IN THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
APPELLATE COURT CASE NO. CA 100109

CUYAHOGA COUNTY COURT OF COMMON PLEAS
TRIAL COURT CASE NO. 803569

DANIEL P. LANG, as the Personal Representative of the Estate of MARY L. STEVENS (deceased), Plaintiff-Appellee,

vs.

BEACHWOOD POINTE CARE CENTER, ET AL., Defendant-Appellants.

Text

BRIEF FOR APPELLEE

ORAL ARGUMENT REQUESTED

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ASSIGNMENT OF ERROR

Assignment of Error I

> THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT-APPELLANTS' MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION.

ISSUE PRESENTED

Issue Number 1

> The arbitration clause in this case is not enforceable. Dessie Stevens had no authority - apparent or otherwise - to sign any contract for her Stepmother, Mary Stevens. The Defendants were not justified in assuming that Dessie Stevens had authority to sign any contract for Mary Stevens.

I. STATEMENT OF THE FACTS AND THE CASE.

Mary Stevens was admitted to Beachwood Pointe Care Center nursing home (hereinafter "Beachwood Pointe") on March 1, 2012. Mary Stevens' husband, Jacob Stevens, was also admitted to Beachwood Pointe around the same time. Mary Stevens and Jacob Stevens were roommates at Beachwood Pointe. Dessie Stevens is the daughter of Jacob Stevens, but not the biological daughter of Mary Stevens. *See* Affidavit of Dessie Stevens at ¶ 1, which was attached to Plaintiff's Brief in Opposition to Defendant's Motion to Stay and Compel Arbitration filed May 6, 2013, a copy of which is attached hereto as Exhibit "A".

While residents at Beachwood Pointe, Jacob Stevens held onto Mary Stevens' non-moving wheelchair in an attempt to pull her with his electric wheelchair. This resulted in Mary Stevens' wheelchair falling over, fracturing her left femur. Mary Stevens was subsequently taken to MetroHealth Hospital on March 26, 2012 to treat her broken femur.

The next day, on March 27, 2012, Kelly Shannon, an employee at Beachwood Pointe, directed Dessie Stevens to sign admission paperwork for Mary Stevens. *See* Affidavit of Dessie

Stevens at ¶ 6 (Exhibit "A"). Although Dessie Stevens was Jacob Stevens' legal guardian in March of 2012, **Dessie Stevens was not the guardian of Mary Stevens, nor did she hold any power of attorney relative to Mary Stevens, at any time.** *Id*. at ¶ 3-4 (Exhibit "A"). Mary Stevens never asked nor told Dessie Stevens to sign any agreement as her agent. *Id.* at ¶ 13 (Exhibit "A"). When the Beachwood Pointe staff asked Dessie Stevens to sign Mary Stevens' admission paperwork, she communicated to the Beachwood Pointe staff that she did not have any authority to sign anything for Mary Stevens. *Id*. at ¶7 (Exhibit "A"). Despite Dessie Stevens' clear communication that she lacked legal authority to do so, the Beachwood Pointe staff directed Dessie Stevens to sign Mary Stevens' admission paperwork. *Id.* at ¶ 8 (Exhibit "A"). This paperwork included; the initial admissions papers, a medicare supplement, pre-admission payment verification, a notice of exclusion of medicare benefits, an authorization to release medical information, a policies and procedures agreement, a management of personal funds form, and an arbitration clause. A copy of the Admission Agreement, which includes, the arbitration clause, is attached hereto as Exhibit "B".

Mary Stevens is not named anywhere in the arbitration clause. None of the Defendants are named in the arbitration clause. Mary Stevens did not sign the arbitration clause. Dessie Stevens signed the arbitration clause, as directed by the staff at Beachwood Pointe, but she had no authority to sign the arbitration clause on behalf of Mary Stevens. *Id*. at ¶ 7-9 (Exhibit "A").

Dessie Stevens told the staff at Beachwood Pointe that she had no authority to sign anything on Mary Stevens' behalf. *Id*. at ¶ 7 (Exhibit "A"). Mary Stevens later designated a health care power of attorney and it was not Dessie Stevens. On April 2, 2012, Kelly Shannon, **the same Beachwood Pointe staff member who had Dessie Stevens sign paperwork on Mary Stevens' behalf**, approached Mary Stevens and had her designate a healthcare power of attorney. *See* Health Care

Power of Attorney Form, a copy of which is attached hereto as Exhibit "C". The form, which was notarized by Kelly Shannon on on April 2, 2012, lists Belinda Harris as Mary Stevens' attorney in fact. *Id*. at Bates-Stamped Pages 21, 26 of 30 (Exhibit "C"). The alternate is listed as "Jake Stevens" (Mary's husband, Jacob Stevens). *Id*. Dessie Stevens is not listed anywhere on the Health Care Power of Attorney Form. Kelly Shannon notarized this form and specifically averred that Mary Stevens appeared of sound mind at the time of signing. *Id*. at Bates-Stamped Page 26 (Exhibit "C").

Defendants negligently and/or recklessly allowed Mary Stevens' husband to pull her around in her wheel chair. Defendants demonstrated a conscious disregard for Mary Stevens' rights and safety - specifically her right to a safe environment - such that significant harm was substantially certain to occur and significant harm did occur. Defendants' negligence and/or recklessness directly and proximately caused Mary Stevens' wheelchair to tip over, fracturing her left femur. Defendants also neglected Mary Stevens and as a direct and proximate result she developed severe bed sores and sepsis while a resident at Beachwood Pointe nursing home. Ultimately, Defendants' negligence and/or recklessness caused Mary Stevens' untimely death on May 27, 2012.

On March 22, 2013, Plaintiff Daniel P. Lang, as the Personal Representative of the Estate of Mary L. Stevens (deceased), filed a lawsuit against Defendants Beachwood Pointe Care Center, Beachwood Nursing & Rehab, Brook Pointe Health and Rehab, Brook Pointe Health and Rehab, Inc., BCFL Holdings, Inc., and Provider Services Holdings, LLC for the injuries and damages suffered by Mary Stevens and for her wrongful death, which occurred on March 22, 2013.

On April 26, 2013, Defendant-Appellants filed a Motion to Stay Proceedings and Compel Arbitration (hereafter referred to as "Defendants' Motion to Stay").

On May 6, 2013, Plaintiff-Appellee filed a Brief in Opposition to Defendants' Motion to Stay

Proceedings and Compel Arbitration.

On May 24, 2013, Defendant-Appellants filed their Reply Brief in response to Plaintiff-Appellee's Brief in Opposition.

On July 2, 2013 the Trial Court issued a Journal Entry denying Defendants' Motion to Stay. *See* Trial Court Journal Entry dated July 2, 2013, a copy of which is attached hereto as Exhibit "D".

Defendants then filed a Motion to Stay Discovery Pending Appeal, which was deemed moot by the Trial Court after this Court granted a Stay on August 8, 2013.

Defendant-Appellants have appealed the Trial Court's July 2, 2013 Journal Entry and are now asking this Court to forever deny Mary Stevens' family their day in court. Defendant-Appellants seek to deny the Estate of Mary Stevens the constitutional right to a trial by jury pursuant to an arbitration clause that Mary Stevens never signed.

II. LAW AND ARGUMENT

A. Standard of Review Applicable to Motions to Stay Proceedings Pending Arbitration Pursuant to O.R.C. § 2711.02.

The standard of review applicable to the denial or granting of a motion to stay proceedings pending arbitration "depends on the type of question raised regarding the applicability of the arbitration provision." *Jatsek Constr. Co. v. Burton Scot Contrs., L.L.C.*, 2012-Ohio-3966, ¶ 14 (8th Dist 2012), citing *McCaskey v. Sanford-Brown Coll.*, 2012-Ohio-1543, ¶ 7 (8th Dist. 2012). "When an appellate court is presented with purely legal questions, however, the standard of review to be applied is de novo." *Terry v. Bishop Homes of Copley, Inc.*, 2003-Ohio-1468, ¶ 11 (9th Dist. 2003). "A de novo standard applies to questions of whether a party has agreed to submit an issue to arbitration." *McCaskey*, 2012-Ohio-1543, at ¶ 7, citing *Shumaker v. Saks, Inc.*, 163 Ohio

App.3d 173, 2005-Ohio-4391, 837 N.E.2d 393 (8th Dist.) and *Vanyo v. Clear Channel Worldwide*, 156 Ohio App.3d 706, 2004-Ohio-1793, 808 N.E.2d 482 (8th Dist.). A determination of whether a power of attorney was in effect at the time when an arbitration clause was signed is subject to de novo review. *Tedeschi v. Atrium Ctrs., L.L.C.*, 2012-Ohio-2929, ¶ 16 (8th Dist. 2012). "In addition, the question of whether a particular claim is arbitrable is one of law for the court to decide." *Northland Ins. Co. v. Palm Harbor Homes, Inc.*, 2007-Ohio-1655, ¶ 7 (12th Dist. 2007), citing *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 666, 1998-Ohio-172, 687 N.E.2d 1352 (1998).

B. Summary of Argument.

Defendant-Appellants, by and through their counsel, moved the Trial Court to permanently stay all proceedings in the within case pending arbitration on all of Plaintiff-Appellee's claims in this case, pursuant to O.R.C. § 2711.02.

Mary Stevens was admitted to Beachwood Pointe on March 1, 2012. The arbitration clause was not signed by Dessie Stevens until March 27, 2012. This was the same day that Mary Stevens returned from the hospital with a broken femur which resulted from her falling while a resident at Beachwood Pointe. Appellee opposed Appellants' Motion to Stay. In his Brief in Opposition to Appellants' Motion to Stay, Appellee presented four (4) separate reasons why the Trial Court should deny Appellants' Motion. Any one of these reasons provide sufficient justification to deny Appellants' Motion to Stay. Appellants failed to address three (3) of those reasons in their Reply Brief to the Trial Court. The Trial Court agreed with Plaintiff-Appellee's arguments and denied Defendant-Appellants' Motion to Stay.

Appellants appealed the Trial Court's July 2, 2013 Journal Entry decision denying their

Motion to Stay to this Court. Although Appellants note on Page 6 of their Merit Brief that the Trial Court did not explain the basis of its denial of Defendant-Appellants' Motion to Stay in its July 2, 2013 Journal Entry, Appellants fail to address all of the arguments that were presented to the Trial Court, considered by the Trial Court, and upon which the Trial Court clearly based its decision. In its Merit Brief to this Court, Appellants have failed to even mention, three (3) of the four (4) reasons Appellee presented to the Trial Court in his Brief in Opposition to Appellants' Motion to Stay, which is why the Trial Court's denial of Defendant-Appellants' Motion to Stay should be upheld by this Court.

"[T]wo basic facts must be proven before a stay of the trial proceedings can be justified: (1) the existence of a valid written agreement to arbitrate disputes between the parties; and (2) the scope of the agreement is sufficiently broad to cover the specific issue which is the subject of the pending case." *Dodeka, L.L.C. v. Keith*, 2012-Ohio-6216, ¶ 25 (11th Dist. 2012). The issues presented in this appeal go directly to the issue of whether a valid written agreement existed between Appellants and Decedent Mary Stevens. If Appellants' arbitration clause does not constitute a valid written agreement, there is no basis to stay this case and subject any of Appellee's claims in this case to arbitration.

As the party requesting the stay pending arbitration, Appellants had the burden of proving to the Trial Court, and now to this Court, that a valid written agreement existed between each of the Defendants and Decedent Mary Stevens, relative to the arbitration of the claims between the parties. *Dodeka, L.L.C.,* at ¶ 26. Having failed to address three (3) of Plaintiff-Appellee's arguments against Appellants' Motion to Stay, Appellants have utterly and completely failed to carry its burden of demonstrating that the arbitration clause is valid and enforceable, and that the Trial Court erred in

denying its Motion to Stay.

Accordingly, Appellee Daniel P. Lang, as the Personal Representative of the Estate of Mary L. Stevens (deceased), respectfully requests that this Honorable Court affirm the Trial Court's July 2, 2013 Journal Entry denying Appellants' Motion to Stay.

C. Appellants' Assignment of Error.

> THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANTS' MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION.
>
> Issue Number 1: Dessie Stevens did not have any authority - apparent or otherwise - to sign anything on behalf of Mary Stevens. The Defendants were not justified in assuming that Dessie Stevens had any authority to sign anything on behalf of Mary Stevens. As a result, the arbitration clause is unenforceable.

Appellants have appealed the Trial Court's denial of their Motion to Stay claiming that the arbitration clause can be enforced because Dessie Stevens had apparent authority to sign the agreement on behalf of Mary Stevens. As discussed below, Dessie Stevens did not have any authority, either explicit or apparent, to bind Mary Stevens or her Estate to any type of agreement. Further, Dessie Stevens did not have any authority to bind Mary Steven's next-of-kin.

1. The arbitration clause cannot be enforced against Mary Stevens or her Estate because Mary Stevens is not a party to the arbitration clause.

In *Council of Smaller Enters. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 1998-Ohio-172, 687 N.E.2d 1352, the Supreme Court of Ohio stated that "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' * * * This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievances to arbitration." *Council of Smaller Enters.*,

80 Ohio St.3d at 665, quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986), quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). The Court went on to hold that there is a **presumption against arbitrability** when "there is serious doubt that the party resisting arbitration has empowered the arbitrator to decide anything". *Council of Smaller Enters.*, 80 Ohio St.3d, at 667-68, citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (In *First Options*, the Supreme Court of the United States held that the because the Kaplans had not personally signed the document containing the alleged arbitration clause, they were not required to arbitrate the underlying dispute).

In *Maestle v. Best Buy*, 2005-Ohio-4120, ¶10 (8th Dist. 2005), the Eighth District Court of Appeals similarly held:

> Nevertheless, courts may not force parties to arbitrate disputes if the parties have not entered into a valid agreement to do so. *See Boedeker v. Rogers* (1999), 136 Ohio App. 3d 425, 429; *Painesville Twp. Local School District v. Natl. Energy Mgt. Inst.* (1996), 113 Ohio App. 3d 687, at 695. As the Supreme Court of the United States has stressed, "arbitration is simply a matter of contract between the parties; it is a way to resolve disputes - but only those disputes - that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan* (1995), 514 U.S. 938, 943.
>
> The Court went on to hold (emphasis added):
>
> **When there is a question as to whether a party has agreed to an arbitration clause, there is a presumption against arbitration.** *Spalsbury v. Hunter Realty, Inc., et al.* (Nov. 30, 2000), Cuyahoga App. No. 76874, citing *Council of Smaller Enters. v. Gates*, McDonald & Co. (1997), 80 Ohio St. 3d 661. An arbitration agreement will not be enforced if the parties did not agree to the clause. *Henderson vs. Lawyers Title Insurance Corp.*, Cuyahoga App. No. 82654, 2004-Ohio-744, citing *Harmon v. Phillip Morris Inc.* (1997), 120 Ohio App. 3d 187, 189.

It is perhaps the most important and most basic principle of contract law, that a contract cannot be enforced against a nonparty to the contract. *See Cincinnati, Hamilton & Dayton RR. Co.*

v. Metro. Nat. Bank, (1896), 54 Ohio St. 60, 68, 42 N.E. 700 ("There can be no cause of action upon a contract unless there is privity of contract between the obligor and the party complaining."); *Ohio Energy Assets v. Solid Rock Energy, Inc.*, 2003-Ohio-6315, ¶ 16 n.5 (4th Dist. 2003) ("Generally speaking, contractual privity is the sine qua non of actionable breach."); *Mahalsky v. Salem Tool Co.* 461 F.2d 581, 584 (6th Cir. 1972) ("Ohio has no remedy for and does not recognize an action in contract absent privity"). Here, there is no privity of contract between Mary Stevens and the Appellants. The arbitration clause cannot be enforced against a nonparty. As a result, the Trial Court's July 2, 2013 Journal Entry denying Appellants' Motion to Stay should be upheld.

Mary Stevens is not a party to the Appellants' arbitration clause, which is contained within Appellent's 12 page Admission Agreement. Mary Stevens never signed the arbitration clause. Further, at the time the arbitration clause was signed, it had **not** been determined that Mary Stevens was incapable mentally or physically of acting on her own behalf. Instead, Appellants unilaterally determined that Mary Stevens should not sign the arbitration clause because she was "sometimes forgetful." *See* page 8 of Appellants' Brief. However, weeks later, Appellants had Mary Stevens sign a Healthcare Power of Attorney Form and found her to be of sound mind. Appellants then pressured Mary Stevens' husband's daughter, Dessie Stevens, who was not her daughter, to sign the Admission Agreement containing the arbitration clause at issue. The Appellants cannot deem Mary Stevens a party to an agreement based on Dessie Stevens' signature. Dessie Stevens had no authority to sign on Mary Stevens' behalf. Because Mary Stevens was never a party to the arbitration clause, it is unenforceable against Mary Stevens and her Estate, and the Trial Court's determination that the arbitration clause was unenforceable should be upheld.

Mary Stevens' name does not appear anywhere in the arbitration clause. There is a space

provided in which to identify the resident who is to be bound. *See* page 12 of the Admission Agreement. In the document produced by the Appellants, that space is left blank. *Id*. The arbitration clause also does not state the name of the entity or facility that the arbitration clause pertains to. Instead it only refers to the "Facility". Neither Mary Stevens nor Beachwood Pointe are mentioned by name anywhere in the arbitration clause. Additionally, none of the other named Defendants in the within case are named anywhere in the arbitration clause. Therefore, the arbitration clause cannot be enforced by the Appellants against Mary Stevens, nor her Estate.

The Eighth District Court of Appeals recently decided this very issue in *Tedeschi v. Atrium Centers, L.L.C.*, 2012-Ohio-2929 (8th Dist. 2012). In *Tedeschi*, a nursing home resident fell out of her wheel chair, suffered head injuries, and died as a result. *Id.* at ¶ 2. When the resident's daughter brought a wrongful death action against the nursing home, the defendant nursing home moved to stay the case pending arbitration. *Id*. at ¶ 4. The arbitration clause was signed by the resident's daughter, "purportedly through a health care power of attorney," and not by the resident herself. *Id.* at ¶ 3. This Court found that the nursing home resident's daughter lacked power of attorney and, therefore, lacked the authority to sign the arbitration clause on behalf of her mother. *Id*. at ¶ 18. As a result, the court held that the arbitration clause was unenforceable. *Id*. Similarly, in the within case, Dessie Stevens lacked authority to bind Mary Stevens to the arbitration clause. Thus, the arbitration clause is unenforceable against Mary Stevens and her Estate, and this Court should affirm the Trial Court's July 2, 2013 decision denying Appellants' Motion to Stay should be upheld.

The Ninth District Court of Appeals' decision in *Koch v. Keystone Pointe Health & Rehab.*, 2012-Ohio-5817 (9th Dist. 2012), is also directly on point. In that case, the Ninth District Court of Appeals held that "no contract existed which bound the parties to arbitrate any disputes or claims"

where a nursing home resident's daughter-in-law, who did not hold a power of attorney, signed nursing home admission paperwork on behalf of her father-in-law. *Id.* at ¶ 19. As a result, the arbitration clause that she signed during the admission process was not enforceable against the father-in-law nor his estate. *Id*.

As in *Koch*, because Dessie Stevens did not have any authority to sign an agreement on behalf of Mary Stevens, she could not legally bind Mary Stevens, nor her Estate, to the arbitration clause by signing it. Also, as in *Koch*, no contract exists to bind the parties in this case to arbitrate any disputes or claims. Thus, the Trial Court correctly denied Appellants' Motion to Stay.

Additionally, in *Jackson v. Arbors at Fairlawn Care Center*, the nursing home defendants in that case sought to enforce an Alternative Dispute Resolution ("ADR") Agreement against a nursing home resident. *See Jackson v. Arbors at Fairlawn Care Center,* Summit County Court of Common Pleas Case No. CV 2012 11 6470 (March 7, 2013 Order) attached hereto. In *Jackson*, the ADR Agreement was signed by the resident's daughter, not the resident herself. The court found that because of a condition precedent in the resident's power of attorney document, the power of attorney had never come into effect. Without an effective power of attorney, the daughter did not have authority to sign the ADR Agreement on her mother's behalf. Therefore, the ADR agreement could not be enforced against the nursing home resident, and the defendants' motion to compel arbitration was denied. The facts of *Jackson* are similar to this case, in that the person who signed the arbitration clause did not hold any power of attorney. Therefore, like in *Jackson*, the arbitration clause entered into by Dessie Stevens is not enforceable against Mary Stevens' or her Estate. Thus, the Trial Court correctly determined that Appellants' Motion to Stay should be denied.

2. Dessie Stevens did not act with apparent authority when she executed the arbitration clause.

"Even where one assuming to act as agent for a party in the making of a contract has no actual authority to so act, such party will be bound by the contract if such party has by his words or conduct, reasonably interpreted, caused the other party to the contract to believe that the one assuming to act as agent had the necessary authority to make the contract." *Miller v. Wick Bldg. Co.*, 154 Ohio St. 93, 93 N.E.2d 467 (1950), syllabus. In this case Mary Stevens did nothing to indicate that Dessie Stevens was authorized to sign anything for her or on her behalf. Therefore, Dessie Stevens did not have apparent authority to sign the arbitration clause for Mary Stevens, and the clause is unenforceable.

The standard applied to the person asserting that there was an agency relationship is whether a "person of ordinary prudence, conversant in the nature of the particular business, is justified in assuming that the agent is authorized to perform on behalf of the principal." *Church v. Fleishour Homes, Inc.*, 172 Ohio App.3d 205, 2007-Ohio-1806, ¶ 47 quoting *Gen. Cartage & Storage Co. v. Cox*, 74 Ohio St. 284, 294 (1906). "In order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority." *Master Consol. Corp v. BancOhio National Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991), syllabus. "When determining the apparent power of an agent, we must

scrutinize the conduct of the principal, not the actions of the agent." *Id*. at 576. In this case the principal - Mary Stevens - did nothing at all to hold Dessie Stevens out as her agent.

a. Mary Stevens did not hold Dessie Stevens out as her agent and did not knowingly permit her to act.

Mary Stevens did not hold Dessie Stevens out as her agent or knowingly permit her to act on her behalf, and thus, apparent authority did not exist. Appellants argue that the fact that Dessie Stevens signed other miscellaneous paper work for Mary Stevens is evidence that Mary Stevens held Dessie Stevens out as her agent. What Appellants fail to mention in their entire Brief, is that Ohio law look at the actions of the alleged principal, Mary Stevens, not the alleged agent. The actions of the agent are **not** the actions to be scrutinized and are not the actions that determine whether apparent authority exists. *Master Consol. Corp.*, 61 Ohio St. 3d at 576. Appellants do not even claim that Mary Stevens ever stated or acted as if Dessie Stevens was her agent. She did not instruct Dessie Stevens to sign any documents for her, nor did she ever advise the staff at Beachwood Pointe that Dessie Stevens was, in any way, responsible for agreeing to any contracts. Appellants argue that the fact that Dessie Stevens signed other paper work for Mary Stevens is evidence that she had apparent authority. The actions of Dessie Stevens, however, have no bearing on whether apparent authority exists because Dessie Stevens is the alleged agent, not the principal. Mary Stevens did not do anything to hold Dessie Stevens out as her agent.

Mary Stevens did not knowingly permit Dessie Stevens to act as her agent. Appellants cite to *Broughsville v. Ohecc*, LLC, 2005-Ohio-6733 (9th Dist. 2005), to support their argument that Dessie Stevens had apparent authority to agree to arbitration on behalf of Mary Stevens. However, the facts in *Broughsville*, are very different from the facts in the case *sub judice*. In *Broughsville*,

the appellant-plaintiff's daughter signed an arbitration clause on behalf of her mother when she entered a nursing home. *Id*. at ¶ 6. The Ninth District Court of Appeals noted that the appellant did not hold her daughter out as her agent, but found that the appellant knowingly permitted her to act as having such authority when the daughter signed her mother's name to the arbitration clause. *Id*. at ¶ 11. The Court determined that the appellant knowingly permitted her daughter to act on her behalf because the mother was present at the signing of the agreement and did not make any attempt to stop her daughter from signing the agreement. *Id*. Further, the Court noted that the nursing home knew of the relationship between the appellant and her daughter because they had provided appellant with care in the past. *Id*. at ¶ 12. This led the Court to find that the appellant had knowingly permitted her daughter to act as having authority.

These facts are starkly different from the facts in this case. Mary Stevens was not present when Dessie Stevens was directed by the Beachwood Staff to sign the arbitration clause. Mary Stevens was never told of the existence of the arbitration clause. The fact that Mary Stevens was not present at the signing is **one** fact that supports the finding that she did not knowingly permit Dessie Stevens to sign the arbitration clause. The fact that Mary Stevens did not knowingly permit Dessie Stevens to sign the agreement on her behalf is also evidenced by the fact that Mary Stevens was not aware of the arbitration clause's existence, before or after it was signed. Further, Mary Stevens signed the Health Care Power of Attorney on her own behalf, clearly demonstrating she was capable of signing her own paperwork and that nobody else was authorized to sign on her behalf.

Appellants argue that agency law does not require the principal to witness the agent's actions for apparent authority to exist. Appellee agrees, that the principal is not required to witness the agent's actions. However, the presence of the principal is still a factor considered by courts when

determining whether the principal knowingly permitted the agent to act on their behalf. *See Broughsville*, 2005-Ohio-6733. Appellants have produced no evidence whatsoever that Mary Stevens knowingly permitted Dessie Stevens to sign the arbitration clause on her behalf.

Appellants then cite to *Stocker v. Castle Inspections, Inc.*, 99 Ohio App.3d 735, 651 N.E.2d 1052 (8th Dist. 1995), to support their argument that the principal does not need to be present for an agent to have apparent authority. However, the *Stocker* case is clearly distinguishable from the facts of the current case. In *Stocker*, the plaintiff sent his father to represent him during the inspection of the home he was going to purchase, at which time the father signed the contract containing the arbitration clause. *Id*. at 737. In *Stocker*, the plaintiff was aware that an inspection was going on and told his father to attend the inspection in his place. *Id*. at 376. In contrast, Dessie Stevens was only at Beachwood Pointe to visit her father. Dessie Stevens was not at Beachwood Pointe at the request of Mary Stevens to be present to sign anything on Mary Stevens' behalf. *See* Dessie Stevens' Affidavit at ¶ 6 (Exhibit "A"). Further, Dessie Stevens told Shannon Kelly that she was neither the attorney-in-fact nor the guardian of Mary Stevens. *Id*. at ¶ 7. Therefore, *Stocker* does not support their argument that Dessie Stevens had apparent authority at the time she signed the arbitration clause.

b. Mary Stevens did not ratify the acts of Dessie Stevens by continuing to reside at Beachwood Pointe Nursing Home.

Appellants further argue that Mary Stevens knowingly permitted Dessie Stevens to act as her agent, and ratified her actions by the mere fact that Mary Stevens moved into, and resided, at Beachwood Pointe without voicing any objections. However, Appellants cite absolutely no authority to support the proposition that the act of residing in a nursing home should be interpreted as creating

apparent authority in an agent. In fact, Appellants cite to case law which directly contradicts this argument.

In *Templeman v. Kindred Healthcare, Inc*., 2013-Ohio-3738, ¶ 6 (8th Dist. 2013), the defendant in that case sought to compel arbitration based on an agreement signed by the deceased resident's son. This Court stated that

> "Ratification * * * [is] the approval by act, word, or conduct of that which was improperly done." *Paterson v. Equity Trust Co.,* 9th Dist. No. 11CA009993, 2012-Ohio-860, ¶ 21, quoting *AFCO Credit Corp. v. Brandywine Ski Ctr., Inc.,* 81 Ohio App.3d 217, 221, 610 N.E.2d 1032 (9th Dist. 1992). In other words, "[a] principal may ratify the unauthorized acts of his agent[.]"*Paterson* at ¶ 21. However, before ratification may occur, "the ratifying party must know what actions [he] is ratifying." *Wells Fargo Bank, N.A. v. Byrd,* 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722 (1st Dist.), citing *Lithograph Bldg. Co. v. Watt,* 96 Ohio St. 74, 86, 117 N.E. 25 (1917) ("before the principal can be held to ratify the unauthorized acts of his agent, it must appear that he had knowledge of all material facts"). "To establish ratification, it must be shown by conduct of the *principal,* done with full knowledge of the facts, which manifests his intention to ratify the unauthorized transaction." (Emphasis in original). *Meyer v. Klensch,* 114 Ohio App. 4, 6, 175 N.E.2d 870 (1st Dist. 1961).

Id. at ¶ 26.

Based on the foregoing, this Court held that because the decedent in that case did not know of the existence of the arbitration clause, it would be unreasonable for the court to find that the decedent ratified the arbitration clause signed by her son. *Id*. Thus, no contract existed to bind the parties to arbitration. *Id*.

In this case, Mary Stevens' actions did not ratify the arbitration clause entered into by Dessie Stevens. As the evidence demonstrates, Mary Stevens was not made aware of the Admission Agreement, let alone the arbitration clause contained within it and its consequences. The record also does not indicate that Mary Stevens ever had any knowledge that Dessie Stevens signed any such agreement on her behalf. Therefore, the fact that she resided at Beachwood Pointe did not, in any

way, ratify the arbitration clause that Dessie Stevens was pressured into signing. It would have been impossible for Mary Stevens to ratify the agreement as she did not know of its existence. Further, Ohio law prevents nursing homes frm conditioning admission of a resident upon a residents' failure or refusal to sign and arbitration clause. Thus, Mary Stevens' continued residence at Beachwood Pointe did not create or imply that Dessie Stevens had apparent authority, nor did her actions ratify the agreement.

c. Beachwood Pointe did not act in good faith when pressuring Dessie Stevens to enter into the arbitration clause on behalf of Mary Stevens.

Not only do the Appellants fail to meet the first requirement in determining whether an agency relationship existed, they also fail the second requirement that they act in good faith and had reason to believe and did believe that the agent possessed the necessary authority. *Master Consol. Corp v. BancOhio National Bank*, 61 Ohio St.3d 570 (1991), syllabus. In *Koch v. Keystone Pointe Health & Rehabilitation*, 2012-Ohio-5817, ¶ 14 (9th Dist. 2012), the Ninth District Court of Appeals found that the nursing home did not act in good faith when it had the resident's daughter-in-law sign admissions paperwork even though they had knowledge that the daughter-in-law did not have power of attorney. This is similar to the facts of this case. Dessie Stevens repeatedly stated that she did not have guardianship nor power of attorney over Mary Stevens. Dessie Stevens' Affidavit at ¶11 (Exhibit "A"). The fact that Beachwood Pointe **knew** Dessie Stevens was neither Mary Stevens' guardian nor her attorney-in-fact is further evidenced by the fact the same staff at Beachwood Pointe who had directed Dessie Stevens to sign the arbitration clause on March 27, 2012, had Mary Stevens' sign a Healthcare Power of Attorney Form on April 2, 2012. *See* Healthcare Power of Attorney Form at Bates-Stamped Page 26 (Exhibit "C"). Despite their knowledge that Dessie

Stevens had no authority to act on behalf of Mary Stevens, Beachwood Pointe told Dessie Stevens that she needed to sign the forms for "general purposes". See Dessie Stevens' Affidavit at ¶9 (Exhibit "A"). Therefore, Beachwood Pointe did not act in good faith when the staff asked Dessie Stevens to enter into the arbitration clause. As a result, Dessie Stevens could not be considered Mary Stevens' agent through the theory of apparent authority. *See also Templeman*, 2013-Ohio-3738, at ¶ 26 (this Court held the nursing home which relied on an invalid power of attorney document did not act in good faith when accepting son's signature on behalf of his mother during admission and thus, the arbitration clause was unenforceable).

D. Additional reasons why Appellants' arbitration clause is invalid and unenforceable, which the Trial Court considered in denying Appellants' Motion to Stay, but which Appellants have failed to address in its Merit Brief.

As noted above, Appelleeset forth four (4) reasons in his Brief in Opposition to Appellants' Motion to Stay for why the arbitration clause, is invalid, void, and unenforceable against the Estate of Mary Stevens and Mary Stevens' next-of-kin. Appellants have failed to address three (3) of these reasons in its Merit Brief, any one of which is sufficient to support the Trial Court's denial of Appellants' Motion to Stay. Based upon Appellants' failure to address these issues in their Merit Brief, it is not in dispute that Appellants' arbitration clause, is unenforceable because it; (1) fails to conform to the requirements under O.R.C. 2711.01(A), (2) violates the requirements under Ohio's Statute of Frauds, O.R.C. 1335.05, (3) and under *Hayes* and *Marmet*, it is unenforceable against Mary Stevens and her Estate. For these reasons, this Court should promptly affirm the Trial Court's July 2, 2013 Journal Entry, which denied Appellants' Motion to Stay.

1. Appellants' arbitration clause is unenforceable for failure to conform to the "agreement in writing" requirement under O.R.C. § 2711.01(A).

O.R.C. § 2711.01(A) further supports the finding that the arbitration clause is unenforceable against Mary Stevens and her Estate because it was not signed by her or anyone authorized to sign on her behalf. O.R.C. § 2711.01(A) defines a valid arbitration clause, in pertinent part, as "any agreement in writing between two or more persons to submit to arbitration any controversy existing between them". *See also* O.R.C. § 2711.22(A). In this case, there is no agreement in writing between Mary Stevens and any of the Defendants. Mary Stevens did not sign the arbitration clause nor did anyone with legal authority to sign on her behalf. Mary Stevens is not identified as a party anywhere in the arbitration clause produced by Appellants nor are any of the Appellants. Pursuant to O.R.C. § 2711.01(A), there is no valid written arbitration clause to enforce between Mary Stevens and the Appellants. Thus, the Trial Court's denial of the Appellants' Motion to Stay should be upheld.

2. Appellants' arbitration clause violates Ohio's Statute of Frauds, R.C. § 1335.05.

Pursuant to Ohio's Statute of Frauds, the arbitration clause that Appellants seek to enforce is unenforceable because it was not **signed by the party to be charged.** O.R.C. §1335.05 states as follows (emphasis added):

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

signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

Agreements that do not comply with the statute of frauds are unenforceable. *Hummel v. Hummel*, 133 Ohio St. 520, 14 N.E.2d 923 (1938), syllabus.

In this case, the arbitration clause fails to comply with the Statute of Frauds. The arbitration clause that Appellants seek to enforce is dated March 27, 2012. Appellants filed their Motion to Stay on April 26, 2013. It is clear that the alleged "agreement" was not to be performed within one year from the making thereof, and thus, the statute of frauds applies. Pursuant to O.R.C. §1335.05, the arbitration clause lacks the signature of the party to be charged therewith, i.e. Mary Stevens, and is unenforceable against her and her Estate. Because the arbitration clause fails under the Statute of Frauds, and the Trial Court's denial should be upheld.

3. Under *Hayes* and *Marmet*, Appellants' arbitration clause is unenforceable against Mary Stevens and her Estate.

Hayes v. Oakridge Home, 2009-Ohio-2054, 122 Ohio St.3d 63 (2009), is the only Ohio Supreme Court case regarding the enforceability of an arbitration clause against a nursing home resident.[1] In *Hayes*, the Ohio Supreme Court held:

> 1. **An arbitration clause voluntarily executed by a nursing-home resident upon her admission** and not as a precondition to admission is not rendered procedurally unconscionable solely by virtue of the resident's age."
>
> 2. **An arbitration clause voluntarily executed by a nursing-home resident** and not as a precondition to admission that waives the right to trial and the right to seek punitive damages and attorney fees is not substantively unconscionable."

Id. at syllabus. (Emphasis added.)

[1] Appellee's counsel represented the plaintiff in the *Hayes* case.

In *Hayes,* the Ohio Supreme Court found that **the nursing home resident voluntarily executed** the arbitration clause. Under *Hayes*, the nursing home resident must be a party to the arbitration clause in order for the agreement to be enforceable. Here, Mary Stevens did not execute any agreement, nor did anyone who had authority to act on her behalf, and Mary Stevens is not a party to the arbitration clause. Therefore, the arbitration clause is unenforceable under *Hayes.*

Also, in *Marmet v. Health Care Center, Inc. v. Brown*, 565 U.S. ____, 132 S.Ct. 1201 (2012), the United States Supreme Court addressed arbitration clauses between nursing homes and their residents. The *Marmet* Court merely removed blanket state public policy prohibitions against the arbitration of bodily injury and wrongful death claims against nursing homes. Stated differently, the only thing that *Marmet* requires is that state courts treat nursing home contracts with their residents as they would any other contract in their state. Under *Marmet*, general principles of Ohio contract law apply to this case. In treating the arbitration clause produced by Appellants as any other purported contract in Ohio, it is clear that no contract was ever formed between Mary Stevens and the Appellants in this case. Under both *Hayes* and *Marmet*, the denial of Appellants' Motion to Stay should be upheld.

E. Additional reasons why the Trial Court's denial of Appellants' Motion to Stay should be upheld.

In addition to the arguments listed above, the arbitration clause should also be found invalid and unenforceable because; (1) it was not separate from Appellants' Admission Agreement, (2) it automatically terminated upon the discharge of Mary Stevens, and (3) the arbitration clause does not apply to the wrongful death claims brought by Mary Stevens' Estate for the exclusive benefit of Mary Stevens' next-of-kin.

1. The arbitration clause at issue was not separate from Appellants' Admission Agreement and, therefore, is invalid and unenforceable pursuant to O.R.C. § 2711.23.

O.R.C. § 2711.23 states, in pertinent part (emphasis added):

> **To be valid and enforceable** any arbitration clauses pursuant to sections 2711.01 and 2711.22 of the Revised Code for controversies involving a medical, dental, chiropractic, or optometric claim that is entered into prior to a patient receiving any care, diagnosis, or treatment shall include and be subject to the following conditions:
>
> * * *
>
> (G) **The arbitration agreement shall be separate from any other agreement, consent, or document;**

O.R.C. § 2711.23(G) requires an arbitration clause involving a medical claim to be separate from any other agreement, consent, or document. The arbitration clause at issue is not separate. The Admission Agreement itself states that the arbitration clause is not a separate agreement. On Page 7 of the Admission Agreement states that "the following attachments are made part of this agreement" and then lists the arbitration clause. By its own language, the Admission Agreement and arbitration clause are not separate, but are part of one agreement.

The entire Admission Agreement contains a number of provisions on topics that have nothing to do with the resolution of medical claims nor arbitration, such as provisions relative to resident's financial obligations, participation in Medicare and Medicaid, disputed debts, termination of the contract by appellants and by a resident, records requests, facility responsibilities, resident rights, Representative responsibilities, and responsibility for loss of personal belongings, among others. In fact, the arbitration clause is buried on Page 11 of Appellants' 12-page Admission Agreement. Accordingly, the arbitration clause contained in Appellants' Admission Agreement is invalid and unenforceable pursuant to the express requirements of O.R.C. § 2711.23(G). As a result, the Trial

Court properly denied Appellants' Motion to Stay.

2. Appellants' Admission Agreement, including its arbitration clause, automatically terminated, pursuant to its own terms, upon Decedent Mary Stevens' discharge on May 4, 2012.

The express language of Appellants' Admission Agreement states that the Admission Agreement, including its arbitration clause, automatically terminated when Mary Steven's was discharged on May 4, 2012. Section 6.1(A) of Appellants' Admission Agreement states "[t]his agreement begins upon the date of Admission and ends upon the date Resident is discharged from the Facility." It is not in dispute that "resident", as used in the Admissions Agreement refers to Mary Stevens, as her name is specifically listed on the first page of the Admissions Agreement (unlike in the arbitration clause). Mary Stevens left Beachwood Pointe for the last time on May 4, 2012, when she was transferred to Lutheran Hospital with a decubitus ulcer. Mary Stevens was then transferred from Lutheran Hospital to Hospice of the Western Reserve, where she died three days later on May 27, 2012. As a result, Appellants' Admission Agreement, including the arbitration clause attached thereto, terminated on May 4, 2012 and was void and unenforceable when Appellants filed their Motion to Stay on April 26, 2013.

The Admission Agreement was drafted exclusively by the Appellants. If Appellants desired the arbitration clause to remain in effect after Mary Stevens' discharge and after the termination of the other obligations contained within the Admission Agreement, it could have easily included a provision to that effect, but it did not. The intent of the parties, as reflected by the language of the Admission Agreement, states that the Admission Agreement including the arbitration clause, terminated upon Mary Stevens' discharge from Beachwood Pointe on May 4, 2012.

In *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Utils. Comm'n of Ohio*, 129 Ohio St.3d 485, 490, 2011-Ohio-4189, 954 N.E.2d 104 (2011), the Ohio Supreme Court held that special contracts between several corporations and their public utility company terminated on December 31, 2008, the date when Toledo Edison stopped collecting its regulatory-transition charges. The contracts terminated on this date because, pursuant to the express terms of the contracts, the corporations and Toledo Edison had agreed that the contracts would terminate on this date, not some other date when Toledo Edison's distribution sales reached a certain level. *Id*. Therefore, the Court held that the express language of the termination clauses in the contracts controlled, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219, 2003-Ohio-5849, 797 N.E.2d 1256 (2003). Arbitration clauses should be "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n. 12, 87 S.Ct. 1801 (1967). It is clear that the Trial Court properly denied Appellants' Motion to Stay because the arbitration clause that Appellants sought to enforce had terminated almost one (1) year prior to the filing of Appellants' Motion to Stay.

3. Mary Stevens' next-of-kin's claim for wrongful death are not subject to the arbitration clause under the Ohio Supreme Court's decision in *Peters*.

The Ohio Supreme Court has held that wrongful death claims are not subject to arbitration pursuant to a clause signed by the decedent. A decedent cannot bind his or her heirs. In *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4784, 873 N.E.2d 1258 (2007), the Ohio Supreme Court considered the issue of "whether the personal representative of a decedent's estate is required to arbitrate a wrongful-death claim when the decedent had agreed to arbitrate all claims against the alleged tortfeasor." *Peters*, 115 Ohio St.3d at 135. In considering this issue, the Court reviewed the separate nature of survival claims and wrongful death claims. The Court stated

that "when an individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* leading to his or her death as well as a wrongful-death action *for the injuries suffered by the beneficiaries of the decedent* as a result of the death." (Emphasis in original.) *Peters*, 115 Ohio St.3d at 137; *See also* O.R.C. §§ 2125.02 and 2305.21, which provide separate causes of action for wrongful death claims and survival claims respectively. The Ohio Supreme Court recognized that although survival claims and wrongful death claims both relate to the same allegedly negligent acts of a defendant, and that such claims are often pursued by the same nominal party (i.e., the personal representative of the estate) in the same case, they are distinct claims that are brought by different parties in interest. *Peters*, 115 Ohio St.3d at 137, citing *Mahoning Valley Ry. Co. v. Van Alstine*, 77 Ohio St. 395, 414, 83 N.E. 601 (1908). The Ohio Supreme Court held that "a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims. The beneficiaries can agree to arbitrate these claims themselves, but they are not required to do so. Because Peter's beneficiaries did not sign the plan nor any other dispute-resolution agreement, they cannot be forced into arbitration." *Peters*, 115 Ohio St.3d at 138, citing *Thompson v. Wing*, 70 Ohio St.3d 176, 182-83, 637 N.E.2d 917 (1994). Simply put, the Court concluded that "[a]lthough we have long favored arbitration and encourage it as a cost-effective proceeding that permits parties to achieve permanent resolution of their disputes in an expedient manner, it may not be imposed on the unwilling." *Peters*, 115 Ohio St.3d at 138. The Court went on to state that "[r]equiring Peters's beneficiaries to arbitrate their wrongful-death claims without a signed arbitration clause would be unconstitutional, inequitable, and in violation of nearly a century's worth of established precedent." *Peters*, 115 Ohio St.3d at 138-39.

None of Mary Stevens' next-of-kin were ever a party to the arbitration clause, so they cannot

be bound by it. Further, Dessie Stevens clearly signed the arbitration clause despite the fact that she was not authorized to sign a contract on Mary Stevens' behalf. It is also clear that she did not sign the contract on her own behalf, or on the behalf of any of Mary Stevens' next-of-kin. As a result, the Trial Court properly denied Appellants' Motion to Stay because none of the wrongful death claims brought by Decedent Mary Stevens' next-of-kin are subject to Appellants' arbitration clause.

III. CONCLUSION.

For all of the numerous reasons articulated herein, the Trial Court properly denied Appellants' Motion to Stay the within case pending arbitration. Accordingly, Plaintiff-Appellee Daniel P. Lang, as the Personal Representative of the Estate of Mary L. Stevens (deceased), respectfully requests that this Honorable Court affirm the Trial Court's July 2, 2013 Journal Entry denying Appellants' Motion to Stay.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Brief for Appellee, was sent by ordinary U.S. Mail, this **1st day of October, 2013**, to the following:

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