IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

RICHARD J. WASCOVICH, JR., as the personal representative of the Estate of RICHARD J. WASCOVICH, SR. (deceased),	)	CASE NO. 09 CV 000918
	)	JUDGE JOSEPH GIBSON
Plaintiff,	)	PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STAY.
vs.	)	
PERSONACARE OF OHIO, INC., d.b.a. THE LAKEMED NURSING AND REHABILITATION CENTER, et al.,	)	
Defendants.	)	

Now comes Plaintiff Richard J. Wascovich, Jr., as the personal representative of the Estate of Richard J. Wascovich, Sr. (deceased), by and through his attorney, Blake A. Dickson of the law firm of Dickson & Campbell, L.L.C., and hereby opposes the Motion to Stay filed by Defendants Personacare of Ohio, Inc. d.b.a. The Lakemed Nursing and Rehabilitation Center and Lakemed Nursing and Rehabilitation (hereafter referred to as Defendants "Personacare").

Defendants Personacare moved this Honorable Court, pursuant to O.R.C. § 2711.02, for a permanent stay of this case, pending binding arbitration. The Defendants have asked this Court to forever deny Plaintiff Richard J. Wascovich, Jr. and the Estate of Richard J. Wascovich, Sr. and Richard J. Wascovich, Sr.'s family their constitutional right to a jury trial in favor of the woefully inadequate alternative of binding arbitration.

Defendants' Motion to Stay seems to communicate that the Defendants do not really expect their Motion to Stay to be granted. Defendants' Motion to Stay consists of only four sentences and a single citation to O.R.C. §2711.02(B). In their Motion to Stay, Defendants argue that there exists a valid agreement between Decedent Richard J. Wascovich, Sr., and the

Defendants, requiring that this matter be arbitrated. Defendants do not offer any case law nor any other support, whatsoever, for their Motion. Defendants do not offer any affidavits nor any deposition transcripts nor any evidence in support of their motion, other than the Arbitration Clause.

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

This Court as already denied Defendants' Motion to Stay with respect to the wrongful death claims being pursued in this case on the authority of *Peters v. Columbus Steel Castings Co.,* (2007), 115 Ohio St.3d 134, 2007-Ohio-4787.

I. FACTS.

Decedent Richard J. Wascovich, Sr., age 73, was admitted to the Lake Med Nursing and Rehabilitation Center on April 4, 2008. He was a high risk for falls. He fell at the subject facility on April 29, 2008. He fell again at the facility on May 5, 2008, and suffered a fracture of his right hip which had to be surgically repaired. Richard J. Wascovich, Sr. died as the result of the fall on May 5, 2008 at LakeMed, and the injuries that he suffered as a result.

II. LAW AND ARGUMENT.

A. 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 Richard J. Wascovich, Sr.'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 Richard J. Wascovich, Sr. to waive his right to pursue a cause of action against the Defendants. Pursuant to O.R.C. §3721.13(C), "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 Richard J. Wascovich, Sr. 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 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." 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. 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.

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.

B. 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 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,**

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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

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 Richard J. Wascovich, Sr. 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.

C. 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.

D. 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 Richard J. Wascovich, Sr. 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.
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> 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:
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> "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).

Plaintiff has attached hereto two Affidavits. The first Affidavit, Exhibit "B", is signed by Decedent Richard J. Wascovich, Sr.'s son, Plaintiff Richard J. Wascovich, Jr. The second Affidavit, Exhibit "C", is signed by Jillian Hendrickson, who was the Admissions Coordinator at LakeMed when Richard J. Wascovich was admitted to LakeMed. Jillian Hendrickson has been identified by LakeMed as the only person who interacted with Richard J. Wascovich, Sr., in any way with respect to the admission process. In Interrogatory Number 30, Plaintiff asked the Defendants to;

> 30. Please identify everyone who interacted in any way with Richard J. Wascovich, Sr., relative to the Alternative Dispute Resolution Agreement, dated April 4, 2008, including anyone who discussed the agreement with him, as well as anyone who signed the Agreement. It appears that Jillian Hendrickson signed the Agreement. There was also someone else who signed the Agreement, whose signature is illegible. Please make sure to identify both of these individuals, as well as anybody else who interacted, in any way, with Richard J. Wascovich, Sr. about this Agreement. For each such individual who interacted, in any way, with Richard J. Wascovich, Sr., relative to the subject Alternative Dispute Resolution Agreement, please indicate if they are still employed by the Defendants. If they are not, please provide their last known address and phone number.

The only person identified in response to this Interrogatory was Jillian Hendrickson. It is interesting that the Defendants did not offer an Affidavit from Ms. Hendrickson in support of their Motion to Stay.

In terms of age, as the Court can see from Richard J. Wascovich, Jr.'s Affidavit, Decedent Richard J. Wascovich, Sr. was 72 years old. At the time that he was being admitted to LakeMed he was being transferred from Lake East Hospital. As indicated in Richard J. Wascovich, Jr.'s Affidavit, his father had Alzheimer's disease at the time he was admitted to LakeMed. In contrast, the other party to the contract was an ageless corporation. According to Jillian Hendrickson's Affidavit, Lake Med is a Kindred Corporation. According to Kindred's web site,

LakeMed is a Kindred Facility (See Exhibit "D"). Kindred is a Fortune 500 company whose stock is publicly traded on the New York Stock Exchange under the symbol KND. Kindred has annual revenue of **$4.2 billion dollars**. It operates 304 facilities in 41 states. (See Exhibit "D") Kindred employees 54,500 people. Clearly, the Defendants in this case had an overwhelming advantage.

In terms of business acumen and experience, according to his son's Affidavit (Exhibit "B") Decedent Richard J. Wascovich, Sr. was a retired truck driver who never had a job involving reviewing and negotiating contracts. He had no experience with litigation. The Defendants are part of a Fortune 500 company with $4.2 billion dollars in annual revenue. They are involved in hundreds of lawsuits nationwide. They have unlimited access to an army of attorneys to draft their contracts and then seek to enforce these arbitration clauses. According to Exhibit "D", Kindred is responsible for 33,400 patients and residents in 41 states. The company has extensive experience with business, contracts and litigation. The Defendants in this case employed Jillian Hendrickson whose full time job was meeting with new residents and securing their signature on admissions agreements. Mr. Wascovich had no experience with contracts. As his son attests in his affidavit he also had no experience with litigation or arbitration.

In terms of relative bargaining power, Kindred is a Fortune 500 company with $4.2 billion dollars in annual revenue, as indicated above. Richard J. Wascovich, Sr. was a 72 year old man with Alzheimers 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 Kindred drafted the contract. According to Jillian Hendrickson's Affidavit, Kindred drafted both the Admissions Agreement and the Arbitration Clause. Kindred drafted the agreement in its entirety.

In terms of whether alterations to the printed terms were possible, it is clear that Decedent Richard J. Wascovich, Sr. did not alter one word of the Arbitration Clause in this case. Further, Jillian Hendrickson affirms in her Affidavit, "I never told any new resident that they could make changes to any of the terms of the Admission Agreement that was signed at LakeMed Nursing & Rehabilitation Center." Jillian Hendrickson further attests, "I never had a new resident at Lake Med Nursing & Rehabilitation Center make changes to the terms of the Admission Agreement." The arbitration clause in this case was a boilerplate contract of adhesion that was presented to Decedent Richard J. Wascovich, Sr., on a take it leave it basis. The clause was drafted by Kindred, in its entirety, to help protect Kindred from liability for malpractice.

In terms of whether the terms were explained, they were not. Jillian Hendrickson attests in her Affidavit;

> I was trained on the Admissions procedure at the Greens Nursing & Rehabilitation Center.
>
> The same admissions procedure was followed at the Lake Med Nursing & Rehabilitation Center when I worked there.
>
> I was not trained to read the contents of the Arbitration Clause to new residents word for word.
>
> I was trained to explain to new residents that the Arbitration Clause would enable the residents to resolve disputes with the nursing home through arbitration and mediation which would be faster than litigation.
>
> I did not talk with new residents about malpractice claims.
>
> I did not talk with new residents about what would happen if they were the victim of malpractice at the nursing home.
>
> I was not taught about how the binding arbitration clause affected the discovery process.
>
> I did not talk with new residents about how the Arbitration Clause affected the discovery process in a potential law suit.

I did not talk with new residents about Interrogatories, Request for Production of Documents or Subpoenas.

The Admission Agreement, including the Arbitration Clause, was drafted by Kindred.

I never had a new resident at Lake Med Nursing & Rehabilitation Center make changes to the terms of the Admission Agreement.

I never told any new resident that they could make changes to any of the terms of the Admission Agreement that was signed at Lake Med Nursing & Rehabilitation Center.

I do not have any experience with litigation.

I am not a lawyer.

I do not have any experience with arbitration.

I was not taught nor did I understand the differences between arbitration and litigation when I worked at Lake Med Nursing & Rehabilitation Center.

Ms. Hendrickson was not able to explain to Richard J. Wascovich, Sr. the true consequences of signing the arbitration clause, as she herself did not understand those consequences as she was not taught those consequences by Kindred.

The Arbitration Clause in this case should not be enforced. If it is, it will deny Richard J. Wascovich, Sr., 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 Richard J. Wascovich, Sr. In fact, as indicated above, Admissions Coordinator Jillian Hendrickson 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 Richard J. Wascovich, Sr., that if he was the victim of malpractice at LakeMed 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. It has already become apparent that the Defendants in this case will not produce even the most basic information and documents without the Court ordering them to do so. Currently there is a Motion to Show Cause pending because the Defendants have refused to even comply with an Order from this Court granting Plaintiff's Motion to Compel Discovery. If any portion of this case is stayed and referred to binding arbitration, it is clear that the Defendants will never produce any information relative to that part of the case. None of this was ever explained to Richard J. Wascovich, Sr. As a result it was impossible for him to make an informed decision. It was impossible for him to knowingly and voluntarily give up his right to a jury trial and his right to conduct discovery before that jury trial. No one ever explained these concepts to him. According to his son's affidavit, he had no experience with litigation or arbitration.

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

Certainly, Kindred, as the much stronger party in this case, knew that the weaker party, Richard J. Wascovich, Sr., would be unable to receive any benefit from this arbitration clause. Kindred, as a multi-billion dollar company, drafted this clause 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 Richard J. Wascovich, Sr., 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 the four (4) page Arbitration Clause to their Motion to Stay. This is entirely misleading. As the Court can see, in the upper right hand corner of each page of the Arbitration Clause it says, "ATTACHMENT M". The Arbitration Clause was the thirteenth

(13th) attachment to the admissions materials that were presented to 72 year old Richard J. Wascovich, Sr. when he arrived at the nursing home from the hospital. The Defendants have produced some of the Admissions Agreement, in response to Plaintiff's written discovery requests. Those materials are attached hereto as Exhibit "E". Unfortunately, like much of what Plaintiff has requested in discovery, the Defendants have refused to produce the entire Admissions Agreement, despite the fact that it is clearly discoverable and clearly relevant to the Court's analysis of the arbitration clause.

Attached hereto as Exhibit "E" are: the nine (9) page Admission Agreement; the two (2) page Consent to Admission and Treatment form, identified as ATTACHMENT A; **the Defendants have refused to produce Attachment B**; the Advanced Directives form identified as ATTACHMENT C; **the Defendants have refused to produce Attachments, D, E or F**; the two page Management of Resident's Personal Funds form identified as ATTACHMENT G; **the Defendants have refused to produce Attachment H**; the two page Center Identification and Notice of Primary Payor Source/Non-Medicare Coverage form identified as ATTACHMENT I; the two (2) page Financial Information form identified as ATTACHMENT J; **the Defendants have refused to produce Attachment K**; the Pharmacy Assignment of Benefits and Payment Agreement form identified as ATTACHMENT L; the Defendants have produced one (1) page of the three (3) page Notice of Bed Hold Policy form; and finally, at the very back of the packet, the four (4) page Alternative Dispute Resolution Agreement Between Resident and Facility form identified as ATTACHMENT M. The Defendants have produced some of the twenty three (23) pages that Decedent Richard J. Wascovich was presented when he arrived at the nursing home from the hospital. The Defendants have refused to produce six (6) of the attachments to the Admission Agreement.

When decedent Richard J. Wascovich, Sr. arrived at the nursing home he was confronted by the Admissions Coordinator and more than 23 pages of complicated forms. The arbitration clause was, not coincidentally, the last form in the packet of materials, the 13th attachment. Ms. Hendrickson attests in her Affidavit that she was not trained to read the entire contents of the arbitration clause to new residents. Given its location in the packet, it appears that the Defendants hoped that new residents would not read the arbitration clause at all.

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.

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.

In the very first paragraph of the clause, it is apparent that Kindred sought to limit the claims of a decedent's next of kin as the clause endeavors to apply to "any person whose claim is derived through or on behalf of the Resident."

The clause promotes arbitration in the second paragraph indicating that arbitration helps minimize a party's legal costs. 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") may be the entity who conducts the arbitration. Whether NAF conducts the arbitration or not, 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 of such 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 Richard J. Wascovich, Sr. Despite the fact that these procedures are supposedly binding on Richard J. Wascovich, Sr., they were not part of his admissions packet and they were not produced in response to Plaintiff's written discovery requests. A copy of the NAF procedures are attached hereto as Plaintiff's Exhibit "F". These procedures provide that all arbitrations are confidential. Clearly this benefits the Defendants. Nowhere in the materials provided to Richard J. Wascovich, Sr. was it mentioned that the arbitration would be confidential.

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, as the Defendants have in this case, it 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 to 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 amount is specified.

According to the NAF fee schedule, a copy of which is attached hereto as Exhibit "G", another important document that was not provided to Richard J. Wascovich, Sr. and was not produced in discovery, 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 Richard J. Wascovich, Sr. would have to pay **$5,000.00 just to file his claim** plus all of the additional fees as articulated above.

In addition, Plaintiff 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 arbitration clause does provide that the facility will pay the arbitrator's fees and other reasonable costs associated with the arbitration up to a maximum of five days of a hearing. It is not clear if the facility would pay all of the fees. After five days each party bears their own fees. The fees charged by NAF are outrageous. They were never disclosed to Richard J. Wascovich, Sr. Clearly, these fees would have a chilling effect on anyone contemplating a claim. Further, the Defendants' willingness to pay these exorbitant fees - or part of them - clearly documents the Defendants' desperate desire to avoid litigation in court.

The Arbitration Clause provides that the parties agree to engage in "limited discovery". This language clearly and exclusively benefits the Defendants. Further, is to be conducted in accord with the "Supplemental Disclosures for Kindred Mediations" another document that was not provided to Richard J. Wascovich, Sr. and has not been provided to Plaintiff's counsel in discovery in this case. 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.

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

In Maestle v. Best Buy, CA 79827 (August 11, 2005), the Eighth Appellate District Court of Appeals held (emphasis added):

> Nevertheless, courts may not force parties to arbitrate disputes if the parties have not entered into a valid agreement to do so. See Boedeker v. Rogers (1999), 136 Ohio App. 3d 425, 429; Painesville Twp. Local School District v.

> Natl. Energy Mgt. Inst. (1996), 113 Ohio App. 3d 687, at 695. As the Supreme Court of the United States has stressed, "arbitration is simply a matter of contract between the parties; it is a way to resolve disputes - but only those disputes - that the parties have agreed to submit to arbitration." First Options of Chicago, Inc. v. Kaplan (1995), 514 U.S. 938, 943.
> The Court went on to hold:
>
> **When there is a question as to whether a party has agreed to an arbitration clause, there is a presumption against arbitration.** Spalsbury v. Hunter Realty, Inc., et al. (Nov. 30, 2000), Cuyahoga App. No. 76874, citing Council of Smaller Enters. v. Gates, McDonald & Co. (1997), 80 Ohio St. 3d 661. An arbitration agreement will not be enforced if the parties did not agree to the clause. Henderson vs. Lawyers Title Insurance Corp., Cuyahoga App. No. 82654, 2004-Ohio-744, citing Harmon v. Phillip Morris Inc. (1997), 120 Ohio App. 3d 187, 189.
>
> The issue of whether or not a party has agreed to arbitrate is determined on the basis of ordinary contract principles. Kegg v. Mansfield (Jan. 31 2000), Stark App. No. 1999 CA 00167, citing Fox v. Merrill Lynch & Co., Inc. (1978), 453 F.Supp. 561. See, also, Council of Smaller Enters., supra; AT&T Technologies, Inc. v. Communications Workers of America (1986), 475 U.S. 643. In order to have a valid contract, there must be a "meeting of the minds" on the essential terms of the agreement, which is usually demonstrated by an offer, acceptance, and consideration. Reedy v. The Cincinnati Bengals, Inc. (2001), 143 Ohio App. 3d 516, 521. An offer is defined as "the manifestation of willingness to enter in a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Id. Further, the essential terms of the contract, usually contained in the offer, must be definite and certain. Id.
>
> "Ohio law continues to hold that the parties bind themselves by the plain and ordinary language used in the contract unless those words lead to a manifest absurdity." Convenient Food Mart, Inc. v. Countrywide Petroleum Co., et al., Cuyahoga App. No. 84722, 2005-Ohio-1994. This is an objective interpretation of contractual intent based on the words the parties chose to use in the contract. Id., citing Kelly v. Medical Life Ins. Co. (1987), 31 Ohio St. 3d 130, paragraph one of the syllabus.

Richard J. Wascovich, Sr. never intended to give away his right to a trial by jury relative to some claim that did not even exist when he signed the admission agreement. He just needed someone to care or him until he was able to go home.

Further, if the subject arbitration clause is enforced, it would absolutely lead to manifest absurdity. It would lead to the deprivation of Richard J. Wascovich Sr.'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.

Richard J. Wascovich, Sr.'s right to a trial by jury should not be taken away because he signed admission documents so he could be admitted to a nursing home. If the subject arbitration clause is enforced, the employees of the nursing home could have dropped Richard J. Wascovich, Sr. down a flight of stairs or allowed him to fall off of toilet and crack his head causing permanent brain damage and his only recourse would be arbitration. No matter how atrocious the care was that he received, no matter how negligent the employees of Lakemed were, he would never be allowed to sue the Defendants and hold them accountable. No one would voluntarily agree to such a clause if it was properly explained to them.

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

The Defendants gave Decedent Richard J. Wascovich, Sr. nothing in exchange for his very valuable right to a trial by jury.

F. 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 Richard J. Wascovich, Sr., 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 an unauthorized additional consideration.

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

III. CONCLUSION.

Defendant's Motion to Stay should clearly be denied. The subject Arbitration Clause 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,
DICKSON & CAMPBELL, L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, Plaintiff's Brief in Opposition to Defendants' Motion to Stay, was sent by ordinary U.S. mail, this **21st day of September, 2009**, to the following:

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By: _____
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