IN THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
APPELLATE COURT CASE NO. CA 13 099850

CUYAHOGA COUNTY COURT OF COMMON PLEAS
TRIAL COURT CASE NO. 12 CV 791812

LOUISE CANTIE, as the personal representative of the Estate of James Cantie (deceased), Plaintiff-Appellee,
vs.
Hillside Plaza, et al., Defendants-Appellants.

BRIEF OF APPELLEE LOUIS CANTIE

ORAL ARGUMENT REQUESTED

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APPELLANTS' ISSUES PRESENTED

Appellants failed to present any issues to the Court as required under App.R. 16(A)(4).

APPELLEE'S ISSUES PRESENTED

A. Although the case should not be stayed or dismissed as requested by Appellant, under O. R.C. § 2711.01, the case is not eligible to be dismissed pending arbitration.

B. The arbitration agreement is both procedurally and substantively unconscionable; and, therefore, is not valid or enforceable.

C. The wrongful death claims brought by the decedent's next-of-kin are not subject to the arbitration agreement pursuant to the Ohio Supreme Court's ruling in *Peters v. Columbus Steel Castings***.**

D. The arbitration agreement was not separate from the admission agreement as required by O.R.C. § 2711.23; and, therefore, it is invalid and unenforceable.

E. The Appellants have waived any alleged right to arbitrate any claims in this case by acting inconsistently with their alleged right to arbitrate and actively participating in this case.

F. Under the terms of Hillside Plaza's Admission Agreement, which included the arbitration clause, the agreement automatically terminated on James Cantie's death on October 6, 2011; and, therefore, is void and unenforceable.

G. The only proper party to the alleged "agreement" is Appellant Hillside Plaza and therefore, it does not apply to Appellants Euclid Hill Health Investors, Inc., DMD Management, Inc., and Legacy Health Services.

H. James Cantie's right to a trial by jury is unwaivable; and, therefore, the arbitration clause is void as a matter of law.

I. The arbitration clause is unenforceable because there was no meeting of the minds and no consideration.

J. The trial court orders used by Appellant to support their Motion to Dismiss or Stay are easily distinguishable from this case.

I. STATEMENT OF THE FACTS AND OF THE CASE.

Prior to his admission at Appellants' nursing home, James Cantie lived with his son, Mark Cantie, and daughter, Louise Cantie, at their home in Cleveland, Ohio. In August, 2011, James Cantie sought treatment for a urinary tract infection at Euclid Hospital. After being treated there, James Cantie was expected to spend up to thirty (30) days at Hillside Plaza after which he would return home to live with his family.

Before admitting James Cantie, AppellantHillside Plaza, by and through its employees and/or agents, required James Cantie's son, Mark Cantie, to sign an Admission Agreement among other paperwork. *See* Hillside Plaza Admission Agreement (attached hereto as Exhibit "A"). The admission paperwork was placed in front of Mark Cantie, and he was told that he had to sign it in order for his father, James Cantie, to be admitted to Hillside Plaza nursing home. *See* Affidavit of Mark Cantie at ¶ 20 (attached hereto as Exhibit "B"). Mark Cantie was told he had to sign the admission paperwork as a formality of his father's admission. *Id.* at ¶ 21; *see* Deposition of Mark Cantie at 33:7-11. Mark Cantie signed the admission paperwork at the direction of the employee and/or agent of the Appellant who conducted the admission process.

When Mark Cantie signed the admission paperwork, he was primarily concerned about his Dad receiving the care he needed so that he could return home. *See* Affidavit of Mark Cantie at ¶ 23. Mark wanted his father to be in a place where he could be cared for, and where his health would improve, so that he would return home with his family. *Id*. at ¶ 27. Mark Cantie did not read the Admission Agreement. *Id.* at ¶ 29. Mark Cantie simply understood what was explained to him– that the Admission Agreement would permit his Dad to be admitted to Hillside Plaza. *Id.* at ¶ 15; Deposition of Mark Cantie at 33:7-11. No one at Hillside Plaza nursing home ever told Mark Cantie that the admission paperwork that he was directed to sign by an employee and/or agent of the Appellant had anything to do with arbitration or litigation. *See* Affidavit of Mark Cantie at ¶¶ 3, 6, 16, 30 and 34.

He did not know that the Admission Agreement contained any terms or provisions regarding the resolution of any disputes with Hillside Plaza nursing home, including any disputes that might arise from negligent care of James Cantie. *Id.* Even if Mark Cantie had read the Admission Agreement, he would not have understood the arbitration clause, because he does not know what arbitration is. *Id*. at 11-13.

Appellant Hillside Plaza's Admission Agreement is a twelve (12) page document. On Page 9 of the Admission Agreement, following sections relating to services, financial obligation, termination of the Agreement, and a "miscellaneous" section, appears an arbitration clause. The arbitration clause is in no way separate from the Admission Agreement. Notably, while some sections of the Admission Agreement do require separate consent, the arbitration clause does not require any type of separate acknowledgment or consent apart from the lengthy Admission Agreement.

The admission paperwork, including the Admission Agreement, was drafted exclusively by Appellant and provided to Mark Cantie by and through Appellant Hillside Plaza's employees and/or agents. *Id*. at ¶¶ 14, 18.

Mark Cantie is not an attorney, nor does he have any legal expertise. *Id*. at ¶ 33; *See* Deposition of Mark Cantie at 8:7. He has had very limited training and education beyond high school. *See* Affidavit of Mark Cantie at ¶ 9. Mark Cantie is lacking experience with litigation or arbitration. *Id.* at ¶ 11. He does not really know what arbitration is or how it works. *Id.* at ¶ 12. No one at Hillside Plaza nursing home ever explained to Mark Cantie the difference between litigation and arbitration. *Id.* at ¶ 5. No one ever mentioned nor explained to Mark Cantie that if he signed the Admission Agreement, that his father would be waiving his right to a jury trial if he received substandard care at Hillside Plaza nursing home and ever decided to sue the owners and operators of Hillside Plaza nursing home for such negligence. *Id.* at ¶ 34. No one ever explained to Mark Cantie or gave him or his father, any choice relative to whether James Cantie would want to be able to sue the owners and

operators of Hillside Plaza nursing home if they ever provided him substandard care or whether he would want to waive his right to a jury trial and arbitrate such a claim. *Id.* at ¶ 6. Mark Cantie and James Cantie never bargained with anyone over the arbitration provision in Appellant Hillside Plaza's Admission Agreement. *Id.* at ¶ 35. They did not even know that such a provision existed. *Id.* at ¶ 10.

When Mark Cantie signed the admission paperwork on behalf of his father, including the Defendant's Admission Agreement, he was never told that he could have an attorney present. *Id.* at ¶ 32. Nor was he ever told that he could have an attorney review the paperwork before he signed it. *Id.* Mark Cantie did not have an attorney present when he signed the admission paperwork. *Id.* at ¶ 31.

On October 6, 2011, James Cantie died as a direct and proximate cause of the Appellants' negligence and/or recklessness.

On September 20, 2013, Appellee Louise Cantie, as the personal representative of the Estate of James Cantie, filed her Complaint.

On November 20, 2012, Appellants filed their first Motion to Dismiss in this case, frivolously alleging that Plaintiff's Affidavit of Merit failed to meet the requirements of Civ.R. 10(D)(2). **Appellants did not demand arbitration at that time.** The Court denied the Appellants' Motion to Dismiss on January 8, 2013.

On November 21, 2012, Appellants filed Answers to Plaintiff's Complaint. **Appellant did not file a Motion to Dismiss or Motion to Stay the case and demand arbitration at that time, and Appellants did not assert Arbitration as an affirmative defense.**

On December 13, 2012, Appellants filed a Motion for Leave to File Amended Answers, along with Amended Answers. Appellants' Amended Answers asserted Arbitration as an affirmative defense. The Court granted Appellants' Motion and permitted Appellants to file the Amended Answers. **Again, Appellants did not file a Motion to Dismiss or Motion to Stay the case and**

demand arbitration at that time.

Plaintiff-Appellee propounded discovery to all Defendant-Appellants on November 13, 2012. On December 10, 2013, Appellants responded to Plaintiff's First Request for Admissions. *See* Letter from Bret C. Perry, Esq. to Meghan P. Connolly, Esq. dated December 10, 2012 (attached hereto as Exhibit "C"). On December 26, 2013, Defendants-Appellants' counsel informed Plaintiff-Appellee that although responses to Plaintiff-Appellee's First Request for Production of Documents and First Set of Interrogatories were late, the Defendant-Appellants were attempting to identify materials and respond to Plaintiff-Appellee's requests. *See* Letter from Bret C. Perry, Esq. to Meghan P. Connolly, Esq dated December 26, 2012 (attached hereto as Exhibit "D").

On January 3, 2013, the Trial Court held a Case Management Conference with counsel. Three attorneys were present to represent the Defendants-Appellants, and Ellen Hobbs Hirshman was present for the Plaintiff-Appellee. During this Case Management Conference, the Defendants-Appellants' recent amendment to their Answers to include the affirmative defense of arbitration was discussed. The Trial Court explicitly inquired of counsel for Defendants-Appellants whether the Defendants-Appellants would seek enforcement of any alleged arbitration agreement in this case. Specifically, the Court asked whether the Court and the parties should commit to a briefing schedule regarding arbitration and its surrounding issues, or a discovery schedule that would move the case forward toward litigation at trial. When Defendants-Appellants' counsel unambiguously indicated that a discovery schedule should be set, the Trial Court set deadlines for the completion of fact discovery, the disclosure of expert reports, and the filing of dispositive motions. Dates were also set for the settlement conference, final pre-trial, and trial of this case. **Defendants-Appellants indicated to the Trial Court and to Plaintiff-Appellee's counsel that they would not be demanding arbitration of this case. Defendants-Appellants did not file a Motion to Dismiss or Motion to Stay the case and demand arbitration at that time, and indicated that no such motion would be filed.**

On January 8, 2013, counsel for Defendants-Appellants participated in a discovery telephone conference with Plaintiff-Appellee's counsel. On January 9, 2013, Appellants filed a Motion to Permit Appellants until February 1, 2013, to Respond to Plaintiff's Discovery Requests, which was granted by the Trial Court. On January 31, 2013, Appellants filed a Notice of Submission of Discovery Responses to Plaintiff. Appellants produced thousands of pages of documents in response to Appellee's discovery requests. **At no time during the pendency of the Plaintiff's discovery requests did Defendants-Appellants file a Motion to Dismiss or Motion to Stay the case and demand arbitration.**

On January 14, 2013, Defendants-Appellants propounded Interrogatories, Requests for Production of Documents, and a First and Second Set of Requests for Admissions to Plaintiff-Appellee. *See* E-Mail from Jason A. Paskan, Esq. to Meghan P. Connolly, Esq. dated January 14, 2013 at 5:14 p.m. (attached hereto as Exhibit "E"). Due to the seventy-six (76) improper and harassing Requests for Admissions propounded by the Appellants, Appellee had to file a Motion for Protective Order. Appellants opposed Appellee's Motion for Protective Order as opposed to withdrawing the Requests. The Court granted Appellee's Motion for Protective Order on February 15, 2013. Otherwise, Appellee responded to all of the Appellants' discovery requests and produced thousands of pages of records in response on February 11, 2013. *See* E-Mail from Meghan P. Connolly, Esq. to Bret C. Perry, Esq dated February 11, 2013 at 6:22 p.m. (attached hereto as Exhibit "F"). **At no time during the pendency of Defendants-Appellants' discovery requests did the Appellants file a Motion to Dismiss or Motion to Stay the case and demand arbitration.**

On February 19, 2013, Appellants Noticed the Depositions of Decedent James Cantie's children, Louise Cantie and Mark Cantie, to take place on February 27, 2013. *See* Letter from Bret C. Perry, Esq. to Ellen Hobbs Hirshman, Esq. dated February 19, 2013 (attached hereto as Exhibit "G").

On February 20, 2013, counsel for Appellants **hosted a ninety (90) minute in person discovery**

conference with Plaintiff's counsel, at the Appellants' counsel's office. Extensive discovery issues were discussed. *See* Letter from Ellen Hobbs Hirshman, Esq. to Bret C. Perry, Esq. and Jason A. Paskan, Esq. dated February 20, 2013 (attached hereto as Exhibit "H").

Appellants continued to produce information and documents responsive to Plaintiff-Appellee's discovery requests. *See* Letter from Bret C. Perry, Esq. to Ellen Hobbs Hirshman, Esq. dated February 25, 2013 (attached hereto as Exhibit "I").

On February 27, 2013, Appellants' counsel conducted the depositions of Appellee Louise Cantie, and Mark Cantie.

Appellants' counsel had agreed to participate in the depositions of the employees who cared for James Cantie during his residency at Hillside Plaza nursing home. However, on March 4, 2013, Appellants filed a Motion to Dismiss or Stay with the Trial Court. Attorney Paskan then suggested that counsel forgo the scheduling of further depositions. Counsel for Appellants stated that "if the Court denies either Motion, my client intends to immediately appeal the Court's Decision." *See* Letter from Jason A. Paskan, Esq. to Ellen Hobbs Hirshman, Esq. dated March 8, 2013 (attached hereto as Exhibit "J").

Even so, on March 15, 2013, Appellants continued to participate in discovery by producing policies and procedures from Hillside Plaza in response to Plaintiff's discovery requests. *See* Letter from Jason A. Paskan, Esq. to Ellen Hobbs Hirshman, Esq. dated March 15, 2013 (attached hereto as Exhibit "K").

On April 12, 2013, the Trial Court denied the Appellant's Motion to Dismiss or Stay, without opinion.

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, at ¶ 14 (8th Dist. 2012), citing *McCaskey v. Sanford-Brown Coll.*, 2012-Ohio-1543, at ¶ 7 (8th Dist. 2012).

"Generally, an abuse of discretion standard applies in limited circumstances, such as a determination that a party has waived its right to arbitrate a given dispute." *Skerlec v. Ganley Chevrolet, Inc.*, 2012-Ohio-5748, at ¶ 6 (8th Dist. 2012), citing *Milling Away, L.L.C. v. UGP Properties, L.L.C.*, 2011-Ohio-1103, at ¶ 8 (8th Dist. 2011). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the [trial] court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

"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, at ¶ 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. 2005) and *Vanyo v. Clear Channel Worldwide*, 156 Ohio App.3d 706, 2004-Ohio-1793, 808 N.E.2d 482 (8th Dist. 2004). "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, at ¶ 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). Further, "questions of unconscionability are reviewed under a de novo standard of review." *Skerlec*, 2012-Ohio-5748, at ¶ 6, citing *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352,

2008-Ohio-938, 884 N.E.2d 12 (2008) and *Shumaker v. Saks Inc.*, 163 Ohio App.3d 173, 2005-Ohio-4391, 837 N.E.2d 393 (8th Dist. 2005); *See also Hayes v. The Oakridge Home*, 122 Ohio St.3d 63, 67, 2009-Ohio-2054, 908 N.E.2d 408 (2009).

Appellants filed a Motion to Dismiss or Stay the within case pursuant to Civ.R. 12(B)1 or O.R.C. § 2711.02 , requesting the trial court to dismiss this case or alternatively stay all proceedings in this case on all of Plaintiff's claims pending arbitration. Appellants' Motion to Stay has no support in law or fact.

B. Summary of Argument.

Appellants have brought three (3) assignments of error that are unsupported in fact and in law. The Trial Court's Order denying the Appellants' Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, Motion to Stay Proceedings and Compel/Enforce Arbitration should be affirmed, and this case should be remanded for further proceedings to avoid further delay.

Appellants' first assignment of error suggests the trial court erred in denying the Appellants' Motion to Dismiss for Lack of Subject Matter Jurisdiction due to the arbitration clause Appellants seek to enforce. This assignment of error is contrary to well settled law in Ohio dictating that a trial court **must stay the arbitrable claims, not dismiss them**, if a party to the proceedings seeks to enforce a valid and enforceable written arbitration agreement. R.C. 2711.02 expressly states that a stay of proceedings is procedurally correct, and the Eighth District Court of Appeals consistently holds the same. Even the Ninth District Court of Appeals decision cited by the Appellants, **the only case cited in support of their first assignment of error**, suggests it is procedural error for a trial court to dismiss a case upon finding the case is arbitrable. This is the Appellants's only argument in support of their Motion to Dismiss, as opposed to their alternative Motion to Stay. As such, the Trial Court's Order denying the Appellants' Motion to Dismiss for Lack of Subject Matter Jurisdiction clearly should not be disturbed.

Appellants' second assignment of error suggests the trial court erred in denying the Appellants' Motion to Stay and Compel Arbitration because the arbitration clause is neither procedurally or substantively unconscionable. Upon review of the arbitration clause's terms, it is apparent that the clause is substantively unconscionable. For example... Upon review of Mark Cantie's affidavit, which summarizes the circumstances surrounding the parties' interaction relative to the arbitration clause, it is also apparent that the arbitration clause is procedurally unconscionable.

Appellants' third assignment of error depends fully on the Appellants' greatly exaggerated interpretation of the Supreme Court of the United States holding in *Marmet*. By over-generalizing the *Marmet* rule and exaggerating its effect on the case at bar, the Appellants seek to mislead this Court to draw the absurd conclusion that a decedent can bind his heirs to an arbitration agreement, thereby contracting away the heirs' rights to bring future wrongful death claims. Clearly, Mr. Cantie's children lack privity with Appellant Hillside Plaza and are not a party to the arbitration agreement. Therefore, the arbitration agreement cannot be enforced against them, and their wrongful death claims cannot be arbitrated pursuant to the agreement the Appellants seek to enforce.

C. Appellants' Assignments of Error.

i. Assignment of Error I.

> THE TRIAL COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS CASE CONSISTENT WITH THE NINTH DISTRICT'S DECISION IN *HELLER V. PRE-PAID LEGAL SERVICES, INC.*

Appellants ask this Court to remand this case with instructions to dismiss Appellee's claims for lack of subject matter jurisdiction pursuant to Civ.R. 12(B)(1). However, Appellants' position is starkly contrary to Ohio law, so much so that this assignment of error is frivolous.

Federal law and Ohio law require courts to stay, not dismiss a case, if the case is referable to arbitration under a written agreement. R.C. 2711.02 explicitly states, in pertinent part:

> (B) If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the

> issue involved in the action is referable to arbitration under an agreement in writing for arbitration, **shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had** in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

R.C. 2711.02 (emphasis added); *see also* 9 U.S.C. 3 Federal Arbitration Act (setting forth an almost identical rule).

This Court recently acknowledged the requirement of Ohio courts to stay, not dismiss, a case pending arbitration. *Tedeschi v. Atrium Centers, LLC, et al.,* 2012-Ohio-2929, 2012 Ohio App. LEXIS 2560 (8th Dist. 2012) at ¶ 18 citing *Gibbons-Grabel Co. v Gilbane Bldg. Co.,* 34 Ohio App.3d 170, 517 N.E.2d 559 (8th Dist. 1986). "[T]he proper action to take when faced with a desire to arbitrate by one of the parties is to stay the case, not dismiss it." *Id*. (holding the trial court did not err in refusing to dismiss the case.) In *Gibbons-Grabel*, it was **plain error** for the trial court to dismiss a case instead of stay the proceedings pending arbitration, and this Court instructed the trial court to stay the case pending the arbitration on remand. *Gibbons-Grabel Co.,* at p. 176, FN3.

The only law cited in support of Appellants' first assignment of error is the ninth district court of appeals case, *Heller v. Pre-Paid Legal Services, Inc*. However, even the *Heller* court acknowledged that a trial court errs in dismissing a case instead of staying it pending arbitration. Under complex procedural facts involving two underlying cases, the propriety of the trial court's dismissal for lack of subject matter jurisdiction was not an issue properly before the court, therefore it was not an issue that was even decided by the court of appeals:

> No party appealed the trial court's dismissal for lack of subject mater jurisdiction. Accordingly, irrespective of whether that dismissal was legally correct, that determination, and the determination of any issues on which the dismissal was premised, have been conclusively determined and may not be relitigated.

Because the trial court order dismissing the case for lack of subject matter jurisdiction was not appealed from, the justiciable issue in *Heller* became whether the doctrine of res judicata applied.

Despite the complicated procedural facts, it is made clear in *Heller* that the dismissal for lack of subject matter jurisdiction was erroneous. As noted by the majority, "the dissent correctly identifies

the procedural problems that plague the two cases below[.]" The dissent emphasized that it was procedural error for the trial court to dismiss the case instead of stay the case pending arbitration.

There is no basis for dismissal of Appellee's claims for lack of subject matter jurisdiction. Appellants assignment of error No. 1 is without merit, and this Court should affirm the trial court's denial of Defendants-Appellants' Motion to Dismiss for Lack of Subject Matter Jurisdiction.

ii. Assignment of Error 2

THE ARBITRATION AGREEMENT AT ISSUE HEREIN IS NEITHER PROCEDURALLY OR SUBSTANTIVELY UNCONSIONABLE, THEREFORE, A VALID AND ENFORCEABLE ARBITRATION AGREEMENT HAS BEEN EXECUTED.

AppellantHillside Plaza's Admission Agreement is not enforceable because it is both procedurally unconscionable and substantively unconscionable.

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

a. Procedural Unconscionability.

"Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, e.g., 'age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply

for the goods in question.'" *Small v. HCF of Perrysburg*, 159 Ohio App.3d 66, 2004-Ohio-5757, 823 N.E.2d 19 (6th Dist. 2004), quoting *Johnson v. Mobil Oil Corp.*, 415 F.Supp. 264, 268 (E.D. Mich. 1976). "Additional factors that may contribute to a finding of procedural unconscionability include the following: 'belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.'" *Hayes*, 122 Ohio St.3d at 68, citing *Taylor Bldg. Corp. of Am.*, 117 Ohio St.3d at 362.

In *Small v. HCF of Perrysburg*, 159 Ohio App.3d 66, 71-73, 2004-Ohio-5757, 823 N.E.2d 19 (6th Dist. 2004), the Sixth District Court of Appeals held that an arbitration clause that provided for the arbitration of a nursing home resident's negligence claims was both procedurally and substantively unconscionable. The Court determined that the arbitration clause was procedural unconscionability because "[w]hen Mrs. Small signed the agreement she was under a great amount of stress. The agreement was not explained to her; she did not have an attorney present. Mrs. Small did not have any particularized legal expertise and was 69 years old on the date the agreement was signed." *Small*, 159 Ohio App.3d at 73.

Mark Cantie was under a significant amount of stress when his father was admitted to Hillside Plaza nursing home. Mark Cantie took care of his father on a daily basis. However, Mark Cantie understood that his father needed short term care at Hillside Plaza, which he understood as less than 30 (thirty) days of rehabilitative care before James Cantie could then return home. *See* Affidavit of Mark Cantie at ¶ 7. The admission paperwork was placed in front of Mark Cantie, and he was told that he had to sign it in order to get his father, James Cantie, admitted to Hillside Plaza nursing home. *Id*. at ¶¶ 20-21. Mark Cantie only intended to sign paperwork that would enable his father to be

admitted to Hillside Plaza nursing home and to receive the proper care and services while he was there. *Id*. at ¶ 2. As a result, Mark Cantie signed the admission paperwork as directed by the employee and/or agent of Appellant who conducted the admission process for James Cantie's admission to Hillside Plaza nursing home. *Id*. at ¶ 22.

In terms of business acumen, Mark Cantie was lacking in experience with litigation, arbitration, or drafting or negotiating contracts. *Id.* at ¶¶ 37-38. He was not an attorney and had no legal expertise. *Id*. at ¶ 33. He did not know the difference between arbitration and litigation. *Id*. at ¶ 13. He did not know what arbitration is or how it works. *Id*. at ¶ 12. No one at Hillside Plaza nursing home ever explained to Mark Cantie the difference between litigation and arbitration. *Id.* at ¶ 5. Mark Cantie is not an attorney, nor does he have any leal expertise. *Id*. at ¶ 33. He has had limited training and education beyond high school. *Id*. at ¶ 9. Appellant Hillside Plaza nursing home and its affiliate, Appellant Legacy Health Services, run a business that operates over twenty (20) nursing homes and have done so for over thirty (30) years. Appellant Hillside Plaza is well versed in the business and law applicable to nursing homes in Ohio. At the time James Cantie was admitted to Hillside Plaza nursing home, Appellant Hillside Plaza employed admissions personnel whose job was meeting with new residents and securing their signatures on Admission Agreements which contained arbitration clauses. It is clear that the Appellant Hillside Plaza had all of the relevant experience and business acumen.

In terms of relative bargaining power, Appellant Hillside Plaza owned and operated a nursing home. James Cantie was a 80 year old man who was unable to care for himself. Mark Cantie was unable to provide the rehabilitative care that his father needed and wanted his father to be admitted to the nursing home so that he could become well enough to come home. It is clear that Appellant had all of the bargaining power.

Appellant drafted the Admission Agreement and the arbitration clause.

In terms of whether alterations to the printed terms were possible, it is clear that neither Decedent

James Cantie nor his son Mark Cantie, altered one word of the arbitration clause. *Id*. at ¶ 19. No one ever explained to Mark Cantie or gave his father any choice relative to whether James Cantie would want to be able to sue the owners and operators of Hillside Plaza nursing home if they provided him substandard care or whether he would want to waive his right to a jury trial and arbitrate such a claim. *Id*. at ¶ 6. The arbitration clause in this case was a boilerplate contract of adhesion that was presented to Mark Cantie on a take it or leave it basis. The clause was drafted by the Appellant, in its entirety, to help protect the Appellant from liability.

The terms of the Admission Agreement were never communicated nor explained to Mark Cantie nor to James Cantie. Just like Mrs. Small in the *Small* case, no one at Hillside Plaza nursing home ever adequately explained the arbitration clause to him, in a manner that he could understand it. When Mark Cantie signed the Admission Agreement, he had no idea that he was signing any document that had anything to do with arbitration. *Id*. at ¶ 10. No one ever told Mark Cantie that the admission paperwork that he was directed to sign had anything to do with arbitration nor with litigation. *Id*. at ¶ 30. No one at Hillside Plaza nursing home ever explained to Mark Cantie the difference between arbitration and litigation. *Id*. at ¶ 5. No one ever mentioned or explained to Mark Cantie that if he signed the admission paperwork that his father would be waiving her right to a jury trial. *Id*. at ¶ 34. He had no idea that he was signing any document that would waive his father's right to a jury trial. *Id*. at ¶ 10. In fact, no one at Hillside Plaza nursing home ever mentioned arbitration to Mark Cantie during the admission process. *Id*. at ¶ 3.

Moreover, no one ever explained to James Cantie, nor to Mark Cantie, that if James Cantie was a victim of abuse or neglect at Hillside Plaza nursing home, and if James Cantie or his family wanted to pursue a claim, they would not be able to subpoena witnesses, conduct discovery, propound interrogatories, propound requests for production of documents, etc., so he or his family could properly pursue the claim. As a result, it was impossible for either James Cantie or Mark Cantie to make an

informed decision. It was impossible for either of them to knowingly and voluntarily give up James Cantie's right to a jury trial and his right to conduct discovery before that jury trial. No one ever explained these concepts to James Cantie nor to Mark Cantie.

Appellant Hillside Plaza nursing home, as the much stronger party in this case, knew that Decedent James Cantie, as the much weaker party in a vulnerable position, would be unable to receive any benefit from the arbitration clause, which was drafted solely to limit the liability of the Appellantt.

Accordingly, this Honorable Court should find that the arbitration clause contained within the Defendant's Admission Agreement is procedurally unconscionable.

b. Substantive Unconscionability.

"Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability. However, courts examining whether a particular limitations clause is substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Small*, 159 Ohio App.3d at 71.

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

In this case, the arbitration clause was handed to Mark Cantie in the Admission Agreement on a take it or leave it basis. This is a classic contract of adhesion. There was no way for Mark Cantie to indicate on the Admission Agreement that he rejected the arbitration clause. There is nothing that indicates the arbitration clause is optional. As in *Small*, Mark Cantie was required to agree to the arbitration clause in order to have his father, James Cantie, admitted to Hillside Plaza nursing home.

Appellant Hillside Plaza's terminated Admission Agreement is a twelve (12) page document. On Page 9 of the terminated Admission Agreement, following numerous other sections, was a boilerplate arbitration clause. There is nothing in the clause that says that sometimes nursing home residents are neglected and abused. There is nothing in the clause about the benefits of a jury trial.

There is nothing in the clause telling new residents about the specific rules that will be applied to the arbitration of their claims. Although the clause states that the National Arbitration and Mediation ("NAM") Code of Procedure will be used, a copy of which is attached hereto as Exhibit "L", that twenty-six (26) page document that incorporates a seven (7) page Fee and Cost Schedule, a copy of which is attached hereto as Exhibit "M", certainly was not provided to James Cantie nor to Mark Cantie by the Appellantat any time. Under these rules, discovery is conducted on a voluntary basis only. If a discovery agreement cannot be reached, discovery is conducted at the arbitrator's discretion. There is no consequence for ignoring discovery requests or the orders of an arbitration panel. Additionally, although the procedures provide that the Federal Rules of Evidence are used as guidelines, the arbitrator has full discretion to determine what is relevant to the case. Further, without the subpoena power of the Court, it cannot force third parties to submit to a deposition, nor can the panel hold a party in contempt.

Unlike a jury trial, which may last two to three weeks in a nursing home case, a hearing under the NAM procedure is limited to sixteen (16) hours. Under the code, this sixteen (16) hours includes all of the arbitrators time during conference, pre-hearing conference, travel time, study and review of

written submissions and documents, research, and award preparation time. Any time beyond sixteen (16) hours is considered additional time which is billed at $580.00 per hour. Thus, Plaintiff's time to present her case at a NAM arbitration hearing could be limited to less than one (1) day, before additional time must be purchased. Obviously, the Plaintiff, the party with the burden of proof, is hurt by limiting the time for the presentation of her case.

In addition, contrary to O.R.C. § 2711.23 (E) and (F), the arbitration panel consists of one person, not three persons. In matters in which the Claimant seeks more than $1 million, the NAM Administrator has the sole discretion to determine whether three (3) Arbitrators should hear the case, which is contrary to Ohio law.

There is nothing in the clause telling new residents that most nursing home cases are handled on a contingent fee basis, so the resident or his or her family do not have to pay any amount in legal fees up front or until a recovery is made. There is nothing in the clause about the exorbitant fees that are required for arbitration through the National Arbitration and Mediation.

According to the NAM fee schedule, which Appellant Hillside Plaza also did not provide to James Cantie nor to Mark Cantie, the claimant has to pay an administration fee of $7,550.00. Therefore, if the arbitration clause in this case was enforced, the Estate of James Cantie would have to pay **$7,550.00** just to file the claim and request arbitration. The fees for the Arbitration Hearing, as mentioned above, includes all of the arbitrator's pre-hearing time, including travel time, and costs an additional **$9,280.00** for the first sixteen (16) hours only. Additional time is charged at **$580.00** per hour. There may also be fees for objections, fees to file certain memorandum with the panel, and fees for written findings of fact and conclusions of law or reasons for the award.

The fees charged by the NAM are outrageous, and they were never disclosed to James Cantie nor to Mark Cantie. Clearly, these fees would have a chilling effect on anyone contemplating a claim.

Additionally, under the NAM code of procedure, the Arbitrator shall determine the location of

the hearing. "The Arbitrator may travel to any place necessary in order to conduct hearings, receive witness testimony, and inspect goods, property or documents." *See* NAM Code of Procedure at P. 10. Unlike under the Ohio Rules of Civil Procedure where the Appellee must bring her claim in a proper jurisdiction, the Arbitrator could hold arbitration anywhere.

There is no question that the arbitration clause is substantively unconscionable, as well as procedurally unconscionable. Since both prongs for the test for unconscionability have been met, Appellee respectfully requests that this Honorable Court affirm the trial court's denial of Appellants' Motion to Dismiss or Stay, as the Admission Agreement is not enforceable because it is both procedurally and substantively unconscionable.

iii. Assignment of Error 3

THE ARBITRATION PROVISION APPLIES TO ALL CLAIMS INCLUDING WRONGFUL DEATH PURSUANT TO THE SUPREME COURT OF THE UNITED STATE'S DECISION IN *MARMET.*

Pursuant to the Ohio Supreme Court's decision in *Peters v. Columbus Steel Castings, Co.*, 115 Ohio St.3d 134, 2007-Ohio-4784, 873 N.E.2d 1258 (2007), wrongful death claims brought by a decedent's next-of-kin are not subject to arbitration, even if the arbitration agreement is otherwise valid and enforceable against the decedent (or his or her lawful attorney-in-fact) who entered into it. As a result, the wrongful death claims brought by Decedent James Cantie's next-of-kin are not subject to arbitration, even if this Court finds that the Admission Agreement is valid and enforceable against Decedent James Cantie, through his estate.

In *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4784, 873 N.E.2d 1258 (2007), the Supreme Court of Ohio considered the issue of "whether the personal representative of a decedent's estate is required to arbitrate a wrongful-death claim when the decedent had agreed to arbitrate all claims against the alleged tortfeasor." *Peters*, 115 Ohio St.3d at 135. In considering this issue, the Court reviewed the separate nature of survival claims and wrongful death claims. The Court

stated that "when an individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* leading to his or her death as well as a wrongful-death action *for the injuries suffered by the beneficiaries of the decedent* as a result of the death." *Peters*, 115 Ohio St.3d at 137 (emphasis in original); *See also* O.R.C. §§ 2125.02 and 2305.21, which provide separate causes of action for wrongful death claims and survival claims respectively. The Ohio Supreme Court recognized that although survival claims and wrongful death claims both relate to the same allegedly negligent acts of a defendant, and that such claims are often pursued by the same nominal party (i.e., the personal representative of the estate) in the same case, they are distinct claims that are brought by different parties in interest. *Peters*, 115 Ohio St.3d at 137, citing *Mahoning Valley Ry. Co. v. Van Alstine*, 77 Ohio St. 395, 414, 83 N.E. 601 (1908).

As a result of the different nature of wrongful death claims from survival claims, the Court held that "a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims. The beneficiaries can agree to arbitrate these claims themselves, but they are not required to do so. Because Peters' beneficiaries did not sign the plan or any other dispute-resolution agreement, they cannot be forced into arbitration." *Peters*, 115 Ohio St.3d at 138, citing *Thompson v. Wing*, 70 Ohio St.3d 176, 182-83, 637 N.E.2d 917 (1994). "Although we have long favored arbitration and encourage it as a cost-effective proceeding that permits parties to achieve permanent resolution of their disputes in an expedient manner, it may not be imposed on the unwilling." *Peters*, 115 Ohio St.3d at 138. The Court went on to state that "[r]equiring Peters's beneficiaries to arbitrate their wrongful-death claims without a signed arbitration agreement would be unconstitutional, inequitable, and in violation of nearly a century's worth of established precedent." *Peters*, 115 Ohio St.3d at 138-39.

The holding and reasoning in *Peters* apply to the wrongful death claims which have been brought by Appellee Louise Cantie on behalf of Decedent James Cantie's next-of-kin. James Cantie's next-of-kin cannot be forced to arbitrate their wrongful death claims because they are not parties to an

arbitration agreement.

Appellants argue that *Peters* set forth a categorical rule prohibiting arbitration of a particular type and is therefore invalidated by the Supreme Court of the United States ruling in *Marmet Health Care Ctr., Inc., v. Brown , 56 U.S.* _____. However, what *Marmet* stands for is the proposition that arbitration agreements, including those entered into by nursing homes and their residents, must be treated like all other contracts and cannot be afforded special treatment on public policy grounds. In *Marmet*, the Supreme Court of Appeals of West Virginia outright prohibited certain types of arbitration agreements on public policy grounds. The United States Supreme Court held that such treatment was not valid. However the Court stated, "On remand, the West Virginia court must consider whether, absent general public policy, the arbitration clauses in Brown's case and Taylor's case are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Marmet*, 565 U.S. _____, at * 5. As a result, it is clear that, under *Marmet*, while an arbitration agreement may not be invalidated on public policy grounds, an arbitration agreement may be invalidated on state law grounds.

In Ohio, the law is clear that a Decedent cannot bind her heirs to arbitration. Unlike the Supreme Court of Appeals of West Virginia, which held that the arbitration agreements at issue were invalid based upon public policy grounds, Appellee is asking this Court to find Appellant's Admission Agreement invalid and unenforceable based upon Ohio state law and common law grounds, not public policy grounds.

This Court has recently held that it was reversible error for a trial court to stay claims that fell outside of the scope of the arbitration agreement. *Skerlec v. Ganley Chevrolet, Inc.*, 2012-Ohio-5748 (8th Dist. 2012)(holding that three intentional tort claims fell outside of the arbitration agreement and should not have been stayed.) In this case, there is no doubt that Plaintiff's wrongful death claims fall outside the scope of the Admission Agreement's arbitration clause. As a result, it would be erroneous

to stay James Cantie's next-of-kin's wrongful death claims pending arbitration on Plaintiff's other claims. Accordingly, Appellee respectfully requests that this Court affirm the trial court's ruling.

D. Additional arguments considered by the Trial Court in denying the Appellants' Motion to Dismiss or Stay not addressed by Appellants' Assignments of Error.

Summary stating that Appellants failed to raise an error regarding these arguments therefore, for any one of these reasons alone, the trial court's decision should be affirmed.

i. Pursuant to ORC § 2711.23, an arbitration agreement involving a medical claim is only valid and enforceable if it is separate from any other agreement, consent, or document. Since the arbitration clause at issue is buried on Page 9 of AppellantHillside Plaza's 12 page Admission Agreement, it is not contained in a separate agreement, it is not separate from any other document, it does not require separate consent, and it is invalid and unenforceable.

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

> **To be valid and enforceable** any arbitration agreements 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;**

The arbitration clause that Appellants rely upon for their Motion to Dismiss or Stay is buried on Page 9 of Appellant Hillside Plaza's 12 page Admission Agreement. In addition to the arbitration clause, the Admission Agreement contains provisions relative to the services provided by the facility, the resident's financial obligations, Appellant Hillside Plaza's participation in Medicare and Medicaid, disputed debts, termination of the contract by the Appellant and by the resident - topics that have nothing to do with the resolution of medical claims or arbitration. The arbitration clause is not contained in a separate agreement or document. The arbitration clause does not require any separate consent. The arbitration clause does not require any consent other than consent to the Admission Agreement at large. Accordingly, the arbitration clause contained in Defendant's Admission

Agreement is invalid and unenforceable pursuant to O.R.C. § 2711.23(G), and this Court should affirm the trial court's ruling and deny Appellants' Motion to Dismiss or Stay.

ii. Appellants have waived any alleged right to arbitrate any claims in this case by acting inconsistently with any alleged right to arbitrate by actively participating in this case.

As stated above, Appellants have no right to arbitrate any of the present claims. However, even if Appellants had such a right, having actively participated in this lawsuit, Appellants have acquiesced to proceeding in the present judicial forum rather than an arbitration forum. Appellants' active participation in this case supports this Court's finding that the Appellants have waived any alleged right of arbitration. *See Jones v. Honchell*, 14 Ohio App.3d 120, 470 N.E.2d 219 (12th Dist. 1984) .

In *Milling Away, LLC v. UGP Properties*, *LLC*, 2011-Ohio-1103, at ¶¶ 8-9 (8th Dist. 2011) the Eighth District Court of Appeals held:

> Like any other contractual right, the right to arbitration may be waived. *Rock v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1992), 79 Ohio App.3d 126, 128, 606 N.E.2d 1054*. But in light of Ohio's strong policy in favor of arbitration, waiver of the right to arbitrate is not to be lightly inferred. *Griffith v. Linton (1998), 130 Ohio App.3d 746, 751, 721 N.E.2d 146*. A party asserting waiver must prove the waiving party (1) knew of the existing right to arbitrate; and (2) acted inconsistently with that right. *Checksmart v. Morgan, 8th Dist. No. 80856, 2003 Ohio 163, ¶22*. "'The essential question is whether, based upon the totality of the circumstances, the party seeking arbitration has acted inconsistently with the right to arbitrate.'" Id., quoting *Wishnosky v. Star-Lite Bldg. & Dev. Co. (Sept. 7, 2000), 8th Dist. No. 77245, 2000 Ohio App. LEXIS 4081*.

See also Hausser & Taylor, LLP v. Accelerated Sys. Integration, Inc., 2005-Ohio-1017, at ¶18 (8th Dist. 2005).

In *Skerlec v. Ganley Chevrolet, Inc.*, 2012-Ohio-5748 (8th Dist. 2012), the Eighth District Court of Appeals recently reiterated that a trial court should consider the following factors in determining whether a Appellanthas acted inconsistently with its right to arbitration:

> (1) any delay in the requesting party's demand to arbitrate via a motion to stay judicial proceedings and an order compelling arbitration; (2) the extent of the requesting party's participation in the litigation prior to its filing a motion to stay the judicial proceeding,

> including a determination of the status of discovery, dispositive motions, and the trial date; (3) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim or third-party complaint without asking for a stay of the proceedings; and (4) whether the non-requesting party has been prejudiced by the requesting party's inconsistent acts.

See Skerlec, 2012-Ohio-5748, at ¶ 24, citing *Phillips v. Lee Homes, Inc.*, 1994 Ohio App. LEXIS 596 (8th Dist. 1994), *Rock v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 79 Ohio App.3d 126, 606 N.E.2d 1054 (8th Dist. 1992), and *Brumm v. McDonald & Co. Secs., Inc.*, 78 Ohio App.3d 96, 603 N.E.2d 1141 (4th Dist. 1992).

Ohio courts have repeatedly held that an Appellant waives its alleged right to arbitrate any claim when the Appellantfiles a responsive pleading without immediately moving for a stay pending arbitration and otherwise engages in the litigation of the claims.

In *Hausser & Taylor, LLP v. Accelerated Sys. Integration, Inc.*, 2005-Ohio-1017, at ¶22 (8th Dist. 2005), the Eighth District Court of Appeals held that the Appellants in that case had waived their alleged right to arbitration where the Appellants, by and through their counsel, had participated in pretrials and filed numerous pleadings:

> After reviewing this case, we find appellants waived their rights by participating in the litigation including pretrials, filing numerous pleadings including a counterclaim, and waiting until after the court appointed a neutral accountant to file a motion requesting that the action be stayed. Accordingly, we find no abuse of discretion in the court's proceeding with the action.

In *MGM Landscaping Contractors, Inc. v. Berry*, 2000 Ohio App. LEXIS 1117 (9th Dist. 2000), a copy of which is attached hereto as Exhibit "N", the Ninth District Court of Appeals held that a Appellantwaives its right to arbitrate when it files a responsive pleading and fails to move for a stay pending arbitration before further engaging in the litigation:

> When a party does not properly raise the arbitration provision of a contract before the trial court, he is deemed to have waived arbitration.
>
> *Austin v. Squire (1997), 118 Ohio App. 3d 35, 37, 691 N.E.2d 1085*, citing *Jones v. Honchell (1984), 14 Ohio App. 3d 120, 122, 470 N.E.2d 219*.
>
> [A] plaintiff's waiver may be effected by filing suit. When the opposite party, the potential

> defendant, is confronted with a filed lawsuit, the right to arbitrate can be saved by seeking enforcement of the arbitration clause. This is done under *R.C. 2711.02* by application to stay the legal proceedings pending the arbitration. **Failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver.**
>
> (Footnotes omitted.) *Mills v. Jaguar-Cleveland Motors, Inc. (1980), 69 Ohio App. 2d 111, 113, 430 N.E.2d 965*.
>
> In the case at bar, the contract between the parties contained an arbitration provision which was incorporated by reference to the spec book. 4 The contract was signed by the parties in April 1996; appellee MGM filed its complaint in December 1996. Berry's counterclaims against MGM and the cross-claims against appellee Sunde were filed in March 1997; both appellees filed answers to Berry's pleadings. The parties engaged in extensive discovery, including a flurry of motions to compel and motions for protective orders. The appellees moved for summary judgment in April 1998. The motion to stay and to compel arbitration was not filed until October 15, 1998. By engaging in extensive litigation, the appellees have acted in a manner inconsistent with the right to seek arbitration and, therefore, have waived that right.

See Berry, 2000 Ohio App. LEXIS 1117, at * 6-8 (emphasis added).

In *Hogan v. Cincinnati Fin. Corp.*, 2004-Ohio-3331 (11th Dist. 2004), the Eleventh District Court of Appeals held that a Appellant waives its right to arbitration when it files an answer to a plaintiff's complaint without demanding arbitration:

> It is well-established that the right to arbitration can be waived. See, e.g., *Griffith v. Linton (1998), 130 Ohio App. 3d 746, 751, 721 N.E.2d 146*; *Siam Feather & Forest Products Co., Inc. v. Midwest Feather Co., Inc. (S.D. Ohio 1980), 503 F. Supp. 239, 242*. "A party can waive his right to arbitrate under an arbitration clause by filing a complaint." *Glenmoore Builders, Inc. v. Kennedy, 11th Dist. No. 2001-P-0007, 2001 Ohio 8777, 2001 Ohio App. LEXIS 5449, at 9*, citing *Rock, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1992), 79 Ohio App. 3d 126, 128, 606 N.E.2d 1054*. "'**When the Appellant[files] its answer in that suit without demanding arbitration, it, in effect, [agrees] to the waiver**.'" *Hoffman v. Davidson (Mar. 11, 1988), 11th Dist. No. 3909, 1988 Ohio App. LEXIS 773, at 5*, quoting *Mills v. Jaguar-Cleveland Motors, Inc., (1980), 69 Ohio App. 2d 111, 113, 430 N.E.2d 965*.
>
> * * *
>
> "Active participation in a lawsuit *** evidencing an acquiescence to proceeding in a judicial rather than arbitration forum has been found to support a finding of waiver." (Citations omitted.) *Griffith at 752*.

See Hogan, 2004-Ohio-3331, at ¶¶ 22, 24.

In *Kellogg v. Griffiths Health Care Group*, 2011-Ohio-1733 (3rd Dist. 2011), the Third District

Court of Appeals held that a Appellant waives its right to arbitrate where it fails to timely raise its right to arbitration before the trial court:

> Courts have found the right to proceed with arbitration is adversely affected when a party has acted inconsistently with the right, such as actively participating in litigation. Id. Waiver attaches where there is active participation in a lawsuit, "evincing an acquiescence to proceeding in a judicial rather than arbitration forum." *Griffith. at 752, 721 N.E.2d 146*.
>
> * * *
>
> A party to a contract to arbitrate waives its right when it files a lawsuit rather than requesting arbitration. *Mills v. Jaguar-Cleveland Motors, Inc. (1980), 69 Ohio App.2d 111, 113, 430 N.E.2d 965*. When the other party, the potential defendant, is confronted with a filed lawsuit, the right to arbitrate can be saved by seeking enforcement of the arbitration clause. Id. This may be done under *R.C. 2711.02* by application to stay the legal proceedings pending the arbitration. **"Failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver."** *Austin v. Squire (1997), 118 Ohio App.3d 35, 37, 691 N.E.2d 1085*, quoting *Mills*. See, also, *Jones v. Honchell (1984), 14 Ohio App.3d 120, 122, 14 Ohio B. 135, 470 N.E.2d 219* (when a Appellantfails to raise the arbitration provision of the contract in an answer, he waives the right to submit the matter to arbitration).

See Kellogg, 2011-Ohio-1733, at ¶¶14, 17 (emphasis added).

In this case, Appellants clearly knew of their alleged right to arbitrate. Appellant Hillside Plaza authored the Admission Agreement that contains the arbitration clause. Appellant Hillside Plaza has been in possession of the Admission Agreement that contains the arbitration clause at issue since James Cantie was admitted to Hillside Plaza nursing home on August 30, 2011.

As indicated above, Appellants have also clearly acted inconsistently with any alleged right to arbitrate. Appellants did not seek to enforce an alleged right to arbitration in this case until March 4, 2013, nearly six (6) months after this case was filed. Before filing their Motion to Dismiss or Stay, Appellants filed Answers to Plaintiff's Complaint and Amended Answers to Plaintiff's Complaint. No motion to stay was filed at either time. No demand for arbitration was made at either time. Appellants filed a Motion to Dismiss this case, frivolously alleging that Plaintiff's Affidavit of Merit failed to meet the requirements of Civ.R. 10(D), and failed to raise any argument that this case should be arbitrated. Appellants responded to Plaintiff's discovery requests. Appellants propounded written

discovery requests. Appellee responded to all of these discovery requests and produced thousands of pages of records in response to Defendant's discovery requests.

Appellants' counsel attended the Case Management Conference of January 3, 2013 on behalf of the Appellants, at which time this Court granted Appellants' Motion to File an Amended Answer for the purposes of including arbitration as an affirmative defense. In light of this amendment, the Court inquired of Appellants' counsel whether a briefing schedule regarding arbitration of this case should be set, or whether a discovery schedule should be set. When Appellants' counsel unambiguously indicated that a discovery schedule should be set, this Court set deadlines for the completion of fact discovery, the disclosure of expert reports, and the filing of dispositive motions. Dates were also set for the settlement conference, final pre-trial, and trial of this case. Based upon the totality of the circumstances, the Appellants have clearly acted inconsistently with any alleged right to arbitrate since this case was filed. And Appellants actively waived their right to arbitrate at the Case Management Conference on January 3, 2013, in person, before this Court.

Appellants' counsel noticed and conducted the depositions of Appellee Louise Cantie and James Cantie's son, Mark Cantie. Appellants' counsel agreed to participate in the depositions of Appellants' current and former employees who cared for James Cantie during his residency at Hillside Plaza nursing home, and were being scheduled to take place in April, 2013.

With respect to the delay by the party seeking arbitration in requesting a stay of proceedings or an order compelling arbitration, Plaintiff's Complaint was originally filed on September 20, 2012. Appellants waited almost six (6) months, until March 4, 2013, to file this Motion to Dismiss or Stay. With respect to the extent to which the Appellants participated in the litigation, Appellants have fully participated in the litigation in this case as indicated above, including by extensively engaging in discovery. With respect to the status of discovery, written discovery was nearly complete and fact depositions were in full swing. Appellee and her counsel were preparing this case for trial, which was

scheduled to begin on September 18, 2013. Appellee propounded written discovery requests. Appellee responded to Appellants' discovery requests. Appellee had to oppose Appellants' Motion to Dismiss based on her affidavit of merit. Appellee had to seek protection from this Court through a Motion for Protective Order from Appellants inappropriate Requests for Admissions. Appellee filed a motion to compel the production of relevant information and documents. Appellee has reviewed thousands of pages of documents relative to this case. Appellee has undergone preparations for deposition of Appellants' fact witnesses. Plaintiff-Appellee's witnesses had been deposed. Appellee had engaged expert witnesses.

Appellants have clearly waived any alleged right to arbitration in this case. Appellants, by and through their counsel, have actively participated in this litigation by attending a Case Management Conference, filing numerous pleadings, propounding numerous written discovery requests, responding to numerous written discovery request, hosting a 90-minute discovery conference with Plaintiff's counsel, and deposing Appellee and other members of James Cantie's family. Moreover, Appellants, by and through their counsel, expressly selected the Court of Common Pleas over arbitration at the Case Management Conference on January 3, 2013. It is clear that Appellants' Motion to Dismiss or Stay was submitted for the purposes of delaying litigation

iii. The express language of AppellantHillside Plaza's Admission Agreement clearly states that the Agreement, including its arbitration clause, automatically terminated on James Cantie's death on October 6, 2011. As a result, the Admission Agreement and its arbitration clause is void and unenforceable.

Pursuant to its express terms, Appellant Hillside Plaza's Admission Agreement, including the arbitration clause contained therein, automatically terminated on October 6, 2011 upon James Cantie's death. Since the Agreement terminated on October 6, 2011, it is not enforceable in March, 2013.

It is well recognized that "arbitration is a creature of contract." *Motor Wheel Corp. v. Goodyear Tire & Rubber Co.*, 98 Ohio App.3d 45, 52, 647 N.E.2d 844 (8th Dist. 1994). Arbitration agreements should be "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin*

Mfg. Co., 388 U.S. 395, 405 n. 12, 87 S.Ct. 1801 (1967). As a result, "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346 (1985). "When confronted with an issue of contract interpretation, the role of the court is to give effect to the intent of the parties to that agreement. The court examines the contract as a whole and presumes that the intent of the parties is reflected in the language used in the agreement." *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Utils. Comm'n of Ohio*, 129 Ohio St.3d 485, 490, 2011-Ohio-4189, 954 N.E.2d 104 (2011), citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219, 2003-Ohio-5849, 797 N.E.2d 1256 (2003). "[T]he terms of a written contract are to be ascertained from the language of the agreement, and no implication inconsistent with the express terms therein may be inferred." *Belfance v. Standard Oil*, 1990 Ohio App. LEXIS 5475, at * 8 (9th Dist. 1990). "When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Martin Marietta Magnesia Specialties, L.L.C.*, 129 Ohio St.3d at 490, citing *Westfield Ins. Co.*, 100 Ohio St.3d at 219.

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

"A court * * * is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219, 2003-Ohio-5849, 797 N.E.2d 1256 (2003), citing *Shifrin v. Forest City Enters., Inc.*, 64 Ohio St.3d 635, 1992-Ohio-28, 597 N.E.2d 499 (1992) and *Blosser v. Enderlin*, 113 Ohio St. 121, 148 N.E. 393, paragraph one of the

syllabus (1925). "Additionally, *all* terms in a contract should be given effect whenever possible." *Budai*, 1997 Ohio App. LEXIS 189, at * 28-29 (emphasis in original), citing *Wadsworth Coal Co. v. Silver Creek Min. & Ry. Co.*, 40 Ohio St. 559, paragraph one of the syllabus (1884). "The contract under consideration should be construed reasonably, so as not to arrive at absurd results. *Budai*, 1997 Ohio App. LEXIS 189, at * 28, citing *Cincinnati v. Cameron*, 33 Ohio St. 336, 364 (1878). "[W]here the written contract is standardized and between the parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party." *Westfield Ins. Co.*, 100 Ohio St.3d at 220, citing *Cent. Realty Co. v. Clutter*, 62 Ohio St.2d 411, 413, 406 N.E.2d 515 (1980).

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

some other date when Toledo Edison's distribution sales reached a certain level. Therefore, the express language of the termination clauses in the contracts controlled.

In this case, it is clear that the Appellant Hillside Plaza's Admission Agreement automatically terminated upon James Cantie's death on October 6, 2011. Article III(B) of the Agreement states, in pertinent part, "This agreement shall automatically terminate upon the death of the resident." It is indisputable that the "resident" refers to James Cantie, and that James Cantie died on October 6, 2011. As a result, Defendant's Admission Agreement, including the arbitration clause contained therein, terminated on October 6, 2011 and should not be given any effect by this Court.

The Admission Agreement was drafted exclusively by the Defendant. If the Appellantdesired the arbitration clause to remain in effect after James Cantie's death and the termination of other obligations reflected in the Agreement, it could have easily included a provision to that effect. However, it did not. The only reasonable conclusion, which is supported by the express terms of the Agreement, is that the Admission Agreement terminated on October 6, 2011. Therefore, there is no basis to dismiss or stay any of Appellee Louise Cantie's claims pursuant to the Appellants' Motion to Dismiss or Stay, which was filed on March 4, 2013, over one (1) year after the Admission Agreement and arbitration clause had terminated.

Since the Admission Agreement automatically terminated on James Cantie's death on October 6, 2011, and Appellants and their counsel knew that James Cantie had died prior to the filing of Defendant's Motion to Dismiss or Stay, it is clear that Appellant Hillside Plaza's Admission Agreement, including its arbitration clause, cannot be enforced and that Appellants' Motion to Dismiss or Stay was filed merely to burden Appellee and her counsel, needlessly increase Plaintiff's litigation costs, and unnecessarily delay this case. Due to the termination of the Admission Agreement, Appellants' Motion to Dismiss or Stay is not warranted or supported by existing statutory and case law in Ohio, in any manner. Nor do Appellants provide any indication in their Motion to Dismiss or Stay

how its Motion is supported by an extension, modification, or reversal of existing law or the establishment of new law. In fact, Appellants outright avoid any discussion of the termination clause in the Admission Agreement and its effect on the enforceability of the Admission Agreement and its arbitration clause. Appellants' attempt, by and through its counsel, to enforce a contract that is void, based upon the unequivocal language of its terms and Ohio law, is frivolous. The Admission Agreement, including its arbitration clause, automatically terminated upon James Cantie's death on October 6, 2011 and should not be given any effect.

iv. The only proper party to the alleged "agreement" is AppellantHillside Plaza. Therefore, it does not apply to Appellants Euclid Hill Health Investors, Inc., DMD Management, Inc., and Legacy Health Services.

Only one Appellant in this case is a party to the Admission Agreement. In the first paragraph, the Admission Agreement expressly states that the "Agreement is made and entered into this day of 8/30/2011 by and among/between Hillside Plaza ("Facility"), James Cantie, ("Resident") and Mark Cantie, RP ("Representative"). On the last page of the Admission Agreement, Kelly Foor executed the Admission Agreement as a representative of "Hillside Plaza" only. Euclid Hill Health Investors, Inc., DMD Management, Inc., and Legacy Health Services, are not parties to the Admission Agreement. There is no argument that any part of this case should be stayed as to these Appellants.

v. Because Decedent James Cantie's right to trial by jury is unwaivable, the arbitration clause is void as a matter of law.

Attached hereto as "Exhibit O" is a letter dated April 2, 2008, from attorney Winston M. Ford, General Counsel of the Ohio Department of Health, explaining the position of the Ohio Department of Health regarding binding arbitration. On page 1, the letter references the Ohio Department of Health'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 (emphasis added);

> **(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 (emphasis added);

> (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 Appellants violated Decedent James Cantie'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 James Cantie to waive his right to pursue a cause of action against the Appellants. Pursuant to O.R.C. §3721.13(C), **"Any attempted waiver of the rights listed in division (A) of this section is void."** (emphasis added) Therefore, because the arbitration clause in this case attempts to induce Decedent James Cantie 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 Appellants' Motion to Dismiss or Stay should be denied.

The letter from the General Counsel for the Ohio Department of Health expresses the concern of the Ohio Department of Health that clauses like the one at issue in this case are designed to limit the liability of the facility and limit the facility's responsibility to provide adequate and appropriate medical treatment and nursing care. On page 2 of his letter, Mr. Ford expresses the Ohio Department

of Health'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 Ohio Department of Health that the agreements are frequently contracts of adhesion, which are presented on a take it or leave it basis. That is exactly what happened in this case. The Ohio Department of Health is concerned that these agreements are often lengthy and complicated. The Ohio Department of Health 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, which begins on page 9 of Appellant Hillside Plaza's 12 page Admission Agreement.

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 Ohio Supreme 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 (emphasis added);

> 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**.
>
> **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.

James Cantie's right to sue the nursing home for its violation of his statutory rights cannot be waived. As a result, the arbitration clause in this case is void as a matter of law.

vi. 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(attached herein as "Exhibit P"). **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.

Neither James Cantie nor Mark Cantie ever intended to give away James Cantie's right to a trial by jury, relative to some claim that did not even exist when the admission agreement was signed. James Cantie needed someone to care for him until he was able to go home, and Mark Cantie signed on his behalf in order for his Dad to be admitted to the nursing home. If the consequences of signing the arbitration clause were clearly explained to Mark Cantie, he never would have signed it. No reasonable person would have agreed to this clause.

Further, if the subject arbitration clause is enforced, it would absolutely lead to manifest absurdity. It would lead to the deprivation of James Cantie'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. James Cantie's right to a trial by jury should not be taken away because Mark Cantie signed admission documents simply so that James Cantie could be admitted to a nursing home.

vii. The trial court authority Appellants rely on to support their Motion to Dismiss or Stay is easily distinguished from this case.

Appellants have attached four (4) trial court orders regarding arbitration as persuasive authority. However, Appellants' reliance on these cases is misplaced.

In *Deprato v. Emeritus Corp., et al* (attached to Appellants Motion to Dismiss or Stay as Exhibit "B-1"), the Honorable Judge Hunter authored a Judgment Entry merely summarizing the Appellee and Appellants' mutual agreement that a valid arbitration agreement is binding and enforceable as to all of the plaintiff's claims. In fact, the parties in that case apparently agreed to arbitrate all of the plaintiff's claims pursuant to the specific terms set forth in that Order. The Honorable Judge Hunter did no more than finalize the parties' agreement in her Journal Entry. Clearly, no agreement to arbitrate all of Plaintiff's claims exists in this case. This case cannot be compared to a case in which the Appellee and the Appellantreached an agreement to arbitrate all claims.

Similarly, in *Hedgespeth v. Country Lawn Center for Rehabilitiaotn and Nursing Care, et al.* (attached to Appellants' Motion to Dismiss or Stay as Exhibit "B-2"), it is clear from the Honorable Frank G. Forchione's Judgment Entry that the "Appellee ha[d] not filed a response" to the defendant's motion to stay the case pending arbitration. Additionally, it is clear that the Honorable Judge Forchione found that the subject arbitration agreement was valid and enforceable. In this case, Appellee opposes Appellants' Motion, and the arbitration clause is invalid and unenforceable for the many reasons set forth above. This case cannot be compared to a case where the Appellee presented no opposition, and where the arbitration agreement was found to be valid and enforceable.

Appellants also cite to *McFarren v. Emeritus at Canton, et al* (attached to Appellants' Motion to Dismiss or Stay as Exhibit "B-3"), but do not provide the Court with any analysis as to why this case should be considered similar to *McFarren*, where the Court granted Appellants' Motion to Compel/Enforce Arbitration. Appellants have failed to show any facts from that case or any analogy whatsoever, without which this Order fails to provide any persuasive authority. Again, the Court clearly found a valid and enforceable arbitration agreement. Here, the arbitration clause is invalid and unenforceable for the many reasons set forth above.

In *Jackson v. Suburban Pavillion, et al.* (attached to Appellants' Motion to Dismiss or Stay as

Exhibit "B-4"), the Honorable Nancy R. McDonnell stayed the case pending arbitration. However, Appellants have again failed to demonstrate any factual similarity to this case. Additionally, the Appellee did not oppose the Appellants' motion to stay in that case. This order provides no persuasive authority under these circumstances, as Appellee opposes Appellants' Motion to Dismiss or Stay, and the arbitration clause at issue is invalid and unenforceable for any one of the many reasons set forth above.

III. CONCLUSION.

It is clear from the above discussion that Appellants are precluded from invoking the arbitration clause because it and the Admission Agreement automatically terminated upon James Cantie's death on October 6, 2011.

Further, as the arbitration clause is not a separate agreement or document requiring separate consent, in violation of O.R.C. § 2711.23, it is void and unenforceable.

Additionally, Appellants have extensively engaged in litigation in this case, including in depth participation in discovery in this case and their express statement to this Court that arbitration would not be sought, thereby waiving any alleged right to arbitration.

James Cantie's next-of-kin are not bound by the Admission Agreement, and cannot be required to submit their wrongful death claims to arbitration, pursuant to the Ohio Supreme Court's decision in *Peters*.

The only party to the Admission Agreement and its arbitration clause is AppellantHillside Plaza. Therefore, it does not apply to the other Appellants in this case.

James Cantie's right to trial by jury was unwaivable, therefore the subject arbitration clause is unenforceable as a matter of law.

The Admission Agreement and its arbitration clause are unsupported by consideration, and there was no meeting of the minds.

Given the many arguments and reasoning set forth herein, each of which were more than sufficient for the trial court to deny Appellants' Motion to Dismiss or Stay, it is respectfully requested that the Appellants' first, second, and third assignments of error be overruled, and that the trial court's order be affirmed.

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 Electronic Mail, **this 8th day of August, 2013**, to the following:

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