IN THE COURT OF COMMON PLEAS
JEFFERSON COUNTY, OHIO

PAMELA J. BELL, as the personal representative of the Estate of William J. Bell (deceased),	)	CASE NO. 10-CV-00284
	)	JUDGE JOSEPH J. BRUZZESE, JR.
Plaintiff,	)	PLAINTIFF PAMELA J. BELL'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STAY.
vs.	)	
DIXON HEALTH CARE CENTER, et al.,	)	
Defendants.	)	

Now comes Plaintiff Pamela J. Bell, as the personal representative of the Estate of William J. Bell (deceased), by and through her attorneys, Blake A. Dickson of The Dickson Firm, L.L.C. and Carl Bettinger of the law firm of Shapiro, Bettinger & Chase, L.L.P., and hereby opposes the Motion to Stay filed by Defendants Dixon Health Care Center, Dixon Health Care Center, Inc., Essex Healthcare Corporation, Atrium Centers, L.L.C., and Atrium Living Centers, Inc. (hereafter referred to as Defendants "Essex").

Defendants Essex have moved this Honorable Court, pursuant to O.R.C. § 2711, for a permanent stay of this case, pending binding arbitration. The Defendants have asked this Court to forever deny Plaintiff Pamela J. Bell and the Estate of William J. Bell and William J. Bell's family their constitutional right to a jury trial, in favor of the woefully inadequate alternative of binding arbitration.

Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion to Stay.

I. FACTS.

Decedent William J. Bell was admitted to the Dixon Health Care Center Nursing Home on January 17, 2008. On May 14, 2009, Decedent William J. Bell was at the Dixon Health Care Center as a resident. He made a loud noise in the dining room of the nursing home. He was

taken to his room, where his pulse was very low. He was rushed to Trinity Medical Center by ambulance where he vomited profusely. Ultimately, a plastic bag was removed from his throat. It appears that this plastic bag was shoved down his throat at the Dixon Health Care Center. He was subsequently taken to Acuity Specialty Hospital where he died on June 3, 2009 at the age of 77. William J. Bell is survived by his daughters, Pamela J. Bell and Patricia Lynn Haines and their families, his sons, William J. Bell, Jr. and Richard Bell and their families, and his granddaughters, Beverly DeFranco Brown and Nicole Lynn DeFranco.

II. LAW AND ARGUMENT.

A. There is no basis to stay the wrongful death claims.

Plaintiff Pamela J. Bell, as the personal representative of the Estate of William J. Bell (deceased), is pursuing both wrongful death claims and survivorship claims in this case. The Ohio Supreme Court held in *Peters v. Columbus Steel Castings Co.,* (2007), 115 Ohio St.3d 134, 2007-Ohio-4787, in ¶1 of the Syllabus that, "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 the result of the death, even though the same nominal party prosecutes both actions." The Court went on to say, in numbered ¶2 of the Syllabus, "A decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims." The Ohio Supreme Court held in its conclusion in the *Peters* case, at ¶20, "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' 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. As such, the judgment of the

court of appeals is hereby affirmed."

The *Peters* case is the controlling authority on the issue of arbitration clauses as they apply or do not apply in wrongful death cases. Pursuant to *Peters* the arbitration clause in this case is not binding on William J. Bell's beneficiaries. There is no basis to stay the wrongful death claims in this case. As Lynn Haines will testify to at the hearing, she signed the arbitration clause, pursuant to a Power of Attorney, given to her by her father. She signed on behalf of her father. She did not sign for herself. She did not sign for her family. The Estate of William J. Bell (deceased) is not a party to any arbitration clause. No member of William J. Bell's family is a party to any arbitration clause. As a result, Plaintiff respectfully requests that this Court deny the Motion to Stay, filed by the Defendants, with respect to the wrongful death claims in this case.

B. The subject arbitration clause is unenforceable as there was no meeting of the minds and no consideration.

In Maestle v. Best Buy, 2005-Ohio-4120 (August 11, 2005), the Eighth Appellate District Court of Appeals held:

> 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 (emphasis added):

> **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.
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> "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.

The Arbitration Clause in this case was signed by Patricia Lynn Haines pursuant to a Power of Attorney given to her by her father William J. Bell. The subject Arbitration Clause was attached to Defendants' Motion to Stay as Exhibit "B". A copy of the clause is attached hereto for the Court's convenience and also identified as Exhibit "B". The clause is not signed by the Defendants.

As she will testify to at the hearing on Monday, November 1, 2010, when Patricia Lynn Haines signed this clause on behalf of Decedent William J. Bell, it was never her intention to give away his right to a trial by jury relative to future claims of malpractice. Malpractice was never discussed. There was no meeting of the minds as far as the arbitration clause is concerned. Further, as will be discussed below - there was no consideration. The Defendants did not sign the clause so they are not bound by it. Further, if the subject arbitration clause is enforced, it

would absolutely lead to manifest absurdity. It would lead to the deprivation of William J. Bell's right to a trial by jury, in exchange for nothing.

The right to vote and the right to trial by jury are the two most sacred rights that any citizen in this country has. Neither should be taken away without careful consideration. William J. Bell's right to a trial by jury should not be taken away because Patricia Lynn Haines signed admission documents on his behalf so he could be admitted to a nursing home.

Further, no consideration is present for the arbitration clause. An enforceable contract requires consideration. A contract without consideration is unenforceable. A promise to do something that the law already requires, does not furnish consideration. International Shoe Company v. Carmichael, 114 So.2d 436 (Fla. 1st DCA 1959). 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. Further, because the Defendants did not sign the Arbitration Clause, they are not bound by it, So the Defendants gave up nothing and yet they seek to take William J. Bell's right to a jury trial away from him.

O.R.C. §1335.05 provides in part (emphasis added);

> **§ 1335.05. Certain agreements to be in writing**
>
> No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, **or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.**

It is clear that the Arbitration Clause was to be performed more than a year after it was allegedly entered into. The Arbitration Clause was signed in January of 2008 and the Defendants are

seeking to enforce it in 2010. However, since the Defendants did not sign the clause, they are not bound by it. Decedent William J. Bell could not impose the clause on the Defendants. The Arbitration Clause in this case is a purely one sided agreement that takes away William J. Bell's right to a trial by jury and gives him nothing in return.

C. The Arbitration Clause is void as a matter of law.

Attached hereto as Plaintiff's Exhibit "A" is a letter dated April 2, 2008, from attorney Winston M. Ford, General Counsel of the Ohio Department of Health (hereafter referred to as "ODH"), explaining the position of the Ohio Department of Health regarding binding arbitration. On page 1, the letter references ODH's decision to "cite facilities with a licensure deficiency if they enter into binding arbitration agreements with residents . . ." As the letter indicates O.R.C. §3721.13(A)(15) states that a resident has the right to exercise all "civil rights", which rights the resident may not waive, as provided by O.R.C. §3721.13(C).

O.R.C. 3721.13(A)(15) guarantees to all Nursing Home residents:

> (15) The right to exercise all civil rights, unless the resident has been adjudicated incompetent pursuant to Chapter 2111. of the Revised Code and has not been restored to legal capacity, as well as the right to the cooperation of the home's administrator in making arrangements for the exercise of the right to vote;

O.R.C. 3721.13(C) provides;

> (C) Any attempted waiver of the rights listed in division (A) of this section is void.

As stated by the General Counsel for the Ohio Department of Health in his letter dated April 2, 2008, a Nursing Home resident's civil rights certainly include the rights set forth in O.R.C. 3721.17. O.R.C. 3721.17(I) provides;

> (I)(1)(a) 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.

O.R.C. 3721.10 to O.R.C. 3721.17 set forth the rights guaranteed to nursing home residents. Plaintiffs are alleging in this case that the Defendants violated Decedent William J. Bell's rights as set forth in O.R.C. 3721.10 to 3721.17. The Arbitration Clause in this case is an attempt on the part of the nursing home to induce Decedent William J. Bell to waive his right to pursue a cause of action against the Defendants. Pursuant to O.R.C. §3721.13(C) (emphasis added), **"Any attempted waiver of the rights listed in division (A) of this section is void."** Therefore, since the Arbitration Clause in this case attempts to induce Decedent William J. Bell to waive one of his rights, as listed in Section (A) of O.R.C. §3721.13, the clause is void as a matter of law and Defendant's Motion to Stay should be denied.

The letter from the General Counsel for the Ohio Department of Health expresses the concern of the Ohio Department of Health that clauses like the one at issue in this case are designed to limit the liability of the facility and limit the facility's responsibility to provide adequate and appropriate medical treatment and nursing care. On page 2, Mr. Ford expresses ODH's concern that the placement of a nursing home resident in a long term care facility is a "hectic, stressful, and overwhelming experience," and. as a result, "residents and their loved ones may not have the time to participate in protracted negotiations regarding the terms of admission agreements." That is exactly what happened in this case as Patricia Lynn Haines will testify to. She went to the facility, was shown a large stack of papers, the papers were not read to her nor explained to her, she was shown where to sign and she did. She had no idea she was giving up her father's constitutional right to a trial by jury if he was ultimately the victim of malpractice or assault. Further, it was never her intention to do so.

The letter expresses the concern of the ODH that the agreements are frequently contracts of adhesion, which are presented on a take it or leave it basis. That is exactly what happened in

this case. Patricia Lynn Haines made no changes to the Arbitration Clause. It was part of a package of materials that she understood to be admission materials.

The ODH is concerned that these agreements are often lengthy and complicated. The ODH has concluded that, "Clearly, the use of binding arbitration provisions and other statutory waiver clauses in resident admission agreements benefits facilities at the expense of the residents that they are supposed protect." All of these concerns are relevant to the arbitration clause in this case. There was absolutely no benefit to William J. Bell, as the Arbitration Clause was not signed by the Defendants, so it was not enforceable against the Defendants. This was a one sided clause that exclusively benefitted the Defendants.

The Ohio Supreme Court has only addressed the enforceability of arbitration clauses contained in nursing home admission agreements in one case, *Hayes v. The Oakridge Home*, (2009) 122 Ohio St. 3d 63, 2009 Ohio 2054, 908 N.E. 2d 408. The Ohio Supreme Court overruled the decision of the Eighth Appellate District Court of Appeals in that decision, and enforced the arbitration clause in that case. However, the Court did not change the law in the area. Instead, the Ohio Supreme Court in *Hayes* confirmed that arbitration clauses, like the one in this case, can be found to be unenforceable, if they are procedurally and substantively unconscionable. The arbitration clause in this case is both procedurally and substantively unconscionable, as will be discussed in detail below. In the *Hayes* case, Justice Pfeiffer said in his dissent;

> I dissent for several reasons. First, I would hold that any nursing-home preadmission arbitration agreement is unconscionable as a matter of public policy. Alternatively, I would hold that the specific agreements in this case were unconscionable as a matter of public policy. More narrowly, I would hold that the arbitration agreements in this case were both substantively and procedurally unconscionable.

Hayes v. The Oakridge Home, (2009) 122 Ohio St. 3d 63, 72, 2009 Ohio 2054, 908 N.E. 2d 408,

417. Justice Pfeiffer went on to say in his dissent (emphasis added);

> In its analysis of the details of this particular matter, the majority ignores the big picture. This is an important case. This court should declare all nursing home preadmission arbitration agreements unenforceable as a matter of public policy. **Arbitration clauses that limit elderly or special-needs patients' access to the courts for claims of negligence or abuse in their care should simply not be honored or enforced by the courts of this state.** The General Assembly has enunciated a public policy in favor of special protection of nursing-home residents through its passage of the Ohio Nursing Home Patients' Bill of Rights, SUPREME COURT OF OHIO *R.C. 3721.10 et seq.* "[W]here there is a strong public policy against a particular practice, a contract or clause inimical to that policy will likely be declared unconscionable and unenforceable unless the policy is clearly outweighed by some legitimate interest in favor of the individual benefitted by the provision." 8 Williston on Contracts (4th Ed.1998) 43, Section 18:7.

Hayes, 122 Ohio St. 3d at 72, 2009 Ohio 2054, 908 N.E. 2d at 417. There is no legitimate interest that outweighs the public policy in favor of protecting nursing home residents. Nursing Homes attempt to impose these clauses on their residents to protect themselves from liability. Justice Pfeiffer went on to say;

> A public policy against preadmission arbitration agreements is reflected in the Ohio Nursing Home Patients' Bill of Rights. Further, this court should recognize a public policy against preadmission arbitration agreements based upon the practical inappropriateness of such agreements for nursing-home residents.
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> By enacting the Ohio Nursing Home Patients' Bill of Rights, *R.C. 3721.10 et seq.*, the General Assembly has demonstrated particular interest in ensuring the rights of nursing-home patients and has provided statutory remedies for those patients whose rights are violated. *R.C. 3721.13(A)* specifically enumerates 32 important rights, including the right "to a safe and clean living environment" (*R.C. 3721.13(A)(1)*), 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" (*R.C. 3721.13(A)(2)*), "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" (*R.C. 3721.13(A)(3)*), the right "to have all reasonable requests and inquiries responded to promptly" (*R.C. 3721.13(A)(4)*), the right "to have clothes and bed sheets changed as the need arises, to ensure the resident's comfort or sanitation," (*R.C. 3721.13(A)(5)*), and the right "to voice grievances and recommend changes in policies and services to the home's staff, to employees of the department of health, or to other persons not

associated with the operation of the home, of the resident's choice, free from restraint, interference, coercion, discrimination, or reprisal." (*R.C. 3721.13(A)(31)*).

R.C. 3721.17 contains the enforcement provision of the Ohio Nursing Home Patients' Bill of Rights. Pursuant to *R.C. 3721.17(I)(1)(a)*, "[a]ny 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 use of injunctive relief to achieve a proper level of care is clearly contemplated by the General Assembly. The General Assembly calls for the award of attorney fees when residents resort to injunctive relief. In cases "in which only injunctive relief is granted, [the court] may award to the prevailing party reasonable attorney's fees limited to the work reasonably performed." *R.C. 3721.17(I)(2)(c)*.

R.C. 3721.17 also allows residents to employ other methods to ensure their rights. Those include reporting violations of the Ohio Nursing Home Patients' Bill of Rights to the grievance committee established at the home pursuant to *R.C. 3721.12(A)(2)*. The statute requires that a combination of residents, sponsors, or outside representatives outnumber nursing home staff two to one on such committees. Another statutory option for residents is to pursue a claim through the Department of Health. *R.C. 3721.031*.

The General Assembly has given nursing-home residents rights and a multitude of ways to preserve those rights. An agreement to arbitrate all disputes flies in the face of the statutory protections of nursing-home residents and should be found unconscionable as a matter of public policy.

Hayes, 122 Ohio St. 3d 63, at 74-75, 2009 Ohio 2054, 908 N.E. 2d at 417-418. Justice Pfeiffer goes on to say;

The tactics employed by Oakridge and countenanced by the majority in this case are appalling. This court today provides a roadmap for nursing-home facilities to avoid the responsibilities of the Ohio Nursing Home Patients' Bill of Rights.

Is it really acceptable to shove an arbitration agreement under the nose of a 95-year-woman, newly arrived at the nursing home, as she goes through the signing frenzy of the admission process? Does the majority really believe that Florence Hayes knowingly and voluntarily gave up her statutory rights through a negotiation process?

The majority suggests that the Constitution demands today's result and that it is this court's duty to defend the right to private contract. The majority writes: "Our citizens do not lose their constitutional rights and liberties simply because they age." Yes, somewhere in the penumbra of the penumbra of the right to contract, if you squint just so, you can make out what the majority identifies today: the right of the elderly to be "taken in" by nursing homes. This court's corollary right for nursing homes is the right to say, "You signed it. Live with it!

> Ohio Nursing Home Patients' Bill of Rights? You waived it! Your fundamental constitutional rights? You waived them too! And don't forget to remind your son that we need next month's check for $ 5,500 by the first."

Hayes, 122 Ohio St. 3d at 79, 2009 Ohio 2054, 908 N.E. 2d at 422-423.

William J. Bell's right to sue the nursing home for its violation of his statutory rights cannot be waived. As a result, the Arbitration Clause is void as a matter of law.

D. The AMA, the ABA and the AAA have all come out against clauses like the one at issue in this case.

As the Court tries to determine if the arbitration clause at issue in this case is unconscionable, Plaintiff urges the Court to consider that the American Medical Association, the leading national organization of doctors and other health care providers, the American Bar Association, the leading national organization of lawyers and the American Arbitration Association, the leading national organization of Arbitrators have all come out against arbitration clauses like the one at issue in this case.

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

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1 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

Process Protocol for Resolution of Health Care Disputes." that; "**The agreement to use ADR should be knowing and voluntary**. **Consent to use an ADR process should not be a requirement for receiving emergency care or treatment. In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so <u>after a dispute arises</u>**." (Emphasis added.)

The arbitration clause at issue in the within case clearly violates the guidelines set forth above. It should not be enforced. It cannot be over-emphasized that the American Arbitration Association, the American Bar Association and the American Medical Association, the leading associations involved in alternative dispute resolution, law, and medicine, have come together and issued a joint report which argues against enforcing arbitration clauses like the one at issue in this case.

The arbitration clause in this case was entered when Decedent William J. Bell first entered the nursing home, before he had a claim. According to the report cited above, the clause should not be enforced. The arbitration clause in this case was not entered into knowingly, nor was it entered into voluntarily, as will be demonstrated below.

E. There is currently legislation making its way through Congress to outlaw these clauses nationwide.

These binding arbitration clauses buried in nursing home admission agreements are such a bad idea, they are so unfair and so abhorrent, that there is currently bipartisan legislation making its way through Congress to pass a Federal Law that would outlaw them nationwide. This is relevant to the Court's determination as to whether these clauses are unconscionable. Two bills have been introduced in Congress to stem the abusive practice of forced arbitration. The bipartisan Arbitration Fairness Act (S. 931 / H.R. 1020), sponsored by Sen. Russ Feingold (D-Wis.) and Rep. Hank Johnson (D-Ga.), would ensure that the decision to arbitrate is made

voluntarily and **after a dispute has arisen**, so corporations cannot manipulate the arbitration system in their favor at the expense of consumers and employees. The bipartisan Fairness in Nursing Home Arbitration Act (S. 512 / H.R. 1237), introduced by Sens. Mel Martinez (R-Fla.) and Herb Kohl (D-Wis.) and Rep. Linda Sanchez (D-Calif.), would eliminate forced arbitration clauses in nursing home contracts. The Fairness in Nursing Home Arbitration Act of 2008 was introduced on May 22, 2008, in the U.S. House. If this bill is passed, Nursing Home operators would be unable to subject residents and prospective residents to binding arbitration. A companion bill was introduced in the Senate in April of this year. The Senate Judiciary Committee passed the bill on Thursday, September 11, 2008. The very existence of this legislation certainly speaks to the unconscionable nature of these clauses.

F. In addition to being void, the Arbitration Clause is also both procedurally and substantively unconscionable.

Even if the Court does not find the arbitration clause in this case void as a matter of law since it seeks to divest William J. Bell of the rights that are guaranteed to him by the Nursing Home Bill of Rights as contained in the Ohio Revised Code, the Court should still deny Defendant's Motion to Stay, in its entirety, since the arbitration clause in this case is both procedurally and substantively unconscionable.

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, these clauses are now being used in transactions between large corporations and ordinary consumers. This has been a significant cause for concern for a number of courts that have considered this issue. The clause at issue in this case is being applied in a negligence action. This should be of particular concern as negligence 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 best left to a jury acting as the fact finder. As Justice Lanzinger said in her concurring opinion in *Hayes*;

> At least one appellate court has expressed unease over applying arbitration clauses, which initially were designed to save time and money for sophisticated business people involved in contract disputes, to situations where nursing-home residents give up court trials in negligence actions. *Small v. HCF of Perrysburg, Inc., 159 Ohio App.3d 66, 2004 Ohio 5757, 823 N.E.2d 19*. Although the General Assembly has not prohibited use of arbitration agreements in nursing-home settings, there is movement at the federal level to do so. Two recently introduced Congressional bills would invalidate pre-dispute arbitration agreements between nursing homes and their residents. H.R. 1237, 111th Cong. (introduced Feb. 26, 2009); S. 512, 111th Cong. (introduced Mar. 3, 2009).

Hayes, 122 Ohio St. 3d at 72-73, 2009 Ohio 2054, 908 N.E. 2d at 417.

The majority in *Hayes v. The Oakridge Home*, (2009) 122 Ohio St. 3d 63, 72, 2009 Ohio 2054, 908 N.E. 2d 408, 417 held that an arbitration clause contained in a nursing home admission agreement can be held to be unenforceable, if it is found to be procedurally and substantively unconscionable.

As noted above, an arbitration agreement is enforceable unless grounds exist at law or in equity for revoking the agreement. *R.C. 2711.01(A)*. Unconscionability is a ground for revocation of an arbitration agreement. *Taylor Bldg., 117 Ohio St. 3d 352, 2008 Ohio 938, P33, 884 N.E.2d 12*. In *Taylor*, we recently explained unconscionability in this context as follows:

> "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.'" *Lake Ridge Academy v. Carney (1993), 66 Ohio St.3d 376, 383, 613 N.E.2d 183*, quoting *Williams v. Walker-Thomas Furniture Co. (C.A.D.C.1965), 350 F.2d 445, 449, 121 U.S. App. D.C. 315*; see also *Collins v. Click Camera & Video, Inc. (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294*. The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable. See generally *Ball v. Ohio State Home Servs., Inc., 168 Ohio App. 3d 622, 2006 Ohio 4464, 861 N.E.2d 553*; see also *Click Camera, 86 Ohio App.3d at 834, 621 N.E.2d 1294*, citing White & Summers, Uniform Commercial Code (1988) 219, Section 4-7 ('One must allege and prove a "quantum" of both prongs in order to establish that a particular contract is unconscionable')." *Taylor Bldg., 117 Ohio St. 3d 352, 2008 Ohio 938, P34, 884 N.E.2d 12*.

Hayes, 122 Ohio St. 3d at 67, 2009 Ohio 2054, 908 N.E. 2d at 412. Plaintiff urges this Court to deny Defendants' Motion to Stay by finding that the Arbitration Clause in this case is both procedurally and substantively unconscionable. As Justice Pfeiffer pointed out in his dissent in Hayes;

> The party challenging a contract as unconscionable must prove a quantum of both procedural and substantive unconscionability. *Taylor Bldg. Corp. of Am. v. Benfield, 117 Ohio St. 3d 352, 2008 Ohio 938, P34, 884 N.E.2d 12*. However, substantive and procedural unconscionability need not be present in equal measure in the agreement in question:
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> "'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' (15 Williston on Contracts (3d ed. 1972) § 1763A, pp. 226-227 * * *. In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz v. Found. Health Psychcare Servs., Inc. (2000), 24 Cal.4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669*.
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> In other words, "'[T]he substantive/procedural analysis is more of a sliding scale than a true dichotomy. The harsher the clause, the less "bargaining naughtiness" that is required to establish unconscionability.'" *Tillman v. Commercial Credit Loans, Inc. (2008), 362 N.C. 93, 103, 655 S.E.2d 362*, quoting *Tacoma Boatbuilding Co. v. Delta Fishing Co. (W.D.Wash.1980), 28 U.C.C.Rep.Serv. (CBC) 26, 37, fn. 20*. The seriousness of the substantive unconscionability of the arbitration agreements in this case requires proof of only minor procedural unconscionability.

Hayes, 122 Ohio St. 3d 63 at 76-77, 2009 Ohio 2054, 908 N.E. 2d 420-421.

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

> **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.

As stated by the Ohio Supreme Court in Branham v. Cigna Healthcare, 81 Ohio St. 3d 388, 390 692 N.E. 2d 137, 140 (1998), "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., 83 Ohio St. 3d 464, 700 N.E.2d 859 (1998), 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, Nottingdale Homeowners' Assn., Inc. v. Darby (1987), 33 Ohio St. 3d 32, 37, 514 N.E.2d 702, 707, fn. 7.

In *Small v. HCF of Perrysburg*, (2004) 159 Ohio App. 3d 66, a case cited in almost every case that has been decided on this issue, since the *Small* opinion was issued, including the Ohio Supreme Court's decision in *Hayes*, 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).

Courts nationwide have held similar arbitration clauses unenforceable.

In Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) 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., 173 Ariz. 148, 840 P.2d 1013 (1992) 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 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.

1. The subject Arbitration Clause is procedurally unconscionable.

As stated in Small, above, "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. The Ohio Supreme Court in Hayes also held;

> In determining whether an arbitration agreement is **procedurally unconscionable,** courts consider "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**."'" (Ellipses sic.) *Taylor Bldg., 117 Ohio St. 3d 352, 2008 Ohio 938, P44, 884 N.E.2d 12*, quoting *Collins v. Click Camera, 86 Ohio App.3d at 834, 621 N.E.2d 1294*, quoting *Johnson v. Mobil Oil Corp. (E.D.Mich.1976), 415 F.Supp. 264, 268*.
>
> Additional factors that may contribute to a finding of procedural unconscionability include the following: '"belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; **knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract**; 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.'" *Taylor Bldg., 117 Ohio St. 3d 352, 2008 Ohio 938, P44, 884 N.E.2d 12*, quoting *Restatement of the Law 2d, Contracts (1981), Section 208, Comment d*.

Hayes, 122 Ohio St. 3d at 67-68, 2009 Ohio 2054, 908 N.E. 2d at 413 (emphasis added).

In terms of age, William J. Bell was 76 years old when he was admitted to the Dixon Health Care Center Nursing Home. At the time that he was being admitted to the Dixon Health Care Center Nursing Home he was coming from Trinity Medical Center where he had been hospitalized. In contrast, the defendants were ageless corporate entities, who, collectively, owned more than twenty (20) nursing homes. (See Rita Chociej Deposition, Page 30). Clearly, the Defendants in this case had an overwhelming advantage with respect the factor of age.

In terms of business acumen and experience, Patricia Lynn Haines will testify that she had no experience with litigation or arbitration. She is not a lawyer. She has no experience drafting and negotiating contracts. The Defendants own more than twenty (20) nursing homes. They have annual revenue in the tens of millions of dollars. At the time that William J. Bell was admitted to the Dixon Health Care Center Nursing Home, the Defendants employed Rita Chociej, whose full time job was meeting with new residents and securing their signature on admissions agreements which contained arbitration clauses. Ms. Chociej did not ask Ms. Haines about her education at the time they allegedly discussed the admissions packet. (Rita Chociej, Depo., Page 53.) She did not ask Ms. Haines if she had any prior business experience or if she had any experience with contracts at the time that she signed the admissions packet. (Rita Chociej, Depo., Page 53.) Further, Rita Chociej testified that it was not her practice to ask either new residents or whoever was signing on their behalf about their education, their prior business experience or their prior experience with contracts at the time she went over the admissions packet. (Rita Chociej, Depo., Page53.) It is clear that the Defendants had all of the relevant

experience and business acumen.

In terms of relative bargaining power, the Defendants owned more than twenty (20) nursing homes. William J. Bell was a 76 year old man who could not care for himself. It is clear that the Defendants had all of the bargaining power.

It is in not in dispute that the Defendants drafted the contract. See Rita Chociej's Deposition Transcript, Page 48.

In terms of whether alterations to the printed terms were possible, it is clear that neither Decedent William J. Bell nor his daughter altered one word of the Arbitration Clause in this case. Further, Rita Chociej testified at her deposition that she could not remember a single resident ever changing a single word of any arbitration clause. (Rita Chociej, Depo., Pages 48-49.) Rita Chociej worked for the Defendants for twenty three (23) years. (Rita Chociej, Depo., Page 21-22.) Rita Chociej further testified that cannot remember anyone ever changing a single word of the entire Admissions Agreement. (Rita Chociej, Depo., Page 49.) Rita Chociej did not tell Ms. Haines that she could change any part of the Admission Agreement. (Rita Chociej, Depo., Page 49.) The arbitration clause in this case was a boilerplate contract of adhesion that was presented to Decedent William J. Bell and his daughter Lynn on a take it leave it basis. The clause was drafted by the Defendants, in its entirety, to help protect the Defendants from liability for malpractice.

In terms of whether the terms were explained, they were not. Patricia Lynn Haines will testify that Rita Chociej held the admissions papers open to the pages where Ms. Haines was to sign and she signed. Ms. Haines did not read the agreement. It was not read to her nor was any part of the agreement explained to her. Further, Ms. Chociej could not have explained the arbitration clause to Ms. Haines as she does not understand it herself. Ms. Chociej does not

know if a jury is involved in an arbitration. ((Rita Chociej, Depo., Page 52.) She does not know what a Motion to Stay is. (Rita Chociej, Depo., Page 52.) She does not know if depositions can be taken in a case referred to binding arbitration. (Rita Chociej, Depo., Page 52.) She does not know if the Dixon Health Care Center has ever sued a resident. (Rita Chociej, Depo., Page 52.) Therefore, there can be no claim that the Arbitration Clause has any mutual benefit. In addition, the arbitration clause is not enforceable against the Defendants as explained above. Further, Rita Chociej, who worked at the Dixon Health Care Center for twenty three (23) years, cannot remember the nursing home ever suing a resident. Clearly, the arbitration clause in this case was drafted for the sole purpose of limiting the nursing home's exposure if it was ever sued by a resident for improper care and/or for assault.

Patricia Lynn Haines will testify that she did not read the admissions packet when she signed it. Ms. Chociej testified at her deposition that she does not remember if Ms. Haines read the admissions packet. (Rita Chociej, Depo., Page 54.) Patricia Lynn Haines will testify that she did not read the arbitration clause when she signed it. Ms. Chociej testified at her deposition that she does not remember if Ms. Haines read the arbitration clause. (Rita Chociej, Depo., Page 54.) Ms. Haines will testify that she was never told she could have a lawyer read the admissions packet before she signed it. Ms. Chociej has testified that she does not remember telling Ms. Haines she could have a lawyer read the admissions packet before she signed it. (Rita Chociej, Depo., Page 54.) Further, Ms. Chociej has testified that it was not her practice to suggest to people that they could take the Admissions Packet home and read it over before signing it. (Rita Chociej, Depo., Page 54.) Rita Chociej testified that all residents at the Dixon Health Care Center signed the Admission Agreement. (Rita Chociej, Depo., Page 54.) Rita Chociej testified that she cannot think of a single resident in twenty three years who ever changed a single word in

the Admissions Agreement. (Rita Chociej, Depo., Pages 54-55.) Rita Chociej also could not think of a single resident in twenty three years who had ever declined to sign the Arbitration Clause. (Rita Chociej, Depo., Page 55.)

Rita Chociej was not able to explain to William J. Bell the true consequences of signing the arbitration clause, as she herself did not understand those consequences as she was not taught those consequences by the Defendants.

The Arbitration Clause in this case should not be enforced. If it is, it will deny William J. Bell, by and through his Estate, his constitutionally protected right to a trial by jury. In addition, it will prevent the Plaintiff from investigating this case, as it will prevent the Plaintiff from conducting discovery. None of this was explained to William J. Bell, nor to Patricia Lynn Haines. In fact, as indicated above, Rita Chociej was not even taught the difference between arbitration and litigation. She was not taught how the arbitration clause would affect the discovery process. She never told William J. Bell nor Patricia Lynn Haines, that if he was the victim of malpractice at Dixon and he wanted to pursue a claim, he would not be able to subpoena witnesses, nor propound interrogatories, nor propound request for production of documents nor file motions to compel, because she did not understand that herself. None of this was ever explained to William J. Bell, nor to Patricia Lynn Haines. As a result it was impossible for Lynn Haines to make an informed decision. It was impossible for her to knowingly and voluntarily give up her father's right to a jury trial and his right to conduct discovery before that jury trial. No one ever explained these concepts to Lynn Haines.

In terms of alternative sources of supply, nursing home beds in good nursing homes are in high demand. Beds in good nursing homes are very hard to come by.

Certainly, the Defendants, as the much stronger parties in this case, knew that the weaker

party, William J. Bell, would be unable to receive any benefit from this arbitration clause. The Defendants drafted the arbitration clause in this case to limit its liability. Its goal was to eliminate, or at least reduce, the amount that it would have to pay to the victims of its malpractice. There was no benefit to William J. Bell, at all. The Defendants are trying to take away his right to a jury trial and to discovery in exchange for nothing. This Arbitration Clause is the very definition of unconscionable.

The Defendants attached Exhibit C to their Motion to Stay. This is the admissions packet that Patricia Lynn Haines was confronted with. It consists of 38 pages of materials. The arbitration clause was contained at pages 10-13.

It is clear that the subject arbitration clause is procedurally unconscionable.

2. The subject Arbitration Clause 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. The Ohio Supreme Court in *Hayes* also held;

> An assessment of whether a contract is **substantively unconscionable** involves consideration of the **terms of the agreement** and whether they are **commercially reasonable**. *John R. Davis Trust 8/12/05 v. Beggs, 10th Dist. No. 08AP-432, 2008 Ohio 6311, P 13*; *Dorsey v. Contemporary Obstetrics & Gynecology, Inc. (1996), 113 Ohio App.3d 75, 80, 680 N.E.2d 240*. Factors courts have considered in evaluating whether a contract is substantively unconscionable include **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**. *John R. Davis Trust at P 13*; *Collins v. Click Camera, 86 Ohio App.3d at 834, 621 N.E.2d 1294*. No bright-line set of factors for determining substantive unconscionability has been adopted by this court. The factors to be considered vary with the content of the agreement at issue.

Hayes, 122 Ohio St. 3d at 69, 2009 Ohio 2054, 908 N.E. 2d at 414 (emphasis added).

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

The arbitration clause talks about mutual promises. However, there are no mutual promises because the clause is not signed by the Defendants. Rita Chociej testified that the admissions materials and the arbitration clauses were usually not signed. (Rita Chociej, Depo., Page 36.) Therefore, there are no mutual promises.

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

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

There is nothing in the clause that says that sometimes nursing home residents are neglected or abused.

It is apparent that the Defendants sought to limit the claims of a decedent's next of kin as numbered paragraph 5 indicates, "This agreement binds all parties whose claims may arise out of or relate to this Agreement or the Resident's stay at the Facility, including any spouse or heirs of the Resident;".

There is nothing in the agreement telling new residents that most nursing home cases are handled on a contingent fee basis so the resident or his or her family do not have to pay any amount in legal fees up front. There is also nothing in the arbitration clause about the exorbitant fees required, as explained below.

The arbitration clause indicates that the National Arbitration Forum ("NAF") will be the entity who conducts the arbitration. Further, the arbitration is to be conducted in accordance with NAF Mediation Rules and the NAF Code of Procedure. Recently the Minnesota Attorney General sued the National Arbitration Forum, charging that it runs a biased process that favors major credit-card companies. The civil suit filed against the National Arbitration Forum in state District Court in Minneapolis alleges that far from being an impartial venue for resolving such disputes, the NAF has conflicting ties to major collection law firms that represent credit-card companies. Indeed, the case claims that New York hedge fund, Accretive LLC—in which Seagram heir Edgar Bronfman Jr. is a general partner—has cross ownership with major collection law firms and the NAF, sending collection cases between the two. The suit also alleges Accretive is involved in the arbitration firm's business development. In response to the suit, the National Arbitration Forum announced that it will voluntarily cease to administer consumer arbitration disputes as of Friday, July 24, 2009, as part of a settlement agreement with the Minnesota Attorney General.

The NAF Code of Procedure is a **47 page document** that was certainly not provided to William J. Bell or to Patricia Lynn Haynes. Despite the fact that these procedures are supposedly binding on William J. Bell, they were not part of his admissions packet. A copy of the NAF procedures are attached hereto as Plaintiff's Exhibit "C". These procedures provide that all arbitrations are confidential. There is also a confidentiality clause in the Dixon Arbitration Clause. Clearly this benefits the Defendants.

Only 25 written questions are permitted by the NAF rules instead of 40 interrogatories as provided by the Ohio Civil Rules.

Further, if either party resists discovery, discovery may only proceed if the party

requesting the discovery satisfies a certain threshold. See Rule 29.

The rules provide for subpoenas. The problem is that these procedures cannot be enforced. There is no consequence for ignoring discovery requests or the orders of an arbitration panel. The panel cannot force third parties to submit to a deposition the way the Court can. The panel cannot hold a party in contempt.

Unlike a jury trial, which may last two to three weeks in a nursing home case, the arbitration hearing is limited to three (3) hours. See Rule 34. Obviously, the Plaintiff, the party with the burden of proof, is hurt by limiting the time for the presentation of his case. More time can be requested for a hearing - resulting in more fees and costs.

An award shall not exceed the relief requested in the claim, unlike a civil tort case where the plaintiff is not limited by the complaint, since no specific amount is specified.

According to the NAF fee schedule, a copy of which is attached hereto as Exhibit "D", another important document that was not provided to William J. Bell, for claims worth less than $75,000.00, additional filing fees of $242.00 have to be paid, a commencement fee of $243.00 has to be paid, an Administrative fee of $1,025.00 has to be paid, a participatory hearing fee of $975.00 has to be paid. In addition, NAF charges $250.00 for each request for a discovery order, $50.00 for a request for adjournment, $20.00 processing plus $100.00 for some objections, $250.00 for others and $500.00 for others. Litigants are charged $100.00 to file a Post-Hearing Memorandum, and $750.00 for written findings of fact, conclusions of law or reasons for an award in a common claim case.

For a claim like this case, worth in excess of $75,000.00, the claimant has to pay a filing fee of up to **$1,750.00**, a commencement fee of **$1,750.00** and an administrative fee of **$1,500.00**. The claimant must state the value of his claim up front, as he is limited to that

amount, as stated above. Therefore, claimants must state a higher value for their claim and therefore pay the higher fees. Therefore, if the arbitration clause were enforced in this case, the Estate of William J. Bell would have to pay **$5,000.00 just to file his claim** plus all of the additional fees as articulated above.

The arbitration clause in this case does provide that filing fees shall be shared equally by the Resident and the Facility. That means that the Estate of William J. Bell will still have to pay **$2,500.00** to request Arbitration. After the filing fees, each party is to pay their own fees, expenses and costs. That means that the Estate of William J. Bell would have to pay the hourly rate for all three arbitrators. According to page 7 of the fee schedule, the party who requests the hearing must pay all of the fees associated with the hearing including payment for all of the time spent by the three arbitrators at their respective hourly rates. In addition there is a fee of $150.00 for every request to the forum and a fee of $100.00 for every objection. There is a fee of $100.00 for every request for an extension of time and a fee of $50.00 for every objection to such a request.

The fees charged by NAF are outrageous. They were never disclosed to William J. Bell Clearly, these fees would have a chilling effect on anyone contemplating a claim.

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 by this Honorable Court. Defendant's Motion to Stay should be denied.

G. The subject arbitration clause violates Federal Law.

The subject arbitration clause is a violation of Federal Law. The Defendants are 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 William J. Bell, already had the right to a jury trial, prior to signing the admission agreement, requiring him to sign an agreement, giving up that right, is unauthorized additional consideration.

In a January 2003 memorandum, the Centers for Medicare & Medicaid Services (CMS) addressed the agency's position on binding arbitration. CMS stated "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.

III. CONCLUSION.

Defendant's Motion to Stay should clearly be denied. The subject Arbitration Clause was

never signed by the Defendants making it a one sided contract of adhesion. Further, it is void as a matter of law. In addition, the clause is both procedurally and substantively unconscionable and the clause is therefore unenforceable. The AMA, the ABA and the AAA have all come out against clauses like the one at issue in this case. There is currently legislation making its way through Congress to outlaw these clauses nationwide. The subject Arbitration Clause is unenforceable, as there was no meeting of the minds and no consideration. The subject arbitration clause violates Federal Law.

Plaintiff respectfully requests that Defendant's Motion to Stay be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the original and a copy of the foregoing, Plaintiff Pamela J. Bell's

Brief in Opposition to Defendants' Motion to Stay, was hand delivered **this 1st day of November, 2010**, to the following:

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