[Cite as *Brown v. Extendicare, Inc.*, 2015-Ohio-3059.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

COURTNEY BROWN INDIVIDUALLY et al.	:	
	:	C.A. CASE NO. 26589
Plaintiffs-Appellants	:	
	:	T.C. NO. 14CV5655
v.	:	
	:	(Civil appeal from
EXTENDICARE, INC., et al.	:	Common Pleas Court)
	:	
Defendants-Appellees	:	

. . . . . .

O P I N I O N

Rendered on the ___31st___ day of ____July___, 2015.

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Courtney Brown, individually and as administrator of the estate and wrongful death beneficiary of her

mother, Patricia Brown, filed February 19, 2015. Courtney appeals from the January 20, 2015 "Decision, Order, and Entry Sustaining in part [and] Overruling in part Defendants' Motion to Compel Arbitration; Staying Case Pending Arbitration," issued in favor of Extendicare Health Services, Inc., Extendicare Health Network, Inc., Extendicare Health Facilities, Inc., Extendicare Homes, Inc., Extendicare Holdings, Inc., Northern Health Facilities, Inc., Dayton Care, LLC, and Wes Ramsey (collectively, "Extendicare").

{¶ 2} Courtney filed a complaint against Extendicare on October 1, 2014. The complaint alleges that Patricia, at the age of 64, was a resident of Arbors at Dayton, a skilled nursing facility located on Albany Street, from April, 2013, until her death on July 30, 2013. The complaint alleges that Patricia died as a result of personal injuries she suffered while at the facility. As noted in the trial court's decision, Courtney alleged 11 counts against Extendicare as follows: "(1) corporate negligence (non-lethal injuries); (2) corporate negligence (lethal injuries); (3) negligence; (4) nursing home violations (non-lethal injuries); (5) nursing home violations (lethal injuries); (6) medical malpractice (non-lethal injuries); (7) medical malpractice (lethal injuries); (8) malice and gross negligence; (9) fraud; (10) breach of fiduciary duty; and (11) premises liability."

{¶ 3} On December 2, 2014, Extendicare filed "Defendants' Motion to Compel Arbitration and Stay Proceedings," pursuant to R.C. 2711.02(B) and R.C. 2711.03(A). Extendicare asserted that the "parties to this action contractually agreed to arbitrate all claims at issue including enforcement of the Arbitration Agreement." Extendicare asserted that Courtney "will likely contend that the Arbitration Agreement is unconscionable, or that discovery is necessary before the Court can make a ruling." Extendicare asserted that the court "can compel arbitration with no additional information,

as none is required to make a determination of the validity of the Arbitration Agreement." Regarding procedural unconscionability, Extendicare asserted that "Courtney Brown, power of attorney for Patricia Brown, was not in her senior years; was not actually entering the nursing home; she was the family member assisting Patricia Brown, and to the Defendants['] knowledge had no cognitive or physical impairments that would prevent her from understanding the contract she was signing."

{¶ 4} Regarding substantive unconscionability, Extendicare asserted that the Arbitration Agreement complies with the factors enumerated in *Manley v. Personacare of Ohio*, 11th Dist. Lake No. 2005-L-174, 2007-Ohio-343, as follows:

> (1) the Arbitration Agreement is a stand-alone document, and, although longer than one page, the Arbitration Agreement is clear, unambiguous, and not overly long or complicated; (2) the Arbitration Agreement explains its purpose in numerous places, and even indicates that the patient could have reviewed the agreement with an attorney or family prior to signing; (3) the Arbitration Agreement contains language indicating the parties were waiving their right to a jury or court trial, and, although not in red type-face, it is in bold, capital letter type, which is clearly discernible from the rest of the agreement; and (4) the Arbitration Agreement contains a 30-day revocation period. Thus, from the four corners of the Arbitration Agreement, it is clear the *Manley* factors are indisputably met. Therefore, the Court can find the Arbitration Agreement is on its face commercially reasonable, substantively conscionable, valid and enforceable.

{¶ 5} Extendicare further asserted that wrongful death "claims are subject to arbitration because [*Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258] is inapplicable to the extent it has been overruled by [*Marmet Health Care Center, Inc. v. Brown*, ___U.S.___, 132 S.Ct.1201, 182 L.Ed.2d 42 (2012)]." According to Extendicare, "it was not the decedent, Patricia Brown, who signed the Arbitration Agreement, but rather it was the representative and sole beneficiary of her estate, Courtney Brown, who signed in her legal representative capacity." Accordingly, Extendicare asserted, Courtney "has agreed to arbitrate all claims."

{¶ 6} Extendicare asserted that Courtney's survival claims "are subject to arbitration and any other claims in the trial court, if determined not subject to arbitration, must be stayed pending arbitration of the survival claims." Extendicare asserted that in "the event the Court finds *Peters* is applicable and the wrongful death claims are not subject to arbitration, Defendants assert *Peters* specifically stands for the proposition that survival claims are in fact subject to pre-dispute arbitration agreements." Extendicare argued, pursuant to the language in the Arbitration Agreement, that "Courtney Brown, acting as Patricia Brown's personal representative, agreed to arbitrate claims belonging to Patricia Brown, in life or in death, namely any survival claims."

{¶ 7} Finally, Extendicare asserted that the "Court must issue a stay for all claims not subject to arbitration pending the arbitration of the survival claims in accordance with R.C. 2711.02(B). * * *. Therefore, at the very least the survival claims must be ordered to arbitration and the remaining claims must be stayed until arbitration of the survival claims is complete." Attached to the motion as Exhibit A is a copy of the "Alternative Dispute Resolution Agreement – Ohio." ("Agreement").

{¶ 8} The Agreement provides in relevant part as follows:

> 1. **Parties to the Agreement**. This Alternative Dispute Resolution ("ADR") Agreement (Hereinafter referred to as the "Agreement") is entered into by [Extendicare], on behalf of its parents, affiliates, and subsidiaries, including Arbors at Dayton (hereinafter referred to as the "Center"), a nursing facility, and Patricia Brown, a Resident at the Center (hereinafter referred to as "Resident"). It is the intent of the Parties that this Agreement shall inure to the benefit of, bind and survive the Parties, their heirs, successors, and assigns.

{¶ 9} The term "Resident" is defined as follows:

> * * * the Resident, all persons whose claim is or may be derived through or on behalf of the Resident, all persons entitled to bring a claim on behalf of the Resident, including any personal representative, responsible party, guardian, executor, administrator, legal representative, agent or heir of the Resident, and any person who has executed this Agreement on behalf of the Resident.

{¶ 10} Section 3 of the Agreement provides in part: "* * * The parties voluntarily agree that any disputes covered by this Agreement (hereinafter referred to as 'Covered Disputes') that may arise between the Parties shall be resolved exclusively by an ADR process that shall include mediation and, where mediation does not successfully resolve the dispute, binding arbitration. * * *."

{¶ 11} Section 4 of the Agreement addresses Covered Disputes and provides:

> This Agreement applies to any and all disputes arising out of or in

> any way relating to this Agreement or to the Resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law sitting in the State of Ohio and shall include, but not be limited to, all claims in law or equity arising from one Party's failure to satisfy a financial obligation to the other Party; a violation of a right claimed to exist under federal, state, or local law or contractual agreement between the Parties; tort; breach of contract; fraud; misrepresentation; negligence; gross negligence; malpractice; death or wrongful death and any alleged departure from any applicable federal, state, or local medical, health care, consumer or safety standards. Covered Dispute shall include the determination of the scope of or applicability of this Agreement to mediate/arbitrate. * * *

{¶ 12} The Agreement provides that the Resident may rescind the Agreement within 30 days of signing it, and that "* * *this Agreement, if not revoked within that time frame, shall remain in effect for all care and services rendered to the Resident at or by the Center regardless of whether the Resident is subsequently discharged and readmitted to the Center without renewing, ratifying, or acknowledging this Agreement." The following text appears at the end of the Agreement:

> THE PARTIES UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY ENTERING INTO THIS AGREEMENT THEY ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR DISPUTES DECIDED BY A COURT OF LAW OR TO APPEAL ANY DECISION OR AWARD OF DAMAGES RESULLTING FROM THE ADR PROCESS AS PROVIDED HEREIN. THIS AGREEMENT GOVERNS IMPORTANT LEGAL

RIGHTS. YOUR SIGNATURE BELOW INDICATES YOUR UNDERSTANDING OF AND AGREEMENT TO THE TERMS SET OUT ABOVE. PLEASE READ IT COMPELTELY, THOROUGHLY AND CAREFULLY BEFORE SIGNING. Initial: _____Resident

_____Center

{¶ 13} No initials appear beneath the above text. On the following signature page, the following text appears:

BY SIGNING THIS AGREEMENT, the Parties acknowledge that (a) they have read this Agreement; (b) have had an opportunity to seek legal counsel and ask questions regarding this Agreement; and (c) they have executed this Agreement voluntarily intending to be legally bound thereto * * * .

If signed by a Legal Representative, the representative certifies that the Center may reasonably rely upon the validity and authority of the Representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the Resident.

{¶ 14} Patricia Brown's name is typed above a line that provides, "Print Name of Resident," and Courtney Brown's signature appears above lines marked "Signature of Resident," "Signature of Legal Representative for Healthcare Decisions," and "Signature of Legal Representative for Financial Decisions." Courtney Brown's typed name appears above two lines marked "Print Name and Relationship or Title (Guardian, Conservator, Power of Attorney, Proxy)," although no relationship or title is indicated. These two lines are beneath the lines identifying Courtney as the Legal Representative

for Healthcare and Financial Decisions.

{¶ 15} On December 8, 2014, Courtney opposed Extendicare's motion, asserting as follows:

> * * * Controlling Ohio law provides that wrongful death beneficiaries can only bind themselves to arbitration for the wrongful death of a decedent when they agree to arbitrate their individual claims, which Courtney Brown did not do in this case. Furthermore, Plaintiff's survival claims cannot be subject to arbitration as no valid contract was ever created as Defendants have not established that Courtney Brown had the authority to act on Patricia Brown's behalf in signing the arbitration agreement.

{¶ 16} Courtney asserted that wrongful death beneficiaries are not subject to arbitration unless they agreed to arbitrate their individual claims. She asserted that "*Peters* is the controlling law on this issue." Regarding her wrongful death claims, Courtney asserted as follows:

> Defendants attempt to distinguish *Peters* by repeatedly asserting that because Courtney Brown merely signed the arbitration agreement and because she happens to be the only wrongful death beneficiary that her wrongful death claims are subject to arbitration. * * * However, this assertion ignores the fact that Courtney Brown signed in her capacity as "legal representative," a fact that Defendants themselves acknowledge earlier in their motion. * * * Signing a contract in a representative capacity and signing in the signatory's individual capacity are two entirely different legal actions as *Peters* makes clear.

{¶ 17} Regarding her survival claims, Courtney asserted that they are not subject to arbitration because no legally cognizable contract exists. Courtney asserted that it is "an elementary rule of law that the burden is upon the party attempting to enforce an agreement to establish that an agency relationship existed and that the act upon which the party relies was within the agency's authority. * * * Thus, the burden of proof falls on Defendants to show that Patricia Brown contracted to waive her Constitutional right to a jury trial in favor of arbitration."

{¶ 18} Courtney asserted as follows:

> Patricia Brown's daughter, Courtney Brown, signed the arbitration agreement. Defendants make the empty assertion that Courtney Brown signed the agreement in her authority as legal representative pursuant to a healthcare power of attorney and a financial power of attorney. Notably, neither of these purported documents were attached to Defendants' motion to support such a claim. Furthermore, next to the signature line on the arbitration agreement there is an indication that the signatory should identify the relationship or title to the resident being admitted to Defendants' facility. There is no indication from the arbitration agreement at issue in this case that Courtney Brown had any legal relationship to her mother that would give her the authority to waive Patricia Brown's constitutional rights to a jury trial. Plaintiff submits that without establishing that Courtney Brown had any legal authority to act on her mother's behalf in waiving her constitutional rights to a jury trial, Defendants have failed to meet their burden and their motion to compel arbitration must be denied.

{¶ 19} Courtney asserted that the trial court must determine if a valid agreement to arbitrate exists. Courtney asserted as follows:

> Any policy favoring arbitration is only implicated after the Court determines that a valid agreement to arbitrate exists. Ohio case law indicates that it is questionable whether any policy favoring arbitration has the same force in cases such as this one as it does in the typical case involving an arbitration clause. As this Court is well aware, the vast majority of cases dealing with arbitration agreements deal with those agreements that occur in commercial settings. Such agreements are borne out of negotiations between two sophisticated parties who are simply bargaining for the opportunity to resolve their disputes in a certain forum. In those instances the parties are aware of the types of disputes that may arise, particularly since any dispute would be based on the contract that was negotiated between those parties. It is quite natural that courts and legislatures would recognize a "policy" favoring arbitration in such settings.
>
> A case involving personal injury, however, particularly in the nursing home setting, is far different. For example, there is no negotiation between the parties as to the terms of the agreement. At the time of Patricia Brown's admission to the nursing home, neither she nor her family had a reasonable expectation that she would suffer the injuries enumerated in Plaintiff's Complaint. * * * . It was certainly not reasonable to expect that Defendants would fail to provide care to [Patricia] Brown such that she would suffer horrific and preventable injuries during her residency at

Defendants' nursing home. Any policy favoring arbitration must rest against this backdrop.

{¶ 20} On December 15, 2014, Extendicare filed a Reply, asserting in part:

> The Supreme Court has well-established precedent requiring courts to enforce agreements to arbitrate "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." [*Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010).] Further, because Courtney Brown signed the Arbitration Agreement, which anticipated arbitrating disputes regarding the "scope of or applicability of" the Agreement, *See* Ex. A., this court must compel to arbitration Plaintiff's claim that Courtney Brown did not have the authority to sign on behalf of Patricia Brown. Finally, to the extent any Ohio case law or statutes are incongruent with the above Supreme Court precedent, those laws are preempted by the FAA. * * *

{¶ 21} In the event that the court did not compel arbitration, Extendicare asserted that, in signing the Arbitration Agreement, Courtney "was acting with, at the very least, apparent authority to act on behalf of Patricia Brown." Extendicare asserted that Courtney "signed numerous documents on behalf of Patricia Brown, including the Arbitration Agreement * * * and the 2012 Admission[] Agreement." In addition to the Agreement, an Admission Agreement, dated September 5, 2012, is attached to the Reply, and the signature page contains Courtney's signatures as "Legal Representative for Healthcare Decisions" and "Legal Representative for Financial Decisions," and both

signatures are above lines that provide "Print Name and Relationship or Title (Guardian, Conservator, Power of Attorney, Proxy)" and no relationship is indicated. The 2012 Admission Agreement does not reflect Patricia's signature, although her typed name appears above a line that provides "Print Name of Resident." Also attached to the Reply is an Admission Agreement for Arbors at Dayton, dated April 3, 2013. The signature page therein reflects Patricia's signature on a line that provides "Signature of Resident," and Courtney's typed name appears above two lines that provide "Print Name and Relationship or Title (Guardian, Conservator, Power of Attorney, Proxy)," which are below lines that provide "Signature of Legal Representative for Healthcare Decisions" and "Signature of Legal Representative for Financial Decisions." Courtney's signature does not appear on the signature page of the 2013 Admission Agreement. We note that the Agreement remained in effect for this subsequent admission.

{¶ 22} According to Extendicare, at "a minimum, '[w]hile [Pat Brown] may not have held [her daughter] out to the public as her agent, she knowingly permitted her to act as having such authority by signing . . . the Agreement.' *Broughsville v. OHECC, LLC,* 9th Dist. Lorain No. 05CA008672, 2005-Ohio-6733, ¶ 11." According to Extendicare, it "is curious that the named Plaintiff and personal representative for the estate of Patricia Brown, Courtney Brown, is now arguing that she did not have the requisite legal authority to sign any legally binding document on behalf of Patricia Brown and now for all intents and purposes states that she committed a fraud upon Defendants" when she signed the Arbitration Agreement.

{¶ 23} Extendicare asserted that since Courtney signed the Arbitration Agreement, "therefore arbitration is not being imposed on the unwilling as it arguably was

in *Peters*. In fact, if the Arbitration and Admissions Agreements were taken in conjunction, Courtney Brown agreed to be financially responsible for Patricia Brown's care, and agreed to arbitrate those same financial claims." Extendicare asserted as follows:

> In sum, Plaintiffs argue that Courtney Brown only signed the Arbitration Agreement to agree to arbitrate any claims her mother would have had, and for any claims the Defendants may have had against Courtney Brown for failure to meet a financial obligation on behalf of Patricia Brown. But, Courtney Brown's signature does not evidence an agreement to arbitrate the wrongful death claims. This is disingenuous. Courtney Brown cannot now pick and choose what claims she contractually agreed to arbitrate at her convenience.

Finally, Extendicare asserted that survival claims "are subject to arbitration and any other claims in the trial court, if determined not subject to arbitration, must be stayed pending arbitration of the survival claims."

{¶ 24} In its Decision, the trial court initially determined as follows:

> * * * [A] valid arbitration agreement exists. On September 7, 2012, Plaintiff as Resident and Legal Representative for Healthcare and Financial Decisions for Patricia signed an Alternative Dispute Resolution Agreement and an Admission Agreement. Thus, the Court finds that the Agreement is enforceable unless grounds exist at law or in equity for revoking the agreement. R.C. 2711.01(A).
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> Plaintiff cites to *Fortune v. Castle*, 5th Dist. Holmes No. 05 CA1, 164

Ohio App.3d 689, 2005-Ohio-6195 and *Wascovich v. Personacare of Ohio*, 11th Dist. Lake No. 2010 L 006, 190 Ohio App.3d 619, 2010-Ohio-4563 for the proposition that the Agreement is invalid in the context of claims involving personal injury in a nursing home setting.

* * *

* * * The Court finds that Plaintiff has not set forth specific facts or evidence to establish that the arbitration clause is unenforceable. It is self-evident that Plaintiff executed the Agreement as legal representative for Patricia on September 7, 2012. * * * Further, plaintiff does not set forth any facts or evidence to establish the arbitration clause is unconscionable.

* * *

* * * Moreover, in both cases Plaintiff cites, the appellate court reversed the trial court's Decision and ultimately upheld the validity of the arbitration agreements, in part, finding that the arbitration agreements were not either procedurally or substantively unconscionable. The concern the Fifth District noted regarding arbitration clauses in the context of transactions between large corporations and ordinary consumers was merely *dicta*. Even so, that concern is not present in this case or at the very least is alleviated by the fact the Plaintiff failed to establish that the Agreement is unconscionable and not enforceable. Thus, the Court concludes that a valid agreement exists and Defendants are entitled to enforce the arbitration clause contained therein.

{¶ 25} The trial court next addressed "the issue of whether Plaintiff's survival

claims are subject to arbitration" as follows:

> * * * The heart of Plaintiff's argument is that without Defendants establishing that [Courtney] had any legal authority to act on Patricia's behalf in waiving her constitutional right to a jury trial Defendants have failed to meet their burden to show that Patricia contracted to waive her right to a jury trial in favor of arbitration.
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> The Court has already found that on September 7, 2012, Plaintiff as Resident and Legal Representative for Healthcare and Financial Decisions for Patricia signed an Alternative Dispute Resolution Agreement and an Admission Agreement. Pursuant to the Agreement, "Resident" is defined in part as: ["]* * * all persons entitled to bring a claim on behalf of the Resident, including any personal representative, responsible party, guardian, executor, administrator, legal representative, agent or heir of the Resident, and any person who has executed this Agreement on behalf of the Resident.["] Additionally, the Ohio Supreme Court has held that the waiver of the right to a jury trial is a necessary consequence of agreeing to arbitration and is not unconscionable. * * *
>
> The fact that Plaintiff signed the Agreement on behalf of Patricia establishes the necessary relationship required to enforce the Agreement and bind Plaintiff to arbitrate any survival claims. Interestingly enough, in arguing that her wrongful death claims are not subject to arbitration, * * *Plaintiff readily admits that she signed the Agreement in her capacity as "legal representative" for Patricia. Plaintiff does not have the luxury of cherry

> picking her contractual obligations as [a] consequence of being a signatory to the Agreement. The signature page of the Agreement stated in part[:] "if signed by a legal representative, the representative certifies that the Center may reasonably rely upon the validity and authority of the Representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the Resident". Therefore, the Court finds that pursuant to *Peters*, *supra*, 2007-Ohio-4787 at P18, the arbitration clause in the Agreement is binding upon Patricia's heirs and applies to Plaintiff's survival claims.

{¶ 26} Finally, the trial court determined that Courtney's wrongful death claims are not subject to arbitration. The court ordered Courtney's survival claims to arbitration, and the court stayed Courtney's wrongful death claims pending the arbitration.

{¶ 27} Courtney asserts a single assignment of error herein as follows:

> THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEES' MOTION TO COMPEL ARBITRATION AS TO THE SURVIVAL CLAIMS OF PATRICIA BROWN BECAUSE COURTNEY BROWN DID NOT HAVE ANY AUTHORITY WHEN SHE SIGNED THE ARBITRATION AGREEMENT.
>
> A. Courtney Brown did not possess actual authority.
>
> B. Courtney Brown did not possess apparent authority.
>
> C. Courtney Brown did not ratify the arbitration agreement.

{¶ 28} Courtney acknowledges that she signed the Agreement on signature lines designated "Signature of Resident," "Signature of Legal Representative for Healthcare

Decisions," and "Signature of Legal Representative for Financial Decision." She asserts however that her relationship or title is not indicated as the signature page requires in two areas. Courtney asserts that Extendicare did not "include any indication of her relationship or title as the form required. * * *. This is a tacit admission that Appellees knew Courtney Brown did not have authority to act on her mother's behalf." Courtney further asserts that Extendicare "did not produce any evidence to the trial court that [she] was the legal representative for healthcare or financial decisions for her mother. This lack of evidence is not surprising as Plaintiff and her counsel have separately searched for any such document, and despite this search, no document has been found and or is believed to be in existence." Courtney asserts that while the trial court found the Arbitration Agreement to be binding on her survival claims, "it did not specifically identify what type of authority Courtney Brown allegedly possessed upon signing that document."

{¶ 29} Courtney asserts that she was not Patricia's "Legal Representative for Healthcare or Financial Decisions and the trial court abused its discretion in so holding without any evidence of such a relationship." Regarding her argument that she did not possess actual authority under the Arbitration Agreement, Courtney asserts as follows:

> Confusingly, the trial court also seemed to find that Courtney Brown signed the arbitration agreement in her capacity as "Resident." * * * The trial court cited the definition of "Resident" from the arbitration agreement itself * * *. It is unclear from the Order what significance the trial court deemed this language to have. Obviously, the language of a contract does not change the general requirements of contract law that only one acting within the scope of his or her authority as an agent can bind a third party

> principal to a contract. The language of the agreement could not in and of itself bestow any legal authority upon one who does not otherwise possess it. Any attempt to rely on this language as a basis for its holding is therefore entirely erroneous.

{¶ 30} Regarding her argument that she lacked apparent authority under the Arbitration Agreement, Courtney notes that Extendicare asserted before the trial court that she had " 'at least apparent authority.' " Courtney asserts that "in so arguing, Extendicare misrepresented how apparent authority is established." Courtney argues as follows:

> Extendicare wrongly directed the trial court to consider Courtney Brown's actions in determining whether apparent authority existed. Specifically, Extendicare points to the fact that Courtney Brown signed numerous documents on behalf of Patricia Brown. * * * The actions of an agent are irrelevant for determining apparent authority. * * *
>
> Thus, Courtney Brown's actions in signing the arbitration agreement, or any other documents, are not relevant in determining whether she acted with apparent authority. Even assuming *arguendo* that Courtney Brown held herself out through her own words and actions a[s] being legally authorized to act as an agent of Patricia, her words and actions as an agent would not be part of a determination of apparent authority as only the actions of the principal are relevant. Extendicare did not provide the trial court with any evidence that Patricia Brown held out Courtney Brown to the public as her authorized agent.

> Extendicare argued in its Reply that even though Patricia Brown did not hold Courtney Brown out to the public as her agent, she knowingly permitted Courtney Brown to act as though she possessed such authority by signing the Agreement because Patricia never exercised her right of rescission. * * * However, Extendicare never established that Patricia Brown knew of the arbitration agreement or knew that Courtney Brown signed it. Extendicare asserted that "there is no argument by Plaintiff that Patricia Brown was unaware that Courtney Brown was signing the admittance paperwork . . ." * * * In so arguing, Extendicare inappropriately shifted the burden to Courtney Brown to show the absence of Patricia's knowledge, and therefore, apparent authority. This argument is also inappropriate in light of Courtney Brown's clear allegations in her Complaint that prior to April 2013, Patricia Brown was no longer competent to handle her own affairs and her cognitive and physical skills were impaired.

{¶ 31} Courtney directs our attention to *Templeman v. Kindred Healthcare, Inc.* 8th District Cuyahoga No. 99618, 2013-Ohio-3738, as well as *Koch v. Keystone Pointe Health & Rehabilitation*, 9th Dist. Lorain No. 11CA010081, 2012-Ohio-5817, which she asserts are analogous to the matter herein. In *Templeman*, the 8th District determined that an ADR agreement was not enforceable against the estate therein, since the power of attorney of the decedent's representative did not contain the decedent's signature nor indicate that the representative's authority to act on behalf of his mother extended to her heath care. *Id*., ¶ 25. "In addition, in spite of what the Kindred defendants' form specifically required, none of the Kindred defendants required of [the representative] that

he provide his 'Printed Name & Authority' to sign the ADR agreement on his mother's behalf." *Id.*, ¶ 26. The Eighth District concluded as follows:

> * * * This case compels the same conclusion reached by the court in *Koch*, 9th Dist. [Lorain] No. 11CA 0110081, 2012-Ohio-5817, which, with substitutions of wording based upon the facts of the instant case, noted at ¶ 14-19 as follows:
>
> * * * [The defendants] did not [receive a valid power of attorney] to act on [the decedent's] behalf, but the nursing facility disregarded this fact and told [the decedent's son] that it would not admit [the decedent] if [he] did not sign the forms. Under these circumstances, there was no evidence that [the defendants] acted in good faith having reason to believe that [the son] had authority to enter into any contract on behalf of [the decedent]. [Defendants'] demand that [the son] sign the forms [or his mother would] be denied admission for necessary rehabilitation did not create the apparent authority necessary * * *. Therefore, to the extent that the trial court premised its order granting the motion to compel arbitration on a finding [of] apparent authority to execute the arbitration agreement, such a finding was unreasonable.
>
> * * *
>
> Based on the only evidence before the trial court, there was nothing to indicate that [the decedent] was even aware of the existence of any * * * arbitration agreement, let alone the terms of such an agreement. Under these circumstances, to the extent that the trial court premised its order

> granting the motion to compel arbitration on a finding that [the decedent] ratified the arbitration agreement signed by [her son], such a finding was unreasonable.
>
> Based on the above analyses, no contract existed which bound the parties to arbitrate any dispute or claims. Therefore, the trial court erred by granting [the defendants'] motion to stay the proceedings and compel arbitration.

Templeman, ¶ 26, quoting *Koch,* ¶ 14-19.

{¶ 32} Regarding Extendicare's citation to *Broughsville*, Courtney asserts that "in finding that apparent authority existed based on the principal's knowledge of the agent's action, the court noted that the principal was present at the signing of the arbitration agreement, made no attempt to stop the agent, and did not ask any questions or to read to the document. Notably, Extendicare has not established these additional facts here." Courtney further asserts as follows:

> In *Broughsville*, the Ninth District Court of Appeals particularly noted that where a resident lacks the mental competence to authorize an agent to enter into an arbitration agreement, no apparent authority could exist. Courtney Brown clearly alleged Patricia Brown's incompetence upon her initial pleading of the Complaint in this matter. * * * Accordingly, Appellant submits that Patricia Brown's awareness of the arbitration agreement cannot be presumed by Extendicare or the trial court without any affirmative evidence so indicating.

{¶ 33} Finally, Courtney asserts that Patricia did not ratify the arbitration

agreement. According to Courtney, for "the same reason that Extendicare could not establish that Patricia Brown knowingly allowed Courtney Brown to act on her behalf, it cannot establish that Patricia Brown ratified the arbitration agreement. The principal's knowledge of the material facts is a prerequisite to any possibility of ratification," and "Extendicare has not established that Patricia Brown was ever aware of the material facts surrounding the arbitration agreement."

{¶ 34} Extendicare initially responds that "[m]any of the bases for arguments made by Courtney Brown to this Court were never made in the record below. As such, evidence or argument presented for the first time on appeal must not be considered." Extendicare asserts that Courtney "now contends that because no power of attorney ever existed, she could not have had actual authority." Extendicare asserts that Courtney "also argues for the first time there are deficiencies in her signature on the Arbitration Agreement," since her relationship to her mother is not provided on the document. Extendicare asserts that Courtney "further states for the first time on appeal that '[t]here is no indication that Patricia Brown was present upon Courtney Brown's signing of the arbitration agreement or that Patricia Brown knew that paperwork of any kind was being executed.' " According to Extendicare, Courtney "cannot argue an abuse of discretion, or in reality argue that the decision is against the manifest weight of the evidence, based on facts and allegations she chose not to present to the court below."

{¶ 35} Extendicare asserts that prima facie evidence of Courtney's authority was presented to the trial court, and "[f]undamentally, Courtney Brown is arguing that because she misrepresented her authority to Extendicare when she signed the Arbitration Agreement, she cannot now be bound by it and should benefit by not being compelled to

arbitrate claims she agreed to arbitrate on behalf of Patricia Brown." Extendicare asserts that it "presented the Arbitration Agreement, multiple medical and financial documents bearing Courtney Brown's signature in an apparent authorized representative capacity, and Courtney Brown's own admission she signed the Arbitration Agreement as a 'legal representative,'" and that Courtney failed to rebut the evidence.

{¶ 36} Based upon "contradictory arguments" asserted in Courtney's response to the motion to compel arbitration, Extendicare asserts that, pursuant to Civ.R. 11, counsel for Courtney, in signing the response, certified that both Courtney lacked authority to sign the Arbitration Agreement, and that she signed the Arbitration Agreement as Patricia's legal representative.

{¶ 37} Extendicare asserts that *Vogt v. Indianspring of Oakley*, 1st Dist. Hamilton No. C-110864, 2012-Ohio-4124 is analogous to the matter herein. In *Vogt,* the trial court denied a long-term care facility's motion to compel arbitration, and on the facility's appeal, the First District determined as follows:

> Rather than focus on the question of substantive and procedural unconscionability, Vogt [the daughter of the long-term care facility patient] instead challenged the validity of the arbitration agreement based upon the fact that Vogt, not Bingham, [Vogt's mother] had signed the agreement. In signing the agreement (and initialing various clauses of the agreement), Vogt held herself out as the legal representative of Bingham. Vogt points to a statement in the agreement that states: "If Resident is unable to sign this Agreement, then a legal representative of the resident may sign on his/her behalf. The person signing below certifies that he/she has the legal

> authority to enter into this Agreement on Resident's behalf with the facility either through a valid Power of Attorney or a guardianship appointment." Vogt contends that this language put the burden on [the facility] to demonstrate that Bingham was unable to sign the agreement. But Vogt's contention ignores the presumption in favor of arbitrability. As the burden was on Vogt to show that the agreement was unenforceable, she had to demonstrate that she had not validly exercised her authority as Bingham's legal representative when she signed the agreement. She did not make such a demonstration.
>
> Because we conclude that Vogt did not demonstrate any grounds for revoking the arbitration agreement, we conclude that the trial court erred when it refused to grant [the facility's] motion for a stay of proceedings for a referral to arbitration. * * *

Vogt, ¶ 7-8.

{¶ 38} Extendicare further asserts that, "because the finding of an agency relationship is a finding of fact, it carries a heavy presumption that the trial court's finding of fact was correct, and can only be overturned if the finding of fact was against the manifest weight of the evidence."

{¶ 39} In Reply, Courtney asserts that Extendicare failed to establish that a valid contract to arbitrate existed. She asserts again that "the acts of the principal, not the agent, are the focus of an inquiry regarding whether a valid agency relationship exists. This is true regardless of whether the agent purportedly acted with actual or apparent authority, or even to establish that the principal ratified the agent's actions." Courtney

asserts as follows:

> * * *Courtney Brown made two main arguments to the trial court: 1) that as a wrongful death beneficiary who did not sign the arbitration agreement in her individual capacity but as a legal representative of the decedent, she cannot be compelled to arbitrate her wrongful death claims; and 2) that Extendicare failed to meet its burden to establish that Courtney Brown was actually the legal representative of Patricia, and therefore, no valid contract to arbitrate even existed. Alternative arguments such as these are merely part of an effective advocacy strategy and Extendicare's attempt to somehow characterize such an argument as an admission of fact is baseless.

{¶ 40} Courtney asserts that accepting "the rule of law as set out in *Vogt* and argued by Extendicare here, would allow a nursing home to have **anyone** sign a contract waiving a resident's constitutional right to a jury trial." Courtney further asserts that *Vogt* "applies the public policy favoring arbitration to contract formation, inappropriately shifting the burden to the party alleging that no contract was ever formed." Courtney asserts that since "the issue presented to the trial court was whether a valid contract was ever formed, no presumption of arbitrability was ever triggered." Finally, Courtney asserts that "Extendicare's argument that the certification language contained in the arbitration agreement itself is somehow prima facie evidence of Courtney Brown's authority to act on Patricia Brown's behalf misconstrues well settled agency and contract law." According to Courtney, "the very act of signing the agreement with that language was an unauthorized act of the agent, and thus, the certification language is similarly ineffective

as to the principal, Patricia Brown. * * * Courtney Brown was not acting with any authority when she signed the agreement, which makes the entirety of that agreement, including the certification language, invalid."

{¶ 41} As this Court has previously noted, " 'Ohio has a strong public policy favoring arbitration.' * * *. Arbitration is favored because it allows parties to bypass expensive and time-consuming litigation and 'provides the parties thereto with a relatively expeditious and economical means of resolving a dispute.' * * *." *Westerfield v. Three Rivers Nursing & Rehab. Ctr.*, 2d Dist. Montgomery No. 25347, 2013-Ohio-512, ¶ 16. "Indeed, the Ohio courts recognize a 'presumption favoring arbitration' that arises 'when the claim in dispute falls within the scope of the arbitration provision.' * * *." *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 27.

{¶ 42} "The Ohio Arbitration Act sets forth a trial court's role in construing and enforcing arbitration agreements." *Lindsey v. Sinclair Broadcast Group, Inc.,* 2d Dist. Montgomery No. 19903, 2003-Ohio-6898, ¶ 15. R.C. 2711.01(A) provides:

> A provision in any written contract * * * to settle by arbitration a controversy that subsequently arises out of the contract, * * * or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

{¶ 43} R.C. 2711.02(B) provides:

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

{¶ 44} As this Court has previously noted, R.C. 2711.01 " 'acknowledges that an arbitration clause is, in effect, a contract within a contract, subject to revocation on its own merits.' " *Westerfied*, ¶ 18. "The arbitrability of a claim is question of law, which we review de novo. * * *." *Id*., ¶ 19. "Whether the parties have executed a valid written arbitration agreement is a matter of state contract law." *Id*., ¶ 20. As this Court further noted in *Westerfield*, at ¶ 20-21:

> * * * "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment) a manifestation of mutual assent and legality of object and of consideration." * * * The parties must have a "meeting of the minds" as to the essential terms of the contract in order to enforce the contract. * * *
>
> When reviewing a contract, the court's primary role is to ascertain and give effect to the intent of the parties.* * *

{¶ 45} Regarding Courtney's ability serve as Patricia's agent, "[a]n agency

relationship is normally a contractual relation created by an express or implied agreement * * *." *Irving Leasing Corp v. M & H Tire Co.,* 16 Ohio App.3d 191, 475 N.E.2d 127 (2d Dist. 1984). As noted by the Supreme Court of Ohio in *Master Consolidated Corporation v. BancOhio National Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991):

> The relationship of principal and agent, and the resultant liability of the principal for the acts of the agent, may be created by the express grant of authority by the principal. Absent express agency, the relation may be one of implied or apparent agency. As the Supreme Judicial Court of Maine observed, "* * * Express authority is that authority which is directly granted to or conferred upon the agent or employee in express terms by the principal, and it extends only to such powers as the principal gives the agent in direct terms; and the express provisions are controlling where the agency is expressly conferred. * * *" *Stevens v. Frost* (1943), 140 Me. 1, 7, 32 A.2d 164, 168. * * *
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> * * *
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> "Apparent authority" has been defined as "* * * the power to affect the legal relations of another person by transactions with third persons * * * arising from * * * the other's manifestations to such third person." 1 Restatement of the Law 2d, Agency (1958), 30 Section 8. This court, in *Miller v. Wick Blg. Co.* (1950), 154 Ohio St.93, 42 O.O. 169, 93 N.E.2d 467, paragraph two of the syllabus, held that:
>
> "Even where one assuming to act as agent for a party in the making of a contract has no actual authority to so act, such party will be bound by

the contract if such party has by his words or conduct, reasonably interpreted, caused the other party to the contract to believe that the one assuming to act as agent had the necessary authority to make the contract." See, also, *Cascioli v. Central Mut. Ins. Co.* (1983), 4 Ohio St.3d 179, 181, 4 OBR 457, 459, 448 N.E.2d 126, 128.

Further, this court in *General Cartage & Storage Co. v. Cox* (1906), 74 Ohio St. 284, 294, 78 N.E. 371, 372, explained that, " '[w]here a principal has by his voluntary act placed an agent in a situation that a person of ordinary prudence, conversant with business usages, and the nature of the particular business, is justified in assuming that such agent is authorized to perform on behalf of his principal a particular act, such particular act having been performed the principal is estopped as against such innocent third person from denying the agent's authority to perform it.' * * *"

Thus, in order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: " '* * * (1) [t]hat the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. The apparent power of an agent is to be determined by the act of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal

> himself by his acts or conduct has clothed the agent with the appearance of the authority and not where the agent's own conduct has created the apparent authority. * * *' " *Logsdon v. ABCO Constr. Co.* (1956), 103 Ohio App. 233, 241-242, 3 O.O.2d 289, 293, 141 N.E.2d 216, 223; *Ammerman v. Avis Rent A Car System, Inc.* (1982), 7 Ohio App.3d 338, 7 OBR 436, 455 N.E.2d 1041; *Blackwell v. Internatl. Union*, *U.A.W.* (1983), 9 Ohio App.3d 179, 9 OBR 289, 458 N.E.2d 1272.

Master Consolidated Corp., at pgs. 574, 576-577.

{¶ 46} "The burden of proving [that apparent authority] exists rests upon the party asserting the agency." *Irving Leasing Corp. v. M & H Tire Co.*, 16 Ohio App.3d 191, 475 N.E.2d 127 (2d Dist. 1984).

{¶ 47} We initially note the distinction between Courtney's survival claims, which the court found to be subject to arbitration, and Courtney's wrongful death claims, which the trial court found were not subject to arbitration. "* * * [W]hen an individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* leading to his or her death as well as a wrongful-death action *for the injuries suffered by the beneficiaries of the decedent* as a result of the death." *Peters v. Columbus Steel Castings Co.,* 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258, ¶ 11.

{¶ 48} As noted above, in her memorandum in opposition to Extendicare's motion to compel arbitration, Courtney asserted that "no valid contract was ever created as Defendants have not established that Courtney Brown had the authority to act on Patricia Brown's behalf in signing the arbitration agreement," and Extendicare replied in part that,

"[i]f Courtney Brown did not have actual authority through a Power of Attorney or some legally recognized document * * * then at a minimum Courtney Brown was acting with apparent agency authority on behalf of Patricia Brown."

{¶ 49} There is no evidence in the record before us that Courtney was expressly authorized to act on Patricia's behalf by, for example, a power of attorney or guardianship appointment. Thus, actual authority is not established. As noted above in *Irving Leasing Corp.*, and contrary to *Vogt*, it was Extendicare's burden to establish the existence of Courtney's apparent authority to act on Patricia's behalf. We conclude that Extendicare did so. We have no basis to conclude that Patricia was incompetent at the time of her admission or when the Agreement was signed. Contrary to her assertion, Courtney did not allege Patricia's mental incompetence in her complaint, but she alleged that Extendicare "accelerated the deterioration of her health and physical condition beyond that caused by the normal aging process and resulted in physical and emotional trauma," including infections, sepsis and death. As the trial court noted, Courtney signed both the Agreement and the 2012 Admission Agreement, representing herself to be Patricia's legal representative. Further, Patricia signed the subsequent 2013 Admission Agreement which contained Courtney's printed name under signature lines for the "Legal Representative for Healthcare Decisions" and the "Legal Representative for Financial Decisions."

{¶ 50} We find that by allowing Courtney to sign the Agreement and 2012 Admission Agreement as legal representative, Patricia clothed her with the appearance of authority and knowingly permitted her to act as agent on her behalf. Patricia was then admitted for treatment, and there is no evidence that she objected to receiving the care

and services provided for her that resulted from Courtney's exercise of authority in executing the documents. Further, Extendicare personnel, as in *Broughsville* and acting in good faith, had reason to believe that Courtney had the necessary authority to act on her mother's behalf based on the decision making authority Courtney exercised during the admission process. In other words, from the perspective of Extendicare personnel, Patricia "knowingly permitted" Courtney to effect Patricia's admission, which included executing the Agreement. This is especially so given the certification language in the Agreement that provides: "the representative certifies that the Center may reasonably rely upon the validity and authority of the Representative's signature based upon actual, implied or apparent authority to execute this Agreement *as granted by the Resident*." The only conclusion that can reasonably be drawn from this effective exercise of apparent authority is that Courtney had the requisite authority to act on Patricia's behalf. In the context of apparent authority, there is no requirement that the principal be aware that documents executed by the agent contain certain provisions, or that the principal witness the actions of the agent. *See Stocker v. Castle Inspections, Inc*., 99 Ohio App.3d 735, 651 N.E.2d 1052 (8th Dist. 1995) (finding that father, acting as son's agent in executing a home pre-inspection agreement in son's absence, could sign the contract on son's behalf and bind son to arbitrate any disputes arising from the contract.)

{¶ 51} We finally note that the factual record in *Templeman* is distinct because the court therein concluded that no contract to arbitrate existed based upon an invalid power of attorney, and *Koch* is distinct because the contract therein was signed not by the expressly designated attorney of fact but by his wife. Finally, we note that Patricia's failure to rescind the Agreement within 30 days supports our conclusion that Courtney

acted with apparent authority. Having concluded that Courtney properly acted as Patricia's agent, we need not address her argument regarding ratification.

{¶ 52} For the foregoing reasons, Courtney's assigned error is overruled, and the judgment of the trial court is affirmed.

. . . . . .

FROELICH, P.J., concurs.

FAIN, J., dissenting:

{¶ 53} In my view, Extendicare failed to prove that Courtney Brown had apparent authority to sign, on her mother's behalf, the agreements containing the arbitration agreements. Accordingly, I would reverse the order of the trial court referring the survival claims to arbitration.

{¶ 54} Courtney Brown's having signed those documents with a certification that she had authority to sign them on her mother's behalf is an impressive testament to her having apparent authority. But apparent authority requires an act by the principal. An agent may not clothe himself or herself with apparent authority. *Master Consolidated Corp. v. BancOhio Nat'l. Bank*, 61 Ohio St. 3d 570, 576, 575 N.E.2d 817 (1991). "Thus, in order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: ' * * * (1) [t]hat the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority * * *' ". *Id.*

{¶ 55} I agree that Patricia Brown's having signed the 2013 Admission Agreement, with her daughter being designated therein as her legal representative for healthcare decisions and as her legal representative for financial decisions is evidence that Patricia

knowingly permitted Courtney to act as having that authority, at least, at that time. The problem, of course, is that the agreement to subject this dispute to arbitration does not derive from the 2013 Admission Agreement. If it did, there would be no need to concern ourselves with issues of Courtney's authority to act as Patricia's agent, since Patricia signed that agreement herself. The agreement to subject this dispute to arbitration derives from the earlier admission agreements. Thus, it must be shown that Patricia knowingly permitted Courtney to have acted as having had the authority to sign those agreements on Patricia's behalf. In my view, the evidence falls short on this point.

{¶ 56} To be sure, Patricia was admitted to the facility on those prior occasions. But there is no evidence that she was aware that either of those admissions was the subject of a written agreement executed on her behalf, unlike, say, checking into a hotel. Since there is no evidence affirmatively demonstrating that Patricia knew that a written agreement was entered into on her behalf (as opposed to, for example, an undertaking by Courtney, on her own behalf, to be responsible for her mother's financial obligations), those prior admissions do not demonstrate that Patricia knowingly permitted Courtney to act on Patricia's behalf on those prior occasions.

{¶ 57} I would reverse the order referring the survival claims to arbitration.

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