[Cite as *Harrison v. Winchester Place Nursing & Rehab. Ctr.*, 2013-Ohio-3163.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Irene Harrison,	:	
Plaintiff-Appellant,	:	No. 12AP-327
v.	:	(C.P.C. No. 10CVA-03-4041)
Winchester Place Nursing & Rehabilitation Center et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on July 18, 2013

Elk & Elk Co., Ltd., *Ryan M. Harrell*, and *Phillip A. Kuri*, for appellant.

Rendigs, Fry, Kiely & Dennis, LLP, *Jeffrey M. Hines, Paul W. McCartney* and *C. Jessica Pratt*, for appellee Winchester Place Nursing & Rehabilitation Center.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant, Irene Harrison ("appellant" or "Ms. Harrison"), appeals from a judgment entered by the Franklin County Court of Common Pleas granting defendant-appellee, Winchester Place Nursing & Rehabilitation Center's ("appellee" or "Winchester Place"), motion to stay proceedings pursuant to R.C. 2711.02. Because we find the arbitration agreement executed between these two parties to be substantively conscionable and otherwise valid and enforceable, we affirm the trial court's decision to stay the proceedings pending arbitration.

I. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} Appellant was admitted to Winchester Place following hospital stay at Mount Carmel Hospital and the Ohio State Medical Center. During the admission process, appellant's daughter, Natasha Gates ("Ms. Gates"), filled out the Nursing Home Admission Agreement ("admission agreement") and other documentation for her mother. The admission agreement is a nine-page contract which includes numerous attachments. One of those attachments is a four-page "Alternative Dispute Resolution Agreement" ("ADR agreement" or "arbitration agreement"). The ADR agreement noted that the ADR process would be conducted in accordance with the National Arbitration Forum ("NAF") mediation rules and its code of procedure. These rules of procedure were not attached to the agreement, but the agreement provided a website and contact information for the organization, in the event that the resident desired a copy of the rules of procedure. Ms. Gates signed the admission agreement, the arbitration agreement, and several other relevant documents in the following manner: "Natasha Gates/POA."

{¶ 3} Between October 28 and 29, 2008, approximately two weeks after her admission to Winchester Place, appellant was prescribed and administered a drug which contained sulfa. Appellant has a known drug allergy to sulfa. As a result of receiving the medication, appellant sustained injuries due to her development of Stevens-Johnson syndrome. Several days later, Ms. Gates learned of the incident and contacted Winchester Place to complain about the administration of the drug.

{¶ 4} On March 15, 2010, appellant filed a complaint against Winchester Place and several other defendants, including Charles Baughman, M.D., and Grove City Family Health alleging claims of negligence and medical malpractice, among others. On April 16, 2010, Winchester Place filed a motion to stay proceedings pursuant to R.C. 2711.02.[1] Winchester Place argued the proceedings should be stayed for arbitration, pursuant to an arbitration agreement executed between appellant/her legal representative and Winchester Place on October 14, 2008. On May 28, 2010, appellant filed a memorandum contra to Winchester Place's motion to stay proceedings. On June 9, 2010, Winchester Place filed a reply brief.

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[1] On April 26, 2010, appellee filed an amended motion to stay proceedings, pursuant to R.C. 2711.02, and attached the arbitration agreement it had failed to attach to the original motion.

{¶ 5} Prior to ruling on Winchester Place's amended motion to stay proceedings, the trial court issued an order on October 4, 2010, allowing limited discovery. The trial court also permitted the filing of supplemental briefs. Winchester Place was the only defendant in the case arguing for a stay of the proceedings pending arbitration and was the only defendant who was a party to the arbitration agreement at issue.

{¶ 6} On March 1, 2011, appellant and Winchester Place filed a stipulation regarding the motion to stay proceedings, in which they stipulated that procedural unconscionability existed as to the ADR agreement executed between these two parties.

{¶ 7} On March 14, 2012, the trial court issued a decision and entry granting Winchester Place's motion to stay proceedings pursuant to R.C. 2711.02. The trial court determined: (1) the fact that the chosen arbitration forum (the NAF) was no longer able to conduct the arbitration was not a ground upon which to void the arbitration agreement, (2) waiver of the right to a trial by jury via an arbitration clause is not substantively unconscionable, (3) the terms of the agreement are commercially reasonable and do not warrant a finding of substantive unconscionability, (4) the danger of inconsistent verdicts is not substantial enough to void an otherwise valid agreement, (5) appellant's arguments regarding voidness do not lead to a finding of substantive unconscionability; and (6) the fact that some parties to the lawsuit are not subject to arbitration does not prevent the court from staying this action pursuant to R.C. 2711.02.

{¶ 8} Consequently, the trial court determined the arbitration agreement was not unconscionable and, therefore, it was enforceable. The court ordered the entirety of this action to be stayed pending arbitration, including appellant's claims against the other defendants.

II. ASSIGNMENTS OF ERROR

{¶ 9} This timely appeal now follows, in which appellant asserts two assignments of error for our review:

> [I.] The Trial Court Erred by not Finding the Arbitration Agreement to be Unconscionable, and Staying Litigation of this Matter Pending Binding Arbitration Pursuant to R.C. 2711.02
>
> [II.] The Trial Court Erred by not Finding the Arbitration Agreement to be Void as a Matter of Law, Because it Violates the Non-Waiver Language of R.C. 3721.12

III. STANDARD OF REVIEW

{¶ 10} We review the legal issue of whether an arbitration provision in an underlying contract is unconscionable pursuant to a de novo standard. *Wascovich v. Personacare of Ohio, Inc.*, 190 Ohio App.3d 619, 2010-Ohio-4563, ¶ 23 (11th Dist.), citing *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ohio App.3d 27, 2004-Ohio-5953, ¶ 12 (9th Dist.). "The determination of whether a contractual provision is unconscionable is fact-dependant and requires an analysis of the circumstances of the particular case before the court." *Id.*, citing *Featherstone*, citing *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, ¶ 13 (9th Dist.). Under this standard, we possess plenary review power and afford no deference to the trial court's analysis. *Wascovich* at ¶ 23, citing *Eagle* at ¶ 11.

IV. LAW AND ANALYSIS

A. First Assignment of Error—Substantive Unconscionability

{¶ 11} In her first assignment of error, appellant contends the trial court erred by failing to find the ADR agreement to be unconscionable and by improperly staying litigation of this matter pending arbitration pursuant to R.C. 2711.02. We disagree.

{¶ 12} Ohio public policy favors enforcement of arbitration provisions. *Featherstone* at ¶ 5, citing *Harrison v. Toyota Motor Sales, U.S.A., Inc.*, 9th Dist. No. 20815, 2002-Ohio-1642, ¶ 9. *See also Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, ¶ 15. If the subject of the dispute arguably falls within a provision of the arbitration agreement, there is a presumption in favor of arbitration. *Featherstone* at ¶ 5, citing *Harrison* at ¶ 9. "Ohio's policy of encouraging arbitration has been declared by the legislature through the Ohio Arbitration Act, R.C. 2711.01 et seq." *Henderson v. Lawyers Title Ins. Corp.*, 108 Ohio St.3d 265, 2006-Ohio-906, ¶ 48 (Lanzinger, J., dissenting). *See also Goodwin v. Ganley, Inc.,* 8th Dist. No. 89732, 2007-Ohio-6327, ¶ 8 ("The Ohio Arbitration Act is codified in Chapter 2711 of the Ohio Revised Code"). This statute mirrors the Federal Arbitration Act in many ways. *Henderson* at ¶ 48.

{¶ 13} R.C. 2711.02 provides for enforcement of an arbitration agreement. A party to an arbitration agreement may obtain a stay of litigation in favor of arbitration pursuant to R.C. 2711.02(B). *Hayes* at ¶ 17. R.C. 2711.02(B) provides, in relevant part, as follows:

> 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.

{¶ 14} "However, an arbitration provision may be held unenforceable under [R.C. 2711.01(A)] on 'grounds that exist at law or in equity for the revocation of any contract.' " *Wascovich* at ¶ 24, quoting *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006- Ohio-4464, ¶ 6 (9th Dist.). One of those grounds is unconscionability. *Wascovich* at ¶ 24; *Hayes* at ¶ 19. "The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable." *Id.* at ¶ 20.

{¶ 15} To determine whether an agreement is procedurally unconscionable, a court considers "the circumstances surrounding the contracting parties' bargaining, such as the parties' ' " age, education, intelligence, business acumen and experience, * * * who drafted the contract, * * * whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question." ' " *Hayes* at ¶ 23, quoting *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶ 44, quoting *Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d 826, 834 (2d Dist.1993).

{¶ 16} To determine whether an agreement is substantively unconscionable, a court must consider the terms of the contract and whether they are commercially reasonable. *Hayes* at ¶ 33, citing *John R. Davis Trust 8/12/05 v. Beggs*, 10th Dist. No. 08AP-432, 2008-Ohio-6311, ¶ 13. Although there is no bright-line set of factors for determining substantive unconscionability, courts have considered the following factors: the fairness of the terms, the charge for the services rendered, the industry standard, and the ability to predict the extent of future liability. *Id.* at ¶ 33, citing *John R. Davis Trust* at ¶13; *Collins* at 834.

{¶ 17} Here, the parties have stipulated that the ADR agreement is procedurally unconscionable. Therefore, we are only required to determine whether or not the ADR agreement is substantively unconscionable.

1. Judicial Economy/Inconsistent Verdicts

{¶ 18} Appellant urges us to follow the reasoning of the Eleventh District in *Wascovich* and to find the ADR agreement here to be substantively unconscionable. In *Wascovich*, the court found the agreement to be substantively unconscionable in large part because of the negative impact that arbitration would have on judicial economy. Appellant argues that in this case, like in *Wascovich*, enforcement of the arbitration agreement will create two proceedings because some of the defendants are not subject to the arbitration agreement, and thus, their claims will have to go through the litigation process, rather than the arbitration process.

{¶ 19} Appellant argues the risk of inconsistent verdicts is a significant issue and submits that use of the "empty chair" argument at separate trials/hearings could allow a defendant to escape liability, simply due to the absence of another defendant. Appellant asserts this is a concern which should override the arbitration agreement. Furthermore, appellant contends that separate proceedings may not equate to a full 100 percent allocation of liability, since a jury would not have the benefit of knowing that a certain percentage of fault had been allocated at an earlier arbitration hearing, thereby depriving appellant of a full and fair recovery. Appellant argues allocation of the percentage of fault, by a single fact finder, is absolutely essential to fully compensating appellant for her injuries.

{¶ 20} We disagree with appellant's assertions regarding the significance of judicial economy and inconsistent verdicts. Several courts have found that the presence of non-arbitrable claims and parties who cannot be compelled to arbitrate does not require a trial court to deny a stay pending arbitration.

{¶ 21} In *Krafcik v. USA Energy Consultants, Inc.*, 107 Ohio App.3d 59 (8th Dist.1995), the rationale of courts in other jurisdictions was adopted to conclude that an applicable arbitration agreement must be enforced, despite the presence of parties who are parties to the underlying dispute, but not subject to the arbitration agreement. The court found: "[I]t would be patently unfair to permit a plaintiff who has agreed to arbitration to escape that agreement by adding a defendant who is not a party to the arbitration contract." *Id.* at 64. The court further stated, "failing to enforce the

agreement simply because the plaintiffs have joined unrelated claims against a second defendant would fly in the face of Ohio's strong presumption in favor of arbitrability." *Id.*

{¶ 22} In *DH-KL Corp. v. Stampp Corbin*, 10th Dist. No. 97APE02-206 (Aug. 12, 1997), our court referenced the Federal Arbitration Act, noting that it is "virtually identical to the Ohio statute" and stating that, under the Federal Arbitration Act, "a party cannot avoid an arbitration agreement simply by adding as a defendant a person not a party to the arbitration agreement." *Id.* We further stated that, pursuant to R.C. 2711.02, once it is determined that the issues raised were covered by a written arbitration agreement, the statute mandates that the trial be stayed until arbitration of those issues has been conducted.

{¶ 23} Additionally, in *Murray v. David Moore Builders, Inc.*, 177 Ohio App.3d 62, 2008-Ohio-2960 (9th Dist.), the court of appeals determined that if any of the claims are subject to an arbitration agreement, R.C. 2711.02 requires a stay of the trial proceedings, regardless of whether the dispute also involves parties who are not a party to the agreement and who cannot be compelled to arbitrate. *Id.* at ¶ 11. To the extent there were claims subject to a valid arbitration provision, it was determined the trial court erred by denying the stay due to the presence of non-arbitrable claims and parties who could not be compelled to arbitrate. *Id.*

{¶ 24} Finally, in *Marquez v. Koch*, 4th Dist. No. 11CA3283, 2012-Ohio-5466, the court held: "the presence of non-arbitrable claims and parties not subject to an arbitration agreement does not justify the denial of Appellants' motion to stay." *Id.* at ¶ 11. *See also Cheney v. Sears, Roebuck and Co.*, 10th Dist. No. 04AP-1354, 2005-Ohio-3283, ¶ 12 (because some of the claims are clearly within the scope of contracts containing valid arbitration provisions, the entire case must be stayed until arbitration is resolved); *Pyle v. Wells Fargo Fin.*, 10th Dist. No. 05AP-644, 2005-Ohio-6478, ¶ 12 (a presumption favoring arbitration over litigation applies even when the case involves some arbitrable claims and some non-arbitrable claims, with the non-arbitrable claims being determined by a court after completion of arbitration); and *Jones v. Unibilt Industries, Inc.*, 2d Dist. No. Civ.A. 20578, 2004-Ohio-5983, ¶ 19 (rejecting the argument that a stay pending arbitration is inappropriate where one of the defendants is not a party to the arbitration agreement).

{¶ 25} While the court in *Wascovich* found the agreement to be substantively unconscionable due to a lack of judicial economy/efficiency, a substantial increase in costs due to participation in two proceedings, and the risk of inconsistent verdicts on the issue of liability, it did so after weighing those factors against the factors in favor of substantive conscionability. The facts in this case are different from those in *Wascovich*, as shall be explained more fully below. We further note that *Wascovich* is not controlling authority and that there is controlling authority to support our conclusion that it is error to deny the stay due to the presence of non-arbitrable parties. Here, any inconvenience or potential inconsistency caused by separate actions is not a legitimate basis for overriding an otherwise enforceable agreement.

{¶ 26} {¶ 37} Based upon the foregoing, we reject appellant's contention that her concerns regarding judicial economy, the "empty chair" issue, and inconsistent verdicts should override the arbitration agreement.

2. Comparison to Other Cases Addressing Substantive Unconscionability

{¶ 27} Appellant relies almost exclusively upon the *Wascovich* case to support her position that the ADR agreement is substantively unconscionable and urges us to follow the rationale in *Wascovich*. Appellant argues many of the terms in the *Wascovich* agreement are nearly identical to those found here, and in *Wascovich*, the court found the agreement to be substantively unconscionable and thus unenforceable. Appellant urges us to overlook Winchester Place's citation to *Manley v. Personacare of Ohio*, 11th Dist. No. 2005-L-174, 2007-Ohio-343, in which a very similar arbitration agreement was upheld as enforceable. Appellant argues *Manley*, which is also from the Eleventh District, was released prior to *Wascovich*, and there is no case law criticizing the approach taken in the more recent case of *Wascovich*.

{¶ 28} In *Wascovich*, the appellate court found the arbitration agreement was both procedurally and substantively unconscionable. The agreement was found to be substantively unconscionable based upon the following: a lack of procedural protections; the potential for an increase in the number of depositions and hearings, duplicate discovery, and also expert testimony and expenses in two forums; and enforcement of the agreement may have resulted in inconsistent verdicts on the issue of liability.

{¶ 29} {¶ 43} In finding there were factors weighing in favor of substantive unconscionability, the *Wascovich* court found "the almost total lack of procedural protections weighs heavily against [the nursing home facility]." *Id.* at ¶ 50. The court also noted there was a lack of evidence in the record indicating that the resident knew what he was signing or had the capacity to contract and, consequently, due to the substantial issues with procedural unconscionability, any substantive deficiency should be fatal.

{¶ 30} Based on the *Wascovich* court's determination that the significant level of procedural unconscionability contributed to the finding of substantive unconscionability, and because the parties here have stipulated to procedural unconscionability, appellant argues the agreement at issue should also be found to be substantively unconscionable. Appellant contends it can be inferred there were significant issues involving procedural unconscionability in this case, arguing the arbitration agreement was "buried" in the middle of the document and also referenced rules and procedures which were only available online. Consistent with the holding in *Wascovich*, appellant submits the procedural unconscionability issues in this case are substantial enough that even the "slightest whiff of substantive unconscionability should be fatal" to Winchester Place. (Appellant's brief, 8.) However, we disagree with appellant's reliance upon *Wascovich* to promote her position that substantive unconscionability should be found as a result of the parties' stipulation to procedural unconscionability in this case.

{¶ 31} The facts in this case are different from those in *Wascovich*. For example, in *Wascovich*, the court found there was an "almost total lack of procedural protections," and cited as an example the fact that there was nothing in the record to reflect that the resident who signed the agreement was lucid and cognizant on the day he signed his admission documents. *Id.* at ¶ 50. The court went on to find the burden was on the nursing home "to produce *something* that reflects that they were 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." (Emphasis sic.) *Id.* However, that issue is not a factor in the instant case, as appellant's daughter signed the admission agreement and other relevant documents for appellant and no issue has been raised as to her daughter's lack of capacity.

{¶ 32} In comparing *Wascovich* and the instant case, appellant notes that both ADR agreements contain: (1) a provision allowing the resident to rescind the agreement within 30 days, (2) a label that the agreement was "optional," (3) a label typed in bold letters, and (4) a provision entitled "Understanding of the Resident," which stated: the resident had the right to seek legal counsel; the agreement was not a precondition of admission to the facility; the agreement could not be submitted to a resident when her condition prevented her from making a rational decision; the agreement did not prevent the resident from reporting violations of the law; the dispute was subject to binding arbitration; and the parties were waiving their right to a jury trial, a trial by judge, and to appeal the decision of the arbitrator.

{¶ 33} We have already determined the risk of inconsistent verdicts is not sufficient to make a valid arbitration agreement in this case unenforceable. In addition, appellant's concerns regarding judicial economy in this case do not trump an otherwise enforceable agreement. And, although there are some similarities between *Wascovich* and the case before us, we find there are several other examples of Ohio cases analyzing arbitration agreements with similar terms where those agreements were found to be substantively conscionable.

{¶ 34} In *Manley*, the court found the agreement was not substantively unconscionable, despite the presence of procedural unconscionability. The court of appeals determined the agreement to be procedurally unconscionable because it was signed under stress, the resident was transferred directly from the hospital to the nursing home, she was elderly and without a friend or relative to assist her, she lacked legal expertise, and she suffered from cognitive impairment and confusion. Despite this, the court found the agreement was not substantively unconscionable because the terms were commercially reasonable, the resident had time to reject the agreement, and the handling of fees and costs were fair.

{¶ 35} Specifically, the ADR agreement in *Manley* contained the following warnings:

> 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 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 a trial by judge, and their right to appeal the decision of the arbitrator(s) in a court of law.

Id. at ¶ 35.

{¶ 36} This language is identical to the language in the ADR agreement in this case. The *Manley* court explained that several factors weighed against a finding of substantive unconscionability: (1) the ADR agreement was a separate, stand-alone document, which indicated that signing it was not contingent upon admission to the nursing home; (2) the arbitration agreement contained a specific statement (in bold type) that admission was not contingent upon signing the arbitration agreement; (3) the ADR agreement contained a warning that the resident was giving up her right to a trial by jury, which advised the resident she would be unable to seek a legal remedy in a court of law; (4) the ADR agreement provided 30 days to reject it, thereby providing an opportunity to discuss the matter with a family member, friend, or counsel; and (5) the ADR agreement stated each party would be responsible for her own attorney fees but that the nursing home would be responsible for the cost of the mediation process and the costs of arbitration for the first five days, after which time, the parties would split the costs. These same factors exist in the case before us.

{¶ 37} We acknowledge, as appellant has pointed out, that *Manley* was decided in the same appellate district as *Wascovich* and that the *Wascovich* decision was released subsequent to *Manley*. However, as we previously noted, neither *Wascovich* nor *Manley* are binding authority here. Yet, we believe the court's approach in *Manley* more closely

follows the approach taken by other courts in addressing issues of substantive unconscionability.

{¶ 38} In *Hayes*, the Supreme Court of Ohio found the terms in that arbitration agreement were not substantively unconscionable. The court determined waiver of the right to trial by jury is a necessary consequence of agreeing to allow an arbitrator to decide the dispute, and such a provision is not substantively unconscionable. *Id.* at ¶ 34, citing *Taylor Bldg. Corp.* at ¶ 55. The *Hayes* court went on to find the provisions by which the parties waived their right to seek punitive damages and attorney fees were also commercially reasonable. *Id.* at ¶ 35. Both parties had to bear their own attorney fees and costs, but the court determined it was equitable. *Id.* And even though the contractual provision waiving punitive damages only applied to the resident, and was therefore one-sided, the court determined that alone did not make it per se substantively unconscionable. *Id.* at ¶ 36. Additionally, by entering into the arbitration agreement, the nursing home facility also waived statutory legal rights which were only applicable to the facility. *Id.* "[W]e find that terms in an arbitration agreement between a nursing home and its resident that eliminate the right to trial and the right to seek punitive damages and attorney fees are not substantively unconscionable." *Id.* at ¶ 41.

{¶ 39} The resident in *Hayes* was not required to sign the arbitration agreement and it was unequivocally not a condition of admission to the nursing home. *Id.* at ¶ 43. Accordingly, the Supreme Court further held that "an arbitration agreement voluntarily executed by a nursing-home resident and not as a precondition to admission that eliminates the right to trial and to seek punitive damages and attorney fees is not substantively unconscionable." *Id.* at ¶ 44.

{¶ 40} Like the agreement in the instant case, the arbitration agreement in *Hayes* was not a condition of the resident's admission and she was not required to sign it. It stated in boldface capital letters at the top of the agreement that it was voluntary. It also explained the benefits and drawbacks of the arbitration process and stated it was not a precondition to receiving medical treatment or admission to the facility. Under the agreement, both parties waived their constitutional right to a jury trial, and acknowledged that they had to pay their own attorney fees and that any arbitration award would not include exemplary or punitive damages.

{¶ 41} Furthermore, like the agreement here, the arbitration agreement in *Hayes* contained the following additional acknowledgments: (1) the agreement could not be submitted to the resident for approval when her condition prevented her from making a rational decision, and (2) the resident understood she had a right to consult with an attorney before signing the agreement. However, unlike the agreement before us, the *Hayes* agreement also contained an acknowledgment that the resident had received a copy of the agreement, the terms were explained to her, and she had an opportunity to ask questions. Despite this, we find there to be strong similarities between the facts and circumstances in this case and that of *Hayes*.

{¶ 42} Finally, in *Rinderle v. Whispering Pines Health Care Ctr.*, 12th Dist. No. CA2007-12-041, 2008-Ohio-4168, the appellant argued the arbitration agreement executed between a resident and a nursing home was substantively unconscionable because it provided for a waiver of rights under Ohio's Nursing Home Bill of Rights ("Bill of Rights") and included undisclosed, prohibitive costs. The court of appeals determined the agreement was not substantively unconscionable because: (1) the right to a trial by jury is not granted under the Bill of Rights, (2) waiver of the right to a jury trial is a necessary consequence of agreeing to have a dispute decided by an arbitrator, and (3) the appellant failed to present evidence that the arbitration costs and fees were prohibitive, unreasonable or unfair as applied to him. *Id.* at ¶ 18-19. Thus, the court rejected the proposition that an arbitration clause is unenforceable based upon unsupported allegations of prohibitive costs. *Id.* at ¶ 19.

{¶ 43} Furthermore, the agreement in *Rinderle* contained a provision under which the resident incurred only his own attorney fees, unless the nursing home prevailed. Under those circumstances, the arbitrator may order the resident to reimburse the nursing home for the arbitration expenses, which were to be paid initially by the nursing home. The resident in *Rinderle* also attached a fee schedule from the NAF and argued that if he did not prevail, he could be required to pay fees of more than $3,000. Nevertheless, the court of appeals found the agreement was not substantively unconscionable and noted that the resident had failed to present specific evidence demonstrating his financial situation and showing that the $3,000 would be prohibitive as applied to him.

{¶ 44} We find the provisions in *Rinderle* to be similar to the provisions in the case before us, in which the arbitration expenses are to be paid up front by the nursing home (in our case, for five days of arbitration) and the resident is responsible for his or her own attorney fees and filing costs, pursuant to a NAF fee schedule. The record before us does not contain specific evidence of appellant's financial situation or demonstrate that the fees would be prohibitive as applied to her.

{¶ 45} In contrast to the previous three cases, we also examine *Fortune v. Castle Care Nursing Homes, Inc.*, 164 Ohio App.3d 689, 2005-Ohio-6195 (5th Dist.), a case in which the arbitration agreement was found to be substantively unconscionable. Because the arbitration agreement contained a "loser pays" clause regarding attorney fees, the execution of the agreement was mandatory for the resident, and the format of the agreement did not alert the resident to the significance of the arbitration clause (that she was waiving her right to a jury trial), it was found to be substantively unconscionable.

{¶ 46} Specifically, the admission agreement in *Fortune* consisted of seven pages. Within that agreement, located on page five, was an arbitration clause written in the same size font as the rest of the agreement. It failed to expressly state that the resident was giving up her right to a jury trial by signing the agreement, and instead merely stated the resident was agreeing to settle a claim exclusively by binding arbitration. The court found that inclusion of a binding arbitration clause "must be done in such a manner that the person signing the agreement is made aware of the existence of the provision and the importance of the right that he or she is waiving." *Id.* at ¶ 32. Notably, the arbitration agreement in *Fortune* is markedly different from the one before us now for review.

{¶ 47} Based upon our analysis and comparison of the cases set forth above, we believe the analysis and reasoning applied by the Supreme Court of Ohio in *Hayes*, the reasoning of the Eleventh District in *Manley*, and the reasoning of the Twelfth District in *Rinderle*, are most applicable to the facts and circumstances of this case. Applying the reasoning and analysis of those cases, we believe the ADR agreement at issue is not substantively unconscionable.

3. Commercially Reasonable

{¶ 48} Appellant also argues the terms of the ADR agreement are not commercially reasonable for several reasons. First, appellant cites to a provision attempting to limit the

claims of a decedent's next of kin, arguing it is unenforceable as to individuals who are not in privity with the agreement. Second, appellant submits the agreement fails to advise residents that most nursing home cases are handled on a contingent fee basis, meaning legal costs and fees are not paid up front. Appellant also argues the agreement fails to provide relevant information regarding the exorbitant fees required to file an arbitration request. Third, appellant notes the NAF code of procedure (purportedly a 47-page document) was not provided with the agreement. Without this code of procedure, appellant asserts she was unadvised of certain applicable procedures and restrictions.

{¶ 49} In particular, appellant complains she was not informed about restrictions such as: confidentiality; the limitation on the number of interrogatories propounded; the inability to enforce subpoenas; and the NAF fee schedule, which set forth additional filing fees, administrative fees, participatory hearing fees, discovery request fees, objection fees, post-hearing fees, and fees to request written findings of fact and conclusions of law, among others. Appellant submits the NAF fee schedule requires her to state the value of her claim up front because she is limited to that amount, and therefore, she must state the highest possible value for her claim (and therefore pay higher fees) in order to recover up to the stated amount. Appellant argues these costs, which in the instant case would purportedly be $5,000 just to file the claim, are clearly not a less expensive alternative to litigation and were not disclosed at the time of admission. Appellant further contends the fees are unreasonable.

{¶ 50} Based upon our comparison of this ADR agreement to similar agreements in *Rinderle*, *Hayes*, and *Manley*, as analyzed above, we find the terms here to be commercially reasonable, pursuant to the following reasoning.

{¶ 51} First, in addressing appellant's argument that the agreement improperly attempts to limit the claims of a decedent's next of kin, we find this argument to be speculative and irrelevant at this point in time. According to the information provided in the record, appellant is alive, is not a decedent, and does not have next of kin raising claims as wrongful death beneficiaries.

{¶ 52} Second, regarding appellant's claim that the agreement fails to provide relevant information regarding the costs and fees for filing an arbitration request, we note that the ADR agreement specifically advised appellant that she had the right to seek legal

counsel regarding the agreement. If appellant had specific questions regarding the timing for the payment of legal costs and fees in an arbitration versus a lawsuit, she was free to consult with an attorney. The lack of information on this issue is not commercially unreasonable.

{¶ 53} Next, we address appellant's complaint that the NAF code of procedure was not provided with the agreement in hard copy form, but only by way of reference to a website, telephone number, facsimile number, and mailing address where such information could be obtained. As stated previously, signing the ADR agreement was optional, and appellant was advised she had the right to consult with an attorney if she had any questions. Additionally, if she had wanted to check the website or get a copy of the code of procedures, she had time to do so prior to the expiration of the 30-day period within which she could revoke the agreement. And, appellant has not demonstrated that the code of procedure and/or the fee schedule at issue are commercially unreasonable in comparison to other arbitration forums or even in comparison to litigation, nor has she demonstrated the fees would be prohibitive as applied to her.

{¶ 54} Overall, we find the terms here to be commercially reasonable. The ADR agreement is a separate, four-page document that is an attachment to the admission agreement. It is not a "clause" buried amid the admission agreement. The ADR agreement expressly advises the resident of the right to seek legal counsel concerning the agreement and refers to the agreement as "OPTIONAL." It also states the ADR agreement is not a precondition of admission or of the rendering of services, and the decision to enter into the agreement is one for the resident to make, without any influence. The arbitration agreement provides the resident with the right to cancel the agreement within 30 days of signing it. Additionally, it states the nursing home shall pay the mediator's and arbitrator's fees and all other reasonable costs (excluding the resident's attorney fees) associated with the mediation and/or arbitration, up to a maximum of five days of the arbitration hearing, at which time any additional arbitration hearing fees and costs shall be split between the parties. The ADR agreement further states (in boldface type) that the parties agree to waive their right to a trial in court, including a jury trial, a trial by judge, and a right to appeal the decision of the arbitrator. Similar agreements have been found to be commercially reasonable. We find this one to be as well.

{¶ 55} Although we believe that arbitration agreements between nursing homes and residents are often suspect as to the level of fairness present in the agreement, given the current state of the law, the acceptance of these types of agreements in the industry, and for all of the reasons set forth above, we overrule appellant's first assignment of error.

B. Second Assignment of Error—R.C. 3721.10 et seq.

{¶ 56} In her second assignment of error, appellant asserts the trial court erred in not finding the arbitration agreement to be void as a matter of law. Appellant argues the arbitration provision is void because it patently violates the Bill of Rights, R.C. 3721.10, et seq., which requires that nursing homes make certain disclosures of the residents' rights, such as the right to sue the nursing home. Specifically, appellant claims the agreement violates the disclosure requirement at R.C. 3721.12, the non-waiver language in R.C. 3721.13, and the provision at R.C. 3721.17(I)(1)(a) providing for the right to a cause of action.

{¶ 57} Appellant argues the Bill of Rights voids any attempt to waive rights which are guaranteed and protected under the statute. Here, rather than making the required disclosure, appellant argues Winchester Place procured a waiver of certain rights, including the right to sue. Appellant argues Winchester Place was required to fully inform her of all of the rights conferred upon her pursuant to the Bill of Rights, but instead of doing this, appellant submits the nursing home asked appellant for a waiver of some of those rights, specifically the right to pursue a civil cause of action. Appellant contends it is not possible to disclose the guarantees of the Bill of Rights, while at the same time ask for a waiver of one or more of those rights. Appellant argues the arbitration provision is void because it solicited a waiver of a specifically enumerated right (i.e., the right of a civil action and the right to a trial by jury) when the law in fact required clear disclosure of said rights. According to appellant, any attempt to waive the guarantees of the Bill of Rights is void by law because a resident cannot waive the rights that are conferred by statute.

{¶ 58} Ohio's Bill of Rights is codified under R.C. Chapter 3721 and sets forth certain rights afforded to nursing home residents, along with the obligations of nursing home facilities and their administrators. Upon review, we find nothing in the ADR agreement here that violates appellant's statutory rights under R.C. 3721.10 et seq.

{¶ 59} R.C. 3721.13 delineates a lengthy list of residents' rights and the right of a resident's sponsor or representative to act on behalf of the resident to ensure the resident's rights. R.C. 3721.13(A) sets forth various rights afforded residents of a nursing home. Examples include the following: the right to a safe and clean living environment; the right to be free from physical, verbal, mental, and emotional abuse and to be treated with courtesy, respect, and dignity; the right to participate in decisions affecting the resident's life; the right to privacy during medical examination and treatment and in the care of personal needs; and the right to use tobacco under the nursing home's safety rules and other applicable state laws unless it is not medically advisable as documented in the resident's medical record, among many others.

{¶ 60} Moreover, it is true that R.C. 3721.13(C) states that "[a]ny attempted waiver of the rights listed in division (A) of this section is void." However, the statutory right appellant is asserting is not set forth in R.C. 3721.13(A), meaning R.C. 3721.13(C), which prevents attempted waiver of the rights set forth in division (A), is not applicable here. Rather, the statutory right appellant is claiming has been violated is set forth in R.C. 3721.17(I)(1)(a).

{¶ 61} Appellant claims the arbitration agreement violates her statutory right to pursue a civil action under R.C. 3721.17(I)(1)(a). That portion of the statute states as follows: "Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated *has a cause of action* against any person or home committing the violation." (Emphasis added.) Notably, the statute does not forbid a claim from being arbitrated. Therefore, we reject appellant's claim that the arbitration agreement violates her statutory right to pursue a civil action under the Bill of Rights.

{¶ 62} Appellant further claims the arbitration agreement violates the non-waiver language of R.C. 3721.12. Yet, a review of the statutory language does not reveal "non-waiver" language. Instead, the statute sets forth the duties of the nursing home administrator concerning the residents' rights and the procedure for grievances. For example, it requires that every resident be provided with a copy of the rights established under R.C. 3721.10 to 3721.17, and with a copy of the nursing home's policies and procedures as well as its rules. *See* R.C. 3721.12(A)(3)(a),(c), and (d). It also requires, among other things, that the nursing home administrator post a copy of the residents'

rights as listed in R.C. 3721.13(A). *See* R.C. 3721.12(C)(1). R.C. 3721.12 does not include "non-waiver" language and it does not void the ADR agreement executed to resolve the dispute at issue via mediation and/or arbitration. Furthermore, the admissions checklist document in the record indicates appellant (or her representative) was provided with the residents' rights. (R. 57 at unnumbered page 13.) Additionally, appellant has not directed us to evidence proving that this did not occur or demonstrating that Winchester Place failed to prominently post the residents' rights within the nursing home.

{¶ 63} Accordingly, we overrule appellant's second assignment of error.

V. DISPOSITION

{¶ 64} In conclusion, we overrule appellant's first and second assignments of error. The judgment of the Franklin County Court of Common Please is affirmed.

Judgment affirmed.

BROWN and DORRIAN, JJ., concur.