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

APPELLANT'S REPLY BRIEF

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I. The Trial Court Erred by Permanently Staying This Case and Forcing it to Binding Arbitration Because the Arbitration Clause is Void, Invalid, and Unenforceable.

The Trial Court's March 28, 2019 Journal Entry granting Appellee's Motion to Stay should be reversed as the subject arbitration clause is void, invalid, and unenforceable.

There is a presumption against arbitration when there is a question as to whether the parties voluntarily agreed to arbitration and/or whether there is a valid arbitration agreement. 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), this Court 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.

II. 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 are not parties to any arbitration clause.

None of the 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.

Appellee Amanda Eberhart is not a party to the subject arbitration clause. She is not named anywhere in the arbitration clause. She did not sign the arbitration clause. She had no basis to ask the Trial Court to stay this case. The Trial Court should not have stayed this case as to Appellee Amanda Eberhart.

Appellee Kindred Healthcare, Inc. is not a party to the subject arbitration clause. Kindred Healthcare, Inc. is not named anywhere in the arbitration clause. No one signed the arbitration clause on behalf of Kindred Healthcare, Inc. Kindred Healthcare, Inc. had no basis to ask the Trial Court to stay the case on its behalf. The Trial Court should not have stayed the case on behalf of Kindred Healthcare, Inc.

Appellee Kindred Healthcare Operating, Inc. is not a party to the subject arbitration clause. Kindred Healthcare Operating, Inc.is not named anywhere in the arbitration clause. No one signed the arbitration clause on behalf of Kindred Healthcare Operating, Inc. Kindred Healthcare Operating, Inc. had no basis to ask the Trial Court to stay the case on its behalf. The Trial Court

should not have stayed the case on behalf of Kindred Healthcare Operating, Inc.

Appellee Kindred Nursing & Rehab - Stratford is not a party to the subject arbitration clause. Kindred Nursing & Rehab - Stratford is not named anywhere in the arbitration clause. No one signed the arbitration clause on behalf of Kindred Nursing & Rehab - Stratford. Kindred Nursing & Rehab - Stratford had no basis to ask the Trial Court to stay the case on its behalf. The Trial Court should not have stayed the case on behalf of Kindred Nursing & Rehab - Stratford.

Appellee Kindred Transitional Care and Rehab - Stratford is not a party to the subject arbitration clause. Kindred Transitional Care and Rehab - Stratford is not named anywhere in the arbitration clause. No one signed the arbitration clause on behalf of Kindred Transitional Care and Rehab - Stratford. Kindred Transitional Care and Rehab - Stratford had no basis to ask the Trial Court to stay the case on its behalf. The Trial Court should not have stayed the case on behalf of Kindred Nursing & Rehab - Stratford.

Appellee KND Development 51 L.L.C. is not a party to the subject arbitration clause. KND Development 51 L.L.C. is not named anywhere in the arbitration clause. No one signed the arbitration clause on behalf of KND Development 51 L.L.C. KND Development 51 L.L.C. had no basis to ask the Trial Court to stay the case on its behalf. The Trial Court should not have stayed the case on behalf of KND Development 51 L.L.C.

Appellant Mary Roberts did not draft the arbitration clause. Therefore, any ambiguities in this clause must be resolved in her favor. *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208, 519 N.E.2d 1380 (1988).

The only party to this clause, other than Mary G. Roberts, is, "**0875** - Kindred Transitional Care and Rehabilitation – Stratford." That is not one of the Defendants in this case. There are a

number of Kindred Defendants. However, **0875** - Kindred Transitional Care and Rehabilitation – Stratford is not one of them.

Appellees argue that Kindred Transitional Care and Rehabilitation - Stratford is the registered trade name for Appellee KND Development, 51, LLC. However, Kindred Transitional Care and Rehabilitation - Stratford is not named as a party to the arbitration clause. **0875** - Kindred Transitional Care and Rehabilitation – Stratford is named as a party. And while the two names are similar, there are a number of Kindred entities involved in this case, some differentiated by a single word. Appellant Mary Roberts did not draft the arbitration clause. So any ambiguity is construed in her favor. Whoever did draft the clause not only could have drafted it to name Kindred Transitional Care and Rehabilitation - Stratford as a party, they could have drafted it to name Appellee KND Development, 51, LLC as a party. In fact they could have listed each of the Appellees as parties. They did not. Since none of the Appellees are listed as parties to the clause none of the Appellees have any basis to move to stay this case.

Appellees offer no explanation as to why the clause was not drafted such that each of the Appellees were named as parties and each of the Appellees signed the clause.

Appellant offered this Court a significant quantity of case law in Appellant's Brief in which Courts have clearly held that the if an individual or an entity is not a party to the arbitration clause, is not named in the clause and/or did not sign the clause, that individual or entity cannot seek to enforce that clause.

Appellees offer the Court no support for the notion that a contract can be expanded to bind non parties not named in the contract and who did not sign the contract.

The Appellees even concede that the arbitration clause, on its face, does not apply to

Appellees. Appellees simply make conclusory statements that "Clearly, claims against the entities that owned and/or operated the Facility are subject to the Agreement irrespective of whether they are parties to the agreement." Appellees' Br. page 10. In fact, the opposite is true. If the Appellees are not parties to the arbitration clause then they have no basis to ask that this case be stayed and forced to binding arbitration.

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 he contract.**" *Turner v. Langenbrunner*, 12th Dist. Warren No. CA2003-10-099, 2004-Ohio-2814.

The Appellees in this case did not make an offer. Mary Roberts did not accept any offer from any of the Appellees. There was no meeting of the minds between Mary Roberts and any of the Appellees. And the Appellees did not give Mary Roberts any consideration. As a result there is no argument that any of the Appellees are entitled to stay this case and force it to binding arbitration.

The identity of each party to the contract is an essential term of the contract. *McGee v. Tobin*, 7th Dist. No. 04 MA 98, 2005 Ohio 2119.

A contract "**must be specific as to the identity of the parties**." *Alligood v. Procter & Gamble Co.*, 72 Ohio App.3d 309, 591 N.E.2d 668 (1st Dist. 1991).

Appellees argue that the arbitration clause relates to Appellant's claims against any of the facility's employees, agents, officers, directors, parents, subsidiaries, affiliates or the medical director. That is not how a contract works. As clearly stated above the parties to a contract need to be named in the contract. You cannot bind unnamed parties by describing them. Parties to a contract need to be named in the contract and they need to sign the contract.

Appellees have not offered this Court nor the Trial Court any evidence that any of the Appellees are employees, agents, officers, directors, parents, subsidiaries, affiliates or the medical director of the facility.

None of the Appellees parties to the arbitration clause. As a result, their Motion to Stay should have been denied.

III. The Subject Arbitration Clause is 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(F) 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.**" (Emphasis added). The Appellees claim that the arbitration clause complies with O.R.C. §2711.23(F) "although the agreement did not have the **express language of R.C. 2711.23(F) contained in the agreement**". Appellees' Br. page 13. The Appellees argue that because there is nothing in the agreement that precluded a panel of three (3) arbitrators, no more than one (1) of which was a physician or representative of a hospital, they are in compliance with O.R.C. §2711.23(F). The statutory requirements of O.R.C. §2711.23 are not optional. If the statutory requirements are absent -- there is not a valid or enforceable contract.

The Rules and Procedures that would apply to the subject arbitration clause as attached to Appellant's Merit Brief as Exhibit "B", indicate that the default rule is "The arbitration shall proceed before a single arbitrator unless one or both parties request a panel of arbitrators." This is not in

compliance with O.R.C. §2711.23(F). There is nothing in the Rules and Procedures that address the second operative clause in O.R.C. §2711.23(F), which states: "no more than one of whom shall be a physician or the representative of a hospital".

Appellees cannot satisfy the requirements of O.R.C. §2711.23 by arguing that the nothing in the clause prohibits the requirements. O.R.C. §2711.23(F) requires that, "Any arbitration panel shall consist of three persons, no more than one of whom shall be a physician or the representative of a hospital." The subject arbitration panel in this case does not require that any arbitration panel shall consist of three persons, no more than one of whom shall be a physician or the representative of a hospital. As a result, the clause violates O.R.C. §271..23 and is therefore unenforceable.

O.R.C. §2711.23(G) mandates that "The arbitration agreement shall be separate from any other agreement, consent, or document". Appellees concede that the subject arbitration clause was attached to the Admissions Agreement. A document cannot be "separate from any other agreement, consent, or document" if it is an attachment to a separate document. Black's Law Dictionary defines "attach" as "To annex, bind, or fasten <attach the exhibit to the pleading>. *Black's Law Dictionary*, 152 (10th Ed. 2014). Because the arbitration clause is not separate from any other agreement, consent or document, it is invalid and unenforceable.

IV. 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).

"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.

As fully briefed in Appellant's Merit Brief, Appellees actively participated in this lawsuit evincing an acquiescence to proceeding in this judicial forum.

It is uncontroverted that Appellees filed an answer in this case. They did not move to stay this case in response to Appellant's Complaint.

In 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.

During these six (6) months Appellees filed several Motions asking the Trial Court to enforce the Civil Rules. 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 Appellant filed affidavits of merit. Appellees also requested a protective order to preclude Appellant from conducting a Civil Rule 30(B)(5) deposition. Seeking to enforce Civil Rule 10 and asking the Court for a protective Order are not things that are available if this case is being arbitrated instead of litigated. On June 27, 2018, the trial court granted, in part, Appellees' June 19, 2018 Motion, seeking to stay discovery until 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."

Appellees must not be permitted to have their cake and eat it too. They cannot avail themselves of the Civil Rules and the Trial Court's power to make discovery orders and then later try and avoid a jury trial by asking that the Court permanently stay the litigation that they have been actively participating in and force the case to binding arbitration.

On October 17, 2018, 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 Appellees, would be held in abeyance while the parties conducted discovery and mediated Appellant's claims. None of the Appellees ever participated in a Mediation of this case. Appellant's counsel tried multiple times to schedule a Mediation. Appellant's counsel suggested multiple dates and multiple mediators. None of the Appellees 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, Appellees again filed a motion asking this Court to permanently stay this case and force it to binding arbitration.

Appellees argue that because Appellant has not asserted a claim for wrongful death, the enforcement of the alleged arbitration clause would not result in this matter proceeding in two separate forums. This is incorrect. As Appellant clearly articulated, Defendants Stratford Care and Rehabilitation, Glenwillow Leasing, LLC and Providence Healthcare Management have **NOT** moved this Court for a stay pending binding arbitration. Therefore, if this case is arbitrated it will

also be litigated against these three (3) Defendants. So if this case is forced to arbitration it will proceed in two different forums. There is no judicial economy nor benefit to be gained by requiring that Appellant's claims proceed in two separate forums. The most efficient way to resolve this case is to allow the parties to complete the litigation that was stopped by Appellees' Motion to Stay.

V. Conclusion.

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

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing, Appellant's Reply Brief, was served via the Court's electronic filing system, this **14th day of August, 2019,** to the following:

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