IN THE COURT OF APPEALS, TENTH APPELLATE DISTRICT
APPELLATE COURT CASE NO. 15AP000782

FRANKLIN COUNTY COURT OF COMMON PLEAS
TRIAL COURT CASE NO. 14CV007216

Richard Fravel, as the Personal Representative of the Estate of Jack Fravel (deceased), Plaintiff-Appellee

vs.

Park East Care & Rehabilitation, et al., Defendant-Appellants

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Appellee's Motion to Dismiss Appeal and Motion for Sanctions

Blake A. Dickson (0059329)
Daniel Z. Inscore (0092586)
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: Dinscore@TheDicksonFirm.com

Attorneys for Plaintiff-Appellee Richard Fravel, as the Personal Representative of the Estate of Jack Fravel (deceased).

G. Brenda Coey (0075879)
BONEZZI SWITZER POLITO & HUPP CO. L.P.A.
1300 East 9th Street, Suite 1950
Cleveland, Ohio 44114

Telephone: (216) 875-2071
Facsimile: (216) 875-1570
Email: bcoey@bsphlaw.com

Attorney for Defendant-Appellants Columbus Rehabilitation and Subacute Institute, Columbus Rehab & Subacute, Columbus Rehabilitation & Subacute, Columbus Rehab and Subacute Inc., Columbus Rehabilitation Care, LLC, Columbus Rehabilitation Care, LLC d.b.a. Columbus Rehabilitation and Subacute Institute, Columbus Rehab. Care, L.L.C., Extendicare Health Services, Extendicare Health Services, Inc., Extendicare Health Facilities, Inc., Extendicare Health Facility Holdings, Inc., Extendicare Holdings, Inc., and Northern Health Facilities, Inc.

I. INTRODUCTION.

Appellants have noticed appeals of two orders of the Trial Court in this case for the sole purpose of delaying this case and forcing the Trial Court to cancel the upcoming jury trial which is scheduled to begin on November 9, 2015. The orders being appealed are not final appealable orders and Appellants improper motivation for filing these improper appeals is to delay this case.

Accordingly, these appeals should be dismissed and Appellants and their counsel should be sanctioned.

Appellants have noticed the appeal of the Trial Court's Order granting Appellee's Motion to Compel and ordering Appellants to produce Patient Care Policies. The Trial Court's Order in this case is not a final appealable order pursuant to R.C. 2505.02. This interlocutory appeal should be dismissed.

Appellants have also noticed the appeal of the Trial Court's denial of their Motion to Stay this case Pending Arbitration. The Trial Court properly denied Appellant's Motion to Stay. As the Court will see below, there is no basis to appeal the Trial Court's Decision. Appellants and their counsel have filed this appeal for the sole purpose of delay. Appellants' counsel has been sanctioned in the past for her improper conduct. This appeal should be dismissed and Appellants and their counsel should be sanctioned for filing an improper appeal for the sole purpose of delaying this case pursuant to R.C. 2323.51 and App. R. 23.

II. STATEMENT OF FACTS.

On March 26, 2013, Decedent Jack Fravel suffered an aneurysm at home. He was admitted to Mount Carmel West Hospital and then transferred to the Ohio State University Wexner Medical Center for surgery for his aneurysm.

On May 23, 2013, Decedent Jack Fravel was admitted to the Columbus Rehab and Subacute Institute nursing home, which is owned and operated by the Appellants, for short-term rehabilitation following his surgery, after which he was supposed to return home to his wife Nancy.

Upon admission to the Columbus Rehab and Subacute Institute nursing home, it was noted that Decedent Jack Fravel's skin was intact and that he did not have any pressure ulcers, but that he was at moderate risk for the development of pressure ulcers because of his decreased mobility and activity.

On May 28, 2013, a nurse noted that there was a blister on Decedent Jack Fravel's **right buttock**. However, no new treatments were ordered until four (4) days later on June 1, 2013.

On May 30, 2013, it was noted that Decedent Jack Fravel did not have any pressure ulcers. Two assessments were conducted to determine Decedent Jack Fravel's risk for the development of pressure ulcer. One assessment indicated that Decedent Jack Fravel's risk had increased and he was now at high risk for the development of pressure ulcers. The second assessment, which relied on information from Decedent Jack Fravel's admission a week earlier and not his current condition, indicated that Decedent Jack Fravel was still at moderate risk for the development of pressure ulcers.

The next day, on May 31, 2013, at approximately 3:00 p.m., Decedent Jack Fravel was transferred to the Mount Carmel West Hospital due to difficulty breathing. While at the hospital, a nurse informed Decedent Jack Fravel's wife that he had a pressure ulcer on his buttocks. Decedent Jack Fravel left the hospital at 8:50 p.m. and returned to the Columbus Rehab and Subacute Institute nursing home. Decedent Jack Fravel's wife informed the staff at the Columbus Rehab and Subacute Institute nursing home that the hospital staff had discovered a pressure ulcer on Decedent Jack Fravel's buttocks.

On June 1, 2013, it was noted that Decedent Jack Fravel had suspected deep tissue injury on his **left buttock**, which measured 6.5 cm x 4.5 cm x 0.0 cm, was open and had a small amount of bloody drainage. It was further noted that there was a Stage II pressure ulcer, which measured 2.0 cm x 2.0 cm, underneath this deep tissue injury.

In addition, it was noted that Decedent Jack Fravel had a suspected deep tissue injury on his **right buttock**, which measured 3.0 cm x 2.2 cm, was open and had a small amount of bloody drainage. It was further noted that there was a Stage II pressure ulcer, which measured 2.0 cm x 1.0 cm, underneath this deep tissue injury.

On June 10, 2013, it was noted that Decedent Jack Fravel now had a Stage II pressure ulcer on his **left buttock**, which measured 4.5 cm x 3.0 cm x 0.0 cm and had a small amount of bloody drainage. It was also noted that Decedent Jack Fravel now had a Stage II pressure ulcer on his **right buttock**, which measured 4.5 cm x 3.0 cm x. 0.0 cm and had a small amount of bloody drainage. It was further indicated that these wounds were **not present** on Decedent Jack Fravel's admission to the Columbus Rehab and Subacute Institute nursing home.

On June 17, 2013, it was noted that the Stage II pressure ulcer on Decedent Jack Fravel's **left buttock** measured 1.5 cm x 1.0 cm x 0.0 cm, and the Stage II pressure ulcer on his **right buttock** measured 3.5 cm x 2.0 cm x 0.0 cm. Both pressure ulcers still had a small amount of bloody drainage.

On June 21, 2013, a shower aide informed a nurse that Decedent Jack Fravel had a black area on his right foot. Upon assessment, it was noted that there were three areas on his **right foot**: an area on the outside of his foot that measured 5.5 cm x 4.0 cm and was black in color; an abrasion on his fourth toe that measured 0.6 cm x 0.8 cm and was red in color; and an area on his fifth toe that

measured 0.5 cm x 0.7 cm and was black in color.

On June 23, 2013, while Decedent Jack Fravel was being repositioned, a nurse noted that he was bleeding from his foley catheter. The catheter had split his meatus. He was subsequently admitted to Mount Carmel West Hospital. The foley catheter was removed and replaced with a condom catheter. Decedent Jack Fravel was discharged back to the Columbus Rehab and Subacute Institute nursing home.

On June 24, 2013, it was noted that the Stage II pressure ulcers on Decedent Jack Fravel's left and right buttocks remained unchanged. The pressure ulcer on his **left buttock** measured 1.5 cm x 1.0 cm x 0.0 cm, and the pressure ulcer on his **right buttock** measured 3.5 cm x 2.0 cm x 0.0 cm. Both pressure ulcers continued to discharge bloody fluid.

On June 26, 2013, it was noted that the deep tissue injury on Decedent Jack Fravel's right foot measured 4.8 cm x 3.8 cm x 0.0 cm and was black in color; the abrasion to his fourth toe measured 0.5 cm x 0.3 cm x 0.0 cm with red tissue; and the deep tissue injury to his fifth toe measured 0.3 cm x 0.2 cm x 0.0 cm and was black in color.

By July 3, 2013, the two pressure ulcers on Decedent Jack Fravel's buttocks had gotten worse and combined to form a single, larger, unstageable, **sacral pressure ulcer**, which measured 7.5 cm x 6.0 cm x 0.0 cm, had a moderate amount of bloody drainage, and the tissue was black, red, and yellow in color. It was also noted that the black area on Decedent Jack Fravel's **right foot** measured 4.8 cm x 3.5 cm x 0.0 cm, and that the abrasion to his fourth toe measured 0.4 cm x 0.3 cm with red tissue. It was noted that the area on his fifth toe had healed.

On July 8, 2013, a nurse practitioner observed that Decedent Jack Fravel had an unstageable area on his **coccyx**, which measured 7.5 cm x 6.0 cm, had necrotic tissue, and had a foul odor. He

also noted that Decedent Jack Fravel had a necrotic area on the lateral aspect of his **right foot** near his fifth toe, which measured 5.0 cm x 4.0 cm.

On July 10, 2013, a nurse noted that Decedent Jack Fravel had an unstageable area on his **coccyx**, which measured 7.5 cm x 6.0 cm, had black, red, and yellow tissue, had a moderate amount of bloody drainage, and had a foul odor. It was also noted that Decedent Jack Fravel had a black area on the lateral aspect of his **right foot**, which measured 4.6 cm x 3.4 cm x 0.0 cm, and an abrasion on his fourth toe, which measured 0.2 cm x 0.2 cm.

That same day, another nurse conducted an assessment and charted that Decedent Jack Fravel **did not have any pressure ulcers** and had been incontinent of bowel over the last four (4) days.

On July 10, 2013, Decedent Jack Fravel went to a follow-up appointment with his neurologist, relative to his aneurysm. Due to the neurologist's concern about Jack Fravel's condition, he sent Jack Fravel to the Emergency Room at the Ohio State University Wexner Medical Center. At the Ohio State University Wexner Medical Center, Decedent Jack Fravel was diagnosed with sacral osteomyelitis, sepsis, and Stage IV pressure ulcers.

On July 11, 2013, he underwent surgical debridement of the Stage IV pressure ulcer on his coccyx.

On July 17, 2013, Decedent Jack Fravel was discharged from the Ohio State University Wexner Medical Center and transferred to Select Specialty Hospital for further treatment for the Stage IV pressure ulcer on his coccyx.

On August 30, 2013, it was determined that Decedent Jack Fravel would need a colostomy in order to help the Stage IV coccyx pressure ulcer heal.

On September 30, 2013, the colostomy procedure was performed.

Decedent Jack Fravel was subsequently admitted to the Ohio State University Wexner Medical Center from October 17, 2013 through October 23, 2013 due to complications related to his colostomy, which required an exploratory laparotomy and a revision of the colostomy.

From November 2, 2013 through November 5, 2013, Decedent Jack Fravel was admitted to the Ohio State University Wexner Medical Center for seizures that were related to his infection.

On January 1, 2014, Jack Fravel died as a direct and proximate result of Appellants' negligence, recklessness, willful and wanton conduct, and/or actual malice. Jack Fravel's death certificate indicates that sepsis contributed to his death.

III. PROCEDURAL HISTORY.

On **April 30, 2014**, Appellee's counsel sent a letter to Columbus Rehabilitation and Subacute Institute requesting "complete and accurate copies of **any and all records** in your possession, relative, in any way, to **Jack Fravel."** *See* Exhibit "A". This letter explained that the subject nursing home was obligated under state and federal law to provide those records within two working days. *Id.*

On June 11, 2014, Appellee received 989 pages of Jack Fravel's medical records and bills from the Columbus Rehabilitation and Subacute Institute. **Appellants did not produce any admission agreement, nor arbitration clause, nor power of attorney agreement relative to Jack Fravel and/or Nancy Fravel.**

On July 10, 2014, Appellee Richard Fravel, as the Personal Representative of the Estate of Jack Fravel (deceased), filed a Complaint in the Franklin County Court of Common Pleas against the Appellants, relative to the injuries and damages that Decedent Jack Fravel suffered during his residency at the Columbus Rehab and Subacute Institute nursing home and for his wrongful death.

On August 11, 2015, Appellants' Columbus Rehabilitation and Subacute Institute, Columbus Rehabilitation Care, LLC, Columbus Rehabilitation Care, LLC d.b.a. Columbus Rehabilitation and Subacute Institute, Extendicare Health Services, Inc., Extendicare Health Facilities, Inc., Extendicare Holdings, Inc., Northern Health Facilities, Inc. and Appellants misnamed as Columbus Rehab & Subacute, Columbus Rehabilitation & Subacute, Columbus Rehab and Subacute Inc., Columbus Rehab. Care, L.L.C., Extendicare Health Services, and Extendicare Health Facility Holdings, Inc. **filed an Answer** to Plaintiff's Complaint. They did not move to stay the case.

On December 10, 2014, Appellee's counsel issued a Notice of Deposition of Appellants pursuant to Ohio Civil Rule 30(B)(5), which was scheduled to take place on **January 13, 2015, at 10:00 a.m.**, in Columbus, Ohio. In the 30(B)(5) deposition notice, Appellee asked Appellants to designate and one or more persons, who are duly authorized to testify on behalf of each of the Appellants and who are to be fully prepared by the Appellants, to testify on behalf of the Appellants as to all information that is known or reasonably available to each of the Appellants regarding twenty-three (23) topics, including, but not limited to, the identity, location, and maintenance of patient care policies that were in place at the subject nursing home during Decedent Jack Fravel's residency. Appellants' counsel subsequently cancelled this 30(B)(5) deposition.

Appellee filed a Motion to Compel Deposition of Appellants Pursuant to Ohio Civil Rule 30(B)(5) and a Motion for Sanctions.

On April 3, 2015, he Trial Court issued a Judgment Entry granting Appellee's Motion to Compel Deposition of Appellants Pursuant to Ohio Civil Rule 30(B)(5).

On December 12, 2014, Appellee's counsel propounded Appellee's First Request for Production of Documents to each of the Appellants, by and through their counsel, both electronically

and by ordinary U.S. Mail. Pursuant to Civ.R. 33(A)(3) and 34(B)(1), Appellants' Answers to Appellee's First Set of Interrogatories and Appellants' Responses to Appellee's First Request for Production of Documents were due on **January 9, 2015**. **Request No. 1 sought "complete and accurate copies of any and all document, which are relative to Jack Fravel and/or the within litigation, in any way..."**

Also in his First Request for Production of Documents, Appellee requested a quantity of relevant information and documentation from the Appellants, relative to Decedent Jack Fravel and the care that he received or should have received during his residency at the Columbus Rehab and Subacute Institute nursing home, including the following materials:

> 17. Complete and accurate copies of any and all policies and/or procedures and/or protocols and/or rules and/or regulations relative, in any way, to patient care that were in place, at any time, when Jack Fravel was a resident of the subject nursing home.
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> 18. Complete and accurate copies of the entire contents of every Policy and Procedure Manual, and/or Quality Improvement Manual that was in place, at any time, when Jack Fravel was a resident of the subject nursing home.
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> 19. Complete and accurate copies of the entire contents of the Operations Manual that was in place, at any time, when Jack Fravel was a resident of the subject nursing home.
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> 20. Complete and accurate copies of the entire contents of the Administrative Policy and Procedure Manual that was in place, at any time, when Jack Fravel was a resident of the subject nursing home.
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> 21. Complete and accurate copies of the entire contents of the Executive Director Financial Training Manual or any other Financial Training Manual that was in place, at any time, when Jack Fravel was a resident of the subject nursing home.
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> 22. Complete and accurate copies of the entire contents of any and all policies and/or procedures and/or protocols and/or rules and/or regulations relative, in any way, to the creation, use, maintenance, preservation, review, and/or production of audit documentation and/or electronic medical records that were in place, of any

time, when Jack Fravel was a resident of the subject nursing home.

Pursuant to Civ.R. 34(B)(1), Appellants' Responses to Appellee's First Request for Production of Documents were due on **January 9, 2015**.

Appellants did not provide any Answers to Appellee's First Set of Interrogatories nor any responses to Appellee's First Request for Production of Documents on or before January 9, 2015.

On January 9, 2015, Appellee's counsel sent a letter to Appellants' counsel, asking Appellants to provide their Responses to Appellee's First Request for Production of Documents. *See* Exhibit "B". Appellants' counsel did not respond to Appellee's counsel's letter.

On January 14, 2015, Appellee's counsel sent a **second** letter to Appellants' counsel, asking Appellants' counsel to provide their Responses to Appellee's First Request for Production of Documents. *See* Exhibit "C". Again, Appellants' counsel did not respond to Appellee's counsel's letter.

On January 28, 2015, Appellee's counsel sent a **third** letter to Appellants' counsel, asking Appellants to provide their Responses to Appellee's First Request for Production of Documents. *See* Exhibit "D".

On February 5, 2015, Appellants' counsel sent an e-mail to Appellee's counsel, in which she indicated that she was gathering responsive information and would be sending Appellants' Responses to Appellee's First Request for Production of Documents by the middle of the following week, which was **February 11, 2015**. *See* Exhibit "E".

On February 9, 2015, Appellants' counsel provided Responses to Appellee's First Request for Production of Documents on behalf of some, but not all, of the Appellants. Specifically, Appellants' counsel provided Responses from Appellants Columbus Rehabilitation and Subacute

Institute, Columbus Rehab & Subacute, Columbus Rehabilitation & Subacute, Columbus Rehab and Subacute Inc., Columbus Rehab. Care, L.L.C., Extendicare Health Services, Extendicare Health Facilities, Inc., Extendicare Health Facility Holdings, Inc., and Extendicare Holdings, Inc. However, **none of these Appellants provided a single document nor any information** in their Responses to Appellee's First Request for Production of Documents. Instead, they referred to the Responses of Appellants Columbus Rehabilitation Care, LLC, Columbus Rehabilitation Care, LLC d.b.a. Columbus Rehabilitation and Subacute Institute, Northern Health Facilities, Inc., and Extendicare Health Services, Inc., **which had not yet been produced to Appellee's counsel**, despite the fact that their Responses were due **nearly two (2) months earlier.**

On March 6, 2015, Appellee filed a Motion to Compel Appellants Columbus Rehabilitation Care, LLC, Columbus Rehabilitation Care, LLC d.b.a. Columbus Rehabilitation and Subacute Institute, Northern Health Facilities, Inc., and Extendicare Health Services, Inc. to Provide Complete and Accurate Responses to Appellee's First Request for Production of Documents.

On March 13, 2015, Appellants Columbus Rehabilitation Care, LLC, Columbus Rehabilitation Care, LLC d.b.a. Columbus Rehabilitation and Subacute Institute, Northern Health Facilities, Inc., and Extendicare Health Services, Inc. provided their Responses to Appellee's First Request for Production of Documents. **These records did not include any admission agreement, nor any arbitration clause, nor any power of attorney agreement relative to Jack Fravel and/or Nancy Fravel. Appellants did not produce a single document in response to Request for Production No. 1, which requested all documents relative to Jack Fravel.** Instead, Appellants objected insisting that they had already produced such documents or the Request was overly burdensome.

In response to Request for Production of Documents Nos. 17-22, these Appellants objected, claiming that these Requests are overly broad and unduly burdensome. Without waiving their objections, these Appellants produced a copy of the Tables of Contents **only** of the patient care policy and procedure manuals that were in place during Decedent Jack Fravel's residency at the subject nursing home. These Appellants indicated that "[Appellee] is welcome to identify those policies and procedures for which he would like a copy. If the selected policies and procedures are relevant to the issues presented in this case, Appellants will produce the same, except however, that the production of the documents must be subject to a confidential agreement inasmuch as these policies and procedures are protected by copyright law."

On April 6, 2015, Appellee's counsel sent a letter to Appellants' counsel, in which Appellee's counsel requested Appellants to immediately produce complete and accurate copies of all of the policies and procedures that were in place during Decedent Jack Fravel's residency at the subject nursing home, including, but not limited to, all of the policies and procedures referenced in the Tables of Contents that the Appellants had previously produced. *See* Exhibit "F". Appellee's counsel also informed Appellants' counsel that her assertion that copyright laws require the requested policies and procedures to be produced subject to a confidentiality agreement was improper and inaccurate.

On April 15, 2015, Appellee's counsel sent a letter to Appellants' counsel regarding Appellants' Responses to Appellee's First Request for Production of Documents. *See* Exhibit "G". Appellee's counsel again addressed Appellants' contention that the policies and procedures should only be produced subject to a confidentiality agreement.

On April 17, 2015, the trial court denied Appellee's Motion to Compel Appellants'

Responses to Appellee's First Request for Production of Documents as moot, since these Appellants had subsequently provided Responses to Appellee's First Request for Production of Documents.

On April 30, 2015, Appellants filed a Motion for Extension of Discovery Cut-Off Deadline, in which Appellants asked the Trial Court to extend the discovery cutoff to allow Appellants to take depositions that they previously requested as well as Appellee's responses to written discovery requests that they previously propounded. Appellants indicated that such an extension would not interfere with the jury trial of this case, which is scheduled to begin on July 21, 2015.

On May 1, 2015, the Trial Court issued an Order granting Appellants' Motion for Extension of Discovery Cut-Off Deadline and extending the discovery cut-off to June 15, 2015.

Also on May 1, 2015, Appellants' counsel sent a letter in response to Appellee's counsel's April 6, 2015 and April 15, 2015 letters, in which Appellants' counsel indicated that she would not produce the requested patient care policies. *See* Exhibit "H".

On June 4, 2015, Appellee's counsel sent another letter to Appellants' counsel regarding the outstanding discovery that the Appellants have not yet produced in this case, including the requested policies and procedures. *See* Exhibit "I".

On June 9, 2015, Appellee moved for an extension of the Discovery Cutoff Date.

On June 15, 2015, Appellants' counsel moved to stay proceedings pending arbitration. Attached to this motion was an arbitration clause, which was never produced to Appellee's counsel by Appellants.

On June 16, 2015, Appellee moved to Compel the Production of Patient Care Policies in place at the subject nursing home during Decedent Jack Fravel's residency.

On July 8, 2015, Appellee moved to Compel the Production of all records in Appellants'

possession relative to Jack Fravel.

On July 20, 2015, the trial court denied Appellants' Motion to Stay Proceedings Pending Arbitration.

On August 6, 2015, the Trial Court granted Appellee's Motion to Compel Patient Care Policies.

On August 17, 2015, Defendant-Appellants filed their notice of appeal with respect to the Court's July 20, 2015 entry denying their motion to stay proceedings pending arbitration as well as the Trial Court's August 6, 2015 entry ordering the production of patient care policies.

IV. LAW AND ARGUMENT.

Appellants have noticed these frivolous appeals solely for the purpose of delaying this case and avoiding trial. As a result, this appeal should be dismissed and Appellants and their counsel should be sanctioned pursuant to App. R. 23, and R.C. 2323.51.

The Trial Court's Order granting Appellee's Motion to Compel and ordering the Appellants to produce patient care policies is not an order compelling the disclosure of any allegedly privileged materials. Therefore, it is not a final order. If this appeal is not dismissed then every Defendant in every nursing home case will have an automatic appeal and a significant delay built into every case. All a Defendant would have to do in a Nursing Home case to delay the case for over a year is refuse to produce patient care policies and then, when the Trial Court inevitably orders them to produce those policies, file a frivolous appeal. The only way to put a stop to this abuse of the system is to dismiss these frivolous appeals and sanction the parties and their counsel for filing them. Delays hurt the Plaintiff. Witnesses move, memories fade and every delay challenges the resolve of the party pursuing the case. A Plaintiff should not have to endure an eighteen (18) month delay because

Appellants filed a frivolous appeal.

A. The Court's August 6, 2015 Entry Ordering the Production of Patient Care Policies is not a Final, Appealable Order.

The Trial Court's August 6, 2014 Journal Entry granting Appellee's Motion to Compel Patient Care Policies, is not a final, appealable order under R.C. § 2505.02(B)(1) or (4). When a party does not assert a claim of privilege or develop it in the Trial Court, an order requiring production of information is not a final, appealable order. Appellants did not assert any privilege with respect to Plaintiff's request for Patient Care Policies. They did not assert a privilege in response to Appellee's First Request for Production of Documents. They did not assert a privilege in response to Appellee's numerous letters. They did not assert a privilege in response to Appellee's Motion to Compel. Appellants did not even assert, much less develop, any claims of privilege in the Trial Court. As a result, the Trial Court's August 6, 2015 Journal Entry is not a final, appealable order and Appellants' frivolous appeal should be promptly dismissed.

"Section 3(B)(2), Article IV of the Ohio Constitution limits * * * appellate jurisdiction to the review of **final judgments** of lower courts." *CNT Constr., Inc. v. Bailey*, 2011-Ohio-4640, at ¶ 16 (8th Dist. 2011) (emphasis added). Absent a final, appealable order, the appellate court does not possess jurisdiction and must dismiss the appeal. *St. Rocco's Parish Fed. Credit Union v. Am. Online*, 151 Ohio App.3d 428, 431, 2003-Ohio-420, 784 N.E.2d 200 (8th Dist. 2003).

"Orders regarding discovery are considered interlocutory and, in general, are not immediately appealable." *Lytle v. Mathew*, 2014-Ohio-1606, at ¶ 9 (9th Dist. 2014), citing *Walters v. Enrichment Ctr. of Wishing Well Inc.*, 78 Ohio St.3d 118, 120-21, 1997-Ohio-232, 676 N.E.2d 890 (1997). "For a judgment to be final and appealable, it must satisfy the requirements of R.C. § 2505.02 and, if applicable, Civ.R. 54(B)." *CNT Constr., Inc. v. Bailey*, 2011-Ohio-4640, at ¶ 16 (8th Dist. 2011),

quoting *Haley v. Reisinger*, 2009-Ohio-447 (9th Dist. 2009).

R.C. § 2505.02(B) states, in pertinent part:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> > (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
> >
> > * * *
> >
> > (4) An order that grants or denies a provisional remedy and to which both of the following apply:
> >
> > > (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
> > >
> > > (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

1. The Trial Court's August 6, 2014 Journal Entry is not a final, appealable order under R.C. § 2505.02(B)(1).

R.C. § 2505.02(A)(1) defines "substantial right" as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect". "An order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future." *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993). "To prevail in this contention, appellants must demonstrate that in the absence of immediate review of the order they will be denied effective relief in the future." *Id.* at 63. "This is precisely the mechanism available to determine whether a claim of privilege in a discovery dispute is justified." *Id.* "[I]t would only be after this in

camera review and a trial court order compelling disclosure that the substantial rights of appellants would be implicated." *Id.* at 64.

The Appellants do not even claim that the documents that they were ordered to produce in this case are privileged. The Appellants claim that the patient care policies that they were ordered to produce are copyrighted. Copyrighted materials are not privileged from discovery. A copyright does not make something private or secret. In fact, most copyrighted materials, like published books, are public, which is why they are copyrighted. However, an Order to a party to produce copyrighted materials is not a final appealable order. Therefore, the Trial Court's August 6, 2015 Journal Entry is not a final, appealable order under R.C. § 2505.02(B)(1).

2. The Trial Court's August 6, 2014 Journal Entry is not a final, appealable order under R.C. § 2505.02(B)(4).

In *State v. Muncie*, 91 Ohio St.3d 440, 446, 2001-Ohio-93, 746 N.E.2d 1092 (2001), the Ohio Supreme Court reiterated the test for determining whether an order is final under R.C. § 2505.02(B)(4):

> R.C. 2505.02(B)(4) now provides that an order is a "final order" if it satisfies each part of a three-part test: (1) the order must either grant or deny relief sought in a certain type of proceeding--a proceeding that the General Assembly calls a "provisional remedy," (2) the order must both determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party with respect to the provisional remedy, and (3) the reviewing court must decide that the party appealing from the order would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

An order requiring the disclosure of privileged documents or testimony, when the record is fully developed or ripe, is a final order that is immediately appealable. The first part of R.C. § 2505.02(B)(4)'s three-part test is satisfied if an order specifically requires the disclosure of actually privileged matter because the definition of "provisional remedy" set forth in R.C. § 2505.02(A)(3)

expressly includes the "discovery of privileged matter", and such an order grants or denies the relief sought. In the within case the Appellants do not even claim that the materials ordered to be produced are privileged.

If an order requires the immediate production of privileged material, the second part of the test is also satisfied "because [the order] determines the action with respect to the provisional remedy and prevents judgment in respect to the provisional remedy." *Schmidt v. Krikorian*, 2012-Ohio-683, at ¶ 21 (12th Dist. 2012). But, " in order to be final under this decision, an order to compel or an order denying protection must definitively decide the matter and there must be no further opportunity to petition the court. *Youngstown State Univ. v. Youngstown State Univ. Assn. of Classified Emps.*, 2013-Ohio-5862, ¶ 29 (7th Dist. 2013), citing *Muncie*, 91Ohio St.3d at 449-51.

An order that requires the unconditional disclosure of privileged material can meet the third part of the test "because forcing disclosure of allegedly privileged material will destroy the privilege and 'the proverbial bell cannot be unrung.'" *Schmidt* at ¶ 26. Where an order does not require the unconditional disclosure of identified privileged documents, it "does not constitute a final appealable order because it does not provide for unfettered discovery coupled with the danger of being unable to unring the proverbial bell." *Dispatch Printing Co. v. Recovery Ltd. P'ship*, 166 Ohio App.3d 118, 2006-Ohio-1347, ¶¶ 9-10, 849 N.E.2d 297 (10th Dist. 2006).

Since the Trial Court's August 6, 2015 Journal Entry did not require the unconditional disclosure of documents that are even alleged to be privileged nor prevent a judgment in Appellants' favor with respect to any provisional remedy, the Trial Court's August 6, 2015 Journal Entry is not a final, appealable order under R.C. § 2505.02(B)(4). As noted by the Trial Court, Appellants' Patient Care Policies are copyrighted and continue to enjoy the protections that a copyright affords.

However, they are not privileged from discovery.

"It is fundamental that the appellant bears the burden of affirmatively demonstrating error on appeal." *Cardone v. Cardone*, 1998 Ohio App. LEXIS 2028, at *27-28 (9th Dist. 1998), citing *Pennant Moldings, Inc. v. C & J Trucking Co.*, 11 Ohio App.3d 248, 251, 464 N.E.2d 175 (12th Dist. 1983). "An appellate court may disregard an assignment of error where 'the party raising it fails to identify in the record the error on which the assignment of error is based.'" *Id.*, quoting App. R. 12(A)(2). Further, "[a]bsent specific references to the record, unsubstantiated assertions cannot be considered on appeal." *Id.*, citing *Sykes Constr. Co. v. Martell*, 1992 Ohio App. LEXIS 93 (9th Dist. 1992). "Pursuant to App. R. 12(A), appellate review is limited to the record as it existed at the time the judgment was rendered." *Id.*, citing *McKay v. Cutlip*, 80 Ohio App.3d 487, 490 fn. 3, 609 N.E.2d 1272 (9th Dist. 1992).

In their Notice of Appeal, Appellants state that the issue on appeal is that the trial court erred by requiring disclosure "policies & procedures without an protective order". App. R. 12 limits appellate review to the record that was before the Trial Court, which does not contain any policies or procedures. Appellants never asserted any privilege relative to the patient care policies. Appellants never submitted any materials to the Trial Court for review. As a result, Appellants cannot possibly satisfy their burden and meet the *Muncie* test articulated above.

Appellants have filed a frivolous appeal in order to delay this case, increase litigation costs, and further harass Appellant and his counsel. Appellants must not be permitted to file a frivolous appeal whenever they want to delay proceedings. There is simply no basis for Appellants to appeal an adverse interlocutory order by claiming that the information to be disclosed is protected by copyright. The Trial Court's order requiring the disclosure of the requested information does not

affect a substantial right nor grant or deny a provisional remedy under R.C. § 2505.02(B)(1) or (4). As a result, the Trial Court's order requiring the disclosure of the requested information is not a final order.

Accordingly, Appellee respectfully requests that this Honorable Court dismiss Appellants' frivolous appeal, and impose reasonable sanctions against Appellants and their counsel for filing a frivolous appeal, which has no basis in the law or facts of this case, solely for the purpose of delaying the within litigation, needlessly increasing litigation costs, and harassing Appellee and his counsel, pursuant to R.C. § 2323.51 and App. R. 23.

B. The Trial Court's July 20, 2015 Entry is not a final appealable order.

"Section 3(B)(2), Article IV of the Ohio Constitution limits * * * appellate jurisdiction to the review of final judgments of lower courts." *CNT Constr., Inc. v. Bailey*, 2011-Ohio-4640, at ¶ 16 (8th Dist. 2011).

In their notice of appeal, Appellants state that they are appealing pursuant to R.C. 2711.02(C). R.C. 2711.02(C) states in pertinent part that (emphasis added), "**an order under division (B) of this section** that grants or denies a stay of a trial of any action pending arbitration *** * * is a final order**."

Division (B) of R.C. 2711.02 states in pertinent part (emphasis added):

> 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.

In this case there was no agreement in writing. Jack Fravel did not sign any arbitration clause, nor did anyone with authority to sign on his behalf. Because there is no agreement in writing,

as required by R.C. 2711.02(B), the Court's July 20, 2015 order, denying Appellants' Motion to Stay cannot have been made under that provision. Therefore, it is not a final appealable order under R.C. 2711.02(C). Any other interpretation would reward frivolous appeals made solely for the purpose of delay. These baseless appeals should clearly be dismissed and the parties and their counsel who file them should be sanctioned.

1. There is no agreement in writing between Jack Fravel or the Estate of Jack Fravel (deceased) and any of the Appellants because it was never signed by Jack Fravel nor anyone with authority to sign on his behalf.

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 reaffirmed the first principle to be analyzed when considering the applicability of any arbitration clause or agreement. The Court 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.* 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). The existence of an agreement under R.C. 2711.02(B) is a matter of basic contract law. In *Doe v. Vineyard Columbus*, 2014-Ohio-2617, ¶¶ 15-16 (10th Dist. 2015) (emphasis added), the Tenth District Court of Appeals held:

> **The court must first determine whether the parties agreed to submit a matter to arbitration**, a question typically raising a question of law for the court to decide. Id. Arbitration is a matter of contract and a party cannot be required to submit a dispute to arbitration when it has not agreed to do so. *Academy of Med. of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, ¶ 11. Thus, a court must " 'look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.' " *Columbus Steel Castings v. Real Time Staffing Servs.*, 10th Dist. No. 10AP-1127, 2011-Ohio-3708, ¶ 13, quoting *White v. Equity, Inc.*, 191 Ohio App.3d 141, 2010-Ohio-4743, (10th Dist.) ¶ 19, quoting *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).
>
> A valid and enforceable contract requires an offer by one party and an acceptance of the offer by another party. *Huffman v. Kazak Bros., Inc.*, 11th Dist. No. 2000-L-15, 2002-Ohio-1683, citing *Camastro v. Motel 6 Operating, L.P.*, 11th Dist. No. 2000-T-0053 (Apr. 27, 2001). There must be a meeting of the minds to create a proper offer and acceptance. Id. "In order for a meeting of the minds to occur, both parties to an agreement must mutually assent to the substance of the exchange." *Miller v. Lindsay-Green, Inc.*, 10th Dist. No. 04AP-848, 2005-Ohio-6366, ¶ 63. Thus, the parties must have a "'distinct and common intention which is communicated by each party to the other.'" *Huffman* quoting *McCarthy, Lebit, Crystal & Haiman Co., L.PA. v. First Union Mgt., Inc.*, 87 Ohio App.3d 613 (8th Dist.1993). Therefore, " '[i]f the minds of the parties have not met, no contract is formed.' " Id.

In *Koch v. Keystone Pointe Health & Rehab.*, 2012-Ohio-5817, at ¶ 19 (9th Dist. 2012), the Ninth District Court of Appeals recently 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. As a result, there was no agreement to enforce against the resident or his estate. (Emphasis added).

In their Motion to Stay, Appellants attached what they purport to be an arbitration clause. *See* Exhibit "J". Jack Fravel did not sign the arbitration clause.

The arbitration clause was signed by Jennifer Matteson on behalf of Appellant Columbus Subacute and Rehabilitation Institute and by Jack Fravel's wife Nancy Fravel. Nancy Fravel signed on a line entitled "Signature of Legal Representative for Healthcare Decisions". However, Nancy

Fravel was not Jack Fravel's legal representative. Nancy Fravel did not have power of attorney for Jack Fravel at the time that the arbitration clause was signed on May 24, 2014. No power of attorney document has ever been produced. Nancy Fravel did not have authority to bind Jack Fravel to an arbitration clause. She did not have the authority to sign anything for him.

In the present case, Decedent Jack Fravel did not sign any agreement requiring him to arbitrate any claims that may arise against Appellant Columbus Rehabilitation and Subacute Institute. Nor did anyone with authority sign such an agreement on his behalf. As a result, it is clear that the Estate of Jack Fravel is not required to arbitrate any survivorship claims that it has against any of the Appellants in this case.

In their Motion to Stay, Appellants argue that on the signature page there is a line in the arbitration clause that states "the representative certifies that the Center may reasonably rely upon the validity and authority of the Representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the Resident." As discussed above Nancy Fravel lacked any authority to sign an arbitration clause on Jack Fravel's behalf.

Implied authority is merely the authority to perform acts which are reasonably necessary to execute one's express actual authority. *Damon's Missouri, Inc. v. Davis*, 63 Ohio St. 3d 605, 607, (1992) citing *Spengler v. Sonnenberg*, 88 Ohio St. 192, 200-201, 102 N.E. 737, 739 (1913). Here, because Nancy Fravel lacked actual authority, she also lacked any implied authority.

Nancy Fravel also did not have apparent authority to sign an arbitration clause on Jack Fravel's behalf. *Lang v. Beachwood Pointe Care Center*, 2014-Ohio-1238 (8th Dist. 2014). In *Lang*, a step-daughter signed an arbitration clause for her step-mother, a nursing home resident. However, the step-daughter did not have power of attorney to sign for her step-mother. The

Appellants in that case argued that the step-daughter had "apparent authority" to sign on her step-mother's behalf. The Eighth District Court of Appeals articulated the two-part, conjunctive test for apparent authority:

> Apparent authority for an agent's act will be found when (1) the **principal** held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted the agent to act as having such authority, and (2) the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817

Id. at ¶ 4 (emphasis added). The Eighth District found no evidence that the principal, the nursing home resident, held out her step-daughter as possessing authority to act on her behalf or that the nursing home had any good faith reason to believe that she had such authority. *Id.* at ¶¶ 5-7. As in *Lang*, Jack Fravel did not do anything to indicate that his wife had authority to act on his behalf. And Appellant Columbus Rehabilitation and Subacute Institute has offered no reason why they had a good faith reason to believe Nancy Fravel had such authority. Here, Appellants fail on both prongs of the apparent authority test.

Not surprisingly, 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 between Jack Fravel and anyone. Jack Fravel did not sign any agreement nor did anyone sign on his behalf. As a result, there is no agreement to enforce between the Estate of Jack Fravel and the Appellants.

Ohio's Statute of Frauds, R.C. §1335.05 requires (emphasis added):

> 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.**

The arbitration clause in this case was allegedly signed on May 24, 2013. Appellants sought to enforce this document in June of 2015, so it is clear that the alleged "agreement" was not to be performed within one year from the making thereof. The alleged "agreement" is not signed by the party to be charged therewith, i.e., Jack Fravel, nor was it signed by some other person thereunto by him lawfully authorized. Nancy Fravel was not lawfully authorized to sign for Jack Fravel. Therefore, there is no agreement in writing.

Without a power of attorney agreement Nancy Fravel's lack of authority is obvious. Appellants should be sanctioned for filing this frivolous untimely motion to stay, when it is based on an obviously void and unenforceable document.

2. Appellants Extendicare Health Services, Extendicare Health Services, Inc., Extendicare Health Facilities, Inc., Extendicare Health Facility Holdings, Inc., Extendicare Holdings, Inc., and Northern Health Facilities, Inc. are not parties to any arbitration clause.

O.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". O.R.C. § 2711.22(A) provides that an arbitration clause becomes "enforceable once the contract is signed by all parties." In this case, there is no agreement in writing between **Appellants Extendicare Health Services, Extendicare Health Services, Inc., Extendicare Health Facilities, Inc., Extendicare Health Facility Holdings, Inc., Extendicare Holdings, Inc., and Northern Health Facilities, Inc. and anyone.** None of these Appellants are parties to the alleged arbitration clause. They are not listed in the clause. No one signed the agreement on their behalf. Accordingly, the Trial Court properly denied Appellants' Motion to Stay Proceedings Pending Arbitration as to these Appellants as they are not parties to any arbitration clause so there is no basis to stay the case

against them. Since no agreement exists as to these Appellants they do not have any right to appeal the Trial Court's decision denying the Motion to Stay.

C. Appellants only appealed the Trial Court's July 20, 2015 Order to delay this case.

There is no valid arbitration agreement in this case and therefore no right to appeal the Trial Court's interlocutory decision denying Appellants' frivolous Motion to Stay. The Appellants have no legal basis for their appeal. The Appellants have filed this appeal solely to delay this case. R.C. 2323.51 defines frivolous conduct to include either of the following:

> (I) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
>
> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

"If a court of appeals shall determine that an appeal is frivolous, it may require the appellant to pay reasonable expenses of the appellee including attorney fees and costs." App. R. 23.

Appellants' appeal is not supported by existing law nor any good faith extension and serves only to cause unnecessary delay and needlessly increase the cost of litigation. As such, this appeal should be dismissed and the Appellants and their attorneys should be sanctioned.

It is clear that the Appellants have no hope of prevailing with this appeal. As stated above, there is no valid arbitration agreement between Jack Fravel and any of the Appellants. In addition, the Appellants cannot prevail for the following reasons.

1. Appellants have clearly waived any alleged right to arbitration.

The Trial Court denied Appellants' Motion to Stay because Appellants have clearly waived any alleged right to arbitrate. Appellants cannot possibly overcome this determination.

In *Hogan v. Cincinnati Fin. Corp.*, 2004-Ohio-3331, at ¶¶ 22-25 (11th Dist. 2004), the Eleventh District Court of Appeals held:

> It is well-established that the right to arbitration can be waived. See, e.g., *Griffith v. Linton (1998), 130 Ohio App. 3d 746, 751, 721 N.E.2d 146*; *Siam Feather & Forest Products Co., Inc. v. Midwest Feather Co., Inc. (S.D. Ohio 1980), 503 F. Supp. 239, 242*. "A party can waive his right to arbitrate under an arbitration clause by filing a complaint." *Glenmoore Builders, Inc. v. Kennedy, 11th Dist. No. 2001-P-0007, 2001 Ohio 8777, 2001 Ohio App. LEXIS 5449, at 9*, citing *Rock, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1992), 79 Ohio App. 3d 126, 128, 606 N.E.2d 1054*.
> * * *

According to the Tenth District Court of Appeals in *Gordon v. OM Financial Life Ins. Co.*, 2009-Ohio-814, 08AP-480 , ¶14 (10th Dist. 2009) there is a two-prong test:

> A party asserting waiver of arbitration must demonstrate that the party waiving the right knew of the existing right of arbitration, and that it acted inconsistently with that right. *Blackburn*, at ¶17, citing *Griffith v. Linton* (1998), 130 Ohio App.3d 746. * * * **Additionally, the failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver.** *Mills v. Jaguar-Cleveland Motors, Inc.* (1980), 69 Ohio App.2d 111, 113. (Emphasis added).

For the first prong, Appellants clearly knew of their alleged right to arbitration. They have been in possession of the arbitration clause since Jack Fravel was first admitted to the Columbus Rehabilitation and Subacute Institute nursing home on May 24, 2013.

The Tenth District Court of Appeals has identified four factors that support the second prong, acts inconsistent with intent to arbitrate:

> (1) whether the party seeking arbitration invoked the court's jurisdiction by filing a complaint or claim without first requesting a stay; (2) the delay, if any, by the party seeking arbitration to request a stay; (3) the extent to which the party seeking

> arbitration has participated in the litigation; and (4) whether prior inconsistent acts by the party seeking arbitration would prejudice the non-moving party.

Dispatch Printing Co. v. Recovery Ltd. Partnership, 10th Dist. No. 10AP-353, 2011-Ohio-80, ¶21 (10th Dist. 2011)(internal citations omitted). "Failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver." *Id.* at 20, quoting *Mills v. Jaguar-Cleveland Motors, Inc.*, 69 Ohio App.2d 111, 113 (8th Dist. 1980).

Appellants filed their Answer and failed to move for a stay. This alone constitutes a waiver of the right to arbitrate.

Appellants delayed filing a Motion to Stay eleven (11) months after Appellee's complaint was filed, and over ten (10) months after filing their answer, even though they had been in possession of Jack Fravel's arbitration clause for well over a year.

Appellants have actively participated in this litigation. They have propounded their own written discovery requests. They have moved to continue the discovery deadline.

Based upon the totality of the circumstances, Appellants clearly acted inconsistently with any alleged right to arbitrate. Appellants have clearly waived their right to arbitration.

2. Pursuant to the Ohio Supreme Court's decision in *Peters v. Columbus Steel Castings, Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258 (2007), wrongful death claims brought by a decedent's next-of-kin are not subject to arbitration.

In *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258 (2007), the Ohio Supreme Court considered the issue of "whether the personal representative of a decedent's estate is required to arbitrate a wrongful-death claim when the decedent had agreed to arbitrate all claims against the alleged tortfeasor." *Peters*, 115 Ohio St.3d at 135. In considering this issue, the Court reviewed the separate nature of survival claims and wrongful death claims. The

Court stated that "when an individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* leading to his or her death as well as a wrongful-death action *for the injuries suffered by the beneficiaries of the decedent* as a result of the death." *Peters*, 115 Ohio St.3d at 137 (emphasis in original); *see also* O.R.C. §§ 2125.02 and 2305.21, which provide separate causes of action for wrongful death claims and survival claims respectively. The Ohio Supreme Court recognized that although survival claims and wrongful death claims both relate to the same allegedly negligent acts of a defendant, and that such claims are often pursued by the same nominal party (i.e., the personal representative of the estate) in the same case, they are distinct claims that are brought by different parties in interest. *Peters*, 115 Ohio St.3d at 137, citing *Mahoning Valley Ry. Co. v. Van Alstine*, 77 Ohio St. 395, 414, 83 N.E. 601 (1908). As a result of the different nature of wrongful death claims from survival claims, the Court held that "a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims. The beneficiaries can agree to arbitrate these claims themselves, but they are not required to do so. Because Peter's beneficiaries did not sign the plan nor any other dispute-resolution agreement, they cannot be forced into arbitration." *Peters*, 115 Ohio St.3d at 138, citing *Thompson v. Wing*, 70 Ohio St.3d 176, 182-83, 637 N.E.2d 917 (1994). Simply put, the Court concluded that "[a]lthough we have long favored arbitration and encourage it as a cost-effective proceeding that permits parties to achieve permanent resolution of their disputes in an expedient manner, it may not be imposed on the unwilling." *Peters*, 115 Ohio St.3d at 138. The Court went on to state that "[r]equiring Peters's beneficiaries to arbitrate their wrongful-death claims without a signed arbitration agreement would be unconstitutional, inequitable, and in violation of nearly a century's worth of established precedent." *Peters*, 115 Ohio St.3d at 138-39.

The holding and reasoning in *Peters* applies to the wrongful death claims which have been brought by Plaintiff Richard Fravel on behalf of Decedent Jack Fravel's next-of-kin. The wrongful death claims in this case are not subject to arbitration pursuant to the arbitration clause. The Trial Court properly denied the Motion to Stay in this case and there is no basis for this Court to overturn that decision. None of Jack Fravel's next-of-kin were ever a party to the arbitration clause, so they cannot be bound by it. It is clear that the arbitration clause, in no way, binds Jack Fravel nor any of Jack Fravel's next-of-kin.

In *Skerlec v. Ganley Chevrolet, Inc.*, 2012-Ohio-5748 (8th Dist. 2012), the Eighth District Court of Appeals held that it was reversible error for a trial court to stay claims pending arbitration where some of the claims that were stayed did not fall within the arbitration agreement. In that case, the Court held that three intentional tort claims fell outside of the arbitration agreement and should not have been stayed.

Similarly, in *McFarren v. Emeritus at Canton*, 2013-Ohio-3900 (5th Dist. 2013), the Fifth District Court of Appeals held that arbitration agreements are not enforceable against a nursing home resident's next-of-kin, relative to their wrongful death claims, where the next-of kin did not sign an agreement agreeing to arbitrate their wrongful death claims. The Fifth District Court of Appeals reversed the trial court's decision that had improperly granted the defendant-appellee's motion to stay proceedings pending arbitration in that case. *Id*. at ¶ 31.

In this case, there is no question that Appellee's wrongful death claims do not fall within the scope of the arbitration clause. None of Jack Fravel's next-of-kin were parties to the arbitration clause. None of Jack Fravel's next-of-kin's names appear anywhere in the arbitration clause. As a result, it would be error for any Court to require Jack Fravel's next-of-kin to arbitrate their

wrongful death claims. Further, it would be error for any Court to stay Jack Fravel's next of kin's wrongful death claims.

3. Pursuant to O.R.C. § 2711.23(C), an arbitration agreement involving a medical claim is only valid and enforceable if the agreement states that the decision whether or not to sign the agreement is solely a matter for the resident's determination without any influence. Appellants' arbitration clause contains no such statement and, therefore, is invalid and unenforceable as a matter of law.

O.R.C. § 2711.23(C) states:

> **To be valid and enforceable** any arbitration agreements * * * for controversies involving a medical, dental, chiropractic, or optometric claim that is entered into prior to a patient receiving care, diagnosis, or treatment shall include or be subject to the following conditions:
>
> * * *
>
> (C) **The agreement shall provide that the decision whether or not to sign the agreement is solely a matter for the patient's determination without any influence;**

In contradiction of O.R.C. § 2711.23(C), the arbitration clause in this case does not state, in any place, that the decision whether or not to sign the agreement is solely a matter for Jack Fravel's determination without any influence. Jack Fravel did not sign the clause in any capacity.

Accordingly, pursuant to O.R.C. § 2711.23(C), Appellants' arbitration clause is invalid and unenforceable as a matter of law.

D. Appellants and their counsel should be sanctioned.

Appellants' appeal is frivolous because it is not supported by existing law nor any good faith extension and serves only to cause unnecessary delay and needlessly increase the cost of litigation. R.C. 2323.51. This Court should "require the appellant to pay reasonable expenses of the appellee including attorney fees and costs." App. R. 23.

Appellants' counsel has been sanctioned in the past for dishonest conduct during discovery

leading to unnecessary expense and delay. Please see the Judgment Entry of the Washington County Court of Common Pleas finding sanctions appropriate, a copy of which is attached hereto as Exhibit "K":

> Attorney Brenda Coey * * * lied to opposing counsel in the course of discovery. As stated by this Court on April 1, Attorney Coey's Misleading conduct caused [sic] this Court and Plaintiff's counsel considerable extra time. Ms Coey's statements were not truthful. This Court finds that sanctions are appropriate with the amount to be determined at a hearing. *Id.*

Please also see the Court's decision on damages against Appellants' counsel and her former firm in the amount of $37,433.81, a copy of which is attached hereto as Exhibit "L".

Once again, Appellants' counsel's conduct is designed for the sole purpose of delaying a case. This appeal should be dismissed and Appellants' and their counsel should be sanctioned. That is the only way to put an end to frivolous appeals and improper delays.

Appellee asked the Trial Court for sanctions. In its Judgment Entry dated July 20, 2015, denying Appellants' frivolous Motion to Stay, the Trial Court held as follows at page 5 (emphasis added);

> As a final matter, the Court will address the issue of sanctions. In their Memorandum in Opposition to Defendants' motion, Plaintiff asks the Court for an award of sanctions for frivolous conduct. Essentially, Plaintiff argues that Defendants' late filing of their request for arbitration is solely a tactic to delay this matter and therefore, Defendants should be sanctioned. **While the Court finds Plaintiff's request to have merit**, it will not grant it at this time. The Court will, however, keep the issue of sanctions under advisement and will be happy to revisit it after the parties' primary claims have been resolved.

The Trial Court found Plaintiff's request for sanctions to have merit, after Appellants' filed their frivolous Motion to Stay. But that ruling from the Trial Court did not dissuade the Appellants from filing this frivolous appeal and attempting to delay this case further. The only way to put an end to the frivolous conduct of Appellants and their counsel is to dismiss this appeal and sanction Appellants and

their counsel.

V. CONCLUSION.

Appellants' Appeal with respect to the Court's August 6, 2015 Entry Ordering the Production of Patient Care Policies Should be Dismissed for Lack of a Final, Appealable Order.

Appellants' Appeal of the Trial Court's July 20, 2015order denying their motion for a stay should be dismissed because there was never any agreement to arbitrate anything and therefore there is no final appealable order. This appeal was filed for the improper purpose of delay and as such should be dismissed and Appellants and their counsel should be sanctioned pursuant to R.C. § 2323.51 and App. R. 23.

Accordingly, Plaintiff respectfully requests that this Honorable Court Grant Appellee's Motion to Dismiss and impose reasonable and appropriate sanctions against Appellants and their counsel.

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

By: _____

Blake A. Dickson (0059329)
Daniel Z. Inscore (0092586)
3401 Enterprise Parkway, Suite 420
Beachwood, Ohio 44122
Telephone: (216) 595-6500
Facsimile: (216) 595-6501
E-Mail: BlakeDickson@TheDicksonFirm.com
E-Mail: DInscore@TheDicksonFirm.com

Attorneys for Plaintiff-Appellee Richard Fravel, as the Personal Representative of the Estate of Jack Fravel (deceased).

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Appellee's Motion to Dismiss Appeal and Motion for Sanctions was sent electronically, this **1st day of September, 2015,** to the following:

G. Brenda Coey, Esq.
BONEZZI SWITZER POLITO & HUPP CO., L.P.A.
1300 East 9th Street, Suite 1950
Cleveland, Ohio 44114

Attorney for Appellants Columbus Rehabilitation and Subacute Institute, Columbus Rehab & Subacute, Columbus Rehabilitation & Subacute, Columbus Rehab and Subacute Inc., Columbus Rehabilitation Care, LLC, Columbus Rehabilitation Care, LLC d.b.a. Columbus Rehabilitation and Subacute Institute, Columbus Rehab. Care, L.L.C., Extendicare Health Services, Extendicare Health Services, Inc., Extendicare Health Facilities, Inc., Extendicare Health Facility Holdings, Inc., Extendicare Holdings, Inc., and Northern Health Facilities, Inc.

By: _____
Blake A. Dickson (0059329)
Daniel Z. Inscore (0092586)

Attorneys for Plaintiff-Appellee Richard Fravel, as the Personal Representative of the Estate of Jack Fravel (deceased).