IN THE COURT OF APPEALS, FIFTH APPELLATE DISTRICT
APPELLATE COURT CASE NO. 05-CA-001
HOLMES COUNTY COURT OF COMMON PLEAS
TRIAL COURT CASE NO. 04-CV-080

IDAMAY FORTUNE, Plaintiff - Appellee
vs.
CASTLE NURSING HOMES, INC., Defendant - Appellant

BRIEF OF APPELLEE IDAMAY FORTUNE

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ASSIGNMENTS OF ERROR
Appellant Castle Nursing Homes, Inc. is arguing that the Trial Court abused its discretion in finding that a contractual arbitration clause was both procedurally and substantively unconscionable and hence refusing to enforce it.ISSUES PRESENTED FOR REVIEW
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2. Appellant Castle Nursing Home, Inc. argues that a “loser pays” provision in an arbitration clause does not, in and of itself, render that clause substantively unconscionable.

3. Appellant Castle Nursing Homes, Inc. argues that an arbitration clause deemed substantively unconscionable due to the presence of a “loser pays” provision should be enforced without that term rather than struck down in its entirety.

I. STATEMENT OF THE CASE.

Appellant Castle Nursing Homes, Inc. (hereafter referred to as Appellant “Castle”) asked the Trial Court to Stay the within case while it was referred to binding arbitration conducted by the American Health Lawyers Association, (hereafter referred to as the “AHLA”). The AHLA is made up of lawyers who represent nursing homes. According to its web site located at http://www.healthlawyers.org, the AHLA is “the nation's largest, nonpartisan, 501(c)(3) educational organization devoted to legal issues in the healthcare field. Health Lawyers provides resources to address the issues facing its active members who practice in law firms, government, in-house settings and academia and who represent the entire spectrum of the health industry: physicians, hospitals and health systems, health maintenance organizations, health insurers, managed care companies, nursing facilities, home care providers, and consumers.” (Emphasis added.)

Appellant Castle asked the Honorable Court to stay the within case and forever deny Plaintiff Idamay Fortune her day in Court.

Appellant Castle asked the Trial Court to rule that Appellee Idamay Fortune’s remedy is binding arbitration conducted by attorneys who represent nursing homes.

Appellant Castle asked the Trial Court to deny Appellee Idamay Fortune her constitutionally protected right to a trial by jury.

Appellant’s Motion was denied by the Trial Court.

Prior to ruling on Appellant’s Motion the Trial Court listened to oral argument on the issue.

Appellee’s counsel has not been able to locate one single case in Ohio, reported or otherwise, where a Court has ever forced a Plaintiff in a case involving allegations of nursing home negligence to forego her constitutional right to a trial by jury and instead to have her case arbitrated. Further, Appellee Castle has not cited any case ever decided in Ohio that supports its request that the within case, a civil case alleging negligence against a nursing home, be stayed while the claims are decided by binding arbitration.

II. STATEMENT OF THE FACTS.

Appellee Idamay Fortune was a resident of the Sunset View Castle Nursing

Home, a long term care facility and/or nursing home, located at 6180 State Route 83 North, Millersburg, Ohio 44654. When she was admitted, she signed an admission agreement. Contained in the agreement was a binding arbitration clause. Ms. Fortune was not mad aware of the clause nor did anyone employed by Appellant Castle discuss it with her.

Shortly after her admission, an aid was helping Ms. Fortune practice in the shower room and the aid dropped Ms. Fortune and she fell to the hard shower floor and broke her right leg. The fracture had to be surgically repaired.

Appellee Fortune should not be forced to give up her right to a trial by jury and to arbitrate the within case before arbitrators who represent nursing homes.

III. LAW AND ARGUMENT.

In its only Assignment of Error, Appellant Castle Nursing Homes, Inc. argues that the Trial Court abused its discretion when it found that the arbitration clause at issue in this case was both procedurally and substantively unconscionable.

Appellant Castle cites many cases dealing with arbitration clauses in general. Appellee does not dispute that there is a value to alternative dispute resolution and to arbitration. Appellee does not dispute that some arbitration clauses are, and should be, enforceable.

On page 4 of its Brief, Appellant concedes that despite Ohio's strong preference for arbitration, not every arbitration clause will be enforced, citing Branham v. CIGNA Healthcare of Ohio, Inc., 81 Ohio St. 3d 388, 390n. 4 (1998).

Appellant also concedes, on page 4 of its Brief, that unconscionable arbitration clauses are not enforceable, citing Williams v. Aetna Finance Co., 83 Ohio St. 3d 464 (1998).

Appellant then discusses unconscionability. However, Appellant fails to cite any case that actually deals with an arbitration clause in a case where nursing home negligence is alleged.

The issue that this Honorable Court must decide is, is the arbitration clause that is at issue in this case unconscionable. Appellant concedes that this decision is within the sound discretion of the Trial Court. The Trial Court determined that the subject arbitration clause was unconscionable. The Trial Court's decision should be affirmed.

As stated by the Ohio Supreme Court in Branham v. Cigna Healthcare, 81 Ohio St. 3d 88, 390 692 N.E. 2d 137, 140 (1998), "While the law of this state favors arbitration, Council of Smaller Enterprises, infra, 80 Ohio St. 3d [661] at 666, 687 N.E.2d [1352] at 1356; Schaefer v. Allstate Ins. Co. (1992), 63 Ohio

St. 3d 708, 711-712, 590 N.E.2d 1242, 1245, not every arbitration clause is enforceable. R.C. 2711.01(A); Schaefer, 63 Ohio St. 3d 708, 590 N.E.2d 1242." (emphasis added).

The arbitration clause contained in Idamay Fortune's admission agreement should not be enforced.

Appellee Idamay Fortune signed the admission agreement during a very emotional time. She was becoming the resident of a nursing home, a very trying time for anyone. She was facing a loss of her independence, grappling with the reality of her declining health and, in fact, her own mortality. She was asked to sign an admission form so that she could be admitted to a nursing home. The subject admission form is seven (7) pages long. Buried on page 5 is the subject clause which is entitled "Resolution of Disputes". The first section is entitled "Nonpayment of Charges." Idamay Fortune had no idea that she was giving away her right to a trial by jury if she found herself the victim of negligence or abuse.

Further, she certainly had no idea that, if she was the victim of negligence or abuse, her only recourse would be an arbitration where lawyers who represent nursing homes would decide her case. It is simply unconscionable to force someone to give up their constitutional right to a trial by jury in favor of an arbitration conducted by lawyers who represent entities like the one you are suing. Further, Appellee Idamay Fortune did not have a claim for injury when she signed the admission agreement. How could she have waived a right that did not even exist when she signed the agreement?

Appellant Castle has not cited any cases, neither in its original Motion to Stay, nor in its Appellate Brief, which are directly on point. However, the Sixth Appellate District Court of Appeals was recently confronted with this exact issue.

In Small v. HCF of Perrysburg, 159 Ohio App. 3d 66 (2004), the trial court ordered the plaintiffs in that case to submit their claims of nursing home negligence against the Defendant to arbitration, and stayed the case until the conclusion of the arbitration. The Plaintiffs appealed. On appeal, the Plaintiffs, now the Appellants, argued that "the clause was unconscionable because Mrs. Small, at the time she signed the document, was concerned about the immediate health of her husband and was in no position to review and fully appreciate the terms of the agreement." Small at 69.

At the outset, the Sixth Appellate District Court of Appeals noted, "We review a decision to stay the trial court proceedings pending arbitration

under an abuse of discretion standard. Harsco Corp. v. Crane Carrier Co. (1997), 122 Ohio App.3d 406, 410, 701 N.E.2d 1040. An abuse of discretion 'connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140." Small at 69.

Therefore, despite Appellant's claim this Honorable Court's review should be de novo, this Honorable Court should review the Trial Court's decision under an abuse of discretion standard. Appellant Castle has not come close to proving that the Trial Court's decision in the within case was "unreasonable, arbitrary or unconscionable". Appellant's appeal should be denied and the Trial Court's decision should be affirmed.

Further, the arbitration clause at issue in the Small case is virtually identical to the arbitration clause contained in the admission agreement in the within case. The arbitration agreement in Small reads as follows:

"A. Nonpayment of Charges. Any controversy, dispute, disagreement or claim of any kind arising between the parties after the execution of this Agreement regarding nonpayment by Resident or Responsible Party for payments due to the Facility shall be adjudicated in a court of law, or arbitrated if mutually agreed to by the parties.

"B. Resident's Rights. Any controversy, dispute, disagreement or claim of any kind arising between the parties after the execution of this Agreement in which resident or a person on his/her behalf alleges a violation of any right granted Resident in a State or Federal statute shall be settled exclusively by binding arbitration.

"C. All Other Disputes. Any controversy, dispute, disagreement or claim of any kind arising between the parties after the execution of this Agreement (other than those actions in sections V.A. and V.B. of this Agreement) shall be settled exclusively by binding arbitration. This arbitration clause is meant to apply to all controversies, disputes, disagreements or claims including, but not limited to, all breach of contract claims, negligence and malpractice claims, and all other tort claims.

"D. Conduct of Arbitration. The Resident's agreement to arbitrate disputes is not a condition of admission. If, however, the Resident and/or Responsible Party agree to arbitrate disputes by signing this Agreement, then the arbitration will be conducted as follows: Any arbitration conducted pursuant to this Article IV shall be conducted at the Facility in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and judgment on the award rendered by the arbitrator shall be entered in any court having jurisdiction thereof. The parties understand that arbitration proceedings are not free and that any person requesting arbitration will be required to pay a filing fee and other expenses. The prevailing party in the arbitration shall be entitled to have the other party pay its costs for the arbitration, including reasonable attorneys' fees and prejudgment interest. The issue of whether a party's claims are subject to arbitration under this agreement shall be decided through the AHLA arbitration process noted above."
Small at 70.

As this Honorable Court can see, this clause is almost identical to the arbitration clause in the admission agreement for the within case.
However, the arbitration clause in the Small case also included, on the final page of the agreement, just above the signature line, the following language:

THE PERSONS SIGNING BELOW HAVE READ ALL THE TERMS OF THIS AGREEMENT, AND HAVE HAD AN OPPORTUNITY TO ASK QUESTIONS REGARDING THOSE TERMS. THE PARTIES UNDERSTAND THAT BY SIGNING THIS AGREEMENT THAT THEY ARE AGREEING TO WAIVE THEIR RIGHTS TO SUE IN A COURT OF LAW AND ARE AGREEING TO ARBITRATE DISPUTES.
THE PARTIES DO FOR THEMSELVES, THEIR HEIRS, ADMINISTRATORS AND EXECUTORS, AGREE TO THE TERMS OF THIS AGREEMENT IN CONSIDERATION OF THE FACILITY'S ACCEPTANCE OF AND RENDERING SERVICES TO THE RESIDENT.
Small at 71. There was no such warning in the agreement at issue in the within case. And yet, despite that warning, the Sixth District Court of Appeals still held the arbitration clause unconscionable.
In deciding this issue the Sixth District Court of Appeals held as follows:
As set forth above, R.C. 2711.01(A) provides that an arbitration clause may be unenforceable based on legal or equitable grounds. An arbitration clause may be legally unenforceable where the clause is not applicable to the matter at hand, or if the parties did not agree to the clause in question. Benson v. Spitzer Mgt., Inc., 8th Dist. No. 83558, 2004 Ohio 4751, P13, citing Ervin v. Am. Funding Corp. (1993), 89 Ohio App.3d 519, 625 N.E.2d 635. Further, an arbitration clause is unenforceable if it is found by a court to be

unconscionable. Unconscionability refers to the absence of a meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to one party. Collins v. Click Camera & Video, Inc. (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294. Accordingly, unconscionability consists of two separate concepts: (1) substantive unconscionability, which refers to the commercial reasonableness of the contract terms themselves and (2) procedural unconscionability, which refers to the bargaining positions of the parties. Id. Collins defines and differentiates the concepts as follows:

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

"Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, e.g., 'age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.' Johnson v. Mobil Oil Corp. (E.D.Mich.1976), 415 F. Supp. 264, 268." Id.

In order to negate an arbitration clause, a party must establish a quantum of both substantive and procedural unconscionability. Id. In reviewing the arbitration clause at issue, we will individually discuss each prong.

"Substantive Unconscionability

Appellants contend that the arbitration clause is substantively unconscionable because: (1) it gives The Manor the right to proceed in any forum its chooses for the resolution of fees disputes while limiting residents' claims to arbitration; (2) the arbitration clause, despite the language in the agreement, was a condition of admission; (3) the prevailing party is entitled to costs and reasonable attorney fees; (4) the issue of whether a resident's claim is subject to arbitration is improperly to be determined through the arbitration process; and (5) the clause requires that arbitration be conducted at the facility rather than a neutral setting. Appellee counters each assertion.

At the outset, we note that the arbitration clause does contain a sentence which provides that admission is not conditioned on agreement to the clause. However, the same clause states that any "controversy, dispute, disagreement or claim" of a resident "shall be settled exclusively by binding arbitration."

Further, and most importantly, the bold print directly above the signature lines states that by signing the agreement the parties agree to arbitrate their disputes and that the parties agree to the terms of the agreement "in consideration of the facility's acceptance of and rendering services to the resident." The residents or their representatives are provided no means by which they may reject the arbitration clause. Accordingly, we believe that the resident or representative is, by signing the agreement that is required for admission, for all practical purposes being required to agree to the arbitration clause.

On review of the arbitration clause and the arguments of the parties, we find troubling the fact that the prevailing party is entitled to attorney fees. Typically, attorney fees are not awarded to the prevailing party in a civil action unless ordered by the court (such as following a finding of frivolous conduct.) Though the prevailing party may be the resident or representative, individuals may be discouraged from pursuing claims because, in addition to paying their attorney and, pursuant to the arbitration clause, the costs of the arbitration, they may be saddled with the facility's costs and attorney fees. Such a burden is undoubtedly unconscionable.

Procedural unconscionability

As stated above, procedural unconscionability involves an examination of the bargaining position of the parties. In her affidavit, Mrs. Small stated that when she arrived at The Manor she was concerned about her husband's health because he appeared to be unconscious. Shortly after his arrival she was informed that Mr. Small was going to be transported by ambulance to the hospital. Mrs. Small was then approached by an employee of The Manor and asked to sign the Admission Agreement. The agreement was not explained to her and Mrs. Small stated that she signed the agreement "while under considerable stress * * *." Mrs. Small stated that the entire process, from their arrival at The Manor until the ambulance left, took approximately 30 minutes.

After careful review of the particular facts of this case, we find procedural unconscionability. When Mrs. Small signed the agreement she was under a great amount of stress. The agreement was not explained to her; she did not have an attorney present. Mrs. Small did not have any particularized legal expertise and was 69 years old on the date the agreement was signed.

In finding that The Manor's arbitration clause is unconscionable, we must make a few observations. Though we firmly believe that this case demonstrates both substantive and procedural unconscionability, there is a broader reason that

arbitration clauses in these types of cases must be closely examined.
Arbitration clauses were first used in business contracts, between sophisticated business persons, as a means to save time and money should a dispute arise. As evidenced by the plethora of recent cases involving the applicability of arbitration clauses, the clauses are now being used in transactions between large corporations and ordinary consumers, which is cause for concern. Particularly problematic in this case, however, is the fact that the clause at issue had potential application in a negligence action. Such cases are typically fact-driven and benefit from the discovery process afforded in a civil action. Further, negligence cases often hinge on the "reasonableness" of a particular action or inaction. Such a subjective analysis is often best left to a jury acting as the fact finder. These observations are not intended to prevent the application of arbitration clauses in tort cases, we merely state that these additional facts should be considered in determining the parties' intentions.

Based on the foregoing, we find that appellants' first assignment of error is well taken. Due to our disposition of appellants' first assignment of error, we find that appellants' second assignment of error is moot.
On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Wood County Court of Common Pleas is reversed. The case is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, costs of this proceeding are assessed to appellee.
Small at 71-73 (emphasis added).

Courts nationwide have held similar arbitration clauses unenforceable.
In Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) the Court stated that a one-sided arbitration agreement that takes away numerous substantive rights and remedies of employee under Title VII is so egregious as to constitute a complete default of employer's contractual obligation to draft arbitration rules in good faith.
In Broemmer v. Abortion Serv. of Phoenix, Ltd., 173 Ariz. 148, 840 P.2d 1013 (1992) the Court stated that an arbitration agreement was unenforceable because it required a patient to arbitrate a malpractice claim and to waive the right to a jury trial and was beyond the patient's reasonable expectations where the drafter inserted a potentially advantageous term requiring the arbitrator of malpractice claims to be a licensed medical doctor.

This case is also right on point. The Appellant in the within case asked the Trial

Court to force the Appellee to waive her right to a trial by jury in favor of an arbitration conducted by lawyers who represent nursing homes.

The case of Howell v. NHC Healthcare-Fort Sanders, Inc., 109 S.W.3d 731 (Tenn. Ct. App. 2003), is also directly on point. In that case the Court refused to enforce an arbitration agreement buried in a lengthy admissions agreement. In doing so, it held that the agreement was eleven pages long, and the arbitration provision was on page ten. The Court held that rather than being a stand-alone document, the arbitration clause was "buried" within a larger document. It was written in the same size font as the rest of the agreement, and the arbitration paragraph did not adequately explain how the arbitration procedure would work, except who would administer it. The facts surrounding the execution of the agreement militated against enforcement. The Trial Court found Ms. Howell had to be placed in a nursing home expeditiously, and that the admission agreement had to be signed before this could be accomplished. The agreement was presented to Mr. Howell on a "take-it-or-leave-it" basis. Moreover, Mr. Howell had no real bargaining power. Howell's educational limitations were obvious, and the agreement was not adequately explained regarding the jury trial waiver. The circumstances in that case demonstrate that Larkin [the admissions coordinator] took it upon herself to explain the contract, rather than asking the resident to read it, and that her explanation did not mention, much less explain, that he was waiving a right to a jury trial if a claim was brought against the nursing home. In that case the defendant seeking to enforce the arbitration provision had the burden of showing the parties "actually bargained over the arbitration provision or that it was a reasonable term considering the circumstances." Given the circumstances surrounding the execution of that agreement, and the terms of that agreement, the Court found that the appellant has not demonstrated that the parties bargained over the arbitration terms, or that it was within the reasonable expectations of an ordinary person.

In the within case, the Defendants do not even allege that the parties “bargained” over the admissions agreement. They do not allege that anyone explained any part of the admissions agreement to Ms. Fortune. They do not claim that anyone explained the arbitration clause to Ms. Fortune, nor its consequences.

In the Fall of 1997, the American Arbitration Association, the American Bar Association and the American Medical Association, the leading associations involved in alternative dispute resolution, law, and medicine, collaborated to form a Commission on Health Care Dispute Resolution (the Commission). The Commission's goal was to issue, by the Summer of 1998, a Final Report on the appropriate use of alternative dispute resolution (ADR) in resolving

disputes in the private managed health care environment. Their Final Report discusses the activities of the Commission from its formation in September 1997 through the date of its report, and sets forth its unanimous recommendations.

The Commission issued its Final Report on July 27, 1998. 1 That report concluded on page 15, in Principle 3 of a section entitled, “C. A Due Process Protocol for Resolution of Health Care Disputes.” that; “The agreement to use ADR should be knowing and voluntary. Consent to use an ADR process should not be a requirement for receiving emergency care or treatment. In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.” (Emphasis added.)

The arbitration provision of the admission agreement at issue in the within case clearly violates the guidelines set forth above. The admission agreement was signed when Idamay Fortune was first admitted to the subject nursing home, on April 25, 2003. The dispute did not arise until after Idamay Fortune was injured, some time later. Further, Idamay Fortune never knowingly and voluntarily agreed to arbitration. She signed an admission form so that she could be admitted to a nursing home to receive medical care.

Under Principle 10 entitled, “COSTS IN MANDATED, NONBINDING ADR PROCESSES” the report states, “As provided in Principle 3, binding ADR arbitration should not be mandated in cases involving patients.” (Emphasis added.)

Further, the arbitration clause in the within case has a “loser pays” rule whereby, “The prevailing party in the arbitration shall be entitled to have the other party pay its costs for the arbitration, including reasonable attorney’s fees and prejudgment interest.” Courts in Ohio have consistently rejected imposing a “loser pays” rule, due to the chilling effect it would have on appropriate litigation. Ohio has not adopted the "loser pays" rule with respect to litigation costs. See, Lee v. Pelfrey (1996), 81 Ohio Misc.2d 52, 57, 675 N.E.2d 80.

The arbitration clause in the subject admission form is unconscionable and against public policy. As Justice Cook stated in the Dissent in , Williams v. Aetna Fin. Co., 83 Ohio St. 3d 464, 700 N.E.2d 859 (1998), though state and federal legislation favors enforcement of agreements to arbitrate, both O.R.C. §2711.01(A) and Section 2, Title 9, U.S. Code permit a court to invalidate an arbitration agreement on equitable or legal grounds that would cause any agreement to be revocable. One such ground is unconscionability.

'Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' Williams v. Walker Thomas Furniture Co. (C.A.D.C.1965), 121 U.S. App. D.C. 315, 350 F.2d 445,449." Lake Ridge Academy v. Carney (1993), 66 Ohio St. 3d 376, 383, 613N.E.2d 183, 189. Accordingly, unconscionability has two prongs: a procedural prong, dealing with the parties' relation and the making of the contract, and a substantive prong, dealing with the terms of the contract itself. Both

prongs must be met to invalidate an arbitration provision.
In explaining the analogies between this case and Patterson, the majority appears to stress the disparity of bargaining power between the parties and arbitration costs as reasons for nullifying the agreement to arbitrate as unconscionable. These factors, however, if by themselves deemed to render arbitration provisions of a contract unconscionable, could potentially invalidate a large percentage of arbitration agreements in consumer transactions.

The disparity of bargaining power between Williams and ITT would be one factor tending to prove that the contract was procedurally unconscionable. A finding of procedural unconscionability, or that the contract is one of adhesion, however, requires more. "Black's Law Dictionary (5 Ed.1979) 38, defines a contract of adhesion as a 'standardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. * * * ' " Sekeres v. Arbaugh (1987), 31 Ohio St. 3d 24, 31, 31 Ohio B. Rep. 75, 81, 508 N.E.2d 941, 946947 (H. Brown, J., dissenting), citing Wheeler v. St. Joseph Hosp. (1976), 63 Cal. App. 3d 345, 356, 133 Cal. Rptr. 775, 783; Std. Oil Co. of California v. Perkins (C.A.9, 1965), 347 F.2d 379, 383. See, also, Nottingdale Homeowners' Assn., Inc. v. Darby (1987), 33 Ohio St. 3d 32, 37, 514 N.E.2d 702, 707, fn. 7.

In the within case, with respect to the procedural prong, dealing with the parties' relation and the making of the contract, Appellee Idamay Fortune played no role in the formation of the subject contract. The admission agreement is a classic boilerplate, take it or leave it, contract of adhesion. Appellee Idamay Fortune had no choice, if she wanted to be admitted to the nursing home, but to sign the admission agreement.
With respect to the substantive prong, dealing with the terms of the contract itself, the contract denies Appellee Idamay Fortune her fundamental right to a trial by a jury of her peers, and, in its place, mandates a binding arbitration conducted by lawyers who represent nursing homes like the one she is suing. In exchange, Appellee Idamay Fortune receives nothing. Both prongs are met in this case and the subject arbitration clause should be invalidated by this Honorable Court.

The arbitration provision of the subject admission agreement is also a violation of Federal law. Appellant Castle is not permitted to require additional consideration from a resident in exchange for admission to their nursing home

pursuant to 42 U.S.C. § 1396r(c)(5)(A)(iii) which provides that, in the case of an individual who is entitled to medical assistance for nursing facility services a nursing facility must

not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter, any gift, money donation, or other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility.

Further, federal regulations provide:

In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility.

42 C.F.R. § 483.12(d)(3).

Both the Medicare and Medicaid programs mandate that participating facilities must accept program payments as "full payment." 42 U.S.C. § 1395r(c)(5)(A)(iii). Because Appellee Idamay Fortune already had the right to a jury trial, prior to signing the admission agreement, requiring her to sign an agreement giving up that right, is unauthorized additional consideration.

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

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

1. Appellant Castle argues that a finding of procedural unconscionability must be supported by evidence other than just the contract itself.

There is ample evidence before this Honorable Court to support a finding of unconscionability.

Appellant Castle drafted the admission agreement and included in that agreement the arbitration clause.

The arbitration clause is binding.

The arbitration clause contains a “loser pays” rule.

Appellee Idamay Fortune, who was 70 years old at the time, was asked to sign the admission agreement which contained the arbitration clause at the time that she was being admitted into a nursing home.

Further, the clause required that any dispute be arbitrated by members of the American Health Lawyers Association (“AHLA”), a group of lawyers who represent nursing homes.

Finally, Appellant Castle reserved its right to sue Appellee Fortune in Court if she did not pay her bill. However, the arbitration clause required that all of Ms. Fortune’s claims be arbitrated by members of the AHLA. The subject clause is clearly unconscionable.

In the Small case the resident’s wife signed the agreement. Her health was not at risk. It was her husband who was being admitted into a nursing home. However, the Appellate Court in Small found that the fact that the resident’s wife was concerned about him was sufficient to enable them to find the arbitration clause contained in the admission agreement unconscionable.

In the within Appellee Idamay Fortune was being admitted into the nursing home and she was asked to sign the agreement which contained the arbitration clause.

What should be important to the determination of whether the arbitration clause is unconscionable in this case is whether or not both parties wanted to agree to arbitration. If two parties choose to resolve their disputes through arbitration, and memorialize their agreement in a contract, then that clause should be enforced. For example, law partners or business partners agree that they will resolve their disputes through arbitration because it is less expensive than litigation and more private and they memorialize that agreement in a contract. That agreement should be enforced.

In the within case, Appellee Idamay Fortune never agreed to waive her right to a trial by jury if she ever became of the victim of abuse or neglect. She never agreed to have any future claim that she might have if she were ever abused or neglected decide by lawyers who represent nursing homes.

2. Appellant Castle argues that the “loser pays” provision does not render the clause substantively unconscionable.

Appellee Idamay Fortune is not basing her argument that the subject arbitration clause is substantively unconscionable solely on the inclusion of the “loser pays”

rule. That is just one of many parts of the clause that are unfair to Appellee Fortune.

Appellant Castle actually states on page 7 of its Brief that “Nothing within the Admission Agreement’s arbitration clause can be deemed “unreasonably favorable” to Castle.

The clause gives Appellant Castle the right to sue Appellee Fortune in Court for non-payment. However, all of Appellee Fortune’s claims that may arise in the future, if she becomes the victim of abuse or neglect (which she did) have to be arbitrated by members of the AHLA, a group of attorneys who represent nursing homes. This seems unreasonably favorable to Appellant Castle.

Pursuant to the clause, Appellee Fortune loses her Constitutional right to a trial by jury in exchange for nothing. This seems unreasonably favorable to Appellant Castle.

As the Court in Small stated, as cited above, “we find troubling the fact that the prevailing party is entitled to attorney fees. Typically, attorney fees are not awarded to the prevailing party in a civil action unless ordered by the court (such as following a finding of frivolous conduct.) Though the prevailing party may be the resident or representative, individuals may be discouraged from pursuing claims because, in addition to paying their attorney and, pursuant to the arbitration clause, the costs of the arbitration, they may be saddled with the facility's costs and attorney fees. Such a burden is undoubtedly unconscionable.”

If the arbitration clause is so fair, why didn’t an employee of Appellant Castle sit down with Appellee Idamay Fortune after she was admitted, with her family and explain the clause and ask her of she wanted to sign it? Why was the clause buried on page 5 of the 7 page admission agreement? The answer is that there is no reason for any resident to sign the subject arbitration agreement. The resident gains nothing and she loses her right to a jury trial. The subject arbitration clause is clearly substantively unconscionable.

3. Appellant Castle argues that if the arbitration clause is unconscionable because of the loser pays rule, the clause should be enforced with that part of the clause.

As stated above, Appellee Idamay Fortune argument that the subject arbitration clause is substantively unconscionable is not based solely on the inclusion of the loser pays rule, it is based on the entire clause. The fact that the arbitration is conducted exclusively by members of an Association comprised of attorneys who represent nursing homes is unconscionable. The fact that the clause calls for all arbitrations to be conducted at the subject facility, rather than at some neutral location is unconscionable.

Further, Appellant Castle fails to cite any case that holds that a contract cannot be determined to be substantively unconscionable because of one term or portion of that contract. Further, Appellant Castle has failed to cite any case where

a Court has eliminated part of an unconscionable contract and enforced the rest of the contract.

IV. CONCLUSION.

Appellee Idamay Fortune has the right to a trial by jury for the claims that she is making in this case against Appellant Castle. She never knowingly waived that right. Appellant Castle buried an unconscionable binding arbitration clause at the end of the admission agreement that it asked Appellee Idamay Fortune to sign when she was admitted to Appellant Castle's facility. Appellee did not receive anything in exchange for allegedly giving up her right to a trial by jury.

The subject arbitration clause is procedurally and substantively unconscionable. The Trial Court hade the correct decision in the within case. Appellant Castle has not come close to carrying its burden on appeal and proving that the Trial Court's attitude in denying Appellant's Motion to Stay, was unreasonable, arbitrary or unconscionable.

The Trial Court's decision should be affirmed and the within case should be remanded back to the Trial Court.

Accordingly, for all of the reasons stated above, Appellee Idamay Fortune respectfully requests that the Trial Court's decision denying Appellant's Motion to Stay Proceedings Pending Arbitration be affirmed. Respectfully submitted,

DICKSON, CAMPBELL & FREEMAN, L.L.C.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellee Idamay Fortune was sent by ordinary U.S. mail this 24th day of March, 2005, to the following:

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mailto:shrock@cci.com
Attorney for Appellant Castle Nursing Homes, Inc.

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Blake A. Dickson

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CERTIFICATE OF SERVICE
I hereby certify that a copy of the foregoing Brief in Opposition was sent by ordinary U.S. mail this 9th day of November, 2004, to the following:
Steven J. Shrock, Esq.
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Attorney for Defendants Sunset View Castle Nursing Home, Inc., Sunset View, Limited and Castle Nursing Homes, Inc.

By: _____
Blake A. Dickson
Marvin H. Schiff
Attorneys for Plaintiff Idamay Fortune

Blake A. Dickson
EXHIBIT A
DATE
[Police Station]
[Street Address]
[City], [State] [ZIP Code]
Attention: Automobile Collision Report Department.
RE: My Client: [Client’s Name]

Date of Incident: [Date of Incident]
Location of Incident: [Location of Incident]
Other Driver's Name: [Other Driver's Name]
Report Number: [Report Number]
Dear Sir or Madam:

I represent [Client's Name] relative to the above-captioned automobile collision. I am attempting to obtain a copy of the police report which was prepared relative to this collision along with copies of any and all witness statements taken in connection with this collision, copies of any and all diagrams or narratives prepared relative to this collision and reprints of any and all photographs taken relative to this collision. Unfortunately, when I called [Police Station] to request these materials I was informed that these materials would not be released.

Please note that, Ohio Revised Code §149.43(B) provides;

(B) All public records shall be promptly prepared and made available for inspection to any person at all times during regular business hours. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, governmental units shall maintain public records in a manner that they can be made available for inspection in accordance with this division.

O.R.C. §149.43(B) (emphasis added).

Law enforcement records are specifically defined in O.R.C. §149.43 as public records. Further, law enforcement records are only exempt from production if their release would create a high probability of disclosure of any of the following;

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness' identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness or a confidential information source.

O.R.C. §149.43(A)(2).

Obviously, none of the preceding exemptions apply in this case. I would very much prefer to obtain the materials I have requested amicably. However, if you refuse to release the materials I have requested, I will be forced to file a lawsuit against [Police Station] pursuant to the provisions of §149. If I do have to file a lawsuit against [Police Station], [Police Station] will not only be compelled by the Court to release all of the records I have requested,

it will also be compelled to pay for all of the attorney fees and all of the litigation expenses incurred in connection with the lawsuit.

I sincerely hope that you agree to send me the records I have requested upon receipt of this correspondence so a law suit is not necessary. If you have any questions or concerns please call me. Thank you for your attention

Very truly yours, Blake A. Dickson

BAD:mmm

EXHIBIT B

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition was sent by ordinary U.S. mail this 24th day of June, 2005, to the following:

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By: _____

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