

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**

---

**REPLY BRIEF FOR APPELLANT**

---

Blake A. Dickson (0059329)  
Mark D. Tolles, II (0087022)  
THE DICKSON FIRM, L.L.C.  
Enterprise Place, Suite 420  
3401 Enterprise Parkway  
Beachwood, Ohio 44122

Telephone: (216) 595-6500

Facsimile: (216) 595-6501

E-Mail: [BlakeDickson@TheDicksonFirm.com](mailto:BlakeDickson@TheDicksonFirm.com)

E-Mail: [MarkTolles@TheDicksonFirm.com](mailto:MarkTolles@TheDicksonFirm.com)

Attorneys for Plaintiff-Appellant  
Kathryn Kick, as the personal representative  
of the Estate of Alice Ritzi (deceased)

Leslie M. Jenny (0067145)  
SUTTER O'CONNELL CO., L.P.A.  
3600 Erieview Tower  
1301 East 9<sup>th</sup> Street  
Cleveland, Ohio 44114

Telephone: (216) 928-3548

Facsimile: (216) 928-3682

E-Mail: [ljenny@sutter-law.com](mailto:ljenny@sutter-law.com)

Attorney for 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.

**TABLE OF CONTENTS**

Table of Cases, Statutes, and Other Authorities. . . . . Page iii

I.     **LAW AND ARGUMENT.** . . . . . Page 1

    A.     Pursuant to the express language of Defendant Smithville Western, Inc.’s Health Care Center Residency Agreement, the entire Agreement automatically terminated upon Alice Ritzi’s death. Therefore, the arbitration clause contained in the Agreement is void and should not be given any effect.. . . . Page 2

    B.     Alice Ritzi signed the Health Care Center Residency Agreement solely and exclusively as Kathryn Kick’s “Representative”. She never signed it personally. She never signed it on behalf of anyone other than Kathryn Kick. Therefore, the Trial Court erred in compelling Alice Ritzi’s next-of-kin to arbitrate their wrongful death claims. . . . . Page 7

    C.     The express language of Defendant Smithville Western, Inc.’s Health Care Center Residency Agreement states that there are no actual or intended third party beneficiaries of the Agreement. As a result, the Agreement does not apply to any Defendant other than Defendant Smithville Western, Inc.. . . . . Page 10

II.     **CONCLUSION.** . . . . . Page 12

Certificate of Service. . . . . Page 13

## TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

<i>ABM Farms Inc. v. Woods</i> , 81 Ohio St.3d 498, 1998-Ohio-612, 692 N.E.2d 574 (1998). .	Page 6
<i>Bourlas Constr., Inc. v. Karns</i> , 1997 Ohio App. LEXIS 3309 (5 <sup>th</sup> Dist. 1997).....	Page 3
<i>Litton Fin. Printing Div. v. NLRB</i> , 501 U.S. 190 (1991).....	Pages 4,7
<i>Marmet Health Care Ctr. v. Brown</i> , 565 U.S. ____, 132 S.Ct. 1201 (2012). . . . .	Page 10
<i>Peters v. Columbus Steel Castings Co.</i> , 115 Ohio St.3d 134, 2007-Ohio-4784, 873 N.E.2d 1258 (2007).....	Pages 8,10
<i>Taylor Bldg. Corp. of Am. v. Benfield</i> , 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12 (2008).....	Page 6
<i>Thompson v. Wing</i> , 70 Ohio St.3d 176, 637 N.E.2d 917 (1994).....	Page 10
<i>Vantage Techs. Knowledge Assessment, L.L.C. v. Coll. Entrance Exam. Bd.</i> , Case No. 08-4743 (E.D. Pa.).....	Pages 4-5
O.R.C. § 2711. . . . .	Page 1

## **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 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 because each Defendant was not a party to the Health Care Center Residency Agreement. The Trial Court should not have stayed proceedings on any of Plaintiff's 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 and should therefore not be enforced.

## **I. LAW AND ARGUMENT.**

The Sprenger Defendants moved the Trial Court to stay all proceedings in this case, pending binding arbitration, pursuant to O.R.C. § 2711, based upon the arbitration clause contained in the Health Care Center Residency Agreement ("Agreement") that Defendant Smithville Western, Inc. and Plaintiff Kathryn Kick, as the attorney-in-fact for Decedent Alice Ritzi, signed, prior to Alice Ritzi's admission to the Smithville Western Care Center Nursing Home. 1. The entire Agreement, including the arbitration clause, automatically terminated upon Alice Ritzi's death, which occurred on March 1, 2011, long before the Complaint in this case was filed. 2. Neither Alice Ritzi, nor Kathryn Kick, had the capacity to bind Alice Ritzi's next of kin to arbitrate their wrongful death

claims, so there is no basis to stay those claims. 3. Defendant Smithville Western, Inc. is the only Defendant which is a party to the Residency Agreement so there is no basis to stay any claim against any other Defendant. The Agreement expressly states that there are no intended third party beneficiaries to the Agreement.

**A. The entire Agreement automatically terminated upon Alice Ritzi's death.**

The Health Care Center Residency Agreement (“Agreement”) automatically terminated upon Alice Ritzi’s death on March 1, 2011. Section III(B) of the Agreement states (emphasis added), **“This Agreement shall automatically terminate upon the death of the Resident.”** In their Brief, the Sprenger Defendants outright ignore the Agreement’s termination clause. They do not dispute that the Agreement had a termination clause, that the termination clause is valid, that, pursuant to the termination clause, the Agreement terminated on Alice Ritzi’s death, nor that Alice Ritzi died on March 1, 2011. The Sprenger Defendants want this Court to enforce the arbitration clause and ignore the termination clause. That is not how contracts work. The Sprenger Defendants attempt to argue that since an arbitration clause is, in effect, “a contract within a contract” that “an arbitration clause must be interpreted separately and apart from the underlying contract.” *See* Appellees’ Br. at 8. Defendants’ argument would only apply if part of the agreement were found to be null and void. The Sprenger Defendants have failed to provide a single citation to a statute or case in support of their position that the termination clause does not terminate the entire contract, including the arbitration clause. However, Ohio courts, as well as federal courts, have held the opposite. In *Bourlas Constr., Inc. v. Karns*, 1997 Ohio App. LEXIS 3309, at \* 6 (5<sup>th</sup> Dist. 1997), the Fifth District Court of Appeals held that an arbitration clause in a contract for the construction of a home did “not affect[] the parties’ rights upon termination or breach of contract. Therefore, we find Section M [the

arbitration clause] does not restrict appellee's right to seek judicial redress". In that case, the defendant property owners entered into a contract with the plaintiff builder for the construction of a new home. The defendant property owners later contracted with a different builder to build a home on a different piece of property. The plaintiff builder brought an action against the defendant property owners for breach of contract. The defendant property owners filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the arbitration clause in the construction contract required the builder to arbitrate its claims. The trial court originally granted the defendant property owners' motion to dismiss, but later granted the plaintiff builder's motion to vacate that order. The defendant property owners appealed. The Fifth District Court of Appeals held that the termination clause terminated the entire contract including the arbitration clause in the contract and, as a result, the plaintiff builder was not precluded from seeking judicial relief.

In *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200-01 (1991), the Supreme Court of the United States held that a party to a contract is not obligated to arbitrate disputes after the underlying contract expires. The contract at issue was a collective bargaining agreement that contained an arbitration clause. The Supreme Court recognized that "arbitration is a matter of consent, and that it will not be imposed upon parties beyond the scope of their agreement." *Litton*, 501 U.S. at 201. The Court reasoned that, "If \* \* \* parties who favor labor arbitration during the term of a contract also desire it to resolve post-expiration disputes, the parties can consent to that arrangement by explicit agreement." *Id.* The Court recognized that parties can draft arbitration clauses such that they will continue in effect beyond the termination of the underlying contract. However, where there is no such language extending the arbitration clause beyond the termination of the contract, the Court will not impose arbitration on the parties after the contract expires.

In *Vantage Techs. Knowledge Assessment, L.L.C. v. Coll. Entrance Exam. Bd.*, Case No. 08-4743 (E.D. Pa.) (Memorandum and Order dated December 18, 2008), the United States District Court for the Eastern District of Pennsylvania recognized that a party cannot enforce arbitration of a dispute after a contract expires, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq. In that case, Vantage and College Board entered into a written agreement whereby Vantage would oversee College Board's writing assessment program. The agreement expired and was later renewed by the parties. The renewed agreement expired on June 30, 2002. Several years later, College Board initiated arbitration proceedings against Vantage. Vantage then filed suit in state court. College Board removed the action to federal court and filed a motion to stay proceedings, pending arbitration, pursuant to Section 3 of the Federal Arbitration Act. The United States District Court for the Eastern District of Pennsylvania denied College Board's motion. The question before the Court was "whether the parties continued to be bound by the arbitration clause of an expired commercial contract". In answering this question in the negative, the Court held that "Vantage's obligation to submit disputes to arbitration elapsed on June 30, 2002", when the contract expired. *Id.* at \* 7 n. 2. The Court recognized that "[w]hile federal policy favors arbitration and doubts concerning the scope of coverage should be resolved accordingly, this policy cannot be invoked to create an arbitration provision in a contractual relationship where no such provision exists." *Id.* at \* 8 (internal citations omitted). Since the contract terminated, the arbitration provision within the contract was not enforced by the Court. This case is exactly on point with the case at bar.

In this case, the Agreement terminated upon Alice Ritzi's death on March 1, 2011. The arbitration clause does not provide any alternate dates that would allow the arbitration clause to remain in effect beyond the termination of the Agreement. As a result, it is clear that no part of the

Agreement, including the arbitration clause, can be enforced by either party after March 1, 2011. Since the Sprenger Defendants failed to seek arbitration prior to March 1, 2011, at which time the Agreement terminated, and only filed their Motion to Stay Proceedings and Compel/Enforce Arbitration on March 21, 2012, over a year later, the Trial Court erred in staying Plaintiff's claims and compelling arbitration.

All of the case law in Ohio that construes arbitration clauses as "contracts within a contract" deal with the revocation of contracts, not the termination of contracts pursuant to their own language. *See Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 361, 2008-Ohio-938, 884 N.E.2d 12 (2008) (discussing unconscionability); *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 501-502, 1998-Ohio-612, 692 N.E.2d 574 (1998) (discussing fraudulent inducement). The fact that an arbitration clause may be treated as a "contract within a contract", for the purposes of revocation of the contract, does not change the fact that a termination clause terminates the entire contract including the arbitration clause, unless there is language in the arbitration clause expressly extending it beyond the termination date.

On Page 9 of their Brief, the Sprenger Defendants argue that the termination clause does not apply because "[t]his portion of the contract includes claims for medical malpractice/wrongful death, which by definition cannot arise until the death of the resident and therefore until the termination of the underlying Resident Agreement." However, there is no mention of "wrongful death" anywhere in the arbitration clause. The arbitration clause indicates that it applies to "claims based on breach of contract, negligence, medical malpractice tort, breach of statutory duty, resident's rights, and any departures from accepted standards of care." *See Appellant's Br. at A-8*. As a result, the Sprenger Defendants' argument is without merit as the arbitration clause does not mention wrongful death.

- C. Alice Ritzi signed the Health Care Center Residency Agreement solely and exclusively as Kathryn Kick’s “Representative”. She never signed it personally. She never signed it on behalf of anyone other than Kathryn Kick. Therefore, the Trial Court erred in compelling Alice Ritzi’s next-of-kin to arbitrate their wrongful death claims.**

In Assignment of Error II, Plaintiff-Appellant Kathryn Kick argues that the Trial Court erred in granting the Sprenger Defendants’ Motion to Stay because the Agreement does not apply to Plaintiff’s wrongful death claims. As pointed out above, the Agreement does not mention “wrongful death”. Further, the Ohio Supreme Court has clearly held that “a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims.” *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 138, 2007-Ohio-4784, 873 N.E.2d 1258 (2007), citing *Thompson v. Wing*, 70 Ohio St.3d 176, 182-83, 637 N.E.2d 917 (1994). In their Brief, the Sprenger Defendants attempt to argue that the Agreement binds Alice Ritzi’s heirs because Plaintiff Kathryn Kick signed the Agreement “personally and on behalf of Ms. Ritzi”. *See* Appellees’ Br. at 11, 14, and 18. Defendants’ claims are completely false. Defendant Smithville Western, Inc.’s Agreement begins by stating the following:

This Agreement is made and entered into this day of June 22, 2009, by and between Smithville Western, Inc. (“Facility”), Alice Ritzi (“Resident”), and Kay Kick (“Representative”).

*See* Appellant’s Br. at A-1. It is clear that Kathryn Kick only signed the Agreement, pursuant to a valid power of attorney, on Alice Ritzi’s behalf, as her “Representative”. It is clear that Kathryn Kick did not sign the agreement personally. It is clear that Kathryn Kick did not have the authority to bind anyone other than Alice Ritzi to the terms of the agreement. The Sprenger Defendants’ argument that Kathryn Kick was personally liable and bound by the Agreement is expressly refuted by the language throughout the Agreement. Section II(A)(1) states, in pertinent part, that “nothing

in this Agreement shall be construed to require that a Representative is in any way personally liable to pay for services rendered by Facility to the Resident”. *See* Appellant’s Br. at A-1. Section II(B)(5)(b) contains a provision where a Representative can “voluntarily personally guarantee payment to the Facility and be jointly and severally liable for all services and supplies received by the Resident in the event that the Resident’s application to Medicaid is denied”. *See* Appellant’s Br. at A-4. Notably, this provision is **not** initialed by Ms. Kick.. Section II(I) states, in pertinent part, that “[t]he privileges under this Agreement are personal to the Resident”. *See* Appellant’s Br. at A-6.

Section IV(A) provides:

- A. **Notifications; Exercising Rights for Resident.** By signing this Agreement, the Representative is certifying that he/she: (1) has an interest or responsibility in the Resident’s welfare; and (2) has been identified to Facility as the person responsible for exercising the rights of the Residents if and when he/she is mentally and/or physically incapable of exercising such rights on his or her own behalf. You have identified the Representative as the person to be notified whenever such notifications are necessary as required by law or in the judgment of Facility.

Further, right above the signature block on the Agreement, it states, in pertinent part: “**THE RESIDENT GIVES PERMISSION TO THE REPRESENTATIVE TO SIGN ANY AND ALL DOCUMENTS THAT ARE PART OF THE ADMISSION PROCESS TO FACILITY ON THE RESIDENT’S BEHALF AS HIS OR HER AGENT.**” The Agreement continues: “**THE REPRESENTATIVE CERTIFIES THAT HE/SHE HAS THE LEGAL AUTHORITY TO ENTER INTO THE AGREEMENT ON RESIDENT’S BEHALF PURSUANT TO A CURRENTLY VALID POWER OF ATTORNEY**”. Kathryn Kick’s signature is below the caption of “**REPRESENTATIVE**”. *See* Appellant’s Br. at A-9-10. It is clear that Kathryn Kick signed the agreement on Alice Ritzi’s behalf as her representative. It is clear that Kathryn Kick did not sign the Health Care Residency Agreement on her own behalf. Further, Kathryn Kick was only

authorized to sign this agreement on behalf of Alice Ritzi and no one else. She had no power or authority to sign the Agreement on behalf of Alice Ritzi's other heirs. She did not sign the agreement personally. Accordingly, under Ohio law and the terms of the Agreement, it is clear that Kathryn Kick, as the attorney-in-fact for Alice Ritzi, could not and did not bind herself nor Alice Ritzi's heirs to arbitrate their wrongful death claims. Defendants' counsel made the same frivolous argument that she is making in this case to the Honorable Judge Joseph J. Bruzzese of the Jefferson County Court of Common Pleas in Case No. 10 CV 00284, captioned *Patricia Lynn Haines as the Personal Representative of the Estate of William J. Bell vs Dixon Health Care Center, et al.* Despite the fact that Judge Bruzzese flatly rejected this argument in that case, Defendant's counsel is still making it in this case with no more support for the argument than in the *Bell* case.

Nothing in the Federal Arbitration Act or the Supreme Court of the United States' decision in *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. \_\_\_\_, 132 S.Ct. 1201 (2012) requires a different result. In *Marmet*, the Supreme Court reversed the West Virginia Supreme Court for outright prohibiting certain types of arbitration agreements on public policy grounds. The *Peters* decision does not prohibit heirs from agreeing to arbitrate their own wrongful death claims. The Ohio Supreme Court in *Peters* correctly held that a Decedent does not have the authority to bind his or her heirs. None of Alice Ritzi's heirs have entered into any agreements with any of the Defendants to arbitrate any of their wrongful death claims.

**D. The express language of Defendant Smithville Western, Inc.'s Health Care Center Residency Agreement states that there are no actual or intended third party beneficiaries of the Agreement. As a result, the Agreement does not apply to any Defendant other than Defendant Smithville Western, Inc.**

Defendant Smithville Western, Inc. is the only Defendant who is a party to the Agreement.

As a result, there is no basis to stay Plaintiff's wrongful death or survival claims against any of the other Defendants. In their Brief, the Sprenger Defendants first argue that the Defendants, other than Defendant Smithville Western, Inc., are third party beneficiaries to the Agreement and, therefore, they did not need to be signatories to the Agreement nor specifically identified in the Agreement for the arbitration clause to apply to Plaintiff's claims against them. Right above the signature block of the Agreement, it 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 Defendant who signed the Agreement is Defendant Smithville Western, Inc. by and through a representative.

The Sprenger Defendants now attempt to argue that the other Defendants are included in the phrase "employees, agents, officers, directors, any parent, subsidiary or affiliate of Facility". There has been no evidence presented in this case that any of the Defendants are a parent, subsidiary, or affiliate of Defendant Smithville Western, Inc. It is clear that Defendants Therapy Partners, Inc. and Wallace Management Corporation d.b.a. Therapy Partners are not affiliated, in any way, with Defendant Smithville Western, Inc. The Trial Court erred in staying Plaintiff's wrongful death and survival claims against the Defendants who are not parties to the Agreement.

## **II. 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,  
THE DICKSON FIRM, L.L.C.

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

Blake A. Dickson (0059329)  
Mark D. Tolles, II (0087022)  
Enterprise Place, Suite 420  
3401 Enterprise Parkway  
Beachwood, Ohio 44122  
Telephone: (216) 595-6500  
Facsimile: (216) 595-6501  
E-mail: [BlakeDickson@TheDicksonFirm.com](mailto:BlakeDickson@TheDicksonFirm.com)  
E-mail: [MarkTolles@TheDicksonFirm.com](mailto:MarkTolles@TheDicksonFirm.com)

\_\_\_\_\_  
\_\_\_\_\_  
Attorneys for Plaintiff-Appellant Kathryn Kick, as the  
personal representative of the Estate of Alice Ritzi (deceased).

### CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Reply Brief for Appellant, was sent by ordinary U.S. Mail, this **13<sup>th</sup> day of October, 2012**, to the following:

Leslie M. Jenny, Esq. of SUTTER, O'CONNELL CO., L.P.A., 3600 Erieview Tower, 1301 East 9<sup>th</sup> Street, Cleveland, Ohio 44114. Attorney for Defendants 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.

Therapy Partners, Inc., c/o Registered Agent Warren Wolfson, 4635 Richmond Road, Suite 102  
Cleveland, Ohio 44128

Wallace Management Corporation d.b.a. Therapy Partners, c/o Registered Agent James W. Rogerson  
14650 Detroit Avenue, Suite 710, Lakewood, Ohio 44017

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

Blake A. Dickson (0059329)  
Mark D. Tolles, II (0087022)

Attorneys for Plaintiff-Appellant Kathryn Kick, as the  
personal representative of the Estate of Alice Ritzi  
(deceased).