IN THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
APPELLATE COURT CASE NO. CA 19108473

CUYAHOGA COUNTY COURT OF COMMON PLEAS
TRIAL COURT CASE NO. 895624

Mary Roberts, Plaintiff-Appellant
vs.
KND Development 51, L.L.C., et al., Defendants-Appellees

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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Assignment of Error

The Trial Court Erred in Permanently Staying This Case and forcing it to Binding Arbitration.

APPELLANT'S ISSUES PRESENTED

1. Whether a plaintiff can be forced to arbitrate claims against a defendant who is not named in any arbitration clause and is therefore not a party to any arbitration clause.

2. Whether a plaintiff can be forced to arbitrate claims against a defendant who did not sign any arbitration agreement and is therefore not a party to any arbitration clause.

3. Whether a defendant can enforce an arbitration clause to which they are not a party and which is void under Ohio law pursuant to O.R.C. §2711.23.

4. Whether a defendant can enforce an arbitration clause to which they are not a party and which is both procedurally and substantively unconscionable.

5. Whether a defendant can enforce an arbitration clause to which they are not a party after waiving their alleged right to enforce the arbitration clause.

I. STATEMENT OF THE CASE AND FACTS.

On March 15, 2016, Mary Roberts was admitted to the nursing home owned and operated by the Appellees, known as the Kindred Transitional Care and Rehabilitation- Stratford nursing home. She was labeled as a fall risk due to a number of factors including her history of falls. A care plan was established to prevent her from falling. Appellees were legally obligated to provide her with a safe environment (42 C.F.R. §483.15(h) and O.R.C. §3721.13(A)(1)) and with adequate supervision to prevent accidents (42 C.F.R. §483.25(h)(2)). Appellees breached their obligations and Mary Roberts was dropped from a hoyer lift by employees of the Appellees causing her to break both of her legs.

On February 8, 2017, a Plan of Care meeting was held to discuss Ms. Roberts' care and potential transfer to the assisted living portion of Kindred Transitional Care and Rehabilitation-Stratford nursing home. It was noted, "Mrs. Robert [sic] is a two person assist at this time and needs to be a one person assisstto [sic] return to AL."

On February 27, 2017, the nursing home records indicate that Mary Roberts required "a mechanical lift for all transfers".

On February 28, 2017, Ms. Roberts was transferred to the assisted living portion of Kindred Transitional Care and Rehabilitation-Stratford. At the time she was transferred she was still labeled an "extensive assist" and required "a mechanical lift for all transfers." Mary Roberts was not a one person assist. She should not have been transferred to assisted living.

In early April, Ms. Roberts' daughter Fay Grady was visiting her mother and attempted to move her legs. Ms. Roberts informed her daughter that she was in pain and not to touch her legs because she was dropped from a Hoyer lift.

On April 5, 2017, Ms. Roberts again complained of pain in her legs and she was given percocet. Ms. Roberts' daughter, Fay Grady, who had power of attorney, requested that her mother be taken to the hospital. Despite resistance, Fay Grady, insisted that her mother be taken to the hospital. The nursing home eventually complied, and Ms. Roberts' was taken, by ambulance, to the Cleveland Clinic emergency department where she presented with a chief complaint of an altered level of consciousness.

The next day, on April 6, 2017, x-rays of Mary Roberts' lower extremities were completed and revealed that both of her femurs were broken. Both of her femurs had to be surgically repaired.

On April 7, 2018, Ms. Roberts underwent "Open treatment of distal 3rd femur shaft fracture with antegrade intramedullary nailing."

On April 10, 2017, Ms. Roberts underwent her second procedure, an "open treatment of femoral supracondylar fracture with intercondylar extension."

On **April 3, 2018,** Plaintiff-Appellant filed her Complaint.

On May 3, 2018, the Defendants-Appellees filed an Answer to Plaintiff-Appellant's Complaint **and demanded a trial by jury**.

On **May 16, 2018**, Plaintiff-Appellant propounded Plaintiff's First Set of Interrogatories and Plaintiff's First Request for Production of Documents on all Defendant-Appellees. Plaintiff-Appellant' also noticed her first Ohio Civil Rule 30(B)(5) deposition. This deposition was noticed to take place on June 20, 2018 beginning at 10:00 a.m.

Defendant-Appellees' counsel did not contact Plaintiff-Appellant's regarding this deposition.

On **June 19, 2018**, the day before the deposition was scheduled to occur, Defendant-Appellees filed a Motion to Stay and Limit Discovery and for a Protective Order. Within this

Motion, Defendant-Appellees KND Development 51 L.L.C.; Kindred Transitional Care and Rehab - Stratford; Kindred Nursing & Rehab - Stratford; Kindred Healthcare Operating, Inc.; Kindred Healthcare, Inc.; and Amanda Eberhart (collectively referred to as the "Kindred Defendants") requested that the trial court stay the matter **until Plaintiff-Appellant filed an affidavit of merit** arguing that **Civil Rule 10** required Plaintiff-Appellant to file an Affidavit of Merit. Defendant-Appellees also asked the trial court grant them a Protective Order regarding Plaintiff's Civil Rule 30(B)(5) deposition.

In Defendant-Appellees' **June 19, 2018**, Motion they **alternatively**, requested that the matter be stayed and limited discovery be permitted to investigate whether a valid arbitration clause existed.

On June 27, 2018, the trial court filed a Journal Entry staying discovery until Plaintiff-Appellant filed Affidavits of Merit.

On August 20, 2018, Plaintiff-Appellant filed the Affidavit of Merit of Mark Berkowitz, M.D.

On August 29, 2018, Plaintiff-Appellant filed the Affidavit of Merit of Barbara Johanson, RN.

On October 17, 2018, **over six (6) months after Plaintiff-Appellant filed her Complaint**, the Kindred Defendants filed a Motion asking this Court to permanently and forever stay this case and force this case to binding arbitration. Defendants Stratford Care and Rehabilitation, Glenwillow Leasing, LLC and Providence Healthcare Management did not move to stay this case.

Later that day, on October 17, 2018, the trial court held a telephone conference, during which the parties agreed to mediate the case. The parties agreed that discovery would continue as to all Defendants and the Motion filed by the Kindred Defendants asking the Court to forever stay this case

and force this case to binding arbitration, would be held in abeyance **while the parties conducted discovery** and ultimately mediated Plaintiff's claims in the hope that the case could be settled.

None of the Defendant-Appellees participated in a Mediation of this case.

Plaintiff-Appellant's counsel tried multiple times to schedule a Mediation. Plaintiff-Appellant's counsel suggested multiple dates and multiple mediators. None of Defendant-Appellees ever agreed to mediate this case with any mediator on any date.

On November 13, 2018, Plaintiff-Appellant filed a Motion to Compel, requesting that the trial court order **all** of the Defendants to produce verified Answers to Plaintiff's First Set of Interrogatories, Responses to Plaintiff's First Request for Production of Documents, and all responsive documents, including the specifically requested medical records and bills.

On November 29, 2018, the trial court granted Plaintiff's Motion and ordered **all** of the Defendants to produce answers to Plaintiff's First Set of Interrogatories, responses to Plaintiff's First Request for Production of Documents and all responsive documents, on or before December 12, 2018.

On January 8, 2019, **Defendant-Appellees** propounded their **Second** Set of Interrogatories, **Second** Request for Production of Documents and their First Request for Admissions.

On January 16, 2019, the parties spoke in-person regarding the scheduling of a Civ.R. 30(B)(5) deposition. Defendant-Appellees' counsel proposed the week of February 11, 2019 to conduct this deposition. The parties agreed to conduct this deposition on February 12, 2019. However, they insisted that the deposition of all of the Defendants take place in Louisville, Kentucky.

As all of the Defendant-Appellees refused to comply with the trial court's November 29,

2018 judgement entry Plaintiff-Appellant's counsel was forced to seek an extension of the Discovery cut-off, and given the Defendants-Appellees' refusal to schedule a Civil Rule 30(B)(5) Deposition anywhere in Ohio, much less in Cuyahoga County, Plaintiff-Appellant's counsel was forced to ask the trial court to order all of the Defendants-Appellees to produce a fully prepared representative to testify at a Civil Rule 30(B)(5) deposition in Cuyahoga County.

On February 5, 2019, the trial court granted Plaintiff-Appellant's Motion for Extension and Plaintiff-Appellant's Motion to Compel a Civil Rule 30(B)(5) deposition and ordered that all of the Defendants-Appellees produce a Civil Rule 30(B)(5) representative for deposition on or before February 12, 2019 in Cuyahoga County.

On February 6, 2019, Plaintiff-Appellant's counsel filed a Motion to Show Cause requesting that the trial court order all of the Defendant-Appellees and their counsel to appear and show cause why they should not be held in contempt for refusing to comply with the trial court's November 29, 2018 Judgment Entry relative to Plaintiff's written discovery requests.

On February 11, 2019, one day before the Civil Rule 30(B)(5) deposition of the Defendant-Appellees was **ordered** to take place, the Defendant-Appellees filed a Motion for Reconsideration of the trial court's order requiring the Civil Rule 30(B)(5) Deposition to take place in Cuyahoga County, and sought leave to file a Brief in Opposition to Plaintiff's Motion to Compel the Civil Rule 30(B)(5) deposition. The trial court denied both of the motions filed on behalf of all of the Defendant-Appellees and again ordered all of the Defendants to produce a representative for a Civil Rule 30(B)(5) deposition, the following day on February 12, 2019, in Cuyahoga County.

On February 11, 2019, at 9:45 p.m., by electronic mail, lead counsel for the Defendant-Appellees confirmed that they would **not** be producing a representative to testify on February 12,

2019 at a Civil Rule 30(B)(5) Deposition, in direct violation of the trial court's February 5, 2019 and February 11, 2019 orders.

On February 12, 2019, Defendant-Appellees' counsel contacted the trial court and requested a conference call. The trial court conducted a conference call with counsel and graciously agreed to allow all of the Defendant-Appellees to produce a representative for a Civil Rule 30(B)(5) Deposition in Defendant-Appellees' counsel's office on February 21, 2019, nine (9) days later.

On February 20, 2019, the Defendant-Appellees filed a second motion asking this Court to permanently stay this case and force it into binding arbitration.

On February 27, 2019, Plaintiff-Appellant responded to the Kindred Defendants' Motion to Stay, by filing the following:

- Plaintiff's Motion to Strike the Motion filed by Defendant Kindred Healthcare Operating, Inc. Seeking to Permanently Stay this Case and Force it to Binding Arbitration;
- Plaintiff's Motion to Strike the Motion filed by Defendant Amanda Eberhart Seeking to Permanently Stay this Case and Force it to Binding Arbitration; and
- Plaintiff's Motion to Strike the Motion filed by Defendant Kindred Healthcare, Inc. Seeking to Permanently Stay this Case and Force it to Binding Arbitration.

On March 5, 2019, Plaintiff-Appellant filed her Motion to Strike the Motion filed by the Kindred Defendants, asking this Court to Permanently and Forever Stay this Case and Force it to Binding Arbitration.

Two days later, on March 7, 2019, the trial court held a telephone conference, where the court denied Plaintiff's Motions to Strike, but held that these Motions "SHALL BE CONSIDERED AS BRIEFS IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS AND ENFORCE THE ALTERNATIVE DISPUTE RESOLUTION AGREEMENT." *See* Judgment Entry dated March 7, 2019.

On March 28, 2019, the trial court granted the Kindred Defendants' Motion to Stay Proceedings and Enforce the Alternative Dispute Resolution Agreement.

On April 22, 2019, more than a full year after Plaintiff's Complaint was filed, Plaintiff timely filed her Appeal.

II. LAW AND ARGUMENT.

A. Standard of Review Applicable to Motions to Stay Proceedings Pending Arbitration Pursuant to O.R.C. § 2711.02.

The standard of review applicable to the denial or granting of a motion to stay proceedings pending arbitration "depends on the type of question raised regarding the applicability of the arbitration provision." *Jatsek Constr. Co. v. Burton Scot Contrs., L.L.C.*, 2012-Ohio-3966, at ¶ 14 (8th Dist. 2012), citing *McCaskey v. Sanford-Brown Coll.*, 2012-Ohio-1543, at ¶ 7 (8th Dist. 2012).

"Generally, an abuse of discretion standard applies in limited circumstances, such as a determination that a party has waived its right to arbitrate a given dispute." *Skerlec v. Ganley Chevrolet, Inc.*, 2012-Ohio-5748, at ¶ 6 (8th Dist. 2012), citing *Milling Away, L.L.C. v. UGP Properties, L.L.C.*, 2011-Ohio-1103, at ¶ 8 (8th Dist. 2011). "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).

"When an appellate court is presented with purely legal questions, however, the standard of review to be applied is de novo." *Terry v. Bishop Homes of Copley, Inc.*, 2003-Ohio-1468, at ¶ 11 (9th Dist. 2003). "A de novo standard applies to questions of whether a party has agreed to submit an issue to arbitration." *McCaskey*, 2012-Ohio-1543, at ¶ 7, citing *Shumaker v. Saks, Inc.*, 163 Ohio

App.3d 173, 2005-Ohio-4391, 837 N.E.2d 393 (8th Dist. 2005) and *Vanyo v. Clear Channel Worldwide*, 156 Ohio App.3d 706, 2004-Ohio-1793, 808 N.E.2d 482 (8th Dist. 2004). A determination of whether a power of attorney was in effect at the time when an arbitration agreement was signed is subject to de novo review. *Tedeschi v. Atrium Ctrs., L.L.C.*, 2012-Ohio-2929, at ¶ 16 (8th Dist. 2012). "In addition, the question of whether a particular claim is arbitrable is one of law for the court to decide." *Northland Ins. Co. v. Palm Harbor Homes, Inc.*, 2007-Ohio-1655, at ¶ 7 (12th Dist. 2007), citing *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 666, 1998-Ohio-172, 687 N.E.2d 1352 (1998). Further, "questions of unconscionability are reviewed under a de novo standard of review." *Skerlec*, 2012-Ohio-5748, at ¶ 6, citing *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12 (2008) and *Shumaker v. Saks Inc.*, 163 Ohio App.3d 173, 2005-Ohio-4391, 837 N.E.2d 393 (8th Dist. 2005); *See also Hayes v. The Oakridge Home*, 122 Ohio St.3d 63, 67, 2009-Ohio-2054, 908 N.E.2d 408 (2009).

This Court should apply a de novo standard when deciding whether the parties agreed to arbitration, including: whether an arbitration clause exists which names any of the Appellees as parties; whether an arbitration clause exists which was signed by or on behalf of any of the Appellees. This Court should also apply a de novo standard when deciding whether the alleged arbitration clause is void under Ohio law and whether the alleged arbitration clause is both procedurally and substantively unconscionable.

B. Summary of Argument.

Defendant-Appellees, KND Development 51 L.L.C., Kindred Transitional Care and Rehab - Stratford, Kindred Nursing & Rehab - Stratford, Kindred Healthcare Operating, Inc., Kindred Healthcare, Inc., and Amanda Eberhart, by and through its counsel, moved the trial court to

permanently stay all proceedings in the within case and force all of Plaintiff-Appellee's claims to binding arbitration, pursuant to O.R.C. § 2711.02. Defendant-Appellees, five (5) corporations and one (1) individual, are not parties to any arbitration clause. As a result, there was no basis to stay this case.

There is no arbitration clause that names any of the Defendants as parties.

There is no arbitration clause that any of the Defendants signed, or that was signed on their behalf.

There is no basis for any of these Defendants to ask that this case be stayed and forced to binding arbitration.

Plaintiff-Appellant is attaching the arbitration clause that Defendant-Appellees claim entitles them to a permanent stay of this case hereto as Exhibit "A." As the Court can see, nowhere are any of the Defendant-Appellees named in the clause. None of them signed the clause, and no one signed the clause on their behalf.

The arbitration clause is also invalid and unenforceable because it fails to comply with the mandatory provisions of O.R.C. §2711.23.

The arbitration clause is also procedurally and substantively unconscionable.

Finally, Defendant-Appellees have waived any alleged claim that they have to arbitration by acting inconsistently with their alleged right to arbitration and litigating this case for a year.

Many Courts believe that there is a strong presumption in favor of arbitration.

In fact, when there is a question as to whether there is a valid arbitration agreement there is actually a presumption **against** arbitration.

In *Council of Smaller Enters. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 665, 687 N.E.2d 1352 (1998), the Supreme Court of Ohio stated, " '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." The Court went on to hold that there is a **presumption against arbitration** 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 (1995).

In *Maestle v. Best Buy*, 8th Dist. Cuyahoga No. 79827, 2005-Ohio-4120 (August 11, 2005), the Eighth Appellate District Court of Appeals held (emphasis added):

> Nevertheless, courts may **not** force parties to arbitrate disputes if the parties have not entered into a valid agreement to do so. *See Boedeker v. Rogers* (1999), 136 Ohio App. 3d 425, 429; Painesville Twp. Local School District v. Natl. Energy Mgt. Inst. (1996), 113 Ohio App. 3d 687, at 695. As the Supreme Court of the United States has stressed, "arbitration is simply a matter of contract between the parties; it is a way to resolve disputes - but only those disputes - that the parties have agreed to submit to arbitration." First Options of Chicago, Inc. v. Kaplan (1995), 514 U.S. 938, 943.
>
> The Court went on to hold (emphasis added):
>
> **When there is a question as to whether a party has agreed to an arbitration clause, there is a presumption against arbitration.** Spalsbury v. Hunter Realty, Inc., et al. (Nov. 30, 2000), Cuyahoga App. No. 76874, citing Council of Smaller Enters. v. Gates, McDonald & Co. (1997), 80 Ohio St. 3d 661. **An arbitration agreement will not be enforced if the parties did not agree to the clause.** Henderson vs. Lawyers Title Insurance Corp., Cuyahoga App. No. 82654, 2004-Ohio-744, citing Harmon v. Phillip Morris Inc. (1997), 120 Ohio App. 3d 187, 189.

The issue of whether or not a party has agreed to arbitration is determined on the basis of ordinary contract principles. *Kegg v. Mansfield* 5th Dist. Stark No 1999CA00167, 2000 Ohio App. LEXIS 334, 2000 WL 222118, citing *Fox v. Merrill Lynch & Co., Inc.* (1978), 453 F.Supp. 561.

See, also, *Council of Smaller Enter., supra; AT&T Technologies, Inc. v. Communications Workers of America* (1986), 475 U.S. 643.

In order to have a valid contract, there must be a "meeting of the minds" on the essential terms of the agreement, which is usually demonstrated by an offer, acceptance, and consideration. *Reedy v. The Cincinnati Bengals, Inc.* (2001), 143 Ohio App. 3d 516, 521. An offer is defined as "the manifestation of willingness to enter in a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Id.* Further, the essential terms of the contract, usually contained in the offer, must be definite and certain. *Id.*

"Ohio law continues to hold that the parties bind themselves by the plain and ordinary language used in the contract unless those words lead to a manifest absurdity." *Convenient Food Mart, Inc. v. Countrywide Petroleum Co., et al.*, Cuyahoga App. No. 84722, 2005-Ohio-1994. This is an objective interpretation of contractual intent based on the words the parties chose to use in the contract. *Id., citing Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St. 3d 130, paragraph one of the syllabus.

There is no contract between the parties in this case in which they agreed to arbitrate this case. The decision of the Trial Court must be overruled.

C. Assignment of Error No. 1: The Trial Court Erred in Permanently Staying This Case and forcing it to Binding Arbitration.

1. No arbitration clause exists which names any of the Appellees: KND Development 51 L.L.C.; Kindred Transitional Care and Rehab - Stratford; Kindred Nursing & Rehab - Stratford; Kindred Healthcare Operating, Inc.; Kindred Healthcare, Inc.; or Amanda Eberhart as parties.

Plaintiff-Appellant cannot be required to arbitrate her claims against the six (6) Appellees in this case because none of these Appellees are parties to any arbitration clause.

A plaintiff cannot be compelled to submit claims against a party "to arbitration if those parties are not parties to the contract containing the arbitration provision." *White v. Equity, Inc.*, 10th Dist. No. 10AP-131, 2010-Ohio-4743, ¶ 19, 945 N.E.2d 536. In *White*, the court of appeals reversed the trial court's decision granting the defendants' motion to stay pending arbitration because all of the defendants were not parties to the contract containing the arbitration provision. The contract in *White* was only signed by one (1) of five (5) named defendants and it did not list any of the other defendants as parties to the contract. *Id.* at ¶21. The court of appeals refused to order the plaintiff to arbitrate her claims against the defendants who were not parties to the contract, stating:

> As the court recognized in *Stilings v. Franklin Twp. Bd. Of Trustees* (1994), 97 Ohio App3d. 504, 508, 646 N.E.2d 1184, "even though the general rule establishes a strong presumption in favor of arbitration, that the rule cannot expand the scope of an arbitration clause beyond that which was expressly intended by the parties." In other words, 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." *E.E.O.C. v. Waffle House, Inc.*, (2002), 534 U.S. 279, 294, 122S.Ct. 754,764, 151 L.Ed. 2d 755.

Id. at ¶19.

In *Hess v. Heer*, the Tenth District reversed the stay imposed by the trial court because there was a question about whether the party seeking to invoke the arbitration clause was privy to the agreement. 10th Dist. Franklin No. 98AP-597, 1999 Ohio App. LEXIS 1419. "Parties not privy to a contract may not benefit from an arbitration clause incorporated therein." *Id.* at *7, citing *Kline v. Oakridge Builders, Inc.*, 102 Ohio App. 3d 63, 656 N.E.2d 992 (9th Dist. 1995). The Tenth District held the trial court "had insufficient basis to find that the matter was subject to the arbitration

clause and should be stayed" and that it should have "at a minimum required proof" that the defendant was privy to the contract. *Id.* at *7-8.

There is no privity between Plaintiff-Appellant Mary Roberts and any of the Appellees. None of the Appellees are parties to any arbitration clause.

The Appellees have not produced any arbitration clause in which they were named as parties nor have they produced any arbitration clause which they signed.

The Supreme Court of Ohio, in *Council of Smaller Enters. v. Gates, McDonald & Co.*, was explicitly clear that a party cannot be forced to arbitrate a claim which he has not agreed to submit to arbitration. There is no question that Appellant has not agreed to submit any claim against these Appellees to arbitration. As a result, Appellant cannot be forced to arbitrate her claims against these Appellees.

Appellees have repeatedly argued that there is a presumption in favor of arbitration in Ohio. However, that presumption does not exist when there is a question about whether there is a valid arbitration clause. That presumption cannot be used to expand the scope of the arbitration clause in this case. As noted above, because there is a question as to whether Appellant agreed to submit her claims to arbitration, there is actually a presumption **against** arbitration.

This Court must strictly construe the contract against the party who drafted it. *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208, 211, 519 N.E.2d 1380 (1988). However, when there is "no evidence of a contract between [the parties], we do not reach this stage of resolving ambiguities." *St. Vincent Charity Hosp. v. URS Consultants*, 111 Ohio App. 3d 791, 794, N.E.2d 381 (8th Dist. 1996). There are no ambiguities to resolve here. Appellees drafted the arbitration clause in such a way that they are not parties to it.

As the parties requesting the stay, Appellees have "the burden of proof regarding both the existence of the agreement to arbitrate and its basic scope." *Dodeka, L.L.C. v. Keith,* 11th Dist. Portage No. 2011-P-0043, 2012-Ohio-6216, ¶26. Appellees failed to meet their burden. Without a valid contract obligating Appellant to arbitrate her dispute with Appellees, Appellees' Motion to Stay should have been denied.

The drafters of this contract chose to draft this contract to name "0875- Kindred Transitional Care And Rehabilitation-Stratford, ("Facility")" and Mary Roberts, ("Resident")" as the only parties to this contract. *See* Exhibit "A. Just like in *URS Consultants*, the moving Defendants have failed to demonstrate, or provide any evidence whatsoever, that they are a party to this contract. There is not a valid contract obligating Appellant to arbitrate her disputes with the Appellees. Defendant-Appellees Motion to Stay should have been denied.

It is basic contract law that "[t]o prove the existence of a contract, 'a party must establish the essential elements of a contract: an offer, an acceptance, a meeting of the minds, an exchange of consideration, **and certainty as to the essential terms of the contract**. *Turner v. Langenbrunner*, 12th Dist. Warren No. CA2003-10-099, 2004-Ohio-2814, ¶ 13. Appellees have failed to prove any of these elements in this case. There is no evidence that any of the Appellees ever made an offer to Appellant. There is no evidence Appellant ever accepted any offer made by any of the Appellees. There is no evidence of any meeting of the minds. There is no evidence of any exchange of consideration.

The Seventh District has also held:

> It is a general rule "that parties cannot enter into an enforceable contract unless they come to a meeting of the minds on the essential terms of contract. See Alligood v. Proctor & Gamble Co. (1991), 72 Ohio App. 3d 309, 311, 594 N.E.2d 668. In those cases, courts have identified the essential terms of a contract as "**the identity of the parties to be bound**, the subject matter of the contract, consideration, a quantity term, and a price term." Id.

McGee v. Tobin, 7th Dist. No. 04 MA 98, 2005 Ohio 2119, at ¶24. (Emphasis added).

In *McGee*, the Court found "In this case, the written document **clearly identifies the parties to the contract**, identifies the subject of the contract, states the quantity of land being sold, and states the "total price" for the 'house and all land.' These are the essential elements of this sale." *Id.* ¶25 (emphasis added).

The first paragraph of the arbitration clause in this case states it is entered into by "0875-Kindred Transitional Care And Rehabilitation-Stratford, ("Facility")" and "Mary Roberts". Exhibit "A." The parties to the arbitration clause, as drafted are, "0875- Kindred Transitional Care And Rehabilitation-Stratford, ("Facility")" and "Mary Roberts". 0875-Kindred Transitional Care And Rehabilitation-Stratford is not a Defendant in this case. The moving Defendant-Appellees in this case are:

- KND Development 51 L.L.C.;
- Kindred Transitional Care and Rehab - Stratford;
- Kindred Nursing & Rehab - Stratford;
- Kindred Healthcare Operating, Inc.;
- Kindred Healthcare, Inc.; and
- Amanda Eberhart.

None of the Defendants are named in the arbitration clause. None of the Appellees are entitled to a stay. None of the Appellees contracted for arbitration instead of litigation.

2. No arbitration clause exists which was signed by or on behalf of any of the Appellees: KND Development 51 L.L.C.; Kindred Transitional Care and Rehab - Stratford; Kindred Nursing & Rehab - Stratford; Kindred Healthcare Operating, Inc.; Kindred Healthcare, Inc.; or Amanda Eberhart.

No one signed the arbitration clause on behalf of any of the moving Defendant-Appellees, as required by O.R.C. §2711.22(A), and as such, none of the Defendant-Appellees have any right to enforce the agreement. Erica Yan signed the agreement as the "Facilities Authorized Agent." The

Facility is defined as "0875- Kindred Transitional Care And Rehabilitation-Stratford." "0875-Kindred Transitional Care And Rehabilitation-Stratford" is not a Defendant.

O.R.C. §2711.22(A) explicitly states, "a written contract between a patient and a hospital or healthcare provider to settle by binding arbitration. . . is valid, irrevocable, and **enforceable once the contract is signed by all parties."** As this contract has not been signed on behalf of any of the Appellees, none of the Appellees should have been granted a permanent stay pursuant to this contract.

On the second page of their Motion to Stay, the Kindred Defendants state "The Agreement is also signed by the authorized agent for Kindred Transitional Care and Rehabilitation-Stratford (hereinafter "facility")." The Kindred Defendants did not offer the trial court any evidence that the agreement was signed by the authorized agent for Kindred Transitional Care and Rehabilitation-Stratford or any of the other Defendants. Further, that is not what the clause says.

As the Defendant-Appellees requested the stay, they were required to carry the burden regarding both the existence of the agreement to arbitrate and its basic scope. *Dodeka, L.L.C. v. Keith*, 11th Dist. Portage No. 2011-P-0043, 2012 Ohio 6212, ¶ 26. They completely fail to carry their burden.

3. The Arbitration Clause produced by the Appellees, to which none of the Appellees are parties, is also void under Ohio Law.

Pursuant to O.R.C. § 2711.23, an arbitration clause concerning medical claims that was entered into prior to the patient receiving care is **only** valid and enforceable if it meets certain requirements. Since the arbitration clause in this case completely fails to meet several requirements of this section of the Ohio Revised Code, it is invalid and unenforceable as a matter of law.

O.R.C. § 2711.23 states, in pertinent part:

> To be valid and enforceable any arbitration agreements pursuant to sections 2711.01 and 2711.22 of the Revised Code for controversies involving a medical, dental,

chiropractic, or optometric claim that is entered into prior to a patient receiving any care, diagnosis, or treatment shall include and be subject to the following conditions:

(A) The agreement shall provide that the care, diagnosis, or treatment will be provided whether or not the patient signs the agreement to arbitrate;

(B) The agreement shall provide that the patient, or the patient's spouse, or the personal representative of the patient's estate in the event of the patient's death or incapacity, shall have a right to withdraw the patient's consent to arbitrate the patient's claim by notifying the health care provider or hospital in writing within thirty days after the patient's signing of the agreement. Nothing in this division shall be construed to mean that the spouse of a competent patient can withdraw over the objection of the patient the consent of the patient to arbitrate;

(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;

(D) The agreement shall, if appropriate, provide that its terms constitute a waiver of any right to a trial in court, or a waiver of any right to a trial by jury;

(E) The agreement shall provide that the arbitration expenses shall be divided equally between the parties to the agreement;

(F) Any arbitration panel shall consist of three persons, no more than one of whom shall be a physician or the representative of a hospital;

(G) The arbitration agreement shall be separate from any other agreement, consent, or document;

(H) The agreement shall not be submitted to a patient for approval when the patient's condition prevents the patient from making a rational decision whether or not to agree;

(I) Filing of a medical, dental, chiropractic, or optometric claim within the thirty days provided for withdrawal of a patient from the arbitration agreement shall be deemed a withdrawal from the agreement;

(J) The agreement shall contain a separately stated notice that clearly informs the patient of the patient's rights under division (B) of this section.

O.R.C. §2711.23 states, "To be **valid and enforceable** any arbitration agreements pursuant to sections 2711.01 and 2711.22 of the Revised Code for controversies involving a medical, dental, chiropractic, or optometric claim that is entered into prior to a patient receiving any care, diagnosis,

or treatment **shall include and be subject to the following conditions**:" (emphasis added). Therefore, if the arbitration clause in this case does not include and is not subject to all of the conditions listed, is it not valid and enforceable.

The arbitration clause offered by the Defendant-Appellees violates O.R.C. §2711.23(A) because it **does not** provide that "care, diagnosis, or treatment will be provided whether or not the patient signs the agreement." See Exhibit "A."

The arbitration clause violates O.R.C. §2711.23(F), because the arbitration clause **does not** state that the arbitration panel will consist of three (3) persons, no more than one whom shall be a physician or the representative of a hospital. See Exhibit "A." As described in the arbitration agreement, "The mediator and arbitrator will be selected as described in Rule 2.03 of the Rules of Procedure." Rule 2.03 of the Rules of Procedure, which were never provided to Ms. Roberts, states as follows:

> 2.03 Procedures for Selecting Neutrals
>
> Upon receipt of a Demand by a party to commence the ADR process, the parties shall proceed to select a mediator and an arbitrator. The arbitrator will be in charge of resolving all pre-arbitration disputes and will preside over the arbitration. If the parties are unable to agree on the selection of a mediator, then they agree to allow the presiding arbitrator to choose one for them. If the parties are unable to agree on an arbitrator then each party shall select an arbitrator and the two selected will choose a third who will serve as the presiding arbitrator.
>
> The Administrator shall issue a notice to all of the parties confirming the selection of the mediator and arbitrator.
>
> The parties shall proceed to arbitration if mediation is unsuccessful. After a dispute arises, the parties may agree to forego mediation and proceed directly to arbitration. In arbitration proceedings, the parties may agree to resolve their dispute before a panel of three (3) arbitrators or a single arbitrator. **The arbitration shall proceed before a single arbitrator unless one or both parties request a panel of arbitrators.**

Attached hereto as Exhibit "B." Emphasis added.

Neither the arbitration clause nor Rule 2.03 of the Rules of Procedure require a panel of three (3) arbitrators. Neither the arbitration clause nor Rule 2.03 of the Rules of Procedure require that "no more than one of whom shall be a physician or the representative of a hospital."

As stated in Rule 2.03, the arbitration will proceed before a single arbitrator **unless** a request is made. This is a direct violation of O.R.C. §2711.23(F). Section 2711.23(F) of the Ohio Revised Code states "Any arbitration panel shall consist of three persons, no more than one of whom shall be a physician or the representative of a hospital." Shall is commonly defined as "has a duty" or "is required to." *Black's Law Dictionary*, 1585 (10th Ed. 2014). Further, there is nothing requiring that "no more than one" of the arbitrators "shall be a physician or the representative of a hospital."

O.R.C. §2711.24, provides a template for a valid arbitration clause that would comply with O.R.C. §2711.23. It specifically states:

> Within fifteen days after a party to this agreement has given written notice to the other of demand for arbitration of said dispute or controversy, the parties to the dispute or controversy shall each appoint an arbitrator and give notice of such appointment to the other. Within a reasonable time after such notices have been given the two arbitrators so selected shall select a neutral arbitrator and give notice of the selection thereof to the parties. The arbitrators shall hold a hearing within a reasonable time from the date of notice of selection of the neutral arbitrator.

The Ohio Revised Code specifically provides an acceptable arbitration clause template. As such, there is no excuse for this clause not complying with the requirements of O.R.C. §2711.23.

The arbitration clause violates O.R.C. §2711.23(G), as the arbitration clause is NOT a separate document. The arbitration clause in question is labeled as "Attachment K." As shown in the Kindred Defendants' "*Objections and Responses to* Plaintiff's Notice to take the Deposition of Defendants Pursuant to Ohio Civil Rule 30(B)(5)" filed with the trial court on February 21, 2019, and attached hereto as Exhibit "C", the Defendants state:

> Copies of the admissions package were provided to Plaintiff. These documents included the following:

- Admissions Agreement;
- Attachment A-Consent to Admission and Treatment
- Attachment B- Federal and State Residents Rights
- Attachment C- Bed Hold Policy
- Attachment D-Notice of Privacy Practices
- Attachment E-Privacy Act Notification Statement
- Attachment F-Management of Resident's Personal Funds
- Attachment G- SNF Determination on Admission
- Attachment H- Medicare Secondary Payor (MSP) Screening
- Attachment I- Optional/Covered Items and Services
- Attachment J- Pharmacy Assignment of Benefits and Payment Agreement
- Attachment K- Voluntary Alternative Dispute Resolution Agreement
- Attachment L- Additional Regulations as Required by State Law
- Vaccine Information Sheet Acknowledgment
- Tobacco Free Policy Acknowledgment.

As this Court can see, this alleged arbitration clause was buried in an 80 plus page document. As the arbitration clause was not given as a separate, stand alone document, but instead as Attachment K, one of many attachments, to the admission agreement, it violates O.R.C. §2711.23(G).

Section 2711.23 of the Ohio Revised Code is explicitly clear. In order for an arbitration clause to be valid and enforceable, it "shall include and be subject to" a list of conditions. The clause presented to Ms. Roberts violates O.R.C. §2711.23. Section 2711.23 of the Ohio Revised Code is not optional. Its terms are mandatory. Therefore, the clause in this case is not valid and unenforceable. Appellees' Motion to Stay should have been denied.

4. The arbitration clause produced by the Appellees, to which none of the Appellees are parties, is both procedurally and substantively unconscionable.

The arbitration clause is not enforceable because it is both procedurally unconscionable and substantively unconscionable.

"[A]n arbitration agreement is enforceable unless grounds exist at law or in equity for revoking the agreement." *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 67, 2009 Ohio 2054, 908

N.E.2d 408 (2009), citing R.C. §2711.01(A). "Unconscionability is ground for revocation of an arbitration agreement." *Id.* citing *Taylor Bldg. Corp. Of Am. v. Benfield*, 117 Ohio St.3d 352, 2008 Ohio 938, 884 N.E.2d 12 (2008). "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." *Id.*, quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383, 613 N.E.2d 183 (1993). "The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable." *Id.*, citing *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006 Ohio 4464, 861 N.E.2d 553 (9th Dist.).

Procedural unconscionability is about power. Did the parties negotiate the terms of the contract from a position of equal footing or was it a contract of adhesion? "[N]o single factor alone determines whether a contract is procedurally unconscionable; a court must consider the totality of circumstances." *Arnold v. Burger King*, 8th Dist. Cuyahoga No. 101465, 2015 Ohio 4485, ¶ 79, 448 N.E.2d 69.

"Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, e.g. 'age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.'" *Small v. HCF of Perrysburg*, 159 Ohio App.3d 66, 2004 Ohio 5757, 823 N.E.2d 19 (6th Dist.), quoting *Johnson v. Mobil Oil Corp.*, 415 F.Supp 264, 268 (E.D. Mich. 1976).

"Additional factors that may contribute to a finding of procedural unconscionability include the following: 'belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be

unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.'" *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009 Ohio 2054, ¶ 24, 908 N.E.2d 408.

In *Manley v. Personacare of Ohio*, 11th Dist. Lake No. 2005-L-174, 2007 Ohio 343, ¶ 31, the Eleventh District Court of Appeals, held that an arbitration agreement, signed by a nursing home resident during admission, was procedurally unconscionable. In *Manley*, the resident signed a "resident admission agreement" as well as an "alternative dispute resolution agreement between the resident and facility." *Id.* at ¶ 3. The Eleventh District Court of Appeals held that the arbitration clause was procedurally unconscionable, specifically noting, the resident, Manley, left the hospital and was directly admitted to the nursing home, she did not have a friend or family member with her during her admission, she was sixty-six (66) years old, she was college educated but had no legal experience and she did not have an attorney present when she entered into the arbitration agreement. *Id* at ¶¶ 21-23. The Eleventh District Court of Appeals went further, considering Manley's cognitive impairments when finding the arbitration clause unconscionable. The Court noted that Manley was competent, however, she suffered from a "very mild cognitive impairment." *Id.* at ¶ 24. After considering these factors, the Eleventh District Court of Appeals stated:

> The fact that a resident is signing an arbitration agreement contemporaneously with being admitted into a nursing home is troubling. By definition, an individual being admitted into a nursing home has a physical or mental detriment that requires them to need the assistance of a nursing home. Further, the reality is that, for many individuals, their admission to a nursing home is the final step in the road of life. In most circumstances, it will be difficult to conclude that such an individual has equal bargaining power with a corporation that, through corporate counsel, drafted the form contract at issue.

Id. at ¶ 29.

In *Small v. HCF of Perrysburg*, 159 Ohio App.3d 66, 71-13, 2004 Ohio 5757, 823 N.E.2d 19 (6th Dist., 2004), the Sixth District held that an arbitration clause that provided for the arbitration of a nursing home resident's negligence claims were both procedurally and substantively unconscionable. The Court determined that the arbitration clause was procedurally unconscionable because "[w]hen Mrs. Small signed the agreement she was under a great amount of stress. The agreement was not explained to her; she did not have an attorney present. Mrs. Small did not have any particularized legal expertise and was 69 years old on the date the agreement was signed. *Id.* at 73.

The signing of the arbitration clause in this case was procedurally unconscionable. Appellant Mary Roberts was 84 years old at the time of her admission. She was an elderly woman, who was seeking the care and treatment of the Defendant-Appellees. Phyllis Burks, Mary Roberts' daughter, was with her. She signed the clause on her behalf as her power of attorney. She was under a great deal of stress during this process, as she was placing her Mother in a nursing home. There is no evidence that the Appellees ever explained anything to Ms. Roberts nor to Ms. Burks regarding arbitration. There is no evidence that they were even given time to read the more than eighty (80) pages of documents they were given. There is no evidence before this Court nor before the Trial Court that anyone, on behalf of the Defendants, who was knowledgeable about arbitration even met with Mary Roberts or her daughter.

Similar to the facts of *Small* and *Manley* Mary Roberts was admitted to the subject facility directly from the hospital. This transition caused Ms. Roberts and her family a great amount of stress. As the court stated in *Manley*, "By definition, an individual being admitted into a nursing home has a physical or mental detriment that requires them to need the assistance of a nursing home. Further, the reality is that, for many individuals, their admission to a nursing home is the final step

in the road of life." *Manley* at ¶ 29. Being admitted to a nursing home is stressful and an emotional process for any individual.

In terms of bargaining power, the Kindred Defendants owned and operated a chain of nursing homes across the country. Ms. Roberts was an 84 year old woman, who was just discharged from the hospital and needed nursing home care. It is clear that the Kindred Defendants held all of the bargaining power.

The same is true when it comes to relevant experience dealing with legal issues. Defendat-Appellees owned and operated a huge chain of nursing homes. They admitted thousands of residents across the country. They drafted the arbitration clause. Appellee Mary Roberts was an eighty four (84) year old woman who needed nursing home care. Neither she nor her daughter had any expertise with arbitration. Neither of them even knew the difference between arbitration and litigation. It is clear the Appellees had the relevant experience and business acumen and the Appellant and her daughter did not.

In terms of whether alterations to the printed terms of the admissions paperwork or arbitration clause were possible, it is clear that neither Ms. Roberts nor her daughter altered one word of the arbitration clause. See Exhibit "A." The arbitration clause is a boilerplate contract, drafted by the Defendants, that was presented on a take it or leave it basis.

Accordingly, the process by which the arbitration clause was signed was procedurally unconscionable.

"Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability.

However, courts examining whether a particular limitations clause is substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Small*, 2004 Ohio 5757 at ¶ 21.

The Eleventh District Court of Appeals "determined 'the burden is on the nursing home to produce something that reflects it was dealing with an individual who, at a minimum had the capacity to contract. Lacking such information in the record, any substantive deficiency would be fatal.'" *Pearson v. ManorCare Health Servs.*, 2015 Ohio 5460 ¶ 41 (11th Dis. 2015), quoting *Wascovich v. Personacare*, 190 Ohio App.3d 619, 2010 Ohio 4563, 943 N.E.2d 1030 (11th Dist. 2010).

In *Pearson*, the defendants presented the deposition of an individual who helped the resident in the admissions process. The defendants were unable to produce any evidence of the specifics of the admissions process in question. The defendants relied on what was typically done during an admissions process. The court found the "lack of evidence that the resident could make a rational decision on whether to enter the agreement was a significant factor weighing in favor of substantive unconscionability." *Id.* at ¶58.

Defendant-Appellees in this case have failed to produce any evidence at all about Mary Roberts' admission. Defendant-Appellees did not even attach the entire Admission Agreement to their Motion to Stay, only the alleged arbitration clause. Defendant-Appellees have not offered any evidence as to what documents were presented to Ms. Roberts and her daughter at the time of admission.

An arbitration clause that is part of a much larger document is unenforceable, even if the agreement states that signing it is not a requirement of admission. O.R.C. §2711.23(G).

Defendant-Appellees cannot prove what was given to Ms. Roberts or her family.

As shown in Exhibit "C",

> In general, the documentation listed under No. 30 above would have been reviewed with Plaintiff or anyone acting on her behalf. In General, there also would have been discussion about payor information (including obtaining documentation such as Medicare card; Social Security Card; insurance card; PDP card; and Medicaid card); advanced directives; healthcare power of attorney (and obtaining a copy of it); and ancillary charges.

The Kindred Defendants do not offer any evidence about what actually happened during Mary Roberts' admission.

In *Arnold v. Burger King*, 2015 Ohio 4485, ¶ 85, 48 N.E.2d 69 (8th Dist. 2015), the Eighth District Court of Appeals analyzed an arbitration clause in the employment context. In the arbitration clause, it claimed "arbitration is 'quicker and less expensive for both sides.' " However, in *Arnold*, the Eighth District recognized that arbitration does not necessarily save money for a plaintiff:

> That is not always the case, particularly for the employee. For example, employment attorneys typically represent plaintiffs on a contingency basis so there is often no cost to the employee until success or settlement. Court filing fees are usually lower than the fees to initiate arbitration. Arbitration is generally beneficial for employers because it is, as opposed to litigation, less expensive due to brevity and lack of appeal rights. It is also advantageous to the employer where, as in this case, the agreement limits the worker's recovery of damages otherwise available via litigation, "[i]n the event you prevail, [the arbitrator] will limit your relief to compensation for demonstrated and actual injury to the extent consistent with the Procedural Standards [that are not attached to the MAA]."

Id.

Further, the Eighth District held that where an arbitration clause merely incorporates the rules for arbitration by reference, it is "necessary to delve deeply into the voluminous rules and procedures." *Id.* at ¶ 92. As in *Arnold*, the present arbitration clause merely incorporates the rules for arbitration by reference. Defendant-Appellees did not provide Ms. Roberts with a copy of the Rules and Procedures. See Exhibit "C."

As stated in the *Arnold* decision, like employment attorneys, personal injury attorneys "typically represent plaintiffs on a contingency basis so there is often no cost. . . . " *Arnold,* 2015 Ohio 4485 at ¶ 85. "Although silence of an arbitration clause with respect to costs does not, by itself, make the clause unconscionable, 'if the costs associated with the arbitration effectively deny a claimant the right to a hearing or an adequate remedy in an efficient and cost-effective manner,' then the clause is invalid." *Id.* at ¶ 90, citing *Rude v. NUCO Edn. Corp.*, 9th Dist. No. 25579, 2011 Ohio 6789, ¶24.

As shown in Exhibit "C", the Kindred Defendants did not provide Ms. Roberts with the Rules and Procedures that govern the arbitration clause. There is no evidence before this Court that Ms. Roberts was properly informed of the rules and procedures of the arbitration process.

In *Manley v. Personacare of Ohio*, 11th Dist. Lake No. 2005-L-2007, 2007 Ohio 343, the Honorable Judge Mary Colleen O'Toole discussed the substantive unconscionability of nursing home arbitration clauses in her dissenting opinion:

> The location is non-neutral. The arbitration provisions are buried near the end of the extremely long admission contract, and are presented to the resident at the time of admission. Thus a resident is required to make his or her decision regarding this vital issue at a time when, typically, they are sick and in need of care.
>
> * * *
>
> This contract gives potential residents a choice between being out on the street with no medical care, or accepting the first available bed.
>
> * * *
>
> The arbitration provision is not in compliance with industry standards. Contract provisions of the type are disfavored by the American Arbitration Association, the American Bar Association, and the American Medical Association. Binding arbitration should not be used between patients and commercial healthcare providers unless the parties agree to it *after* the dispute arises. This is the only way a consumer/patient entering a nursing or healthcare facility in an ailing and diminished capacity can stand on equal footing with a large corporate entity. This would promote meaningful dispute resolution and allow both sides to enter into this agreement voluntarily and knowingly. The law favors arbitration: it abhors contracts of adhesion.

> The third factor of substantive unconscionability deals with the ability to properly determine future liability. It is clear that neither party to this contract could accurately predict the extent of future liability. The negligence had not occurred at the time of the signing of the contract. It was impossible to determine if Ms. Manley, at the time of admission, could be waiving her right to a wrongful death suit. Certainly when she went into the nursing home she was anticipating her release.

Id. at ¶¶ 59-62.

The arbitration clause in this case is a classic contract of adhesion. There is nothing in the arbitration clause that says that sometimes nursing home residents are neglected and abused. *See* Exhibit "A." There is nothing in the clause regarding the benefits of a jury trial. *See Id.* It does not explain the specific rules that will be applied to the arbitration of their claims. *Id.* In fact, the clause simply refers to the "Kindred Healthcare Alternative Dispute Resolution Rules of Procedure ("Rules of Procedure") then in effect. A copy of the Rules of Procedure may be obtained from the Facility's Executive Director, or directly from DJS at the address or website listed above."

These rules do not allow for the issuance of subpoenas, nor would they be able to enforce such subpoenas if allowed. The arbitration panel cannot force third parties to submit to a deposition, nor can the panel hold a party in contempt. There is no evidence this was explained to Mary Roberts or her daughter.

A jury trial may last two to three weeks in a nursing home case. There is no indication as to how long the arbitration will last. Obviously, the Plaintiff-Appellant, the party with the burden of proof, is hurt by any time limitation when presenting her case. There is no evidence this was explained to Mary Roberts or her daughter.

Further, each party must pay for their own attorney fees and the costs of preparing their case. There is nothing in the clause explaining that most nursing home cases are handled on a contingent fee basis, so the resident or his or her family do not have to pay any amount in legal fees up front or until a recovery is made. There is no evidence this was explained to Mary Roberts or her daughter.

Finally, "[a]t its core, the purpose of an arbitration agreement is to provide the parties an expeditious and economical way of resolving any dispute that could arise from their relationship." *Pearson*, 2015 Ohio 5460, ¶ 24, citing *Hayes v. The Oakridge Home*, 122 Ohio St.3d 63, 2009 Ohio 2054, ¶ 15, 908 N.E.2d 408. "To the extent that arbitration is an alternative means of determining legal disputes, agreements to arbitrate further serve the purpose of decreasing the number of pending cases on court dockets." *Id.*

In *Wascovich*, despite language in an arbitration clause stating that it was "optional" and providing a thirty-day (30) right to cancel the agreement, the Eleventh District Court of Appeals determined that the agreement's terms were substantively unconscionable. *Wascovich v. Personacare of Ohio*, 2010 Ohio 4563, 190 Ohio App.3d 619, 943 N.E.2d 1030 (11th Dist. 2010). The Eleventh District noted:

> The main problem with affirming the substantive aspect of the agreement, however, is that under the facts of this case, the normal factors favoring arbitration do not apply. This is because there is no economy or efficiency achieved. In fact, the contrary is true, because a party may be forced to participate in two proceedings, instead of one. Rather than achieve cost savings, there would be a substantial increase in costs. The potential exists for an increase in the number of depositions and hearings, duplicate discovery, and expert testimony and expense in two forums. The addition of these factors outweighs the factors that weigh in favor of substantive conscionability.

Id. at ¶ 51.

In the present case, three Defendants: Defendant Stratford Care and Rehabilitation, Defendant Glenwillow Leasing, LLC and Defendant Providence Healthcare Management have not moved to stay the proceedings and force binding arbitration. As such, the claims against these Defendants will not be subject to binding arbitration. "Because there is no economy or efficiency achieved" the entire purpose of arbitration is moot. *Id.* "Rather than achieve a cost savings, there would be a substantial increase in cost." *Id.*

There is no question that the arbitration clause is substantively unconscionable, as well as procedurally unconscionable. Therefore, Plaintiff-Appellant respectfully request that this Honorable Court hold this arbitration clause unenforceable.

5. Appellees have waived any alleged right to arbitration by acting inconsistently with the alleged right to arbitrate.

It is well-established that the right to arbitration can be waived. See, e.g. *Hogan v. Cincinnati*, 11th Dist. Trumbull No. 2003-T-0034, 2004 Ohio 3331; *Griffith v. Linton*, 130 Ohio App.3d 746, 751, 721 N.E.2d 146 (1998); *Siam Feather & Forest Products Co., Inc. v. Midwest Feather Co., Inc.*, 503 F.Supp. 239, 242 (S.D. Ohio 1980). "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, citing *Rock, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 79 Ohio App.3d 126, 128, 606 N.E.2d 1054 (1992).

According to the Tenth District Court of Appeals in *Gordon v. OM Financial Life Ins. Co.*, there is a two-prong test used by courts to determine whether a party has waived their right to arbitrate:

> 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 11, 113.

10th Dist. Franklin No. 08AP-480, 2009 Ohio 814, ¶14 (emphasis added).

The Kindred Defendants clearly knew of their alleged right to arbitrate. They have been in possession of the arbitration clause since Mary Roberts was first admitted to the subject facility. As such, the first-prong is satisfied.

The Sixth 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 jurisdiction of the court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of the proceedings; (2) the delay, if any, by the party seeking arbitration to request a stay of the judicial proceedings, or an order compelling arbitration; (3) the extent to which the party seeking arbitration has participated in the litigation, including a determination of the status of discovery, dispositive motions, and the trial date; and (4) whether the nonmoving party would be prejudice by the moving party's prior inconsistent actions.

Travelers Cas. & Sur. Co. v. Aeroquip-Vickers, Inc., 6th Dist. Lucas No. L-06-1201, 2007 Ohio 5305, ¶35.

"Waiver attaches where there is active participation in a lawsuit evincing an acquiescence to proceeding in a judicial forum." *Fravel v. Columbus Rehab. & Subacute Inst.*, 10th Dist. Franklin No. 15AP-782, 2015 Ohio 5125, ¶13. In *Fravel* the court of appeals held:

> [Defendants] did not promptly move for a stay and instead actively used the court proceedings to obtain discovery. Moreover, enforcement of the arbitration agreement would engender proceedings in two separate forums, as appellants concede that only decedent's claims which survive him are subject to arbitration. The wrongful death claims of the statutory beneficiaries, pursuant to R.C. 2125.02(A)(1), may not be forced into arbitration where each of them did not sign the agreement. *Peters v. Columbus Steel Casting Co.*, 115 Ohio St.3d 134, 2007 Ohio 4787, ¶¶19-20, 873 N.E.2d 1258. We overruled the first assignment of error. On account of the litigation activities of the appellants, their delay in seeking an arbitration stay and the potential prejudice via piecemeal litigation to appellee, the trial court acted within is sound discretion to find waiver and deny appellants' motion for stay.

The Defendant-Appellees filed an answer in this case. They did not move to stay this case in response to Plaintiff-Appellant's Complaint. This alone constitutes a waiver of the right to arbitrate under *Mills v. Jaguar-Cleveland Motors, Inc.*, supra.

In Defendant-Appellees' Answer **they demanded a jury trial**. Demanding a jury trial is certainly inconsistent with trying to enforce an alleged right to arbitrate.

Instead of insisting on their alleged right to arbitration, the Defendant-Appellees waited almost six (6) months, until **October 17, 2018,** to file their Motion to Stay, during which the Trial Court established deadlines, established dates for expert reports, established a date for a settlement conference and established a trial date. In compliance with the established dates and deadlines of the Court, Plaintiff's counsel has provided Defendant-Appellees with three (3) separate expert reports.

During these six (6) months when Defendant-Appellees were litigation this case, not seeking arbitration, Defendant-Appellees filed several Motions asking the Trial Court to enforce the Civil Rules. Seeking to enforce the Civil Rules is inconsistent with an alleged right to arbitrate. Defendant-Appellees actively participated in litigation evincing an acquiescence to proceeding in a judicial forum.

On June 19, 2018, almost four months before Defendant-Appellees filed their Motion to Stay, they filed a Motion requesting that this Court stay proceedings until Plaintiff-Appellant filed affidavits of merit. Defendant-Appellees filed a motion with this Court asking the Court to enforce the requirements of Civil Rule 10. That is completely inconsistent with an alleged right to arbitration and clearly constitutes waiver.

Defendant-Appellees requested a protective order to preclude Plaintiff-Appellant from conducting a Civil Rule 30(B)(5) deposition, from the trial court. Seeking the protection of Civ.R. 26 is not acting consistent with the Defendant-Appellees right to arbitration. This clearly constitutes waiver.

On June 27, 2018, the trial court granted, in part, Defendant-Appellees' June 19, 2018 Motion, seeking to stay discovery until Plaintiff-Appellant complied with Civ.R. 10(D). The trial

court specifically held, "Discovery, including depositions in this case is stayed until Plaintiff has filed an Affidavit(s) of Merit."

Defendant-Appellees demanded a jury trial, moved the Court to enforce Civil Rule 10 and sought a protective order. These are all actions that evince an acquiescence to proceed in a judicial forum and are inconsistent with an alleged right to arbitration. Defendant-Appellees have clearly waived any alleged right to arbitration.

On October 17, 2018, Defendant-Appellees filed their Motion asking this Court to permanently and forever stay this case and force this case to binding arbitration. Later that day, this Court held a telephone conference, during which the parties agreed to mediate the above-captioned case. The parties agreed **that discovery would continue** as to all Defendants and the Motion to Stay filed by the Defendant-Appellees, would be held in abeyance while the parties conducted discovery and mediated Plaintiff-Appellant's claims in the hope that the case could be settled. None of the Defendants have ever participated in a Mediation of this case. Plaintiff's counsel tried multiple times to schedule a Mediation. Plaintiff's counsel suggested multiple dates and multiple mediators. None of the Defendants ever agreed to mediate this case with an agreed upon mediator on any date.

On February 20, 2019, without cooperating with discovery as they promised, and without mediating the case, as they promised, Defendant-Appellees again filed a motion asking this Court to permanently stay this case and force it to binding arbitration.

Defendant-Appellees' goal was simply to delay this case.

Further, as in *Fravel*, the "potential prejudice via piecemeal litigation" weighs in favor of finding waiver in this case. As explained above Defendants Stratford Care and Rehabilitation, Glenwillow Leasing, LLC and Providence Healthcare Management have **NOT** moved this Court for a stay pending binding arbitration. As such, enforcement of the arbitration clause against the

Plaintiff-Appellant would result in proceedings moving forward in two separate forums. There is a potential for prejudice from piecemeal litigation, such as inconsistent results. There is no judicial economy nor benefit to be gained by requiring that Plaintiff-Appellant's claims proceed in two separate forums.

The potential for prejudice coupled with Defendant-Appellees' inconsistent actions in Answering Plaintiff's Complaint, demanding a jury trial, seeking enforcement of Civil Rule 10, seeking a protective order and waiting six (6) months to file their Motion to Stay, during which they sought and received the benefits and protections of the Civil Rules, all weigh in favor of finding waiver in this case.

III. Conclusion.

For the reasons articulated above, Plaintiff-Appellant respectfully requests that this Honorable Court find the arbitration clause is invalid and unenforceable, and reverse the Trial Court's decision to permanently stay this case pending binding arbitration.

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

By: /s/ Blake A. Dickson
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Attorneys for Plaintiff-Appellant Mary Roberts.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing, Appellant's Merit Brief, was served via the Court's electronic filing system, this **24th day of June, 2019,** to the following:

Paul W. McCartney, Esq.
Diane L. Feigi, Esq.
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Cincinnati, Ohio 45202.

Attorneys for Defendant-Appellees, KND Development 51 L.L.C., Kindred Transitional Care and Rehab - Stratford, Kindred Nursing & Rehab - Stratford, Kindred Healthcare Operating, Inc., Kindred Healthcare, Inc., and Amanda Eberhart.

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Attorneys for Plaintiff-Appellant Mary Roberts.

ATTACHMENT K

ALTERNATIVE DISPUTE RESOLUTION AGREEMENT BETWEEN RESIDENT AND FACILITY (OPTIONAL)

This Alternative Dispute Resolution Agreement ("Agreement") is made and entered into this day of January 29, 2017 by and between 0875 - Kindred Transitional Care And Rehabilitation-Stratford, ("Facility"), Mary G Roberts, ("Resident"), and _____ ("Legal Representative"). The term "Resident" includes the Resident, his/ her Guardian or Attorney in Fact, or any person whose claim is derived through or on behalf of the Resident.

The parties wish to work together to resolve any disputes in a timely fashion and in a manner that minimizes both of their legal costs. Therefore, in consideration of the mutual promises contained in this Agreement, the Resident and Facility hereby agree as follows:

A. **Conduct of Alternative Dispute Resolution ("ADR").** The ADR process will be conducted by an independent impartial entity that is regularly engaged in providing mediation and arbitration services. DJS Administrative Services, Inc., ("DJS"), P.O. Box 70324, Louisville, KY 40270-0324, (877) 586-1222, www.djsadministrativeservices.com may serve as this independent entity. In the event that DJS is unwilling or unable to conduct the mediation or arbitration, or the parties mutually agree that DJS should not conduct the mediation or arbitration, then by mutual agreement the parties shall select another independent impartial entity that is regularly engaged in providing mediation and arbitration services. Requests for ADR, regardless of the entity chosen to be Administrator, shall be conducted in accordance with the Kindred Healthcare Alternative Dispute Resolution Rules of Procedure ("Rules of Procedure") then in effect. A copy of the Rules of Procedure may be obtained from the Facility's Executive Director, or directly from DJS at the address or website listed above.

B. **Scope of ADR.** Any and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's stay at the Facility including disputes regarding the interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties (including, without limitation, any claim based on violation of rights, negligence, medical malpractice, any other departure from the accepted standards of health care or safety or unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be submitted to alternative dispute resolution as described in this Agreement. This Agreement includes claims against the Facility, its employees, agents, officers, directors, any parent, subsidiary or affiliate of the Facility, and/or its medical director. Only disputes that would constitute a legally cognizable cause of action in a court of law may be submitted to alternative dispute resolution. All claims based in whole or in part on the same incident(s), transaction(s), or related course of care or services provided by Facility to the Resident, shall be mediated or arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to mediation and is not presented in the arbitration hearing.

EXHIBIT
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C. **No Class Actions.** The parties agree to mediate or arbitrate each claim on an individual basis, and will not seek consolidated or class treatment of any claim in any mediation or arbitration.

D. **Process.** The parties shall attempt to resolve any dispute arising out of or relating to the Agreement or the Resident's stay at the Facility, by mediation. The mediator and arbitrator will be selected as described in Rule 2.03 of the Rules of Procedure. The mediation shall convene not later than one hundred twenty (120) days after the Request for ADR is filed. Any claim or controversy that remains unresolved after the conclusion or termination of the mediation shall be settled by binding arbitration in accordance with the Agreement. The arbitration shall convene not later than sixty (60) days after the conclusion or termination of the mediation. Except as otherwise provided herein, Ohio law applicable to a comparable civil action brought in the Court of Common Pleas of the county in which Facility is located, including provisions related to the standard of proof, privilege, and limitations on damages shall apply. Claims where the demand is less than $50,000 shall not be subject to mediation and shall proceed directly to arbitration, unless one of the parties requests mediation, in which case all parties shall mediate in good faith.

E. **Discovery.** The parties agree to engage in limited discovery of relevant information and documents before and during mediation in accord with Rule 3.02 of the Rules of Procedure. Any disputes which the parties cannot resolve regarding the scope and limits of discovery shall be resolved as described in Rule 3.02 of the Rules of Procedure.

F. **Costs of ADR.** Facility shall pay the mediator's and arbitrator(s)' fees and other reasonable costs (excluding Resident's attorney's fees) associated with the mediation and/or arbitration up to a maximum of five days of the arbitration hearing. If the arbitration hearing exceeds five days, the additional fees and costs shall be borne equally by the parties. Each party agrees to bear their own attorney fees and costs incurred in relation to this Agreement.

G. **Jurisdiction.** The Parties agree that except as otherwise provided herein, this Agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and not by recourse to a court of law.

H. **Binding Effect of Agreement.** It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees, servants, officers, directors, and any parent, subsidiary or affiliate of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, child, guardian, executor, agent administrator, legal representative, or heir of the Resident.

I. **Severability.** If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, the remaining provisions, and partially invalid or unenforceable provisions, to the extent valid and enforceable, shall nevertheless be binding and valid and enforceable.

J. **Revocation of the Agreement.** The Resident, or the Resident's spouse or the personal representative of the Resident's estate in the event of the Resident's death or incapacity, has the right to cancel this Agreement within thirty (30) days of signing the Agreement by: (1) providing notice to the Facility, or (2) filing a claim in a court of law.

K. **Electronic Storage of ADR Agreement (Scanning and Photocopies).** The parties hereto agree and stipulate that the original of this ADR Agreement, including the signature page, may be scanned and stored in a computer database or similar device, and that any printout or other output readable by sight, the reproduction of which is shown to accurately reproduce the original of this document, may be used for any purpose just as if it were the original, including proof of the content of the original writing.

L. **Understanding of the Resident.** **By signing this Agreement, the Resident is acknowledging that he/she understands the following: (1) he/she has the right to seek legal counsel concerning this Agreement; (2) the execution of this Agreement is not a precondition of admission or to the furnishing of services to the Resident by Facility, and the decision of whether to sign the Agreement is solely a matter for the Resident's determination without any influence; (3) this Agreement may not even be submitted to Resident for approval when Resident's condition prevents him/her from making a rational decision whether to agree; (4) nothing in this Agreement shall prevent Resident or any other person from reporting alleged violations of law to the Facility, or the appropriate administrative, regulatory or law enforcement agency; (5) the ADR process adopted by this Agreement contains provisions for both mediation and binding arbitration, and if the parties are unable to reach settlement informally, or through mediation, the dispute shall proceed to binding arbitration; and (6) agreeing to the ADR process in this Agreement means that the parties are waiving their right to a trial in court, including their right to a jury trial, their right to trial by a judge, and their right to appeal the decision of the arbitrator(s) in a court of law.**

IN WITNESS WHEREOF, the parties, intending to be legally bound, have signed this Agreement as of the date first above written.

Mary G Roberts
Stratford
Name of Resident

0875 Kindred Transitional Care And Rehabilitation-
Facility Name & Number

_____/_____
Signature of Resident/Date

If signed by a Legal Representative, the representative certifies that the Facility 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.

Mary G Roberts,
Legal Representative Printed Name & Authority
Title
for mary Roberts
-Phyllis Burks 02/01/17
Signature of Legal Representative/Date

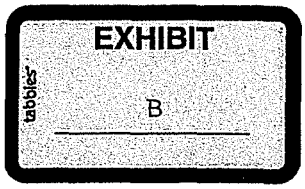
ERICA YAN - Admissions Coordin
Facility's Authorized Agent Printed Name &

02/01/17
Signature of Facility's Authorized Agent/Date

3-3.0875.3206236..ROBERTS-MARY

Kindred Healthcare Alternative Dispute Resolution Rules of Procedure

Program Administrator: DJS Administrative Services, Inc.
P.O. Box 70324
Louisville, KY 40270-0324
719 Old Mill Stream Lane
Shepherdsville, KY 40165
(877) 586-1222
www.djsadministrativeservices.com



Purpose

These procedural rules have been adopted by Kindred Healthcare for the purpose of attempting to resolve disputes with consumers of services related to the delivery of health care, long term care or assisted living services. DJS Administrative Services, Inc. (hereinafter "DJS") will act as the administrator of this process in accordance with the rules set forth below.

Due Process Standards for Consumer Healthcare Disputes

DJS reserves the right to refuse to administer any dispute resolution process which may be based upon an agreement between the parties which substantially amends the rules or which does not meet the following Due Process Standards for Consumer Healthcare Disputes.

I. Agreement

There must be a written agreement between the parties to engage in the dispute resolution process. The agreement should be knowing and voluntary.

II. Capacity

The parties must have capacity both at the time of execution of the agreement and at the time of initiation of the dispute resolution process or be represented by a surrogate or agent with capacity.

III. Voluntariness

Execution of an agreement must be voluntary and optional. It must not be executed as a condition of admission, treatment or a condition of remaining in a facility.

IV. Witness

The party's signature on the agreement must be witnessed by an individual who has been trained to explain the dispute resolution process to consumers who have questions and to provide consumers with a written explanation of the dispute resolution process.

V. Right to Rescission with Review by Counsel

The agreement must provide for a minimum of five (5) business days right of rescission period during which the parties may have the agreement reviewed by counsel.

VI. Mediation as Prerequisite to Arbitration

Should the parties' agreement provide for binding arbitration, mediation must be offered as a prerequisite to arbitration, except for those disputes that meet the criteria for resolution under the Expedited Procedures. However, after a dispute arises, the parties may agree in writing to proceed directly to arbitration.

VII. ADR Sessions

Mediation sessions or arbitration hearings must be conducted with adequate notice and with a fair opportunity to be heard and to understand what information is being presented. The place of the proceedings should be accessible to the parties and to the production of relevant evidence and witnesses.

VIII. Remedies

Parties may not be denied legal remedies otherwise available to them under applicable laws.

IX. Costs

Consumers may not be assessed costs unreasonably related to the costs they would incur had they filed an action in a court with jurisdiction over the matter.

Rules of Procedure for the Resolution of Consumer Healthcare Disputes

1.0 General Rules

1.01 Applicability of Rules

The parties shall be bound by these Rules wherever they have agreed in writing to dispute resolution by DJS or under these Rules. If there is a dispute between the parties regarding the interpretation of these Rules, the presiding arbitrator shall have the authority to make a decision or interpretation regarding the Rules, and the arbitrator's decision or interpretation shall be final and binding.

When parties agree to resolve disputes under these Rules, they accept the terms of these Rules and authorize the Administrator to assist in the process of selecting neutrals and provide such other services as are provided for by the Rules. Parties using these Rules agree to indemnify, hold harmless and release the Administrator, its partners and employees, from any and all liability to the party or a person or entity claiming through the party by reason of or in any way related to the Administrator or its administration of these Rules, the Administrator, the neutral, the Rules, or any action taken or not taken with respect thereto.

1.02 Existence of an Agreement to Resolve Disputes

The provision by the Administrator of any services to parties does not necessarily constitute a determination by the Administrator that an agreement to resolve disputes exists.

1.03 Meaning of Mediator or Arbitrator

The term "neutral" "mediator" or "arbitrator" in these Rules means the mediation or arbitration panel, whether composed of one or more mediators or arbitrators.

1.04 Interpretation of Rules

The provisions of these Rules and any exceptions thereto are subject to applicable laws. Where there is a difference in interpretation among the parties to a dispute resolution process, the issue shall be referred to the presiding arbitrator for a final decision, which shall be binding upon the parties.

2.0 Initiating ADR and selection of Mediators and Arbitrators

2.01 Demand for Alternative Dispute Resolution

The demand for alternative dispute resolution ("ADR") shall be made in writing and submitted to DJS, P.O. Box 70324, Louisville, KY 40270-0324; 719 Old Mill Stream Lane, Shepherdsville, KY 40165, (877) 586-1222, www.djsadministativeservices.com, by regular mail, certified mail, electronic mail, or overnight delivery. If the parties choose not to select DJS or, if DJS is unwilling or unable to serve as the Administrator, the parties shall select another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator. Requests for ADR, regardless of the entity chosen to be Administrator, shall be conducted in accordance with these Rules. A copy of these Rules may be obtained from the Facility's Executive Director, or from DJS at the address or website listed above.

The demand for ADR (the "Demand") must include the name, address and telephone numbers of all parties, the requested location of the proceeding, a description of the issue(s) in dispute, and the amount(s) in dispute. The Demand must contain a copy of the ADR Agreement ("Agreement") or an affidavit affirming that an Agreement was executed by the Resident or the Resident's legal representative. A Demand Form may be obtained at the web address listed above.

If the Demand is filed by an institution, the required Administration Fees must be included with the Demand.

2.02 Payment of Administration Fees when Demand is filed by a Consumer

Upon receipt of a Demand from a consumer, the Administrator shall send a confirmation letter to all parties including a copy of the Demand within three (3) business days.

In the event the claimant is *pro se* a confirmation letter will be sent to all parties and will include the following information:

- A copy of the formal demand made by the plaintiff
- A copy of the Kindred Healthcare Alternative Dispute Resolution Rules of Procedure
- A brochure outlining the Kindred ADR process
- A detailed Scheduling Order consistent with the ADR agreement;
- A list of three (3) mediators and three (3) arbitrators including instructions on mediator and arbitrator selection.
- Notice that the mediator and arbitrator must be selected within thirty-five

(35) days.

The institution must pay the Administration Fees to DJS no later than ten (10) business days from the date on which the institution receives the confirmation letter.

2.03 Procedures for Selecting Neutrals

Upon receipt of a Demand by a party to commence the ADR process, the parties shall proceed to select a mediator and an arbitrator. The arbitrator will be in charge of resolving all pre-arbitration disputes and will preside over the arbitration. If the parties are unable to agree on the selection of a mediator, then they agree to allow the presiding arbitrator to choose one for them. If the parties are unable to agree on an arbitrator then each party shall select an arbitrator and the two selected will choose a third who will serve as the presiding arbitrator.

The Administrator shall issue a notice to all of the parties confirming the selection of the mediator and arbitrator.

The parties shall proceed to arbitration if mediation is unsuccessful. After a dispute arises, the parties may agree to forego mediation and proceed directly to arbitration. In arbitration proceedings, the parties may agree to resolve their dispute before a panel of three (3) arbitrators or a single arbitrator. The arbitration shall proceed before a single arbitrator unless one or both parties request a panel of arbitrators.

2.05 Notice to the Neutrals of Appointment

Except for disputes resolved under the Expedited Procedures, notice of the selection of the neutrals shall be mailed to the neutrals by the Administrator with a reference to these Rules.

2.06 Disclosure and Withdrawal

Within five (5) business days of receipt of notice of appointment, a person selected as a neutral shall disclose to the parties in writing any circumstances likely to affect impartiality, including a bias, a financial or personal interest in the result of the mediation or arbitration, or a past or present relationship with a party or a party's counsel or other authorized representative.

A neutral shall refrain from accepting employment or continuing as a neutral in any dispute if he reasonably believes or perceives that his participation would be directly adverse to any interest of his, or a person with whom he has a client or other substantial relationship which may materially limit the neutral's ability to perform his

responsibilities. This disclosure requirement continues throughout the ADR process and shall include any pertinent information known or made available to the neutral regarding the prior use by either party of the neutral.

After appropriate disclosure of an interest other than a directly adverse interest, the neutral may serve if all parties consent.

3.0 Rules on Regular Procedures for Arbitrations and Mediations

3.01 Preliminary Conferences

A preliminary conference with the parties and/or their counsel and other authorized representatives shall occur within ten (10) days of the selection of the neutrals unless otherwise agreed to by the parties. The neutral may consider any matters that will expedite or facilitate the efficient conduct of proceedings. All agreements reached by the parties during the preliminary conference shall be circulated in writing by the neutral to the parties. In the case of an arbitration a preliminary conference should be scheduled with the presiding arbitrator within (10) days after the mediation has been declared an impasse.

3.02 Discovery

The parties shall be allowed to initiate discovery as soon as the demand for ADR has been filed. Discovery must be completed not later than 180 days after the date the Demand for ADR was filed. Permissible discovery shall include: a) 30 interrogatories inclusive of subparts; b) 30 requests for production of documents inclusive of subparts; c) 10 requests for admissions inclusive of subparts; d) depositions of not more than six (6) fact witnesses, and e) depositions of not more than two (2) expert witnesses.

Where warranted, by agreement or by request to the presiding neutral, the parties may conduct such additional reasonable discovery as may be necessary or proper.

The parties agree that in the case of a dispute over the scope of discovery during the mediation phase of the ADR process, such disputes should be resolved by the presiding arbitrator.

3.03 Fixing the Locale of the Proceeding

The parties may mutually agree on the locale for the proceeding. If there is no mutual agreement, or if a party objects to the locale, the neutral shall have the power to

determine the locale in accordance with the Rules of Procedure and due process considerations.

3.04 Date, Time and Place of Proceedings

Unless otherwise agreed by the parties, the neutral shall set the date and time for each proceeding session and shall mail to each party notice thereof at least ten (10) days in advance, unless the parties by mutual written agreement waive such notice or modify the terms thereof.

3.05 Statement of the Issues and Relevant Information

Unless otherwise agreed by the parties and the neutral, at least ten (10) days prior to the mediation or arbitration, each party shall provide the neutral with a brief statement of the issues and that party's position on each issue. The parties should enclose all relevant documents to assist the neutral in resolving the dispute.

3.06 Proceedings

Unless otherwise agreed by the parties and the neutral, mediation shall occur no later than one hundred twenty (120) days after receipt of the demand for ADR. The parties may be represented at proceedings by counsel or other authorized representative.

A party desiring to make a record of an arbitration proceeding shall make arrangements for the making of such record and shall notify all other parties and the arbitrator of these arrangements in advance of the proceeding. The party or parties requesting the record shall pay the cost of the record and shall furnish a copy of the record to thearbitrator. A party shall be entitled to a copy of any official record of the proceeding upon payment therefore including payment of an equal share of the original expense of making the record.

3.07 Authority of the Neutral

The mediator is authorized to facilitate the resolution of the issues in dispute, but may not impose a resolution. The mediator is authorized to determine when each mediation session should be suspended.

The arbitrator is authorized to decide any disputes about discovery or the Rules of Procedure and to render a final and binding award as to the issues in dispute within the scope of the arbitration. Prior to the hearing, the arbitrator shall determine whether a reasoned award explaining the basis for its final award shall issue.

An arbitrator may not delegate any decision-making function to another person without consent of all of the parties.

3.08 Confidentiality

Mediation sessions are considered confidential. A mediation session is a settlement negotiation entitled to the protection accorded by Rule 408 of the Federal Rules of Evidence and its state counterparts. Except as otherwise provided in these Rules, all oral communications disclosed to the mediator as part of the mediation and all papers and other written communications created during or exclusively for the mediation shall remain confidential, and the mediator shall not be required to testify with respect thereto in any proceeding.

The parties shall maintain the confidentiality of the mediation sessions and shall not rely on the following as evidence in any proceeding, views of another party or the mediator with respect to settlement or settlement proposals;

(a) admissions by another party; and

(b) settlement proposals.

An arbitrator shall maintain the privacy of any proceeding. It shall be discretionary with the arbitrator to determine the propriety of the attendance of a person other than a party, the party's counsel or other authorized representative, a stenographer or witnesses. A party may request the application of a rule requiring all persons other than the parties, the party's counsel or other authorized representative and the stenographer to be excluded from the hearing except while testifying as a witness. If a party makes such a request, the arbitrator shall exclude such persons from the hearing except while testifying as a witness.

3.09 Termination of Mediation

The mediation shall be considered terminated:

(a) by the execution of a settlement agreement by the parties;

(b) by a written declaration of the mediator to the effect that mediation is not productive;

(c) by a written declaration of a party or parties that the mediation is not productive, *provided that* the mediation proceeding has commenced and the parties have mediated with the mediator for at least four (4) hours; or

(d) by the mutual written agreement of the parties; or

(e) if the parties have not specified a specific period for mediation, upon the expiration of thirty (30) days from the time when the parties were deemed to have mediated with the mediator for at least four (4) hours.

The mediator shall immediately notify the Administrator of the termination of any mediation and the results of such mediation. The parties shall proceed to binding arbitration if mediation is unsuccessful. Upon notification that mediation did not result in settlement, the Administrator will notify the parties and the appointed arbitrator(s) of the initiation of the Arbitration process.

4.0 Rules Exclusive to Arbitrations

4.01 Proceedings

Unless otherwise agreed to by the parties and the neutral, arbitration shall occur no later than sixty (60) days after the unsuccessful termination of mediation.

4.02 Oaths

Before the start of the first arbitration hearing, if any, the arbitrator may take an oath of office. The arbitrator shall require witnesses to testify under oath administered by the arbitrator or a duly qualified person.

4.03 Order of Proceedings

An arbitration hearing shall be opened by the taking of the oath of the arbitrator, if any; by announcing of the date, time and place of the hearing, and the presence of the arbitrator, the parties, and their counsel and other authorized representatives, if any; and by announcing the receipt by the arbitrator of the Demand for arbitration, any response, and the notification of appointment of the arbitrator.

The arbitrator may, at the beginning of the hearing, ask for oral or written statements clarifying the issues involved. In some cases, part or all of the above actions will have been accomplished at the preliminary conference conducted by the arbitrator. The arbitrator may conduct a preliminary hearing to resolve evidentiary issues at the request of the parties or at the arbitrator's discretion.

With respect to each claim, the complaining party shall then present evidence to support its claim. The defending party shall then present evidence supporting its defense. Witnesses for each party shall submit to questions or other examination. The arbitrator may vary this procedure within the arbitrator's discretion but shall afford a full, equal and reasonable opportunity to all parties for the presentation of any material, relevant, and admissible non-duplicative evidence.

Exhibits, when offered by either party, may be received in evidence at the discretion of the arbitrator. The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of any stenographic record.

The maximum length of the arbitration hearing exclusive of the preliminary evidentiary hearing, if required, shall be five (5) days.

4.04 Failure to Appear

The arbitration may proceed in the absence of a party or a party's counsel or other authorized representative who, after due notice, fails to be present or fails to obtain a postponement. The arbitrator shall require each party who is present to submit such evidence as the arbitrator may require for the making of an award.

4.05 Evidence

The parties may offer such non-duplicative evidence as is relevant, material and admissible to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of a party or upon the arbitrator's own motion.

The arbitrator shall be the judge of the duplicative nature, relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. However, the arbitrator should refuse to allow the introduction of any evidence that the arbitrator believes would result in the disclosure of confidential information which is privileged under any applicable statute or under applicable law, including, but not limited to, information subject to (a) a quality assurance and/or peer review privilege; (b) a patient-physician privilege; or (c) an attorney-client privilege. All evidence shall be taken in the presence of all of the arbitrators and all of the parties and the parties' counsel and other authorized representatives, except where a party is absent after due notice has been given or has waived the right to be present.

4.06 Inspection or Investigation

An arbitrator finding it necessary for there to be a further inspection or investigation in connection with the arbitration or requested by less than all the parties to make a further inspection or investigation may do so and shall advise the parties of the arbitrator's requirements. An arbitrator requested by all of the parties to make a further inspection or investigation shall do so.

4.07 Interim Measures

The arbitrator may issue such orders for interim relief as may be deemed necessary by the arbitrator or all of the parties to maintain the status quo in the dispute without prejudice to the rights of the parties or to the final determination of the dispute.

4.08 Closing of Hearing or Arbitration Proceeding

When satisfied that the record is complete, the arbitrator shall declare the hearing closed. If written statements are to be submitted, the hearing shall be declared closed as of the final date set by the arbitrator for such submission. If there has been no hearing, the arbitrator shall determine a fair and equitable procedure for receiving evidence and closing the proceeding. The time limit within which the arbitrator is required to make the award shall commence to run upon the closing of the hearing or proceeding.

4.09 Time of Award

The award shall be made promptly by the arbitrator but no later than thirty (30) days from the date of closing of the hearing or proceeding.

4.10 Publication and Form of Award

The award shall be in writing and shall be signed by each arbitrator approving the award. A copy shall be forwarded by the arbitrator to the Administrator and shall be available for publication only if both the arbitrator(s) and all parties agree in writing.

4.11 Scope of Award

Submission by the parties to arbitration under these Rules shall constitute an agreement between or among the parties, that arbitration hereunder shall be the exclusive remedy between or among the parties regarding any claim which could or might have been raised out of or relating to any and all matters covered by said submission or the subject matter thereof.

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the ADR agreement of the parties and consistent with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credits against or limitations on, such damages.
If the parties settle their dispute during the course of the arbitration, the arbitrator may set forth the terms of the agreed settlement in an award.

4.12 Reconsideration of Award

Within five (5) days after the effective date of an award, a party to an arbitration may request, in writing, the arbitrator to reconsider his award. Such request shall contain a concise statement of the reasons that the arbitrator should reconsider the award. Unless the arbitrator notifies all of the parties that the arbitrator has decided to reconsider the award within five (5) days of the effective date of the request, the request is deemed denied. Within five (5) days after the effective date of an award, the arbitrator may, upon the arbitrator's own initiative, modify the written award to correct non-substantive errors in the award. The arbitrator shall immediately furnish a copy of the modified award to the parties.

4.13 Award

An arbitration award, if any, must be paid within thirty (30) days of the effective date of the award. In the event of non-payment of the award, the prevailing party may bring legal action to enforce the award as if it were a judgment entered by a court of competent jurisdiction.

4.14 Release of Documents for Judicial Proceedings

The Administrator shall, upon the written request of a party, furnish to the party, at the expense of the party, certified copies of any papers, notices, process or other communications in the possession of the Administrator that may be required in judicial proceedings relating to the arbitration.

4.15 Applications to Court and Exclusion of Liability

Neither the Administrator, DJS, nor a neutral in a proceeding under these Rules is a necessary party in judicial proceedings relating to any stage of the dispute resolution process, the mediation, or the arbitration. The parties agree to hold harmless, indemnify, and reimburse DJS, the Administrator, or the neutral for time, costs and expenses incurred in the participation of any legal proceedings to which they are not named as a party.

Parties using these Rules for binding arbitration shall be deemed to have consented that the claims considered in the arbitration have merged into the award, that the award is the only continuing basis of determining the parties' rights and that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

DJS, the Administrator, their officers, members, employees, agents, attorneys, consultants and representatives shall not be liable to a party or a person or entity claiming through the party by reason of or in any way related to the Administration of a proceeding, these Rules, or any action taken or not taken with respect thereto.

Neither the arbitrator nor mediator shall be liable to a party for any act, error or omission in connection with a dispute resolution process conducted under these Rules unless such party is able to establish by clear and convincing evidence that (i) the arbitrator or mediator has actively participated in an effort by a party to obtain an outcome by fraud or corruption; or (ii) the arbitrator or mediator has engaged in corruption or gross misconduct.

5.0 Rules Exclusive to Expedited Arbitrations

.01 Expedited Procedures

Expedited Procedures shall be applied in a case where no disclosed claim or counterclaim exceeds $50,000 exclusive of interest and costs of the proceeding. Parties may also agree in writing to the Expedited Procedures in a case. In any case the parties agree that an award under an expedited process shall not exceed $50,000.00 exclusive of interest and costs.

(a) Where the Expedited Procedures are to be applied, the arbitration shall be conducted in accordance with the procedures set forth below:

The parties shall accept all notices, process, and other communications from the Administrator by telephone or email.

To the extent that the Rules governing Regular Procedures do not conflict with the Rules governing Expedited Procedures, the Rules governing Regular Procedures shall apply to the Expedited Procedures. All other cases shall be administered in accordance with the Regular Procedures.

.02 Date, Time and Place of Expedited Hearing

The arbitrator shall set the date, time and place of any hearing and will notify the parties by telephone, at least seven (7) days in advance of the hearing date. Unless

mutually agreed upon by the parties, in no event shall the date of the hearing be later than thirty (30) days from the effective date of the notice of selection of the arbitrator.

.03 Expedited Hearing

Generally, the expedited hearing shall be completed within one day. The arbitrator, for good cause shown, may schedule an additional hearing to be held within seven (7) days.

6.0 Other Procedural Rules

6.01 Communications

Parties to a process shall be deemed to have consented that any paper, notice or other communication necessary or proper for the initiation or continuation of any proceeding under these Rules may be sent to the party by first class mail, postage prepaid, registered or certified, return receipt requested, addressed to the party at the last known address, by overnight delivery service, or made by personal delivery.

The Administrator, neutrals, and the parties may also use facsimile transmission, telex, telegram or other written forms of electronic communications.

All papers, notices, and other communications sent by first class mail shall be deemed received three (3) days after they are deposited in the United States mail. All papers, notices, and other communications sent or delivered by any other means shall be deemed received upon their actual delivery.

6.02 Service

When requested by either the Administrator or the neutral, each party shall provide to the Administrator a copy of any paper, notice or other communication provided by that party to the mediator or another party. The Administrator has no obligation to keep a copy of any paper, notice or other communication provided to it or to act thereon in a timely manner.

6.03 Counting of Days

In all instances in which the counting of days is required by these Rules, the day of the event shall count, but the day on which a paper, notice or other communication is sent shall not count. If the date on which some action would otherwise be required to be taken, a paper, notice or other communication would otherwise be required to be sent or a period would otherwise expire on a holiday, a Saturday or a Sunday, such action shall be taken, such paper, notice or communication sent or such period

extended to the next succeeding weekday which is not a weekend day or a holiday. For purposes of these Rules, the term "holiday" means such days that are recognized as holidays by the United States Postal Service.

7.0 Rules on Administration

7.01 Expenses

Except where specified in agreements between the parties, all expenses of the neutrals, including required travel and other expenses of the neutral, shall be borne equally by the parties.

7.02 Neutral's Fee

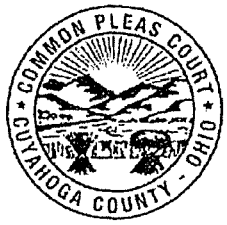
The compensation of the neutral shall be determined in accordance with the fee and expense schedule of the neutral submitted with the list of neutrals provided by the Administrator, unless other arrangements are made. Other arrangements may be negotiated and agreed upon by the parties and the neutral prior to the commencement of the proceeding. The Administrator should be notified in writing of any arrangements agreed upon that are different from the submitted materials.

7.03 Deposits.

The neutral may require the parties to deposit with the neutral in advance of any proceeding such sums of money as the neutral deems necessary to defray the expense of the proceeding, including the neutral's fee. The neutral shall render an accounting to the parties and return any unexpended balance at the termination of the proceeding, less any costs and expenses associated with the proceeding.

7.04 Amendments and Interpretations

These Rules may be amended or interpreted by the Administrator from time to time, which amendments or interpretations thereafter become binding upon the parties to a proceeding pursuant to these Rules or under the auspices of the Administrator. Any reference to these Rules shall be construed to refer to these Rules as amended and interpreted from time to time.



NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

OBJECTION ...
February 21, 2019 10:06

By: PAUL W. MC CARTNEY 0040207

Confirmation Nbr. 1631661

MARY ROBERTS

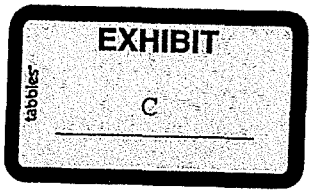
CV 18 895624

vs.

Judge: DICK AMBROSE

KND DEVELOPMENT 51, L.L.C., ET AL.

Pages Filed: 27



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARY ROBERTS,	:	CASE NO. CV 18 895624
Plaintiff,	:	JUDGE DICK AMBROSE
vs.	:	***Objections and Responses to*** **PLAINTIFF'S NOTICE TO TAKE THE DEPOSITION OF DEFENDANTS PURSUANT TO OHIO CIVIL RULE 30(B)(5)**
KND DEVELOPMENT 51, L.L.C., et al.,	:	
Defendants	:	

Defendants, KND Development 51 L.L.C., Kindred Transitional Care and Rehab – Stratford, Kindred Nursing & Rehab – Stratford, Kindred Healthcare Operating, Inc., and Kindred Healthcare, Inc. (collectively "Defendants"), by and through counsel, and submit the following Objections and Responses to Plaintiff's Notice to Take Deposition of Defendants Pursuant to Ohio Civil Rule 30(B)(5), on February 21, 2019:

GENERAL OBJCETION

Defendants object to the "Designated Matters" as outside the scope purview of Civ. R. 30(B)(5). Further, much of the information sought has previously been requested and provided through other discovery methods including but not limited to interrogatories pursuant to Civ. R. 33 and requests for production of documents pursuant to Civ. R. 34. To the extent Plaintiff is using to a Civ. R. 30(B)(5) deposition to circumvent the limits on interrogatories pursuant to Civ. R. 33(A), Defendants also object.

DESIGNATED MATTERS

1. The ownership, operation, and management of the nursing home and/or long term care facility located at 7000 Cochran Road, Solon, Ohio 44139 (hereafter referred to as "subject nursing home") during Mary Roberts' residency there,

including, but not limited to:

a. The name and current address of each individual and/or entity who had any ownership interest in the subject nursing home, at any time, during Mary Roberts' residency there, including the name of each individual and/or entity with any other ownership and/or control interest in the subject nursing home, as defined in 42 C.F.R. §§420.201 and 455.101, at any time, during Mary Roberts' residency there;

RESPONSE: Plaintiff was a resident of Kindred Transitional Care and Rehabilitation – Stratford from March 15, 2016 to June 9, 2017 and again from January 29, 2017 to February 28, 2017. She was a resident of Kindred Assisted Living at Stratford Commons from June 9, 2016 to November 1, 2016 and again from February 28, 2017 to April 7, 2017. During these time periods, Kindred Transitional Care and Rehabilitation – Stratford and Kindred Assisted Living at Stratford Commons were owned, operated and managed by KND Development 51, LLC, 680 South Fourth Street, Louisville, KY 40202. KND Development 51, LLC was the license holder. Kindred Transitional Care and Rehabilitation – Stratford and Kindred Assisted Living at Stratford Commons were registered trade names of KND Development 51, LLC.

b. The name and current address of each individual and/or entity who operated the subject nursing home, at any time, during Mary Roberts' residency there;

RESPONSE: See response to Designated Matter 1a. above.

c. The name and current address of each individual and/or entity who managed the subject nursing home, at any time, during Mary Roberts' residency there;

RESPONSE: See response to Designated Matter 1a. above.

d. The name and current address of each officer, director, agent, and managing employee of the subject nursing home, at any time, during Mary Roberts' residency;

RESPONSE: Objection. The identity of the officers, directors and agents is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. It is unknown what is meant by "managing employee."

Without waiving this objection, the Executive Director during Plaintiff's residencies was Amanda Eberhart. The Executive Director was responsible for the over all management of the facility.

e. The name and current address of each individual and/or entity that held the license for the subject nursing home, at any time, during Mary Roberts' residencythere;

RESPONSE: KND Development 51, LLC
680 South Fourth Street
Louisville, KY 40202

f. The name, current address, and place of employment of each individual who served as a member of the governing body for the subject nursing home, pursuant to 42 C.F.R. § 483.75(d), at any time, during Mary Roberts' residency there, as well as the dates when each person served as a member of the governing body for the subject nursing home;

RESPONSE: Objection. This exact information was requested in Interrogatory No. 13 in Plaintiff's First Set of Interrogatories to Defendants and the information was provided. It further seeks information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Without waiving this objection, the Governing Body consisted of the Executive Director (Amanda Eberhart), the Director of Nursing (Dayna Krofta) and the Medical Director (Bejanishvili Tamar, M.D.). Eberhart and Krofta were both employees of KND Development 51, LLC. Dr. Tamar was an independent contractor; her employment is unknown. All three were in their positions during the time of Plaintiff's residency.

g. The name, qualifications, current address, and employment status of each individual who served as the Administrator and/or Executive Director, Director of Nursing, Assistant Director of Nursing, Unit Manager, and Medical Director of the subject nursing home, during Mary Roberts' residency;

RESPONSE: Objection. This exact information was requested in Interrogatory No. 7 in Plaintiff's First Set of Interrogatories to Defendants and the information was provided. It further seeks information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Without waiving this objection, see answer to Interrogatory No. 7 in Plaintiff's First Set of Interrogatories to Defendants.

h. The identity of each individual to whom the Administrator, Executive Director, Director of Nursing, Assistant Director of Nursing, Unit Manager, and Medical Director reported, at any time, during Mary Roberts' residency at the subject nursing home;

RESPONSE: Objection. At least some of this information was requested in Interrogatory No. 7 in Plaintiff's First Set of Interrogatories to Defendants and the information was provided. It further seeks information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Without waving this objection, the Executive Director reported to Donna Brown, who was employed as the Regional Director of Operations by Kindred Nursing Center Limited Partnership from 06/05/2016 – 12/17/2016 and RehabCare Group East, LLC from 12/18/2016 – 08/31/2017. The Director of Nursing reported to the Executive Director. The Assistant Director of Nursing and the Unit Managers reported to the Director of Nursing. The Medical Director was an independent contractor.

i. The manner and amount in which the Administrator, Executive Director, Director of Nursing, Assistant Director of Nursing, Unit Manager, and Medical Director reported and any other senior management personnel were compensated, specifically including but not limited to any and all salary amounts, any and all bonuses, specifically including but not limited to the criterion for any such bonuses, the way those bonuses were calculated, who had discretion to determine whether or not those individuals received a bonus and the amount of that bonus, during Mary Roberts' residency at the subject nursing home;

RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. No corporate representative will be produced on this topic.

j. The identity of each nursing home, hospital, convalescent center, or other health care facility that is owned and/or operated by any of the Defendants, in which any of the Defendants has a greater than five percent (5%) interest; and

RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Overly broad and unduly burdensome. No corporate representative will be produced on this topic.

k. The identity of any chain of nursing homes or health care facilities to which the subject nursing home is part of or otherwise belongs, or was

part of or otherwise belonged during any part of Mary Roberts' residency at the subject nursing home.

RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Overly broad and unduly burdensome. It is unknown what is meant by a "chain of nursing homes." No corporate representative will be produced on this topic.

2. The sale of the nursing home business and/or the nursing home building and/or the real estate at any time. It has been represented that the nursing home was sold in October of 2017. Please identify the following:

   a. All of the individuals or entities involved in that sale including all the individuals or entities who owned the facility and/or the business and/or the building and all of the individuals or entities who purchased the facility and/or the business and/or the building;

   RESPONSE: Objection. The identity of who purchased the facility is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence as the purchaser did not assume any liabilities for the facility.

   Without waiving this objection, during the time of Plaintiff's residency at both Kindred Transitional Care and Rehabilitation – Stratford or Kindred Assisted Living at Stratford Commons, KND Development 51, LLC owned and operated the facility.

   b. All terms of the sale including any payments, stock purchase, debt reconstructuring, etc.;

   RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Overly broad and unduly burdensome. No corporate representative will be produced on this topic.

   c. Any assumption of liability whatsoever. In other words, did one or more individual or entity agree to indemnify or hold harmless or assume the liability of or assume the debt of one or more of the other;

   RESPONSE: There was no assumption of any liability by the purchaser. KND Development 51, LLC must indemnify the purchaser related to suits such as this one involving care at Kindred Transitional Care and Rehabilitation – Stratford or Kindred Assisted Living at Stratford Commons prior to transfer date.

d. The purchase price of the building and/or the business and/or the property and all amounts and/or anything of value that was transferred in exchange for thetransfer; and

RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. No corporate representative will be produced on this topic.

e. The transfer of the license.

RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Further, it is unclear what is sought by this designated matter. No corporate representative will be produced on this topic.

3. The relationship between each of the Defendants in this case, including when and how each Defendant first became involved with each of the other Defendants, and whether and when any such relationships terminated.

RESPONSE: Objection. This exact information was requested in Interrogatory No. 14 in Plaintiff's First Set of Interrogatories to Defendants and the information was provided. It further seeks information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Without waiving this objection, KND Development 51, LLC f/d/b/a Kindred Transitional Care and Rehabilitation – Stratford and Kindred Assisted Living at Stratford Commons. It held the license to operate Kindred Transitional Care and Rehabilitation-Stratford and Kindred Assisted Living at Stratford Commons, which were business names for KND Development 51, LLC. KND Development 51, LLC is a wholly owned subsidiary of Kindred Healthcare Operating, Inc., which is a wholly owned subsidiary of Kindred Healthcare, Inc. There was an Administrative Services Agreement between Kindred Healthcare Operating, Inc. and KND Development 51, LLC that was in effect at the time of Ms. Roberts' residency for Kindred Healthcare Operating, Inc. to provide administrative services to KND Development 51, LLC. It does not include management of any facilities for which KND Development 51, LLC held the license to operate.

4. The identification and utilization of all forms of documentation utilized at the subject nursing home, at any time, during Mary Roberts' residency, including, but not limited to, all documentation relative to: residents' admissions to the subject nursing home; resident assessments including, but not limited to, any admission assessments, minimum data sets, or other assessments; residents' care plans, including, but not limited to, any care plans, care cards, Kardex, and instructions

to S.T.N.A.'s; changes in residents' conditions; communications with a resident's physician; communication with a resident and/or his or her family; physician's orders; administration of medications and any other treatments; nurse's notes; communications among nurses and S.T.N.A.'s and other personnel, including, but not limited to, 24-hour reports, shift change reports, shift-to-shift reports, etc.; incidents and/or accidents involving residents; resident transfers and discharges; all documentation generated or utilized by a resident's physician, a Medical Director, physician assistants, and nurse practitioners; all documentation generated or utilized by nurses; all documentation generated or utilized by S.T.N.A.'s and/or C.N.A.'s, including, but not limited to, any documentation of activities of daily living, transfers, input and output, etc.; all documentation generated or utilized by physical therapists, occupational therapists, and/or speech therapists; all documentation generated or utilized by dieticians and/or dietary aides; all documentation generated or utilized by activity personnel and/or social workers; and any other documentation, in any form, that relate to the care of residents at the subject nursing home, which were generated or utilized, at any time, during Mary Roberts' residency.

RESPONSE: Objection. This designated matter is overly broad and unduly burdensome. It is outside the scope of a Civ. R. 30(B)(5) deposition. The documentation generally used can be found in the chart of Plaintiff as it attempts to shift the burden for discovery from Plaintiff to Defendants. It is essentially an interrogatory or request for production of documents requiring Defendants to list all forms available. Moreover, at the time of Plaintiff's admissions to Kindred Transitional Care and Rehabilitation – Stratford, the medical record was electronic and there were not forms per se. Therefore, a corporate representative will not be produced on this topic.

5. The audit trail records, audit records, and any other audit documentation generated relative to electronic medical records of residents of the subject nursing home, including the software or program used to generate such documentation, what is generated, how it is generated, and where and how it is stored and maintained.

RESPONSE: Objection. The information sought by this Designated Matter is unclear and confusing.

Without waiving this objection, the program for the electronic medical record was Point Click Care. It was generated by a user signing into a computer terminal at the facility. The system captured effective date, note type, who revised it last and the last revision date of each note in the patient chart. Any revisions would be reflected in the entry in the chart. The information is stored by Kindred Healthcare Operating, Inc., 680 South Fourth Street, Louisville, KY 40202 pursuant to the administrated services agreement.

6. The current location and contents of the following that were in effect, at any time, during Mary Roberts' residency at the subject nursing home: the subject nursing home's Provider Agreement with the State of Ohio; any Management Agreement for the subject nursing home; any Operating Agreement for the subject nursing home; and any lease for the subject nursing home.

RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. No corporate representative will be produced on this topic.

7. The Quality Indicator Reports and/or Quality Measure Reports, Facility Key Indicator Reports, and Turnover Recap Reports for the subject nursing home, for 2014 - 2017, including, but not limited to:

a. The process by which data was collected for the above-referenced reports for the subject nursing home for 2014 - 2017;

RESPONSE: Data was not collected per se for Quality Indicator Reports and/or Quality Measure Reports and Facility Key Indicator Reports. Quality Indicator Reports and/or Quality Measure Reports and Facility Key Indicator Reports are generated by CMS from the data submitted to CMS in the Minimum Data Set for each resident of Kindred Transitional Care and Rehabilitation – Stratford. There is no requirement for Minimum Data Set for residents of Kindred Assisted Living at Stratford Commons.

There are no "Turnover Recap Reports" that are routinely generated. The Executive Director submitted electronically information concerning the termination of employees, whether voluntary or involuntary, to an email, which information was then entered electronically. From the electronically stored data, reports concerning turnover could then be generated.

b. The identity of each every single person who was provided with a copy of any of the above-referenced reports for the subject nursing home, at any time, from 2014 to the present;

RESPONSE: Data was not collected per se for Quality Indicator Reports and/or Quality Measure Reports and Facility Key Indicator Reports. Quality Indicator Reports and/or Quality Measure Reports and Facility Key Indicator Reports are generated by CMS from the data submitted to CMS in the Minimum Data Set for each resident of Kindred

Transitional Care and Rehabilitation – Stratford. There is no requirement for Minimum Data Set for residents of Kindred Assisted Living at Stratford Commons.

There are no "Turnover Recap Reports" that are routinely generated. The Executive Director submitted electronically information concerning the termination of employees, whether voluntary or involuntary, to an email, which information was then entered electronically. From the electronically stored data, reports concerning turnover could then be generated.

c. The identify of each and every entity and/or state agency, which was provided with a copy of any of the above-referenced reports for the subject nursing home, at any time, from 2014 to the present;

RESPONSE: None.

d. The process by which data was tracked at the subject nursing home, from 2014 - 2017;

RESPONSE: Data was not collected per se for Quality Indicator Reports and/or Quality Measure Reports and Facility Key Indicator Reports. Quality Indicator Reports and/or Quality Measure Reports and Facility Key Indicator Reports are generated by CMS from the data submitted to CMS in the Minimum Data Set for each resident of Kindred Transitional Care and Rehabilitation – Stratford. There is no requirement for Minimum Data Set for residents of Kindred Assisted Living at Stratford Commons.

There are no "Turnover Recap Reports" that are routinely generated. The Executive Director submitted electronically information concerning the termination of employees, whether voluntary or involuntary, to an email, which information was then entered electronically. From the electronically stored data, reports concerning turnover could then be generated.

e. The location where the above-referenced reports for the subject nursing home, were kept, during Mary Roberts' residency to the present; and

RESPONSE: Data was not collected per se for Quality Indicator Reports and/or Quality Measure Reports and Facility Key Indicator Reports. Quality Indicator Reports and/or Quality Measure Reports and Facility Key Indicator Reports are generated by CMS from the data submitted to CMS in the Minimum Data Set for each resident of Kindred Transitional Care and Rehabilitation – Stratford. There is no requirement

for Minimum Data Set for residents of Kindred Assisted Living at Stratford Commons.

There are no "Turnover Recap Reports" that are routinely generated. The Executive Director submitted electronically information concerning the termination of employees, whether voluntary or involuntary, to an email, which information was then entered electronically. From the electronically stored data, reports concerning turnover could then be generated.

f. If any of the above-referenced reports for the subject nursing home have been destroyed, the date when they were destroyed, the identity of the person who authorized their destruction, and the identity of the person or persons who destroyed them.

RESPONSE: Data was not collected per se for Quality Indicator Reports and/or Quality Measure Reports and Facility Key Indicator Reports. Quality Indicator Reports and/or Quality Measure Reports and Facility Key Indicator Reports are generated by CMS from the data submitted to CMS in the Minimum Data Set for each resident of Kindred Transitional Care and Rehabilitation – Stratford. There is no requirement for Minimum Data Set for residents of Kindred Assisted Living at Stratford Commons.

There are no "Turnover Recap Reports" that are routinely generated. The Executive Director submitted electronically information concerning the termination of employees, whether voluntary or involuntary, to an email, which information was then entered electronically. From the electronically stored data, reports concerning turnover could then be generated. This data is still available.

8. The identity, location, and maintenance of any and all budgets prepared for the purpose of operating the subject nursing home, at any time during Mary Roberts' residency, including, but not limited to:

a. The identity and contents of any budgets prepared for the purpose of operating the subject nursing home, at any time, during Mary Roberts' residency at the subject nursing home, including all budgetary information and spreadsheets;

RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. No corporate representative will be produced on this topic.

b. The location where any budgets prepared for the purpose of operating the subject nursing home during Mary Roberts' residency at the subject nursing home, were kept, during Mary Roberts' residency to the present; and

RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. No corporate representative will be produced on this topic.

c. If any budgets prepared for the purpose of operating the subject nursing home, at any time, during Mary Roberts' residency at the subject nursing home, have been destroyed, the date when any such budgets were destroyed, the identity of the person who authorized the destruction of any such budgets, and the identity of the person or persons who destroyed any such budgets.

RESPONSE: No budgets have been destroyed.

9. The identity, location, and maintenance of any and all profit and loss statements for Defendants, including all spreadsheets and budgetary information, which were in place from 2013, 2014, 2015, 2016 and 2017, including, but not limited to:

a. The identity and contents of any profit and loss statements for Defendants, including all spreadsheets and budgetary information, that were in place from 2013, 2014, 2015, 2016 and 2017;

RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. No corporate representative will be produced on this topic.

b. The location where any such profit and loss statements, including all spreadsheets and budgetary information, were kept from 2013, 2014, 2015, 2016 and 2017; and

RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. No corporate representative will be produced on this topic.

c. If any such profit and loss statements, including all spreadsheets and budgetary information have been destroyed, the date when any such documents were destroyed, the identity of the person who authorized the destruction of any such documents, and the identity of the person or persons who destroyed any such documents.

RESPONSE: No profit and loss statements have been destroyed.

10. The identity, location, and maintenance of any and all of all Tax Returns for Defendants, as well as for any individual or other entity that owned the subject nursing home, for 2013, 2014, 2015, 2016 and 2017.

RESPONSE: Objection. Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. No corporate representative will be produced on this topic.

11. The existence, identity, and contents of any and all insurance agreements, under which any person, carrying on an insurance business, may be liable to satisfy part or all of any judgment, which may be entered in the within litigation, or to indemnify or reimburse for payments made to satisfy the judgment, including, but not limited to:

a. The existence of any and all applicable insurance agreements;

b. The contents of each applicable insurance agreement;

c. The contents of the declaration page for each applicable insurance agreement;

d. The name and address of each insurance carrier, relative to each applicable insurance agreement;

e. The name of the insured, as shown on each applicable insurance agreement;

f. All coverage limits relative to each applicable insurance agreement, including per person, per occurrence, and aggregate limits, all liability limits, all excess limits, and/or all umbrella limits;

g. Whether the coverage relative to each applicable insurance agreement is primary, excess, or umbrella;

h. The period of coverage for each applicable insurance agreement and whether each applicable insurance agreement is an occurrence policy or a claims made policy;

i. Whether any insurance carrier has denied coverage or is defending under a reservation of rights, relative to each applicable insurance agreement;

and

j. Whether each applicable insurance agreement is a "wasting" policy.

RESPONSE: Objection. This exact information was requested in Interrogatory No. 25 in Plaintiff's First Set of Interrogatories to Defendants and the information was provided. Further, the actual policy with dec page was produced in response to Request for Production No. 12 of Plaintiff's First Set of Requests for Production to Defendants.

There exists a policy of insurance through Cornerstone Insurance Company, 62 Forum Lane, 3rd Floor, Camana Bay, Grand Cayman, Cayman Islands with a single limit of $5 million. The named insured is Kindred Healthcare, Inc. The policy period is from January 1, 2018-December 31, 2018. There is no deductible. It is a claims-made policy and primary. There has been no denial of coverage or reservation of rights letter for this matter. It is a "wasting" policy. It is not a fronting policy.

12. The name and current or last known address of each of Mary Roberts' roommates, at any time, during her residency at the subject nursing home.

RESPONSE: Objection. This exact information was requested in Interrogatory No. 6 in Plaintiff's First Set of Interrogatories to Defendants and the information was provided. Defendants believe this information is protected by HIPAA and the disclosure of such information would violate HIPAA. Defendants will produce this information on court order.

Without waiving this objection, Plaintiff did not have a roommate while a resident of Kindred Assisted Living at Stratford Commons.

13. The investigation of Mary Roberts' fall and/or injuries, including, but not limited to:

a. The existence and current location of any documentation relative to any injuries that Mary Roberts suffered during her residency at the subject nursing home;

b. The name, title, and current address of any persons who assessed and/or provided any care to Mary Roberts for any such injuries resulting from any falls;

c. The name, title, and current address of any persons who contacted 911,

any physician, and/or any member of Mary Roberts' family following any falls;

d. The name, title, and current address of any other persons who have any knowledge of any falls suffered by Mary Roberts;

e. The name, address, and title of all individuals who were responsible for conducting any investigation and/or participated in any investigation, relative to Mary Roberts' fall;

f. The name, address, and title of each individual who was interviewed, relative, in any way, to Mary Roberts;

g. The name, address, and title of each individual who conducted each interview relative, in any way, to Mary Roberts;

h. The date, time, and location of each interview;

i. The contents of any and all interviews that occurred, relative, in any way, to Mary Roberts;

j. The location where all interview notes, relative, in any way, to Mary Roberts that were kept, from 2016 to the present;

k. The name, address, and title of everyone who has reviewed any of these interview notes;

l. If any interview notes, relative to Mary Roberts, have been destroyed, the date when they were destroyed, the identity of the person who authorized their destruction, and the identity of the person or persons who destroyed them;

m. The name, address, and title of each individual who made a written and/or recorded statement, relative, in any way, to Mary Roberts;

n. The name, address, and title of each individual who recorded any statement relative, in any way, to Mary Roberts;

o. The date, time, and location of any and all written and/or recorded statements relative, in any way, to Mary Roberts;

p. The contents of any and all written and/or recorded statements, relative, in any way, to Mary Roberts;

q. The location where any and all written and/or recorded statements,

relative, in any way, to Mary Roberts were kept, from 2016 to the present;

r. The name, address, and title of everyone who has reviewed any written and/or recorded statements relative, in any way, to Mary Roberts;

s. If any written and/or recorded statements, relative to Mary Roberts, have been destroyed, the date when they were destroyed, the identity of the person who authorized their destruction, and the identity of the person or persons who destroyed them;

t. The name, address, and title of each individual who wrote and/or contributed to any incident report, accident report, and/or unusual occurrence report, relative, in any way, to Mary Roberts;

u. The date, time, and location each incident report, accident report, and unusual occurrence report was obtained;

v. The contents of any and all incident reports, accident reports, and unusual occurrence reports, relative, in any way, to Mary Roberts;

w. The location where any and all incident reports, accident reports, and unusual occurrence reports, relative, in any way, to Mary Roberts, were kept, from 2016 to the present;

x. If any incident reports, accident reports, or unusual occurrence reports for the subject nursing home, relative to Mary Roberts, have been destroyed, the date when they were destroyed, the identity of the person who authorized their destruction, and the identity of the person or persons who destroyed them;

y. The name, address, and title of each individual and/or entity and/or state agency to whom any notes and/or summaries from any interview, relative, in any way, to Mary Roberts, were submitted and/or reported;

z. The name, address, and title of each individual and/or entity and/or state agency to whom any written and/or recorded statement, relative, in any way, to Mary Roberts, was submitted and/or reported;

aa. The name, address, and title of each individual and/or entity and/or state agency to whom any incident reports, accident reports, or unusual occurrence reports, relative, in any way, to Mary Roberts, were submitted and/or reported;

bb. The name, address, and title of each individual who spoke with any of Mary Roberts' family members regarding Mary Roberts' injuries and/or the investigation relative to Mary Roberts' injuries;

cc. The contents of any discussions that occurred with any of Mary Roberts' family members regarding Mary Roberts' injuries and/or the investigation relative to Mary Roberts' injuries;

dd. The date, time, and location of each discussion with any of Mary Roberts' family members regarding Mary Roberts' injuries and/or the investigation relative to Mary Roberts' injuries;

ee. The name, address, and title of each individual who reviewed or was responsible for reviewing the findings and/or conclusions of the investigation relative to Mary Roberts' injuries;

ff. The contents of all documentation of findings and/or conclusions of the investigation, relative to Mary Roberts' injuries;

gg. The location where all findings and/or conclusions of the investigation, relative to Mary Roberts' injuries, were kept from 2016 to the present; and

hh. If any findings and/or conclusions of the investigation relative to Mary Roberts', have been destroyed, the date when they were destroyed, the identity of the person who authorized their destruction, and the identity of the person or persons who destroyed them.

RESPONSE: Objection. This exact information was requested in Interrogatories Nos. 20 and 21 in Plaintiff's First Set of Interrogatories to Defendants and the information was provided. Further, this designated matter seeks information protected by the attorney-client privilege, work product doctrine and quality assurance privilege. No corporate representative will be produced on this topic.

14. The name and title of each and every individual, including each and every attorney, who has read or reviewed Mary Roberts' nursing home chart, at any time.

RESPONSE: Objection. This exact information was requested in Interrogatory No. 18 in Plaintiff's First Set of Interrogatories to Defendants. Further, this designated matter seeks information protected by the attorney-client privilege, work product doctrine and quality assurance privilege. No corporate representative will be produced on this topic.

15. The name, title, and current address of all consultants and/or management personnel hired to evaluate the adequacy of care rendered to residents at the subject nursing home during Mary Roberts' residency at the subject nursing home, or for a period of three (3) years prior to her residency, including but not limited to:

a. The name of any RN nurse consultant, pharmaceutical consultant, registered dietician consultant, registered nutritional consultant, physical therapy consultant, speech therapy consultant, other therapist, and any other health or medical consultant employed to evaluate or study the compliance readiness (i.e. survey preparation) of the subject nursing home;

b. The existence and current location of any and all ongoing incidental, or periodic report, study, evaluation, or assessment, related to patient care, generated or performed by any such consultant or management personnel, at any time, during Mary Roberts' residency at the subject nursing home and for a period of three (3) years prior to her residency.

RESPONSE: Objection. This exact information was requested in Interrogatory No. 20 and 21 in Plaintiff's First Set of Interrogatories to Defendants and the information was provided.

Without waiving this objection, none.

16. Any suspension, revocation, or action taken relative to any Defendant's right, license, certificate, or other authority to operate any nursing home or other long term care facility in the last five (5) years, including, but not limited to:

a. The state in which the action occurred;

b. The complete name and address of each nursing home or other long term care facility that was involved in the incident or incidents that precipitated the action;

c. A complete description of the action that was taken;

d. The date such action was taken; and

e. the amount of any fine(s), if any, that were levied.

RESPONSE: Objection. This exact information was requested in Interrogatory No. 29 in Plaintiff's First Set of Interrogatories to Defendants and the information was provided.

Without waiving this objection, KND Development 51, LLC f/d/b/a Kindred Transitional Care and Rehabilitation-Stratford's license was neither suspended nor revoked during this time period. KND Development 51, LLC f/d/b/a Kindred Living at Stratford's license was also neither suspended nor revoked during this time period.

17. The identity, contents and location of any and all reports generated relative to the nursing home and the identity of everyone those reports are provided to, including, but not limited to, patient care reports, financial reports, staffing reports, census reports, acuity reports, reports about surveys or citations or fines, marketing reports, labor reports and the identity of anyone these reports are sent to including the Administrator of the Nursing Home, the Director of the Nursing of the Nursing Home, any of the named Defendants and/or any other individual or entity.

RESPONSE: There are no such reports generated.

18. The existence and maintenance of any and all grievance and/or concern forms that were submitted to the subject nursing home, at any time, during Mary Roberts' residency and for a period of three (3) years prior to her residency, including, but not limited to:

a. The identity and contents of any grievance and/or concern forms submitted to the subject nursing home, at any time, during Mary Roberts' residency at the subject nursing home and for a period of three (3) years prior to her residency;

RESPONSE: The grievance forms for the time period of Plaintiff's residency and for a period of three (3) years prior to her residency remained at the facility when ownership was transferred effective October 2, 2017. They were in black binders by year and were in the social worker's office.

b. The processes by which grievance and/or concern forms for the subject nursing home were submitted by residents, family members, visitors, and employees, at any time, from three (3) years prior to Mary Roberts' residency through the end of her residency;

RESPONSE: If a resident or family member had a grievance, the person would fill out a form and submit it to the social worker, or the social worker would fill out the form if the grievance was given orally. The social worker would then address the grievance with the proper

department head. For instance, if the grievance related to therapy, the social worker would bring it to the attention of the rehab director. The grievance had to be resolved within five days of submission.

c. The process by which any grievance and/or concern forms submitted to the subject nursing home were maintained, at any time, from three (3) years prior to Mary Roberts' residency to the present, including the location where any grievance and/or concern forms submitted to the subject nursing home during Mary Roberts' residency at the subject nursing home and for a period of three (3) years prior to her residency, were kept, at any time, from three (3) years prior to Mary Roberts' residency to the present;

RESPONSE: Grievances were maintained in black binders by year and kept in the social workers office. The grievances from the time period of Plaintiff's residency and three years prior were left at the facility at the time of the transfer of ownership effective October 1, 2017.

d. The identity of each and every single person who was provided with a copy of any grievance and/or concern form for the subject nursing home, at any time, from three (3) years prior to Mary Roberts' residency through the end of her residency;

RESPONSE: The social worker would have been provided with the grievance form. Other individuals who may have received or reviewed grievances is unknown as it would depend on the nature of the grievance.

e. The identity of each and every entity and/or state agency, which was provided with a copy of any grievance and/or concern form for the subject nursing home, from three (3) prior to Mary Roberts' residency through the end of her residency; and

RESPONSE: None.

f. If any grievance and/or concern forms submitted to the subject nursing home, at any time, during Mary Roberts' residency at the subject nursing home and for a period of three (3) years prior to her residency, have been destroyed, the date when they were destroyed, the identity of the person who authorized their destruction, and the identity of the person or persons who destroyed them.

RESPONSE: The grievances from the time period of Plaintiff's residency and three years prior were left at the facility at the time of the transfer of ownership effective October 1, 2017. It is unknown if any have been destroyed since that time.

19. The location, creation, maintenance, and content of the staffing model used at the subject nursing home during Mary Roberts' residency, including, but not limited to:

a. Where the staffing model is located;

b. The identity of anyone that contributed to the creation of the staffing model, including anyone that contributed to the creation of the original and anyone that contributed to the creation of the version that was in place during Mary Roberts' residency at the subject nursing home, and the identity of their employer;

c. The requirements and contents of the staffing model itself and the reason for those requirements.

RESPONSE: No "staffing model" was utilized.

20. The location, creation, maintenance, and content of each of the named Defendants' Business Objectives, in use during Mary Roberts' residency, including, but not limited to:

a. Where all documentation of each of the named Defendants' Business Objectives is located;

b. The identity of anyone that contributed to the creation or modification of the Business Objectives for each of the named Defendants and the identity of their employer; and

c. The contents of the Business Objectives for each of the named Defendants.

RESPONSE: Objection. It is unknown what is meant by "Business Objectives."

Without waiving this objection, none.

21. Any policy, procedure, training or investigation, relative to Mary Roberts, that was done pursuant to 42 C.F.R. 483.12 requiring: (1) that all alleged violations involving mistreatment, neglect, abuse, or injury of unknown origin are reported and investigated; (2) that the facility retain evidence of that investigation, and (3) that the results of that investigation be reported to the administrator and the state survey agency, including:

a. Whether any such allegations were reported to the administrator and if so by whom;

b. Whether any such investigations were done;

c. The contents and results of any such investigations;

d. The location of any evidence and/or documentation of any such investigations; and

e. The identity of the administrator, the state survey agency, or other entity to whom the results were reported.

RESPONSE: Objection. The information sought by this Interrogatory is protected by the attorney-client privilege, work product doctrine and by the Peer Review and Quality Assurance.

Without waiving this objection, no policies and procedures were changed as a result of any issues with Plaintiff. It is not believed there was any training that resulted from the care and treatment of Plaintiff. Finally, 42 C.F.R. 483.12 does not apply to Plaintiff's residency at Kindred Assisted Living at Stratford Commons.

22. The location, creation, maintenance, and content of any records of the Hoyer Lift that was being used at the time that Mary Roberts was a resident of the subject facility, including, but not limited to:

a. The brand name of the Hoyer lift;

b. The model number of the Hoyer lift;

c. The serial number of the Hoyer lift;

d. Any other identifying information regarding the Hoyer lift;

e. Documentation of the purchase of the Hoyer Lift, or the leasing, or renting of the Hoyer lift;

f. Documentation of any maintenance that was performed on the Hoyer lift, at any time;

g. The identity of any company and/or individual who maintained the Hoyer

lift;

RESPONSE: It is not known what Hoyer lift was used, if any, for Plaintiff while she was a resident at Kindred Transitional Care and Rehabilitation – Stratford or Kindred Assisted Living at Stratford Commons. It is not known if the Hoyer lift at Kindred Assisted Living at Stratford Commons was supplied by the facility or the family. This information was not tracked and is therefore unknown.

23. Documentation of all training that was provided to the staff of the subject facility, leading up to and including the time that Mary Roberts was a resident of the subject facility, relative to the proper use of a Hoyer lift, including but not limited to, all in-service programs taught to the staff of the subject nursing home facility, all in-service program taught to the staff, any demonstrations done by the company that sold or leased the Hoyer lift to the subject facility, as well as any other education, whatsoever, relative to Hoyer Lifts, for a period of three (3) years leading up to and including Mary Roberts' residency.

RESPONSE: This information cannot be located.

24. Please identify all documentation of Mary Roberts' admission into the subject facility, specifically including, but not limited to, all assessments, all admission materials, etc. and please identify everyone involved in the admissions process, including, but not limited to, any and all decisions to admit Mary Roberts to the nursing home and/or skilled nursing facility and/or assisted living portion of the facility as well as any and all decisions to transfer her back and forth between these portions of the facility.

RESPONSE: Objection. This is overly broad and unduly burdensome. Most of this information is also currently available to Plaintiff by reviewing the chart on Plaintiff and the business office file. It is also confusing

Without waiving this objection, the chart includes the assessments and no corporate representative is necessary for this. The business office file includes documents used in the admission process.

For Kindred Transitional Care and Rehabilitation - Stratford, the Admissions Coordinator would handle the signing of paperwork. The Executive Director and the Director of Nursing would approve any admission. For Kindred Assisted Living at Stratford Commons, the Assistant Executive Director would handle the signing of paperwork. The Assistant Executive Director and the Assistant Director of Nursing would approve any admission.

Plaintiff was not transferred "back and forth" between Kindred Transitional Care and Rehabilitation – Stratford and Kindred Assisted Living at Stratford Commons. Plaintiff was never transferred from Kindred Assisted Living at Stratford Commons to Kindred Transitional Care and Rehabilitation - Stratford. On the two occasions Plaintiff was transferred from Kindred Transitional Care and Rehabilitation – Stratford to Kindred Assisted Living at Stratford Commons. Plaintiff was discharged based on medical necessity and when Plaintiff no longer needed the services of a nursing home and for discharge whether to home or assisted living. Plaintiff or her family elected for Plaintiff to then be admitted to Kindred Assisted Living at Stratford Commons.

25. Please identify all documentation of any process to transfer Mary Roberts from the nursing home and/or skilled nursing facility and/or assisted living portion of the facility, specifically including, but not limited to the identities of anyone involved in that decision, any documentation of any and all assessments that led to that decision, as well as, any and all documentation and/or communication whatsoever with Mary Roberts and/or her family that led to the decision to transfer Mary Roberts to the assisted living portion of the facility.

RESPONSE: The documentation concerning the discharge of Plaintiff from the nursing home can be found in the chart and the business office file. Plaintiff was discharged based on medical necessity and when Plaintiff no longer needed the services of a nursing home and for discharge whether to home or assisted living. Plaintiff or her family elected for Plaintiff to then be admitted to Kindred Assisted Living at Stratford Commons.

26. Please provide the specific dates exactly when Mary Roberts was admitted to the nursing home and/or skilled nursing facility and/or assisted living portion of the facility and any and all dates when she was transferred back and forth between the nursing home and/or skilled nursing facility and/or assisted living portion of the facility.

RESPONSE: Plaintiff was a resident of Kindred Transitional Care and Rehabilitation – Stratford from March 15, 2016 to June 9, 2016 and again from January 29, 2017 to February 28, 2017. She was a resident of Kindred Assisted Living at Stratford Commons from June 9, 2016 to November 1, 2016 and again from February 28, 2017 to April 7, 2017.

27. Please describe all documentation of all injuries that Mary Roberts suffered at the subject facility, including but not limited to any fractures.

RESPONSE: Objection. This Designated Matter infringes upon the quality assurance privilege. Further, any such documentation, if any, is in the chart, which has been produced. It is not a proper use of a Civ. R. 30(B)(5) deposition to have a corporate representative to testify on this issue.

Without waiving this objection, documentation of injuries, if any, would be in the charts.

28. Please identify anyone who was involved in any Hoyer lift transfers, with regards to Mary Roberts, at any time during her residency at the subject facility, specifically including, but not limited to, any Hoyer lift transfers that resulted in any injury to MaryRoberts.

RESPONSE: Objection. This Designated Matter assumes Plaintiff suffered an injury during a Hoyer lift transfer, which is in dispute. Further, this designated matter is overly broad and unduly burdensome. It seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Without waiving this objection, this information was not tracked and is unknown.

29. The identity of all staff who took care of Mary Roberts when she was a resident of the subject facility.

RESPONSE: Objection. Overly broad and unduly burdensome. It seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Without waiving this objection, this information is contained within the chart of Kindred Transitional Care and Rehabilitation – Stratford. Defendants have not been able to identify who made the notations in the chart for when Plaintiff was a resident at Kindred Assisted Living at Stratford Commons.

30. The identity of all documentation of who was scheduled to work at the facility and who actually worked at the facility during Mary Roberts' residency including but not limited to all schedules, punch detail reports, attendance reports, payroll reports and all electronic documentation used for the Payroll Based Journal.

RESPONSE: Objection. This documentation was produced in response to Plaintiff's First Set of Requests for Production.

Without waiving this objection, the Time Card Reports were produced, which include the times employees worked. The daily staffing schedules cannot be located.

31. The identity of all individuals who participated, in any way, in the admission of Mary Roberts to the subject facility, including each individual's name and title, each individual's current address, an indication of whether or not each individual was employed by any of the Defendants, an indication of which of the Defendants each individual was employed by, and a description of each individual's involvement in the admission process, relative to Mary Roberts, including the contents of all communications relative to the admission process, specifically including, but not limited to, all documentation of all communications as well as the identity of any and all individuals who acted on Mary Roberts' behalf at any time relative to the admission process.

RESPONSE: Erica Yan was the Admissions Coordinator. Her current address is unknown. She would have handled the paperwork for Plaintiff's admissions to Kindred Transitional Care and Rehabilitation. Angela Young, the Assistant Executive Director, would have handled the admission paperwork for Plaintiff's admissions to Kindred Assisted Living at Stratford Commons. Both were employed by KND Development 51, LLC. From the business office files, it appears that Phyllis Burks, a daughter of Plaintiff was present during these times. Any documentation of communications would be in the business office files.

Ebony Eaton, LPN was the nurse who completed Plaintiff's admission for the March 15, 2016 admission at Kindred Transitional Care and Rehabilitation - Stratford. Erika Gomez, RN was the nurse who completed Plaintiff's admission for the January 29, 2017 admission at Kindred Transitional Care and Rehabilitation - Stratford. Both were employed by KND Development 51, LLC. Any documentation of communications would be in the charts.

Because the requirements for assisted living are minimal, the initial assessments are minimal. From the records available for Plaintiff's admissions to Kindred Assisted Living at Stratford Commons, it is unknown what staff member completed her admissions. Any such individual would have been employed by KND Development 51, LLC. Any documentation of communications would be in the charts.

32. The identity and contents of all documents that were provided to Mary Roberts or any member of her family as part of the admission process, specifically including, but not limited to, any documents that were signed by Mary Roberts or any member of her family, as well as any other documents that were provided to Mary Roberts or any member of her family and/or were shown to Mary Roberts or any

member of her family, relative, in any way, to Mary Roberts' admission to the subject facility.

RESPONSE: Copies of the admissions package were provided to Plaintiff. These documents included the following:

- Admissions Agreement
- Attachment A-Consent to Admission and Treatment
- Attachment B-Federal and State Resident Rights
- Attachment C-Bed Hold Policy
- Attachment D-Notice of Privacy Practices
- Attachment E-Privacy Act Notification Statement
- Attachment F-Management of Resident's Personal Funds
- Attachment G-SNF Determination on Admission
- Attachment H-Medicare Secondary Payor (MSP) Screening
- Attachment I-Optional/Covered Items and Services
- Attachment J-Pharmacy Assignment of Benefits and Payment Agreement
- Attachment K-Voluntary Alternative Dispute Resolution Agreement
- Attachment L-Additional Regulations as Required by State Law
- Vaccine Information Sheet Acknowledgment
- Tobacco Free Policy Acknowledgment

These documents and those signed by Plaintiff or anyone on her behalf are in the business office files produced to Plaintiff.

33. The content of any and all conversations and/or communications, relative, in any way, to Mary Roberts' admission to the subject facility involving Mary Roberts or any member of her family or any one acting on her behalf, specifically including, but not limited to, any and all in-person meetings, any and all telephone conversations, any and all letters and/or e-mails sent to Mary Roberts or any member of her family or anyone acting on her behalf, and any and all other communications relative, in any way, to Mary Roberts' admission to the subject facility, specifically including, but not limited to: the date and time of each such conversation and/or communication; the name, title, and current address of each person who participated in each such conversation and/or communication; how each such conversation and/or communication was conducted (i.e., in-person, by telephone, by e-mail, by facsimile, by text message, etc.); and a description of each such conversation and/or communication including the content of all such communications.

RESPONSE: Objection. This is overly broad and unduly burdensome. It is an improper use of a Civ. R. 30(B)(5) deposition.

Without waiving this objection, the content of conversations and communications at the time of any admission are unknown to Defendants other than those reflected in the business office files, which have been produced. In general, the documentation listed under No. 30 above would have been reviewed with Plaintiff or anyone acting on her behalf. In general, there also would have been discussions about payor information (including obtaining documentation such as Medicare card; Social Security card; insurance card; PDP card; and Medicaid card); advance directives; health care power of attorney (and obtaining a copy of it); and ancillary charges.

Respectfully submitted,

/s/ Paul W. McCartney
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CERTIFICATE OF SERVICE

The foregoing has been filed and served by operation of the Court's electronic filing system and, pursuant to 5(B)(2)(f), upon any party not receiving electronic service by ordinary U.S. Mail, this 21st day of February 2019.

/s/ Paul W. McCartney
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