IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO

IDAMAY FORTUNE ) CASE NO. 04-CV-080

Plaintiff ) JUDGE THOMAS D. WHITE

vs. ) PLAINTIFF IDAMAY
) FORTUNE'S BRIEF IN
SUNSET VIEW CASTLE ) OPPOSITION TO
DEFENDANTS'
NURSING HOMES, INC., et al. ) MOTION TO STAY PROCEEDINGS
) PENDING ARBITRATION.
Defendant. )

Now comes Plaintiff IDAMAY FORTUNE, by and through her attorneys, Blake A. Dickson and Marvin H. Schiff of the law firm of Schiff & Dickson, L.L.C., and, for her Brief in Opposition to the Motion to Stay Proceedings Pending Arbitration, filed by Defendants Castle Nursing Homes, Inc., (hereafter referred to as Defendant "Castle") and by Defendant Sunset View, Limited (hereafter referred to as Defendant "Sunset View"), states as follows.

Defendants Castle and Sunset View have asked this Honorable Court to Stay this case while it is 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.)

Defendants Castle and Sunset View are asking this Honorable Court to stay this case and forever deny Plaintiff Idamay Fortune her day in Court. They are asking this Honorable Court to rule that Plaintiff Idamay Fortune's remedy is binding arbitration conducted by attorneys who represent nursing homes. They

are asking this Honorable Court to deny Plaintiff Idamay Fortune her constitutionally protected right to a trial by jury. Defendants' Motion should be denied.

Plaintiff's counsel was not 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, the Defendants did not cite any case ever decided in Ohio that supports their request that the within case, a civil case alleging negligence against a nursing home, be stayed while the claims is decided by binding arbitration.

As stated by the Ohio Supreme Court in Branham v. Cigna Healthcare, 81 Ohio St. 3d 388, 390 692 N.E. 2d 137, 140 (1998), "While the law of this state favors arbitration, Council of Smaller Enterprises, infra, 80 Ohio St. 3d [661] at 666, 687 N.E.2d [1352] at 1356; Schaefer v. Allstate Ins. Co. (1992), 63 Ohio St. 3d 708, 711-712, 590 N.E.2d 1242, 1245, not every arbitration clause is enforceable. R.C. 2711.01(A); Schaefer, 63 Ohio St. 3d 708, 590 N.E.2d 1242." (emphasis added).

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

Plaintiff 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, Plaintiff 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?

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 right on point. The Defendants in the within case are asking this Court to force the Plaintiff 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 as who would administer it. The facts surrounding the execution of the agreement militate 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 fact that Howell cannot read does not excuse him from a contract he voluntarily signed. See Pyburn v. Bill Heard Chevrolet, 63 S.W.3d 351, 359 (Tenn. Ct. App. 2001). But the circumstances here demonstrate that Larkin [the admissions coordinator] took it upon herself to explain the contract, rather than asking him 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. As we have observed, the defendant who is seeking to enforce the arbitration provision has the burden of showing the parties "actually bargained over the arbitration provision or that it was a reasonable term considering the circumstances." Brown. Given the circumstances surrounding the execution of this agreement, and the terms of the agreement itself, 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 reports 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, Plaintiff 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. Plaintiff 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 Plaintiff 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, Plaintiff 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 a violation of Federal Law. Defendants Castle and Sunset View are not permitted to require additional consideration from a resident in exchange for admission to their nursing home pursuant to 42 U.S.C. § 1396r(c)(5)(A)(iii) which provides that, in the case of an individual who is entitled to medical assistance for nursing facility services a nursing facility must

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

Further, federal regulations provide:

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

consideration as a precondition of admission, expedited admission or continued stay in the facility.

42 C.F.R. § 483.12(d)(3).

Both the Medicare and Medicaid programs mandate that participating facilities must accept program payments as “full payment.” 42 U.S.C. § 1395r(c)(5)(A)(iii). Because Plaintiff 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 an unauthorized additional consideration.

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

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.

Accordingly, for all of the reasons stated above, Plaintiff Idamay Fortune respectfully requests that Defendants’ Motion to Stay Proceedings Pending Arbitration be promptly denied.

Respectfully submitted, SCHIFF & DICKSON, L.L.C.

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 9th day of November, 2004, to the following:

Steven J. Shrock, Esq.
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mailto:shrock@cci.com
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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Attorney for CYNTHIA MANLEY as the personal representative of the Estate of PATRICIA MANLEY (deceased).

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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