IN THE COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT
APPELLATE COURT CASE NO. 2014-L-047

LAKE COUNTY COURT OF COMMON PLEAS
TRIAL COURT CASE NO. 13 CV 1703

Christine Pearson, as the Personal Representative of the Estate of Gary Banks (deceased), Plaintiff-Appellee,
vs.
ManorCare Health Services - Willoughby, et. al., Defendant-Appellants.

BRIEF OF APPELLEE CHRISTINE PEARSON, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY BANKS (DECEASED)

ORAL ARGUMENT REQUESTED

Blake A. Dickson (0059329)
Mark D. Tolles, II (0087022)
James A. Tully (0084018)
THE DICKSON FIRM, L.L.C.
3401 Enterprise Parkway, Suite 420
Beachwood, Ohio 44122
Telephone: (216) 595-6500
Facsimile: (216) 595-6501
E-mail: BlakeDickson@TheDicksonFirm.com
E-mail: MarkTolles@TheDicksonFirm.com
E-mail: Jtully@TheDicksonFirm.com

Attorneys for Plaintiff-Appellee Christine Pearson, as the Personal Representative of the Estate of Gary Banks (deceased).

Thomas A. Prislipsky (0067623)
Danny M. Newman, Jr. (0074740)
Michael M. Mahon (0087296)
REMINGER CO., L.P.A.
11 Federal Plaza Central, Suite 1200
Youngstown, Ohio 44503
Telephone: (330) 744-1311
Facsimile: (330) 744-7500
E-mail: tprislipsky@reminger.com
E-mail: dnewman@reminger.com
E-mail: mmahon@reminger.com

Attorneys for Defendant-Appellants ManorCare Health Services - Willoughby, Manor Care of Willoughby OH, LLC, Manor Care, Inc., Manor Care of Willoughby, HCR Manor Care Services, LLC, HCR ManorCare, Inc., HCR II Healthcare, LLC, HCR III Healthcare, LLC, HCR IV Healthcare, LLC, HCR ManorCare Heartland, LLC, HCR ManorCare Operations II, LLC, Healthcare Operations Holdings, Inc., Healthcare Operations Investments, Inc., Carlyle MC Partners, LP, MC Operations Investments, Inc., TC Group V, LP, Carlyle Partners V MC Holdings, LP, Carlyle Partners V MC, LP, HCP, Inc., HCR Healthcare, LLC, and Paul A. Ormond.

TABLE OF CONTENTS

I. STATEMENT OF THE CASE.

On August 2, 2013, Plaintiff-Appellee Christine Pearson, as the Personal Representative of the Estate of Gary Banks (deceased), filed a Complaint with the Lake County Court of Common Pleas against Defendant-Appellants, asserting claims for personal injury, wrongful death, medical negligence, ordinary negligence, and violations of Ohio's Nursing Home Resident's Bill of Rights related to Mr. Banks' residency at ManorCare Health Services-Willoughby nursing home. (T.d. 3.)

On October 11, 2013, Appellants filed a Joint Answer and demanded a jury trial on all of Appellee's claims against them. (T.d. 35.) Appellants also filed a Motion to Stay Proceedings Pending Arbitration (hereafter "Motion to Stay") pursuant to R.C. § 2711.02. (T.d. 36.)

On October 25, 2013, Appellee filed a Motion for Extension of Time to Respond to Appellants' Motion to Stay, in order to conduct limited discovery relative to the subject arbitration clause. (T.d. 37.) Appellants filed a Brief in Opposition, in which they stated "it is inconceivable how, under these facts, additional discovery would be necessary" and that "the Court need only look to the Complaint and Arbitration Agreement itself" to determine the validity of the arbitration clause. (T.d. 38, pp. 2-3.) Appellants also filed a Motion for Protective Order, in which they asked the Trial Court "for a protective order precluding any and all discovery". (T.d. 39, pp. 1 and 6.) The Trial Court granted Appellee's Motion and denied Appellants' Motion for Protective Order on November 14, 2013. (T.d. 40.)

On December 17, 2013, Admissions Coordinator Darlene Stincic and Courtney Laurich, LPN were deposed by counsel for the parties. (T.d. 41 and T.d. 42.)

On February 12, 2014, Appellee filed a Motion for Leave to File the Within Brief, Instanter, in Opposition to Appellants' Motion to Stay, in which Appellee sought leave to exceed the ten (10) page limitation set forth in Lake Co. C.P.R. 3.01(A), which the Trial Court granted. (T.d. 46 and 47.) Appellee's Motion included Appellee's proposed Brief in Opposition and all proposed exhibits, including the Affidavit of Appellee Christine Pearson. Appellee's Brief in Opposition to Appellants'

Motion to Stay was filed on February 20, 2014 pursuant to Lake Co. C.P.R. 3.01(F)(1). (T.d. 49.)

On February 19, 2014, Appellants' counsel deposed Appellee Christine Pearson. (T.d. 55.)

On March 12, 2014, Appellants filed a Reply Brief, after obtaining an extension of time to file their Reply Brief after Appellee Christine Pearson's deposition. (T.d. 50 and 53.)

On March 19, 2014, before Appellee's Sur-Reply Brief was even filed, Appellants filed a Motion for Leave to File a Response to Appellee's Sur-Reply Brief, which the Trial Court denied. (T.d. 56 and 60) Appellants also filed a Motion to Compel Compliance with the Subpoena Served upon The Gables, which the Trial Court denied. (T.d. 57 and 60.)

On March 19, 2014, after obtaining leave from the Trial Court to respond to Appellants' arguments based upon Appellee Christine Pearson's recent deposition testimony, Appellee filed a Sur-Reply Brief in response to Appellants' Reply Brief. (T.d. 52 and 58.)

On April 23, 2014, the Trial Court issued a Judgment Entry denying Appellants' Motion to Stay. (T.d. 61 and 62.)

On May 8, 2014, Appellants filed a Notice of Appeal, appealing the Trial Court's April 23, 2014 Judgment Entry to this Court. (T.d. 63.) Appellants filed their Merit Brief on July 2, 2014.

II. STATEMENT OF THE FACTS.

Decedent Gary Banks was a mentally retarded man who suffered from paranoid schizophrenia and progressive quadriplegia. (T.d. 49, pp. 1-2 and Exhibits "B" and "C".) From 2006 until August 7, 2012, Gary Banks resided at The Gables, which is a group home for adults located in Madison, Ohio. Gary Banks was not able to read and needed the support of his family and The Gables staff at all times. (T.d. 49, p. 1 and Exhibit "F".)

On August 7, 2012, Gary Banks was admitted to the Cleveland Clinic because of his worsening gait, which was caused by two (2) herniated discs in his spine, which, in turn, were caused by his progressive quadriplegia. Gary Banks successfully underwent surgery, relative to the herniated discs in his back, on August 13, 2012. Since Gary Banks' progressive quadriplegia was

also beginning to cause him to lose his ability to walk, he needed a mechanical lift for transfers. Since The Gables could not provide this level of care to Gary Banks, he had to be transferred to a different facility upon discharge from the Cleveland Clinic. (T.d. 49, p. 1.)

On August 15, 2012, Gary Banks was discharged from the Cleveland Clinic and admitted to the ManorCare Health Services-Willoughby nursing home. He brought a stuffed animal and a balloon with him to the nursing home. No one was with him during his admission. (T.d. 49, p. 1.)

Upon his admission, the staff of the nursing home were fully aware of Gary Banks' mental disabilities. When Gary Banks arrived at the nursing home, prior to signing any admitting documents, Courtney Laurich, LPN conducted an initial nursing assessment and received admission physician's orders for Gary Banks, which clearly indicated that he was mentally retarded and had diagnoses of mental retardation and schizophrenia. (T.d. 41, pp. 9:11-10:7, 17:8-21; T.d. 49, pp. 1-2 and Exhibit "B" (Progress Note indicating that Gary Banks had diagnoses of mental retardation and paranoid schizophrenia upon admission to the nursing home); T.d. 49, pp. 1-2 and Exhibit "C" (Physician's Order confirming diagnoses of mental retardation ("MR") and schizophrenia).)

Although it was clearly documented by Ms. Laurich and Gary Banks' admitting and attending physician that Gary Banks was mentally retarded and suffered from schizophrenia prior to, and at the time of, his admission to the nursing home, Darlene Stincic, the Admissions Coordinator at the nursing home during Gary Banks' admission, still placed admission paperwork in front of Gary Banks consisting of twenty-seven (27) typewritten pages, and instructed him to sign the paperwork. Although the nursing home was aware that Gary Banks was mentally retarded and suffered from paranoid schizophrenia, neither Ms. Stincic, nor any other employee or agent of the nursing home, contacted any of Gary Banks' family members, including his sister and attorney-in-fact, Christine Pearson, to aid Mr. Banks during the admission process. (T.d. 42, p. 23:2-8.) No one at the nursing home did anything to determine if Gary Banks could comprehend or read the Admission Agreement or the subject arbitration clause. (*Id.* at pp. 25:24-26:1.; T.d. 41, p. 9:15-21.)

Gary Banks could not read any portion of the Admission Agreement, including the arbitration clause. (T.d. 49, pp. 11, 23-24 and Exhibit "F".) He did not understand arbitration. (*Id.*) Gary Banks was not told that he could have an attorney review the arbitration clause before he signed it. (T.d. 42, p. 26:10-13.) Ms. Stincic directed Gary Banks to sign all of the admission paperwork, including the arbitration clause, all of which he signed.

Upon his admission to the nursing home, it was noted that Gary Banks was at risk for skin breakdown and required assistance with his activities of daily living due to his inability to change and control his body position. However, Appellants, by and through their employees and/or agents, did not properly reposition and treat Gary Banks in order to prevent the development of new pressure ulcers and promote the healing of pressure ulcers after they developed. (T.d. 49, pp. 2-3.)

On September 19, 2012, Gary Banks went to the Cleveland Clinic's Spine Clinic for a follow-up appointment. At the Spine Clinic, it was discovered that he had infected pressure ulcers on his sacrum and left hip, as well as pressure ulcers on both ankles. The Spine Clinic immediately referred Mr. Banks to the Cleveland Clinic's Emergency Department. The sacral pressure ulcer exuded a foul smell and contained fecal matter. Gary Banks was admitted to the Cleveland Clinic and underwent surgical debridement of the two (2) infected pressure ulcers. (T.d. 49, p. 3.)

As a direct and proximate result of Appellants' negligence, recklessness, and/or actual malice, Gary Banks suffered from multiple pressure ulcers which became septic and resulted in osteomyletis; he suffered a myocardial infarction due to infection-related tachycardia; he was required to undergo a diverting colostomy; and he ultimately died on May 25, 2013. (T.d. 49, p. 3.)

III. LAW AND ARGUMENT.

A. Standard of Review.

"Generally, the standard of review for a decision granting or denying a motion to stay proceedings pending arbitration is abuse of discretion." *Naylor Family P'ship v. Home Savings & Loan Co. of Youngstown, Ohio*, 2014-Ohio-2704, at ¶ 13 (11th Dist. 2014). "For example, this court

reviews a trial court's decision as to whether a party waived arbitration for an abuse of discretion". *Id.* "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the [trial] court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "However, a de novo standard of review is used when a trial court's grant or denial of a stay is based solely upon questions of law." *Naylor Family P'ship*, 2014-Ohio-2704, at ¶ 13. This Court "review[s] the legal issue of whether an arbitration provision in an underlying contract is unconscionable de novo." *Wascovich v. Personacare of Ohio, Inc.*, 190 Ohio App.3d 619, 625, 2010-Ohio-4563, 943 N.E.2d 1030 (11th Dist. 2010). Further, "this court reviews de novo a trial court's legal conclusion as to whether a party is contractually bound by an arbitration clause." *Naylor Family P'ship*, 2014-Ohio-2704, at ¶ 13 (11th Dist. 2014).

B. Appellants' First Assignment of Error: The trial court erred in finding that the Arbitration Agreement is unconscionable and unenforceable under R.C. 2711.02 (T.d. 61, p. 6).

Appellants' First Issue Presented for Review: Whether an Arbitration Agreement is valid and enforceable where it is executed by the resident and sufficient evidence exists that the provisions of the Agreement were fully read to the resident; the resident was able to understand the provisions; and the resident did not object to or otherwise cancel the Arbitration Agreement within the 30-day cancellation period.

"Unconscionability includes both 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 67, 2009-Ohio-2054, 908 N.E.2d 408 (2009). There is no dispute that "[u]nconscionability is a ground for revocation of an arbitration agreement." *Id.* "[E]ven with the presumption in favor of arbitration, an arbitration clause may be held unenforceable for several reasons, including that the clause is unconscionable." *Manley v. Personacare of Ohio*, 2007-Ohio-343, at ¶ 11 (11th Dist. 2007).

With respect to procedural unconscionability, Appellants argue that the Trial Court improperly based its determination upon the following facts: "(1) the Arbitration Agreement was signed by Banks while being admitted to a nursing home; (2) Banks went directly from the hospital

to the nursing home; and (3) Banks was purportedly mentally retarded, had no legal experience, and did not have any attorney present." *See* Page 6 of Appellants' Brief.

First, Appellants argue that the fact that the arbitration clause was signed by Gary Banks while he was being admitted to the nursing home is not evidence of procedural unconscionability because there was no apparent emergency or need for an expeditious admission. Appellants rely on *Broughsville v. OHECC, LLC*, 2005-Ohio-6733 (9th Dist. 2005). In *Broughsville*, the Ninth District Court of Appeals held that an arbitration clause was not procedurally unconscionable where the resident was admitted to a nursing home for respite care and there was no apparent emergency or need for an expeditious admission; the resident had previously been admitted to the same nursing home; the resident had experiences involving similar transactions and had previously signed an identical arbitration clause at the same nursing home; the resident was not suffering from dementia or confusion; and the arbitration clause was signed on the resident's behalf by her daughter, who was competent, college educated, and a registered nurse, and who read the arbitration clause. *Broughsville*, 2005-Ohio-6733, at ¶¶ 21 and 23. *Broughsville* is distinguishable from this case.

In this case, Gary Banks had been admitted to the Cleveland Clinic for surgery. Upon his discharge from the hospital, Gary Banks was transferred directly to the nursing home. Unlike the resident in *Broughsville*, Gary Banks was not admitted to the nursing home for respite care, but for long-term care. (T.d. 55, pp. 18:25-19:22, 20:23-25.) He was unaccompanied during the admission process. (T.d. 42, p. 26:7-9.) The initial nursing assessment conducted by Courtney Laurich, LPN, as well as the admission physician's orders signed by his treating physician, clearly indicated that Gary Banks suffered from mental retardation and schizophrenia. (T.d. 41, pp. 9:11-10:7 and 17:8-21; Gary Banks' Progress Note dated August 15, 2012, at 10:56 p.m., T.d. 49, Exhibit "B"; Gary Banks' Admission Physician's Orders dated August 15, 2012, T.d. 49, Exhibit "C".)

The facts in this case are similar to those in *Manley v. Personacare*, 2007-Ohio-343 (11th Dist. 2007), where this Court held that an arbitration clause was procedurally unconscionable where

the resident had been in a hospital the week prior to her admission to the nursing home; she was transferred there directly from the hospital; she was unaccompanied during her admission; and she was competent but found to have a "very mild cognitive impairment". *Id.* at ¶¶ 21 and 24.

Appellants further argue that there is no evidence that Gary Banks was under any stress at the time of his admission to the nursing home because the nursing assessment conducted by Ms. Laurich indicates that Gary Banks did not exhibit any altered level of consciousness or incoherent thinking during the admission process. However, this Court recognized in *Manley* that a resident can be under stress even where the resident is competent and not suffering from an altered level of consciousness. Here, it is clear that the admission process was a stressful event for Gary Banks. Gary Banks, who was mentally retarded, was taken directly from the hospital to the nursing home alone. He brought with him only a stuffed animal and a balloon. He was then directed by Ms. Stincic to sign paperwork that he could not read and did not understand. He was not told that he could call a family member or anyone else before signing the paperwork. Nor did the nursing home contact anyone to assist him during the admission process. (T.d. 49, Exhibit "F".)

Second, Appellants argue that there is no evidence to support Gary Banks' mental retardation. However, as discussed above, the indisputable evidence in this case establishes that Gary Banks was a mentally retarded, severely physically impaired individual, who could not read, comprehend legal documents, nor conduct commercial transactions on his own. (T.d. 41, pp. 9:11-10:7 and 17:8-21; T.d. 49, Exhibit "B"; T.d. 49, Exhibit "C"; T.d. 49, Exhibit "F".)

Appellants further argue that Christine Pearson's deposition testimony contradicts the averments in her Affidavit regarding Gary Banks' mental retardation, specifically her statements about Gary Banks' education and a Durable Power of Attorney for Health Care that Gary Banks had executed on February 26, 2010, nearly two and a half (2 ½) years before his admission to the nursing home. However, Appellants' arguments are without merit. Christine Pearson stated both in her Affidavit and during her deposition that Gary Banks had attended and graduated from John Adams

High School. (T.d. 49, Exhibit "F"; Depo., T.d. 55, p. 15:5-13.) She further stated that Gary Banks had been in special education classes throughout his entire education. (T.d. 49, Exhibit "F".)

Additionally, the fact that Gary Banks was competent and had legal capacity to execute a Durable Power of Attorney for Health Care two and a half (2 ½) years earlier, which others had discussed with him and which he understood would provide his sister, Christine Pearson, with authority to assist him in making health care decisions, in no way establishes that Gary Banks had legal capacity to carry out all subsequent transactions, including the signing of an arbitration clause that he could not read or understand, which was not explained to him by anyone, and for which he did not know or understand the effects of his signature. (T.d. 55, pp. 11:11-20, 13:5-14, 37:10-18.)

Appellants argue that since no one accompanied Gary Banks during the admission process and Christine Pearson did not sign the admission paperwork on Gary Banks' behalf, that the power-of-attorney was not in effect at the time of his admission and that Gary Banks had legal capacity to sign the arbitration clause. However, as indicated in her Affidavit and her deposition testimony, Christine Pearson did not review the arbitration clause because she was never told about it, nor was she ever asked to sign it on Gary Banks' behalf. (T.d. 49, Exhibit "F"; T.d. 55, pp. 52:13-23, 53:17-54:7.) In addition, the nursing home's subsequent communications with Christine Pearson, relative to Gary Banks' care, destroy any suggestion that the power-of-attorney was not in effect.

Also, the fact that Gary Banks neatly signed his name on the designated lines of the admission paperwork does not make the arbitration clause procedurally conscionable. Christine Pearson testified that Gary Banks could sign his name, which were some of the few words he could write. (T.d. 49, Exhibit "F".) As a result, it would have been an arduous task for Gary Banks to sign all the documents that Ms. Stincic directed him to sign, which demonstrates that he was under stress.

Third, Appellants argue that the Trial Court incorrectly determined that Gary Banks lacked any meaningful choice based upon his lack of legal experience and the absence of an attorney during the admission process, because the subject arbitration clause contains language stating that Gary

Banks would receive services whether or not he signed it, that he recognized that other health care facilities were available to meet his needs, and that he had thirty (30) days to reject the arbitration clause. However, it is not in dispute that Gary Banks could not, and did not, read the subject arbitration clause and that no one explained the arbitration clause to him. (T.d. 49, Exhibit "F"; T.d. 42, pp. 20:24-21:5, 22:18-23:1, 32:15-17.) As a result, it is clear that Gary Banks lacked any meaningful choice based upon these factors as well as his mental retardation and illiteracy.

Moreover, it should be noted that Appellants do not dispute that Gary Banks was illiterate and could not read. Appellants do not dispute that Gary Banks did not, and could not, read the Admission Agreement and the subject arbitration clause. Christine Pearson's uncontroverted testimony indicates that Gary Banks would not have understood any admission paperwork, and that he did not know what arbitration is. (T.d. 49, Exhibit "F".) Appellants do not dispute that no one accompanied Gary Banks when he signed the twenty-seven (27) page Admission Agreement, including the subject arbitration clause. (T.d. 42, p. 26:7-9.) The Trial Court properly recognized that these factors weigh in favor of finding that the arbitration clause is procedurally unconscionable.

With respect to substantive unconscionability, Appellants argue that the Trial Court erred in concluding that Gary Banks lacked capacity to contract where he was never adjudicated as mentally incompetent and there is no evidence that Gary Banks lacked the capacity to contract. Appellants go on to repeat their argument that since Gary Banks was mentally competent and had legal capacity to execute the Durable Power of Attorney for Health Care on February 26, 2010, that he must have also had legal capacity when he signed the arbitration clause on August 15, 2012. For all of the reasons discussed above, Appellants arguments are without merit. In addition, Appellants recognize that legal capacity relates to "whether the principal has the ability 'to understand the nature, scope and the extent of the business she is about to transact.'" *See* Page 13 of Appellants' Brief, citing *Testa v. Roberts*, 44 Ohio App.3d 161, 542 N.E.2d 654 (6th Dist. 1988). As a result, Gary Banks' capacity to understand the power-of-attorney is wholly irrelevant, and the only relevant

inquiry is whether Gary Banks understood the nature, scope, and extent of the arbitration clause when he signed it. It is undisputed that Gary Banks did not have any experience with arbitration and did not know what it is. He did not know the difference between arbitration and litigation. (T.d. 49, Exhibit "F".) It is also undisputed that Gary Banks was unable to understand a document even if someone explained it to him. (T.d. 55, p. 37:19-25.) He was very compliant and would agree with a person explaining a document to him despite the fact that he had no clue about what the person was talking about. (*Id*. at p. 38:1-6.) Gary Banks would not have understood if someone asked him if they could put his name in a directory or phone book for the nursing home, if someone asked him if they could share health care information with another family member, or if someone asked him if he had the ability to hold a small bank account. (*Id*. at pp. 41:10-14, 41:20-24, 42:13-17.) Gary Banks would not have been able to answer questions about whether he received Black Lung Benefits or whether he wanted to see a psychiatrist because he would not have know the answers to those questions. (*Id*. at pp. 44:1-5, 46:14-18, 47:13-48:5.) If he had been given the State of Ohio Nursing Home Resident's Bill of Rights, he would not have understood it. (*Id*. at p. 37:1-6.) Gary Banks often called Christine Pearson and asked her to talk with the staff of the nursing home because he could not understand them. (*Id*. at p. 40:8-21.) Ms. Stincic testified that neither she, nor anyone else at the nursing home, did anything as part of the admission process to determine Gary Banks' mental or legal capacity. (*Id*. at pp. 25:24-26:1, 32:3-6, 33:5-7.) As a result, the Trial Court properly determined that Gary Banks lacked capacity to sign the arbitration clause.

The subject arbitration clause is also substantively unconscionable for several other reasons. First, it fails to comply with at least five (5) of the requirements of R.C. §§ 2711.23 and 2711.24. Second, the arbitration clause was offered to Gary Banks on a take it or leave it basis, with no way for Gary Banks to indicate that he rejected the arbitration clause or to alter it. Third, while the arbitration clause contains a provision labeled "Right to Change your Mind", which requires a resident to send notice by certified mail within thirty (30) days to revoke the arbitration clause, Gary

Banks could not read this provision and did not have the capacity to send a letter to the nursing home by certified mail. Fourth, the entire Admission Agreement, which contains the arbitration clause, is a twenty-seven (27) page, boilerplate document, which states nothing about how nursing home residents are sometimes neglected and abused nor the benefits of a jury trial. (T.d. 49, Exhibit "E".) Fifth, the arbitration clause does not explain arbitration nor the specific rules that would apply to arbitration of Gary Banks' claims. Neither Ms. Stincic, nor anyone else at the nursing home, explained arbitration to Gary Banks. (T.d. 42, pp. 20:24-21:5, 22:18-23:1, 32:15-17.) Further, Ms. Stincic would have been unable to explain arbitration to him because she did not understand it herself, including whether a judge is present during arbitration; whether the parties can issue subpoenas, conduct depositions, and propound written discovery requests; what rules would apply in an arbitration against the nursing home; or the costs associated with arbitration. (*Id*. at pp. 24:18-25:5, 25:9-13, 25:16-18.) Sixth, the Voluntary Arbitration Program brochure, which was supposed to be provided along with the arbitration clause, contains a place for the resident or the resident's legal representative to sign and acknowledge receipt of it. Appellants have not produced a copy of any Voluntary Arbitration Program brochure with Gary Banks' signature, and Ms. Stincic does not remember reading it to him. (*Id*. at p. 21:6-8.) This Court can only conclude that he was not provided with it, and would have been unable to determine all of the terms of the arbitration clause.

Since the subject arbitration clause is both procedurally and substantively unconscionable, this Honorable Court should affirm the Trial Court's April 23, 2014 Judgment Entry on that basis.

C. Appellants' Second Assignment of Error: The trial court erred in deciding the motion to stay without affording Manor Care the opportunity to conduct discovery as to Banks' capacity to contract.

Appellants' Second Issue Presented for Review: Did the trial court error in denying Manor Care's motion to compel the production of limited discovery from The Gables in order to establish Banks' capacity to contract where Plaintiff's arguments against arbitration relied upon Banks' alleged lack of capacity?

Appellants argue that the Trial Court erred in denying their Motion to Compel Compliance

with the Subpoena Served upon The Gables on March 28, 2014. (T.d. 57 and 60.) However, the Trial Court's March 28, 2014 Judgment Entry is not a final appealable order under R.C. § 2505.02. "[T]he trial court's denial of appellant's motion to compel compliance with [a] subpoena [is] not a final, appealable order." *In re: Kelleher*, 2009-Ohio-2960, at ¶ 15 (7th Dist. 2009); *see Youngstown State Univ. v. Youngstown State Univ. Ass'n of Classified Employees*, 2013-Ohio-5862, at ¶¶ 27-38 (7th Dist. 2013); *see Tessler v. Ayer*, 1995 Ohio App. LEXIS 4686, at * 17 and fn. 5 (1st Dist. 1995). Further, in the event that the Trial Court's March 28, 2014 Judgment Entry is a final appealable order, Appellants failed to timely appeal that decision in accordance with App.R. 4(A), App.R. 3(D), and Loc.R. 3(D)(2). Accordingly, this Court should dismiss Appellants' second assignment of error.

D. Appellee's First Cross-Assignment of Error: The trial court erred in failing to find that the subject arbitration clause is void, invalid, and unenforceable on any grounds other than unconscionability (T.d. 61).

Appellee's First Issue Presented for Review: Whether Appellants have standing to enforce the subject arbitration clause where none of the Appellants signed the Admission Agreement nor the arbitration clause, as required by R.C. §§ 2711.01(A) and 2711.22(A).

R.C. § 2711.01(A) defines a valid arbitration clause, in pertinent part, as "any agreement in writing between two or more persons to submit to arbitration any controversy existing between them." R.C. § 2711.22(A) further states that an arbitration clause is valid and enforceable "once the contract is signed by all parties." Regardless of whether the subject arbitration clause is a part of the Admission Agreement, as indicated by Ms. Stincic, or a separate document, none of the Appellants in this care are parties to the Admission Agreement nor the subject arbitration clause. (T.d. 42, p. 29:12-14.) The second paragraph of the two (2) page arbitration clause expressly states that it was "[m]ade on 8/15/12 (date) by and between the Patient Gary Banks or Patient's Legal Representative _____ (collectively referred to as "Patient") and the Center MC Wby." (T.d. 49, Exhibit "E", pp. 26-27.) Ms. Stincic, who signed the arbitration clause as "Center Representative", testified that "MC Wby" is not defined anywhere in the arbitration clause. (T.d. 42, p. 29:9-11.) She further testified that none of the Appellants are mentioned anywhere in the arbitration clause,

except for Appellant HCR ManorCare, Inc., which is referenced in numbered paragraph 1. (*Id*. at pp. 33:8-35:16.) She indicated that Appellant HCR ManorCare, Inc. is not mentioned anywhere else in the arbitration clause, including as a party to the arbitration clause. (*Id*. at p. 34:1-5.) Similarly, the only parties to the Admission Agreement are Gary Banks and HCR Manor Care Willoughby, which is not a party. Since no agreement to enforce exists between Gary Banks and any of the Appellants, Appellants lacked standing to move the Trial Court to stay proceedings.

Appellee's Second Issue Presented for Review: Whether the subject arbitration clause is enforceable where Appellants admitted in their Answer that there is no privity of contract.

In their Joint Answer, Appellants stated that "Plaintiff's claims fail for lack of privity of contract." If there is no privity of contract between Appellants and Appellee, as Appellants have indicated, then Appellants cannot rely on the Admission Agreement and the subject arbitration clause to compel arbitration of any of Appellee's claims against them. *See Naylor Family P'ship v. Home Savings & Loan Co. of Youngstown, Ohio*, 2014-Ohio-2704, at ¶ 16 (11th Dist. 2014).

Appellee's Third Issue Presented for Review: Whether the Admission Agreement, including the arbitration clause contained therein, is enforceable where the express language of the Admission Agreement states that it automatically terminated upon Gary Banks' discharge from the ManorCare Health Services - Willoughby nursing home, which occurred on September 19, 2012.

Section 6.1 of the Admission Agreement states, in pertinent part: "This Agreement begins on the day You are admitted to the Center and ends on the day You are discharged from the Center unless you are readmitted within 15 days of Your discharge date." (T.d. 49, Exhibit "E".) Assuming that the subject arbitration clause was part of the Admission Agreement, as Ms. Stincic testified, the Admission Agreement, including the arbitration clause, automatically terminated when Gary Banks was discharged from the nursing home on September 19, 2012 and is now void.

Appellee's Fourth Issue Presented for Review: Whether the subject arbitration clause is enforceable where Gary Banks could not effectively communicate in spoken and written English due to his intellectual disabilities, as required by R.C. § 2711.24.

R.C. § 2711.24 states, in pertinent part, that an arbitration agreement is invalid and unenforceable where "the patient executing the agreement was not able to communicate effectively

in spoken and written English". As noted above, it is undisputed that Gary Banks could not read. He could not, and did not, read the Admission Agreement nor the subject arbitration clause, as required by R.C. § 2711.24, when he signed them on August 15, 2012. Further, his mental capacity was such that he could not effectively communicate in spoken English relative to arbitration.

Appellee's Fifth Issue Presented for Review: Whether the subject arbitration clause is enforceable where it fails to state that Gary Banks will receive care and treatment at the ManorCare Health Services - Willoughby nursing home regardless of whether or not he signs the arbitration clause, as required by R.C. § 2711.23(A).

R.C. § 2711.23(A) states that "[t]o be valid and enforceable any arbitration agreements * * * shall provide that the care, diagnosis, or treatment will be provided whether or not the patient signs the agreement to arbitrate". The subject arbitration clause does not state, in any place, that Gary Banks will receive the necessary medical care and treatment at the nursing home, regardless of whether he signed the arbitration clause, and, therefore, is invalid and unenforceable.

Appellee's Sixth Issue Presented for Review: Whether the subject arbitration clause is enforceable where it fails to state that the decision whether or not to sign the arbitration clause is solely a matter for the resident's determination without any influence, as required by R.C. § 2711.23(C).

RC. § 2711.23(C) states that "[t]o be valid and enforceable any arbitration agreements * * * shall provide that the decision whether or not to sign the agreement is solely a matter for the patient's determination without any influence". The arbitration clause does not state, in any place, that the decision whether or not to sign the agreement is solely a matter for Gary Banks' determination without any influence. As a result, the arbitration clause is invalid and unenforceable.

Appellee's Seventh Issue Presented for Review: Whether the subject arbitration clause is enforceable where it is contained within Appellants' twenty-seven (27) page Admission Agreement and is not separate from any other agreement, as required by R.C. § 2711.23(G).

R.C. § 2711.23(G) states that "[t]o be valid and enforceable any arbitration agreements * * * shall be separate from any other agreement, consent, or document". Ms. Stincic testified that the arbitration clause is part of the Admission Agreement. (T.d. 42, p 29:18-19.) Therefore, it is invalid.

Appellee's Eighth Issue Presented for Review: Whether the subject arbitration clause is enforceable where Appellants waived any alleged right to arbitration.

"Despite the strong public policy encouraging enforcement of arbitration clauses, a trial court may refuse to enforce an arbitration clause if a party waives his right to arbitration." *Glenmoore Builders, Inc. v. Kennedy*, 2001-Ohio-8777, at * 9 (11th Dist. 2001). Appellants clearly knew of their alleged right to arbitration, as they have been in possession of the Admission Agreement containing the arbitration clause since August 15, 2012. In *Hogan v. Cincinnati Fin. Corp.*, 2004-Ohio-3331, at ¶¶ 22-23 (11th Dist. 2004), this Court held that "[a] party can waive his right to arbitrate under an arbitration clause by filing a complaint." Appellants acted inconsistently with any alleged right to arbitration by filing an Answer, demanding a jury trial on all of Appellee's claims, waiting more than two (2) months after Appellee filed her Complaint to assert their alleged right to arbitration, and deposing Christine Pearson on topics beyond the scope of the arbitration clause. (T.d. 55, pp. 6:18-7:11, 15:16-18:17, 19:6-20:4, 21:1-22:25, 23:11-24:17, 25:12-31:11. Pursuant to Civ.R. 38(D), Appellants did not need to file a jury demand to preserve any right to a jury trial, as Appellee's Complaint contained a jury demand that cannot be withdrawn without Appellants' consent. Appellants affirmatively sought the Trial Court's jurisdiction and have actively engaged in litigation.

Appellee's Ninth Issue Presented for Review: Whether the subject arbitration clause is enforceable against Gary Banks' next-of-kin where none of them signed it.

In *Peters v. Columbus Steel Castings, Co.*, 115 Ohio St.3d 134, 138, 2007-Ohio-4784, 873 N.E.2d 1258 (2007), the Ohio Supreme Court held that "a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims". Pursuant to *Peters*, Gary Banks did not have authority to bind his next-of-kin to arbitration. Accordingly, there is no basis to stay the wrongful death claims of Gary Banks' next-of-kin, which are not subject to arbitration as none of Gary Banks' next-of-kin ever signed an arbitration clause with any of the Appellants.

IV. CONCLUSION.

For all of the foregoing reasons, Appellee respectfully requests that this Honorable Court affirm the Trial Court's April 23, 2014 Judgment Entry denying Appellants' Motion to Stay.

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

By: _____

Blake A. Dickson (0059329)
Mark D. Tolles, II (0087022)
James A. Tully (0084018)
3401 Enterprise Parkway, Suite 420
Beachwood, Ohio 44122
Telephone (216) 595-6500
Facsimile (216) 595-6501
E-mail: BlakeDickson@TheDicksonFirm.com
E-mail: MarkTolles@TheDicksonFirm.com
E-mail: Jtully@TheDicksonFirm.com

Attorneys for Plaintiff-Appellee Christine Pearson, as the Personal Representative of the Estate of Gary Banks (deceased).

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Brief for Appellee, was sent by ordinary U.S. Mail this **17th day of July, 2014**, to the following:

Thomas A. Prislipsky, Esq.
Danny M. Newman, Jr., Esq.
Michael M. Mahon, Esq.
REMINGER CO., L.P.A.
11 Federal Plaza Central, Suite 1200
Youngstown, Ohio 44503

Attorneys for Defendant-Appellants ManorCare Health Services-Willoughby, Manor Care of Willoughby OH, LLC, Manor Care, Inc., Manor Care of Willoughby, HCR Manor Care Services, LLC, HCR ManorCare, Inc., HCR II Healthcare, LLC, HCR III Healthcare, LLC, HCR IV Healthcare, LLC, HCR ManorCare Heartland, LLC, HCR ManorCare Operations II, LLC, Healthcare Operations Holdings, Inc., Healthcare Operations Investments, Inc., Carlyle MC Partners, LP, MC Operations Investments, Inc., TC Group V, LP, Carlyle Partners V MC Holdings, LP, Carlyle Partners V MC, LP, HCP, Inc., HCR Healthcare, LLC, and Paul A. Ormond.

By: _____

Blake A. Dickson (0059329)
Mark D. Tolles, II (0087022)
James A. Tully (0084018)

Attorneys for Plaintiff-Appellee Christine Pearson, as the Personal Representative of the Estate of Gary Banks (deceased).