

MISSOURI SUPREME COURT

No. SC89392

PATRICIA WARD, INDIVIDUALLY AND IN HER CAPACITY AS PLAINTIFF AD LITEM FOR NONA WOODS, AND DARRELL WOODS, INDIVIDUALLY AND IN HIS CAPACITY AS PLAINTIFF AD LITEM FOR NONA WOODS,)))))))	Respondents,
vs.))	
NATIONAL HEALTHCARE CORPORATION, ET AL.,)))	Appellants,
and))	
CHARLESTON MANOR NURSING, LLG, ET AL.,)))	Defendants.

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STATEMENT OF FACTS

This case is about abuse and neglect in a nursing home. On May 16, 2003, Nona Woods became a resident of NHC Healthcare in Kennett, Missouri following a brief hospitalization due to a hip fracture. (LF 18) Nona Woods died on October 19, 2003 as a direct result of the abuse, neglect, lack of care, assessment, and treatment she received from NHC, its owners, operators, agents, employees and/or representatives. On August 18, 2005, Plaintiff filed this lawsuit in her representative capacity on behalf of the Estate of the decedent, Nona Woods, and on behalf of the wrongful death beneficiaries of Nona Woods, for the defendants' negligent custodial care and treatment of Nona Woods. The action was filed against two groups of defendants. The first group of defendants are legal and natural persons affiliated with the Missouri skilled nursing facility doing business as NHC Healthcare/Kennett, LLC (hereinafter the "NHC"). The second group are legal and natural persons affiliated with the Missouri skilled nursing facility doing business as Charleston Manor (hereinafter the "Charleston Manor Defendants"). (LF 13-38)

On November 7, 2005, corporate NHC defendants filed a Memorandum of Law to Enforce Arbitration Clause. (LF 95) That Motion sought to enforce the arbitration terms contained within a nursing home admission agreement purportedly executed on March 11, 2003. In support of its' Motion, NHC attached a copy of the Admission and Financial Contract. (LF 102) No affidavits or other

testimony authenticating this document was presented by NHC in support of its Motion.

Plaintiff responded to NHC's Motion by filing a *Memorandum of Law in Opposition to Defendants Motion to Dismiss* on January 23, 2006. (LF 115) In support of her Response Plaintiff attached the affidavit of Bobby Rouse, a copy of the AAA and AHLA health care policy statements, AHLA's schedule of fees, and background information about AHLA. (LF 150).

A hearing on NHC's Motion was held before Judge Stephen R. Sharp on August 22, 2007. (LF 10) No evidence or testimony was presented to the Trial Court at the hearing. Further, the arguments of counsel and statements of the court were not transcribed by a court reporter. By Order dated September 4, 2007, the Trial Court denied NHC's Motion. (LF 168) NHC filed a Notice of Appeal on September 14, 2007. (LF 169)

On May 16, 2008, the Missouri Court of Appeals for the Southern District, Division Two, dismissed the appeal for NHC's failure to provide a sufficient record with regard to the issues on appeal. There is no evidence in the record authenticating Nona Woods' signature on the arbitration agreement. Further, there is no record of any evidence being received by the trial court. Since the Legal File is insufficient, the appellate court dismissed the appeal. The instant transfer to the Supreme Court was made on August 26, 2008, pursuant to Rule 83.04.

This appeal does not involve the merits of Woods's Complaint. Moreover, this appeal does not involve the Charleston Manor Defendants or the individual

NHC-related defendants. The question before the Court is whether the trial court erred in denying NHC's Motion to Enforce Arbitration Clause.

1. The Signatures.

The record in this case is bare because of the procedural posture in which the case was decided. What we do know is that the Admission and Financial Contract that is the subject of NHC's appeal is dated March 11, 2003. The parties to the Contract are identified as Nona F. Woods, as "Patient," and NHC of Kennett as "Center." No one is identified as Patient's Legal Representative. (LF 102) The agreement was signed by Bobby Jean Rouse as "Other Persons Signing on Behalf of Patient". (LF 114) The purported signatures of Nona Woods and Terri Forsythe, as "Administrator/ Social Worker," also appear on the agreement. (LF 114)

Mrs. Rouse is the biological adult daughter of Nona Woods and has a 10th grade education. (LF 150) Nothing in the record explains why both Nona Woods and Bobby Rouse's names appear on the admission agreement other than Mrs. Rouse's statement in her affidavit that her mother was not present when she signed the document and that Mrs. Woods's signature did not appear on the document when it was presented to Mrs. Rouse. (LF 151) There is no evidence before the Court regarding Mrs. Woods's purported execution of the agreement. There is no testimony regarding the circumstances surrounding her signature or verifying its authenticity.

None of the defendants other than NHC Healthcare/Kennett, LLC, by and through Tina Forsythe, nor any of the Charleston Manor Defendants, is identified as a party to the Admissions Contract.

While there is no evidence before the Court regarding the circumstances surrounding or the authenticity of Nona Woods's signature, Mrs. Rouse submitted an affidavit authenticating and explaining the circumstances surrounding her signature. (LF 150-52) As explained by Mrs. Rouse, the Admission and Financial Contract was presented to her by NHC's representative Tina Forsythe. Ms. Forsythe told Mrs. Rouse that she needed to sign the document so that her mother would be admitted to the nursing home. (LF 150-51) Mrs. Rouse tried to read the contract as Ms. Forsythe thumbed through it. However, Ms. Forsythe was talking very quickly and went through the contract so fast that Mrs. Rouse could not keep up with her. (LF 150-51) Ms. Forsythe never presented the option of having the contract reviewed by an attorney or of changing any of the boilerplate language. Mrs. Rouse's understanding was that these were not options. (LF 150-51) According to Mrs. Rouse, Ms. Forsythe told her that she needed to sign the contract "so that [her mother] could be admitted to the nursing home." (LF 150-51)

Mrs. Rouse testified that Ms. Forsythe did not tell her the rules and consequences of arbitration nor did she give her the written rules of arbitration. As for any disputes she may have with the Center, all Ms. Forsythe said to her was "if you've got complaints, you just bring them to us." (LF 151) Mrs. Rouse was

never told that signing the contract was tantamount to waiving a jury trial or that she would incur substantial costs and fees if a claim was filed. Mrs. Rouse never was told that the contract she was told to sign was an agreement to waive substantial constitutional rights. (LF 150-51)

With regard to Mrs. Woods's purported signature, Mrs. Rouse could only speculate as to whether her mother was later required to sign the contract. Mrs. Rouse is unaware of the circumstances surrounding the facility's purported procurement of Mrs. Woods' signature, as her mother was not present during her meeting with Ms. Forsythe. Mrs. Rouse did testify that Mrs. Woods was on medication for a heart condition at the time she was admitted to NHC Healthcare/Kennett. Moreover, Nona Woods had only a 7th grade education. (LF 150-51)

2. The Terms.

The "Admission and Financial Contract" sets forth the services provided, the rates charged, payment arrangements, Medicare and Medicaid coverage, information releases and transfer and discharge rules. Mrs. Woods's daily rate for room and board is set at \$166.00. (LF 103) NHC's policy is to collect payment for room and board 30 days in advance. (LF 105) Then, on pages 11 and 12 of this 13-page document, NHC sets forth its "Dispute Resolution Procedure" which includes an initial grievance procedure, mediation, and binding arbitration of claims. (LF 112)

Several points are important with respect to the arbitration provision. The clause does contain a dedicated signature block. (LF 113) However, so do other

portions of the document. (LF 108, 110, 111, 114) The headings are in bold type, but so are headings in the remainder of the document. The type is identical to the type contained in the remainder of the document.

The arbitration provision itself contains several important and material terms. The arbitration provision is a condition of admission and cannot be revoked independent of revocation of the entire admission agreement. (LF 114) Any arbitration is to be conducted by the American Arbitration Association (AAA) or the American Health Lawyers Association (AHLA). (LF 112) The provision further states that any arbitration “shall be arbitrated” pursuant to the procedures of either the AAA or the AHLA. (LF 113) There is no provision for the circumstance where neither service is willing or able to serve.

The place of arbitration shall be where the Center is located. (LF 113) The agreement is to be “governed by and interpreted in accordance with the laws of the state where the Center is licensed.” (LF 113) The arbitrator may award compensatory and punitive damages. “The Administrative Fee and Arbitrator’s compensation shall be initially advanced by the party requesting arbitration.” (LF 113) The agreement also contains a table for the “Legal Representative” signing on behalf of a resident to mark the type and scope of his authority, such as guardianship, power of attorney, etc. None of the listed types of authority are checked on this document. (LF 113)

No other facts relevant to the issues before this Court are contained in the record. Because NHC has not presented to this Court a sufficient record on appeal in this matter, this appeal should be dismissed.

ARGUMENT

I. The Trial Court Correctly Found NHC's Arbitration Provision to Be Unenforceable. (Point Relied On I)

It is axiomatic that parties cannot be forced into binding arbitration on claims which they did not agree to arbitrate. Thus, the threshold issue for the court is whether the parties have entered into a valid agreement to arbitrate. The mere existence of an arbitration agreement, alone, is not enough to compel arbitration. A party moving to compel arbitration must prove (1) the existence of a valid agreement to arbitrate and (2) a dispute that falls within the scope of the agreement. *See Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003).

If the possibility exists that a binding agreement was not reached, policy does not compel referral to an arbitrator until a court has concluded that a valid agreement to arbitrate did exist. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (noting that "the FAA does not confer a right to compel arbitration of any dispute at any time"; it confers only the right to obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement"); *Finney v. National Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. App. S.D.2006)(determination of whether the parties contractually agreed to arbitration must occur before the parties are forced to submit to arbitration); *Korte Const. Co. v. Deaconess Manor Ass'n*, 927 S.W.2d 395, 398 (Mo. App. E.D.1996); *Silver*

Dollar City v. Kitsmiller Construction Co., 874 S.W.2d 526, 536-37 (Mo. App. S.D.1994)(the court cannot proceed summarily to determine if there is an “agreement to arbitrate” until it first determines whether there is an agreement between the parties); 9 U.S.C. § 4 (directing that the trial court is to order arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue"). The Trial Court correctly determined that NHC’s arbitration provision is not enforceable for the reasons set forth below. This Court’s review of the Trial Court’s decision denying NHC’s Motion to Enforce Arbitration Clause is *de novo*. *Finney v. National HealthCare Corp.*, 193 SW 3d 393 (Mo. App. S.D. 2006).

A. The Arbitration Provision Is Unconscionable.

The Federal Arbitration Act and the Missouri Arbitration Act provide that arbitration clauses shall be valid, irrevocable, and enforceable, “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. §2; Mo. Rev. Stat. §435.350.

The usual defenses to a contract, such as fraud, unconscionability, duress, impossibility, and lack of consideration can all be used to invalidate an arbitration clause. *See generally, Howell v. NHC Health Care - Ft. Sanders, Inc.*, 109 S.W.3d 731 (Tenn. Ct. App. 2003), *permission to appeal denied* by Supreme Court, June 30, 2003; *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn.1996).

Unconscionability has two aspects: procedural unconscionability and substantive unconscionability. Procedural unconscionability deals

with the formalities of making the contract, while substantive unconscionability deals with the terms of the contract itself. *See Bracey v. Monsanto Co., Inc.*, 823 S.W.2d 946, 950 (Mo. banc 1992); *see also* Hollis, et al., *Is State Law Looking for Trouble?*, 2003 Journal of Dispute Resolution 463, 487 (“The doctrine of unconscionability gives courts the discretion to invalidate contracts that cause one of the parties to be subject to an absence of meaningful choice and unfairly oppressive terms.”). Procedural unconscionability focuses on such things as high pressure sales tactics, unreadable fine print, or misrepresentation among other unfair issues in the contract formation process. *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308 (Mo.App.2005). Substantive unconscionability means an undue harshness in the contract terms. *Id.*

State ex rel. Vincent v. Schneider, 194 S.W.3d 853, 858 (Mo. 2006). Typically, an adhesion contract is referred to as procedurally unconscionable because of the lack of meaningful choice one party has as to the agreement’s terms. An unconscionable contract or clause of a contract will not be enforced. *Id.*

1. The Arbitration Provision is a Contract of Adhesion.

Section 435.350 of the Missouri Uniform Arbitration Act provides:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract, except contracts of

insurance and contracts of adhesion, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. ...

Id. (Emphasis added). If this Court finds NHC’s arbitration provision to be an adhesion contract, then it is unenforceable under Missouri law. As recognized by the Missouri Supreme Court in *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 857 (Mo. 2006):

A contract of adhesion, as opposed to a negotiated contract, is a form contract that is created and imposed by the party with greater bargaining power. *Robin v. Blue Cross Hospital Service, Inc.* 637 S.W.2d 695, 697 (Mo. banc 1982). The “stronger party” has more bargaining power than the “weaker party,” often because the “weaker party” is unable to look elsewhere for more attractive contracts. *Id.*; see also Corbin on Contracts, Section 559 (1960). The “stronger party” offers the contract on a “take this or nothing” basis. See *Estrin Construction Co. v. Aetna Casualty & Surety Co.*, 612 S.W.2d 413, 418 (Mo.App.1981). The terms in the contract are imposed on the weaker party and “unexpectedly or unconscionably limit the obligations and liability of the [stronger party].” *Robin*, 637 S.W.2d at 697.

Id.

NHC's arbitration provision is discreetly hidden within a larger, mass-produced, pre-printed 13-page document for a resident's admission to a nursing home. It bears all of the markings of a contract of adhesion, or a standardized form offered to consumers on essentially a 'take this or nothing' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract. See *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 857 (Mo. 2006). It appears from the date on the document that it was signed at a time when Mrs. Woods sought admission to NHC Healthcare/Kennett. Even assuming that the signature on the document is Mrs. Woods's, proof of which is not in evidence, because there is no ability to opt out of or revoke the arbitration provision without canceling the entire admission contract, Mrs. Woods risked NHC discontinuing or denying her much-needed care and treatment if she did not sign the Agreement. See *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn.1996).

In reality, Mrs. Woods was denied any reasonable opportunity to question or reject the terms or purpose of the arbitration provisions. As testified by Mrs. Rouse, she tried to read the contract as Ms. Forsythe thumbed through it. However, Ms. Forsythe was talking very quickly and went through the contract so fast that Mrs. Rouse could not keep up with her. Ms. Forsythe never presented the option of having the contract reviewed by an attorney. Further, changing the boilerplate language was not a stated option. Ms. Forsythe noted that Mrs. Rouse

needed to sign the contract “so that [her mother] could be admitted to the nursing home.” (LF 150-51)

Ms. Forsythe did not explain to Mrs. Rouse the rules and consequences of arbitration, nor did she present her with the written rules of arbitration. As for disputes Ms. Woods and Center may have, all Forsythe said was “if you’ve got complaints, you just bring them to us.” Mrs. Rouse was never told that filing a claim under the arbitration agreement would require that Mrs. Woods advance substantial costs and fees. Mrs. Rouse never was told that the contract was an agreement to waive her mother’s substantial constitutional rights. (LF 150-51)

Mrs. Rouse herself was 61 years old at the time of this contract and had completed only up to the 10th grade. Indeed, Mrs. Rouse was not qualified to accept and understand the language presented in the Admissions Contract. The foregoing circumstances coupled with the standardized format of the arbitration agreement render the agreement an unenforceable contract of adhesion under Missouri law. Mo. Rev. Stat. §435.350.

An earlier version of NHC’s arbitration agreement was held to be unconscionable by the Tennessee Court of Appeals in *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731 (Tenn. Ct. App. 2003). The *Howell* Court recognized the adhesive nature of the contract and, thus, held the arbitration provision to be unconscionable because,

The Agreement is eleven pages long, and the arbitration provision is on page ten. Rather than being a stand-alone document,

it is "buried" within the larger document. It is written in the same size font as the rest of the agreement, and the arbitration paragraph does not adequately explain how the arbitration procedure would work, except as who would administer it. The facts surrounding the execution of the agreement militate against enforcement. The Trial Court found Ms. Howell had to be placed in a nursing home expeditiously, and that the admission agreement had to be signed before this could be accomplished. The agreement was presented to Mr. Howell on a "take-it-or-leave-it" basis. Moreover, Mr. Howell had no real bargaining power. Howell's educational limitations were obvious, and the agreement was not adequately explained regarding the jury trial waiver.

...

the circumstances here demonstrate that Larkin took it upon herself to explain the contract, rather than asking him to read it, and that her explanation did not mention, much less explain, that he was waiving a right to a jury trial if a claim was brought against the nursing home.

Howell, 109 S.W.3d at 734- 735.

The *Howell* Court further recognized that:

[C]ourts are reluctant to enforce arbitration agreements between patients and health care providers when the agreements are hidden...

and do not afford the patients an opportunity to question the terms or purpose of the agreement. This is so particularly when the agreements require the patient to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment.

Howell, 109 S.W.3d at 734 (internal citations omitted) (emphasis added).

NHC responded to the *Howell* ruling by making slight alterations to its system-wide admission agreement. For instance, the arbitration clause now has a signature line for the contracting party. Plaintiff submits that minor, technical changes are not enough to overcome the inherent unconscionability of terminating the right of the elderly to the court system at a time when they, and their families, find themselves in an extremely emotional and vulnerable position of seeking admission to a nursing home.

Attorneys litigating nursing-home cases on both sides say arbitration has quickly become the rule rather than the exception. Critics say the binding agreements are determining the outcome of high-stakes cases of vulnerable patients that should instead be handled by the courts. Too often, they say, people don't understand whether the clauses are mandatory, or that they are signing away their rights to sue. "It is an unfair practice given the unequal bargaining position between someone desperate to find a place for their loved ones and a large corporate entity like a nursing home," said Sen. Mel Martinez,

a Florida Republican who introduced legislation along with Democratic Sen. Herb Kohl of Wisconsin.

The biggest arbitration provider, the American Arbitration Association, frowns on agreements requiring arbitration in disputes over nursing-home care and generally refuses such cases. Some patients "really are not in an appropriate state of mind to evaluate an agreement like an arbitration clause," says Eric Tuchmann, the association's general counsel. A second group, the American Health Lawyers Association, also avoids them. Other arbitration groups say they generally accept the cases if the agreements comply with the law.

Koppel, Nathan, Nursing homes, in bid to cut costs, prod patients to forgo lawsuits, *Wall Street Journal*, April 11, 2008.

While a resident at NHC, Mrs. Woods was totally dependent upon NHC to provide for her every need. NHC had a fiduciary and confidential relationship with Mrs. Woods. In *Moore v. Webb*, 345 S.W.2d 239, 243 (Mo. App. 1961) the Missouri appellate court recognized that, "[a] physician occupies a position of trust and confidence as regards his patient a fiduciary position. It is his duty to act with the utmost good faith. This duty of the physician flows from the relationship with his patient and is fixed by law not by the contract of employment." The Missouri Supreme Court has cited *Moore* in describing the confidential bond between a doctor and patient as a fiduciary relationship. See *State ex rel. Woytus v.*

Ryan, 776 S.W.2d 389, 393 (Mo. banc 1989); *State ex rel. McCloud v. Seier*, 567 S.W.2d 127, 128 (Mo. banc 1978). Just as the relationship between physician and patient is one of trust and confidence regarding disclosure of necessary information, the relationship between NHC and Mrs. Woods was one of trust and confidence.

Implicit in NHC's confidential relationship with its new residents is a duty to candidly disclose material facts. NHC, here, had an affirmative duty to disclose those terms of the arbitration document that worked to their benefit—and to the detriment of the resident. Instead, they attempted to mask the significance of the arbitration provision by misleading residents into believing that they have not given up any rights by residing at NHC. Plaintiff submits that NHC has developed a corporate-wide policy of hiding the effect of the arbitration provision. Moreover, NHC conceals from its residents the real purpose and benefits NHC receives as a result of the arbitration provision. The resident and her family are shielded from the harsh reality of the NHC's later abuse and neglect. It is questionable whether any policy favoring arbitration has the same force in these circumstances as it does in the typical case involving an arbitration agreement.

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, particularly in the medical care setting, is far different. First, there is no negotiation between the parties as to the terms of the agreement. Second, there is clearly no reasonable expectation that an injury would occur. Any policy favoring arbitration must rest against this backdrop. NHC should not be allowed to mislead residents into an agreement governing future “disputes,” particularly disputes arising from the facility’s own abuse and neglect, without fully disclosing the effect of the agreement and the advantages and disadvantages to both parties in the range of possible disputes that may arise. NHC’s silence and nondisclosure equals misrepresentation because they had a duty to speak. See *Andes v. Albano*, 853 S.W.2d 936, 943 (Mo. banc 1993); see also, *Restatement (Second) of Contracts § 161*.

As testified by Mrs. Rouse in her affidavit, the existence of an arbitration provision in the admission documents admitting her mother to NHC Healthcare/Kennett completely escaped her detection. Silence or nondisclosure equals misrepresentation only when there is a duty to speak. *Andes v. Albano*, 853 S.W.2d 936, 943 (Mo. banc 1993); see *Restatement (Second) of Contracts § 161*. There can be no knowing and voluntary waiver of the right to trial by jury under these circumstances because the horrific mistreatment and abuse that later occurs

cannot be comprehended upon the admission of a loved one to a long-term care facility.

This inherent unfairness is but one reason why Missouri courts examine the following factors in determining the procedural unconscionability of arbitration agreements: negotiability of the contract terms, disparity in bargaining power, the business acumen of the party opposing the waiver, and whether the parties had retained or had access to counsel. *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 627-28 (Mo. 1997).

The circumstances surrounding the execution of this contract militate heavily toward a finding of procedural unconscionability:

- This thirteen page contract is rife with legalese. It is not a contract for care, but one establishing financial responsibility on the resident and her representative. (LF 102-14)
- No description of, or copy of the rules which would apply in the event of arbitration was provided – nor was any opportunity to read or understand those rules offered to Plaintiff or her mother. (LF 112-14, 150-52)
- The Admissions Contract is a form agreement utilized by NHC in each of the 74 nursing homes it operates in multiple states and as such contains boilerplate language rather than language specific to this facility. (102-14)

- It was presented to a 61 year old woman who possessed a 10th grade education, who was expected at this time to review, understand and sign the lengthy page document. (LF 150-52)
- It appears that the document was later presented to Nona Woods, an ailing 85 year old woman with a 7th grade education who was on multiple medications. (LF 150-52)
- No changes were made, discussed or permitted to the standard thirteen page form. (LF 150-52, 112-13)
- The arbitration language is contained at the end of the form 13-page contract as, yet, another provision for admission. (LF 112-13)
- The terms of the arbitration clause were not accurately explained by HNC's representative but rather, glossed over with the misleading statement that all this means is that "if you've got complaints, you just bring them to us." Absolutely no mention of waiving a jury trial was made. (LF 151)
- No information about the costs of arbitration was provided, despite the fact that both forums identified as possible administrating agencies require several thousand dollars in up front administration fees, not including arbitrator fees, and require that costs be split between the parties. (LF 151, 159)

- The Admissions Contract was offered on a “take it or leave it” basis, and was condition precedent to the patient’s admission to the Center. (LF 112-13, 150-52)

In reality, Mrs. Woods and Bobby Rouse were denied any reasonable opportunity to question or reject the terms or purpose of the arbitration provisions. The foregoing circumstances coupled with the standardized format of the arbitration agreement render the adhesion contract procedurally unconscionable. The Trial Court correctly denied NHC’s motion to enforce the arbitration agreement.

1. Enforcement of the Agreement is Substantively Unconscionable.

The arbitration document provides that all disputes shall be arbitrated in accordance with one of three sets of rules: the American Arbitration Association’s Commercial Dispute Resolution Procedures, the American Arbitration Association’s Rules for the Resolution of Consumer-Related Disputes, or the AHLA Dispute Resolution Procedures. (LF 112-13) None of these rules is attached to the document. No disclosure is made in the document as to the effect of applying these rules to the proposed arbitration except for the statement that the Consumer-Related Dispute Rules can only apply if the claim amount is within a certain dollar limit. (LF 112) The arbitration document does not disclose that oppressive fees will be associated with the pursuit of a significant claim under either the American Arbitration Association or AHLA’s rules.

The arbitration provision states that the initiating party shall advance the costs of arbitration, including the Administrative Fee and Arbitrator’s compensation. (LF 113) The United States Supreme Court recognized in *Green Tree v. Randolph*, 531 U.S. 79 (2000), that a party resisting arbitration on the grounds that arbitration would be unduly burdensome bears the initial burden of showing a particular likelihood of prohibitive costs. As set forth below, the costs held secret by NHC are prohibitive.

The arbitration provision directs the parties to www.adr.org to review the AAA “Commercial Dispute Resolution Procedures.” (LF 113) According to the AAA Commercial Fee Schedule found at <http://www.adr.org/sp.asp?id=22440#A3>,

an initial filing fee is payable in full by a filing party when a claim, counterclaim or additional claim is filed. A case service fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled.

The AAA’s fees are set forth on the designated website as follows:

Amount of Claim	Initial Filing Fee	Case Service Fee
Above \$0 to \$10,000	\$500	\$200
Above \$10,000 to \$75,000	\$750	\$300
Above \$75,000 to \$150,000	\$1,500	\$750

Above \$150,000 to \$300,000	\$2,750	\$1,250
Above \$300,000 to \$500,000	\$4,250	\$1,750
Above \$500,000 to \$1,000,000	\$6,000	\$2,500
Above \$1,000,000 to \$5,000,000	\$8,000	\$3,250
Above \$5,000,000 to \$10,000,000	\$10,000	\$4,000
Non-monetary claims	\$3250	\$1250

See American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), Amended and Effective July 1, 2003; www.adr.org.

If a claim is filed that is less than \$10,000, then the minimum filing fee of \$500 is owed. The cases service fee owed for such claim, also the lowest fee permitted, is \$200. Those fees increase incrementally based on the amount of the claim, with the initial filing fee topping out at \$10,000 and the case service fee being \$4000 for claims over \$5,000,000. See <http://www.adr.org/sp.asp?id=22440#A3>. But that is not all. Under the American Arbitration Association's rules, the consumer must also deposit one-half of the arbitrator's compensation. The arbitrator's compensation rate is set forth on the panel biography provided to the parties when the arbitrator is appointed.

NHC has virtually guaranteed that it will never have a significant claim to submit to arbitration because it requires that the daily rate for room and board be paid monthly in advance. In the event that a resident fails to stay current in her payments, then the facility may discharge the resident for non-payment. Here, Nona Woods's daily rate was \$166. (LF 103) Accordingly, under the worst case scenario of Mrs. Woods not making payment for 30 days, NHC Kennett would never have a claim against Mrs. Woods for more than \$4980, well within the minimum filing fee set forth by AAA. This represents a tremendous disparity in the financial obligations of the parties asserting a claim. This difference is not indicated or explained in the arbitration document—to the resident's detriment. Moreover, failing to disclose such a requirement to the resident prevents any knowing and voluntary agreement to the arbitration clause's terms.

The administration fees for AHLA's arbitration services are also unexpectedly high. The administrative fee for a hearing officer is \$1500, while the fee for the first panel of an arbitration is \$2000, with a \$475 fee for each additional party beyond two parties. This fee does not include the compensation that the initiating party must also pay to the dispute resolver. (LF 159) All told, the administration fee alone in this case would likely be in excess of \$4,500.

Compared to the cost of filing Plaintiff's Complaint in Dunklin County, Missouri, the fees required by the American Arbitration Association and AHLA are unreasonable and would deter any resident's filing of claims against NHC—arguably an intended result of the arbitration agreement. Indeed, the fees are so

high that they are cost-prohibitive to a Medicaid resident's, like Nona Woods's, ability to file a claim against the facility. (LF 140-44)

The Tennessee Court of Appeals in *Hill v. NHC/ Nashville*, 2008 WL 1901198 at *7 (Tenn. Ct. App. April 30, 2008), recently examined a similar version of NHC's admission agreement and found the agreement's cost provisions to be unconscionable. The proof in *Hill* showed that the likely costs to simply initiate an arbitration under the agreement are very high, perhaps reaching \$18,000. The cost to initiate litigation would be considerably less. The Court found that even though the arbitrator retained discretion to award costs and distribute the fees among the parties, the arbitration agreement was of a distinct benefit to its drafter, NHC, if its cost provisions serve to deter claims:

A party who has been damaged by the actions of NHC cannot seek redress in the courts if the arbitration agreement is enforced, but may, due to expense that would not accompany the initiation of litigation, be precluded from seeking relief in the arbitral forum.

Hill, at *7; accord, *Delta Funding Corp. v. Harris*, 912 A.2d 104 (N.J. 2006).

NHC had an affirmative duty to disclose all of the terms of the arbitration document that worked to their benefit, including the applicable rules of procedure and any fees imposed upon filing a claim. The exorbitant costs that a claimant is required to advance would likely deter the pursuit of any such claims-- the most probable reason the fees are not disclosed on the front end. Because the undisclosed fees render this agreement unconscionable, the Trial Court correctly

denied NHC's Motion.

B. A Material Term Of The Contract For Arbitration Is Incapable Of Performance.

The arbitration clause provides that disputes shall be “resolved by binding arbitration administered by either the American Arbitration Association (AAA) or the American Health Lawyers Association (AHLA), as selected by the party requesting arbitration.” (LF 112) Moreover, the provision dictates that the rules of procedure of one of these organizations will govern the arbitration. However, the AAA and the AHLA have both amended their rules to provide that they will no longer accept the administration of cases involving individual patients without either a post-dispute agreement to arbitrate or a court order. (LF 154, 156-57) Unquestionably, the agreement containing the arbitration provision was executed at the time of Mrs. Woods's admission to NHC and prior to any dispute related to her care. Moreover, AAA and the AHLA are specifically designated as the sole forums of choice in the contract.

Plaintiff submits that the parties' choice of a particular arbitrator and a particular set of arbitration procedures is a term so material to the contract that failure of either term voids the agreement. The NHC lawyers chose to limit the contractual right to arbitrate to either of two specific forums they deemed advantageous or competent. They apparently now regret that choice, claim a general right to arbitrate without regard to forum, and attempt to coerce the other party down a different road. The Admissions Contract, however, creates no such

right. “While courts look favorably upon [arbitration] clauses, this does not mean that a court will create ambiguity where, as here, none exists, or that it will read a right to arbitrate into a contract where, as here, the contract does not provide such a right. *Triarch Industries v. Crabtree*, 158 S.W.3d 772, 777 (Mo. 2005) (adding that “arbitration is a matter of consent, not coercion.”)

If NHC wanted to make its own boilerplate arbitration clause refer to arbitration in general and not to arbitration before only those panels it preferred as advantageous, it could have employed simple English words to do so. Interestingly, AAA made it clear that it rejected these types of claims long before this Admissions Contract was even signed. (LF 153) NHC had to know that the contract it submitted to Mrs. Rouse on a take it or leave it basis contained a flawed and unenforceable arbitration provision.

Examining the four corners of the Admissions Contract, the right to arbitrate is unambiguously confined to the two tribunals selected by the Center. Accordingly, the system-wide policy of both forums that this type of agreement will not be accepted for arbitration demands that this Court declare NHC’s agreement unenforceable. Indeed, the Mississippi Supreme Court recently declined to enforce an arbitration agreement on exactly these grounds. In *Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby*, 2008 WL 3101737, 2 -3 (Miss.), the Mississippi Supreme Court held that because AHCA has announced a policy refusing to enforce pre-dispute arbitration agreements in the health-care

context, where a pre-dispute arbitration agreement with a health-care provider incorporates the rules of AHLA, there is no valid agreement to arbitrate.

“If the [contract containing an arbitration clause] is unambiguous, it will be enforced according to its terms. If ambiguous, it will be construed against the drafter.” *Keymer v. Mgmt. Recruiters Int’l Inc.*, 169 F.3d 501, 504 (8th Cir. 1999). NHC is in no position to complain at this point about the fact that they failed to draft the language as they would now like this Court to interpret. NHC chose to limit the applicable arbitral forums and rules under its agreement to rules enforced by AAA and AHLA. Unfortunately for NHC, AAA and AHLA’s rules do not permit their administration of an arbitration under this provision because the agreement was entered into before health-care services were rendered and before a dispute arose. This Court must enforce the agreement as written. As written, there is no valid agreement to arbitrate. The Trial Court correctly denied NHC’s motion to enforce this arbitration provision.

II. The Federal Arbitration Act (FAA) Does Not Apply. (Point Relied On II)

A. The Arbitration Provision Adopts Missouri Law.

The question of whether the FAA or MUAA applies is relevant to the Trial Court’s refusal to enforce this arbitration agreement based on applicable Missouri law. While the FAA pre-empts application of state laws that render arbitration agreements unenforceable, “[i]t does not follow, however, that the federal law has preclusive effect in a case where the parties have chosen in their [arbitration] agreement to abide by state rules.” *Volt Information Sciences, Inc. v. Board of*

Trustees of Leland Stanford Junior University, 489 U.S. 468, 472 (1989)(citations omitted); see 9 U.S.C. §2; Compare *Duggan v. Zip Mail Services, Inc.*, 920 S.W.2d 200, 202 -203 (Mo.App. E.D. 1996)(the § 435.460 notice requirement is invalid and unenforceable with regard to those contracts construed under the FAA) and *Johnson v. Long John Silver's Restaurants, Inc.*, 320 F.Supp.2d 656 (M.D.Tenn. 2004) (§ 435.460 notice requirement is preempted in those cases governed by the FAA) with *Teltech, Inc. v. Teltech Communications, Inc.*, 115 S.W.3d 441, 445 (Mo.App. W.D. 2003)(FAA does not preempt state law where contract contains choice-of-law provision stating that “[t]his agreement shall be governed in accordance with the laws of the state of Kansas”).

Section 4 of the Federal Arbitration Act does not confer a right to compel arbitration of any dispute at any time. Instead, it confers only the right to obtain an order directing that, “arbitration proceed *in the manner provided for in [the parties'] agreement.*” 9 U.S.C. § 4 (emphasis added). Here, the arbitration document drafted by NHC provides that, “This agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed.” (LF 113)

The Tennessee Supreme Court recently considered the exact same language in another version of NHC’s arbitration agreement in *Owens v. NHC*, 2007 WL 3284669 (Tenn.) *pet. for writ of cert pending*, No. 07-1380 (US). The *Owens* Court held that the language “governed by and interpreted in accordance with the laws of the State” compelled a finding that the Tennessee Uniform Arbitration

Act, not the Federal Arbitration Act, applied to its review of the case. Because the arbitration agreement here expressly adopts Missouri law as controlling its enforcement, the Missouri Uniform Arbitration Act, and applicable Missouri statutes, apply.

B. There is No Evidence of Interstate Commerce to Implicate the FAA.

Even if this Court fails to find that the parties expressly agreed to apply Missouri law over the FAA, the FAA does not apply here because there is insufficient evidence to determine that the underlying dispute involves interstate commerce. Section 1 of the FAA defines "commerce" as "commerce among the several States...." 9 U.S.C. § 1 (2000). In order for the FAA to control the instant arbitration provision, NHC has the burden of proving that the arbitration provision affects interstate commerce. *See Stewart Title Guaranty Co. v. Mack*, 945 S.W.2d 330 (Tex. Ct. App. 1997)(party seeking arbitration under the FAA must present evidence of and prove involvement of interstate commerce).

While it is true that some state courts have held that a substantiated allegation of activity in interstate commerce can be sufficient to invoke the FAA for purposes of nursing home arbitration agreements, Plaintiff submits that there is no evidentiary support in this record to find a sufficient nexus between interstate commerce and this arbitration agreement. Moreover, the better reasoned approach is followed by those courts that recognize that the provision of health care services is not interstate in nature, notwithstanding the purchase of out of state supplies.

The Oklahoma Supreme Court held in *Bruner v. Timberlane Manor Ltd. Partnership*, 155 P.3d 16 (Okla. 2006) that nursing homes do not engage in interstate commerce for purposes of the FAA. “Nothing in the Medicare/Medicaid statutes indicates Congress found some overriding national concern and some substantial interstate commerce connection and therefore intended to take nursing home care out of the health and safety local concern category and place nursing home care in the interstate commerce category.” *Id.* at 31 (citing *Perez v. United States*, 402 U.S. 146, 156 (1971)). The court noted that under 42 CFR § 483.5 and 483.75, “the most pertinent regulations require the facility to be licensed under applicable State and local law.” The court also quoted a memorandum issued by the federal Medicare and Medicaid agencies, which states,

Under Medicaid, we will defer to State law as to whether or not such binding arbitration agreements are permitted subject to concerns we have where federal regulations may be implicated.

Id.

The *Bruner* Court noted a distinction between triggering federal jurisdiction (trivial commerce nexus) and triggering substantive federal law (greater nexus is needed). The court also took into account that residents have the right to agency hearings and judicial review as allowed by state law. 42 C.F.R. § 431.245. The court concluded that arbitration proceedings are “antithetical to the federal goal of protecting dependent nursing home patients from abuse and neglect.” *Id.* at 31, 32.

The South Carolina Supreme Court's decision in *Timms v. Greene*, 427 S.E.2d 642 (S.C. 1993) is also instructive. There, the South Carolina court, considering another NHC agreement, held that the "contract for patient-residential service with the Center is obscure, if not devoid, of any basis for holding that commerce was involved in the transaction between the parties." 427 S.E.2d at 644. The court held that the following factors were insufficient to find that the agreement formed a sufficient basis to trigger interstate commerce: the Center 1) was a division of National HealthCorp, L.P., a Delaware Limited Partnership; 2) markets its services to persons residing outside this State; 3) hires employees from outside the State; 4) purchases a majority of its goods, equipment and supplies outside the state for use at the Center; and 5) contemplates payment in part by Medicare or Medicaid.

Similarly, the Arkansas Supreme Court in *Arkansas Diagnostic Center, P.A., v. Tahiri*, 370 Ark. 157, 257 S.W.3d 884 (Ark. 2007) rejected the contention that an arbitration agreement contained in a physician's employment contract was enforceable under the FAA despite the fact that the medical facility 1) purchased of out-of-state supplies, 2) received payment from out-state insurance company, 3) treated 3 out-of-state patients, and 4) paid for physicians to travel to out-of-state conferences. Instead, the Court found that the employment contract was **only an agreement to provide care** --- which was solely intrastate. The Court looked to whether Dr. Tahiri's employment facilitated business' interstate business activities or engaged in interstate business activities. The Court said that because his

activity was local in nature, the FAA did not apply. To hold otherwise, “it would equate to a finding that the FAA is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce.” 370 Ark. at 167, 257 S.W.3d at 892.

Plaintiff submits that nursing home agreements are agreements to provide intrastate care. This specific agreement was to provide Nona Woods, a Missouri resident with nursing care in Missouri. Under the *Tahiri* analysis, this relationship is not sufficiently interstate in nature to invoke the provisions of the FAA.

In *Baronoff v. Kean Development Company, Inc.*, 12 Misc.3d 627 (N.Y. Sup. 2006), a New York court considered the effect of a contract between homeowners and a contractor who renovated their homes and said that such contracts did not “affect commerce.” The court found that factors, such as, the following: the project manual and engineer’s drawings were created in a joint effect with a structural engineering firm headquartered in Illinois; petitioner’s largest supplier of materials for project was New Jersey company; project meetings and visits were often scheduled at the New Jersey supplier’s offices; the largest supplier of equipment for the project was a Massachusetts company; and further additional materials, equipment and services for project were obtained from Oklahoma, Maryland and Kansas, were insufficient to require application of the FAA.

Plaintiff submits that even if the arbitration agreement is not construed to adopt Missouri law over the FAA, there is insufficient evidence of a nexus to

establish that NHC's provision of care to Nona Woods at NHC Kennett so involved interstate commerce that the FAA applies to the interpretation and construction of this arbitration provision.

C. The Arbitration Provision Is Unenforceable Under Missouri Law.

The Missouri Uniform Arbitration Act, which the document provides applies to its interpretation and governance, requires that an agreement to arbitrate contain the following statement in at least ten-point capital letters adjacent to or above the signature lines: "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES." See Mo. Rev. Stat. §435.460; *Hefele v. Catanzaro*, 727 S.W.2d 475, 476 (Mo.App.1987). While the instant arbitration provision contains a notice that is somewhat similar to the notice required by Mo. Rev. Stat. §435.460, the exact notice does not appear in the document.

The Missouri requirement of ten point capital letters is not an option. Where the parties fail to include such statement, denying a stay or dismissal pending arbitration is proper, and is consistent with the intent of the legislature in forming the requirement. *Hefele v. Catanzaro*, 727 S.W.2d 475 (Mo. App. 1987) (denying a motion to compel arbitration on these grounds, and explaining that the "apparent harshness of the rule . . . is mitigated by the legislature's bona-fide concern that the voluntary nature of arbitration agreements be assured"). The *Hefele* court added that the virtue of this rule is more evident where some question

of the party's intention to waive his right of recourse to courts exists." *Id.*, at 477.

Plaintiff submits that because the parties here expressly adopted the substantive and procedural rules of the State of Missouri, the Missouri Uniform Arbitration Act applies and the instant arbitration agreement, because it does not contain the mandatory notice, is not enforceable under Missouri law. *See generally, Teltech, Inc. v. Teltech Communications, Inc.*, 115 S.W.3d 441, 445 (Mo.App. W.D. 2003)(FAA does not preempt state law where contract contains choice-of-law provision stating that "[t]his agreement shall be governed in accordance with the laws of the state of Kansas"); *but see, Duggan v. Zip Mail Services, Inc.*, 920 S.W.2d 200, 202 -203 (Mo.App. E.D. 1996)(the § 435.460 notice requirement is invalid and unenforceable with regard to those contracts construed under the FAA); *Johnson v. Long John Silver's Restaurants, Inc.*, 320 F.Supp.2d 656 (M.D.Tenn. 2004) (§ 435.460 notice requirement is preempted in those cases governed by the FAA).

III. The Arbitration Provision Does Not Bind Mrs. Woods's Wrongful Death Beneficiaries. (Point Relied On III)

Under Missouri's wrongful death statute, a party or parties may receive "pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death." Mo. Rev. St. §537.090. A wrongful death claim does not belong to the deceased or even to a decedent's

estate. *Campbell v. Callow*, 876 S.W.2d 25, 26 (Mo.App. S.D.1994). Indeed, it has been the law in Missouri for more than 60 years that “[t]he wrongful death act creates a new cause of action where none existed at common law and did not revive a cause of action belonging to the deceased.” *O’Grady v. Brown*, 654 S.W.2d 904, 910 (Mo. banc 1983) (quoting *State ex rel. Jewish Hospital v. Buder*, 540 S.W.2d 100, 104 (Mo.App.St.L.D.1976)). It is not a transmitted right nor a survival right but is created and vested in the statutorily designated survivors at the moment of death. *Id.* at 910.

Yet, on March 7, 2007, in the context of determining venue, the Missouri Supreme Court stated that a wrongful death action added to a pre-existing claim asserted by the injured is a derivative claim, not a new cause of action. *Burns v. Whittington*, 219 SW3d 224 (Mo. Banc 2007). *Burns* does not acknowledge that it is changing 60 years of Missouri law with regard to wrongful death actions or overturning prior precedent. In fact, the statement “the cause of action is derivative of the underlying tortious acts that caused the fatal injury” bears no citation or reference to any authority for the proposition. *Burns*, 219 S.W.3d at 225.

As further set forth below, the declaration in *Burns* that wrongful death actions are derivative should not apply to the present case. The arbitration document presented by NHC is dated March 11, 2003, prior to the *Burns* decision. Plaintiff’s wrongful death claim should not be considered derivative because that was not the state of the law when the agreement was purportedly executed and

NHC should not benefit from an unexpected and surprising change in Missouri law.

Further, even if this Court were to construe *Burns* as holding that wrongful death actions are derivative and such decision should be applied retroactively, it does not follow that this arbitration document binds Nona Woods's wrongful death beneficiaries. Missouri's Wrongful Death Statute provides in pertinent part:

Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured...

Mo. Rev. Stat. §537.080.1. The statute addresses liability and who may bring a claim. It does not address choice of forum. Forum selection is a matter of agreement between two parties. It has no bearing on NHC's liability.

Even if a wrongful death beneficiary's cause of action is derivative of the underlying tortious acts, it does not follow that the beneficiaries are also bound to bring those claims in the forum that NHC claims Nona Woods chose. ¶H of the Admission and Financial Contract provides that the "parties" agree to the Dispute Resolution Procedures. (LF 112) The parties to the Admission and Financial Contract are identified as NHC of Kennett and Mrs. Woods. (LF 102) No where

in the arbitration provision is there any indication that Mrs. Woods's estate might be bound by the arbitration provision's terms. While Bobby Rouse signed the Admission and Financial Contract on page 13 as "Other Persons Signing on Behalf of Patient." She did not sign in her individual capacity. There is no evidence that she had any authority to bind her mother. Moreover, she is not a party identified in the agreement because she was not Mrs. Woods's Legal Representative. (LF 102, 114)

On April 20, 2006, a Missouri appellate court held that a wrongful death beneficiary who does not sign an arbitration agreement purporting to bind a nursing home resident cannot be bound by its terms. *Finney v. National Healthcare Corp.*, 193 S.W.3d 393, 395 -396 (Mo.App. S.D. 2006). The *Finney* Court based its decision based on the previous decisions *Dunn* and *Greenpoint Credit*. In *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. 2003), the Missouri Supreme Court found that a guarantor, who is not a signatory to a contract containing an arbitration clause, is generally not bound by the arbitration clause unless the arbitration agreement is incorporated into the guaranty or performance bond. *Id.* at 435. Similarly, in *Greenpoint Credit, L.L.C. v. Reynolds*, 151 S.W.3d 868 (Mo.App. S.D.2004), the Missouri Court held that Mary Nations, who was not a signatory to a contract, an agent of the signing party, or a third-party beneficiary, was not bound by an arbitration agreement. *Id.* at 873-74. Noting that arbitration is a matter of contract, absent an agreement to arbitrate, a person cannot be compelled to do so. *Id.* at 873.

Because Mrs. Woods's wrongful death beneficiaries are not parties to the agreement, they are not bound by the arbitration provision. Even if this Court declares Bobby Rouse to be bound by the arbitration provision's terms, under no circumstances could Mrs. Woods's other wrongful death beneficiaries be bound by the arbitration provision. No agreement to arbitrate exists between the wrongful death beneficiaries and NHC. Such a result has no impact on the independent or derivative nature of the wrongful death claim. For this independent reason, the Trial Court correctly denied NHC's motion.

IV. NHC Waived Arbitration.

A party waives its right to arbitrate if it (1) had knowledge of the existing right to arbitrate, (2) acted inconsistently with that right, and (3) the party's inconsistent acts prejudiced the opponent. *Mueller v. Hopkins & Howard, P.C.*, 5 S.W.3d 182 (Mo.App. 1999). Applying this three-factor test reveals that NHC has waived its right arbitrate.

NHC attorneys drafted this Admission and Financial Contract. If there was a right to arbitrate contained therein, they must have known about it before they demanded a jury trial on all counts. (LF 51, 65, 79, 93) If the agreement was lost or misplaced is irrelevant. The fact is, NHC had an obligation to bring this to the Court's attention immediately and it failed to do so. Moreover, NHC defendants have acted inconsistently with that supposed right to arbitrate in two important ways. They did not offer or suggest arbitration when they were first informed of the claims of the Plaintiff. Mrs. Woods was involuntarily discharged from the

Center in response to Mrs. Woods's family members' complaints about her care. They were informed of that decision on August 18, 2003. (LF 150-52) Although they claim to have had a right to demand arbitration when informed of these complaints, they made no effort and offered no means of resolving this dispute at that time. Second, when confronted with this lawsuit, NHC did not raise arbitration as an affirmative defense. Instead, each of the NHC defendants demand a jury trial on all counts. (LF 51, 65, 79, 93) Further, NHC submitted discovery requests to Plaintiffs and responded to discovery requests from Plaintiffs unrelated to the issue of arbitration on numerous occasions before NHC set a hearing on its arbitration motion. (LF 3-10) NHC defendants purposefully availed themselves of the judicial system's discovery procedures.

There is no rigid rule as to what constitutes a waiver of the right to arbitrate. The issue must be decided based on the circumstances of each particular case. See *Southern Systems, Inc. v. Torrid Oven Limited*, 105 F.Supp.2d 848 (W.D. Tenn. 2000)(citing *St. Mary's Med. Ctr. v. Disco Aluminum Prod. Co., Inc.*, 969 F.2d 585 (7th Cir.1992)).

Waiver of the right to insist on arbitration may occur in several ways. Conduct such as filing responsive pleadings while not asserting a right to arbitration, filing a counterclaim, filing pretrial motions, engaging in extensive discovery, use of discovery methods unavailable in arbitration, and litigation of issues on the merit have all been considered by courts to amount to a waiver of the right to

arbitration. *See, e.g., National Found. for Cancer Research*, 821 F.2d at 778 (finding that the movant's delay in seeking arbitration, its extensive participation in discovery, its motion for summary judgment, and the resulting prejudice to the opposing party constituted waiver); *U.S. v. Darwin Constr. Co.*, 750 F.Supp. 536, 538-539 (D.D.C.1990) (finding plaintiff's conduct in filing eight motions with the court, conducting extensive discovery, and filing motion to stay two months before trial date inconsistent with intent to enforce arbitration right).

Torrid, 105 F.Supp.2d at 854; *see, e.g., Carolyn B. Beasley Cotton Company v. Ralph*, 59 S.W.3d 110 (Tenn. Ct. App. 2000) (finding waiver where defendant filed answer to plaintiff's complaint, answered requests for production of documents, and otherwise participated in discovery for about a year before filing motion to compel arbitration). Indeed, an agreement to arbitrate may be "waived by the actions of a party which are completely inconsistent with any reliance thereon." *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 573 (6th Cir. 2003)(internal citations omitted).

Here, each of the NHC defendants elected to proceed with a jury trial when they separately demanded a jury trial in their Answers, did not contest venue, and actively participated in non-arbitration related discovery. *Cf. Holm-Sutherland, Co., Inc. v. Town of Shelby*, 982 P.2d 1053 (Mont.1999) (fact that defendant initially asserted its arbitration right as an affirmative defense did not defeat

allegation of waiver by proceeding with litigation instead of pressing for arbitration). Through discovery, NHC has obtained valuable information that was otherwise unavailable in arbitration proceedings. These actions are wholly inconsistent with an intent to rely on an arbitration agreement's terms. In fact, NHC only sought a hearing on its motion to compel arbitration after it had received information through discovery that it would not have otherwise obtained through the arbitration process.

Because NHC has actively participated in the discovery process of this case and has postured itself as an “adversary preparatory to trial,” rather than seeking enforcement of the arbitration agreement, Plaintiff has invested a considerable amount of time and resources in preparing this case for trial. Plaintiff has been materially prejudiced by NHC's actions. “Lost evidence, duplication of efforts, use of discovery methods unavailable in arbitration, or litigation of substantial issues may constitute prejudice . . . delay and the moving party's trial oriented activity are material factors in assessing prejudice. *Reis v. Peabody Coal Co.*, 935 S.W. 2d 625, 631 (Mo. App. E.D. 1996). Prejudice can result when a party postpones invoking arbitration, causing his adversary to incur unnecessary delay or expense. *Reis*, at 642 (quoting *Kramer v. Hammond*, 943 F.2d 176, 179 (2nd Cir., 1991).

In *American Locomotive v. Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950), the Sixth Circuit Court of Appeals considered a somewhat similar scenario wherein the defendants asserted arbitration as an affirmative defense but did not

seek enforcement of the arbitration provision until after the defendants had actively participated in legal proceedings. The *American Locomotive* court noted that the two methods of proceeding are “inconsistent enough to require an election between them.” The Sixth Circuit further wrote that American Locomotive could have and should have *either* insisted upon arbitration *or* prepared for a jury trial at the time of the filing of their complaint “or within a reasonable time thereafter.” *American Locomotive*, 185 F.2d at 320. The court concluded that American Locomotive had waived its right to arbitrate by proceeding with the litigation process and failing to indicate any intention to enforce its right to arbitration. *Ibid.*

NHC delayed more than two years from the time that it was first aware of a dispute and months after a lawsuit was filed over the dispute before invoking arbitration. (LF 12, 95, 152) When finally confronted with the Petition, NHC demanded a jury trial. Two years after the death of Nona Woods, months after the commencement of her wrongful death suit, and months after they themselves demanded a jury trial and commenced discovery, the NHC defendants suddenly tell Mrs. Rouse that she must arbitrate before a panel of lawyers (AAA), or a group formed largely from the ranks of lawyers representing nursing homes like the one she is suing (AHLA). After all this denying, delaying and defending, NHC now wishes arbitration before a panel of their peers, instead of the people of this community.

Were AHLA to accept this dispute, it would be decided by members of an organization who are “primarily health care attorneys who represented and

counseled hospitals and hospital systems, physicians, managed care organizations, insurers, *long term health care facilities*, home health agencies, and other healthcare entities on business, corporate and regulatory matters.” AHLA’s predecessor organization, AAHA, was comprised of approximately of approximately 3,300 attorneys approximately 1/3 of whom were in-house counsel. Approximately 1,000 members were non-attorneys, including physicians and healthcare executives. (LF 164-65) These are the “neutrals” before whom NHC wishes Mrs. Rouse to present her case. Enforcement of the arbitration provision at this stage would highly prejudice Plaintiffs’ claims, and reward NHC’s unfair practices. Accordingly, the Trial Court properly refused to enforce defendants’ arbitration provision.

V. The Arbitration Agreement, If It Applies At All, Only Applies To NHC Healthcare/ Kennett.

“Only the parties to a contract are bound by its terms.” *Prickett v. Lucy Lee Hospital*, 986 S.W.2d 947, 948 (Mo. App., 1999). Conversely, “[a] party can be compelled to arbitrate a dispute only when [she] has agreed to arbitrate.” *Estate of Burford v. Edward D. Jones & Co, LP*, 83 S.W. 3d 589, 593 (Mo.App. 2002). NHC’s appeal has been brought by NHC National Health Corporation, NHC, Inc., National Healthcare, LP, and NHC Healthcare/ Kennett. However, by its terms, the Admission and Financial Contract was entered into by and between NHC HealthCare/ Kennett, as the “Center” and Nona Woods as the “Patient.” No other

persons or entities are identified therein as parties. Moreover, the arbitration agreement states that it is binding on the “parties.”

Interestingly, the three NHC corporate defendants who have sought to enforce the arbitration provision have already denied any right to control or profit from the Center’s activities-- crucial facts which would establish their agency with the Center. (LF 40, 68, 81-82) Clearly, NHC seeks to have this issue both ways. Those defendants not a party to the Admissions Contract want to deny all involvement in the facility yet insist on a close enough relationship to ride its coattails to arbitration. “While the policy favoring arbitration is strong, it alone cannot authorize a non-party to invoke arbitration, or require a non-party signatory to arbitrate.” *Nitro Distributing v. Dunn*, (2005 Mo.App. LEXIS 571) (citing *Greenwood v. Sherfield*, 895 S.W.2d 169 (Mo.App. 1995)). If there is a right to compel arbitration, which there is not in this instance, it is confined to the parties identified in the Admissions Contract, in this case Nona Woods and NHC of Kennett. The remaining defendants are not entitled under any reading of the agreement to enforce its provisions.

VI. If The Trial Court’s Ruling Is Reversed, Additional Discovery Is Appropriate.

The Trial Court correctly denied NHC’s Motion to Enforce Arbitration Clause because NHC waived its right to enforce the provision’s terms. Even if the arbitration provision was not waived, it is unenforceable. NHC has failed to carry its burden in proving its Motion. In the event this Court should grant NHC

another bite at the apple and reverse the Trial Court's ruling denying NHC's Motion to Enforce Arbitration Clause, Plaintiff respectfully requests that the Court remand this case to the Trial Court for additional discovery on the issues related to the arbitration provision's enforceability. If the agreement is not unenforceable as presented, there are significant legal and factual issues regarding the enforceability of the arbitration agreement that will require discovery, briefing, and a hearing before the Trial Court.

In Missouri, the discovery rules are broad. Missouri Rule 56.01(b)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery.... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Given the Court's broad discovery rules, discovery on the issue of whether the instant arbitration provision is void or voidable, enforceable or revocable, and especially whether Nona Woods is bound by the terms of the purported arbitration agreement presented by NHC, is both appropriate and necessary. The Missouri Supreme Court recently recognized the usefulness of participating in discovery to

determine the underlying merits of a motion to compel arbitration in *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339 (Mo. 2006).

Several recent Tennessee appellate decisions have also recognized the need for the development of facts in nursing home arbitration cases before factual determinations can be made. The Court of Appeals sitting at Nashville recently held that discovery was necessary “regarding any steps NHC may have taken to ascertain whether Mr. Cabany was competent to make his own decisions.” *Cabany v. Mayfield Rehabilitation and Special Care Center et al*, 2007 WL 3445550 (Tenn.Ct.App. Nov. 15, 2007). Similarly, the Tennessee Court of Appeals sitting at Nashville remanded another nursing home arbitration case to the trial court for development of the record on the issues of unconscionability and capacity of the resident. The appellate court emphasized the need for the trial court to conduct an evidentiary hearing regarding disputed issues of fact that were material to the motion to compel arbitration and further instructed the trial court on remand to “make findings of fact and conclusions of law as to whether the arbitration agreement is enforceable.” *Raines v. National Health Corporation d/b/a NHC Healthcare et al.*, 2007 WL 4322063 (Tenn. Ct. App. Dec. 6, 2007); see generally, *Howell v. NHC Healthcare- Fort Sanders, Inc.*, 109 S.W.3d 731 (Tenn. Ct. App. 2003)(arbitration agreement unenforceable where there was evidence that the resident and her spouse had never heard of arbitration and nursing home never told them the right to jury trial was being waived).

Leading authority from other jurisdictions is in accord that, looking beyond

the four corners of the agreement, discovery is necessary to develop various factual matters relating to the enforceability of an arbitration clause. *See Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003)(evidence of surveys conducted by AT&T as to the most advantageous place to insert an arbitration provision was relevant on the issue of enforceability). A federal court in West Virginia discussed the importance of discovery in disclosing whether there will be likely bias on the part of the arbitral form. *See Toppings v. Ameritech Mortgage Services, Inc.*, 140 F. Supp. 2d 683 (S.D. WV 2001). Likewise, the Kentucky Supreme Court recently affirmed the trial court's broad discretion in allowing parties to conduct discovery on the enforceability of an arbitration agreement. *Kindred Healthcare, Inc. v. Peckler*, 2006 WL 1360282 (Ky.). As noted by the Kentucky Supreme Court in *Peckler*, "an arbitration agreement may be unconscionable, and therefore unenforceable, if the arbitral forum is biased or the terms of the arbitration are so one-sided that no reasonable person would willingly enter into such agreement...." *Id.* Some of the evidence that should be considered in addressing whether the arbitration agreement is enforceable includes "factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, . . . [and] whether the terms were explained to the weaker party" *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666 (6th Cir. 2003)(*en banc*). The same holds true with regard to examination of the costs of arbitration, which may make it impossible for a plaintiff to pursue her claim in that forum.

If the Trial Court's ruling is reversed, full discovery must be conducted so that Plaintiff may fully pursue her defenses and so that the Trial Court may conduct an evidentiary hearing and make findings of fact and conclusions of law on these very important issues. See *Raines, supra*. Certainly, NHC's arbitration-related experiences with other residents, its arbitration policies, and the training provided to its employees clearly shed further light on and are relevant to the issue of this agreement's enforceability. Before Nona Woods is deprived of her constitutional right to a trial by jury, these questions should be answered in discovery and placed in the calculus in this case.

VII. CONCLUSION

As the Trial Court correctly held, NHC's arbitration provision is unenforceable. Defendants failed to authenticate the signature of the party to be charged, Nona Woods. Further, the arbitration provision expressly adopts Missouri law, yet it does not comply with Missouri legal requirements for arbitration agreements. NHC has waived its right to enforce the arbitration provision by taking actions that are wholly inconsistent with the right to arbitrate. The record reflects that NHC did not demand arbitration, but requested a trial by jury. NHC acted inconsistent with an intention to proceed to arbitration. The arbitration clause is also unenforceable by its terms. It provides for an arbitral forum that is not available. It requires but does not disclose outrageous filing fees to be advanced by the complaining party. Plaintiff respectfully requests that this Court

affirm the decision of the Trial Court so that the parties might proceed with the merits of this litigation.

In the event that this Court reverses the Trial Court's ruling denying the NHC's Motion to Enforce Arbitration Clause, Plaintiff respectfully requests that the Court remand the case with directions to complete discovery as to the enforceability of the arbitration clause prior to any ruling as to its enforceability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent via e-mail, in PDF format, and via U.S. Mail, postage pre-paid, this _____ day of October, 2008, to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Rule of Civil Procedure 84.06(c), the undersigned attorney certifies that this brief complies with the requirements of Missouri Rule of Civil Procedure 84.06:

1. This brief complies with the signature requirement of Missouri Rule 55.03.
2. This brief complies with the type-volume limitation of Missouri Rule 84.06(b) because it contains approximately 11,764 words and 1067 lines according to the Word Count feature of Microsoft Word.
3. This brief complies with the typeface requirement of Missouri Rule 84.06(a) and the type-style requirements of Missouri Rule 84.06(a) because it has been prepared in a proportionally-faced typeface in Microsoft Office Word 2003 using 13-point Times New Roman text, double spaced.
4. The submitted CD-R Compact Disc has been scanned for viruses and is virus free.

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