IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

CYNTHIA MANLEY, as the personal representative of the Estate of PATRICIA MANLEY (Deceased)	) CASE NO. 05 CV 000876
Plaintiff	) JUDGE VINCENT A. CULOTTA
vs.	) PLAINTIFF CYNTHIA MANLEY'S BRIEF IN OPPOSITION TO THE MOTION OF DEFENDANT PERSONACARE OF OHIO, INC. d.b.a. LAKEMED NURSING AND REHABILITATION CENTER TO STAY PROCEEDINGS PURSUANT TO O.R.C. §2711.01.
LAKE MED NURSING AND REHAB CENTER, et al.	)
Defendants.	) ORAL ARGUMENT

Now comes Plaintiff CYNTHIA MANLEY, as the personal representative of the Estate of PATRICIA MANLEY, by and through her attorney, Blake A. Dickson of the law firm of Dickson, Campbell & Freeman, L.L.C., and, for her Brief in Opposition to the Motion of Defendant Personacare of Ohio, Inc. d.b.a. Lakemed Nursing and Rehabilitation Center to Stay Proceedings Pursuant to O.R.C. §2711.01, states as follows: (Plaintiff respectfully requests that Defendant's Motion be scheduled for oral argument.

I. INTRODUCTION.

Defendant Personacare of Ohio, Inc. d.b.a. Lakemed Nursing and Rehabilitation Center (hereafter referred to as Defendant "Personacare") has asked this Honorable Court to Stay this case, while it is referred to binding arbitration, and to forever deny Plaintiff CYNTHIA MANLEY her day in

Court. Defendant Personacare is asking this Honorable Court to deny Plaintiff CYNTHIA MANLEY her constitutionally protected right to a trial by jury.

Defendants' Motion should be denied. The arbitration clause contained in decedent Patricia Manley's admission agreement should not be enforced as it is procedurally and substantively unconscionable.

II. LAW AND ARGUMENT.

Defendant Personacare does not cite one single case 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 arbitrate her case.

In fact, Defendant Personacare does not cite any case at all, neither in its Motion, nor in its Brief in Support of its Motion.

At least two Courts in Ohio have refused to enforce binding arbitration agreements in similar situations.

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. 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 (emphasis added):

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).

Further, the Holmes County Court of Common Pleas recently denied a similar Motion to Stay in Idamay Fortune v. Sunset View Castle Nursing Homes, Inc., Case No. 04-CV-080. A copy of the Journal Entry from that case is attached hereto. In the Fortune case the Court considered an arbitration clause in a Nursing Home Negligence case in light of O.R.C. §2711.01. In the Journal Entry where the Court denied Defendant's Motion to Stay, the Fortune Court held as follows.

After a thorough review of the admission agreement herein and the decision of the Sixth District mentioned above, the Court finds for the reasons mentioned in the appellate decision that defendant's arbitration clause is unconscionable.

The Court finds that the arbitration clauses herein are both substantive and procedurally unconscionable. Such arbitration clauses are subject to close examination. While arbitration clauses were first used in business contracts between sophisticated business persons, as a means of saving resources should a dispute arise, there is much cause for concern when a nursing home patient agrees to waive her right to trial by jury and agrees to pay the nursing home's attorney's fees for the resolution of any dispute, including a negligence action as contained therein.

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.

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 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. 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 had not demonstrated that the parties bargained over the arbitration terms, or that it was within the reasonable expectations of an ordinary person.

Defendant Personacare cites only one statute, O.R.C. §2711.01 which reads as follows (emphasis added):

2711.02 Court may stay trial.

(A) As used in this section and section 2711.03 of the Revised Code, "commercial construction contract" means any written contract or agreement for the construction of any improvement to real property, other than an improvement that is used or intended to be used as a single-family, two-family, or three-family detached dwelling house and accessory structures incidental to that use.

(B) If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

(C) Except as provided in division (D) of this section, an order under division (B) of this section that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

(D) If an action is brought under division (B) of this section upon any issue referable to arbitration under an agreement in writing for arbitration that is included in a commercial construction contract, an order under that division that denies a stay of a trial of the action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.
Effective Date: 03-15-2001.

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 alleged arbitration agreement in this case should not be enforced.

As the Court can see, decedent Patricia Manley could barely sign her name to the arbitration agreement at issue in the within case. Further, Decedent Patricia Manley did not have a claim for injury when she signed the

admission agreement.

In the within case, the Defendant Persona Care does not even allege that the parties “bargained” over the admissions agreement. Defendant Personacare does not allege that anyone explained any part of the arbitration agreement to Ms. Manley, nor its consequences.

The subject arbitration clause 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, Decedent Patricia Manley 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. Decedent Patricia Manley had no choice.

With respect to the substantive prong, dealing with the terms of the contract itself, the contract denies Decedent Patricia Manley her fundamental right to a trial by a jury of her peers, and, in its place, mandates a binding arbitration. In exchange, Decedent Patricia Manley receives nothing.

Both prongs are met in this case and the subject arbitration clause should be invalidated by this Honorable Court.

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.

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 agreement at issue in the within case clearly violates the guidelines set forth above. The admission agreement was signed when Patricia Manley was first admitted to the subject nursing home, on April 15, 2004. The dispute did not arise until after Patricia Manley was injured, some time later.

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.)

The subject arbitration agreement is a violation of Federal Law. Defendant Personacare 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 Decedent Patricia Manley 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.

III. CONCLUSION.

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

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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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