IN THE COURT OF APPEALS, NINTH APPELLATE DISTRICT
APPELLATE COURT CASE NO. 12-CA-0032

WAYNE COUNTY COURT OF COMMON PLEAS
TRIAL COURT CASE NO. 12-CV-0124

KATHRYN KICK, as the personal representative of the Estate of Alice Ritzi (deceased), Plaintiff-Appellant

vs.

SMITHVILLE WESTERN CARE CENTER, et al., Defendant-Appellees

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

APPENDIX

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

ASSIGNMENTS OF ERROR

Assignment of Error I

THE TRIAL COURT ERRED IN GRANTING THE SPRENGER DEFENDANTS' MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION BECAUSE THE HEALTH CARE CENTER RESIDENCY AGREEMENT AT ISSUE, BY ITS OWN TERMS, TERMINATED UPON DECEDENT ALICE RITZI'S DEATH. THEREFORE, THE TRIAL COURT SHOULD NOT HAVE GIVEN ANY EFFECT TO THE ARBITRATION CLAUSE CONTAINED WITHIN THAT AGREEMENT.

Assignment of Error II

THE TRIAL COURT ERRED IN GRANTING THE SPRENGER DEFENDANTS' MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION AND STAYING ALL PROCEEDINGS BECAUSE THE HEALTH CARE CENTER RESIDENCY AGREEMENT AND ITS ARBITRATION CLAUSE DO NOT APPLY TO PLAINTIFF'S WRONGFUL DEATH CLAIMS. THE TRIAL COURT SHOULD NOT HAVE STAYED PROCEEDINGS ON PLAINTIFF'S WRONGFUL DEATH CLAIMS AGAINST ANY OF THE DEFENDANTS.

Assignment of Error III

THE TRIAL COURT ERRED IN GRANTING THE SPRENGER DEFENDANTS' MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION AND STAYING ALL PROCEEDINGS BECAUSE EACH DEFENDANT WAS NOT A PARTY TO THE HEALTH CARE CENTER RESIDENCY AGREEMENT. THE TRIAL COURT SHOULD NOT HAVE STAYED PROCEEDINGS ON PLAINTIFF'S SURVIVAL CLAIMS AGAINST THE DEFENDANTS WHO WERE NOT PARTIES TO THE AGREEMENT.

Assignment of Error IV

THE TRIAL COURT ERRED IN GRANTING THE SPRENGER DEFENDANTS' MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE CONTAINED IN THE HEALTH CARE CENTER RESIDENCY AGREEMENT AT ISSUE IS PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE.

ISSUES PRESENTED

Issue Number 1

The Health Care Center Residency Agreement clearly states that it "shall automatically terminate upon the death of the Resident." The arbitration clause contained in Defendant Smithville Western, Inc.'s Health Care Center Residency Agreement is now void since Alice Ritzi died on March 1, 2011.

Issue Number 2

Wrongful death claims brought by a decedent's next-of-kin are not subject to arbitration based upon an arbitration agreement entered into by the decedent. Simply put, a decedent cannot compel his or her heirs to arbitrate their wrongful death claims. The Trial Court erred in granting Defendants' Motion to Stay Proceedings and Compel Arbitration relative to Plaintiff's wrongful death claims.

Issue Number 3

A contract will not generally bind third parties who have not entered into the contract. The Health Care Center Residency Agreement specifically states that it only applies to Defendant Smithville Western, Inc. and that there are no actual or intended third party beneficiaries of the Agreement. The Trial Court erred in determining that the Health Care Center Residency Agreement applied to Defendants other than Defendant Smithville Western, Inc. and in staying Plaintiff's claims against the other Defendants.

Issue Number 4

In determining whether an arbitration agreement is procedurally unconscionable, a court must consider the circumstances surrounding the contracting parties' bargaining. The Trial Court erred when it determined that the terminated Health Care Center Residency Agreement was not procedurally unconscionable.

Issue Number 5

In determining whether an arbitration agreement is substantively unconscionable, a court must consider whether the terms of the agreement are reasonable. The Trial Court erred when it did not find that the Health Care Center Residency Agreement was substantively unconscionable.

Issue Number 6

The Trial Court erred in ordering arbitration with the National Arbitration Forum. The selection of the National Arbitration Forum was an integral term of the Arbitration Clause. The National Arbitration Forum no longer participates in consumer arbitration, and, as a result, it is now impossible for the National Arbitration Forum to conduct the arbitration of any of Plaintiff's claims.

I. STATEMENT OF THE CASE AND OF THE FACTS.

Alice Ritzi was first admitted to the Smithville Western Care Center nursing home on August 4, 2005, following a ventral hernia. No argument is being made that Alice Ritzi, her daughter Kathryn Kick, or anyone else signed an admission agreement containing an arbitration clause, relative to this admission. She was discharged to an assisted living facility on October 10, 2005.

Four years later, on June 16, 2009, Alice Ritzi was admitted to the Wooster Community

Hospital with a small bowel obstruction caused by another ventral hernia. During her hospital admission, Alice Ritzi also had an episode of syncope or fainting. Due to her syncope, it was determined that Alice Ritzi should be discharged to a nursing home, rather than back to an assisted living facility, so that she could receive adequate supervision and care with her daily activities.

On June 22, 2009, Alice Ritzi was discharged from the Wooster Community Hospital and admitted to the Smithville Western Care Center nursing home.

Before admitting Alice Ritzi to the Smithville Western Care Center, Defendant Smithville Western, Inc., by and through its employees and/or agents, required Alice Ritzi's daughter, Kathryn Kick, who held a durable power of attorney to act on her mother's behalf, to sign a Health Care Center Residency Agreement, a copy of which is attached hereto as Pages A-1-10, as well as other paperwork. The admission paperwork was placed in front of Kathryn Kick, and she was told that she had to sign it in order to get her mother, Alice Ritzi, admitted to the Smithville Western Care Center. *See* Affidavit of Kathryn Kick, a copy of which is attached hereto as Pages A-11-13, at ¶¶ 21, 29, 33, and 44. Defendant Smithville Western, Inc.'s Health Care Center Residency Agreement was a ten (10) page document. On Page 8 of the Health Care Center Residency Agreement, following a section of miscellaneous, boilerplate provisions, was an arbitration clause. The admission paperwork, including the Defendant Smithville Western, Inc.'s Health Care Center Residency Agreement, was drafted by and provided to Kathryn Kick by Defendant-Appellees Smithville Western Care Center, Smithville Western Care, Inc., Smithville Western, Inc., CMS & Co. Management Services, Inc., Sprenger Retirement Centers, Bluesky Healthcare, Inc., Bluesky Healthcare, Inc. d.b.a. Sprenger Enterprises, Inc., Bluesky Healthcare, Inc. d.b.a. Sprenger Health Care Systems, Bluesky Healthcare, Inc. d.b.a. Sprenger Retirement Centers, Sprenger Enterprises, Inc., and Grace Management Services, Inc. (hereafter referred to collectively as the "Sprenger Defendants"). *Id.* at ¶¶ 15 and 19.

Kathryn Kick was 73 years old when her mother, Alice Ritzi, was admitted to the Smithville Western Care Center on June 22, 2009. *Id.* at ¶ 9. Kathryn Kick is not an attorney. *Id.* at ¶ 39. She does not have any formal education beyond high school. *Id.* at ¶ 10. She does not have any experience with litigation, arbitration, nor drafting and negotiating contracts. *Id.* at ¶¶ 12, 34, 38, and 40. She does not know the difference between arbitration and litigation. *Id.* at ¶ 14. She does not really know what arbitration is or how it works. *Id.* at ¶ 13.

When Kathryn Kick signed the admission paperwork, she was worried about her mother's health and safety and simply wanted to get her mother admitted to the Smithville Western Care Center, so that her mother could receive the care and supervision that she needed. *Id.* at ¶¶ 22, 23, 24, and 25. Kathryn Kick signed the paperwork over the course of a few minutes, as directed by an employee and/or agent of the Defendants who conducted the admission process for Alice Ritzi's admission to the Smithville Western Care Center. *Id.* at ¶ 27.

Kathryn Kick only intended to sign paperwork that would enable her mother to be admitted to the Smithville Western Care Center. *Id.* at ¶¶ 2 and 16. No one at the Smithville Western Care Center ever told Kathryn Kick that the admission paperwork that she was required to sign had anything to do with arbitration or litigation. *Id.* at ¶¶ 30. Kathryn Kick did not read the paperwork. *Id.* at ¶ 28. She did not make any changes to the paperwork, nor was she ever told that she could make any changes to the paperwork and still have her mother admitted to the Smithville Western Care Center. *Id.* at ¶¶ 18, 20, 42, and 43.

No one at the Smithville Western Care Center ever explained to Kathryn Kick the difference between arbitration and litigation. *Id.* at ¶ 5. No one ever mentioned nor explained to Kathryn Kick that if she signed the admission paperwork that her mother would be waiving her right to a jury trial if she received substandard care at the Smithville Western Care Center and ever decided to sue the

owners and operators of the Smithville Western Care Center for such negligence. *Id.* at ¶ 35. No one ever explained to Kathryn Kick or gave her or her mother, any choice relative to whether Alice Ritzi would want to be able to sue the owners and operators of the Smithville Western Care Center if they provided her substandard care or whether she would want to waive her right to a jury trial and arbitrate such a claim. *Id.* at ¶¶ 6 and 17. Kathryn Kick never bargained with anyone over the arbitration provision in the Health Care Center Residency Agreement. *Id.* at ¶ 36. She did not even know that such a provision even existed. *Id.* at ¶ 36.

No one at the Smithville Western Care Center ever mentioned arbitration to Kathryn Kick during the admission process nor at any time during the next twenty (20) months of Alice Ritzi's residency there. *Id.* at ¶ 3. When Kathryn Kick signed the Health Care Center Residency Agreement, she had no idea that she was signing any document that had anything to do with arbitration. *Id.* at ¶ 11. She had no idea that she was signing any document that would waive her mother's right to a jury trial. *Id.* at ¶ 4.

When Kathryn Kick signed the admission paperwork on behalf of her mother, including the Health Care Center Residency Agreement, she was never told that she could have an attorney present. *Id.* at ¶ 32. Nor was she ever told that she could have an attorney review the paperwork before she signed it. *Id.* at ¶ 32. Kathryn Kick did not have an attorney present when she signed the admission paperwork. *Id.* at ¶ 31.

On June 22, 2009, when Alice Ritzi was admitted to the Smithville Western Care Center, she was 93 years old.

On February 18, 2011, two employees of the Smithville Western Care Center were transferring Alice Ritzi using a Hoyer lift when they dropped her. As a result of the negligence and/or recklessness of the Defendants, by and through their employees, Alice Ritzi suffered severe, permanent injuries,

including a broken hip, and she ultimately died as a direct and proximate cause of these injuries on March 1, 2011.

On February 17, 2012, Plaintiff Kathryn Kick, as the personal representative of the Estate of Alice Ritzi (deceased), filed a Complaint in the Wayne County Court of Common Pleas against the Sprenger Defendants, as well as Defendants Therapy Partners, Inc., Wallace Management Corporation d.b.a. Therapy Partners, and Infinity Health Care, L.L.C. d.b.a. Infinity, NP.[1]

On March 21, 2012, the Sprenger Defendants filed a Motion to Stay Proceedings and Compel/Enforce Arbitration pursuant to R.C. § 2711.

On March 26, 2012, the Sprenger Defendants filed a joint Answer.

On April 13, Plaintiff Kathryn Kick filed a Brief in Opposition to the Sprenger Defendants' Motion to Stay Proceedings and Compel/Enforce Arbitration.

On April 23, 2012, the Sprenger Defendants filed a Reply Brief in Support of Their Motion to Stay Proceedings and Compel/Enforce Arbitration.

On May 23, 2012, Plaintiff Kathryn Kick filed a Motion for Leave to File Sur Reply Brief, Instanter, in Response to the Sprenger Defendants' Reply Brief.

On May 30, 2012, the Trial Court issued a Judgment Entry granting the Sprenger Defendants' Motion to Stay Proceedings and Compel/Enforce Arbitration, a copy of which is attached hereto as Pages A-14-17, and stayed all of Plaintiff's claims against all of the Defendants pending arbitration.

On June 5, 2012, Plaintiff filed a Motion for Reconsideration of the Trial Court's Order Staying All of Plaintiff's Claims Pending Arbitration.

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[1] On May 1, 2012, Plaintiff and Defendant Infinity Health Care, L.L.C. d.b.a. Infinity, NP filed a Joint Notice of Dismissal Without Prejudice, dismissing Defendant Infinity Health Care, L.L.C. d.b.a. Infinity, NP. All of the other Defendants remain parties in the underlying case.

On June 8, 2012, the Trial Court issued a Judgment Entry denying Plaintiff's Motion for Reconsideration of Court's Order Staying All of Plaintiff's Claims Pending Arbitration, a copy of which is attached hereto as Page A-18.

On June 26, 2012, Plaintiff-Appellant Kathryn Kick timely filed a Notice of Appeal, pursuant to O.R.C. § 2711.02(C), appealing from the Trial Court's May 30, 2012 Judgment Entry.

II. LAW AND ARGUMENT.

The Sprenger Defendants moved the Trial Court to stay all proceedings pending arbitration on all of Plaintiff's claims in this case, pursuant to O.R.C. § 2711, based upon the arbitration clause contained in the Health Care Center Residency Agreement that Defendant Smithville Western, Inc. only and Plaintiff Kathryn Kick, as the attorney-in-fact for Decedent Alice Ritzi, entered into prior to Alice Ritzi's admission to the Smithville Western Care Center.

O.R.C. § 2711.02 permits a party to request a stay of proceedings when an "action is brought upon any issue referable to arbitration under an agreement in writing for arbitration". O.R.C. § 2711.02(B) states, as follows:

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

O.R.C. § 2711.01(A) states that arbitration clauses in written contracts are generally valid and enforceable, subject to several statutory exceptions as well as "grounds that exist at law or in equity for the revocation of any contract."

Defendant Smithville Western, Inc.'s Health Care Center Residency Agreement, including the arbitration clause contained therein, is invalid and unenforceable against the Estate of Alice Ritzi

(deceased) and Alice Ritzi's heirs for several reasons.

First, the express language of the Health Care Center Residency Agreement clearly states that the Agreement, including the arbitration clause, automatically terminated upon the death of Alice Ritzi which occurred on March 1, 2011, long before the Complaint in this case was even filed on February 17, 2012.

Second, even if the express language of the Health Care Center Residency Agreement did not clearly state that the Agreement, including the arbitration clause, automatically terminated upon the death of Alice Ritzi, the agreement only has the capacity to bind Alice Ritzi. No one who signed the agreement had the authority to bind Alice Ritzi's heirs. So there is no argument that the agreement could possibly apply to the wrongful death claims in this case.

Third Defendant Smithville, Inc. is the only Defendant that is a party to the arbitration agreement at issue. Therefore, Kathryn Kick's survival claims against the other Defendants in this case are not subject to the arbitration clause so they could not possibly be stayed by it.

Fourth, the arbitration clause is both procedurally and substantively unconscionable and, as a result, it is not enforceable.

Fifth, it is undisputed that the selected forum, the National Arbitration Forum, is no longer available to arbitrate any claims brought pursuant to the Health Care Center Residency Agreement. Since the selection of the National Arbitration Forum is an integral term of the arbitration agreement, the unavailability of the National Arbitration Forum renders the arbitration agreement unenforceable due to impossibility of performance.

For all of these reasons, the Trial Court erred in granting the Sprenger Defendants' Motion to Stay Proceedings and Compel Arbitration. Accordingly, Kathryn Kick respectfully requests that this Honorable Court reverse the Trial Court's Judgment Entry staying all proceedings in this case on all

of Kathryn Kick's claims.

This Court has jurisdiction to review the Trial Court's Judgment Entry granting the Sprenger Defendants' Motion to Stay Proceedings and Compel Arbitration on all of Plaintiff's claims pursuant to O.R.C. § 2711.02(C), which states that an order "that grants or denies a stay of a trial of any action pending arbitration * * * is a final order and may be reviewed, affirmed, modified, or reversed on appeal".

A. Assignment of Error I.

THE TRIAL COURT ERRED IN GRANTING THE SPRENGER DEFENDANTS' MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION BECAUSE THE HEALTH CARE CENTER RESIDENCY AGREEMENT AT ISSUE, BY ITS OWN TERMS, TERMINATED UPON DECEDENT ALICE RITZI'S DEATH. THEREFORE, THE TRIAL COURT SHOULD NOT HAVE GIVEN ANY EFFECT TO THE ARBITRATION CLAUSE CONTAINED WITHIN THAT AGREEMENT.

1. Standard of Review.

"Generally, in determining whether the trial court properly denied or granted a motion to stay proceedings pending arbitration, the standard of review is whether the order constituted an abuse of discretion." *Terry v. Bishop Homes of Copley, Inc.*, 2003-Ohio-1468, at ¶ 10 (9th Dist. 2003), citing *Reynolds v. Lapos Constr., Inc.*, 2001 Ohio App. LEXIS 2392 (9th Dist. 2001) and *Harsco Corp. v. Crane Carrier Co.*, 122 Ohio App.3d 406, 410, 701 N.E.2d 1040 (3rd Dist. 1997), appeal not allowed, 80 Ohio St.3d 1477, 687 N.E.2d 473 (1997).

"When an appellate court is presented with purely legal questions, however, the standard of review to be applied is de novo." *Terry*, 2003-Ohio-1468, at ¶ 11, citing *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.*, 81 Ohio App.3d 591, 602, 611 N.E.2d 955 (9th Dist. 1992). "The construction of a written contract is a legal question," which is subject to de novo review. *Budai v. Euclid Spiral Paper Tube Corp.*, 1997 Ohio App. LEXIS 189, at * 28 (9th Dist. 1997), citing *Alexander*

v. Buckeye Pipe Line Co., 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph one of the syllabus (1978). "Under the de novo standard of review, an appellate court does not give deference to a trial court's decision." *Terry*, 2003-Ohio-1468, at ¶ 11, citing *Akron v. Frazier*, 142 Ohio App.3d 718, 721, 2001-Ohio-2593, 756 N.E.2d 1258 (9th Dist. 2001).

2. The Trial Court erred in compelling arbitration pursuant to the arbitration clause in Defendant Smithville Western, Inc.'s Health Care Center Residency Agreement because the Agreement expressly stated that it terminated upon Alice Ritzi's death.

Issue Number 1: The Health Care Center Residency Agreement clearly states that it "shall automatically terminate upon the death of the Resident." The arbitration clause contained in Defendant Smithville Western, Inc.'s Health Care Center Residency Agreement is now void since Alice Ritzi died on March 1, 2011.

Pursuant to its express terms, Defendant Smithville Western, Inc.'s Health Care Center Residency Agreement, including the arbitration clause contained therein, automatically terminated on March 1, 2011 upon Alice Ritzi's death. Since the Agreement terminated on March 1, 2011, it was not in effect on March 21, 2012 when the Sprenger Defendants filed their Motion to Stay Proceedings and Compel Arbitration.

It is well recognized that "arbitration is a creature of contract." *Motor Wheel Corp. v. Goodyear Tire & Rubber Co.*, 98 Ohio App.3d 45, 52, 647 N.E.2d 844 (8th Dist. 1994). Arbitration agreements should be "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n. 12, 87 S.Ct. 1801 (1967). As a result, "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346 (1985). "When confronted with an issue of contract interpretation, the role of the court is to give effect to the intent of the parties to that agreement. The court examines the contract as a whole and presumes that the intent of the parties is reflected in the language used in the agreement." *Martin*

Marietta Magnesia Specialties, L.L.C. v. Pub. Utils. Comm'n of Ohio, 129 Ohio St.3d 485, 490, 2011-Ohio-4189, 954 N.E.2d 104 (2011), citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219, 2003-Ohio-5849, 797 N.E.2d 1256 (2003). "[T]he terms of a written contract are to be ascertained from the language of the agreement, and no implication inconsistent with the express terms therein may be inferred." *Belfance v. Standard Oil*, 1990 Ohio App. LEXIS 5475, at * 8 (9th Dist. 1990). "When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Martin Marietta Magnesia Specialties, L.L.C.*, 129 Ohio St.3d at 490, citing *Westfield Ins. Co.*, 100 Ohio St.3d at 219.

"Contract provisions that are unambiguous must be construed according to the plain, express terms." *Budai*, 1997 Ohio App. LEXIS 189, at * 29, citing *USS Great Lakes Fleet, Inc. v. Spitzer Great Lakes, Ltd.*, 85 Ohio App.3d 737, 741, 621 N.E.2d 461 (9th Dist. 1993). "When a written contract is plain and unambiguous, it does not become ambiguous by reason of the fact that its operation will work a hardship on one party and accord advantage to the other." *Belfance v. Standard Oil*, 1990 Ohio App. LEXIS 5475, at * 8-9 (9th Dist. 1990).

"A court * * * is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219, 2003-Ohio-5849, 797 N.E.2d 1256 (2003), citing *Shifrin v. Forest City Enters., Inc.*, 64 Ohio St.3d 635, 1992-Ohio-28, 597 N.E.2d 499 (1992) and *Blosser v. Enderlin*, 113 Ohio St. 121, 148 N.E. 393, paragraph one of the syllabus (1925). "Additionally, *all* terms in a contract should be given effect whenever possible." *Budai*, 1997 Ohio App. LEXIS 189, at * 28-29 (emphasis in original), citing *Wadsworth Coal Co. v. Silver Creek Min. & Ry. Co.*, 40 Ohio St. 559, paragraph one of the syllabus (1884). "The contract under consideration should be construed reasonably, so as not to arrive at absurd results. *Budai*, 1997 Ohio App. LEXIS 189, at * 28, citing *Cincinnati v. Cameron*, 33 Ohio St. 336, 364 (1878). "[W]here

the written contract is standardized and between the parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party." *Westfield Ins. Co.*, 100 Ohio St.3d at 220, citing *Cent. Realty Co. v. Clutter*, 62 Ohio St.2d 411, 413, 406 N.E.2d 515 (1980).

In *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Utils. Comm'n of Ohio*, 129 Ohio St.3d 485, 2011-Ohio-4189, 954 N.E.2d 104 (2011), the Supreme Court of Ohio was asked to determine the termination date of special contracts between corporations and their public utility company, Toledo Edison. The corporations contended that their special contracts "would terminate on the date that Toledo Edison ceased its collection of regulatory-transition charges, i.e., December 31, 2008", pursuant to the express terms of the contracts. *Id.* at 489. However, Toledo Edison terminated the contracts in February of 2008. Toledo Edison claimed that the parties had agreed to a termination date "that tied regulatory-transition charges to Toledo Edison's distribution sales", such that the contracts would terminate "when Toledo Edison's distribution sales reach a certain level." *Id.* at 490. Finding that the language of the contracts was clear and unambiguous and expressly stated that the contracts "shall terminate with the bill rendered for the electric usage through the date which [the regulatory-transition charge] ceases for the [Toledo Edison] Company", the Court held that the contracts were supposed to terminate on December 31, 2008 when Toledo Edison stopped collecting its regulatory-transition charges. *Id.* The Court found that, pursuant to the express terms of the contracts, the corporations and Toledo Edison had agreed that the contracts would terminate on this date, not on some other date when Toledo Edison's distribution sales reached a certain level. Therefore, the express language of the termination clauses in the contracts controlled.

In this case, it is clear that the Health Care Center Residency Agreement automatically terminated upon Alice Ritzi's death on March 1, 2011. Section III(B) of the Agreement states, in

pertinent part, "This Agreement shall automatically terminate upon the death of the Resident." It is not in dispute that "Resident" refers to Alice Ritzi. As a result, the Health Care Center Residency Agreement, including the arbitration clause contained therein, terminated on March 1, 2011 and should not be given any effect by this Court nor the Trial Court. The Agreement was drafted exclusively by the Defendants. If Defendant Smithville Western, Inc. desired the arbitration clause to remain in effect after Alice Ritzi's death and the termination of other obligations reflected in the Agreement, it could have easily included a provision to that effect. However, it did not. The only reasonable conclusion, which is supported by the express terms of the Agreement, is that the Agreement terminated on March 1, 2011. Therefore, there is no basis to stay any of Plaintiff Kathryn Kick's claims pursuant to the Sprenger Defendants' Motion to Stay Proceedings and Compel Arbitration, which was filed on March 21, 2012, over one (1) year after the Agreement and arbitration clause had terminated.

Accordingly, Kathryn Kick respectfully requests that this Honorable Court reverse the Trial Court's decision, which stayed all of Plaintiff's claims pending arbitration pursuant to an Agreement that had automatically terminated upon the death of Alice Ritzi and should not have been given any effect at a later date.

B. Assignment of Error II.

THE TRIAL COURT ERRED IN GRANTING THE SPRENGER DEFENDANTS' MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION AND STAYING ALL PROCEEDINGS BECAUSE THE HEALTH CARE CENTER RESIDENCY AGREEMENT AND ITS ARBITRATION CLAUSE DO NOT APPLY TO PLAINTIFF'S WRONGFUL DEATH CLAIMS. THE TRIAL COURT SHOULD NOT HAVE STAYED PROCEEDINGS ON PLAINTIFF'S WRONGFUL DEATH CLAIMS AGAINST ANY OF THE DEFENDANTS.

1. Standard of Review.

"Interpreting the meaning and construction of contracts * * * involves a question of law which appellate courts review de novo." *Northland Ins. Co. v. Palm Harbor Homes, Inc.*, 2007-Ohio-1655,

at ¶ 7 (12th Dist. 2007), citing *West v. Household Life Ins. Co.*, 170 Ohio App.3d 463, 2007-Ohio-845, 867 N.E.2d 868 (10th Dist. 2007). "In addition, the question of whether a particular claim is arbitrable is one of law for the court to decide." *Northland Ins. Co.*, 2007-Ohio-1655, at ¶ 7, citing *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 666, 1998-Ohio-172, 687 N.E.2d 1352 (1998). Accordingly, this Court should review whether the Health Care Center Residency Agreement and its arbitration clause apply to Plaintiff Kathryn Kick's wrongful death claims against any of the Defendants in this case under a de novo standard of review.

Issue Number 2: Wrongful death claims brought by a decedent's next-of-kin are not subject to arbitration based upon an arbitration agreement entered into by the decedent. Simply put, a decedent cannot compel his or her heirs to arbitrate their wrongful death claims. The Trial Court erred in granting Defendants' Motion to Stay Proceedings and Compel Arbitration relative to Plaintiff's wrongful death claims.

The Trial Court erred in granting the Sprenger Defendants' Motion to Stay Proceedings and Compel Arbitration relative to the wrongful death claims against the Defendants.

In *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4784, 873 N.E.2d 1258 (2007), the Supreme Court of Ohio considered the issue of "whether the personal representative of a decedent's estate is required to arbitrate a wrongful-death claim when the decedent had agreed to arbitrate all claims against the alleged tortfeasor." *Peters*, 115 Ohio St.3d at 135. In considering this issue, the Court reviewed the separate nature of survival claims and wrongful death claims. The Court stated that "when an individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* leading to his or her death as well as a wrongful-death action *for the injuries suffered by the beneficiaries of the decedent* as a result of the death." *Peters*, 115 Ohio St.3d at 137 (emphasis in original); *See also* O.R.C. §§ 2125.02 and 2305.21, which provide separate causes of action for wrongful death claims and survival claims respectively. The Ohio Supreme Court recognized that although survival claims and wrongful

death claims both relate to the same allegedly negligent acts of a defendant, and that such claims are often pursued by the same nominal party (i.e., the personal representative of the estate) in the same case, they are distinct claims that are brought by different parties in interest. *Peters*, 115 Ohio St.3d at 137, citing *Mahoning Valley Ry. Co. v. Van Alstine*, 77 Ohio St. 395, 414, 83 N.E. 601 (1908). As a result of the different nature of wrongful death claims from survival claims, the Court held that "a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims. The beneficiaries can agree to arbitrate these claims themselves, but they are not required to do so. Because Peter's beneficiaries did not sign the plan or any other dispute-resolution agreement, they cannot be forced into arbitration." *Peters*, 115 Ohio St.3d at 138, citing *Thompson v. Wing*, 70 Ohio St.3d 176, 182-83, 637 N.E.2d 917 (1994). Simply put, the Court concluded that "[a]lthough 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." *Peters*, 115 Ohio St.3d at 138. The Court went on to state that "[r]equiring 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*, 115 Ohio St.3d at 138-39.

The holding and reasoning in *Peters* apply to the wrongful death claims which have been brought by Plaintiff Kathryn Kick on behalf of Decedent Alice Ritzi's next-of-kin. Even if the Health Care Center Residency Agreement, and the arbitration clause contained within it, had not automatically terminated upon Decedent Alice Rotzi's death, the wrongful death claims in this case are not subject to arbitration pursuant to that Agreement. As a result, there was no basis for the Trial Court to stay the wrongful death claims in this case.

Kathryn Kick signed the Health Care Center Residency Agreement only in her capacity as

attorney-in-fact for Alice Ritzi. The only parties to the now terminated Health Care Center Residency Agreement were Decedent Alice Ritzi and Defendant Smithville Western, Inc. None of Alice Ritzi's next-of-kin were ever a party to the Health Care Center Residency Agreement so they cannot possibly be bound by it.

The Smithville Defendants will likely argue that the Supreme Court of the United States' decision in *Marmet Health Care Center v. Brown*, 565 U.S. ____, 132 S.Ct. 1201 (2012) supports their position that wrongful death claims are subject to arbitration. Nothing in *Marmet* holds that a Nursing Home resident can bind his or her next of kin. Ohio law, as set forth in *Peters*, makes it clear that a resident cannot bind his or her heirs to arbitration. What *Marmet* stands for is the proposition that arbitration agreements must be treated like all other contracts and they cannot be singled out. In *Marmet* the West Virginia Supreme Court singled arbitration agreements out on public policy grounds. The Supreme Court of the United States held that such treatment was not valid. However, the Court stated, "On remand, the West Virginia court must consider whether, absent that general public policy, the arbitration clauses in Brown's case and Taylor's case are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Marmet*, 565 U.S. ____, at * 5. As a result, it is clear that an arbitration agreement may be invalidated on state law grounds. It is also clear that in Ohio the law is clear, a Decedent cannot bind her heirs to arbitration.

Accordingly, Kathryn Kick respectfully requests that this Honorable Court reverse the Trial Court's decision, which stayed Plaintiff's wrongful death claims pending arbitration.

C. Assignment of Error III.

THE TRIAL COURT ERRED IN GRANTING THE SPRENGER DEFENDANTS' MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION AND STAYING ALL PROCEEDINGS BECAUSE EACH DEFENDANT WAS NOT A PARTY TO THE HEALTH CARE CENTER RESIDENCY AGREEMENT. THE TRIAL COURT SHOULD NOT HAVE STAYED PROCEEDINGS ON PLAINTIFF'S SURVIVAL CLAIMS AGAINST THE DEFENDANTS WHO

WERE NOT PARTIES TO THE AGREEMENT.

1. Standard of Review.

"Interpreting the meaning and construction of contracts * * * involves a question of law which appellate courts review de novo." *Northland Ins. Co. v. Palm Harbor Homes, Inc.*, 2007-Ohio-1655, at ¶ 7 (12th Dist. 2007), citing *West v. Household Life Ins. Co.*, 170 Ohio App.3d 463, 2007-Ohio-845, 867 N.E.2d 868 (10th Dist. 2007). "In addition, the question of whether a particular claim is arbitrable is one of law for the court to decide." *Northland Ins. Co.*, 2007-Ohio-1655, at ¶ 7, citing *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 666, 1998-Ohio-172, 687 N.E.2d 1352 (1998). Accordingly, this Court should review whether the Health Care Center Residency Agreement and its arbitration clause apply to Plaintiff Kathryn Kick's survival claims against Defendants other than Defendant Smithville Western, Inc. under a de novo standard of review.

Issue Number 3: A contract will not generally bind third parties who have not entered into the contract. The Health Care Center Residency Agreement specifically states that it applies only to Defendant Smithville Western, Inc. and that there are no actual or intended third party beneficiaries of the Agreement. The Trial Court erred in determining that the Health Care Center Residency Agreement applied to Defendants other than Defendant Smithville Western, Inc. and in staying Plaintiff's claims against the other Defendants.

The terminated Health Care Center Residency Agreement does not apply to any Defendant other than Smithville Western, Inc., as the other Defendants are not parties to the Health Care Center Residency Agreement.

In *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 136, 2007-Ohio-4784, 873 N.E.2d 1258 (2007), the Supreme Court of Ohio recognized that it is a longstanding general principle of law that "only signatories to an arbitration agreement are bound by its terms". The Court recognized that "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 so to submit.'" *Peters*, 115 Ohio St.3d at 136,

quoting *Council for Smaller Enters. v. Gates, McDonald & Co.*, 80 Ohio St.3d at 665. "Despite the strong policy in favor of arbitration, a matter that does not fall within the ambit of an arbitration agreement should not be submitted to mandatory arbitration." *Northland Ins. Co. v. Palm Harbor Homes, Inc.*, 2007-Ohio-1655, at ¶ 9, citing *Council of Smaller Enters.*, 80 Ohio St.3d at 665, quoting *AT&T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-49, 106 S.Ct. 1415 (1986). "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." *Peters*, 115 Ohio St.3d at 136; *see also ABM Farms Inc. v. Woods*, 81 Ohio St.3d 498, 500, 1998-Ohio-612, 692 N.E.2d 574 (1998). Simply put, "a party cannot be compelled to arbitrate any dispute which he has not agreed to submit [to arbitration]." *Northland Ins. Co.*, 2007-Ohio-1655, at ¶ 9 (alteration in original), citing *McGuffey v. LensCrafters, Inc.*, 2006-Ohio-206, at ¶ 28 (12th Dist. 2006), quoting *Teramar Corp. v. Rodier Corp.*, 40 Ohio App.3d 39, 40, 531 N.E.2d 721 (8th Dist. 1987).

The issue of "whether a controversy is arbitrable under the provisions of a contract is a question for the court to decide upon examination of the contract." *Ambulatory Care Review Servs., Inc. v. Blue Cross and Blue Shield*, 131 Ohio App.3d 450, 455-56, 722 N.E.2d 1040 (8th Dist. 1998), citing *Divine Construction Co. v. Ohio-Am Water Co.*, 75 Ohio App.3d 311, 599 N.E.2d 388 (10th Dist. 1991).

Defendant Smithville Western, Inc.'s terminated Health Care Center Residency Agreement begins by stating, "This Agreement is made and entered into this day June 22, of 2009, by and between Smithville Western, Inc. ("Facility"), Alice Ritzi ("Resident"), and Kay Kick ("Representative")."

On Page 10 of the Health Care Center Residency Agreement, under Section V containing the arbitration clause, the Agreement expressly states, "**YOU AGREE THAT THERE ARE NO ACTUAL OR INTENDED THIRD PARTY BENEFICIARIES OF THIS AGREEMENT**

OTHER THAN THOSE PERSONS OR ENTITIES WHOSE NAMES ARE SIGNED BELOW."

The only names signed at the bottom of that page are Kathryn Kick, as the attorney-in-fact for Alice Ritzi, and Helen Berg, as the representative of Defendant Smithville Western, Inc.

Defendant Smithville Western, Inc. is the only Defendant in this case that is a party to the terminated Health Care Center Residency Agreement. None of the other Sprenger Defendants are parties to the terminated Health Care Center Residency Agreement. In addition, Defendants Therapy Partners, Inc. and Wallace Management Corporation d.b.a. Therapy Partners are not parties to the Agreement. As a result, any alleged agreement between Kathryn Kick, as the attorney-in-fact for Alice Ritzi, to arbitrate Alice Ritzi's survival claims was made only with Defendant Smithville Western, Inc. The agreement does not involve any of the other Defendants in this case. *See West v. Household Life Ins. Co.*, 170 Ohio App.3d 463, 468, 2007-Ohio-845, 867 N.E.2d 868 (10th Dist. 2007).

Accordingly, Kathryn Kick respectfully requests that this Honorable Court reverse the Trial Court's decision, which stayed all of Plaintiff's claims against all of the Defendants in this case.

D. Assignment of Error IV.

THE TRIAL COURT ERRED IN GRANTING THE SPRENGER DEFENDANTS' MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE CONTAINED IN THE HEALTH CARE CENTER RESIDENCY AGREEMENT AT ISSUE IS PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE.

1. Standard of Review.

"Upon appeal of a determination of whether an arbitration agreement is enforceable in light of a claim of unconscionability, the reviewing court employs a de novo standard of review." *Hayes v. The Oakridge Home*, 122 Ohio St.3d 63, 67, 2009-Ohio-2054, 908 N.E.2d 408 (2009), citing *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12 (2008).

2. The Trial Court erred in granting the Sprenger Defendants' Motion to Stay Proceedings and Compel Arbitration because Defendant Smithville

Western, Inc.'s Health Care Center Residency Agreement is both procedurally and substantively unconscionable and, therefore, is not enforceable.

Defendant Smithville Western, Inc.'s terminated Health Care Center Residency Agreement is not enforceable because it is both procedurally unconscionable and substantively unconscionable.

"[A]n arbitration agreement is enforceable unless grounds exist at law or in equity for revoking the agreement." *Hayes*, 122 Ohio St.3d at 67, citing O.R.C. § 2711.01(A). "Unconscionability is a ground for revocation of an arbitration agreement." *Id.*, citing *Taylor Bldg. Corp. of Am.*, 117 Ohio St.3d 352. "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." *Id.*, quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383, 613 N.E.2d 183 (1993). "The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable." *Id.*, citing *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006-Ohio-4464, 861 N.E.2d 553 (9th Dist. 2006).

Issue Number 4: In determining whether an arbitration agreement is procedurally unconscionable, a court must consider the circumstances surrounding the contracting parties' bargaining. The Trial Court erred when it determined that the terminated Health Care Center Residency Agreement was not procedurally unconscionable.

"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.'" *Small v. HCF of Perrysburg*, 159 Ohio App.3d 66, 2004-Ohio-5757, 823 N.E.2d 19 (6th Dist. 2004), quoting *Johnson v. Mobil Oil Corp.*, 415 F.Supp. 264, 268 (E.D. Mich. 1976). "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.'" *Hayes*, 122 Ohio St.3d at 68, citing *Taylor Bldg. Corp. of Am.*, 117 Ohio St.3d at 362.

In *Small v. HCF of Perrysburg*, 159 Ohio App.3d 66, 71-73, 2004-Ohio-5757, 823 N.E.2d 19 (6th Dist. 2004), the Sixth District Court of Appeals held that an arbitration clause that provided for the arbitration of a nursing home resident's negligence claims was both procedurally and substantively unconscionable. The Court determined that the arbitration clause was procedural unconscionability because "[w]hen 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." *Small*, 159 Ohio App.3d at 73.

In her Affidavit in this case, Kathryn Kick stated that she was under a significant amount of stress when her mother was admitted to the Smithville Western Care Center because she was worried about her mother's health and safety and wanted her mother to get the care and supervision that she needed. Affidavit of Kathryn Kick, a copy of which is attached hereto as Pages A-11-13, at ¶¶ 22, 23, 24, and 25. The admission paperwork was placed in front of Kathryn Kick, and she was told that she had to sign it in order to get her mother, Alice Ritzi, admitted to the Smithville Western Care Center. *Id.* at ¶¶ 21, 29, 33, and 44. Kathryn Kick only intended to sign paperwork that would enable her mother to be admitted to the Smithville Western Care Center. *Id.* at ¶¶ 2 and 16. As a result, Kathryn Kick signed the paperwork over the course of a few minutes, as directed by an employee and/or agent

of Defendant Smithville Western, Inc., who conducted the admission process for Alice Ritzi's admission to the Smithville Western Care Center. *Id.* at ¶ 27.

In terms of age, Kathryn Kick was 73 years old when her mother, Alice Ritzi, who was 93, was admitted to the Smithville Western Care Center on June 22, 2009. *Id.* at ¶ 9.

In terms of business acument, Kathryn Kick had no experience with litigation, arbitration, or drafting and negotiating contracts. *Id.* at ¶¶ 12, 34, 38, and 40. She was not an attorney. *Id.* at ¶ 39. She did not know the difference between arbitration and litigation. *Id.* at ¶¶ 13-14. She did not have any formal education beyond high school. *Id.* at ¶ 10. Defendant Smithville Western, Inc. runs a business that generates tens of millions of dollars in annual revenue. At the time when Alice Ritzi was admitted to the Smithville Western Care Center, Defendant Smithville Western, Inc. employed admissions personnel whose full-time job was meeting with new residents and securing their signatures on Residency Agreements which contained arbitration clauses. It is clear that Defendant Smithville Western, Inc. had all of the relevant experience and business acumen.

In terms of relative bargaining power, Defendant Smithville Western, Inc. owned and operated ten (10) campuses at the time, each of which included a nursing home, an assisted living and an independent living facility. Alice Ritzi was a 93 year old woman who was unable to care for herself. Kathryn Kick was a 73 year old woman who was unable to adequately care for her mother. It is clear that Defendant Smithville Western, Inc. had all of the bargaining power.

Defendant Smithville Western, Inc. drafted the Health Care Center Residency Agreement and the arbitration clause.

In terms of whether alterations to the printed terms were possible, it is clear that neither Decedent Alice Ritzi nor her daughter, Kathryn Kick, altered one word of the arbitration clause. No one told Kathryn Kick that she could make any changes to the paperwork and still have her mother

admitted to the Smithville Western Care Center. *Id.* at ¶¶ 18, 20, 42, and 43. No one ever explained to Kathryn Kick or gave her or her mother, any choice relative to whether Alice Ritzi would want to be able to sue the owners and operators of the Smithville Western Care Center if they provided her substandard care or whether she would want to waive her right to a jury trial and arbitrate such a claim. *Id.* at ¶¶ 6 and 17. The arbitration clause in this case was a boilerplate contract of adhesion that was presented to Kathryn Kick on a take it or leave it basis. The clause was drafted by Defendant Smithville Western, Inc., in its entirety, to help protect Defendant Smithville Western, Inc. from liability.

The terms of the Health Care Center Residency Agreement were ever explained to Kathryn Kick nor to Alice Ritzi. Just like Mrs. Small in the *Small* case, no one at the Smithville Western Care Center ever explained the arbitration clause to her. When Kathryn Kick signed the Health Care Center Residency Agreement, she had no idea that she was signing any document that had anything to do with arbitration. *Id.* at ¶ 11. No one ever told Kathryn Kick that the admission paperwork that she was required to sign had anything to do with arbitration nor with litigation. *Id.* at ¶¶ 30. No one at the Smithville Western Care Center ever explained to Kathryn Kick the difference between arbitration and litigation. *Id.* at ¶ 5. No one ever mentioned or explained to Kathryn Kick that if she signed the admission paperwork that her mother would be waiving her right to a jury trial. *Id.* at ¶ 35. She had no idea that she was signing any document that would waive her mother's right to a jury trial. *Id.* at ¶ 4. In fact, no one at the Smithville Western Care Center ever mentioned arbitration to Kathryn Kick during the admission process or at any time during the next twenty (20) months of Alice Ritzi's residency there. *Id.* at ¶ 3.

Moreover, no one ever explained to Alice Ritzi, nor to Kathryn Kick, that if Alice Ritzi was a victim of abuse or neglect at the Smithville Western Care Center, and if Alice Ritzi or her family

wanted to pursue a claim, they would not be able to subpoena witnesses, conduct discovery, propound interrogatories, propound requests for production of documents, etc., so she or her family could properly pursue the claim. As a result, it was impossible for either Alice Ritzi or Kathryn Kick to make an informed decision. It was impossible for either of them to knowingly and voluntarily give up Alice Ritzi's right to a jury trial and her right to conduct discovery before that jury trial. No one ever explained these concepts to Alice Ritzi nor to Kathryn Kick.

Defendant Smithville Western, Inc., as the much stronger party in this case, knew that Decedent Alice Ritzi, as the much weaker party, was unable to reasonably to protect her interests by reason of her inability to understand the language of the arbitration clause, and that she would be unable to receive any benefit from the arbitration clause, which was drafted solely to limit the liability of Defendant Smithville Western, Inc.

This Honorable Court should find that the arbitration clause contained within the Health Care Center Residency Agreement is procedurally unconscionable.

Issue Number 5: In determining whether an arbitration agreement is substantively unconscionable, a court must consider whether the terms of the agreement are reasonable. The Trial Court erred when it did not find that the Health Care Center Residency Agreement was substantively unconscionable.

"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." *Small*, 159 Ohio App.3d at 71.

In *Small*, the Sixth District Court of Appeals held that an arbitration clause was substantively unconscionable where the resident or representative was given no means by which to reject the arbitration clause in an admissions agreement, despite the presence of a sentence in the agreement stating that admission is not conditioned on agreement to the arbitration clause. The Court stated that "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." *Small*, 159 Ohio App.3d at 72.

In this case, the arbitration clause was offered to Kathryn Kick in the Health Care Center Residency Agreement on a take it or leave it basis. This is a classic contract of adhesion. There was no way for Kathryn Kick to indicate on the Health Care Center Residency Agreement that she rejected the arbitration clause. There is nothing that indicates the arbitration clause is optional. As in *Small*, Kathryn Kick was required to agree to the arbitration clause in order to have her mother, Alice Ritzi, admitted to the Smithville Western Care Center.

Defendant Smithville Western, Inc.'s terminated Health Care Center Residency Agreement was a ten (10) page document. On Page 8 of the terminated Health Care Center Residency Agreement, following a section of miscellaneous, boilerplate provisions, was a boilerplate arbitration clause. There is nothing in the clause that says that sometimes nursing home residents are neglected and abused. There is nothing in the clause about the benefits of a jury trial. There is nothing in the clause that tells new residents that the National Arbitration Forum is not an impartial venue.

A civil suit was filed against the National Arbitration Forum in the state district court in Minneapolis alleging that it runs a biased process for resolving disputes in favor of major credit card companies. In response to this civil suit, as noted below, the National Arbitration Forum announced that it will voluntarily cease to administer consumer arbitration disputes, as part of a settlement

agreement with the Minnesota Attorney General.

There is nothing in the clause telling new residents about the specific rules that will be applied to the arbitration of their claims. Although the clause states that the National Arbitration Forum's Code of Procedure will be used, that 47 page document certainly was not provided to Alice Ritzi nor to Kathryn Kick by Defendant Smithville Western, Inc. at any time. These procedures limit the number of written questions that can be asked to 25, instead of the 40 interrogatories that are provided by the Ohio Civil Rules. There is no consequence for ignoring discovery requests or the orders of an arbitration panel. Although the procedures provide for subpoenas, the arbitration panel cannot enforce a subpoena. It cannot force third parties to submit to a deposition, nor can the panel 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. Obviously, the Plaintiff, the party with the burden of proof, is hurt by limiting the time for the presentation of her case. More time can be requested, but it will require more fees and costs.

There is nothing in the clause 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 or until a recovery is made. There is nothing in the clause about the exorbitant fees that are required for arbitration through the National Arbitration Forum.

According to the National Arbitration Forum fee schedule, which Defendant Smithville Western, Inc. also did not provide to Alice Ritzi nor to Kathryn Kick, 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 $1,7500.00, and an administrative fee of $1,500.00. Therefore, if the arbitration clause in this case was enforced, the Estate of Alice Ritzi would have to pay **$5,000.00** just to file the claim. Although the arbitration clause in this case does provide that filing fees shall be shared equally by the resident

and Defendant Smithville Western, Inc., that means that the Estate of Alice Ritzi 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 Alice Ritzi would have to pay the hourly rate of all three arbitrators for all of their activity in the case. There is an additional participatory hearing fee of $975.00 that has to be paid. In addition, the National Arbitration Forum charges $150.00 for every request to the forum, $250.00 for each request for a discovery order, $50.00 for a request for adjournment, $20.00 processing fee plus $100.00 for some objections, $250.00 for others, and still $500.00 for others. Parties 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.

The fees charged by the National Arbitration Forum are outrageous, and they were never disclosed to Alice Ritzi nor to Kathryn Kick. Clearly, these fees would have a chilling effect on anyone contemplating a claim.

There is no question that the arbitration clause is substantively unconscionable, as well as procedurally unconscionable. Since both prongs for the test for unconscionability have been met, Kathryn Kick respectfully requests that this Honorable Court reverse the Trial Court's decision, which stayed all of Plaintiff's claims pending arbitration, as the Health Care Center Residency Agreement is not enforceable because it is both procedurally and substantively unconscionable.

3. The Trial Court erred in granting the Sprenger Defendants' Motion to Stay Proceedings and Compel Arbitration because the impossibility of the National Arbitration Forum to conduct the arbitration of Plaintiff's claims, which was an integral term in Defendant Smithville Western, Inc.'s Health Care Center Residency Agreement, renders the Agreement unenforceable.

Issue Number 6: The Trial Court erred in ordering arbitration with the National Arbitration Forum. The selection of the National Arbitration Forum was an integral term of the Arbitration Clause. The

National Arbitration Forum no longer participates in consumer arbitration, and, as a result, it is now impossible for the National Arbitration Forum to conduct the arbitration of any of Plaintiff's claims.

The terminated Health Care Center Residency Agreement is unenforceable because of impossibility of performance of an integral term of the Agreement. "Impossibility of performance occurs where, after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties." *Ass'n of Cleveland Fire Fighters, Local 93 of the Int'l Ass'n of Fire Fighters v. Cleveland*, 2010-Ohio-5597, at ¶ 13 (8th Dist. 2010). "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an even the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged". *See* Restatement of the Law 2d, Contracts, Section 261 (1981).

Section V(C) of the Health Care Center Residency Agreement states that "[t]he arbitration shall be conducted by the National Arbitration Forum ("NAF")." Section V(E) states that "[a]ny party desiring arbitration shall file a claim with NAF. Section V(F) states that "[t]he arbitration shall be conducted in accordance with the NAF Code of Procedure". Section V(D) states that the costs of arbitration shall be determined by the NAF Code of Procedure. The terminated Health Care Center Residency Agreement designates the National Arbitration Forum as the arbitral forum. The National Arbitration Forum is no longer conducting consumer arbitrations involving health care services and is barred from doing so. *See State v. National Arbitration Forum, Inc.*, Hennepin County (Minn.) District Court Case No. 27-CV-09-18550 (Consent Judgment Entry dated July 17, 2009), a copy of which is attached hereto as Pages A-19-22. As a result, the arbitration clause cannot be complied with as the National Arbitration Forum no longer conducts these kinds of arbitrations.

The Sprenger Defendants will likely argue that the arbitration clause recognizes the benefits

of arbitration generally, which the parties to the arbitration clause can still achieve by selecting an alternative arbitral forum. However, it is clear that the selection of a particular forum to resolve a particular dispute is an integral term to the contract. The fact that that term of the contract is impossible to perform, renders the contract unenforceable.

Accordingly, Kathryn Kick respectfully requests that this Honorable Court reverse the Trial Court's decision staying all of Plaintiff's claims pending arbitration, as it is clear that it is impossible for the parties to perform arbitration pursuant to the Agreement due to the unavailability of the National Arbitration Forum.

III. CONCLUSION.

The Trial Court erred in granting the Sprenger Defendants' Motion to Stay Proceedings and Compel Arbitration and staying all of Plaintiff's claims against all of the Defendants in this case. Accordingly, Plaintiff-Appellant Kathryn Kick, as the personal representative of the Estate of Alice Ritzi (deceased), respectfully requests that this Honorable Court reverse the Trial Court's May 30, 2012 Judgment Entry, which granted the Sprenger Defendants' Motion to Stay Proceedings.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Brief for Appellant, was sent by ordinary U.S. Mail, this **17th day of September, 2012**, to the following:

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