

IN THE COURT OF COMMON PLEAS  
CUAYAHOGA COUNTY, OHIO

DANIEL P. LANG, as the personal	)	CASE NO. CV 13 803569
representative of the Estate of Mary L.	)	
Stevens (deceased),	)	JUDGE CAROLYN B. FRIEDLAND
	)	
Plaintiff,	)	PLAINTIFF'S BRIEF IN OPPOSITION TO
	)	DEFENDANTS' MOTION TO STAY
vs.	)	PROCEEDINGS AND COMPEL
	)	<u>ARBITRATION.</u>
BEACHWOOD POINTE CARE	)	
CENTER, ET AL.,	)	
	)	
Defendants.	)	

Now comes Plaintiff Daniel P. Lang, by and through his attorneys, Ellen Hobbs Hirshman and Meghan P. Connolly of The Dickson Firm, L.L.C., and hereby submits his Brief in Opposition to the Motion to Stay Proceedings and Compel Arbitration filed by Beachwood Pointe Care Center, Beachwood Nursing & Rehab, Brook Pointe Health and Rehab, Brook Pointe Health and Rehab, Inc., BCFL Holdings, Inc., and Provider Services Holdings, LLC ("Defendants"). Decedent Mary Stevens did not sign, and was never a party to, the "Arbitration Agreement" Defendants seek to enforce. The "Arbitration Agreement" is unenforceable. Therefore, Plaintiff respectfully requests that this Court issue an Order denying the Defendants' Motion to Stay and Compel Arbitration and permit Plaintiff to pursue his claims in this Court.

**I. STATEMENT OF THE FACTS.**

Mary Stevens was admitted to Beachwood Pointe Care Center (hereinafter "Beachwood Pointe") nursing home on March 1, 2012. Mary's husband, Jacob Stevens, was also admitted to

Beachwood Pointe around the same time. Mary and Jacob were roommates at Beachwood Pointe. Dessie Stevens is the daughter of Jacob Stevens, not the biological daughter of Mary Stevens. *See* Affidavit of Dessie Stevens at ¶ 1 (attached hereto as Exhibit “A”).

On March 27, 2012, Beachwood Pointe staff directed Dessie Stevens to sign admission paperwork for Mary Stevens. *See* Affidavit of Dessie Stevens at ¶ 6. Although Dessie Stevens was Jacob Stevens’s legal guardian in March, 2012, Dessie Stevens was not the guardian or power of attorney relative to Mary Stevens at any time. *Id.* at ¶ 3-4. Mary Stevens never asked or told Dessie Stevens to sign any agreement as her agent. *Id.* at ¶ 13. And, when the Beachwood Pointe staff asked Dessie Stevens to sign Mary Stevens’s admission paperwork, she communicated to the Beachwood Pointe staff that she lacked a guardianship and power of attorney relative to Mary Stevens. *Id.* at ¶ 7. Despite Dessie Stevens’s clear communication that she lacked legal authority to do so, the Beachwood Pointe staff directed Dessie Stevens to sign Mary Stevens’s admission paperwork anyway. *Id.* at ¶ 8.

On more than one occasion, Dessie Stevens was approached by Beachwood Pointe to execute documents on behalf of Mary Stevens. *Id.* at ¶ 10. On more than one occasion, Dessie Stevens made it clear that she did not have legal authority to do so, yet a representative of Beachwood Pointe directed her to sign the documents anyway. *Id.* at ¶ 11-12.

The Defendants seek to enforce the “Arbitration Agreement” signed by Dessie Stevens against the estate of Mary Stevens. *See* Arbitration Agreement produced by Defendants (attached hereto as Exhibit “B”). Mary Stevens is not named anywhere in the “Arbitration Agreement”. Mary Stevens did not sign the “Arbitration Agreement”. Dessie Stevens had no authority to sign the “Arbitration Agreement”, or any other agreement, on behalf of Mary Stevens.

As a direct and proximate result of the negligence and/or recklessness of the Defendants,

Mary Stevens suffered severe bed sores and sepsis while a resident at Beachwood Pointe nursing home. Ultimately, the Defendants' negligence and/or recklessness caused Mary Stevens's untimely death.

Defendants now seek to deny the Estate of Mary Stevens the constitutional right to a trial by jury pursuant to an "Arbitration Agreement" that Mary Stevens never signed, which her husband's daughter signed, despite the fact that her husband's daughter had no authority to sign any agreement on Mary's behalf.

## II. LAW AND ARGUMENT.

### A. **The "Arbitration Agreement" cannot be enforced against Mary Stevens or her estate because Mary Stevens is not a party to the "Arbitration Agreement".**

Mary Stevens is not a party to the Defendants' "Arbitration Agreement". Mary Stevens never signed the "Arbitration Agreement". Her husband's daughter, Dessie Stevens, had no authority to sign any agreement on her behalf. The Defendants cannot deem Mary Stevens a party to an agreement based on Dessie Stevens's signature. Because Mary Stevens was never a party to the "Arbitration Agreement", it is unenforceable against Mary Stevens and her estate, and the Defendants' Motion to Stay must clearly be denied.

Mary Stevens's name does not appear anywhere in the "Arbitration Agreement." On page two (2) of the "Arbitration Agreement", there is a space provided in which to identify the resident who is to be bound by the contract. In the document produced by the Defendants, that space is left blank. The Defendants have not presented any evidence that this "Arbitration Agreement" was relative to Mary Stevens in anyway, as opposed to her husband or to any other resident.<sup>1</sup>

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<sup>1</sup>Further, the Defendants have not shown any evidence that any Defendant in this case is a party to the purported "Arbitration Agreement". The first paragraph of the document refers to a

In *Council of Smaller Enters. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 1998 Ohio 172, 687 N.E.2d 1352 (1998), the Supreme Court of Ohio stated that ““arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” \* \* \* This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievances to arbitration.” *Council of Smaller Enters.*, 80 Ohio St.3d at 665, quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986), quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). The Court went on to hold that there is a **presumption against** arbitrability when “there is serious doubt that the party resisting arbitration has empowered the arbitrator to decide anything”. *Id* (emphasis added) at 667-68, citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (In *First Options*, the Supreme Court of the United States held that the because the Kaplans had not personally signed the document containing the alleged arbitration clause, they were not required to arbitrate the underlying dispute).

In *Maestle v. Best Buy*, 2005-Ohio-4120 (August 11, 2005), the Eighth Appellate District Court of Appeals similarly held:

Nevertheless, courts may not force parties to arbitrate disputes if the parties have not entered into a valid agreement to do so. See *Boedeker v. Rogers* (1999), 136 Ohio App. 3d 425, 429; *Painesville Twp. Local School District v. Natl. Energy Mgt. Inst.* (1996), 113 Ohio App. 3d 687, at 695. As the Supreme Court of the United States has stressed, “arbitration is simply a matter of contract between the parties; it is a way to resolve disputes - but only those disputes - that the parties have agreed to submit to arbitration.” *First Options of Chicago, Inc. v. Kaplan* (1995), 514 U.S. 938, 943.

The Court went on to hold (emphasis added):

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“Facility”, but the facility is never identified. “Kelly S.” apparently signed for the “facility”, but there is no evidence that Kelly S. had the authority to bind any Defendant in this case.

**When there is a question as to whether a party has agreed to an arbitration clause, there is a presumption against arbitration.** *Spalsbury v. Hunter Realty, Inc., et al.* (Nov. 30, 2000), Cuyahoga App. No. 76874, citing *Council of Smaller Enters. v. Gates, McDonald & Co.* (1997), 80 Ohio St. 3d 661. An arbitration agreement will not be enforced if the parties did not agree to the clause. *Henderson vs. Lawyers Title Insurance Corp.*, Cuyahoga App. No. 82654, 2004-Ohio-744, citing *Harmon v. Phillip Morris Inc.* (1997), 120 Ohio App. 3d 187, 189.

It is perhaps the most important and most basic principle of contract law, that a contract cannot be enforced against a nonparty to the contract. See *Cincinnati, Hamilton & Dayton RR. Co. v. Metro. Nat. Bank* (1896), 54 Ohio St. 60, 68, 42 N.E. 700 (“There can be no cause of action upon a contract unless there is privity of contract between the obligor and the party complaining.”); *Ohio Energy Assets v. Solid Rock Energy, Inc.*, 2003-Ohio-6315, 2003 Ohio App. LEXIS 5656 (4th Dist., 2001) (“Generally speaking, contractual privity is the sine qua non of actionable breach.”); *Mahalsky v. Salem Tool Co.* (C.A.6 1972), 461 F.2d 581, 584 (“Ohio has no remedy for and does not recognize an action in contract absent privity”). Here, there is no privity of contract between Mary Stevens and the Defendants. The “Arbitration Agreement” cannot be enforced against a nonparty to the agreement. Defendants’ Motion to Dismiss should be denied.

In the Defendants’ Statement of the Case, Defendants assert that Dessie Stevens was the “responsible party” relative to Mary Stevens. See Defendants’ Motion to Stay p. 3. The Defendants have presented no evidence to suggest Dessie Stevens had authority to sign or enter into a contract on Mary Stevens’s behalf. Dessie Stevens was not Mary Stevens’s legal representative by way of a guardianship, power of attorney, or agency relationship. She was not authorized to sign any agreement on behalf of Mary Stevens. The “Arbitration Agreement” is unenforceable against Mary Stevens and her estate, and the Defendants’ Motion to Stay must be denied.

The Eighth District Court of Appeals recently decided this very issue in *Tedeschi v. Atrium Centers, L.L.C.*, 2012-Ohio-2929, 2012 Ohio App. LEXIS 2560 (8th Dist. 2012). In *Tedeschi*, a

nursing home resident fell out of her wheel chair, suffered head injuries, and died as a result. *Id.* at ¶ 2. When the resident's daughter brought a wrongful death action against the nursing home, the defendant nursing home moved to stay the case pending arbitration. *Id.* at ¶ 4. The arbitration agreement was signed by the resident's daughter, "purportedly through a health care power of attorney," and not by the resident herself. *Id.* at ¶ 3. The court found that the nursing home resident's daughter lacked power of attorney, and therefore lacked the authority to sign the arbitration agreement on behalf of her mother. As a result, the court held that the arbitration agreement was unenforceable. Because Dessie Stevens lacked power of attorney, she did not have authority to bind Mary Stevens to the "Arbitration Agreement". The "Arbitration Agreement" is unenforceable against Mary Stevens and her estate, and the Defendants' Motion to Stay must be denied.

Similarly, the Ninth District Court of Appeals decision in *Koch v. Keystone Pointe Health & Rehab.*, 2012-Ohio-5817, (9<sup>th</sup> Dist. 2012), is directly on point. In that case, the Court held that "no contract existed which bound the parties to arbitrate any disputes or claims" where a nursing home resident's daughter-in-law, who did not hold a power of attorney, signed nursing home admission paperwork on behalf of her father-in-law. *Id.* at ¶ 19. As a result, the arbitration agreement that she signed during the admission process was not enforceable against the father-in-law or his estate. As in *Koch*, because Dessie Stevens did not have any authority to sign an agreement on behalf of Mary Stevens, she could not legally bind Mary Stevens, or her estate, to the "Arbitration Agreement" by signing it. As in *Koch*, no contract exists to bind the parties in this case to arbitrate any disputes or claims, and Defendants' Motion to Stay must be denied.

In *Jackson v. Arbors at Fairlawn Care Center*, the nursing home defendants sought to enforce an Alternative Dispute Resolution (ADR) Agreement against a nursing home resident. *See Jackson v. Arbors at Fairlawn Care Center*, Summit County Court of Common Pleas Case No. CV

2012 11 6470, Order of March 7, 2013, the Honorable Judge Tammy O'Brien (attached hereto as Exhibit "C"). The ADR Agreement was signed by the resident's daughter, not the resident herself. The court found that because of a condition precedent in the resident's Power of Attorney document, the Power of Attorney had never come into effect. Without an effective power of attorney, the daughter did not have authority to sign the ADR Agreement on her mother's behalf. Therefore, the ADR agreement could not be enforced against the nursing home resident, and the Defendants' Motion was denied.

**B. The Defendants' "Arbitration Agreement" is unenforceable for failure to conform to the "agreement in writing" requirement under R.C. § 2711.01(A).**

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

**C. The Defendants' "Arbitration Agreement" violates Ohio's Statute of Frauds, R.C. § 1335.05.**

Pursuant to Ohio's Statute of Frauds, the "Arbitration Agreement" the Defendants seek to enforce is unenforceable because it was not **signed by the party to be charged**.

O.R.C. §1335.05 states as follows:

**§ 1335.05. Certain agreements to be in writing**

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

R.C. §1335.05 (emphasis added).

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

In this case, the “Arbitration Agreement” fails to comply with the Statute of Frauds. The “Arbitration Agreement” the Defendants seek to enforce is dated March 27, 2012. Defendants filed their Motion to Stay and Compel Arbitration on April 26, 2013. It is clear that the alleged “agreement” was not to be performed within one year from the making thereof, and that the statute of frauds applies. Pursuant to R.C. §1335.05, the “Arbitration Agreement” lacks the signature of the party to be charged therewith, i.e. Mary Stevens, and is unenforceable against her and her estate. Because the “Arbitration Agreement” fails under the Statute of Frauds, Defendants’ Motion to Dismiss should be denied.

**D. Under *Hayes* and *Marmet*, the Defendants’ “Arbitration Agreement” is unenforceable against Mary Stevens and her estate.**

The Defendants cite *Hayes v. Oakridge Home*, 2009-Ohio-2054, 122 Ohio St.3d 63 (2009), the only Ohio Supreme Court case regarding the enforceability of an arbitration clause against a



nursing home resident.<sup>2</sup> In *Hayes*, the Ohio Supreme Court held:

1. **An arbitration agreement voluntarily executed by a nursing-home resident upon her admission** and not as a precondition to admission is not rendered procedurally unconscionable solely by virtue of the resident's age."

2. **An arbitration agreement voluntarily executed by a nursing-home resident** and not as a precondition to admission that waives the right to trial and the right to seek punitive damages and attorney fees is not substantively unconscionable."

*Id.* at syllabus (emphasis added).

In *Hayes*, the Court found that the nursing home resident **voluntarily executed** the arbitration agreement. Under *Hayes*, the nursing home resident must be a party to the arbitration agreement in order for the agreement to be enforceable. Here, Mary Stevens did not execute any agreement, and Mary Stevens is not a party to the "Arbitration Agreement". The "Arbitration Agreement" is unenforceable under *Hayes*.

The Defendants also cite *Marmet v. Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012), in which the U.S. Supreme Court addressed arbitration agreements between nursing homes and their residents. The *Marmet* Court merely removed blanket state public policy prohibitions against the arbitration of bodily injury and wrongful death claims against nursing homes. Stated differently, the only thing that *Marmet* requires is that state courts treat nursing home contracts with their residents as they would any other contract in their state. Under *Marmet*, general principles of Ohio contract law apply to this case. In treating the "Arbitration Agreement" produced by Defendants as any other purported contract in Ohio, it is clear that no contract was ever formed between the Decedent and the Defendants in this case. Under both *Hayes* and *Marmet*, the Defendants' Motion to Stay must be denied.

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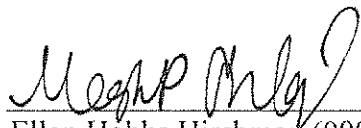
<sup>2</sup> Plaintiff's counsel's firm represented the plaintiff in the *Hayes* case.

### III. CONCLUSION.

Because neither Mary Stevens, nor any person lawfully authorized to contract on Mary Stevens's behalf, ever signed the "Arbitration Agreement", it is invalid and unenforceable against Mary Stevens and her estate. For the reasons discussed above, Defendants' Motion to Stay and Compel Arbitration, should be promptly denied. Accordingly, this Court should deny Defendants' Motion and permit Plaintiff to pursue his claim in this Court.

Respectfully submitted,  
THE DICKSON FIRM, L.L.C.

By:



Ellen Hobbs Hirshman (0004914)

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Attorneys for Plaintiff Daniel P. Lang, as the personal representative of the Estate of Mary L Stevens (deceased).

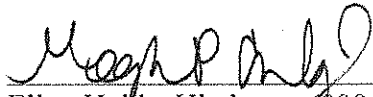
## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Plaintiff's Brief in Opposition to Defendants' Motion to Stay Proceedings and Compel Arbitration, was sent by Electronic Mail, **this 6th day of May, 2013**, to the following:

Ernest W. Auciello, Esq.  
Jane F. Warner, Esq.  
TUCKER ELLIS, LLP  
925 Euclid Avenue, Suite 1150  
Cleveland, Ohio 44115-1414  
[ernest.auciello@tuckerellis.com](mailto:ernest.auciello@tuckerellis.com)  
[jane.warner@tuckerellis.com](mailto:jane.warner@tuckerellis.com)

Attorneys for Defendants Beachwood Pointe Care Center, Beachwood Nursing & Rehab, Brook Pointe Health and Rehab, Brook Pointe Health and Rehab, Inc., BCFL Holdings, Inc., and Provder Services Holdings, LLC.

By:



Ellen Hobbs Hirshman (0004914)

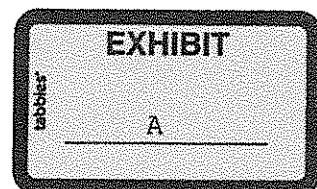
Meghan P. Connolly (0089682)

Attorneys for Plaintiff Daniel P. Lang, as the personal representative of the Estate of Mary L Stevens (deceased).

STATE OF OHIO )  
 ) SS:  
COUNTY OF CUYAHOGA )

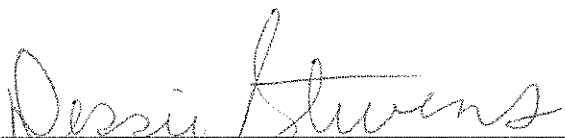
Now comes Dessie Stevens, and for her Affidavit, states as follows:

1. I am Jacob Stevens's daughter. I am not the biological daughter of Mary Stevens.
2. Mary Stevens was married to my father, Jacob Stevens.
3. I was my dad's guardian when he was admitted to Beachwood Pointe Care Center in March, 2012.
4. I was never guardian or ever given power of attorney for Mary Stevens.
5. When my dad was admitted to Beachwood Pointe Care Center in March, 2012, I signed his admission papers as his guardian.
6. When I was at Beachwood Pointe Care Center visiting my dad in March, 2012, someone from the Beachwood Pointe Care Center staff asked me to sign admission papers for Mary Stevens.
7. When this Beachwood Pointe staff person asked me to sign Mary Stevens's admission papers, I told them I did not have a guardianship or power of attorney for Mary Stevens.
8. The Beachwood Pointe staff person told me to go ahead and sign Mary Stevens's admission papers anyway.
9. I did not feel comfortable signing Mary Stevens's papers, but the Beachwood Pointe staff told me they needed me to sign it anyway, for "general purposes".



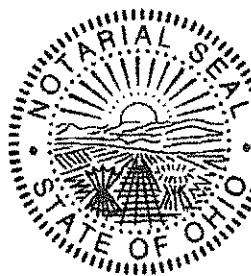
10. On more than one occasion, a Beachwood Pointe Care Center staff person asked me to sign papers for Mary Stevens.
11. On more than one occasion, I told the Beachwood Pointe Care Center staff that I did not have a guardianship or power of attorney for Mary Stevens.
12. On more than one occasion, the Beachwood Pointe Care Center staff told me to sign the documents anyway.
13. Mary Stevens never told me or asked me to sign a contract on her behalf.

Affiant further sayeth naught.

  
\_\_\_\_\_  
Dessie Stevens

Sworn to and subscribed before me in my presence this 2<sup>ND</sup> day of May, 2013, in BEACHWOOD, Ohio.

  
\_\_\_\_\_  
NOTARY PUBLIC



MEGHAN P. CONNOLLY  
Attorney At Law  
NOTARY PUBLIC  
STATE OF OHIO  
My Commission Has  
No Expiration Date  
Section 147.03 O.R.C.

# ARBITRATION AGREEMENT

## INTRODUCTION

This agreement sets forth a resolution procedure by which the Resident and Facility intend to resolve all disputes which may arise between them concerning any disagreement arising out of the *Nursing Facility Admission Agreement*.

The procedure is intended to be a speedy and economic alternative to court litigation which is often slow, time-consuming and expensive. By using private arbitration without the right to appeal, the parties are able to avoid crowded court dockets and lengthy appeals processes.

## NONPAYMENT OF CHARGES

Any dispute, disagreement, or claim relating to nonpayment of any fee or charge by the Resident, Resident's Representative, or the Facility may be adjudicated in a court of law, unless arbitration is mutually agreed upon by both parties. Said arbitration shall be according to the terms and procedures set forth below.

## ALL OTHER DISPUTES

Any controversy, dispute, disagreement or claim of any kind arising out of, or related to the *Nursing Facility Agreement*, (other than nonpayment of charges as described above) shall be settled by binding arbitration. These disputes include, but are not limited to, all claims based upon breach of contract (other than claims arising out of nonpayment of charges), negligence, medical malpractice, tort, breach of statutory duty, resident's rights, and any departures from accepted standards of care.

## BINDING NATURE OF ARBITRATION

The decision rendered by the arbitrator shall be final and binding, and judgment on the award, if any, shall be entered in accordance with applicable law in any court having jurisdiction thereof. There shall be no appeal of the arbitrator's decision by either party. The decision of the arbitrator shall be binding on all of the parties to the arbitration, and also on their successors and assigns.

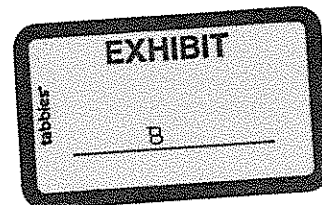
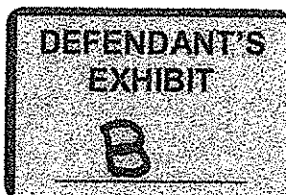
## CONDUCT, COSTS, AND RULES OF ARBITRATION

The arbitration shall be conducted by the National Arbitration Forum ("NAF") and the rules shall in accordance with the NAF Code of Procedure. Where the NAF Code of Procedure does not apply, the proceedings shall follow all rules of civil procedure, evidence, statutes of limitation, and award caps that would be applicable to a comparable civil action brought in the court of common pleas in which the facility is located. If the NAF process is no longer in existence at the time of the dispute, or the NAF is unwilling or unable to conduct the arbitration, then the parties shall mutually agree on an alternative organization to conduct the arbitration. Information regarding NAF and a copy of pertinent rules and forms may be located at NAF's website [www.arbitration-forum.com](http://www.arbitration-forum.com) or by contacting NAF toll free at 800-474-2371.

Arbitration proceedings are not free and any person requesting arbitration will be required to pay a filing fee to initiate the arbitration. After filing, each party agrees to be responsible for their own fees, expenses, and costs as attributed to them pursuant to the NAF Code of Procedure, unless ordered otherwise by the arbitrator. Each person will be responsible for their own attorney's fees, if any.

The parties agree that Facility is engaged in interstate commerce and that this agreement to arbitrate disputes and the arbitration proceeding shall be governed in accordance with the Federal Arbitration Act. If for any reason there is a finding that the Federal Arbitration Act cannot be applied to this Agreement, then the parties hereby make clear their intent that their disputes/claims be resolved pursuant to Chapter 2711 of the Ohio Revised Code, and that the parties do not want their disputes/claims resolved in a judicial forum.

PS 10/2008



**CONFIDENTIALITY**

The parties agree to keep all arbitration proceedings strictly confidential, and hereby direct any organization overseeing the arbitration process, and any arbitrator to do the same. The fact that a dispute was settled or a judgment issued, and the details of the foregoing, may not be released without an express written authorization from both the Resident and Facility, unless otherwise required by law.

**CANCELLING THE ARBITRATION PROVISION**

THE RESIDENT OR THE PERSONAL REPRESENTATIVE OF THE RESIDENT HAS THE RIGHT TO CANCEL THIS AGREEMENT BY NOTIFYING THE FACILITY IN WRITING. SUCH NOTICE MUST BE SENT VIA CERTIFIED MAIL (OR HAND DELIVERED) TO THE ADMINISTRATOR OF THE FACILITY, AND THE NOTICE MUST BE POST MARKED WITHIN 30 DAYS OF THE DATE UPON WHICH THIS ARBITRATION AGREEMENT WAS SIGNED.

**IMPORTANT PROVISIONS (PLEASE READ CAREFULLY)**

IMPORTANT TERMS TO UNDERSTAND. By signing this Agreement, Resident and Representative acknowledge that they have been informed that: (1) This arbitration provision shall not limit in any way their right to file formal or informal complaints with this Nursing Facility, the state of Ohio under R.C. 3721.17, or the Federal government, including the right to challenge a proposed discharge pursuant to R.C. 3721.16 to 3721.162; (2) Agreeing to arbitrate legal disputes is not a condition of admission, and care and treatment will be provided whether or not they agree to arbitrate (if they do not wish to sign this Agreement then they are under no requirement to do so); (3) This arbitration provision does not limit their rights to bring any action that they could bring in a court of law, it merely changes the forum in which such an action must be brought; (4) Other than changing the forum for lawsuits, this Agreement does not waive any of the resident's rights as provided for in R.C. 3721.10 through 3721.17; (5) The decision whether to sign the Agreement with the arbitration provision is solely a matter for their determination without any influence; (6) They have the right to seek legal counsel regarding this arbitration provision; and (7) THE AGREEMENT WAIVES THEIR RIGHT TO A TRIAL IN COURT AND A TRIAL BY A JURY FOR ANY LEGAL CLAIMS THEY MAY HAVE AGAINST THE FACILITY.

**NONSEVERABILITY**

If any portion of this agreement is determined to be unenforceable by a court of competent jurisdiction for any reason, such part shall be deemed modified so as to be in accordance with relevant laws and regulations, and the validity of the balance of this agreement shall not be affected.

RESIDENT

\_\_\_\_\_

Date: \_\_\_\_\_

FACILITY

*[Handwritten Signature]*

Date: 3/27/10

REPRESENTATIVE

*[Handwritten Signature]*

Date: 3-27-10

DANIEL M. HOFFIGAN

2013 MAR -7 AM 10:51

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

SUMMIT COUNTY  
AMBROSIA JACKSONS  
CLEVA OHIO

Plaintiff,

VS.

ARBORS AT FAIRLAWN, *et al.*,

Defendants.

CASE NO. CV 2012 11 6470

JUDGE TAMMY O'BRIEN

**ORDER**

This matter comes before the Court on the Motion to Dismiss or, in the Alternative, Motion to Refer Case to Alternative Dispute Resolution (Arbitration) filed on December 28, 2012 by Defendants Arbors at Fairlawn, Arbors at Fairlawn Care, LLC, Extendicare Health Services and Extendicare Health Services, Inc. ("Defendants"). The Court has considered Defendants' Motion, the replies and surreplies filed in response thereto, the alleged facts of this matter, and applicable law. Upon due consideration, the Court DENIES Defendants' Motion to Dismiss or, in the Alternative, to Refer Case to Alternative Dispute Resolution (Arbitration).

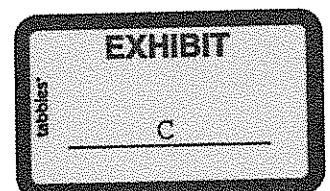
A PRETRIAL CONFERENCE has been scheduled in this matter for April 15, 2013 at 8:30 a.m. Please note this date on your calendars. FAILURE TO APPEAR FOR ANY SCHEDULED PRETRIAL CONFERENCE MAY RESULT IN SANCTIONS.

**ANALYSIS**

**1. Factual Background.**

Plaintiff commenced the instant litigation on November 27, 2012 when she filed her Complaint with the Court. Arbors at Fairlawn, Arbors at Fairlawn Care, LLC, Extendicare Health Services, Extendicare Health Services, Inc., and John Doe 1-10 are the named Defendants in this action. Plaintiff alleges that, at all relevant times, she was a resident of Defendant Arbors of Fairlawn, a long term care facility and/or nursing home. *See* Complaint at ¶1. It is alleged that, while under Defendants' care, Plaintiff "was caused to suffer numerous severe injuries, she was permitted to become very ill, her illness and her injuries were not treated properly, and her physical condition was permitted to deteriorate." *Id.* at ¶5. Plaintiff's alleged injuries include, but are not limited to, "bilateral fractures to her femurs" and "severe pressure ulcers." *Id.* at ¶6. It is Plaintiff's position that Defendants owed a duty of care to her and that Defendant's breached that duty of care by providing substandard care. Plaintiff further alleges that Defendants acted with "actual malice." *Id.* at ¶72.

In response to Plaintiff's Complaint, Defendants Arbors at Fairlawn, Arbors at Fairlawn Care, LLC, Extendicare Health Services, and Extendicare Health Services, Inc. ("Defendants")





filed a Motion to Dismiss or, in the Alternative, to Refer Case to Alternative Dispute Resolution (Arbitration) on December 28, 2012. It is Defendants' position that, pursuant to the parties' Alternative Dispute Resolution Agreements ("Arbitration Agreements") that were entered into on December 10, 2009 and November 4, 2011, this matter must be arbitrated. Defendants argue:

The terms of the Agreements, which speak for themselves, clearly provide that the Agreements cover the types of allegations which are made in the complaint, including 'a violation of a right claimed to exist under federal, state or local law or contractual agreement between the Parties;' or 'tort', or 'negligence.' The Agreements further provide that the parties:

\* \* \* voluntarily agree that any disputes covered by this Agreement (hereinafter referred to as 'Covered Disputes') that may arise between the Parties shall be resolved exclusively by an Alternative Dispute Resolution process that shall be binding arbitration.

\* \* \*

A review of the Alternative Dispute Resolution Agreements signed by the parties to this case clearly establishes that the Agreements are neither procedurally unconscionable nor substantively unconscionable, and therefore they should be enforced according to their terms.

This Court has recently had the occasion to rule on a similar motion in the case of *Hiley v. Northern Health Facilities, Inc., et al.* \* \* \* The Court will note that Judge Parker of this Court upheld an identical arbitration agreement and dismissed the case for lack of jurisdiction. Judge Parker further held that the case must be dismissed due to the parties voluntarily choosing to select arbitration and alternative dispute resolution as the 'preferred manner to resolve any dispute arising from their contract.'

See Defendants' Motion to Dismiss or, in the Alternative, to Refer Case to Alternative Dispute Resolution (Arbitration) at 2-3. Defendants ask the Court to enforce the parties' Arbitration Agreement.

Plaintiff filed a Brief in Opposition to Defendants' Motion to Dismiss or, in the Alternative, to Refer Case to Alternative Dispute Resolution (Arbitration) on January 7, 2013. Among other arguments, Plaintiff emphasizes in her Opposition that she did not sign the Arbitration Agreement. Plaintiff asserts that her daughter, Carol Boone, signed the Agreement without her permission and/or without authority. See Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss or, in the Alternative, to Refer Case to Alternative Dispute Resolution at 2. Plaintiff argues that that she was not a party to the Arbitration Agreement and that, therefore, it is unenforceable as against her. *Id.* at 2-3. Plaintiff further asserts that Defendant Arbors at Fairlawn is the only Defendant that is a party to the Arbitration Agreement

and that, because Defendants Arbors at Fairlawn Care, LLC, Extencicare Health Services, and Extencicare Health Services, Inc. are not parties to the Agreement, the Agreement is unenforceable as against these Defendants. Plaintiff also asserts that the Arbitration Agreement is unenforceable as it fails to comply with the Statute of Frauds. *Id.* at 7-8.

Defendants filed a Reply Brief in Support of Motion to Dismiss or to Refer Case to Alternative Dispute Resolution on January 18, 2013. Attached to Defendant's Reply Brief as Exhibit A is a Durable Power of Attorney executed by Plaintiff Ambrosia Jackson and designating Carol Boone as her attorney in fact and agent. Carol Boone is Plaintiff's daughter and the individual who signed the Arbitration Agreement on Plaintiff's behalf. Defendants emphasize that the Durable Power of Attorney was recorded with the Summit County Auditor and Recorder's Office on October 4, 2001 and that, pursuant to the Durable Power of Attorney, Carol Boone had the power "to perform any act, power, duty, right or obligation whatever that I [Ambrosia Jackson] may hereinafter acquire \* \* \*." See Defendants' Reply Brief in Support of Motion to Dismiss or Refer Case to Alternative Dispute Resolution at 2. Defendants argue that, in light of the Durable Power of Attorney, Carol Boone properly signed the Arbitration Agreement and that said Arbitration Agreement should be enforced.

With respect to Plaintiff's statute of frauds argument, Defendants assert that this argument is misplaced. Defendants assert:

The fact of the matter is that the Agreement was, in fact, signed by the attorney in fact and agent of Ambrosia Jackson, *i.e.*, her daughter, Carol Boone. Ohio Revised Code 1335.05 specifically provides that the agreement must be ' . . . signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized'.

*Id.* It is Defendants' position that, in light of the Arbitration Agreement that was properly signed by Carol Boone, their Motion should be granted and the parties should be ordered to proceed to alternative dispute resolution.

Plaintiff filed a Motion for Leave to File Surreply Brief, *Instantly*, in Opposition to Defendants' Motion to Dismiss, or in the Alternative, to Refer Case to Alternative Dispute Resolution (Arbitration) on January 23, 2013. Upon due consideration, the Court GRANTS Plaintiff's Motion for Leave to File Surreply Brief. Likewise, the Court GRANTS Defendants' Motion to File Surreply Brief in Support of Motion to Dismiss or Refer Case to Alternative Dispute Resolution (Arbitration). Plaintiff's February 27, 2013 Motion to Strike Defendants' Surreply is DENIED.

Plaintiff argues in her Surreply Brief that "Defendants offer no evidence that the Durable Power of Attorney was in effect when Carol Boone signed the ADR Agreement." See Plaintiff's Surreply Brief at 2. Plaintiff relies upon section five (5) of the Durable Power of Attorney which states:

5. **SPRINGING POWER OF ATTORNEY CLAUSE.** This general power of attorney shall become effective upon my disability or incapacity. I shall be deemed disabled or incapacitated upon the election by my said attorney, CAROL BOONE, **to accept the written certification of a physician who, in his opinion, is qualified, which states that such physician has examined me and that I am incapacitated mentally or physically and am therefore incapable of attending to my personal and business affairs.**

[*Emphasis added.*] See Plaintiff's Surreply Brief at 2, *citing* Durable Power of Attorney at 3. The Durable Power of Attorney is attached to Plaintiff's Surreply Brief as Exhibit A. It is Plaintiff's position that, because Carol Boone "never received any written certification from a physician stating that they examined Ambrosia Jackson, and that she is incapacitated mentally or physically, and is therefore incapable of attending to her personal and business affairs," the Durable Power of Attorney never went into effect and, therefore, Carol Boone had no authority to sign the Arbitration Agreement on Plaintiff's behalf. *Id.* Plaintiff cites case authority to support her position that a Durable Power of Attorney does not become effective until the conditions precedent are satisfied.

Defendants argue in their February 25, 2013 Surreply that "there is no question that plaintiff, Ambrosia Jackson, was disabled and/or incapacitated while she was a resident of Arbors at Fairlawn." See Defendants' Surreply at 3. Defendants refer the Court to Plaintiff's discharge summary, a physician's progress notes, nursing home documents, and a note from Dr. Bong Kaugh. Defendants argue that "plaintiff was clearly incapacitated and disabled, both in 2009 and also in 2011, when she was a resident at Arbors at Fairlawn." *Id.* at 5. It is Plaintiff's position that "[i]t is totally disingenuous for plaintiff's counsel to be claiming that the plaintiff was not disabled or incapacitated or that the Power of Attorney is not valid due to Carol Boone not electing to accept a written certification of a physician." *Id.*

## 2. **Standard of Review.**

While "Ohio favors arbitration as an expedient and cost-effective means of resolving disputes," it is well established that "a party who has not agreed to arbitrate a dispute cannot be forced to do so and give up her right to court adjudication of disputes." *Tedeschi v. Atrium Centers, L.L.C., et al.*, 8th Dist. No. 97647, 2012-Ohio-2929, ¶15, *citing* *Council of Smaller Ents. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 665, 1998-Ohio-172, 687 N.E.2d 1352. See also *Eagle v. Fred Martin Motor Co., et al.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161 (9th Dist. 2004). "Additionally, a presumption arises favoring arbitration when the claim in dispute falls within the scope of the arbitration provision." *Id.* at 159, 2004-Ohio-829, 809 N.E.2d 1161.

"When addressing whether a trial court has properly granted or denied a motion to stay proceedings and compel arbitration, the standard of review is abuse of discretion." *Stickler v. First Ohio Banc & Lending, Inc.*, 9th Dist. Nos. 08CA009416, 08CA009460, 2009-Ohio-1422, ¶7, *citing* *Carter Steel & Fabricating Co. v. Danis Bldg. Constr. Co.*, 126 Ohio App.3d 251, 254, 710 N.E.2d 299 (3rd Dist. 1998); *Harsco Corp. v. Crane Carrier Co.*, 122 Ohio App.3d 406,

410, 701 N.E.2d 1040 (3rd Dist. 1997). See also *Ault v. Parkview Homes, Inc.*, 9th Dist. No. 24375, 2009-Ohio-586, ¶7. "An abuse of discretion connotes more than simply an error in judgment; the court must act in an unreasonable, arbitrary, or unconscionable manner." *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Questions of law, however, are reviewed under a *de novo* standard of review. *Ault v. Parkview Homes, Inc.*, 9th Dist. No. 24375, 2009-Ohio-586, ¶7, citing *George Ford Constr., Inc. v. Hissong*, 9th Dist. No. 22756, 2006-Ohio-919, ¶6. "A *de novo* standard applies to questions of whether a party has agreed to submit an issue to arbitration." *Tedeschi*, 8th Dist. No. 97647, 2012-Ohio-2929, ¶15.

### 3. Analysis.

It is undisputed that Carol Boone signed the Arbitration Agreement and that Plaintiff had executed a Durable Power of Attorney designating Ms. Boone as her attorney in fact and agent. The Durable Power of Attorney has been produced and the Court notes that said document specifically provides at paragraph 5, and as fully set forth above, that it is effective only upon Plaintiff's "disability or incapacity." See Durable Power of Attorney, attached to Plaintiff's January 23, 2013 Surreply as Exhibit A. The Durable Power of Attorney further states that Plaintiff

shall be deemed disabled or incapacitated upon the election by my said attorney, CAROL BOONE, to accept the written certification of a physician who, in his opinion, is qualified, which states that such physician has examined me and that I am incapacitated mentally or physically and am therefore incapable of attending to my personal and business affairs.

*Id.*

Attached to Plaintiff's Surreply is the Affidavit of Carol Boone. Ms. Boone states in her Affidavit that she "never received any written certification from a physician stating that they examined Ambrosia Jackson, and that she is incapacitated mentally or physically, and is therefore incapable of attending to her personal and business affairs." See C. Boone Aff. at 2, attached to Plaintiff's January 23, 2012 Surreply as Exhibit B. Plaintiff argues that, because Ms. Boone never received such written certification from a physician, the Durable Power of Attorney never became effective and, therefore, Ms. Boone was without authority to sign the Arbitration Agreement on Plaintiff's behalf. The Court agrees and finds that, because this condition precedent was never satisfied, the Durable Power of Attorney never went into effect. Because the Durable Power of Attorney never went to effect, Ms. Boone did not have authority to sign the Arbitration Agreement. As such, the Arbitration Agreement cannot be enforced as against Plaintiff and Plaintiff is allowed to proceed with her claims in this Court.

As set forth in Plaintiff's Surreply, the underlying facts are similar to those that were before the court in *Tedeschi v. Atrium Centers, L.L.C., et al.*, 8th Dist. No. 97647, 2012-Ohio-2929. In *Tedeschi*, the plaintiff filed suit against the defendant nursing home and others after her mother died while a resident at the nursing home. In response to the plaintiff's complaint, the nursing home moved to stay the case pending arbitration. *Id.* at ¶4. The nursing home relied

upon an arbitration agreement signed by the resident's daughter "purportedly through a health care power of attorney." *Id.* at ¶3. Like the Plaintiff in this action, the *Tedeschi*-plaintiff argued that the health care power of attorney was not in effect when the arbitration agreement was signed and that, therefore, the arbitration agreement was unenforceable. The court agreed and held that, because the decedent was never declared incompetent and unable to make decisions on her own, the health care power of attorney never went into effect and, therefore, the decedent's daughter did not have authority to sign the arbitration agreement. The court specifically held that "[w]ithout the fulfillment of the conditions required for the power to come into being, the representative had no authority to bind the principal" and that the resident's daughter "lacked authority to sign the arbitration agreement on behalf of [the resident]." *Id.* at ¶¶17, 19. *See also Koch v. Keystone Pointe Health & Rehab.*, 9th Dist. No. 11CA010081, 2012-Ohio-5817 (holding that, because the arbitration agreement was signed by someone who did not have power of attorney, the arbitration agreement could not be enforced.)

While Defendants rely upon Judge Parker's November 23, 2011 ruling in *Hiley v. Northern Health Facilities, Inc., et al.*, Summit County Court of Common Pleas in CV 2011 08 4550, said case is clearly distinguishable from the underlying matter. Unlike in this case, there was no dispute in *Hiley* that the parties had entered into an arbitration agreement.

By its terms, the Durable Power of Attorney only becomes effective when Carol Boone accepts written certification from a competent physician stating that Plaintiff is "incapacitated mentally or physically" and that she is "incapable of attending to \* \* \* [her] personal and business affairs." *See Durable Power of Attorney.* As set forth in Ms. Boone's Affidavit, she has never received such written certification. Because Ms. Boone has never received such written certification, the Court finds that the Durable Power of Attorney has never gone into effect and that, as such, Ms. Boone did not have authority to sign the Arbitration Agreement on Plaintiff's behalf. Accordingly, the Arbitration Agreement cannot be enforced. The Court further finds that, because Ms. Boone did not have authority to sign the Arbitration Agreement, the Arbitration Agreement is unenforceable under the Statute of Frauds as it was not signed by the party to be charged or an authorized representative. *See R.C. 1335.05.*

### CONCLUSION

WHEREFORE, for the reasons set forth above and upon due consideration, the Court DENIES Defendants' Motion to Dismiss or, in the Alternative, to Refer Case to Alternative Dispute Resolution (Arbitration).

A PRETRIAL CONFERENCE has been scheduled for **April 15, 2013 at 8:30 a.m.** Please note this date on your calendars. FAILURE TO APPEAR FOR ANY SCHEDULED PRETRIAL CONFERENCE MAY RESULT IN SANCTIONS.

IT IS SO ORDERED.

  
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JUDGE TAMM O'BRIEN

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