutes both actions.
2. A decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claims.

Therefore, only the survival claims in this case are at issue with respect to Appellant's Motion to Stay and Referral to Binding Arbitration. It is not in dispute that none of Decedent Florence Hayes' next of kin signed an arbitration agreement with Appellant. Therefore, the wrongful death claims in this case will be allowed to proceed to trial. For the reasons stated herein, Appellee urges this Honorable Court to affirm the ruling of the Eighth District Court of Appeals denying Appellant's Motion to Stay and Remanding the survivorship portion of the case back to the Trial Court for further proceedings.

D. Proposition of Law No. 1.

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

Appellant The Oakridge Home argues that Florence Hayes' age is not a justification for finding procedural unconscionability. Appellant also argues that there is no support for the finding of the Eighth Appellate District Court of Appeals that Florence Hayes had no business or contract experience. The Eighth Appellate District Court of Appeals held that age and experience are appropriate factors to consider when determining procedural unconscionability. Appellant improperly attempts to limit the information available in this case which is relevant to a determination of procedural unconscionability.

In *Small v. HCF of Perrysburg*, (2004) 159 Ohio App. 3d 66, 2004 Ohio 5757, 823 N.E. 2d 19, the Sixth District Court of Appeals held that age, education, intelligence, business acumen and

experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible and whether there were alternative sources of supply for the goods in question, were all factors to be considered when determining procedural unconscionability. As stated in *Small*, "Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, e.g., 'age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.' Johnson v. Mobil Oil Corp. (E.D.Mich.1976), 415 F. Supp. 264, 268." Id." *Small* at 71.

In terms of age, Florence Hayes was 94 years old. She was not able to care for herself. She needed to be admitted to a nursing home. Appellant was an ageless corporation running a nursing home. Appellant had the clear advantage when it came to age.

In terms of business acumen and experience, it is not in dispute that Florence Hayes was a 94 year old woman who needed nursing home care and The Oakridge Home is a for profit corporation that runs at least one nursing home. Florence Hayes did not have experience negotiating contracts. The Oakridge Home negotiated a contract with every resident. Florence Hayes was born on April 4, 1910. Appellant has not offered any evidence that she had any business experience. Appellant is a sophisticated corporation with lawyers and employees. Appellant admits hundreds, if not thousands, of residents to its facility and deals with its arbitration clause with each resident. There is no evidence that Florence Hayes had any prior experience with contracts nor that she was ever admitted to a nursing home before nor that she had ever been confronted with an Admission Agreement before. Appellant had the only business experience and the clear advantage.

In terms of relative bargaining power, The Oakridge Home is a for profit corporation who hired lawyers to draft an admission agreement that contains a two page section entitled “Voluntary Agreement to Resolve Future Malpractice Claims by Binding Arbitration”. Florence Hayes was a 94 year old woman whose health was so poor she had to be admitted into a nursing home. As the Eighth Appellate District Court pointed out at page 271 of its decision, “finding a quality nursing home is difficult.” Florence Hayes was a 94 year old woman being transported from the hospital, who needed to be admitted to the nursing home. There is no question that Appellant The Oakridge Home had all of the bargaining power.

In terms of who drafted the contract, it is not in dispute that Appellant The Oakridge Home drafted the entire agreement. This was not an agreement that the two parties drafted together. The Oakridge Home drafted the agreement in its entirety and presented it to Florence Hayes on a take it or leave it basis. It was a contract of adhesion. Appellant had all of the advantage when it came to drafting the contract.

In terms of whether the terms were explained, they were not. No one from the Oakridge Home explained the terms of the agreement to Florence Hayes. Further, and most importantly, no one spoke to Florence Hayes about arbitration, or jury trials, or malpractice. The arbitration clause was overlooked, just as the Oakridge Home hoped that it would be. Appellant The Oakridge Home argues that Appellee has not offered any evidence that the terms of the agreement were not explained to Florence Hayes. This Court can clearly conclude that the terms were not explained to Florence Hayes based on the fact that she signed the agreement. What rational person would accept such a contract? Appellant wants this Court to believe that Florence Hayes knowingly and voluntarily accepted a contract whereby, if the nursing home injured Florence Hayes, even fatally, in the future,

as the result of their malpractice, she would waive her right to a jury trial, and to discovery, and to punitive damages and to attorney fees in exchange for nothing. It is not possible that the subject arbitration clause was properly explained to Florence Hayes and that she voluntarily and knowingly agreed to it. No rational person would voluntarily sign such an agreement, if it was explained to them that if an employee of the nursing home raped her, or threw her down a flight of stairs, she would be unable to sue the nursing home. No rational person would sign such an agreement if it was explained to them that they would have not ability to conduct effective discovery. One of the biggest problems with these clauses, and one of the main reasons that nursing homes use them is, if the case is stayed Plaintiff cannot effectively conduct discovery. Plaintiff cannot file a Motion to Compel to compel the Defendant to produce protocols relative to patient care or personnel files for the employees who cared for Florence Hayes. If the case is stayed Plaintiff will not be able to subpoena former employees and depose them. Plaintiff will not be able to subpoena any witness to testify at the Arbitration because there will be no authority of the Court of Common Pleas to facilitate these procedures. If a witness in a case that has been stayed ignores a subpoena there is no consequence. The Arbitration cannot hold them in contempt or issue a bench warrant to compel their testimony. Once the case is stayed, the Plaintiff cannot conduct effective discovery.

In terms of whether alterations to the printed terms were possible no one told Florence Hayes that she could change any part of the agreement. No one told Florence Hayes that she could cross out any part of the agreement that she did not like. Florence Hayes did not change a single word of the arbitration clause. She did not cross out any language. Obviously, the arbitration clause was a boilerplate, take or leave it type of clause. The clause was drafted by Defendant Oakridge in its entirety, to help protect Defendant Oakridge from liability for malpractice, and it was presented to

Florence Hayes as she was being admitted to the nursing home on a take it or leave it basis.

In terms of alternative sources of supply, Nursing Home beds are in high demand. The Eighth Appellate District Court of Appeals held that there were not alternate sources of supply.

On May 31, 2005, as Florence Hayes was being admitted into the nursing home, she was confronted with 29 pages of confusing, complicated forms, printed in a small font that would be hard for anyone to read. All of these pages were attached to Plaintiff's Brief in Opposition to Motion to Stay and identified as Exhibit D. They are also contained in Appellee's Supplement as pages 4-32. 94 year old Florence Hayes was asked to read an Admission Billing Information Sheet, a Long Term Authorization Agreement, a Vision Consultation Agreement, an Authorization for Dental Treatment, a Voluntary Agreement for Arbitration of Disputes not involving Malpractice Claims, a Voluntary Agreement to Resolve Future Malpractice Claims by Binding Arbitration. Thereafter, there were 14 pages of attachments. It would have taken over an hour for Florence Hayes to read all of these forms.

Further, if this agreement were to be voluntarily entered into, why did it have to be signed as Florence Hayes was being admitted to the nursing home, along with all of her other admission papers? If Binding Arbitration were simply some option that benefitted both parties, why wasn't a brochure about binding arbitration left with Florence Hayes to be reviewed at a later date by Ms. Hayes and her son and their attorney? Why wasn't binding arbitration offered to Ms. Hayes instead of thrust upon her in the lobby on the day she arrived? Who would not feel pressured, sitting in the lobby, presumably in a wheel chair or on a gurney, coming from the hospital in an ambulance being asked to sign a stack of papers so you could be admitted into a nursing home because you were in dire need of care?

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

The Eighth Appellate District Court of Appeals held on page 269 of its decision that, "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 forego her substantive legal rights when she agrees to arbitration. *Morrison v. Circuit City Stores* (C.A. 6, 2003), 317 F.3d 646, 670." The Court went on to say in its decision on page 270, "Under Ohio statute and case law, Ms. Hayes may recover punitive damages and attorney's fees. The arbitration agreement attempts to require her to forego those legal rights. Because the arbitration agreement requires Ms. Hayes to give up her legal rights to a jury, punitive damages, and attorney's fees, it is substantively unconscionable."

The Court went on to say at page 270-271:

In addition to being substantively unconscionable, the agreement is also procedurally unconscionable. Ms. Hayes was a 94-year-old woman with no business or contract experience. The nursing home, as a corporation whose lawyers drafted the agreement, had all of the bargaining power. No one explained the terms to Ms. Hayes, including the fact that she could alter the agreement. Although the agreement indicated that she could cancel, that information was listed among a myriad of terms, and there were numerous forms for her to fill out. Also, there were not alternative sources of supply for Ms. Hayes -- finding a quality nursing home is difficult.

The Court also found that there was no meeting of the minds and that Ms. Hayes gave up her

right to a trial and received nothing in return. The Court held on page 271 of its opinion, “Ms. Hayes signed documents she felt she had to sign in order to be admitted to the nursing home, including an arbitration agreement that we find to be substantively and procedurally unconscionable. Accordingly, we sustain this assignment of error.”

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

Arbitration may be appropriate between sophisticated business people and/or corporations. However, Courts throughout Ohio have been troubled by the notion of imposing these agreements on vulnerable nursing home residents, especially when they receive nothing in return, the terms were never explained to them, they had no experience with contracts and the agreements were presented

at the time of admission, making it seem as if the arbitration agreement was a requirement of admission.

Courts nationwide have held similar arbitration clauses unenforceable.

In *Hooters of Am., Inc. v. Phillips*, (1999) 173 F.3d 933, the Court stated that a one-sided arbitration clause that takes away numerous substantive rights and remedies of employee under Title VII is so egregious as to constitute a complete default of employer's contractual obligation to draft arbitration rules in good faith.

In *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, (1992) 173 Ariz. 148, 840 P.2d 1013, the Court stated that an arbitration clause was unenforceable because it required a patient to arbitrate a malpractice claim and to waive the right to a jury trial and was beyond the patient's reasonable expectations where the drafter inserted a potentially advantageous term requiring the arbitrator of malpractice claims to be a licensed medical doctor.

The case of Howell v. NHC Healthcare-Fort Sanders, Inc., 109 S.W.3d 731 (Tenn. Ct. App. 2003), is also directly on point. In that case the facts surrounding the execution of the agreement militated against enforcement. The Trial Court found Ms. Howell had to be placed in a nursing home expeditiously, and that the admission agreement had to be signed before this could be accomplished. Moreover, Mr. Howell had no real bargaining power. Howell's educational limitations were obvious, and the agreement was not adequately explained regarding the jury trial waiver. The circumstances in that case demonstrate that Larkin [the admissions coordinator] took it upon herself to explain the contract, rather than asking the resident to read it, and that her explanation did not mention, much less explain, that he was waiving a right to a jury trial if a claim was brought against the nursing home. In that case the defendant seeking to enforce the arbitration

provision had the burden of showing the parties "actually bargained over the arbitration provision or that it was a reasonable term considering the circumstances." Given the circumstances surrounding the execution of that agreement, and the terms of that agreement, the Court found that the appellant had not demonstrated that the parties bargained over the arbitration terms, or that it was within the reasonable expectations of an ordinary person.

As stated by the Ohio Supreme Court in *Branham v. Cigna Healthcare*, (1998) 81 Ohio St. 3d 388, 390 692 N.E. 2d 137, 140, "While the law of this state favors arbitration, Council of Smaller Enterprises, *infra*, 80 Ohio St. 3d [661] at 666, 687 N.E.2d [1352] at 1356; Schaefer v. Allstate Ins. Co. (1992), 63 Ohio St. 3d 708, 711-712, 590 N.E.2d 1242, 1245, not every arbitration clause is enforceable. R.C. 2711.01(A); Schaefer, 63 Ohio St. 3d 708, 590 N.E.2d 1242." (emphasis added).

As Justice Cook stated in the Dissent in, *Williams v. Aetna Fin. Co.*, (1998) 83 Ohio St. 3d 464, 1998 Ohio 294, 700 N.E.2d 859, though state and federal legislation favors enforcement of agreements to arbitrate, both O.R.C. §2711.01(A) and Section 2, Title 9, U.S. Code permit a court to invalidate an arbitration clause on equitable or legal grounds that would cause any agreement to be revocable. One such ground is unconscionability.

'Unconscionability has generally been recognized to include 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.' Williams v. Walker Thomas Furniture Co. (C.A.D.C.1965), 121 U.S. App. D.C. 315, 350 F.2d 445,449." Lake Ridge Academy v. Carney (1993), 66 Ohio St. 3d 376, 383, 613N.E.2d 183, 189. Accordingly, unconscionability has two prongs: a procedural prong, dealing with the parties' relation and the making of the contract, and a substantive prong, dealing with the terms of the contract itself. Both prongs must be met to invalidate an arbitration provision.

In explaining the analogies between this case and Patterson, the majority appears to stress the disparity of bargaining power between the parties and arbitration costs as reasons for nullifying the agreement to arbitrate as unconscionable. These factors,

however, if by themselves deemed to render arbitration provisions of a contract unconscionable, could potentially invalidate a large percentage of arbitration agreements in consumer transactions.

The disparity of bargaining power between Williams and ITT would be one factor tending to prove that the contract was procedurally unconscionable. A finding of procedural unconscionability, or that the contract is one of adhesion, however, requires more. "Black's Law Dictionary (5 Ed.1979) 38, defines a contract of adhesion as a 'standardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. * * * ' " Sekeres v. Arbaugh (1987), 31 Ohio St. 3d 24, 31, 31 Ohio B. Rep. 75, 81, 508 N.E.2d 941, 946947 (H. Brown, J., dissenting), citing Wheeler v. St. Joseph Hosp. (1976), 63 Cal. App. 3d 345, 356, 133 Cal. Rptr. 775, 783; Std. Oil Co. of California v. Perkins (C.A.9, 1965), 347 F.2d 379, 383. See, also, Nottingham Homeowners' Assn., Inc. v. Darby (1987), 33 Ohio St. 3d 32, 37, 514 N.E.2d 702, 707, fn. 7.

Appellant talks on page 10 of its Brief about "lack of capacity". Appellee is not arguing that Florence Hayes was incompetent. Appellee is arguing that the subject Arbitration Clause was Procedurally and Substantively unconscionable and therefore unenforceable.

E. Proposition of Law No. 2.

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

As stated above, the Eighth Appellate District Court of Appeals clearly laid out its reasons for finding that the subject agreement was substantively unconscionable. The Eighth Appellate District Court of Appeals held in this case at page 269 that, "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 forego her substantive legal rights when she agrees to arbitration. *Morrison v. Circuit City Stores* (C.A. 6, 2003), 317 F.3d 646, 670.” The Court went on to say in its decision on page 270, “Under Ohio statute and case law, Ms. Hayes may recover punitive damages and attorney’s fees. The arbitration agreement attempts to require her to forego those legal rights. Because the arbitration agreement requires Ms. Hayes to give up her legal rights to a jury, punitive damages, and attorney’s fees, it is substantively unconscionable.”

As stated in *Small* above, “Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability. However, courts examining whether a particular limitations clause is substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability. See Chanda, supra; Berjian, supra.” *Small* at 71.

With respect to the substantive prong, dealing with the terms of the contract itself, the arbitration clause is a classic boilerplate agreement.

There is nothing in the agreement about the benefits of a jury trial.

There is nothing in the agreement about whether or not juries are biased against nursing homes.

According to the plain language of the arbitration clause, there is no right to appeal the arbitration award unless there is evidence of fraud on the part of the arbitrators. Therefore, not only is Appellant Oakridge trying to deprive Appellee Florence Hayes of her right to a trial by jury, it is

also trying to deprive her of her right to appeal.

The Agreement requires the arbitration to be conducted by members of the American Arbitration Association pursuant to the rules of the American Arbitration Association. However, as documented above, the American Arbitration Association, in collaboration with the American Medical Association and the American Bar Association, published a report which opposes the enforcement of a binding arbitration clause for claims of malpractice, if the agreement was entered into before the malpractice claim arose. Further, the American Arbitration Association will not arbitrate a dispute when one party disputes the validity of the Arbitration clause.

There is nothing in the agreement that tells Florence Hayes that she cannot subpoena witnesses, if her case is stayed and not in suit.

There is nothing in the agreement that tells Florence Hayes that she is waiving her right to propound interrogatories to Defendant The Oakridge Home.

There is nothing in the agreement that tells Florence Hayes that she is waiving her right to Request Documents from Defendant the Oakridge Home, including copies of protocols and/or procedures and/or rules and/or regulations relative to patient care, and copies of the personnel files of the employees who cared for Florence Hayes while she was a resident of the nursing home and/or provided her with substandard care and caused her harm.

The Arbitration clause deprives Florence Hayes of all of her rights to which she is entitled, once her case is in suit and, in exchange, gives her nothing.

There is no question that the subject Arbitration Clause is substantively unconscionable.

Both prongs are met in this case.

The subject Arbitration Clause should not be enforced.

F. The subject Arbitration Clause is unenforceable as there was no meeting of the minds and no consideration.

The Eighth Appellate District Court of Appeals found that there was no meeting of the minds in this case. A meeting of the minds did not take place. Therefore, the contract is unenforceable. The Court of Appeals also found that there was no meeting of the minds and no consideration. Perhaps the most important finding by the Eighth Appellate District Court of Appeals is that Florence Hayes received nothing in exchange for giving up her right to a jury trial. If the arbitration agreement were to be enforced in this case, Florence Hayes would have no ability to conduct discovery, no subpoena power, no right to propound written discovery requests, no ability to seek the trial court's intervention when the nursing home refused to comply with Plaintiff's discovery requests, and no right to a trial by jury.

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

In *Maestle v. Best Buy*, (2005), 2005 Ohio 4120, 2005 Ohio App. LEXIS 3759, the Eighth Appellate District Court of Appeals held (emphasis added):

Nevertheless, courts may not force parties to arbitrate disputes if the parties have not entered into a valid agreement to do so. See Boedeker v. Rogers (1999), 136 Ohio App. 3d 425, 429; Painesville Twp. Local School District v. Natl. Energy Mgt. Inst. (1996), 113 Ohio App. 3d 687, at 695. As the Supreme Court of the United States has stressed, "arbitration is simply a matter of contract between the parties; it is a way to resolve disputes - but only those disputes - that the parties have

agreed to submit to arbitration.” *First Options of Chicago, Inc. v. Kaplan* (1995), 514 U.S. 938, 943.

The Court went on to hold:

When there is a question as to whether a party has agreed to an arbitration clause, there is a presumption against arbitration. *Spalsbury v. Hunter Realty, Inc., et al.* (Nov. 30, 2000), Cuyahoga App. No. 76874, citing *Council of Smaller Enters. v. Gates, McDonald & Co.* (1997), 80 Ohio St. 3d 661. An arbitration agreement will not be enforced if the parties did not agree to the clause. *Henderson vs. Lawyers Title Insurance Corp.*, Cuyahoga App. No. 82654, 2004-Ohio-744, citing *Harmon v. Phillip Morris Inc.* (1997), 120 Ohio App. 3d 187, 189.

The issue of whether or not a party has agreed to arbitrate is determined on the basis of ordinary contract principles. *Kegg v. Mansfield* (Jan. 31 2000), Stark App. No. 1999 CA 00167, citing *Fox v. Merrill Lynch & Co., Inc.* (1978), 453 F.Supp. 561. See, also, *Council of Smaller Enters.*, supra; *AT&T Technologies, Inc. v. Communications Workers of America* (1986), 475 U.S. 643. In order to have a valid contract, there must be a “meeting of the minds” on the essential terms of the agreement, which is usually demonstrated by an offer, acceptance, and consideration. *Reedy v. The Cincinnati Bengals, Inc.* (2001), 143 Ohio App. 3d 516, 521. An offer is defined as “the manifestation of willingness to enter in a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” *Id.* Further, the essential terms of the contract, usually contained in the offer, must be definite and certain. *Id.*

“Ohio law continues to hold that the parties bind themselves by the plain and ordinary language used in the contract unless those words lead to a manifest absurdity.” *Convenient Food Mart, Inc. v. Countrywide Petroleum Co., et al.*, Cuyahoga App. No. 84722, 2005-Ohio-1994. This is an objective interpretation of contractual intent based on the words the parties chose to use in the contract. *Id.*, citing *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St. 3d 130, paragraph one of the syllabus.

Florence Hayes never intended to give away her right to a trial by jury relative to some claim that did not even exist when she signed the admission agreement.

She just wanted someone to take care of her.

Further, if the subject arbitration clause is enforced, it would absolutely lead to manifest absurdity. It would lead to the deprivation of Florence Hayes’ right to a trial by jury in exchange for

nothing. Florence Hayes' right to a trial by jury should not be taken away because she signed admission documents so she could be admitted to a nursing home. If the subject arbitration clause is enforced, the employees of the nursing home could drop Florence Hayes down a flight of stairs or allow her to fall off the toilet and crack her head causing permanent brain damage and her only recourse would be arbitration. No matter how atrocious the care was that she received, no matter how negligent the employees of the Oakridge Home were, she would never be allowed to sue the Oakridge Home and hold it accountable.

Further, no consideration is present for the arbitration clause. As cited above, an enforceable contract requires consideration. A contract without consideration is unenforceable. Further, a promise to do something that the law already requires, does not furnish consideration. *International Shoe Company v. Carmichael*, (Fla. 1st DCA 1959), 114 So.2d 436. Thus, because the nursing home is already obligated, under Federal and State law, to provide quality care, it fails to provide any consideration for the arbitration clause.

The Oakridge Home gave Florence Hayes nothing in exchange for her very valuable right to a trial by jury. The Arbitration Clause is unenforceable.

G. The subject arbitration clause violates Federal Law.

The subject arbitration clause is a violation of Federal Law. Appellant Oakridge is not permitted to require additional consideration from a resident in exchange for admission to their nursing home pursuant to 42 U.S.C. § 1396r(c)(5)(A)(iii) which provides that, in the case of an individual who is entitled to medical assistance for nursing facility services a nursing facility must

not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter, any gift, money donation, or other consideration as a precondition of admitting (or expediting the admission of)

the individual to the facility or as a requirement for the individual's continued stay in the facility.

Further, federal regulations provide:

In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility.

42 C.F.R. § 483.12(d)(3).

Both the Medicare and Medicaid programs mandate that participating facilities must accept program payments as "full payment." 42 U.S.C. § 1395r(c)(5)(A)(iii). Because Florence Hayes already had the right to a jury trial, prior to signing the admission agreement, requiring her to sign an agreement giving up that right, is an unauthorized additional consideration.

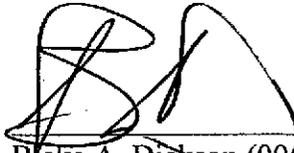
In a January 2003 memorandum, the Centers for Medicare & Medicaid Services (CMS) addressed the agency's position on binding arbitration. CMS states "Under both programs, however, there may be consequences for the facility where facilities attempt to enforce these agreements in a way that violates Federal requirements." CMS offered guidance to State Survey Agency Directors -- that if a facility either retaliates against or discharges a resident due to the resident's failure to agree to or comply with a binding arbitration clause, then the state and region may start an enforcement action against the facility.

IV. CONCLUSION.

For the reasons discussed above, Appellee respectfully requests that this Honorable Court affirm the decision of The Eighth District Court of Appeals finding the Arbitration Clause at issue unenforceable.

Respectfully submitted,
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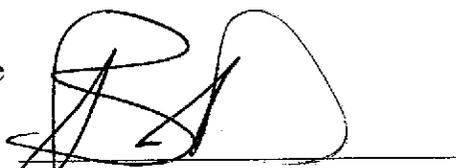
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Appellee's Merit Brief was sent by ordinary U.S. Mail **this 5th day of November, 2008**, to the following:

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